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Lawyers on Trial: Juror Hostility to Defendants in Legal Malpractice Trials

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LAWYERS ON TRIAL: JUROR HOSTILITY TO DEFENDANTS IN LEGAL MALPRACTICE TRIALS*

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I. INTRODUCTION

An enduring question in the study of civil justice is whether certain types of parties are advantaged or disadvantaged as litigants. Professor Marc Galanter's classic essay, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*,[1] raises this question in terms of resources and experience and has been the subject of extensive testing.[2] Other research has examined whether certain demographic factors, such as race[3] or gender,[4] disadvantage plaintiffs, whether

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

2. *See generally* Brian J. Glenn, *The Varied and Abundant Progeny*, *in* IN LITIGATION: DO THE "HAVES" STILL COME OUT AHEAD? 371 (Herbert M. Kritzer & Susan S. Silbey eds., 2003) (discussing Marc Galanter's contributions to academic discourse).

3. AUDREY CHIN & MARK A. PETERSON, INST. CIVIL JUSTICE, DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS 37-41 (1985).

4. *See* NICHOLAS M. PACE ET AL., INST. CIVIL JUSTICE, CAPPING NON-ECONOMIC AWARDS IN MEDICAL MALPRACTICE TRIALS 32 (2004). *See generally* Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263 (2004).

government litigants are particularly advantaged,[5] and whether deep-pocket corporate defendants are disfavored by juries.[6] In this Article, we examine a group one might expect to come to court as advantaged players—lawyers.

Society has long had a love-hate relationship with the legal profession.[7] Public opinion polls typically show that lawyers are held in low esteem, usually being described as untrustworthy, manipulative, and overly concerned about their own financial advantage.[8] As Galanter has reported, these views of lawyers are reflected in the large corpus of jokes told about lawyers.[9]

Indeed, public disdain for lawyers is neither a new phenomenon, nor a phenomenon restricted to the United States or other common law countries. William Shakespeare's plays include eleven references to lawyers, nine of which are negative or mocking.[10] John Stuart Mill is quoted criticizing a lawyer as being ready "to frustrate justice with his tongue."[11] On the continent, Prussian King Wilhelm issued an edict in 1739 proclaiming:

> [T]hose advocates, procurators and draftsmen . . . who dare make
> people rebellious by having soldiers hand over to His Royal Majesty
> petitions on the most negligible matters or any other documents on

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5. Herbert M. Kritzer, *The Government Gorilla: Why Does Government Come Out Ahead in Appellate Courts?*, *in* IN LITIGATION: DO THE "HAVES" STILL COME OUT AHEAD? 342, 343-50 (Herbert M. Kritzer & Susan S. Silbey eds., 2003); Linda R. Cohen & Matthew L. Spitzer, *The Government Litigant Advantage: Implications for the Law*, 28 FLA. ST. L. REV. 391, 397-407 (2000).

6. VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 42 (2000).

7. Leonard E. Gross, *The Public Hates Lawyers: Why Should We Care?* 29 SETON HALL L. REV. 1405, 1407-17 (1999).

8. Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 808-10 (1998); Gross, *supra* note 7, at 1416.

9. MARC GALANTER, LOWERING THE BAR: LAWYER JOKES & LEGAL CULTURE 16 (2005).

10. These figures are derived from MARVIN SPEVACK, THE HARVARD CONCORDANCE TO SHAKESPEARE (1973). While the best known of these quotes—"first thing we do, let's kill all the lawyers"—is spoken by a character who is himself less than upright, other lines reflect the perceived greed of lawyers: "then 'tis like the breath of an unfee'd lawyer" or "[o]'er lawyers' fingers, who straight dream on fees." *See* WILLIAM SHAKESPEARE, KING LEAR act 1, sc. 4; WILLIAM SHAKESPEARE, ROMEO AND JULIET act 1, sc. 4; WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4, sc. 2. It is important to note, however, that a goodly portion of the audience at the Globe Theatre was lawyers who came from the Inns of Court which are more or less directly across the Thames from where the Globe stood.

11. DAVID MELLINKOFF, THE CONSCIENCE OF A LAWYER 12 (1973). Public opinion polls in England show a decline in "approval ratings for lawyers" in recent years. ALAN PATERSON, LAWYERS AND THE PUBLIC GOOD: DEMOCRACY IN ACTION? 18 (2012).

> justice, such as those asking for pardon, shall be hanged with a dog hanged at their side, granting neither mercy nor pardon.[12]

A 1978 poll conducted by a French television broadcaster queried 982 viewers as to their images of the *avocat*; fewer than 5% held a positive view.[13] Of those holding a negative view: 18% conveyed general negative attitudes; 48% felt that the *avocat* was a "money sucker"; 14% saw him as a man without conscience; 14% felt that he acted with impunity; 4% considered him to be an auxiliary of scoundrels; and, 3% suspected him of connivance with his client's opponent.[14]

While most evidence of hostility toward lawyers takes expressive forms, such as jokes, popular culture, and attitudes, there is less evidence that the hostility has behavioral manifestations. There are generally held viewpoints specific to certain types of lawyers, particularly plaintiffs' lawyers who bring personal injury suits or shareholder suits. These lawyers have been the targets of political campaigns and legislation. Another example that has been reported is the unwillingness of some landlords to rent apartments to lawyers.[15]

In the United States, the public has another way to demonstrate its negativity toward the legal profession: assessing liability and damages in legal malpractice trials. In this Article, we report the results of an experiment designed to assess whether jury decisions in such cases reflect the public negativity one finds in public opinion polls, jokes, and other expressions of popular culture.

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12. Erhard Blankenburg & Ulrike Schultz, *German Advocates: A Highly Regulated Profession*, *in* LAWYERS IN SOCIETY: THE CIVIL LAW WORLD 126 (Richard L. Abel & Philip S.C. Lewis eds., 1988).

13. Tang Thi Thanh Trai Le, *The French Legal Profession: A Prisoner of Its Glorious Past?*, 15 CORNELL INT'L L.J. 63, 63 (1982). *L'avocats* comprise one of many branches of the French legal profession. *See* Anne Boigeol, *The French Bar: The Difficulties of Unifying a Divided Profession*, *in* LAWYERS IN SOCIETY: THE CIVIL LAW WORLD (Richard L. Abel & Philip S.C. Lewis eds., 1988). It is important to note that the figures referenced above refer to the public's general perception of lawyers, not the evaluation of a lawyer by a former or current client. A 2001 study found generally positive views of lawyers representing individuals involved in court proceedings. *See Enquête de Satisfaction Auprès des Usagers de la Justice*: *Mai 2001*, RECHERCHE DROIT ET JUSTICE, http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/014000589.pdf (last visited Feb. 15, 2016).

14. Le, *supra* note 13, at 63.

15. Tom Goldstein, *Landlords Backed on the Right to Bar the Well-Informed*, N.Y. TIMES, Nov. 10, 1977, at A1 (reporting that a landlord could refuse to rent to lawyers because the housing anti-discimination law did not bar discrimination based on occupation). The New York City Council subsequently passed a measure barring discrimination based on occupation. *See* Alan Finder, *Committee Votes a Ban on Job Bias in Housing*, N.Y. TIMES, Oct. 21, 1986, at B1; *see also* David Berreby, *Rent Wars: Lawyers vs. Landlords*, NAT'L L.J., July 18, 1983, at 8; Gregg Geller, *No Dogs, or Lawyers, Need Apply*, N.Y. TIMES, Feb. 23, 1997, at CY 15.

II. THE LEGAL MALPRACTICE STUDY

The experiment reported below is part of an ongoing, larger study of legal malpractice claims.[16] That larger project has involved: a series of conversations with legal malpractice insurers and lawyers who represent either plaintiffs or defendants in legal malpractice lawsuits;[17] analyses of insurance reports of legal malpractice claims from Florida and Missouri (where state law requires reporting to the insurance commission);[18] analyses of legal malpractice cases found in the Bureau of Justice Statistics ("BJS") studies of civil verdicts for 1996, 2001, and 2005;[19] and, civil jury reports from Cook County, Illinois. It also builds on the first author's experience as an observer in lawyers' offices as part of his study of contingency fee legal practice.[20]

Despite claims about the frequency of legal malpractice,[21] one of the striking findings of our larger research project is the scarcity of trials involving legal malpractice claims. The data collected for the three BJS studies have a total of only 156 verdicts in legal malpractice cases compared to 1908 in medical malpractice cases, yielding a ratio of medical malpractice verdicts to legal malpractice verdicts of over 12 to 1. The civil jury reports we obtained for Cook County for the period of January 1988 through December 2014 included 105 jury verdicts in legal malpractice cases.[22] During that same period, the jury reporter recorded 3802 verdicts in medical malpractice trials for a ratio of 36 to 1.[23]

This is surprising given evidence that there are large numbers of potential legal malpractice claims. The best data on this matter come

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16. *See infra* Part III.

17. *See generally* Herbert M. Kritzer & Neil Vidmar, *Handling Legal Malpractice Claims: Plaintiffs' Lawyers, Defense Lawyers, and Insurers* (working paper 2015) (on file with the *Hofstra Law Review*) (discussing legal malpractice claims). This paper was prepared for a presentation in Oñati, Spain at the workshop on Consumer Redress When Lawyers Are Negligent, Int'l Inst. for the Soc. of Law (July 9-10, 2015).

18. *Id.* at 8 n.44, 18 n.60.

19. Herbert M. Kritzer & Neil Vidmar, *When the Lawyer Screws Up: A Portrait of Legal Malpractice Claims and Their Resolution* 13 (working paper 2015) (on file with the *Hofstra Law Review*).

20. HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 26, 96-98 (2004).

21. *See* Manuel Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1664-69 (1994).

22. The date range refers to when the report was published by the *Illinois Jury Verdict Reporter* rather than the date of the actual verdict. *See* Kritzer & Vidmar, *supra* note 17, at 14 & n.72.

23. Email from John Kirkton, Jury Verdict Reporter, Law Bulletin Publ'g Co., to Herbert Kritzer, Marvin J. Sonosky Chair of Law and Pub. Policy, Univ. Minn. Law Sch. (Feb. 4, 2015, 8:14 AM) (on file with the *Hofstra Law Review*). The figure for medical malpractice trials was provided by the publisher of the verdict editor.

from Oregon, which is the only state where legal malpractice insurance is mandatory for private practitioners.[24] The annual claim rate based on figures from the Oregon Professional Liability Fund—the provider of the mandatory insurance—is about 12 claims per 100 insured lawyers.[25] Compare this ratio to the frequency of medical malpractice claims, which, according to a study using closed claim data from Texas before major limits on damages were implemented, ranged from 20 to 30 per 100 physicians.[26] A second study, using closed claim data from Florida, shows numbers suggesting claims per 100 physicians may be around 10.[27] This means that the ratio of medical malpractice claims to legal malpractice claims could be as low as 1 to 1 or as high as 2 or 3 to 1, while the ratio of medical malpractice to legal malpractice cases that reach trial is many times that.

There are a variety of reasons why legal malpractice claims might be infrequent among cases that get to trial. First, the typical legal malpractice claim involves lower levels of damages than is the case in medical malpractice claims. While some legal malpractice claims involving corporate plaintiffs might entail seven, eight, or nine figure financial losses, many legal malpractice claims will not involve sufficient damages to make the cases attractive to lawyers working on a contingency fee basis because the percentage of the potential recovery is too low to generate a fee sufficient for the lawyer to want to take the case.[28] Second, outside of Oregon, significant numbers of private

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24.   Jeffrey D. Watters, *What They Don't Know Can Hurt Them: Why Clients Should Know if Their Attorney Does Not Carry Malpractice Insurance*, 62 BAYLOR L. REV. 245, 258 (2010).

25.   This figure was computed using the number of claims for 2011, 2012, and 2013 as reported in recent annual reports of the Professional Liability Fund ("PLF"), and the number of lawyers insured by the fund as provided by Carol Bernick, Chief Executive Officer of PLF. *See* IRA R. ZAROV, PLF ANNUAL REPORTS, OR. ST. B. PROF. LIABILITY FUND, https://www.osbplf.org/about-plf/annual-reports.html (last visited Feb. 15, 2016); email from Carol Bernick, Chief Exec. Officer, PLF, to Herbert Kritzer, Marvin J. Sonosky Chair of Law and Pub. Policy, Univ. Minn. Law Sch. (Feb. 18, 2015, 2:58 PM) (on file with the *Hofstra Law Review*). These figures reflect actual claims rather than simply notification from an insured of a potential claim. Email from Carol Bernick, Chief Exec. Officer, PLF, to Herbert Kritzer, Marvin J. Sonosky Chair of Law and Pub. Policy, Univ. Minn. Law Sch. (Apr. 6, 2015, 2:59 PM) (on file with the *Hofstra Law Review*) ("A file is opened when a claim is made. A claim is defined as a demand for money . . . directly from the claimant, from a lawyer for the claimant [or from our insured after receiving] a demand for money [from the claimant or the claimant's lawyer].").

26.   Bernard Black et al., *Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002*, 2 J. EMPIRICAL LEGAL STUD. 207, 236 fig. 7 (2005).

27.   Neil Vidmar et al., *Uncovering the "Invisible" Profile of Medical Malpractice Litigation: Insights from Florida*, 54 DEPAUL L. REV. 315, 332 tbl. 3 (2005). However, in making these comparisons it needs to be noted that in many medical malpractice cases the injuries may be far more serious than in legal malpractice cases.

28.   This is also true of many medical malpractice claims. *See* Kritzer & Vidmar, *supra* note 17, at 88.

practitioners, particularly those in small firms or solo practice where malpractice claims are most likely,[29] are uninsured. For example, a survey conducted by the Texas State Bar in 2005 found that 63% of solo practitioners in Texas reported that they were uninsured.[30] Third, the law and the judges and arbitrators who administer that law appear somewhat hostile toward claims of legal malpractice, consequently erecting barriers that do not exist with regard to negligence by members of other professions.[31] Fourth, lawyers may be more willing to settle claims than are physicians, either because they fear the reputational hit of losing a legal malpractice case at trial or because they do not face the prospect of public reporting of payments made to resolve the claims, as do physicians who must report such payments to the publicly accessible National Practitioner Data Bank.[32] Fifth, and most important for the analysis we present below, there is a perception among experienced litigators that juries are biased against lawyer defendants, and hence, legal malpractice cases may be settled before trial more often than other kinds of professional malpractice cases.[33] Legal malpractice is usually a

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29. William H. Gates, *Lawyers' Malpractice: Some Recent Data About a Growing Problem*, 37 MERCER L. REV. 559, 559 (1986). It is easy to overstate the likelihood of malpractice among solo and small firm practitioners, but it is important to keep in mind that about three quarters of private practitioners work in such settings. *See* CLARA N. CARSON & JEEYOON PARK, AM. BAR FOUND., THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2005, at 10 (2012). However, there is good evidence that the claim rate (claims per 100 or 1000 practitioners) is higher among small firms and solo practitioners than among large firm practitioners. *See* Tom Baker & Rick Swedloff, *Liability Insurer Data as a Window on Lawyers' Professional Liability*, U.C. IRVINE L. REV. (forthcoming 2016) (manuscript at 22) (on file with the *Hofstra Law Review*); Kritzer & Vidmar, *supra* note 17, at 2.

30. Chuck Herring & Bill Miller, *Pro/Con Professional Liability Disclosure*, 72 TEX. B.J. 822, 823 n.2 (2009).

31. *See* BENJAMIN H. BARTON, THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM 161-87 (2011); Louis A. Russo, *The Consequences of Arbitrating a Legal Malpractice Claim: Rebuilding Faith in the Legal Profession*, 35 HOFSTRA L. REV. 327, 340 (2006).

32. *See* Russo, *supra* note 31, at 336; Lawrence E. Smarr, *A Comparative Assessment of the PIAA Data Sharing Project and the National Practitioner Data Bank: Policy, Purpose and Application*, LAW & CONTEMP. PROBLEMS, 59, 68 (1997).

33. See Ramos, *supra* note 21, at 1681 (1994) (noting an increase in juror hostility toward lawyers). However, other sources argue that lawyers can receive a fair hearing by jurors and that they usually win malpractice cases that get to trial. *See* Lisa Chalidze, *Defending the Legal Malpractice Claim Arising from Representation of Small Business*, 62 AM. JUR. TRIALS 395 § 1 (1997); Mark O'Neill, *Do Juries Treat Lawyers Fairly in Legal Malpractice Cases*, 58 DEF. COUNS. J. 248, 248-49 (1991). At least one commentary argues that defendant-lawyers are advantaged in legal malpractice cases due to bias by judges. *Judicial Bias in Legal Malpractice Cases*, VOLKEMA THOMAS MILLER & SCOTT, http://www.vt-law.com/blog/2012/01/judicial-bias-in-legal-malpractice-cases.shtml (last visited Feb. 15, 2016). We note, however, Mark O'Neill cites high win rates for lawyers in legal malpractice cases—anywhere from 2 to 1 to as high as 4 to 1—which is not consistent with what we observed in either data collected by the BJS, which we reanalyzed, or data that we compiled using the *Illinois Jury Verdict Reporter*; the win rate for defendants in both of these data sources was around 50%: 51% in the BJS data and 44% in the Illinois data.

negligence-based tort claim.[34] As such, the plaintiff must prove the four standard elements of negligence: (1) that the defendant had a duty to the plaintiff; (2) that the defendant had breached that duty; (3) that the breach had caused injury; and, (4) that the injury had resulted in damage to the plaintiff.[35] The archetypical legal malpractice case arises when the lawyer has missed a filing deadline in a "slam-dunk" personal injury suit (for example, a passenger in a car involved in an accident, or a pedestrian in a crosswalk), which results in the plaintiff's claim against the original tortfeasor being barred. A plaintiff in this situation will likely now have a claim against the lawyer who missed the filing deadline. Clearly, the lawyer had a duty to the plaintiff and presumably breached that duty. The question that will arise is whether that breach of duty caused any damage to the plaintiff; that is, would the plaintiff's original claim have succeeded had the case gone to trial? Thus, when this kind of legal malpractice claim is tried, the question at trial is actually the underlying personal injury claim, or what is commonly referred to as the "case-within-the-case."

The issue is best illustrated from an incident that occurred during the first author's observations in three law firms as part of his study of contingency fee practice.[36] A lawyer in one of the firms had missed a filing deadline, and the firm was appealing the dismissal by arguing that the deadline was actually a couple of days later. One of the lawyers explained that if the appeal was unsuccessful, the firm was likely to be sued by its client. The lawyer went on to observe that while the client would still have to prove the underlying case (the "case-within-the-case"), juries were more likely to find negligence in the underlying case when it was the plaintiff's former lawyer who would be on the hook for the damages than when it was the original defendant who would have to pay any award. In this instance, the firm was successful on its appeal, so the issue of what would happen at a legal malpractice trial was not tested. Nor would it likely have been tested, given the lawyer's concern about jurors' attitudes toward lawyer defendants; almost certainly the firm's insurer would have settled with the client.

In the course of our conversations with insurers and practitioners in the legal malpractice arena, a number of people mentioned this same

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34. Claims can also be brought against lawyers by former clients (or possibly the beneficiary of former clients) under a contract theory, a breach of fiduciary duty theory, or possibly a fraud theory; lawyers can also, in some circumstances, face fraud claims from nonclients. *See* VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW 13-14, 166-88 (2011).

35. *See* Chalidze, *supra* note 33, at 395 § 5.

36. The study is reported in HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES (2004). However, the incident described here is not recounted in that book.

phenomenon. Juries, they believe, are sufficiently hostile to lawyers so that the jurors are more likely to find negligence in the underlying case in the context of a legal malpractice trial than if the original case went to trial. We were unable to find any systematic evidence in support of this proposition, but it appears to loom large in the minds of insurers and practitioners. The perception of juror hostility might explain the fact that a large percentage of legal malpractice trials are bench trials. Our analysis of data on trial outcomes in 1996, 2001, and 2005, collected by the National Center for State Courts ("NCSC") on behalf of the BJS, showed that 38.5% of legal malpractice trials were bench trials compared to only 2% in trials of physician malpractice.[37]

Ideally, one would try to test this hypothesis by looking at actual jury verdicts. However, that approach is not practical. In the small number of legal malpractice cases in the BJS/NCSC dataset, there is a very modest tendency for juries to find for the plaintiff more often than do judges in bench trials (53% versus 43%), a difference that is not statistically significant given the small number of cases, and, also, a figure that is confounded by case selection issues.[38] However, the small number of cases and case selection are actually not the most severe problem. First, it is likely that the cases tried to the bench are different in important ways from those tried to juries.[39] Second, and more important, given that, as noted above, in a legal malpractice case the plaintiff generally has to prove both the case-within-the-case and the lawyer's negligence, there is no way to know from actual cases whether the difference is due to one or both elements. Even if one could match the case-within-the-case in legal malpractice cases to simple negligence cases, this problem of confounding would still exist.

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37. These figures exclude cases where a trial started, but the parties reached a settlement before a verdict was reached. These data are available from the Interuniversity Consortium for Political and Social Research ("ICPSR")—ICPSR studies 2883, 3957, and 23862. For the 1996 and 2001 studies, the data were drawn for a sample of 45 and 46 of the 75 largest counties in the United States. *See* CAROL J. DEFRANCES & MARIKA F.X. LITRAS, U.S. DEP'T OF JUSTICE, NCJ 173426, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 1996 (Sept. 1999), http://www.bjs.gov/content/pub/pdf/ctcvlc96.pdf; THOMAS H. COHEN & STEVEN K. SMITH, U.S. DEP'T OF JUSTICE, NCJ 202803, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 2001, (Apr. 2004), http://www.bjs.gov/content/pub/pdf/ctcvlc01.pdf; LYNN LANGTON & THOMAS H. COHEN U.S. DEP'T OF JUSTICE, NCJ 223851, CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005 (Oct. 2008), http://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf. The 2005 study was expanded to include a stratified sample of 110 of the 3066 counties outside the 75 largest. For details regarding the sampling strategy for the 2005 study, see LANGTON & COHEN, *supra* at 11.

38. These figures are from our own reanalysis of the 2005 BJS civil verdict study. The data for this study was obtained from the ICPSR data archive. *See* BUREAU OF JUSTICE, U.S. DEP'T OF JUSTICE, ICPSR 23862, CIVIL JUSTICE SURVEY OF STATE COURTS, 2005 at 9-13 (2005).

39. A bench trial will occur only if neither party has requested a jury trial. If either party thinks it would be advantaged by having a jury, then that party will demand a jury trial.

Thus, arguably, testing the hypothesis that lawyer-defendants are disadvantaged in jury trials is best accomplished experimentally. One can ask simulating jurors to decide the identical underlying case in the context of that case alone versus in the context of a legal malpractice case where the lawyer's negligence has been stipulated. With this kind of experiment, the only difference in the cases will be whether the defendant is the former lawyer or the original defendant. This was an approach used by Valerie Hans in her study of whether jurors were more or less likely to hold a business responsible than a homeowner.[40] Using simulated jurors, the experiment reported below tested two hypotheses regarding lawyers being disadvantaged as defendants: (1) juries are more likely to find for the plaintiff when the defendant who will have to pay any damages is the plaintiff's former lawyer; and (2) juries award more in damages when the defendant is the plaintiff's former lawyer.[41]

III.   METHOD

To test the two hypotheses, we designed an Internet experiment involving three distinct cases: the first involving an auto accident where the issue related to causation of one of the claimed injuries and damages; the second involving a slip (actually a trip) and fall on a sidewalk in a residential neighborhood involving both liability and damages; and, the third involving a claim of medical malpractice concerning both liability and damages. We describe each of our cases in more detail below.[42] For each of the three cases, we created two versions: a legal malpractice version in which the plaintiff's original lawyer had missed a filing deadline and was consequently being sued for legal malpractice; and, a control version being the original tort case itself. In the legal malpractice condition, the respondents were told that the lawyer was not contesting the allegation that he had missed the filing deadlines (that is, he had breached his duty to his former client);[43] they were only to decide whether the original tortfeasor was negligent and what damages were due to the plaintiff. In the legal malpractice condition, we included a question to determine if the respondent had recognized that the lawyer was the defendant and excluded from the analysis persons who had not understood that it was the lawyer who was the defendant who would have to pay any damages.[44] The experiment produced a total of 1157

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40.   Hans, *supra* note 6, at 42-46.
41.   *See infra* Part III.
42.   *See infra* Part III.A–C.
43.   The defendant-lawyer was male in all three of our cases.
44.   We conducted three rounds of the experiment. We used the results of the first round to estimate the percentage of respondents in the legal malpractice condition for each of the three cases

usable respondents who comprise the sample used in the analysis reported below.[45] The median time required by those respondents to complete the exercise was 20.4 minutes.[46]

A.   The Cases

1.   Auto Case

The auto case was based on a trial observed by the first author in a rural county in a Midwestern state. The defense lawyer for that case made his trial notebook available. It included the deposition transcripts for the treating physicians and the defense's medical expert. The accident occurred because an elderly driver made a left turn in front of oncoming traffic. The plaintiff, a young mother, collided with the defendant's car. The issue in the case was whether the plaintiff suffered an injury. She declined transportation to the hospital at the scene of the accident, but later went to an urgent care facility. The plaintiff testified that at urgent care she complained of pain in both her chest and her knee; she also had bruising on her face, presumably from the airbag that deployed. However, the clinic notes said nothing about complaints involving knee pain. A week after the accident, the plaintiff attended a previously-made appointment with a nurse-practitioner because she thought she might be pregnant. She testified that she told the nurse-practitioner about the accident and that she still had some pain in her neck, back, and knee. Again, the notes of the appointment made no mention of knee pain (although, in later testimony, it came out that the notes did report that the nurse-practitioner observed a "well-healed bruise area" on the knee).

The first medical record showing any evidence of pain in the knee was from an appointment two or three weeks after the accident when the plaintiff went to her clinic complaining about the knee. At that time, she was told to wear a knee brace and make an appointment with an orthopedist. She saw the orthopedist about a month after the accident; the orthopedist did not take an x-ray, but told her to continue wearing the

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who recognized the manipulation and then oversampled in the subsequent rounds to try to equalize the number of usable responses for the experimental and control conditions for each of the three cases.

45.   *See supra* Part III.A.

46.   The results reported below are based on all respondents who completed the experiment and passed the manipulation check for the experimental (legal malpractice) condition. We repeated the analysis limiting the respondents to those who took between 5 and 120 minutes to complete the experiment; presumably, some of those who took a long time to complete were multitasking and took time to engage in other tasks. This eliminated a total of 71 respondents, but had little effect on the results reported below although some tests that achieved statistical significance with all respondents did not make the cut-off with the reduced number of respondents.

knee brace and undergo physical therapy. The pain actually became worse over the next several months, and when she finally returned to the orthopedist's office, she saw a different physician who suggested she have an MRI. Because she was pregnant, she postponed the MRI until after her daughter was born. After the MRI, the orthopedist suggested some injections, but she decided not to receive them because the orthopedist told her that he could not be sure that they would help. She did not return until almost eighteen months later, after she had consulted with a lawyer who told her to go back to the orthopedist. At that time, the orthopedist told her that she needed a surgical procedure to look inside the knee and repair any damage. That procedure was carried out, and the knee was healed by the time of the trial.

In his trial testimony, the treating orthopedist reported that the radiologist who read the MRI initially read the result as showing both fluid and a tear in the meniscus (the tendon inside the knee that holds the knee in proper position and supports it), but then modified his diagnosis to fluid and degeneration of the meniscus, but no tear through the meniscus. When the orthopedist personally reviewed the film after the plaintiff returned following advice from her lawyer, he thought he saw a tear in the meniscus and recommended a surgical procedure to further diagnose and possibly repair the condition. The orthopedist also testified that he had seen nothing in the medical records indicating any kind of injury to the knee that would have existed prior to the accident.

The orthopedist hired by the defense reported that he had examined the plaintiff prior to the surgery and had reviewed the film of the MRI. He agreed with the revised diagnosis of the radiologist concluding that there was some change to the meniscus, but no tear. He also testified that striking the knee on the steering column, which is what the plaintiff claimed had happened in the accident, was not the kind of mechanism normally associated with a tear to the meniscus; such an injury typically occurs when the leg is twisted, as might happen during activities such as running, walking, jumping, or going up or down stairs. In his closing argument, the defense lawyer suggested that the tear could have occurred by the plaintiff unknowingly twisting her knee, as she was dealing with the care of her young children.

The questions the jury was asked to decide were essentially whether the knee injury was due to the accident and, if it was, what damages (past pain and suffering, medical expenses, future pain and suffering) would be appropriate compensation in connection with that injury. In addition, the jury needed to determine the appropriate pain and suffering damages for the injuries that were not contested. The plaintiff's lawyer suggested total damages of about $57,000, which included the roughly

$550 for lost wages and the charges from the urgent care clinic. While opposing any damages for the knee surgery, the defense acceded to damages covering the initial diagnostic procedures (including the MRI) and other treatment and suggested total damages of between $6000 and $7500. The simulated jurors were then asked to award amounts for medical expenses, past pain and suffering, and future pain and suffering.[47]

2. Medical Malpractice Case

The medical malpractice case was based on the hypothetical case used by Christopher Robertson and David Yokum.[48] Those researchers used a thirty-five minute videotaped mock trial in their experiment. Robertson shared with the present authors a transcript produced from the videotape, which was the basis of the case script for the medical malpractice case. Robertson and Yokum described the case in the following way:

> The script was written by practicing physicians, who also served as both project consultants and the actors playing the expert witnesses. The scenario concerned the failure of a primary care physician to diagnose a possible case of lumbar radiculopathy [nerve irritation caused by damage to the discs between the vertebrae] and refer the patient to imaging, which allegedly would have allowed timely surgery and avoidance of the permanent disability that the patient now suffers. The primary dispute concerned whether the physician-defendant met the standard of care when, instead of ordering imaging, he simply instructed the patient to take painkillers and return if the pain got worse. The case was designed so that there was a right answer to this question of medical doctrine, one given by a national practice guideline published in the *Annals of Internal Medicine*.[49] According to that guideline and the stipulated facts, the physician did violate the

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47. As noted above, this case was based on an actual trial observed by the first author. The jury in that trial awarded a total of about $17,500 in damages. That award included $7500 for past pain and suffering, about $9800 for past medical expenses, the stipulated amount for past wages, and $0 for future pain and suffering. Essentially, this was a win for the defense; the only part of the award that went beyond what was suggested by the defense was the cost of the knee surgery itself. The last demand from the plaintiff was $38,000; the defendant had made a formal offer of judgment in the amount of $14,800 and a further settlement offer prior to trial of $16,000.

48. Christopher T. Robertson & David V. Yokum, *The Effect of Blinded Experts on Juror Verdicts*, 9 J. EMPIRICAL LEGAL STUD. 765, 770 (2012). In Robertson and Yokum's experiment, the manipulation was whether one or both experts were "blinded" as to which side they were hired by with "neither" blinded as the control. *Id.*

49. Roger Chou et al., *Diagnosis and Treatment of Low Back Pain: A Joint Clinical Practice Guideline from the American College of Physicians and the American Pain Society*, 147 ANNALS INTERNAL MED. 478, 478 (2007).

standard of care.[50] To avoid confounding with the variables of interest, this guideline was not introduced in the stimulus trial for the present experiment. It is only a reference point for analysis.

The trial consisted of the following sequence: the trial judge's introduction and preliminary instructions (based on the Revised Arizona Jury Instructions (RAJI)), very brief opening statements from the plaintiff and the defendant's attorneys, the testimony of plaintiff's expert, the cross-examination of plaintiff's expert, the testimony of defendant's expert, the cross-examination of defendant's expert, very brief closing statements from the plaintiff's and defendant's attorneys, and, lastly, jury instructions from the trial judge (also based on the RAJI).[51]

Our reworking of the transcript produced a narrative of a trial with opening and closing statements, testimony by the experts for the two sides, and instructions from the judge.[52]

3. Premises Case

The premises case was based on a case narrative used by researcher Leslie Ellis[53] and was modified slightly for the present experiment. In this case, the plaintiff tripped over a sidewalk crack. His injuries included a cut to his forehead, a fractured eye socket, and headaches and dizziness for a period of years that limited his ability to work. The defendant was the owner of the home adjacent to the sidewalk. By law, homeowners are responsible for maintaining the sidewalk in front of their houses, and are liable for injuries if the sidewalk deteriorates to the point that it is in an "unreasonably dangerous condition."[54] A central

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50. *See* Robertson & Yokum, *supra* note 48, at 771. For the control condition, only 46% of the respondents found the physician negligent, even though they had designed the case so that the physician was in fact negligent. It is important to note again that the practice guide was not introduced; the standard of care was introduced only through expert testimony.

51. *Id.*

52. Our version used only Robertson and Yokum's control condition in which both experts knew which side had retained them. We actually included a third condition, which we do not report in this Article. In that condition, we changed the physician's name to something very foreign-sounding to see if the physician from a group commonly seen as comprised of relatively recent immigrants was disadvantaged by his apparent national heritage. Without going into detail, we found no differences between that condition and our control condition, which used a name that would be seen as traditionally American.

53. Leslie Ellis, Don't Find My Client Liable, But If You Do . . . : Defense Recommendations, Liability Verdicts, and General Damage Awards 193-206 (2002) (unpublished Ph.D. Dissertation, University of Illinois at Chicago). Ellis's research question dealt with the impact of the lawyers suggesting specific amounts of damages.

54. Mark C. Dillon, *Breaking the Ice: How Plaintiffs May Establish Premise Liability in "Black Ice" Cases Where the Dangerous Condition Is by Definition Not Visible or Apparent to Property Owners*, 43 HOFSTRA L. REV. 691, 694-97, 695 n.26 (2015).

question in this last case was whether the crack was sufficiently large to have made the sidewalk unreasonably dangerous. If the juror found it to be unreasonably dangerous, she needed to set an amount to compensate the plaintiff for past and future non-economic damages, including pain and suffering. The amount that the plaintiff would receive for medical expenses and lost wages if the defendant was found liable had been agreed to by the parties. In the version used in our research, there were opening and closing statements by the lawyers for each side, instructions from the judge, and testimony from three witnesses: the plaintiff, the homeowner, and a neighbor who witnessed the plaintiff falling. The simulated jurors were also shown a photo of the sidewalk with the crack. The plaintiff testified to the specific event and the impact of his injuries. The defendant testified that the crack had been there for some time and that, to his knowledge, no one had ever tripped on it prior to the plaintiff. The neighbor testified that she worked at home by a window that looks out toward the defendant's house. She reported that she saw a lot of people walking down the sidewalk and had never witnessed anyone falling; she said that most people would see the crack and step over it.

In closing arguments, the plaintiff's attorney asked for $100,000 in damages. The defense attorney argued that the sidewalk was not unreasonably dangerous, and hence, the homeowner should not be found to have been negligent. He went on to argue that if the jurors were to find the homeowner to be negligent, the non-economic damages should be no more than $10,000.

B. Sample and Survey Administration

The sample population was drawn from an internet panel obtained through Qualtrics.[55] Potential respondents were screened for jury eligibility by asking if they were registered to vote. Those who were not registered were asked if they were a U.S. citizen and, if yes, whether they would be eligible to vote if there were an upcoming election. Potential respondents who were not citizens or who could not register to vote were excluded. Respondents who completed the questions at the end of the case narrative were compensated in accordance with the policies of the panel provider.[56]

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55.   Qualtrics is a survey service which provides both an online platform for surveys and sample generation. *See* QUALTRICS, http://www.qualtrics.com (last visited Feb. 15, 2016).

56.   We paid $5 per respondent; we do not know how much of that actually went to the respondents. Generally, online survey panelists are slightly younger and better educated than the population as a whole, which means that our sample probably does not perfectly mirror a jury pool; of course, our respondents were not subject to anything resembling voir dire, which further distinguishes them from actual jurors.

After completing the informed consent section, respondents were screened for eligibility. Those determined to be eligible then read a brief introductory section followed by the case narrative itself. After completing the case narrative, respondents assigned to the experimental condition (legal malpractice) were asked a question to determine if they understood who the defendant was. As noted above, respondents who failed to identify the lawyer as the defendant were excluded from the analysis we report below. The next questions were the actual jury questions concerning liability and/or damages, as would be found on a jury verdict form. Respondents then completed a small set of demographic questions (year of birth, gender, education, current occupation, and household income), a political orientation/ideology question, questions about experience serving on juries or personal involvement as a plaintiff or defendant in a lawsuit, two questions assessing attitudes toward the tort system, and, depending on the condition questions, about whether the respondent or anyone in the respondent's immediate family had attended (or was attending) law or medical school.

The survey was administered by the staff of the University of Minnesota College of Liberal Arts' Office of Information Technology using the Qualtrics survey system.

C.   Results

1. Auto Case

Because there was no issue of liability in the auto case, the respondents were only asked to provide amounts for three elements of damages: medical expenses, past pain and suffering, and future pain and suffering. Our hypothesis was that higher damages would be awarded in the legal malpractice condition. Table 1 shows various statistics for each of the three elements of damages and for the total of those three elements, along with the results of four statistical tests.[57]

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57.   *See infra* Table 1.

TABLE 1: DAMAGES FOR AUTO ACCIDENT CASE

	(a) Past Medical		(b) Past Pain & Suffering	
	Control	Experimental	Control	Experimental
Mean	$3,649	$5,425	$4,040	$8,439
Median	$375	$720	$750	$1,000
Std. Dev.	$6,214	$16,290	$7,810	$41,098
t-test	t=1.41, p=.079		t=1.47, p=.072	
median test (below)	Z=1.56, p=.060		Z=1.62, p=.053	
median test (above)	Z=1.90, p=.028		Z=1.71, p=.044	
Wilcoxon rank sum test	Z=1.37, p=.085		Z=1.54, p=.062	

	(c) Future Pain & Suffering		(d) Total Damages	
	Control	Experimental	Control	Experimental
Mean	$3,059	$13,463	$10,747	$27,327
Median	$11	$100	$2,175	$3,100
Std. Dev.	$7,181	$101,198	$17,720	$146,719
t-test	t=1.43, p=.077		t=1.57, p=.060	
median test (below)	Z=0.78, p=.218		Z=1.51, p=.066	
median test (above)	Z=0.65, p=.251		Z=1.91, p=..028	
Wilcoxon rank sum test	Z=0.78, p=.219		Z=1.41, p=.079	

Notes: N's are 178 for control and 195 for experimental; t-tests assume unequal variances; all p-values are one-tailed

Looking only at the means shown in Table 1, it appears that there were substantial differences between the experimental and control groups, with the mean for the former about three times the latter for total damages and more than four times the latter for future pain and suffering. However, none of the t-tests shown in Table 1 achieved statistical significance at the .05 one-tailed level, although all would be significant at the .10 one-tailed level. The patterns shown in Table 1 could well have been produced by a random process rather than reflect systematic differences between conditions.[58] A close examination of the distributions of the various damage amounts set by the two groups of respondents shows that the apparent differences evidenced by the means probably reflect a small number of outliers among the respondents in the experimental condition. Moreover, the medians shown in Table 1 do exhibit particularly large differences in absolute terms. Perhaps there are differences, but these are obscured by the outliers. To check for this possibility, we also ran tests that are not sensitive to a small number of extreme values.

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58. All of the t-tests were done assuming unequal variances for the two groups because the test for equality of variances showed very clearly that the variances for the two groups were not equal, and that is fairly clear in the standard deviations shown in Table 1.

We applied two such tests. As shown in Table 1, the median test[59] provides inconsistent evidence of statistically discernible differences in the amounts awarded for past medical costs, past pain and suffering, and total damages. The inconsistency arises from how observations falling exactly at the median are handled. The test is significant at the .05 level only when we combine those observations with the observations falling above the median test. For future pain and suffering, the median test provides no evidence of significant differences between the control and experimental group.

A second test that is insensitive to extreme values is the Wilcoxon rank sum test.[60] As shown in Table 1, none of the Wilcoxon rank sum tests achieved statistical significance at the .05 level, although three (the two past damage amounts and total damages) would be statistically significant at the .10 level (one-tailed).

Another approach to dealing with the skew in the amounts of damages is to convert the values to natural logarithms. This also has the advantage of shifting the distribution to something that more closely approaches the normal distribution, which is one of the standard assumptions of the t-test. Table 2 shows a series of t-tests based on the natural logarithms of the damage amounts.[61] The column labeled e^{mean} is the exponentiation of the mean of the logarithm of the damages.[62] The results shown in Table 2 are consistent with the previous discussion; the only statistically significant differences (or almost statistically significant differences) are for past pain and suffering and total damages.

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59. SIDNEY SIEGEL, NONPARAMETRIC STATISTICS FOR THE BEHAVIORAL SCIENCES 115-16 (1956). In the median test, the observations are split into those above and below the overall median, and then separate proportions for above and below the overall median for the two groups to be compared. The statistical test is either a simple difference of proportions test or a 2x2 chi square test; we used the former because we have a directional hypothesis. The software we used, Stata, actually computes the chi square; we report the square root of that chi square and divide the p-value of the chi square by two in order to obtain the one-tailed p-value. One challenge in performing the median test is the handling of observations that fall exactly at the overall median; there are four alternatives: classify all of these cases into the below group, classify all cases into the above group, exclude cases falling at the median, and splitting the cases at the median into above and below. Tables 1, 3, and 4 show only results using the first two approaches.

60. *See* THOMAS H. WONNACOTT & RONALD J. WONNACOTT, INTRODUCTORY STATISTICS 525 (1990). The Wilcoxon test, which is equivalent to the Mann-Whitney U test, can be thought of as roughly equivalent to a t-test which has been done on the ranks of the dependent variable rather than on the original values. The statistical distribution underlying the Wilcoxon test is standard normal distribution (hence, producing a Z-value) rather than a t-distribution because the ranks have a uniform distribution and the standard deviation of the uniform distribution is known because it is defined by the minimum and maximum values. The advantage of this test is that it is insensitive to skew in the data and has a standard way of handling tied ranks.

61. *See infra* Table 2.

62. The logarithms were computed by adding 1 to the value to be transformed prior to taking the logarithm.

TABLE 2: TESTS USING THE LOGARITHM
OF DAMAGES FOR THE AUTO CASE

	Experimental			Control				
	mean	std dev	e^{mean}	mean	std dev	e^{mean}	t	p
Past Medical Expenses	6.416	2.676	$612	6.072	2.764	$433	-1.223	0.111
Past Pain and Suffering	6.258	3.064	$522	5.709	3.246	$302	-1.681	0.047
Future Pain and Suffering	4.200	3.935	$67	3.852	3.849	$47	-0.862	0.195
Total Compensation	7.701	2.635	$2,210	7.237	2.854	$1,390	-1.63	0.052

Notes: N's are 178 for control and 195 for experimental; t-tests assume equal variances; all p-values are one-tailed

We conclude that, for the auto case, there is, at best, a suggestion that respondents in the experimental condition involving legal malpractice might have been a bit more generous in their setting of damages than were respondents in the non-malpractice control condition.

2. Premises Case

For the premises case, respondents were asked to both make a determination on liability and, for those who found the homeowner to have been negligent, to specify a figure for non-economic damages (such as pain and suffering). A higher percentage of respondents in the experimental group (42%, n=203) than in the control group (34%, n=186) found the homeowner to have been negligent. This difference was statistically significant under the directional (one-tailed) hypothesis, that there was a higher likelihood of finding negligence in the malpractice condition than in the non-malpractice condition .05 level (Z=1.72, p=.042).[63]

Table 3 shows statistics for the control and experimental groups, comparing the damages set by respondents who found the homeowner negligent, along with both t-tests (one for the untransformed compensation award and one for the natural logarithm of the compensation award) plus a median test.[64] The t-tests support the hypothesis that lawyer defendants were disadvantaged compared to the original tortfeasor, but the median test is ambiguous. The results for the median test at first appear odd, producing a significant test if observations at the median are classified as above the median and producing a test statistic approaching zero when those observations are classified as below the median. The problem here is that the overall median is $50,000, and there are a substantial number of observations in

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63. Limiting the respondents to those who took between 5 and 120 minutes to complete the survey reduced the gap to 7 percentage points which, combined with slight drop in sample sizes, no longer produced a statistically significant test of the difference in proportions.

64. *See infra* Table 3.

the experimental group falling at $50,000.[65] Table 3 also shows the Wilcoxon rank sum test described previously. Consistent with the t-tests, the Wilcoxon test was statistically significant. A close look at the data distribution confirms that there is a broad difference in the damages set by the experimental and control groups. For example, both the first and third quartiles are higher for the experimental group ($20,000 to $100,000) compared to the control group ($10,000 to $75,000). This is evident in Figure 1, which is a box plot showing the distributions for the two groups; values have been transformed to base 10 logarithms to better show the spread.

TABLE 3: DAMAGES FOR PREMISES CASE

	Control	Experimental
Mean	$46,643	$69,413
Median	$42,134	$50,000
Std. Dev.	$47,372	$81,179
Mean of log	9.685	10.615
$e^{Mean\_of\_log}$	$16,082	$40,753
n	57	82
t-test (untransformed)	t=2.08, p=.020	
t-test (log transform)	t=2.64, p=.010	
median test (below)	Z=0.21, p=.416	
median test (above)	Z=2.02, p=.022	
Wilcoxon rank sum test	Z=1.93, p=.027	

Notes: t-tests assume unequal variances; all p-values are one-tailed.

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65. Two other alternatives—evenly dividing the observations at the median between the above and below groups or deleting those observations from the test—both produce test statistics that do not come close to achieving statistical significance.

FIGURE 1: DISTRIBUTION OF DAMAGE VALUES
FOR PREMISES CASE
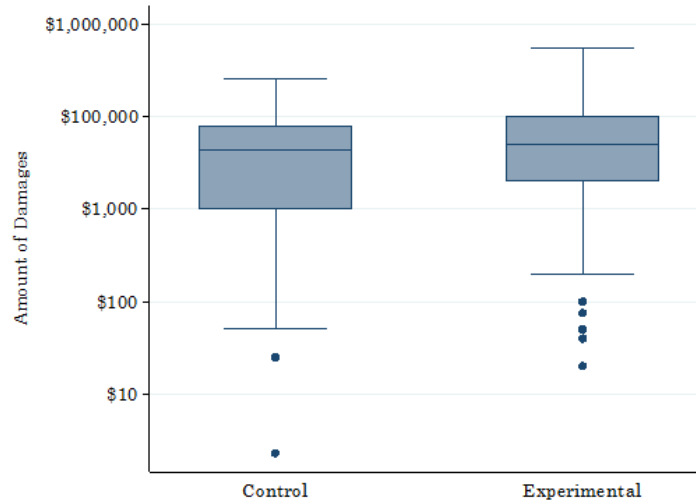
From the above analyses, we conclude that there was a tendency in the premises case for the respondents who found the homeowner to have been negligent to award somewhat higher damages when defendant was the plaintiff's former lawyer than would be the case if the homeowner were the actual defendant. However, while a difference was detectable, the magnitude of that difference was modest.

3. Medical Malpractice Case

In the medical malpractice case respondents were asked two questions which together determine whether the physician was liable or, in the experimental condition, would have been liable. The first question asked whether the physician had been negligent: 41% of the control condition respondents found negligence compared to 34% of the experimental condition respondents. No statistical test is needed because the direction of the difference is the reverse of what was hypothesized. Those respondents who found the physician negligent were then asked whether the physician's negligence had caused the plaintiff's claimed injury: 77% of the control condition respondents found causation compared to 87% of the experimental condition respondents. Using a one-tailed difference of proportions test at the .05 level, that difference was not statistically significant (Z=1.50, p=.067). Combining these two questions to determine liability, 31% of the control condition respondents found the physician liable compared to 30% of the

experimental condition respondents who would have held the physician liable. Clearly, there is no evidence in Table 4 to conclude that there was a greater inclination among those in the experimental group to find the physician at fault for the plaintiff's claimed injury.[66] It is worth noting again that the case was designed so that there was negligence on the part of the physician, but less than 40% of the respondents found negligence, and even fewer found liability.

TABLE 4: DAMAGES FOR MEDICAL MALPRACTICE CASE

	Control	Experimental
Mean	$454,914	$106,082
Median	$6,000	$12,500
Std. Dev.	$1,712,454	$262,579
Mean of log	8.098	8.752
$e^{Mean\_of\_log}$	$3,287	$6,322
n	57	60
t-test (untransformed)	n/a	
t-test (log transform)	t=0.95, p=.171	
median test (below)	Z=1.24, p=.108	
median test (above)	Z=1.94, p=.026	
Wilcoxon rank sum test	Z=1.19, p=.118	

Notes: t-test for untransformed award omitted because difference of means is the reverse of the hypothesis; t-test for log transform assumes equal variances; all p-values are two-tailed.

Table 4 provides statistics and relevant tests of significance for damages in the medical malpractice case.[67] The number of respondents who provided figures for damages is small because less than a third had found the doctor liable. The untransformed mean for the control group was actually higher than that for the experimental group due in part to one extreme response; however, even removing that response, the mean of the control ($284,466) exceeded that of the experimental group shown in Table 4. Using the log transformation, the mean of the experimental group was higher, as is the median of the experimental group. The tests of significance produced inconsistent results. Neither the t-test for the log transform, nor the Wilcoxon test, was statistically significant;[68] the median test produced a statistically significant result if observations

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66. *See infra* Table 4.

67. *See supra* Table 4.

68. No test need be computed for the untransformed award because the direction of difference is inconsistent with the hypothesis that awards would on average be higher in the legal malpractice condition.

falling exactly at the median are grouped with those above the median while using the "below" variant is not statistically significant.[69]

We conclude that there is at best minimal evidence that the simulated jurors in this case were more plaintiff-friendly when the actual defendant was the plaintiff's former lawyer.

IV.   FURTHER ANALYSES

While the experimental setup means that we should expect there to be no differences between the experimental and control groups other than the experimental manipulation, it is always possible that some differences might remain that could impact the results. To test for this possibility, we constructed regression models that added various controls in addition to the experimental manipulation. The control variables we used included the following:

- respondent's gender;
- respondent's education (three categories: high school or less, some college, college degree or more);
- household income (we used a four-point scale: 1=under $25,000, 2=$25,000-$50,000, 3=$50,000-$100,000, 4=over $100,000);
- prior experience on a civil jury;
- experience as a defendant in a lawsuit (other than divorce);
- experience as a plaintiff in a lawsuit (other than divorce);
- political ideology (three categories collapsed from a seven-point scale: conservative, middle-of-the-road, liberal);
- whether any member of the respondent's immediate family was a lawyer or was currently in law school; and
- for the medical malpractice case only, whether any member of the respondent's immediate family was a physician or was currently in medical school.

We estimated logistic regression models for the liability issue and ordinary linear regression models for damage amounts (both untransformed and log transformed). Most of the regressions produced minimal effects from the control variables, and none revealed effects of the experimental manipulation that would lead us to modify our conclusions about one or more of the three versions of the cases used in the study.

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69. Both of the two variants, dropping those cases at the median or splitting those cases evenly between above and below, produce tests that almost meet the .05 one-tailed threshold (p=.052 for "drop" and .056 for "split").

V.   SUMMARY AND CONCLUSION

In this study, we set out to test the argument that juries are more plaintiff-friendly in cases tried in the context of admitted legal malpractice than they would be if they were simply trying the case-within-the-case. We designed three different cases to use in our test of this hypothesis, each involving a different context (auto accident, premises liability, and medical malpractice) and differing in the evidence and circumstances the jurors had to assess.[70] In only one of the three cases, the premises case, did we find clear support for our hypothesis. Moreover, even in that case, both the differences in the probability of finding for the plaintiff and the difference between the amounts awarded in the experimental and control conditions would be best described as modest.

There were hints of possible effects for the auto case, where respondents were only asked to set damage amounts. The fact that the possible effect we did find was limited to economic damages (that is, past medical expenses) suggests that jurors might be inclined to accept a plaintiff's position when there is a question about causation, at least with regard to expenses the plaintiff might have incurred, but not with regard to compensation for pain and suffering. Interestingly, this interpretation is consistent with the actual result in the case upon which our narrative was based. In that case, the jury did award the costs of surgery for the claimed knee injury while not awarding damages the plaintiff requested for the pain and suffering associated with the knee injury.

There was no consistent evidence of any of the hypothesized effects in the medical malpractice case. Even though the case narrative was designed such that there was negligence and liability on the part of the physician, less than one third of our respondents in either condition found that the doctor was, or would have been, liable. This amount is even lower than the 46% Robertson and Yokum reported for their control condition when they used a video version of the case.[71] While some critics might argue that the nature of the case was sufficiently technical that lay jurors even in an actual trial, to say nothing of subjects acting as jurors in a simulation experiment, would have significant

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70. *See supra* Part III.A.

71. Robertson & Yokum, *supra* note 48, at 777. There is one unexplored explanation for the surprisingly low likelihood that respondents found the doctor-defendant liable (both in our study and in Robertson and Yokum's experiment). Specifically, the scenario was created such that the defendant-physician had failed to follow *published* guidelines for dealing with patients who presented as the plaintiff did; however, the respondents were not specifically informed of those guidelines. If the testimony had made clear that the guidelines had not been followed, more subjects would likely have found the physician to be negligent and liable.

difficulty grasping the relevant details and responded by giving the physician the benefit of the doubt. However, that does not explain the absence of differences in the amount of damages awarded when the physician was determined to be liable.

The results in the present experiment are, at best, suggestive of how things work in practice. As with any jury simulation study, there are inevitable questions about external validity, and those issues are probably enhanced in our study. While we sought to design our experimental scenarios to emphasize the lawyer as defendant, the manipulation check variable indicates that we had mixed success. This, in turn, suggests that telling respondents that the lawyer is the defendant, as we have done, is a far cry from jurors seeing the lawyer sitting at the defense table over the several days (or more) that an actual trial would take. However, for an empirical exploration of the question we have posed, the only real option would be some form of jury simulation. We could have made our study more realistic by creating video versions of the trial, having groups of respondents watch one of the two versions of the video and then have the groups deliberate for a period of time before taking votes. The cost of such a study would be substantial, particularly if it were to include more than one case. Furthermore, one might expect that, if there was a very substantial anti-lawyer effect, even a relatively weak experimental setup would produce some clear effects; on the other hand, if there were at most modest anti-lawyer effects, the type of experiment used here could be very problematic.

Returning to the question we opened with: does our study provide evidence of popular hostility toward lawyers generally, and plaintiffs' lawyers in particular? Maybe a little, but we would be hard pressed to argue that our study suggests that lay jurors want to punish lawyers by favoring plaintiffs in legal malpractice trials. Perhaps the "jurors" in our study saw themselves in the role of potential defendants to the underlying case. Perhaps our results reflect the reality of the perception among plaintiffs' lawyers that jurors have become less favorable toward plaintiffs as a result of the campaign by insurance companies and conservative interest groups.[72]

Finally, what are the potential implications of our results for practicing lawyers who might face a legal malpractice claim and for the insurers and defense counsel who handle those claims? If one is prepared to accept the validity of the present experiment we have

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72. *See* Stephen Daniels & Joanne Martin, *Texas Plaintiffs' Practice in the Age of Tort Reform: Survival of the Fittest—It's Even More True Now*, 51 N.Y.L. SCH. L. REV. 285, 295-97 (2006).

conducted—that is, our findings reflect what would happen in actual legal malpractice trials—then the fear lawyers express about juror prejudice disadvantaging lawyer-defendants in such trials is misplaced. Lawyers certainly do not have the advantages that physicians seem to have in medical malpractice trials,[73] but our simulated jurors did not express the approbation of lawyers to affect how they judged cases or set damages. This point was reinforced by a lawyer who specialized in plaintiffs' legal malpractice whom we interviewed as part of the larger study. When we raised this issue and briefly told him about the results of our experiment, he said he was "not surprised," and went on to observe: "It is a perception, but I do not think it's accurate." He went on to explain why he did not think it was an issue:

Good defense lawyers handle [the issue of anti-lawyer sentiment] in voir dire very effectively:

Defense lawyer: "How many people don't like lawyers?"

Everybody raises their hand.

Defense lawyer: And tell me when you needed a will, who did you go to?"

Juror: "I went to a lawyer."

Defense lawyer: "When you got divorced, who did you go to?"

Juror: "I went to a lawyer."

Defense lawyer: "And did you depend on those lawyers?"

Juror: "Yes."

Defense lawyer: "How did they do?"

Juror: "Well they did a pretty good job."

Defense lawyer: "Those lawyers weren't so bad, were they?"

73.	*See supra* note 67 and accompanying text.