

# EVIDENTIARY WISDOM AND BLINDERS IN PERSPECTIVE: THOUGHTS ON *MISJUDGING*

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Empirical studies serve to enlighten the law, even when they simply confirm the wisdom of existing rules. Chris Guthrie's article, *Misjudging*,<sup>1</sup> primarily serves that useful function – confirming the wisdom of existing rules – even though the author sought to establish something different. Guthrie's article applies insights from cognitive psychology to the resolution of legal disputes and presents some empirical proof of the effect of the application. He concludes that three sets of “blindness” – informational, cognitive, and attitudinal – affect the ability of judges to reach correct resolutions of disputes.<sup>2</sup> He therefore recommends further appreciation of the ability of arbitration and mediation to avoid some of the pitfalls of “misjudging” the blindness cause.<sup>3</sup>

The theme of this response is that the studies Guthrie reports and cites have an implication that undercuts his conclusion. Specifically, his studies are more consistent with a litigation model<sup>4</sup> where juries rather than judges decide facts. The reason is that they confirm the wisdom of some common law rules of evidence that protect fact-finding juries from certain types of information. Although Guthrie does not focus on juries, his article reaffirms as empirically justified the common law rules that protect juries from certain types of information. This response will focus on two rules: the introduction of repair evidence and the prohibition against per diem arguments in some jurisdictions.<sup>5</sup>

Guthrie's discussion of cognitive blindness in particular confirms the desirability of a system that restricts the access of fact-finders to certain kinds of information. Because juries are ideally suited for making decisions on the basis of restricted information, Guthrie's article gives credibility to this aspect of traditional litigation rather than supports his rejection of it. His conclusion that this research lends greater credibility to alternative models of dispute resolution

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<sup>1</sup> Chris Guthrie, *Misjudging*, 7 NEV. L. J. 420 (2007).

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

<sup>3</sup> *Id.*

<sup>4</sup> This article uses the artificial distinction between “litigation models” and “alternative models” in the same limited context in which *Misjudging* addresses issues of fact-finding. *But see* Jean R. Sternlight, *ADR Is Here: Preliminary Reflections on Where it Fits in a System of Justice*, 3 NEV. L.J. 289 (2003) (explaining the interrelationship of types of dispute resolution and noting that the distinction between litigation and alternatives is an artificial one).

<sup>5</sup> *See infra* text accompanying notes 37-41.

is therefore not justified. Although Guthrie is correct that the research supports one model of alternative dispute resolution – nonevaluative mediation – it does not support the rejection of traditional litigation on these grounds alone.

Moreover, Guthrie's entire concept of "misjudging" on the basis of these psychological fallacies is not always well-founded. In the context of informational blinders, the concept does not appear to be premised on achieving just results, but ones predicted by the application of exclusionary rules. When the rules have other goals besides justice between these two parties, is it "misjudging" to reach the correct result in the individual case once the cat is out of the bag? Ironically, Guthrie's concept of "blinder" is used incorrectly in these situations; it is the fact-finder who has a blinder forced by the rule. When the blinder is off, should the fact-finder be forbidden to see? Guthrie assumes so and calls it "misjudging" when the fact-finder relies on evidence that is forbidden – but probative.

Cognitive blinders present a different challenge. Guthrie explains that this category involves mindsets that affect judgment.<sup>6</sup> Based on the work of the brilliant psychologists Kahneman and Tversky, he demonstrates with his own clever experiments how a phenomenon such as "anchoring" can affect the assessment of damages.<sup>7</sup> This work shows that when individuals are exposed to a number that sets their thinking about an assessment as either high or low, that number "anchors" their thinking by pulling their individual assessment in that direction.

Attitudinal blinders are a different matter altogether. Guthrie presents convincing evidence, as others have done, that a decision-maker's political bent affects the assessment of issues in a case.<sup>8</sup> He further acknowledges that that same human frailty will affect any type of dispute resolution and thus endorses types that are premised on agreement of the parties rather than judging at all.<sup>9</sup> Whether attitudinal blinders amount to "misjudging" at all is an interesting question, in the absence of certainty about how disputes should be resolved. Disputes are, by their nature, a controversy over values and preferences. This response does not disagree with the attitudinal blinders section of *Misjudging* and agrees with Guthrie's conclusion that this human characteristic underscores the desirability of consensual resolution of agreements rather than litigation whenever possible.

## I. INFORMATIONAL BLINDERS REEVALUATED

### A. *Unexplored Implications of Informational Blinders*

Guthrie begins his article with three studies that explore the tendency of judges to "misjudge" because of their all-too-human informational blinders.<sup>10</sup> These informational blinders, he explains, prevent judges from being able to

<sup>6</sup> Guthrie, *supra* note 1, at 429-40.

<sup>7</sup> *Id.* at 430-31.

<sup>8</sup> *Id.* at 440-46.

<sup>9</sup> *Id.* at 450.

<sup>10</sup> *Id.* at 421 n.2 (citing Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001); W. Kip Viscusi, *How Do Judges Think About Risk?*, 1 AM. LAW & ECON. REV. 26 (1999); Andrew J. Wistrich, Chris Guthrie &

disregard inadmissible evidence when making merit-based decisions.<sup>11</sup> For example, many judges exposed to evidence that is inadmissible because of the attorney-client privilege take that evidence into account to rule in a manner inconsistent with ignoring the evidence.<sup>12</sup> In other words, they cannot forget the elephant that they have been told not to think about.<sup>13</sup> He distinguishes this kind of “misjudging” from “bad judging” that results from behavior such as corruption or abuse of power.<sup>14</sup> Guthrie’s concept of misjudging is the unintentional tendency of honest judges to take forbidden information into account.

Guthrie observes that if judges were not prone to human error, there would be no need for appellate courts.<sup>15</sup> In one sense this observation is correct, but in another it is shortchanging the nature of the common law process. It is only one function of appellate courts to reverse errors at trial where the judge failed to apply existing law correctly. Another crucial function is to build upon existing law in new applications and to reevaluate existing law as policy dictates with changing times.<sup>16</sup>

It is nonetheless true that one function of appellate courts – and of legal rules – is to force a conformity of practice on the trial courts. Not only do appellate courts reverse errors of application to achieve such conformity, but they also devise common law rules designed to achieve the just result in categories of cases. In this context, Guthrie’s experiments on misjudging have an

Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005).

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

<sup>12</sup> *Id.* at 268-70.

<sup>13</sup> This famous example refers to the inability of people to stop thinking about an elephant, or sometimes a pink elephant, once the idea has been planted in their heads. The notable linguist George Lakoff, the Richard and Rhonda Goldman Professor of Cognitive Science and Linguistics at the University of California, Berkeley, describes the phenomenon as follows:

When I teach the study of framing at Berkeley, in Cognitive Science 101, the first thing I do is I give my students an exercise. The exercise is: Don’t think of an elephant! Whatever you do, do not think of an elephant. I’ve never found a student who is able to do this. Every word, like *elephant* evokes a frame, which can be an image or other kinds of knowledge: Elephants are large, have floppy ears and a trunk, are associated with circuses, and so on. The word is defined relative to that frame. When we negate a frame, we evoke the frame.

GEORGE LAKOFF, DON’T THINK OF AN ELEPHANT!: KNOW YOUR VALUES AND FRAME THE DEBATE 3 (2004).

<sup>14</sup> Guthrie distinguishes “bad judging” in the work by Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 432-33 (2004). See note 8 and accompanying text in Guthrie, *supra* note 1.

<sup>15</sup> Guthrie, *supra* note 1, at 421.

<sup>16</sup> Consider, for example, famous cases such as *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), or *Li v. Yellow Cab Co. of Cal.*, 532 P.2d 1226 (Cal. 1975). In *MacPherson*, Justice Cardozo (then Judge Cardozo on the New York Court of Appeals) reconsidered the privity limitation established in *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1852), in the context of the developing twentieth century marketing of goods such as automobiles, and set the stage for modern products liability law. In *Li*, the California Supreme Court reevaluated the policy arguments justifying the doctrine that contributory negligence completely bars claims in negligence, and thus set the stage for the nationwide movement toward comparative negligence. These two cases dramatically illustrate the function of appellate courts to reevaluate and develop the common law. They did not simply reverse “errors” of the trial court in applying existing law.

implication that his paper does not explore: they confirm that these rules of evidence are wise ones. The judges who created these rules as a matter of common law knew intuitively what modern psychology has proven empirically, namely that certain matters must be excluded from evidence because of their effect on judgment.

The crucial connection that is missing from Guthrie's discussion is that the rules of exclusion are intended to prevent the jury – not the judge – from hearing these matters. The jury is the classic fact-finder, and when a judge rules that a communication is privileged, or that a subsequent repair is inadmissible as proof of prior negligence, the goal is to protect the jury as fact-finder from hearing the prejudicial information. It is precisely because this information is so powerful that it is excluded. When parties in litigation choose the judge as fact-finder instead of a jury, they are doing so knowing that this advantage is lost. The fact-finder can no longer be protected from knowing that an elephant is in the room.<sup>17</sup> Strategic choices – between types of dispute resolution of between types of fact-finders within the litigation model – are the privilege of the parties and do not call into question the legitimacy of the process in themselves. The inability of humans to ignore an elephant in the room is simply one factor among many for the parties to consider in determining strategy. The strategist may simply intuit the prejudicial effect or may know of its documentation, but it remains simply a factor in the calculation and not reason to consider the system illegitimate, as the term “misjudging” suggests.

Guthrie's experiments on informational blinders do provide documentation of that prejudicial effect. The most obvious conclusion of these studies is that it is wise for such information to be withheld from the jury. The inability of a judge to withhold the information from his or her own ears is a separate question. For the typical damages case, the parties may choose to waive a jury for a more expeditious and cheaper bench trial. Guthrie's studies show that such a waiver is ill-advised – at least for one side – when prejudicial evidence may taint the judge's evaluation.

Consider the first experiment where Guthrie considers the blinder effect of evidence of subsequent remedial measures.<sup>18</sup> The judges in the experimental group in the study were exposed to the information that the defendant container manufacturer in a product defect case has taken subsequent remedial measures to prevent similar accidents in the future. They were asked to “rule” on the admissibility of this evidence, and they properly excluded it as violative of the rule against admission of such evidence. The judges in the control group were not exposed to the evidence of the subsequent remedial measures and otherwise had exactly the same evidence in the case before them as the experimental group.<sup>19</sup> The researchers documented the effect of the informational blinder when the judges in the control group ruled in favor of the defendant at a rate that was higher than the judges in the experimental group who were exposed to the evidence of the subsequent remedial measure. The difference, which was

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<sup>17</sup> See *supra* note 13.

<sup>18</sup> Guthrie, *supra* note 1, at 423-24.

<sup>19</sup> *Id.* at 424.

statistically significant, demonstrated that the “exposed” judges could not ignore what they heard in the motion.<sup>20</sup>

The rule against the introduction of evidence of subsequent remedial measures is a common law rule that excludes remedial measures, such as repairs, that were taken after an accident<sup>21</sup> for the purpose of preventing future injuries. Thus, for example, if a manufacturer adds a device for the purpose of preventing a product from causing fires after the plaintiff has been burned in such a fire, that subsequent measure is not admissible at trial. The rule has been codified in Federal Rule of Evidence 407:

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The reason for the rule is twofold. The first reason is most consistent with Guthrie's example – the prejudicial effect. The evidence is likely to be taken as an admission of negligence or defect even though it is not conclusive and does not rule out the plaintiff's own negligence. The Advisory Committee to the Federal Rule of Evidence noted that such evidence is not inconsistent with a mere accident or with contributory negligence.<sup>22</sup> As such, defendants should prefer fact-finders who are not exposed to the evidence, such as juries. The study that Guthrie cites would have done better to focus on this reason for the rule when devising the experiment where the evidence of subsequent repair was revealed to the fact-finding judges who then disproportionately acted on the information.

Guthrie's thesis is undercut, however, by the second policy reason for the rule against evidence of subsequent repair. This reason is a quite different one, unrelated to its prejudicial value. The Advisory Committee further said that Rule 407 is designed to encourage the “social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.”<sup>23</sup> This policy justification is unrelated to getting the “right result” between the particular parties in this dispute; it has another goal altogether. Therefore, as the next section explores, it is not at all clear that a result that takes this factor into account is the “wrong” result as Guthrie claims, in the sense that it does not necessarily reflect a fallacy in judging. The benefit to the defendant from the exclusion of such evidence may be undeserved in the sense of achieving the correct result between the two parties to the case. The larger social goal that the rule seeks – encouragement of safety measures – does not bear directly on the merits of the claim between the two parties in the dispute.

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

<sup>21</sup> See, e.g., *Rimkus v. Nw. Colo. Ski Corp.*, 706 F.2d 1060, 1064 (10th Cir. 1983).

<sup>22</sup> FED. R. EVID. 407 advisory committee's note.

<sup>23</sup> *Id.*

B. *The False Assumption of the "Wrong Result"*

The underlying premise in Guthrie's argument is that informational blinders can produce the "wrong" result simply because of the human fallacies inherent in all judging.<sup>24</sup> Even when honest judges seek to obtain the right result, he posits, a psychological phenomenon such as an informational blinder interferes with the process.<sup>25</sup> It is for this reason that Guthrie does not focus on the possibility of a prejudicial effect of a rule, but simply in the existence of the rule. Indeed, in the context of subsequent remedial repair, Guthrie does not even cite the prejudicial prong of the rationale and concedes freely that the thrust of the rule is the encouragement of repairs.

Guthrie then offers the experiment with the product defect case as an example of the operation of an informational blinder on judges; once exposed to the forbidden information, they disproportionately relied upon it.<sup>26</sup> Implicit in this conclusion is that the "right" result is the one dictated by the control group. In the example of the manufacturer product defect case, the assumption of the experimenters is that the "correct" result favored the plaintiff.<sup>27</sup> Otherwise one would not call it "misjudging." The rule against the introduction of the subsequent remedial measure, however, is not just targeted to avoid "wrong" or even "unjust" results. The rule exists in part *despite* the fact that excluding the evidence may lead to the wrong result.

Consider, for example, a case where a toddler plaintiff falls from a scenic overlook because there was no protective railing. The fact that the defendant subsequently installed a railing is not admissible because that fact would discourage defendants from taking such safety measures. The public safety issue is more important than the possibility that the evidence may help probe whether the absence of the railing was negligence that caused the toddler's accident. Although the accident might have happened even in the absence of the defendant's negligence, it is unlikely that the toddler would be contributorily negligent. The reasons for excluding the evidence to support the toddler's case do not relate to truth-finding. Rather, the defendant is offered the windfall of being able to exclude this compelling evidence of its failure to use due care to prevent the toddler's fall in the public place.

A defendant in such a case would be well-advised not to waive the jury trial in order to take advantage of the rule. If the defendant fails to demand a jury, however, it is not necessarily the "wrong" result for the defendant to lose because of this evidence. The repairs may logically lead one to the conclusion that the condition was an unsafe one at the time of the plaintiff's accident. Guthrie concludes that it is "misjudging" for a judge in a bench trial to reach this result, but that conclusion does not necessarily follow. It may be a different result from the one that a jury would reach if it has been protected from the information of repair, but that information is excluded for reasons other than the truth of whether the condition was unreasonably unsafe at the time of the plaintiff's accident. The different result is not necessarily the wrong one.

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<sup>24</sup> Guthrie, *supra* note 1, at 429, 458.

<sup>25</sup> *Id.* at 446.

<sup>26</sup> *Id.* at 423-24.

<sup>27</sup> *Id.* at 426-27.

Quite to the contrary of Guthrie's conclusion, the "misjudging" result that he criticizes may in fact be the "correct" result in terms of justice between these two parties. Repairs may well be an indication that the previous condition was an unsafe one and the plaintiff should recover. The plaintiff who loses because of the rule excluding the evidence has been disadvantaged individually for the sake of the greater good – the encouragement of repairs. Therefore, if the defendant's attorney fails to take advantage of the rule that unjustifiably favors her client for this reason, the defendant cannot complain that the result was the "wrong" one with relation to these two parties.

The same reasoning applies to Guthrie's example of information protected by the attorney-client privilege. As Guthrie acknowledges, the rule protecting the jury from such information is premised on the policy of promoting communication.<sup>28</sup> It is not designed to protect the parties from the unjust result in a case. To the contrary, the policy is so strong that the rule persists *despite* its function as an obstacle to just results in individual cases.

In his experiment, Guthrie and his colleagues "exposed" the experimental group of judges to information that was fatal to the plaintiff's case but protected by attorney-client privilege.<sup>29</sup> A statistically significant number of judges in the experimental group then held against the plaintiff on the substantive claim compared with the control group that was not exposed to the fatal information that was protected by attorney-client privilege.<sup>30</sup> In the experiment, the client essentially confesses to the attorney that he did not bargain for a contract benefit that he is now claiming.<sup>31</sup> Guthrie properly cites the reason for the privilege: encouragement of communication between attorneys and clients.<sup>32</sup> The policy reason for the rule is unrelated to truth-finding or justice between two particular parties. Were the judges who were exposed to the fatal information "misjudging" the case if they did justice between these two parties? This result did not destroy the rule nor adversely affect the behavior of any future parties. How was it "misjudging" in any sense other than coming to a different result that those unexposed to this very probative information?

### C. *Blinders Off and On*

It is fatal to Guthrie's argument about informational blinders that he assumes that reaching a different result is "misjudging." It is misjudging only in the sense of getting a different result from someone under the veil. The experimental evidence proves that the rules are correct that such evidence affects judgment, and therefore that juries should not hear such evidence if there are societal reasons to encourage repairs or confidential disclosure. The studies Guthrie employs do not prove, however, that a fact-finder who is privy to the forbidden knowledge will reach an unjust result. It is very likely to be the just result – simply a different one from the ignorant fact-finder.

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<sup>28</sup> *Id.* at 425.

<sup>29</sup> *Id.* at 425-27.

<sup>30</sup> *Id.* at 427.

<sup>31</sup> *Id.* at 426.

<sup>32</sup> See text accompanying *id.* at 425 n.30.

Once the fact-finder has access to the forbidden information, is it wrong to use it? Is it “misjudging” to reach the correct result in the individual case simply because the defendant used the wrong litigation strategy to keep the fact-finder from hearing the highly probative evidence that the defendant was entitled to exclude for reasons other than justice between these parties? Guthrie’s concept of “blinder” is better applied to the ignorant fact-finder in such cases. The exclusion of the evidence is a blinder that is not justified in any absolute sense. Why should the fact-finder be forbidden to see if the blinder is off for a reason that is not the fault of the plaintiff or the court? Unlike the basis for the exclusionary rule in criminal law, reliance on forbidden evidence does not taint the civil law process if the defendant failed to protect itself by demanding a jury. The defendant may have weighed many factors in the decision whether to demand a jury; such trial strategies do not taint the justice of the result if the judge finds in favor of the plaintiff because of exposure to evidence that the jury would not have seen.

Guthrie advocates the use of nonevaluative mediation as an alternative method to dispute resolution in such a situation.<sup>33</sup> Should the fact of repair or confidential communication be available to the mediator? Imagine that we live in an ideal world where a philosopher king resolves such disputes and rules of evidence do not encourage undesirable behavior in actors (such as avoiding subsequent repairs or discouraging communication between attorney and client). Would we allow the philosopher king to know about the repair or the communication? I submit that we would – precisely because it is relevant to the correct result between these two parties.

## II. ANCHORING STUDIES: EMPIRICAL PROOF OF COMMON LAW WISDOM

The second part of *Misjudging* details empirical evidence of cognitive blinders and the effect of this phenomenon on the resolution of civil disputes.<sup>34</sup> The article explains how the psychological effect of “anchoring” affects the way that decision-makers approach a numerical assessment.<sup>35</sup> In the context of civil litigation, the experiments ably demonstrate that anchoring can affect the assessment of damages.

Although Guthrie concludes that this phenomenon contributes to his negative critique of “judging,” this section reinforces the wisdom of the common law rules on types of arguments that are permissible to juries.<sup>36</sup> Specifically, it provides further confirmation of the rules on the per diem form of argument in personal injury cases. As explained below, per diem arguments are a form of anchoring by plaintiffs’ attorneys to encourage juries to give higher personal injury verdicts. The common law rules developed in response to per diem arguments are based upon the common law assumption that juries will be unduly persuaded by such arguments. Although the rules were developed without the benefit of the empirical studies, the courts that developed the rules intuited the phenomenon of anchoring and constructed rules to combat the

<sup>33</sup> *Id.* at 452-54.

<sup>34</sup> *Id.* at 429-40.

<sup>35</sup> *Id.* at 430-34.

<sup>36</sup> *Id.*

prejudicial effect. This part of Guthrie's article confirms that wisdom and does not support his conclusion that litigation is less desirable in light of these psychological findings. To the contrary, these findings reconfirm the value of jury trials.

A per diem argument is a tool of plaintiff's counsel to persuade the jury to award a large sum for pain and suffering damages. The argument suggests a method for quantifying damages based on a daily (or hourly or weekly) rate and multiplying that number of units for a yearly rate, and then multiplying the number of years of suffering. Calculating on the basis of per diem, which literally means "by the day," typically results in very large numbers. The jury is lured into the large calculation by beginning with a small number to contemplate before counsel introduces the effect of the double multiplication. The following example of this type of argument comes from *Debus v. Grand Union Stores of Vermont*.<sup>37</sup> In this case, the plaintiff grocery shopper was permanently injured when she was crushed by falling boxes of pet food that a clerk had stacked haphazardly on a pallet.<sup>38</sup> Her attorney argued to the jury:

Now, let's just take one element. We have talked about pain and suffering. What would be fair compensation for pain and suffering? Entirely up to you. I have a suggestion. If you think about what it is like for Susanne to go through one day with the pain that she has and think about what would be fair compensation for that one day, what do you think it would be? Would it be \$100 to go through that in a day? Would it be \$75? Would it be \$50, \$40?

Ladies and gentlemen, we want to be scrupulously fair about our request to you. So I am going to suggest to you that you award Susanne \$30 a day for the loss of those three elements: pain and suffering, mental anguish, and loss of enjoyment of life. That is \$10 a day for each one. I put it to you for your consideration to follow that through.

You would do it this way, there are 365 days a year. I am just going to put here pain and suffering, mental anguish, loss of enjoyment of life. Now there are 365 days in a year. And Susanne's six years she has already suffered in these ways and 29 more, that is 35 years total that she should be compensated for. And if you multiply 35 times 365, there are 12,775 days. And if you multiply that figure by the \$30 per day I just suggested, it comes out to \$383,250 – sorry. \$383,250.

Now, another way of thinking of that is if you divide 35 years into this figure of \$383,250 it comes out to slightly under \$11,000 a year. Maybe that would be a help to think for you \$11,000 a year to live the way she lives, to lose what she has lost.<sup>39</sup>

There are variations on the per diem argument that also have the effect of providing an anchor for the jury. One such variation is known as the "golden rule" approach, where plaintiff's counsel asks jurors to award damages in an amount they would want for their own suffering or its avoidance.<sup>40</sup> Another

<sup>37</sup> 621 A.2d 1288 (Vt. 1993).

<sup>38</sup> *Id.* at 1290.

<sup>39</sup> *Id.* at 1295-96 (Allen, C.J., dissenting) (emphasis removed).

<sup>40</sup> An example of such an argument is provided in *Henker v. Preybylowski*, 524 A.2d 455 (N.J. Super. Ct. App. Div. 1987):

Remember the wisdom tooth, a little canker sore in your mouth. You can't get rid of it. You may take Tylenol. Or take a fractured tooth, finger, a cut, a burn. What is pain worth for one hour? You've gone to doctors and dentists. An anesthesiologist, you know how much he charges just to limit or prevent pain during the course of an operation. You know how much a

persuasive tool in the plaintiff's arsenal is the "job offer" argument, where jurors are invited to think about a sum of money that they would accept in order to trade places with the plaintiff and suffer the same pain and disability. That daily rate is then multiplied to a large sum.<sup>41</sup>

Jurisdictions are divided as to whether to allow such arguments.<sup>42</sup> The debate centers on whether such calculations are prejudicial and based on argument rather than evidence. Some jurisdictions refuse to permit such arguments because the suggestion of a formula produces an illusion of certainty and because juries are misled and deceived by the effect of multiplication. Other jurisdictions reason that defense counsel can anticipate such arguments and counter them. Further, the judge can explain to juries the difference between evidence and argument and can guide the jury to estimate the proper amount based upon the evidence.

The evidence on anchoring in Guthrie's article provides an explanation for why the per diem approach is favorable to plaintiffs. It permits the plaintiff's counsel to present a sum that effectively anchors. The wisdom of the common law is again confirmed by these studies. The rules surrounding per diem arguments and their cousins are based upon the common law assumption that juries will be unduly persuaded by such arguments. Although the judicial authors of these rules were not aware of the now relevant studies, they intuited the phenomenon of anchoring and provided sensible rules to govern per diem arguments.

Far from leading to Guthrie's conclusion that the science undercuts the civil damages system, it reinforces its wisdom. Juries are protected from the full impact of anchoring arguments in ways that the judges were not protected in the experiment.

### III. IMPLICATIONS FOR DISPUTE RESOLUTION: REAFFIRMATION OF THE JURY

Ironically, Guthrie's article is a reaffirmation of the jury system, even though its author came to a different conclusion that the evidence supports non-litigation models of dispute resolution. It was his failure to account for the role

dentist charges to give a shot of Novocain so you don't feel pain for ten, fifteen minutes. How much is that pain worth for one hour? When you get that hour, think about the thousands of hours that Ken Henker has suffered pain just the last three years . . . . The jury is going to tell how much is owed him for that pain, thousands of hours in the past and thousand of hours in the future.

*Id.* at 458-59.

<sup>41</sup> An example of the "job offer" approach is provided in *Faught v. Washam*, 329 S.W.2d 588 (Mo. 1959):

In considering what is an adequate sum for this young man, suppose I was to meet one of you ladies on the street and I say to you, "I want to offer you a job and I want to tell you a little bit about this job before you say you are going to accept it; one peculiar thing, if you take it you have to keep it for the rest of your life, you work seven days a week, no vacations, work daytime and night. The other thing is, you only get paid \$3.00 a day. Here is your job - your job is to suffer Mr. Faught's disability.

*Id.* at 601-02.

<sup>42</sup> An example of one jurisdiction that has flip-flopped on the per diem rule is Kansas. See *Wilson v. Williams*, 933 P.2d 757, 761 (Kan. 1997) (reversing its earlier prohibition of the argument in *Caylor v. Atchinson, Topeka & Santa Fe Ry. Co.*, 374 P.2d 53 (Kan. 1962)).

of juries – or for the option of juries, at least – that makes the difference. First, the attitudinal blinders support the existence of a buffer between the person who decides on the admissibility of the evidence and the fact-finder. That would argue in favor of more juries or other methods of resolution where there is more than one step in the proceeding.

Second, for cognitive blinders, notably anchoring, Guthrie's solution appears unrelated to the problem. The danger of the "mental trick" that anchoring can play is like the *per diem* argument, and it can best be countered with awareness and counter-argument in whatever method of adjudicated resolution is adopted. Self-resolution of the conflict by the parties themselves, such as settlement following nonevaluative mediation, would not appear to be immune from this human fallacy any more than other types of resolution. Plaintiffs who have no idea what a case is "worth" will be influenced by the anchor number they hear – and perhaps even more so than participants with more access to differing numbers.

The best case for Guthrie's conclusion is his account of attitudinal blinders.<sup>43</sup> Judges and juries alike are certainly very human, and any litigant knows well that the predisposition of the decision-maker will affect the disposition of the dispute. Children apply that principle as soon as they figure out that they should ask one parent or another, or perhaps even their grandparents, about particular issues. The conclusion that Guthrie draws is that such predispositions result in "misjudging."<sup>44</sup> If that conclusion is shared by the reader, then nonevaluative mediation – i.e., parties resolve their own disputes – may be the right answer, as he suggests. But he concedes that there is no reason to think that evaluative forms of nonlitigation dispute resolution will fare any better than litigation in this regard.<sup>45</sup>

Ultimately, it is the legitimacy of the system used to resolve disputes that is the issue rather than whether particular disputes are resolved in particular ways. Consider a child's father who is "soft" on whether to comply with a child's plea for designer jeans because of a predisposition based on his own childhood experience, and the teen's mother who is "hard" on the subject for her own personal reasons. Is one of these equal decision-makers more legitimate than the other for that reason? These are attitudinal blinders, but they do not necessarily make the decision of either parent illegitimate or even questionable.

Continuing the analogy, and moving from attitudinal blinders to cognitive ones, consider the teen's plea for a higher allowance. The mother, but not the father, hears about what other children are receiving – an anchor that causes cognitive blinders. Is it less legitimate for a mother to decide on the teen's allowance after she hears what other children receive than it is for the father to decide the question without that anchoring information? In this situation, the anchor might even be useful to the decision-maker. As long as the parents understand that the anchoring affects the mother, the process does not seem

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<sup>43</sup> Guthrie, *supra* note 1, at 440-46.

<sup>44</sup> *Id.* at 446-48.

<sup>45</sup> *Id.* at 456.

tainted. This situation is the equivalent of the jurors who hear the *per diem* argument from the plaintiff's attorney.

Continuing the analogy and moving to informational blinders, consider these parents deciding on a teen's punishment for coming home late. The parents are aware that one of their older children became a problem on this subject and for this reason they may decide to give a harsh punishment – longer “grounding” – to this younger child in order to “nip the problem in the bud.” This is an informational blinder because the conduct of the previous child is irrelevant to this child's conduct. Moreover, it is prejudicial to this child and the conduct of the older sibling would not be admitted into evidence in either a criminal or civil trial for that reason. But is the punishment less legitimate because the informational blinder prejudiced the parents? Although such evidence would never support state punishment, we do not question it with respect to parental authority because of our cultural concept of the legitimacy of this decision-maker. It is not the blinders themselves that call into question the legitimacy of the system. The parents are not “misjudging” despite their blinders.

Historically, our culture has accepted the legitimacy of the system of judge and jury to resolve civil disputes. The common law has devised rules that have been confirmed by the empirical data as wise ones; juries should be protected from information that triggers cognitive and informational blinders. Further, litigants can protect themselves from the attitudinal blinders of judges through the use of juries, when available. If litigants waive the right to a jury trial and trust the judge as a decision-maker for strategic or economic reasons, that does not change the legitimacy of the system even if the result changes. The legitimacy of this system remains unchallenged by the empirical evidence because the evidence does not suggest that rank injustice pervades the land during those instances when blinders – at least informational and cognitive ones – are at play. There are many reasons to challenge the system for its cost, delay, and trauma for the litigants, but the empirical evidence of blinders does not add much to the indictment.

#### IV. CONCLUSION

Guthrie makes an important and provocative contribution, but ultimately he fails to make his case that blinders undercut the civil litigation model because he fails to account for juries in that model. First, the informational blinders argue in favor of a buffer between the adjudicator of the admissibility of the evidence and the fact-finder. That evidence supports more juries or other methods of resolution where there is more than one step in the proceeding.

Second, for cognitive blinders, Guthrie's solution appears unrelated to the problem. Anchoring poses the danger of the “mental trick” on the fact-finder's assessment of something like damages because the anchor pushes that assessment higher or lower than it would otherwise be. One trial equivalent is *per diem* arguments in personal injury litigation, where the plaintiff's attorney suggests a method of calculating pain and suffering damages in a way that anchors a high number. The danger of the “mental trick” that the argument can play may be best countered with awareness and counter-argument. Parties' self-

resolution would not appear to be immune from this human fallacy any more than other types of resolution. Plaintiffs who have no idea what a case is “worth” will be influenced by the anchor number they hear – and perhaps even more so than participants with more access to differing numbers.

The best case for Guthrie’s conclusion is attitudinal blinders. Judges certainly are very human and any litigant knows well that the predisposition of the decision-maker will affect the disposition of the dispute. Children apply that principle as soon as they figure out that they should ask one parent or another, or perhaps even their grandparents, about particular issues. The implication that Guthrie draws is that that blinder calls into question the legitimacy of the system. If that conclusion is shared by the reader, then nonevaluative mediation – i.e., parties resolve their own disputes – may be the right answer, as he suggests. But he concedes that there is no reason to think that evaluative forms of nonlitigation dispute resolution will fare any better than litigation.

*Misjudging* makes a great contribution to the literature on empirical studies of fact-finding, and it serves well to confirm the wisdom of some common law rules that protect juries from certain kinds of information that we now can label as informational or cognitive blinders. The article does less well at its stated goal of confirming the wisdom of methods of dispute resolution that are alternatives to litigation. Although there are many other reasons to embrace non-litigation models,<sup>46</sup> Guthrie’s *Misjudging* article should be cited in a limited way. It does support the desirability of nonevaluative mediation to minimize the three types of blinders Guthrie catalogues, but it offers little to justify the rejection of litigation in favor of other types of alternative dispute resolution. Perhaps its best contribution is to the general proposition that the law should continue to struggle toward finding and implementing new ways of resolving disputes that take into account our all-too-human fallacies.

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<sup>46</sup> See Sternlight, *supra* note 4.