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Embracing Deference

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EMBRACING DEFERENCE*

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INTRODUCTION

A fundamental conceptual problem has long dogged discussions about scientific and other expert evidence in the courtroom. In American law, the problem was most famously posed by Judge Learned Hand, who asked:

> [H]ow can the jury judge between two statements each founded upon an experience confessedly foreign in kind to their own? It is just because they are incompetent for such a task that the expert is necessary at all.[1]

This puzzle, sometimes known as the "expert paradox," is quite general. It applies not only to the jury as factfinder, but also to the judge as gatekeeper under the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[2] regime and Federal Rule of Evidence 702. It also applies when there is no jury at all, whether in a bench trial, administrative proceeding, or civil law jurisdiction. When it comes to scientific and other specialized knowledge, legal actors are inevitably non-experts. And if legal actors are faced with the so-called "battle of the experts," how are they to decide between the warring experts? After all, to quote Judge Hand again, "[i]t is just because they are incompetent for such a task that the expert is necessary at all."[3]

As one of us has previously argued, because of this epistemic competency problem, the *Daubert* approach to expert evidence is a mistake. The solution to the problem of expert evidence is not judicial gatekeeping, but rather to change the substantive question asked of legal actors. Instead of

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** Hess Professor of Law, Vanderbilt Law School. Bruce Bromley Visiting Professor of Law, Harvard Law School (Fall 2022). Many thanks to my friend and colleague Dave Caudill and the *Villanova Law Review* for organizing this symposium focused on scientific evidence and the consensus rule—I am truly honored.

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1. Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 54 (1901).

2. 509 U.S. 579 (1993).

3. Hand, *supra* note 1, at 54.

asking factfinders to *independently* determine specialized facts—something that they are unqualified to do—the legal system should be asking factfinders to determine what the relevant expert community believes the specialized facts to be. It is in that deferential posture that we can find a more practical and workable solution to the expert paradox.

In what follows, this Article explores several aspects of a deferential approach to expert evidence in greater detail. Part I provides context. It reviews how the legal system handles scientific evidence today and the erroneous assumptions that underlie the current practices. Part II briefly describes the proposed deferential or consensus-based approach. Philosophically, this consensus approach involves deference to expert communities, rather than producing independent judgments. It owes much to the prior work of the sociologists participating in this symposium—Harry Collins, Rob Evans, and Martin Weinel—as well as other philosophers and sociologists of science.[4]

Finally, Parts III and IV demonstrate that a deferential approach to factfinding is not nearly as foreign to the American legal system as it may first seem. Part III discusses the use of custom to determine the standard of care in medical malpractice cases, a well-established instance in which the law favors deference to a professional community over the independent judgment of a legal actor. Part IV discusses foreign language translation and interpretation in court, another area in which the legal system seems to have recognized its limitations and wisely adopted a deferential stance. Both Parts III and IV not only provide hope for eventual acceptance of a consensus-based approach, but also offer lessons on how to successfully implement such a regime.

I. THE STRUCTURE OF EXPERT EVIDENCE REFORMS

Expert evidence in the American legal system exhibits three significant structural elements. First, due to the adversarial system, parties typically hire and call their own expert witnesses to provide evidence supporting their case. Next, a judge, acting as a gatekeeper, screens the expert testimony for reliability. In federal court and most state courts this is done under the *Daubert* standard,[5] codified in Rule 702,[6] whereas other states follow *Frye v. United States*[7] or some hybrid.[8] In all cases, however, there is some admissibility step. Finally, based on the admissible evidence,

4. *See generally* DAVID S. CAUDILL & LEWIS LARUE, NO MAGIC WAND: THE IDEALIZATION OF SCIENCE IN THE LAW (2006) (arguing that legal actors should not idealize science and instead recognize that the field has both (empirical) methodological and socially constructed aspects).

5. *Daubert*, 509 U.S. 579.

6. *E.g.*, FED. R. EVID. 702.

7. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

8. *See generally* FIFTY STATE SURVEY: DAUBERT V. FRYE—ADMISSIBILITY OF EXPERT TESTIMONY (Eric R. Harlan & Jennifer Routh eds., 2016).

the factfinder (archetypally a jury) independently determines the facts. The factfinder gives an expert's testimony whatever weight it sees fit.[9]

In many ways, this structure is a familiar one. It mirrors how practically all evidence is handled by the American legal system. Parties call witnesses to provide evidence. Some of that evidence is declared inadmissible by the judge and excluded. And then finally, the jury, acting as factfinder, processes the rest of the evidence and reaches a verdict. Expert evidence, however, turns out to be a poor fit for this conventional structure, which is why many of the proposed reforms for expert evidence have targeted these structural elements.

A. *Adversarial Experts*

Reform efforts frequently try to make expert witnesses less adversarial. When dealing with conventional witnesses, the adversarial process works reasonably well because there is a limited pool of witnesses, and many will be independent of the parties.[10] For example, consider the eyewitnesses in a typical car accident. Only a limited number of people will observe the accident, and they typically will be unrelated to the parties. In this context, the adversarial process operates as expected. The parties seek out witnesses in support of their case, generating evidence. The parties also rigorously cross-examine opposing witnesses, revealing their weaknesses. Factfinders can then consider the number and quality of witnesses on each side in making their decision.

Adversarial experts, however, create a very different decision-making environment. Because the parties select, work with, and pay their experts,

9. The Seventh Circuit's pattern jury instructions explicitly tell the factfinder to weigh expert's testimony according to their own judgement:

> You have heard [an expert witness] give opinions about matters requiring special knowledge or skill. You should judge this testimony in the same way that you judge the testimony of any other witness. The fact that such person has given an opinion does not mean that you are required to accept it. Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness's qualifications, and all of the other evidence in the case.

FEDERAL CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 1.21 (rev. 2017).

Oklahoma's state court system instructs juries similarly:

> Testimony has been introduced of certain witnesses who purport to be skilled in their line of endeavor or who possess peculiar knowledge acquired by study, observation, and practice. You may consider the testimony of these witnesses, and give it such weight and value as you think it should have, but the weight and value to be given their testimony is for you to determine. You are not required to surrender your own judgment to that of any person testifying, based on that person's education, training or experience. You need not give controlling effect to the opinion of such witnesses for their testimony, like that of any other witness, is to be received by you and given such weight and value as you deem it is entitled to receive.

OKLAHOMA UNIFORM JURY INSTRUCTIONS: CRIMINAL § 13–21 (2d ed. 2020).

10. *See* David Bernstein, *Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the* Daubert *Revolution*, 93 IOWA L. REV. 451, 453–55 (2008).

the frequent result is the classic battle of the experts. Each side can offer roughly the same number of experts, and those experts will predictably reach conclusions in support of their side.[11] Factfinders thus hear evenly matched expert witnesses, often testifying about complicated technical material, making a factfinder's decision extremely difficult.

A natural response to this problem of adversarial experts is to eliminate or supersede them by offering neutral ones appointed by the court. Indeed, proposals for using court-appointed experts surfaced soon after the first expert witnesses appeared in the early nineteenth century,[12] and continue to the present day.[13] The problem with court-appointed experts is that these proposals have never been successful. They are frequently proposed, but almost always ignored.[14] This result is unsurprising—among other things, court-appointed experts require judges to become actively involved in the litigation at an early stage, which disrupts timetables and offends passive judicial virtues.[15] They also (rightly) appear to abdicate decision-making to a single expert or panel.

B. *Gatekeeping*

Another common reform is to improve the second structural component of the expert witness system—the admissibility step. Gatekeeping is precisely the focus of the *Daubert* regime,[16] and is largely where expert witness battles are fought today. The logic is simple. Worried about the quality of expert evidence? Then have judges screen the expert evidence, just as we do in many other areas of evidence, like hearsay and character evidence.

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11. *See id.* at 454–57.

12. *See generally* TAL GOLAN, LAWS OF MEN AND LAWS OF NATURE: THE HISTORY OF SCIENTIFIC EXPERT TESTIMONY IN ENGLAND AND AMERICA 52-106 (2004).

13. *See* General Electric Co. v. Joiner, 522 U.S. 136, 147, 149–50 (1997) (Breyer, J., concurring); Bradford H. Charles, *Rule 706: An Underutilized Tool to Be Used When Partisan Experts Become "Hired Guns"*, 60 VILL. L. REV. 941 (2015) (arguing that fellow members of the judiciary should take advantage of the ability to appoint neutral experts); *see also* Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1188-89 (1991) (discussing the longevity of the court-appointed expert proposal). The American Association for the Advancement of Science currently operates, and has expanded, the Court Appointed Scientific Experts (CASE) program which screens and recommends experts specific to a request from an administrative law, state, or federal judge. *See* AM. ASSOC. FOR THE ADVANCEMENT OF SCI., *Court Appointed Scientific Experts (CASE)*, https://www.aaas.org/programs/court-appointed-scientific-experts/about [permalink not available] (last visited Dec. 27, 2022).

14. *See* Edward K. Cheng, *Same Old, Same Old: Scientific Evidence Past and Present*, 104 MICH. L. REV. 1387, 1393–96 (2006); Edward K. Cheng, *Independent Judicial Research in the* Daubert *Age*, 56 DUKE L.J. 1263 (2007) (reporting survey results) [hereinafter Cheng, *Independent Judicial Research*]

15. *See* Cheng, *Independent Judicial Research*, *supra* note 14, at 1271–72.

16. Daubert v. Merrell Dow Pharms. Inc., 509 U.S. 579, 592 (1993).

Judicial gatekeeping harbors a deep, latent problem though, which is colorfully illustrated by the case of *Rosen v. Ciba-Geigy Corp.*[17] In *Rosen*, the plaintiff began using a nicotine patch in an effort to quit smoking.[18] Perhaps out of habit, plaintiff continued smoking while on the patch, and suffered a heart attack shortly thereafter. At issue in the case was whether the nicotine patch was a "cause" of the heart attack.[19] The curious aspect of *Rosen*, however, was not the evidence per se, but the *dramatis personae*. Plaintiff's expert, targeted by the defense for exclusion under *Daubert*, was Dr. Harry Fozzard, the former chair of cardiology at the University of Chicago Medical School.[20] The judge who wrote the opinion excluding Dr. Fozzard on appeal was Judge Richard Posner, then Chief Judge of the United States Court of Appeals for the Seventh Circuit, but formerly a Professor of Law at the University of Chicago Law School.

In short, *Rosen* involved the law professor telling the medical professor that his opinion on medical causation was unreliable and inadmissible. Now, there is no doubt that Judge Posner is an intelligent and highly accomplished legal jurist, but the very idea that a law professor would tell medical school colleagues that their assessments were unreliable seems both breathtakingly arrogant and utterly ridiculous. Obviously, medical professors know far more about their specialties and have far better judgment and intuition in their fields than their law colleagues, no matter how brilliant. Simply flipping the scenario illustrates the absurdity of *Daubert*: If we had to predict how a court was going to rule on a *Daubert* motion, whom should we consult—Judge Posner or Dr. Fozzard?

This *Rosen* analysis suggests that *Daubert* has it all wrong. The solution to the problem of expert witnesses is emphatically not judicial gatekeeping. Gatekeeeping may be how the legal system typically deals with problematic evidence, but it is ultimately incongruous in the expert context. We need a different approach.

C. *Factfinding*

If it is not practical to eliminate the adversarial aspects of the legal system, and it is not practical to have judges screen expert evidence for reliability, we are left with attacking the third part of the structure of expert proof. Can the legal system improve how the jury makes decisions about expert topics?

Generally speaking, the legal system leaves the jury to its own devices. Punting difficult questions to juries is standard fare in American courts. For example, what constitutes "reasonable care" in torts, determining the defendant's intent in a criminal case—these kinds of questions are left to

17. 78 F.3d 316 (7th Cir. 1996).

18. *Id.* at 317.

19. *Id.* at 317–18.

20. *See id.* at 318; Timothy J. Kamp & Craig T. January, In Memoriam, *Harry A. Fozzard, MD: 1931–2014*, 116 CIRCULATION RSCH. 552, 552–53 (2015).

juries to decide. But the Hand Paradox suggests that expert evidence presents a uniquely problematic issue for conventional lay factfinders. How is a jury, a nonexpert body, supposed to decide between the conflicting testimony of two adversarial experts when the very reason why those experts are in court is because the jury lacks expertise?

Resolving the Hand Paradox requires a fundamentally different approach based on deference. Juries should not make independent decisions about expert questions, nor should judges act as gatekeepers, because as non-experts they are epistemically ill-equipped. Instead, they should defer to the relevant expert communities.

II. THE CONSENSUS RULE

A detailed description and defense of the Consensus Rule is found in prior work,[21] so we will only summarize some highlights here. The conceptual question that motivates this discussion is a deceptively simple one: How can a non-expert decisionmaker best make decisions about facts involving expert topics?

A. *Understanding the Question*

This question has several attributes or constraints that are worth highlighting and that will keep the problem tractable. The first thing to note is by "best," we mean "most accurately." In other words, the goal is to find the strategy with the highest probability of arriving at the true or correct answer, or the answer that comports most with empirical reality.

The second is that our focus is only on "facts" and factfinding, not on general decision-making. This focus on facts alone is an important simplifying constraint because it puts aside questions involving value judgments or other external considerations. In the legal system, the judge and jury are implicitly assumed to be qualified to make various value judgments related to law and its application. Expert factual questions by contrast are the source of trouble. So, for example, our focus is on questions such as: "Can Drug A cause Disease X?" or "Is this painting authentic?" or "Did the blood left at the crime scene come from the defendant?" Our focus is not on normative questions such as: "Was the cost of the drug worth its benefits?" or "Did the defendant exercise sufficient care?"[22]

The third is that, implicitly, this decision must be made under heavy time and resource constraints. A court obviously cannot reserve judgment, and while perhaps it can consult experts or review some expert literature, neither jurors nor judges have the time to become experts

21. *See* Edward K. Cheng, *The Consensus Rule: A New Approach to Scientific Evidence*, 75 VAND. L. REV. 407 (2022).

22. To be sure, factual determinations such as authenticity involve implicit value judgments because they require setting the burden of proof. However, insofar as governing law externally sets the burden of proof, we need not concern ourselves with those questions here.

themselves. Decisions must be made with the information available at the time of litigation.

B. *A Proposed Reform*

Given these parameters, what then is the optimal strategy for the non-expert? Informed by the available social science on expertise, including important work from symposium participants Harry Collins, Rob Evans, and Martin Weinel, the answer seems to track along the following lines: If there is a consensus on a particular issue in the relevant expert community, then the non-expert should defer to the expert consensus. The consensus answer provides the highest probability of arriving at the true answer. The expert community consists of people who have dedicated their intellectual and professional lives to the field, and it is their judgment and not that of some dilletante legal actor that is most likely to be correct. And given the time and resource constraints, deference is a very efficient path to a workable answer. To emphasize, however, the legal system should defer to the consensus answer, not the opinion of a single expert. Single experts can have outlier views, and indeed the adversarial system largely guarantees that such outliers will find their way to trial.

By contrast, if there is no consensus, the legal system's options become a bit more interesting. If there is actual dissensus, meaning that the community is fractured in substantial numbers, then the non-expert can arguably choose from among the available theories. If the expert community cannot agree, then one cannot possibly expect non-experts to do any better. Commonly, however, a lack of consensus has more to do with a lack of specific research than actual dissensus. For example, for case-specific applications of an established technique, like DNA typing or some other diagnostic test, there may be community consensus on the proper techniques, but no consensus on the results for a specific case. In these cases, it seems that the factfinder should use the Consensus Rule as a mental construct: "What would the relevant expert community conclude on the case-specific question?" Often, the hypothetical community consensus will be whatever the standard technique yields.

Why defer to the expert community's consensus rather than exercise independent judgment? Again, the answer boils down to epistemic competence. Non-experts lack the background knowledge and experience necessary to determine substantive questions involving expertise. What a lay decision does have competency in doing—or at least greater competency in doing—is determining what the expert consensus is.

Focusing on consensus completely changes the role of legal actors in the expert evidentiary process. The expert's role is no longer to educate the jury so that the jury can make an independent substantive decision, nor is it to present the expert's own substantive opinion in the hope that the jury will defer to it. Instead, the expert witness's job is more akin to

that of a reporter. The expert provides evidence about what the expert community thinks about an issue or question.

The judge's role also changes. Unlike *Daubert*, the Consensus Rule no longer places judges in the awkward position of gatekeeping the substantive reliability of expert evidence. Judges are no longer the "science police." Judges do, however, retain a responsibility to check the jury's determinations about consensus under the standard rules governing sufficiency. If no reasonable jury could conclude that the consensus was otherwise, then the trial judge should take the case away from the jury and decide the issue as a matter of law. Appellate courts would review such trial court decisions in the usual way.

And of course, the jury's or factfinder's role changes. The lay decisionmaker no longer makes a substantive determination on the issue requiring expertise. It instead faces the easier and more accessible task of determining what the expert community thinks.

C. *Some Further Observations*

Beyond its specific contours, a few additional broader clarifications about the proposed consensus rule are worth mentioning. First, the Consensus Rule is not a resurrection of the *Frye* test. Long before *Daubert*, in *Frye v. United States*,[23] the D.C. Circuit suggested that the admissibility of some types of expert evidence hinged on whether such evidence was "generally accepted in the relevant scientific community."[24] And indeed, *Frye* effectively remains the expert admissibility standard in a minority of states today.[25]

General acceptance of course seems to evoke consensus, but *Frye* is emphatically not the proposed consensus rule. For one thing, courts historically applied *Frye* only to techniques or procedures, and not substantive facts.[26] But more importantly, *Frye*, like *Daubert*, is an admissibility rule. Satisfying *Frye* means only that the expert evidence is admissible. The jury is still asked to make the ultimate substantive determination. The Consensus Rule by contrast is more like an inference rule than an admissibility rule. The Consensus Rule changes the very question that we ask factfinders to determine.

Second, although the Consensus Rule's preferencing of experts over laypersons may seem elitist, it is not. Indeed, the motivation behind the rule is epistemic *humility*, not elitism. The Consensus Rule recognizes that most of the time all of us are non-experts. Modern society is incredibly specialized for good reason, and each of us should defer to those working in their specific specialties. Just because one is an intelligent and capable

23. 293 F. 1013 (D.C. Cir. 1923).

24. *Daubert*, 78 F.3d at 1314 (citing *Frye*, 293 F. at 1014).

25. *See* ABA SURVEY, *supra* note 8.

26. *See* David E. Bernstein, *Frye, Frye, Again: The Past, Present, and Future of the General Acceptance Test*, 41 JURIMETRICS 385, 388 (2001).

person does not mean that one should do superficial research and decide things independently. The Consensus Rule does not say that laypersons can never become experts, or that experts are inherently or specially endowed. It merely acknowledges the reality that given the time and resource constraints of trial, for the vast majority of factual questions, deferring to expert communities is the best overall strategy. Indeed, the *Daubert* framework is arguably the most elitist of all, as it assumes that judges alone are capable of processing and screening all manner of expert information.

Finally, a frequent rejoinder to the Consensus Rule is that expert communities can be incorrect. History is littered with famous examples in which the existing theories were ultimately proven wrong, and the Consensus Rule ignores the possibility that minority opinions will be eventually vindicated or that there are geniuses working in obscurity. While this criticism is fair enough, the legal system should be perfectly willing to forgo these "black-swan"-type cases. Maverick ideas on occasion are proven correct, but those instances are famous precisely because they are rare. And if our goal is to maximize the chance of the legal system getting the facts right, then we should skip the long-shot ideas and defer to the expert community's current best guess. Could the consensus be wrong? Absolutely. But the legal system has neither the time nor the expertise to assess maverick ideas, and allowing factfinders to choose from amongst them is a high-risk proposition that harms accuracy in the long-run. Courts should let expert communities fix these problems themselves and in their own time.

III. CUSTOM IN MEDICAL MALPRACTICE

Adopting a deferential approach to expert factfinding is not as radical as one might initially think. A similar deference model has been operational in determining the standard of care of medical professionals for decades.

A. *Generally*

In tort cases, legal decisionmakers usually decide the standard of reasonable care independently,[27] but not so in medical malpractice.[28] There, the question for the jury is not what a reasonable person would have done, but rather what the medical community has decided is the customary standard of care. This internal standard-setting is effectively the consensus approach in action.

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27. *See, e.g.*, DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, DOBBS' LAW OF TORTS § 127 (2d ed. 2021).

28. *See* WILLIAM LLOYD PROSSER, PAGE KEETON, DAB B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON TORTS § 32, 189 (5th ed. 1984); Tim Cramm, Arthur J. Hartz & Michael D. Green, *Ascertaining Customary Care in Malpractice Cases: Asking Those Who Know*, 37 WAKE FOREST L. REV. 699, 699–700 (2002); 61 AM. JUR. 2D *Physicians, Surgeons, and Other Healers* §188 (2022).

To be sure, some outlier cases have attempted to wrestle medical malpractice away from a deference model. For example, the Washington Supreme Court in *Helling v. Carey*[29] famously ignored prevailing medical custom and imposed liability on an ophthalmologist for failing to administer a simple glaucoma test based on its own independent cost-benefit analysis.[30] However, *Helling* has largely been confined to its facts or ignored entirely.[31] Similarly, some commentators ascertain an overall trend towards replacing the custom standard with that of a "reasonable physician," but this continues to remain a minority approach amongst the states.[32]

Custom has prevailed in the medical malpractice arena due in part to the concerns over expertise. Physicians are a part of a learned profession that requires a ten- to fourteen-year process of schooling, residency, and board certifications for full licensure. During this time, physicians gain skills, knowledge, and expertise far beyond non-experts. Thus, the deference to custom simply reflects the inherent information asymmetries between medical professionals and laypersons—whether acting as patients, jurors, or judges. Deference to custom also reflects the view that there is an optimal way to provide medical care, and that it is scientifically driven rather than a matter of subjective preference.[33] Further, the medical community has long argued that effective medical practice, and accordingly patient care, would suffer if it were held to the highest standard of care that a lay juryperson could imagine.[34]

The criticisms of custom are familiar. Reliance on custom raises the problem of guilds, so famously raised by Judge Learned Hand in *The T.J. Hooper*[35] case: "[A] whole calling may have unduly lagged in the adoption

29. 519 P.2d 981 (1974).

30. *Id.*; *cf.* The T.J. Hooper, 60 F.2d 737 (2d. Cir. 1932) ("Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It may never set its own tests, however persuasive its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.").

31. Some commentators have persuasively argued that *Helling* merely recognized an exception to the general rule where a disease is detectable via a simple and cost-effective test that involves no medical judgment other than administration of the test. Others have suggested that the decision turned on the court's sympathies for the blind plaintiff. *See* Neil Meltzer, Helling v. Carey: *Landmark or Exception in Medical Malpractice; Compliance with the Medical Standard of Care May Not Protect the Specialist from Liability,* 11 NEW ENG. L. REV. 301, 310–12 (1975); Steven E. Hamilton, Helling v. Carey*: Medical Malpractice Standard of Care Determined by Court,* 11 WILLIAMETTE L.J. 152, 156–57 (1974).

32. *See generally* Philip G. Peters Jr., *The Quiet Demise of Deference to Custom: Malpractice Law at the Millennium,* 57 WASH. & LEE L. REV. 163 (2000).

33. *See* James F. Blumstein, *The Legal Liability Regime: How Well is it Doing in Assuring Quality, Accounting for Costs, and Coping with Reality in the Health Care Marketplace?,* 11 ANNALS HEALTH L. 125, 132 (2002).

34. *See* John W. Ely, Arthur J. Hartz, Paul A. James & Cynda A. Johnson, *Determining the Standard of Care in Medical Malpractice: The Physician's Perspective,* 37 WAKE FOREST L. REV. 861, 869 (2002).

35. 60 F.2d 737 (2d Cir. 1932).

of new and available devices."[36] Conformity to an intellectual community is of course no guarantee of reliability.[37] Absent some external check, self-regulation has the danger of focusing on group conformity rather than empirical validity. It also runs the risk of freezing the standard of care at suboptimal but historical levels, as the expert community lacks incentives to improve.[38] Finally, courts' total deference to custom smacks of abdication. It seemingly relinquishes the courts' own duty and role in medical malpractice actions.

B. *Lessons on Proving Consensus*

Analyzing how the legal system proves custom in medical malpractice cases can offer some important strategies, as well as flag some potential problems, with applying a consensus approach more generally.

1. *Individual vs. Community*

To re-emphasize, both the custom standard and the consensus approach involve deference to community consensus, not deference to individual experts. The job of expert witnesses is to report on the community's opinion, not their own. Yet, perhaps because trial is structured around individual witnesses, or perhaps because it is easier for the experts themselves, there has been a tendency in medical custom cases to backslide toward individual opinions. This problem is only made worse when there is a lack of published research and formal data on customary practices.[39]

For example, a notable 2002 study found that doctors may be testifying as to what "they would have done and to assume that this is what other physicians would have done" rather than (more properly) explaining what is *ordinarily* done by the medical community.[40] Any implementation of the consensus approach will therefore need to keep this pitfall firmly in mind, and perhaps impose procedures to ensure that expert witnesses have sufficient foundation for their testimony on community consensus. For example, in the medical malpractice context, Tennessee courts have made clear that a medical expert "must present facts demonstrating how he or she has knowledge of the applicable standard of professional care . . . in the com-

36. *Id.* at 740.

37. *See* Mark P. Denbeaux & D. Michael Risinger, Kumho Tire *and Expert Reliability: How the Question You Ask Gives the Answer You Get*, 34 SETON HALL L. REV. 15, 55–56 (2003); D. Michael Risinger, *Defining the "Task at Hand": Non-Scientific Forensic Science After* Kumho Tire Co. v. Carmichael, 57 WASH. & LEE L. REV. 767, 770, n.14 (2000).

38. *See* John Marsh Tyson, *Statutory Standard of Care for North Carolina Health Care Providers*, 1 CAMPBELL L. REV. 111, 129 (1979).

39. *See* Cramm, Hartz & Green, *supra* note 28, at 710, 752; Ely, Hartz, James & Johnson, *supra* note 34, at 865; Maxwell J. Mehlman, *Professional Power and the Standard of Care in Medicine*, 44 ARIZ. ST. L.J. 1165, 1183–84 (2012).

40. Ely, Hartz, James & Johnson *supra* note 34, at 865–71.

munity."[41] As the Tennessee Supreme Court has noted, such knowledge can come from not only first-hand experience, but also "reference materials on pertinent statistical information[,] . . . conversing with other medical providers in the pertinent community[,] . . . visiting the community or hospital where the defendant practices, or other means."[42] One can imagine similar techniques being applied to determine scientific consensus in other areas as well.

2. *Texts, Treatises, and Guidelines*

Witness testimony is of course the default method of proof in legal proceedings, but when it comes to proving custom or consensus, textbooks and other documents may be both more accurate and more efficient. Courts have thus recognized the importance of these sources in proving medical custom. Alabama courts, for example, have recognized an exception enabling plaintiffs to rely on a standard medical text to prove what is or is not proper practice.[43]

Another documentary option that has garnered significant attention in medical malpractice is the use of clinical practice guidelines.[44] In the custom context, a variety of guidelines have successfully been used to set the standard of care, including medical association guidelines and guidelines governing state-run health departments.[45] Medical association guidelines are compiled and crafted by experts selected by their peers, and thus may be the best and most accessible approximation of consensus on the standard of care.[46] They are also relatively easy to use. For exam-

41. Donathan v. Orthopaedic & Sports Med. Clinic, PLLC, No. 4:07-cv-18, 2009 WL 3584263, at *24 (E.D. Tenn. Oct. 26, 2009) (cited by West v. United States, 502 F. Supp. 3d 1243, 1251–52 (M.D. Tenn. 2020)).

42. Shipley v. Williams, 350 S.W.3d 527, 553 (Tenn. 2011).

43. *See* Zills v. Brown, 382 So. 2d 528, 531 (Ala. 1980). Alabama does, however, demand the medical text state the applicable standard of care with sufficient specificity. *Compare* McMickens v. Callahan, 533 So. 2d 579, 581 (Ala. 1988) (disallowing the use of a physician reference treatise that required that intraocular pressure be checked "frequently"), *with* Powell v. Mullins, 479 So. 2d 1119, 1124–25 (Ala. 1985) (allowing the use of a medical text indicating that X-rays be at least considered for patients at high risk of left-behind medical sponges prior to leaving the operating room).

44. *See generally* Mehlman, *supra* note 39 (tracing the historical momentum of practice guidelines in American law). But note that the reliance on guidelines in courts is infrequent. The infrequency of use is not determinative of the validity of the method and the potential broadly applicable role that guidelines could play in a deference model. *See* Ronen Avraham, *Clinical Practice Guidelines: The Warped Incentives in the U.S. Healthcare System*, 37 AM. J.L. & MED. 7, 18–19 (2011).

45. *See* Jiles v. State, No. E2003-01005-COA-R3-CV, 2004 WL 784876 (Tenn. Ct. App. Apr. 13, 2004) (affirming trial court's finding that the Tennessee Health Department Protocol's Pap Smear Guidelines constituted the standard of care where a plaintiff received medical care at a state-run health department).

46. *See* Avraham, *supra* note 44. Though associations often publish their guidelines with an express disclaimer that they are not indicative of the standard of care, a defendant doctor who testifies that they follow the guidelines and/or view

ple, in *Gerace v. United States*,[47] the district court faced the familiar problem of warring experts: plaintiff's expert insisted the standard of care required a prescription of anticoagulants, while defendant's experts testified to the opposite, relying on clinical guidelines established by the Consensus Conference on Antithrombotic Therapy of the American College of Chest Physicians.[48] The court deferred (correctly) to the guidelines as reflecting the consensus standard of care.[49]

The use of guidelines is not without its challenges. Thousands of medical treatment guidelines have been promulgated by various entities since the 1990s, and these guidelines vary in terms of quality, specificity, and evidentiary support.[50] It is also possible for guidelines to conflict with each other. Yet, they remain a convenient source of information on custom.

In proving scientific consensus more generally, one can imagine analogous documents serving a similar role to medical treatises or guidelines. For example, courts could use standard texts to establish specialized facts or proper techniques. The well-known National Academy of Sciences reports on various law-related scientific issues, such as DNA,[51] forensics,[52] and electromagnetic radiation,[53] could also be used in ways analogous to clinical practice guidelines.

3. *Medical Review Panels*

Several states have implemented medical review panels in medical malpractice cases.[54] Jurisdictions vary on whether such panels are

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the guidelines as the standard of care is sufficient to remediate the attempted disclaimer.

47. No. 5:03-CV-166 (NPM/GHL), 2006 WL 2376696 (N.D.N.Y. Aug. 10, 2006).

48. *See id.* at *24.

49. *See id.* at *26 (characterizing plaintiff's expert's testimony as "nothing more than his own subjective assessment of . . . what he deemed to be the governing standard of care").

50. *See* Avraham, *supra* note 44, at 17.

51. *See* NAT'L RSCH. COUNCIL, THE EVALUATION OF FORENSIC DNA EVIDENCE: AN UPDATE (1996).

52. *See* NAT'L RSCH. COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009).

53. *See* NAT'L RSCH. COUNCIL, POSSIBLE HEALTH EFFECTS OF EXPOSURE TO RESIDENTIAL ELECTRIC AND MAGNETIC FIELDS (1997).

54. Seventeen jurisdictions (Alaska, Delaware, Hawaii, Idaho, Indiana, Kansas, Louisiana, Maine, Massachusetts, Montana, Nebraska, New Hampshire, New Mexico, Utah, Virginia, Wyoming, and the Virgin Islands) require a case to be screen by a medical review panel before trial. Anjelica Cappellino, *How Are Medical Malpractice Review Panels Impacting the Legal Process?*, EXPERT INST. (June 25, 2020) https://www.expertinstitute.com/resources/insights/are-medical-malpractice-review-panels-helping-or-hindering-the-legal-process/ [https://perma.cc/UPK5-Z8HL].

mandatory or voluntary, but panels usually consist of doctors who review the facts and reach an opinion on the merits of the case.[55]

While the primary purpose of medical review panels is often to eliminate frivolous claims and encourage settlement, they can be an important source of expert opinions.[56] Panel opinions are admissible in some states, where they may provide prima facie evidence of malpractice,[57] or at minimum hold considerable sway with juries as a non-partisan source of information.[58] Viewed from the lens of the consensus approach, medical review panels illustrate how court-appointed or other non-partisan panels can serve as quasi-surveys of community consensus. While medical review panels may not be specifically tasked with determining community views, they effectively do so, since having multiple, neutral experts serves as a de facto sample of expert community sentiment.

4. *Surveys*

Finally, perhaps the best way to determine medical custom is to conduct an actual physician survey.[59] Surveys in this context, however, are shockingly rare, perhaps because of the time and costs involved. A 2012 study on proving medical custom found only five reported cases referring to empirical surveyed evidence and a single 1994 state appellate court decision where a practice survey was introduced to establish the standard of care.[60]

Interestingly, in the minority of states that maintain the "locality rule"—the rule requiring that medical custom be geographically localized—informal surveys are often done by non-local experts.[61] Idaho and Tennessee, for instance, require non-local expert witnesses to establish familiarity with local practices in order to testify.[62] These non-local experts often familiarize themselves by talking to local physicians.[63] One can similarly imagine that under a consensus approach to expert evidence, testifying experts would conduct surveys to determine current community

55. *See* MERCEDES DEINES, 2 MEDICAL MALPRACTICE § 13A.02 (2022).

56. *See* JAMES E. LUDLAM, 3 TREATISE ON HEALTH CARE LAW § 15:05 (2022).

57. *See* DEINES, *supra* note 55, § 13A.02.

58. *See A Guide to Indiana Medical Malpractice*, SWEENEY L. FIRM, at 7–8, https://sweeneylawfirm.com/Data/Accounts/Files/1/A_Guide_to_Indiana_Medical_Malpractice_Law.pdf [https://perma.cc/AFZ5-US8R] (last visited Dec. 28, 2022).

59. Cramm, Hartz & Green, *supra* note 28, at 733 ("When taken as a group, these individual normative decisions are minimized, and the decisions of the collective can substitute as a better measure of the treating physician's behavior.").

60. *See* Mehlman, *supra* note 39, at 1184–85; Kramer v. Milner, 639 N.E.2d 157 (Ill. App. Ct. 1994) (holding that evidence of how physicians actually complied with ACS guidelines and other recommendations should have been admitted at trial).

61. *See* Marc D. Ginsberg, *The Locality Rule Lives! Why? Using Modern Medicine to Eradicate an Unhealthy Law*, 61 DRAKE L. REV. 321, 337–38, 345 (2013).

62. *See id.*

63. *See id.*

consensus. The experience in medical malpractice suggests that if courts demand such evidence, the parties are likely to produce it.

IV. FOREIGN LANGUAGE TRANSLATION AND INTERPRETATION

A second instructive example comes from foreign language translators and interpreters. While foreign language interpretation may seem a far cry from scientific expertise, the two contexts present courts with functionally the same problem. Legal decisionmakers (English-speaking juries and courts[64]) lack expertise in foreign language—nor can they acquire such expertise over the course of a trial. Yet, litigants may present warring experts, setting up a potential "battle of the translators" that decisionmakers have little ability to arbitrate.

Like scientific experts, interpreters have dedicated their intellectual and professional lives to a field. While federal courts allow for limited use of ad hoc non-professional interpreters,[65] there is a strong preference for certified interpreters.[66] Meeting the standards for certification requires more than mere multilingualism. Only rarely do non-professionals or those without significant higher education meet qualification standards.[67]

Unlike with scientific evidence, however, courts appear to have implicitly adopted a deference framework when it comes to foreign language evidence. First, courts implicitly assume that a consensus translation exists, which courts then search for and defer to. Second, the expert's role is not to educate the jury so they can make their own substantive decisions, but rather to provide evidence about what the community thinks about a translation. Third, courts acknowledge that they are unqualified to resolve translation disputes. Judges do not gatekeep the experts beyond checking qualifications. Finally, juries are not permitted to second-guess

64. American courts are mandatorily English-speaking by law. *See, e.g.*, 48 U.S.C. § 864 (2018). This can lead to absurd results, especially in Puerto Rico, where Spanish-language evidence or testimony is translated to English, then back to Spanish for the benefit of Spanish-speaking jurors. *See* United States v. Rivera-Rosario, 300 F.3d 1 (1st Cir. 2002) (finding reversable error for two of five defendants because the District Court had allowed the presentation of Spanish evidence to Spanish-speaking judge, jury, litigants, and attorneys).

65. *See Interpreter Categories,* U.S. COURTS, https://www.uscourts.gov/services-forms/federal-court-interpreters/interpreter-categories [https://perma.cc/G9CA-F6JN] (last visited Dec. 28, 2022); Ko v. United States, 722 A.2d 830 (D.C. 1998) (explaining translators were asked to translate despite knowing only "a little" Cantonese).

66. *See Interpreter Categories, supra* note 65.

67. *See generally* Esther Monzo Nebot, *Understanding Legal Interpreter and Translator Training in Times of Change,* 9 INTERPRETER & TRANSLATOR TRAINER 129 (2015); Fadime Coban, *Analysis and Training of the Required Abilities and Skills in Translation in the Light of Translation Models and General Theories of Translation Studies,* 197 PROCEDIA – SOC. & BEHAV. SCIS. 707, 713 (2015); *Interpreter Skills,* U.S. COURTS, https://www.uscourts.gov/services-forms/federal-court-interpreters/interpreter-skills [https://perma.cc/U2FY-M239] (last visited Dec. 28, 2022).

the experts' translations, effectively shifting them away from making a substantive determination about the matter requiring expertise.

A. *Focusing on Consensus*

Court behavior around foreign language translations almost assumes that there exists some consensus translation that the expert community will coalesce around. The standard procedure for challenging the accuracy of an English language transcript of a foreign language conversation reflects this assumption, as the Eleventh Circuit described in *United States v. Montor-Torres*[68]:

> The [proper] procedure . . . has been delineated as follows: "Initially, the district court and the parties should make an effort to produce an 'official' or 'stipulated' transcript, which satisfies all sides. If such an 'official' transcript cannot be produced, then each side should produce its own version of a transcript or its own version of the disputed portions. In addition, each side may put on evidence supporting the accuracy of its version or challenging the accuracy of the other side's version."[69]

This model, which the Second and Fifth Circuits also subscribe to, assumes that with effort, groups of translators can agree on a consensus translation.[70] Other Circuits base their rules on the assumption that translators will basically achieve consensus sua sponte. These circuits allow competing translations to be presented only if there is no material agreement between interpretation by each party's expert—the baseline assumption is that any two translators will come to the same solution.[71]

On its face, this assumption—that adversarial translation experts will simply agree on a translation—runs deeply counter to the rest of legal practice. For one thing, why would we expect litigants to agree on a translation? We certainly make no such assumptions with regard to other forms of expert evidence. In fact, the litigation context would seem to guarantee warring translations. For another thing, lawyers make their living on the

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68. 449 F. App'x 820 (11th Cir. 2011).

69. *Id.* at 822 (citing United States v. Cruz, 765 F.2d 1020, 1023 (11th Cir. 1985)).

70. *See, e.g.*, United States. v. Llinas, 603 F.2d 506, 509 (5th Cir. 1979); United States v. Ben-Shimon, 249 F.3d 98, 101–02 (2nd Cir. 2001).

71. *See, e.g.*, United States v. Zambrana, 841 F.2d 1320, 1337–38 (7th Cir. 1988) (stating, in the Seventh Circuit, the "defendant had ample opportunity not only to challenge the accuracy of the government's transcript through cross-examination and expert testimony, but also . . . to present his own transcript"); United States v. Gutierrez, 367 F.3d 733, 736 (8th Cir. 2004) (upholding use of similar pattern jury instructions on foreign language transcripts where defendant fails to allege specific inaccuracies in the transcript despite having a Spanish translator testify for him at trial).

idea that words can have different meanings in different contexts.[72] Countless legal resources are spent each year determining the contested meaning of terms in carefully negotiated and drafted documents. Surely a casual conversation in a foreign language is not going to magically have a well-accepted translation. Nevertheless, courts assume that a commonly accepted translation will emerge.

Indeed, even when translators disagree, courts frequently characterize their disagreement as immaterial, pretending as if the experts reached consensus. For example, in *Strauss v. Crédit Lyonnais*,[73] the court faced the question of whether the French term "*sympathisant*" should be translated as "supporters" or "sympathizers" in a terrorism case where "supporter" could be considered a legal term of art.[74] The court, however, declared this discrepancy "immaterial" and took "no position on the correct translation."[75] Similarly, in *Buchanan v. Cate*,[76] the defendant challenged two phrases of jailhouse slang in a translation of a wiretapped phone conversation. At issue was the defendant's statement, in reference to a victim: "[S]o I wanted to talk to him first and if, if he doesn't behave then its [sic] like all right, he's fucked and then I'll let you get at him, uh, later, you know what I mean?" Prosecution contended that "he's fucked" showed knowledge that the victim would be killed. Appellant responded that "he's fucked" should have been translated as "I know I crapped," a phrase alleged to be jailhouse Spanish for "failed to win."[77] The court, however, again declared the different translations as immaterial, reasoning that a reasonable jury would interpret both translations the same way.

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72. For disagreements about the meaning of the word "licensing," see Chamber of Commerce v. Whiting, 563 U.S. 582, 583 (2011) ("[N]either dictionary definitions nor the use of the word 'license' in an unrelated statute can demonstrate what scope Congress intended the word 'licensing' to have as it used that word in this federal statute."); the controversy over whether a burrito is a sandwich for tax purposes, see *Sandwiches: Tax Bulletin ST-835 (TB-ST-835)*, N.Y. STATE DEP'T OF TAX'N & FIN. (Apr. 8, 2019), https://www.tax.ny.gov/pdf/tg_bulletins/sales/b19-835s.pdf [https://perma.cc/LU2C-WYQ9]; discussion about whether chocolate chips are a "snack" or a "food," see Katherine Bishop, *California Tax Test: Is It Snack or Food?*, N.Y. TIMES (Aug. 3, 1991), https://www.nytimes.com/1991/08/03/us/california-tax-test-is-it-snack-or-food.html [https://perma.cc/GNK3-RCRD]; and the classic law school example prohibiting vehicles in the park but exploring differing meanings for "vehicle" "in" and "park", see Pierre Schlag, *No Vehicles in the Park*, 23 SEATTLE U. L. REV. 381 (1991). *But see* Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court's Use of Dictionaries in the Twenty-First Century*, 94 MARQ. L. REV. 77 (2010) (noting that the period 2000–2010 was a "boom period" for Supreme Court Judges use of dictionary definitions, using dictionaries to define 295 words in 225 opinions, compared to 23 terms in 16 opinions over the same period in the 1960s).

73. 925 F. Supp. 2d 414 (E.D.N.Y. 2013), *on reconsideration in part*, No. 06-CV-702 (DLI) (MDG), 2017 WL 4480755 (E.D.N.Y. Sept. 30, 2017).

74. *Id.* at 521.

75. *Id.*

76. Civ. No. 10-0423 BTM (NLS), 2011 WL 10730141 (S.D. Cal. Sept. 30, 2011).

77. *Id.* at *19.

So what is going on? In both examples, the translations are clearly different, yet the courts effectively imposed a presumption against materiality in order to eliminate the disagreement.[78] We suspect that courts are implicitly assuming the existence of a "standard" translation—a translation that a consensus of experts (i.e., bilingual speakers) would agree upon. Courts are assuming that once a professional translator or interpreter is established as "qualified," he will provide that "standard" translation.

B. *The Role of Experts*

The *Federal Rules of Evidence* require translators and interpreters to be "qualified" and to give an oath "to make a true translation."[79] The experts are not required to explain the methods they use to make a translation, nor do their requirements and qualifications include any mandate to educate the factfinder.[80] If translators were expected to meet the same requirements as scientific experts, we would expect to see them educating the jury, or presenting a substantive opinion in the hopes that the jury will agree. We would also expect to see translators aiming to teach crash courses in Spanish, Chinese, or Creole over the course of a trial. Instead, total deference to the experts is a given in interpretation cases, even when jurors are bilingual, as discussed below.

C. *Judicial Deference*

Unlike with scientific evidence, judges rarely if ever impose *Daubert* and interrogate the methods used to translate the foreign piece, relying instead on qualifications alone.[81] Indeed, courts readily concede their ep-

78. *See id.* at *20; United States v. Sung Myung Moon, 532 F. Supp. 1360, 1364 (S.D.N.Y. 1982); United States v. Dibee, 2020 WL 2039327, at *2 (D. Or. 2020).

79. FED. R. EVID. 604. The definition of "true" interpretation seems to be that interpreters are "[a]ble to accurately and idiomatically turn the message from the source language into the target language without any additions, omissions or other misleading factors that alter the intended meaning of the message from the speaker." *Interpreter Skills*, *supra* note 67. As discussed in Section IV.A. above, this definition assumes a single true meaning in any recorded or written language.

80. Court Interpreters Act, 28 U.S.C. § 1827 (2018); *Interpreter Skills*, *supra* note 67.

81. One curious exception to this hands-off approach to translation occurs when a judge actually knows the foreign language involved, such as in *In re Audibility of Certain Recorded Conversations*, 770 F. Supp. 786 (D. Conn. 1991), one of the only published cases involving judicial resolution of a translation dispute. Faced with conflicting Spanish translators, the judge in *Audibility* took great pains to detail his experience with Spanish, including his status as a native speaker, translation experience, and the dialects in which he has worked. *Id.* at 788 n.3. The judge then used his specialized knowledge to select the official translation. *Id.* at 788.

In a way, the judge's behavior in *Audibility* coheres with the expectations of *Daubert* and the plethora of judicial science education efforts spawned by *Daubert*. An informed judge admits only the "reliable" translation. Yet, judges importing their own extrajudicial specialized knowledge lies in deep tension with the adversarial system. For example, in *United States v. Bonds*, 18 F.3d 1327 (6th Cir. 1994), defense counsel in a criminal case involving DNA evidence argued that Judge

istemic incompetence with regard to foreign language translation. Take, for example, *Kitchen v. Tucker*,[82] a child sexual abuse case where there was a dispute among four separate translators over the translation of a term (alleged by interpreters to be either "vagina" or "anus"). In its opinion, the court readily admitted that "[w]hile [a dueling translation] does go to the merits of the allegation, its primary force is to create a battle of the interpreters. At this point, the Court has no method of determining which interpretation is correct."[83]

Why the wildly different treatment versus the scientific context? One suspects that with regard to foreign language, epistemic incompetency is patently obvious. Something written in a foreign language is facially incomprehensible, and judges easily understand that casual study cannot hope to give them the tools necessary to make complex decisions related to language translation. By contrast, the scientific realm—outside highly technical mathematics—may seem enticingly accessible. Indeed, in the scientific realm, a burgeoning assortment of short courses and reference manuals promise to provide judges with the "tools they need" to manage complex scientific and technical evidence.[84]

Boggs, who had attended a conference on DNA evidence, should have recused himself based on the extrajudicial information. The Sixth Circuit (with Judge Boggs writing) ultimately ruled that recusal was unnecessary, but the conceptual tension remains.

82. No. 3:10cv237/LC/CJK, 2012 WL 7051038, at *11 (N.D. Fl. Sept. 20, 2012).

83. *Id.* at *11. The court's concession is remarkably reminiscent of Chief Justice Rehnquist's dissent in *Daubert*, which cast doubts on trial judge's ability to assess the reliability of scientific evidence. Daubert v. Merrell Dow Pharmaceuticals, Inc. 727 F. Supp. 570, 599–600 (S.D. Cal. 1989) (Rehnquist, C.J., dissenting).

84. A cursory Google search reveals a huge market for these tools: The REFERENCE MANUAL ON SCIENTIFIC EVIDENCE provides 1,000+ pages of guidance to "assis[t] judges in managing cases involving complex scientific and technical evidence by describing the basic tenants of key scientific fields from which legal evidence is typically derived and by providing examples of cases in which that evidence has been used." *Science for Judges: Development of the Third Edition of the Reference Manual on Scientific Evidence*, NAT'L ACADS. https://www.nationalacademies.org/our-work/science-for-judges-development-of-the-third-edition-of-the-reference-manual-on-scientific-evidence [permalink not available] (last visited Dec. 28, 2022); *see also* FED. JUD. CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (3d ed. 2011); The third edition, available in full online, is 1,025 pages long and devotes, *inter alia*, twelve pages to "How Science Works" and eighty-four pages to a "Reference Guide on Mental Health Evidence." FED. JUD. CTR., *supra*, at xvii. By contrast, a Master's program in Psychology requires on average 330 pages of reading per week. *See* Beth Azar, *Degree in Sight: Sink or Swim?*, 8 GRADPSYCH MAG. 36 (2010). With at least forty-eight weeks required to graduate (twelve weeks per semester times two semesters per year over a minimum of two years), the distance between even a freshly graduated "Master" of Psychology and a reference guide reader is over 15,000 pages of reading, in addition to clinical and laboratory study.

D. *The Role of Jurors*

A similarly deferential attitude to translation is found in the legal rules for jurors. The role of the jury in arbitrating translation issues is not to make a substantive determination on the accuracy or method of translation. Instead, the court defers to the expert community itself to determine what consensus is. The deference to translators is so deeply felt that many courts prohibit jurors from second-guessing translations. For example, consider the Seventh Circuit's *Civil Pattern Jury Instructions*:

> You should consider only the evidence provided through the official interpreter. Although some of you may know [*language(s) used*], it is important that all jurors consider the same evidence. Therefore, you must base your decision on the evidence presented in the English translation.[85]

California courts follow a similar instruction, strikingly entitled "Duty to Abide by Translation Provided in Court":

> An interpreter will provide a translation for you at the time the testimony is given. You must rely on the translation provided by the interpreter, even if you understand the language spoken by the witness. Do not retranslate any testimony for other jurors. If you believe the court interpreter translated testimony incorrectly, let me know immediately by writing a note and giving it to the (clerk/bailiff).[86]

Indeed, one California court characterized it as "misconduct for a juror to [reinterpret] for other jurors . . . testimony as translated by the court-appointed interpreter."[87] For these reasons, attorneys are generally permitted to strike bilingual jurors during voir dire if they have doubts that those jurors will defer to translators and interpreters.[88]

Initially, this practice may seem nonsensical, particularly in light of the legal system's conventional preference for independent jury determinations. Why should a bilingual juror not interpret or translate the mate-

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85. THE COMM. ON PATTERN CIV. JURY INSTRUCTIONS OF THE 7TH CIR., FEDERAL CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 1.22 (rev. 2017); *see also* 9TH CIR. JURY INSTRUCTIONS COMM., NINTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS 45 (2007), https://www.rid.uscourts.gov/sites/rid/files/documents/juryinstructions/otherPJI/9th%20Circuit%20Model%20Civil%20Jury%20Instructions.pdf [https://perma.cc/U2XG-9HSW]. *But see* United States v. Rrapi, 175 F.3d 742, 748 (9th Cir. 1999) (holding that the jury could properly decide which translation was accurate when the defendant disputed the accuracy of the English translation of a taped conversation).

86. JUD. COUNCIL OF CAL. ADVISORY COMM. ON CRIM. JURY INSTRUCTIONS (CALCRIM) No. 121, at 21–22 (2021) (Duty to Abide by Translation Provided in Court).

87. People v. Cabrera, 230 Cal. App. 3d 300, 303–04 (Cal. Ct. App. 1991).

88. *See, e.g.*, United States v. Cabrera-Beltran, 600 F.3d 742, 748 (4th Cir. 2011); Hernandez v. New York, 500 U.S. 352, 358–59 (1991).

rial for himself and others on the jury? Indeed, is this not precisely the kind of scrutiny that the traditional expert evidence framework wants and expects? Jurors are supposed to exercise independent judgment in deciding cases; they may choose to believe one expert, another expert, or strike off on their own.

But there are sound practical reasons for this prohibition. For one thing, the bilingual juror might have idiosyncratic or outlier views on the translation.[89] A juror interpreter also creates an influential source of uncontrolled, extrajudicial information. As one court put it, "The rules of evidence and the expert testimony would prove of little use if a self-styled expert in the deliberations were free to give his or her opinion on this crucial issue, unknown to the parties."[90] Bilingual jurors might even end up in direct conflict with experts, as the following extraordinary exchange illustrates:

> DOROTHY KIM (JUROR NO. 8): Your Honor, is it proper to ask the interpreter a question? I'm uncertain about the word La Vado [sic]. You say that is a bar.
>
> THE COURT: The Court cannot permit jurors to ask questions directly. If you want to phrase your question to me—
>
> DOROTHY KIM: I understand it to be a restroom. I could better believe they would meet in a restroom rather than a public bar if he is undercover.
>
> THE COURT: These are matters for you to consider. If you have any misunderstanding of what the witness testified to, tell the Court now what you didn't understand and we'll place the—
>
> DOROTHY KIM: I understand the world La Vado [sic]—I thought it meant restroom. She translates it as bar.
>
> MS. IANZITI: In the first place, the jurors are not to listen to the Spanish but the English. I am a certified court interpreter.
>
> DOROTHY KIM: You're an idiot.[91]

For these reasons, the deferential approach taken by courts on foreign language interpretation and translation makes good sense. And its contours unsurprisingly align with the Consensus Rule. Jurors are not to exercise independent judgment: Non-bilingual jurors are epistemically incompetent to decide on the proper translation, whereas bilingual jurors

89. This concern about idiosyncratic views is precisely why the Consensus Rule focuses on community views, rather than the views of an individual expert.

90. United States v. Fuentes-Montijo, 68 F.3d 352, 355 (9th Cir. 1995).

91. Hernandez v. New York, 500 U.S. 352, 360 n.3 (1991) (alterations in original) (quoting United States v. Perez, 658 F.2d 654, 662 (9th Cir. 1981)).

are loose cannons in the adversarial proof process. It is better for the expert translators to present evidence of a consensus or community translation, and for the jurors to defer to that translation, even if the jurors may have their own ideas as to what the translation should be. The Consensus Rule merely expands these ideas more broadly into the expert context. On issues involving specialized knowledge, jurors should defer to the expert community's consensus (or perceived consensus), not generate rogue ideas of their own.

CONCLUSION

The *Daubert* framework for handling expert knowledge in the legal system is wrong. It is wrong in setting up judges as gatekeepers, and it is wrong in asking jurors to reach independent, substantive conclusions about specialized facts. And the reason why this conventional framework is wrong is that it requires non-experts to make decisions requiring expertise.

A more practical and appropriate approach, especially given the time and resource constraints found in litigation, is to follow a policy of deference. Legal actors should defer to the conclusions of the expert community. And if no consensus exists on a specific question, then legal actors should hypothetically ask what the expert community is likely to conclude, rather than try to reach conclusions on their own.

We have further shown in this Article that the idea of deference is not nearly as radical as it may first seem. Use of custom to determine the standard of care in medical malpractice is a deference model, and indeed how the tort system proves custom provides valuable lessons to how a broader consensus model might work. In addition, how courts handle foreign language interpreters and translators also shares much in common with the proposed consensus or deference approach. In translation cases, courts search for consensus positions, acknowledge their epistemic limitations, and do not ask for independent jury determinations. Both of these contexts provide promising starting points for embracing deference models.