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ARTICLE: Civil Jury Nullification

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SUMMARY:
... Jury nullification has a long pedigree and a number of defenders in the criminal context, but its counterpart in civil litigation has received essentially no serious attention. ... Because these different sources of information are suggestive but ultimately inconclusive, Part II isolates one particular aspect of tort litigation that may provide the strongest evidence of civil jury nullification, namely, the widespread failure to abide by the contributory negligence defense. ... Evidence of civil jury nullification comes from several sources. ... Third, this Part evaluates the arguments for and against civil jury nullification in its own right, revisiting the history of the contributory negligence defense. ... But because of the weaknesses in the historical and normative defenses of criminal jury nullification and the undoubted differences between civil and criminal litigation, nobody appears to support civil jury nullification as a general proposition. ... Even if everyone agrees that the old contributory negligence defense operated too harshly, and therefore invited civil jury nullification, does anyone believe that requiring the plaintiff to prove causation or negligence before recovering damages in tort suffers from a similar illogic or obvious unfairness? Perhaps courts or legislatures should relieve plaintiffs of some of these burdens, but a single jury would have no basis for making such a momentous departure from traditional doctrine. ... D. Combating Civil Jury Nullification ...

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I. Introduction

Occasionally, one hears the complaint that jurors in civil cases intentionally ignore their instructions and return verdicts inconsistent with the applicable law. n2 Jury nullification has a long pedigree and a number of defenders in the criminal context, but its counterpart in civil litigation has received essentially no serious attention. n3 Indeed, some definitions of jury nullification exclude civil litigation altogether, n4 but this conception is unduly narrow. Because trial and appellate judges often hesitate to intrude on the jury's fact-finding domain, verdicts based on a jury's intentional deviation from the law as instructed by the court may escape post-trial correction. As with an unreviewable acquittal in a criminal trial, a general verdict imposing or refusing to impose civil liability is largely inscrutable and, therefore, often unreviewable in practice.

The legal realists long ago recognized that the "law in the books" did not capture the "law in action," and they gave both criminal and civil juries a prominent role in this translational process, sometimes enthusiastically, n5 and sometimes disapprovingly. n6 As one recent article recognized, "civil juries **[*1604]** have some residual nullification power ... , for they can de facto apply whatever law they wish when deciding cases, provided that they do not overstep certain bounds into legal irrationality." n7 Other commentators have recognized that civil juries occasionally may nullify, but

they discount this possibility because judges have the last word on any judgment in civil litigation. n8

Nullification occurs whenever a jury intentionally ignores the trial judge's instructions on the applicable law. It does not refer to instances where a jury may have misunderstood the facts or the law. n9 Acquittals by **[*1605]** criminal juries provide the starkest context for jury nullification because double jeopardy prevents retrial of the accused, but nullification also can occur in civil litigation, at least insofar as a general verdict effectively insulates a jury's decision from close judicial scrutiny. In fact, some of the earliest examples of jury nullification in this country arose in civil trials. n10

Should we tolerate such intentional departures from judicial instructions as a mechanism for injecting healthy flexibility into the law, or does the practice reflect an inappropriate lawlessness? Part II of this Article canvasses the available evidence of civil jury nullification. Recently published surveys indicate that a majority of potential jurors express a willingness to disregard the law, and post-verdict interviews with actual jurors have identified failures to abide by the judge's instructions in some cases. For instance, in recent tort litigation involving the prescription drug Bendectin and silicone-gel breast implants, juries returned verdicts for the plaintiffs even after deciding that the evidence failed to demonstrate that these products could have caused the plaintiffs' afflictions. Even so, archival analyses of verdict patterns in products liability cases indicate that plaintiffs prevail in jury trials less frequently than in bench trials. More limited verdict data suggest that employees alleging wrongful discharge fare better with juries than judges, and that victims of discrimination alleging violations of civil rights laws do less well with juries in the South than elsewhere.

Because these different sources of information are suggestive but ultimately inconclusive, Part II isolates one particular aspect of tort litigation that may provide the strongest evidence of civil jury nullification, namely, the widespread failure to abide by the contributory negligence defense. Juries often disregarded the harsh rule that any fault by the victim would defeat recovery, instead returning compromise verdicts based on a form of comparative negligence. Even though most states now have shifted to comparative negligence, some juries still find it necessary to deviate from the law in these cases, either by circumventing the thresholds used in many comparative negligence states or by inflating damage assessments to counteract the apportioned reduction in the plaintiff's award.

Part III introduces the historical and normative debate about jury nullification in criminal litigation as a prelude to evaluating its possible relevance to civil cases. Defenders of criminal jury nullification emphasize that early American courts granted juries the power to resolve questions of law and that, coupled with the fact that double jeopardy protections render acquittals unreviewable, this gave juries a right to nullify that the courts **[*1606]** should explicitly recognize. Wholly apart from the historical and constitutional claims, proponents of criminal jury nullification defend the practice as a desirable counterweight to possibly overzealous prosecutors, unjustly harsh criminal laws, and biased judges. Opponents dispute the historical claim, particularly the suggestion that a jury's law-finding power also contemplated a law-dispensing power, and they object that the recognition of a right to nullify would invite anarchy. In a number of ways, the courts have sided with the opponents of criminal jury nullification. Although they cannot prevent or override acquittals that spring from jurors' defiance of instructions, trial judges generally reject efforts to apprise jurors of their power to ignore the law and may also strike potential nullifiers from the jury.

Part IV asks whether jury nullification has a legitimate place in civil litigation. The historical claim favoring civil jury nullification seems no weaker than the claim for its criminal counterpart, and the structural differences are more theoretical than real. Even though civil litigation allows for greater intervention by judges than is possible in criminal trials, in practice civil juries enjoy a great deal of unreviewable discretion to deviate from what the law would dictate, and at least some types of civil litigation (for example, suits involving governmental entities as litigants) have important similarities to criminal cases. Although no one advocates that trial judges should inform civil juries of their power to ignore instructions, a number of commentators applaud particular examples of nullification, such as failing to abide by the old contributory negligence defense or, more recently, shifting the burden of proof on causation to the defendants in toxic tort cases. Perhaps the courts or legislatures should make these and other doctrinal modifications, but jury departures from the law in such cases seem even less defensible than nullification in favor of criminal defendants. Nullification lodges a de facto lawmaking function with an unaccountable group of laypersons and operates inconsistently for similarly-situated litigants. In addition, defiance by juries may mask the need for, rather than prompt efforts at, such legal reform. Unlike acquittals in criminal cases, when a jury strives to do what it regards as particularized justice for one of the parties to a dispute, it necessarily sacrifices the due process rights of the other litigant. Part IV concludes by suggesting procedural devices that might constrain civil jury nullification, focusing in particular on the use of special verdict forms and the bifurcation of trials. Some scholars object that these devices unduly intrude upon the jury's ability to do justice in particular cases, which both concedes the descriptive claim and begs the central normative question posed herein.

II. Peering Inside the Black Box

Evidence of civil jury nullification comes from several sources. First, judges and lawyers can provide valuable insights about the behavior of juries **[*1607]** in particular types of cases. n11 In addition, surveys of potential jurors, post-verdict interviews with actual jurors, trial simulations conducted with mock juries, and archival analyses of verdict patterns all cast light on the existence of civil jury nullification. Historically, the clearest examples of civil jury nullification came from tort litigation. n12 Seemingly everyone agrees, for example, that juries frequently disregarded the contributory negligence defense and instead returned compromise verdicts partially reducing awards for plaintiffs who shared some of the blame for their injuries. Ultimately, it is impossible to estimate the frequency with which civil juries intentionally disregard their instructions, but it seems implausible to argue that nullification never happens (or that judges always intercede when it happens) in civil litigation.

Although it draws on the increasingly rich literature concerning jury behavior, n13 this Article does not engage in a debate with those researchers who have investigated questions concerning lay comprehension or the role of heuristics in decisionmaking. Nor does it make any particular claims about the prevalence of civil jury nullification. Instead, after suggesting that there is good reason to suspect that nullification occurs to some unclear **[*1608]** extent, this Article will inquire more abstractly about the legitimacy of the practice. After all, the same paucity of empirical evidence has in no way diminished the vigor of debates about the legitimacy of jury nullification in criminal cases.

A. Searching for Hints of Nullification

Surveys of potential jurors offer one source of information about the likelihood of jury nullification. For instance, DecisionQuest conducted a survey in 1999 that asked 1000 adults a series of questions, including one about nullification framed in the following terms: "In reaching a verdict, should juries ignore a judge's instructions if they believe justice will best be served by doing so?" Almost half of those responding (48.8%) answered this question in the affirmative, while only 43.4% answered this question in the negative. n14 The same survey conducted in 1998 actually found a far higher percentage (76.4%) expressing a willingness to nullify. n15

Interviews with jurors after trial provide another source of information about nullification. Unlike surveys of potential jurors, which cannot capture the effect of formal trial proceedings and the collaborative decisionmaking process that occurs inside the jury room, n16 post-verdict interviews offer first-hand accounts of how that dynamic may affect individual jurors' tendencies to disregard their instructions. n17 In fact, some jurors have identified nullification verdicts in civil litigation. n18 For instance, several jurors **[*1609]** interviewed after two recent trials that resulted in multi-million dollar verdicts against the manufacturers of silicone-gel breast implants candidly admitted that the plaintiffs had failed to prove that silicone could have caused their autoimmune diseases. n19 Even so, such interviews can offer only limited anecdotal information about civil jury nullification.

The impressions of legal scholars also provide some insights about possible forms of civil jury nullification. Several observers have suggested, for example, that juries seem to apply rules of general causation less rigorously when corporate defendants have engaged in apparently egregious misconduct, thereby "commingling" distinct elements of a prima facie tort claim. n20 The severity of a plaintiff's injury apparently also plays a role in deciding questions of liability, which may reflect hindsight bias or sympathy. n21 Similarly, some commentators fear that in a multiple-defendant **[*1610]** case, the jury may allocate a small percentage of responsibility to a corporate defendant (even when the evidence of any liability on the part of that company seems questionable), which may then have to pay the full amount of a plaintiff's damages under rules of joint and several liability. n22

Jury nullification also may arise in statutory programs that provide a right to recover damages from wrongdoers. In the course of holding that the Seventh Amendment right to a jury trial attaches to cases brought under Title VIII of the Civil Rights Act of 1968, the United States Supreme Court recognized that supporters of the legislation "were concerned that the possibility of racial prejudice on juries might reduce the effectiveness of civil rights damages actions." n23 The notorious history of jury nullification in southern states, particularly in resisting efforts to prosecute persons charged with lynchings, n24 certainly gave credence to concerns that juries might act similarly in civil litigation. In fact, it does appear that juries in some parts of the country have refused to impose liability on defendants who have violated antidiscrimination laws. n25

The available empirical data cannot confirm or deny that civil jury nullification occurs, but they do suggest that the phenomenon is not terribly **[*1611]** prevalent. For instance, the evidence from two decades of products liability

litigation in the federal courts demonstrates that plaintiffs prevail less frequently in jury trials than in bench trials. n26 Perhaps, contrary to common expectation, nullification works in favor of defendants and against plaintiffs. n27 Even so, as these researchers concede, the case mix differs, with plaintiffs insisting on jury trials when they have weaker cases; n28 plaintiffs may experience better – though still limited – luck with a jury than a judge in such cases. n29 By contrast, in wrongful termination lawsuits, juries appear to favor employees far more than trial judges do. n30 Only by comparing the **[*1612]** results of jury and bench trials for equally compelling cases, if that were possible, could one meaningfully test the nullification hypothesis. n31 Even if one found that plaintiffs succeeded more often before juries than before trial judges (without holding the relative quality of cases constant), this would provide only suggestive evidence in support of the hypothesis.

B. The Revolt Against Contributory Negligence

The history of the contributory negligence defense offers perhaps the clearest evidence that civil juries sometimes intentionally disregard their instructions from the trial judge. Under the old rule that any contributory negligence by a plaintiff would defeat recovery in tort, n32 widespread jury nullification occurred to soften the harshness of this doctrine. As one trial judge candidly remarked in an opinion dismissing a complaint:

I am as confident as one can be about these matters that, had the case been tried to a jury, the jury would have determined the sum of plaintiff's damages in a substantial amount, deducted a portion equivalent to the degree of his negligence, and returned a verdict for the difference. In short, as every trial lawyer knows, the jury would likely have ignored its instructions on contributory negligence and applied a standard of comparative negligence. n33

Trial judges did not, however, always decide to keep such cases from juries, thereby allowing some contributorily negligent plaintiffs to prevail. Reviewing courts also understood what juries were up to in these cases, but they did not invariably reverse judgments entered on verdicts for plaintiffs. n34

[*1613] Thus, trial and appellate judges shouldered some responsibility for allowing such cases to reach juries in the first place or for turning a blind eye to defendants' post–trial objections that such compromise verdicts reflected a misapplication of contributory negligence principles. n35 In many cases, of course, the defendant's argument that the plaintiff had acted unreasonably under the circumstances may have raised a genuine issue requiring resolution by a jury, and a verdict for less than the full amount of damages may have reflected a determination that the plaintiff had acted reasonably but exaggerated the seriousness of the injury. In other cases, however, the plaintiff's contributory negligence may have been fairly obvious, in which case a trial judge should have granted summary judgment to the defendant instead of submitting it to the jury. n36 One might more appropriately characterize this latter subset of jury cases as instances of judicial nullification.

Although not focusing on contributory negligence, Professor Michael Saks has made the provocative claim that judges in civil trials invite jury nullification by giving incomprehensible instructions. n37 He notes the irony **[*1614]** that judges refuse to instruct jurors of their power to nullify but then make it essentially impossible for the jurors to conform their verdict to the law as instructed. n38 Ultimately, this operates only as a weak form of jury nullification because the trial judge remains free to intervene after the verdict in case the jury deviates too far from what the law would dictate in a particular case. n39 In effect, the trial judge exercises a nullification power, insulating a judgment from appellate reversal by providing the jury with the correct instructions while allowing the jury to depart from those instructions to some limited extent. n40 Professor Saks applauds this state of affairs as introducing valuable flexibility into the law. n41 Even if civil juries appropriately play such a role, a controversial normative claim considered **[*1615]** more fully in Part IV.C of this Article, the lack of candor and accountability implied by judicial nullification makes this practice troublesome. n42

It would be a mistake, however, to suggest that trial judges regularly and intentionally dupe juries into misapplying the law applicable to a particular case. It seems implausible, for example, to think that juries in the past misunderstood the instruction that any contributory negligence by the plaintiff would entitle the tortfeasor to a verdict. Perhaps judges failed to keep cases involving undisputed contributory negligence from going to juries, but it remained necessary for those juries to ignore their instructions in rendering compromise verdicts. When they did so, the fact that the trial and appellate judges did not always override the verdict simply confirms that some civil juries do in fact nullify and get away with it, because of either judicial acquiescence or impotence.

A couple of state constitutions adopted during the Progressive era seemingly had enshrined a right of jury nullification on questions of contributory negligence. n43 As revealed by tort litigation governed by these provisions, some juries exercised this authority in order to soften the impact of this harsh defense. In one case, for example, a jury evidently chose to disregard clear evidence of a victim's contributory negligence when it awarded his estate full damages for stepping in front of a train visible hundreds of feet down the tracks. n44 In an opinion by Justice Holmes, the United States Supreme Court rejected a due process challenge to the judgment in this case, though it suggested that civil juries generally would not enjoy the right to nullify absent special dispensation by state law. n45

[*1616] Although the overwhelming majority of jurisdictions no longer treat a plaintiff's contributory negligence as a complete bar to recovery, in many states the plaintiff receives no damages if a jury allocates a greater share of responsibility to the plaintiff than to the defendant(s). Historically, when using a special verdict form, judges refused to inform the jury of how this modified comparative negligence rule operated, just as they may "blindfold" juries as to such technically irrelevant issues as insurance coverage, contingent fee arrangements, settlements, trebling of damages, and taxation of awards. n46 More recently, however, many courts have decided to lift the comparative negligence blindfold, n47 which can serve no other purpose than inviting the jury to cook the numbers to ensure that the victim receives some award. n48 In fact, empirical research confirms that juries will adjust the plaintiff's percentage of fault downward if told that a threshold otherwise would bar recovery. n49

Along similar lines, fully informed juries may strive to avoid even a **[*1617]** partial reduction in damages for comparative negligence by first inflating the damage award. In one case, a jury initially apportioned 65% fault to the defendant and set damages at $75,000, but it increased the damages to $116,000 after the trial judge clarified that the apportionment would reduce the plaintiff's recovery by 35% (leaving $75,400). n50 Conversely, in cases where a jury views the plaintiff's comparative negligence as substantial, they may deflate the full damage assessment without realizing that the trial judge will further discount that amount by the percentage of fault they assign to the plaintiff. n51

As with the tendency of civil juries to nullify the older contributory negligence rule, some commentators defend this practice of informing juries about the consequences of their findings as allowing them to mitigate the effects of unduly harsh laws. n52 Others who object to blindfolding point out that the practice sometimes will work to the disadvantage of defendants as well, for example by failing to inform juries that an allocation of even a small share of responsibility to one among several tortfeasors might impose the entire financial burden of the judgment on that defendant. n53 Again, **[*1618]** however, these commentators imply that a fully informed jury might decide to allocate no percentage of fault to a minor defendant in order to protect this erstwhile tortfeasor from the seemingly harsh operation of the rules of joint and several liability applicable in that jurisdiction.

In short, the resolution of cases involving comparative fault offers powerful evidence of civil jury nullification. In some cases, juries either ignored the older contributory negligence defense as a complete bar to recovery and returned compromise verdicts more consistent with a comparative negligence formula, or they circumvented the thresholds under a modified comparative negligence defense when apportioning the plaintiff's relative fault, or they avoided the discounting of the award under any version of the comparative negligence defense by first inflating their damage assessment. Several commentators applaud one or more of these misapplications of the law by juries, an issue taken up at length in Part IV.C of this Article. Whether or not one approves of these outcomes, one cannot deny that some civil juries nullify and that sometimes they get away with it.

III. Jury Nullification in Criminal Trials

Just as the data fail to support any claims of rampant civil jury nullification, n54 little empirical evidence exists about its prevalence in the criminal context. n55 But no one seems to doubt that it occurs on occasion, **[*1619]** and the lack of supporting evidence has not deterred scholars from debating its merits. A number of commentators have defended criminal jury nullification as desirable, n56 while others have called it troublesome. n57 The debate often focuses on whether courts should inform juries of their undoubted and unreviewable power to acquit even though the evidence appears to leave no doubt about the defendant's guilt under the law as instructed by the judge. The literature displays a good deal of ambivalence about this practice, in part because some categories of nullification seem more defensible than others. n58 Over the last couple of centuries, jury nullification appears to have played some role in the unsuccessful prosecutions of persons accused of seditious libel in colonial America, assisting fugitive slaves before the Civil War, bootlegging in the midst of Prohibition, murdering civil rights activists, protesting the Vietnam War, harassing abortion clinic staff and clients, and assisting in the suicide of terminally ill patients. n59

[*1620]

A. Historical and Contemporary Practice

By the late Seventeenth Century, juries in England no longer had to fear official reprisals for their verdicts, so they could disregard trial judges' instructions about the law with some impunity. n60 In the American colonies, this tradition apparently developed into the recognition of an explicit law-finding function for the jury, n61 reflecting a judicial willingness to invite laymen to use their common sense in resolving questions of law in the era before the widespread codification of the criminal law or the professionalization of the bench. n62 Defenders of jury nullification point to this law-finding tradition as the basis for claiming a constitutional right to deviate from the dictates of the law.

The historical claim seems flimsy. Although Eighteenth Century juries were invited to find both law and facts and not feel bound by the interpretation of the law offered by trial judges, they were admonished to apply the law as they understood it. n63 The independence of jurors in this regard did not countenance deciding disputes in total disregard of the applicable common or other law. Although no one doubts that juries enjoyed a raw power to nullify when they returned a general verdict, particularly acquittals that judges lacked any power to review for error, it **[*1621]** does not mean that juries also had the right to disregard the law in reaching their decisions.

Courts today generally reject any suggestion that criminal juries enjoy a right to nullify. Federal courts have uniformly refused attempts by defense counsel to invite a jury to nullify, whether in argument or requested instructions, n64 and most state courts have done so as well. n65 Most courts will not instruct a jury about the sentencing consequences of their verdicts in criminal trials. n66 Even when jurors inquire about their ability to nullify, judges have scrupulously avoided elaborating on this power to disregard instructions, n67 and, more controversially, courts have excluded potential **[*1622]** nullifiers from the jury before or even during trial. n68 Finally, in reviewing any alleged errors that occurred at trial, appellate courts will treat such errors as harmless even if at retrial a new jury might have chosen to acquit the defendant by exercising its nullification power. n69

Typically, a federal judge will tell a jury that "the law as given by the Court in these and other instructions constitutes the only law for your guidance. It is your duty to accept and to follow the law as I give it to you even though you may disagree with the law." n70 Even so, judges concede that juries occasionally ignore instructions, and some courts recognize that the opportunity for such spontaneous nullification may serve a legitimate function in counteracting overzealous prosecution by public officials. n71 As Judge Learned Hand once explained, the jury "introduces a slack into the enforcement of law, tempering its rigor by the mollifying influence of current **[*1623]** ethical conventions." n72

B. Terms of the Debate

The opportunity to rebuff prosecutorial excesses may represent the most compelling rationale for allowing juries to acquit criminal defendants even if that means ignoring their instructions. Proponents sometimes analogize criminal jury nullification to the exercise of prosecutorial discretion not to charge persons who have violated the law or to the executive's power to pardon those convicted. n73 It also serves as a check against the possibility of biased or jaded judges. n74

In addition, nullification represents a form of lenity in response to criminal statutes that juries believe operate too harshly. n75 Historically, colonial juries provided a safeguard against oppressive legislation imposed by the English, and "not guilty" verdicts in criminal prosecutions had the effect of nullifying the operation of such laws. This original version of the rationale lost much of its force once popularly elected legislative assemblies became the source of statutes in the United States. Nonetheless, because laws inevitably leave gaps or lead to absurd (or palpably unjust) results when applied literally, jury nullification may serve a function similar to dynamic **[*1624]** statutory interpretation undertaken by the judiciary. n76 In addition, some commentators argue that routine nullification will alert legislators to the need for modifications in the law. n77

Thus, criminal jury nullification arguably serves as a counterweight to the potential excesses of officials in all three branches of government - executive, legislative, and judicial. Drawing on this foundation, some commentators have advocated routine nullification by juries in certain classes of cases, such as prosecutions brought against African-Americans accused of drug possession and other non-violent crimes. n78 More generally, one organization has sponsored legislative and grassroots efforts designed to educate potential jurors of their power to disregard trial judges' instructions. n79

Others have criticized criminal jury nullification as promoting lawlessness and inconsistent treatment of similar cases.

More than a century ago, the United States Supreme Court expressed the fear that with jury nullification "our government would cease to be a government of laws, **[*1625]** and become a government of men." n80 Critics question the democratic legitimacy of giving small panels of citizens the power to disregard the choices made by popularly elected officials and their agents. n81 Moreover, when juries refuse to apply an existing law, they may dissipate whatever pressure exists for modifications of that law by elected officials. n82 Finally, critics warn that nullification can work in both directions, inviting jurors to convict innocent but unsympathetic defendants as easily as to acquit guilty but sympathetic defendants, n83 though judicial review remains available as a safeguard against the former hazard. For these reasons, courts have attempted to minimize the likelihood that juries in criminal cases will intentionally disregard their instructions concerning the applicable law even if it is impossible to prevent such lawlessness altogether.

[*1626]

IV. Does Nullification Have Any Place in Civil Litigation?

Objections based on suspected jury nullification rarely arise on appeal from civil verdicts. The California Supreme Court entertained one such case in 1986, though only two of the concurring justices addressed the issue. In Ballard v. Uribe, n84 a personal injury plaintiff cross-appealed from a $200,000 judgment in his favor and sought a new trial based on allegations of juror misconduct. n85 Evidently, two members of the jury had taken the position that they would never award pain and suffering damages. In his concurring opinion, Justice Mosk recognized that nullification might occur, n86 but he did not regard it as misconduct and thought it unwise to allow appeals from final judgments based on the recollections of jurors about what transpired during their deliberations. n87 In her separate opinion dissenting in part, Chief Justice Bird explained that, whatever its status in criminal trials, jury nullification had no legitimate place in civil litigation, and she would have entertained the plaintiff's objection. n88

This Part addresses the question alluded to by Justices Mosk and Bird in several steps. First, it attempts to construct an argument in favor of civil jury nullification based on history and the U.S. Constitution, even though the historical claim cannot make the case for civil jury nullification any more than it has for its counterpart in criminal litigation. Second, this Part crafts a structural defense of the practice by demonstrating that at least some types of civil litigation sufficiently resemble criminal prosecutions so that any normative defense of jury nullification might apply equally in both settings. Nonetheless, certain essential differences make whatever justification exists for criminal jury nullification even less compelling in the context of resolving private disputes. Third, this Part evaluates the arguments for and against civil jury nullification in its own right, revisiting the history of the contributory negligence defense. Because the freestanding normative claims **[*1627]** in favor of civil jury nullification prove to be unconvincing, this Part finally suggests a couple of procedural devices that courts could use to reduce the risk of juries intentionally disregarding the applicable law.

A. Historical Parallels

As previously explained, the historical argument favoring criminal jury nullification is not particularly strong. n89 The historical argument for civil jury nullification does not appear to be any weaker. In the years before ratification of the Bill of Rights, "several eminent American lawyers and statesmen famously contended that juries had the right - not just the power - to decide the law as well as the facts in civil cases as well as criminal." n90 To the extent that the practice of jury law-finding existed in both criminal and civil cases in 1791, n91 this tradition should inform the interpretation of both the Sixth Amendment right to a jury in criminal trials and the Seventh Amendment right to a jury in civil cases. n92

In fact, the arguments made by those who urged adoption of the Seventh Amendment mirror the arguments made by today's proponents of jury nullification in the criminal context: Civil juries would protect private parties against the application of unjust laws, overreaching by the government when it appears as a litigant, and biased federal judges. n93 "The **[*1628]** inconveniences of jury trial were accepted precisely because in important instances, through its ability to disregard substantive rules of law, the [civil] jury would reach a result that the judge either could not or would not reach." n94 In the years immediately before and after the American Revolution, creditors - typically British subjects or loyalists - fared poorly before juries when they sued to collect debts, and the Seventh Amendment was designed in part to ensure that debtors would have the opportunity to seek jury nullification. n95 In addition, civil juries in Massachusetts were expressing their strong abolitionist sentiments at around the same time in the context of tort and property cases involving slaves. n96

The first formal expression of the idea of jury independence by the United States Supreme Court appeared in 1794, in the context of a civil case tried under the Court's original jurisdiction. Chief Justice John Jay gave the following jury

instruction on behalf of the Court:

It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. n97

[*1629] This willingness to let juries decide questions of law did not, however, last long. It first fell out of favor in civil cases, as commercial interests demanded greater predictability. n98 As one commentator explained, critics at the time argued that "damage suits invariably went in favor of individuals and against corporations. Many influential members of the bar evidently objected to the jury because it would be hostile to their clients and sympathetic to poor litigants." n99 This concern became particularly pronounced in the middle of the Nineteenth Century with the advent of the Industrial Revolution and accompanying expansion of the railroads in this country. n100

In criminal cases, the practice lasted a few decades longer, n101 and the **[*1630]** opportunity to acquit by a general verdict means that it continues even today, though without the blessing of the courts. n102 In 1895, however, the Supreme Court's resolution of a criminal case apparently put to rest the notion that juries enjoyed any law-finding function in the federal courts. n103 Two years later, the Court began to reject Seventh Amendment challenges to a variety of mechanisms for taking cases away from juries in civil trials, n104 thereby emphasizing that the Constitution preserves only the jury's fact-finding and law-applying roles. n105 Notably, England no longer uses juries in most civil cases. n106

[*1631] Although the American tradition of law-finding by jurors had fallen out of favor by the end of the Nineteenth Century, in 1919 the United States Supreme Court rejected a federal due process challenge to a state constitutional provision that preserved a law-finding function for civil juries on certain issues in tort litigation. n107 Moreover, the federal constitutional commitment to civil juries has created difficulties in diversity cases where states would not provide for a jury trial, precisely because of an intuition that this procedural choice may well prove to be "outcome determinative." n108 The Court seemingly recognizes that civil juries appropriately may do more than find facts and mechanically apply the law as instructed by the trial judge, but it has neither elaborated on the nature of this additional role nor elevated it to constitutional status.

In sum, whatever the contours of the civil jury's law-finding role at the time of ratification, it competed with a tradition of judicial control over which cases would get to a jury for resolution. n109 Thus, Professor Roger Kirst **[*1632]** has conceded that civil jury nullification occurred in the late Eighteenth Century, but he disputes the suggestion that the Seventh Amendment enshrined this practice because judges could take cases away from juries before or after trial if no dispute existed over the facts. n110 The effectiveness of these jury-control devices remains an open question, as discussed in the next section, but their use does weaken any Seventh Amendment claim premised on historical practice.

B. Similarities and Differences

Jury nullification is less likely to succeed in the civil than in the criminal litigation context. First, judges can grant judgment as a matter of law to either party involved in civil litigation if the evidence would not allow the fact-finder to conclude otherwise, n111 while prosecutors could never seek summary judgment or a directed verdict in a criminal trial. n112 Some commentators have pointed to this distinction as the basis for concluding that, while the civil jury now serves primarily a fact-finding function, the criminal jury retains a somewhat broader decisionmaking role. n113 In **[*1633]** addition, as mentioned at the outset of this Article, such opportunities for judicial intervention (or post-trial correction) have led several scholars entirely to discount concerns about civil jury nullification. n114

Second, given the availability of special verdict forms or interrogatories in civil trials, n115 jury nullification is less likely to occur in such litigation than in criminal trials where general verdicts predominate. n116 These devices help steer the jury's deliberations more reliably than instructions alone, and they reveal more about possible missteps in decisionmaking that will trigger judicial correction. n117 Thus, unlike a simple "not guilty" verdict, special verdicts and interrogatories make it both less likely that civil juries will disregard their instructions and more likely that the judge will notice in case they do. Although courts use these devices only infrequently now, perhaps because jury verdicts become more vulnerable to judicial correction, the final section urges greater use of special verdicts as one method for combating the risk of civil jury nullification.

Third, civil litigation offers greater opportunities for judicial correction, n118 whether because of a serious weakness in the factual record or because of inconsistencies in a verdict. n119 As one court explained in the course of holding that a judge had the power to override the jury if it returned an inconsistent verdict, "the civil jury has no power to dispense clemency, and verdicts in the teeth of the evidence may be set right." n120 **[*1634]** Unlike prosecutors who have no opportunity to challenge acquittals, n121 both plaintiffs and defendants can request post-trial or appellate relief.

Even so, heightened judicial supervision does not necessarily protect parties from lawless juries. Because of significant judicial deference to fact-finding by juries, n122 civil litigants cannot count on subsequent correction of verdicts founded on jury nullification. n123 This results in part from the fact that trial judges rarely utilize special verdicts or interrogatories. n124 Judge Jerome Frank, undoubtedly one of the most outspoken critics of juries, wrote in one opinion that:

when a jury returns an ordinary general verdict, it usually has the power utterly to ignore what the judge instructs it concerning the **[*1635]** substantive legal rules, a power which, because generally it cannot be controlled, is indistinguishable for all practical purposes, from a "right." ... Indeed, some devotees of the jury system praise it precisely because, they say, juries, by means of general verdicts, can and often do nullify those substantive legal rules they dislike n125

Courts review verdicts with the perhaps heroic assumption that juries understand and dutifully adhere to their instructions. n126 Post-trial motions generally cannot make reference to juror affidavits or interviews offered to impeach a verdict. n127 Even when courts express serious misgivings about delegating complicated and profoundly important questions to civil juries, they claim impotence to second-guess the fact-finder, n128 though recent empirical research casts some doubt on the proposition that appellate courts hesitate to upset jury verdicts for plaintiffs. n129

[*1636] The undoubted differences between civil and criminal litigation should not be overstated. The government may appear as the plaintiff in civil cases, in seeking monetary sanctions authorized by statute, n130 or in seeking damages at common law - just think of the recent litigation undertaken by the state attorneys general and now the federal government against the tobacco industry to recoup health care expenditures for smokers' illnesses. n131 In many cases, of course, the tables are turned and governmental entities become the targets of litigation brought by private parties. n132 **[*1637]** Interestingly, Congress opted in favor of bench trials when it partially waived federal sovereign immunity in the Federal Tort Claims Act. n133 Presumably, this reflects a concern that juries will have little sympathy for the federal government when it appears in the capacity of a defendant with a very deep pocket. n134

Even if the government does not participate as a party, civil litigation may at times more closely resemble prosecutorial efforts. Several statutes now allow citizen suits against persons who violate environmental and other laws, n135 and, even in actions based on common law claims, punitive damage awards may serve as a stand-in for criminal fines. n136 Indeed, the assessment of punitive damages has become a flashpoint for debates about the appropriate role of civil juries. n137 Moreover, intentional torts such as assault and battery **[*1638]** represent civil actions for criminal misdeeds. n138 Finally, even if the rationales for jury nullification in criminal litigation as a check on the excesses of executive or legislative officials seem attenuated in the arena of civil litigation, n139 one might still take the position that independent jurors can serve as a limited counterweight to judges who might harbor biases against certain parties in both civil and criminal litigation.

As with the historical argument in defense of civil jury nullification, the structural argument can point to a number of parallels between civil and criminal trials. To the extent that the normative claims made by proponents of criminal jury nullification seem compelling, one also can defend jury freedom to disregard the law in at least some types of civil litigation. But because of the weaknesses in the historical and normative defenses of criminal jury nullification and the undoubted differences between civil and criminal litigation, nobody appears to support civil jury nullification as a general proposition. Nonetheless, as explained in the next section, a number of scholars have come to defend limited pockets of jury lawlessness in civil litigation. Perhaps one can justify the practice in a fashion that does not depend on the outcome of the debate over criminal jury nullification.

C. Assessing the Normative Claim

No one seems to defend civil jury nullification as such, but there is a strong undercurrent of support for jury departures from instructions. Unlike the debate in the criminal context, which focuses on whether judges should instruct juries of

their power to nullify, no one today contends that judges should invite civil juries to disregard their instructions concerning the applicable law. In fact, a few of the bills introduced in state legislatures by supporters of the Fully Informed Jury Association had proposed instructing jurors of their nullification power in both civil and criminal cases, but the **[*1639]** inclusion of civil litigation attracted significant criticism and no apparent rebuttal from proponents of these legislative efforts. n140 Instead, the nascent debate over civil jury nullification asks whether judges should do more to prevent rule departures by juries.

Many commentators applaud the jury's ability to reach equitable decisions in civil cases. n141 Although critics complain about an apparent escalation in the size of compensatory and punitive damage awards, legal institutions have asked juries to make these assessments - which often pose difficult value judgments - with little or no guidance. n142 Perhaps juries **[*1640]** should not have so much discretion in setting damages, but this Article focuses instead on the logically prior question of the jury's role in deciding questions of liability. Arguments favoring jury resolution of tort issues, in particular about what constitutes reasonable conduct under the circumstances, n143 sometime allude to the jury's capacity to serve as an instrument of social change. n144 Consistent with Professor Saks' claim about judicial nullification, n145 the opportunity that judges give juries to bend or misapply more determinate rules may provide a half-step toward the alteration of those rules when appropriate. n146 Alternatively, jury nullification may reflect a triumph of "unwritten law" over the written law. n147

[*1641] For instance, several commentators have applauded widespread jury nullification of the contributory negligence defense in tort as providing the impetus for the eventual shift to a regime of comparative negligence. n148 Even if trial judges routinely corrected such "mistaken" verdicts, the frequency of these nullifying jury verdicts still would provide a valuable signal to decisionmakers that existing tort doctrine did not comport with widely shared notions of fairness. n149 Although a number of courts have adjusted the common law to reflect such behavior by juries in tort cases, in part on the basis of this pattern of jury decisions, n150 legislation in most states has not gone quite so far, creating instead modified comparative negligence rules under which the plaintiff's contributory negligence still may operate as a complete bar to recovery if it surpasses a certain threshold. n151 In fact, some of the codified limitations apparently responded to a fear that, under the more logical pure comparative negligence rule, n152 juries would actually enjoy greater latitude to disregard instructions to apportion damages according to each party's relative fault for an injury. n153 If juries continue to nullify when **[*1642]** made aware of such limitations, they register a lack of respect for a political compromise struck by the duly elected members of the state legislature. n154

A pair of researchers who have studied the issue extensively found no evidence for the widespread suspicion that juries impose unjustified liability on "deep pocket" tortfeasors, but they also concluded that juries appropriately hold corporate defendants to a higher standard of care than individual defendants charged with identical acts of negligence, n155 a distinction that appears nowhere in the case law. n156 Perhaps juries react to the presumed asymmetries in access to information and litigation resources that exist between corporate tortfeasors and the victim in much the same way that they respond to the differences between government prosecutors and the accused in criminal cases.

[*1643] Along similar lines, some have applauded the failure by civil juries to abide by causation instructions as appropriately shifting the burden of proof to industries producing toxic chemicals without adequate safety testing. n157 One commentator has even suggested, though evidently half in jest, that nullification of this sort may have the desirable effect of leading to the establishment of more rational non-tort mechanisms for compensation and risk regulation. n158 In fact, some legal historians have credited jury failures to abide by the fellow-servant rule and assumption of risk defense for helping to convince employers to support the adoption of worker's compensation laws. n159

Other commentators have suggested that, even if juries systematically favor plaintiffs, any such bias would help provide the appropriate signal to **[*1644]** tortfeasors who otherwise might be under-deterred given the fact that only a small percentage of victims ever pursue litigation. n160 Another scholar recently concluded that jurors in tort litigation render verdicts that approximate the correct results under the prevailing legal standards even though the reasons for their decisions may deviate from what the law regards as relevant. n161

One striking feature of this barely perceptible debate is the selective defense offered by proponents of civil jury nullification. Unlike criminal jury nullification, no one defends it as a general matter; instead, some commentators applaud it in cases where they themselves take issue with the applicable law, a position that parallels suggestions for the strategic use of criminal jury nullification to benefit African-American defendants accused of nonviolent crimes or anti-abortion protesters accused of harassing patients and clinic staff. The problem, of course, with a selective defense of only "benevolent" (or at least innocuous) forms of jury nullification is that it rests entirely in the eye of the beholder. n162

Unlike criminal litigation, which is structured to err on the side of acquittals, n163 civil trials usually pit private parties against one another without favoring either side as a procedural matter. n164

[*1645] If a particular common law doctrine or statute seems inappropriate, jury nullification offers litigants only partial and inconsistent relief. n165 For instance, Dean William Prosser offered the following negative assessment of one such widespread practice in tort litigation half a century ago:

Every trial lawyer is well aware that juries often do in fact allow recovery in cases of contributory negligence, and that the compromise in the jury room does result in the diminution of the damages because of the plaintiff's fault. But the process is at best a haphazard and most unsatisfactory one. There are still juries which understand and respect the court's instructions on contributory negligence, just as there are other juries which throw them out of the window and refuse even to reduce the recovery by so much as a dime. n166

Whether or not jury nullification systematically favors plaintiffs and might promote defensible ends in particular types of cases, it remains an essentially arbitrary and surreptitious process. n167 For instance, idiosyncratic factors may inappropriately come to influence judgments about liability. n168 Nullification **[*1646]** also creates uncertainty for those seeking to conform their conduct to what the law requires, which in turn generates wasteful litigation. n169

Thus, civil jury nullification might violate norms of equal treatment and fair notice embedded in the Due Process Clause. n170 It more closely resembles a form of nullification in criminal trials that even the proponents of jury leniency rightly abhor – namely, convicting someone in contravention of the applicable criminal law. In the course of invalidating one state's procedure giving the jury unreviewable discretion to award punitive damages, the Supreme Court rejected a defense of this arrangement premised on the early tradition of letting juries resolve questions of law:

The criminal cases do establish – as does our practice today – that a jury's arbitrary decision to acquit is unreviewable. There is, however, a vast difference between arbitrary grants of freedom and arbitrary deprivations of liberty or property. The Due Process Clause has nothing to say about the former, but its whole purpose **[*1647]** is to prevent the latter. n171

These features of civil jury nullification differentiate it from its counterpart in the criminal context, where the usual "victim" of a nullifying jury (namely, the prosecutor) can claim no due process rights for the government as a party. Unlike governmental entities, corporations are entitled to the full protections of due process. n172

Just as plaintiffs must establish each element of a tort claim if they wish to recover damages, prosecutors must establish each element of a crime, n173 putting aside for the moment the higher burden of proof applied in the latter context. Imagine that juries in criminal trials began commingling weak evidence on one of the required elements with overwhelming evidence on another in the course of convicting a defendant. As with civil jury nullification, judges will not always manage to correct such verdicts. Presumably, no one would defend such a development even if they might choose to modify the criminal law to drop the commingled element.

Due process contemplates a commitment to the rule of law as well as certain procedural forms. Although we may sacrifice the rule of law in acquitting guilty defendants when necessary to do particularized justice in a criminal trial, it makes less sense to do so when such nullification works an injustice on the opposing party in a civil lawsuit. Due process does not independently ensure a right to a jury trial, n174 and one federal appellate court has held that due process rights may override the Seventh **[*1648]** Amendment guarantee of a jury trial when a complex case might lead to an erroneous verdict because of difficulties with jury comprehension. n175 Presumably, a trial judge could not grant a plaintiff's request for a jury nullification instruction in a civil case without thereby triggering a serious constitutional objection from the defendant. n176

For similar reasons, the Supreme Court has withdrawn certain factual questions from the jury in defamation cases. If the trial judge concludes that the plaintiff is a "public figure," then, in order to accommodate the First Amendment rights of the speaker, the jury can award damages only if it finds that the defendant acted with actual malice. n177 If a jury could disregard the trial judge's instruction and apply a more generous liability standard in order to do justice in a particular case, it would nullify an important constitutional protection extended to this class of defendants.

Finally, the claim that jury nullification promotes law reform that will benefit similarly-situated litigants is hardly obvious. On the contrary, if jury nullification regularly softens the impact of excessively harsh rules, it may delay the adoption of reform measures. n178 Conversely, it may backfire by **[*1649]** prompting reforms that defenders of jury decisionmaking will deplore. As previously mentioned, the modified comparative negligence rule retains some of the harsh consequences of the contributory negligence defense in part as a recognition that courts cannot always trust juries to apportion honestly under a pure comparative negligence test. n179 Jury tendencies to commingle weak evidence of causation with strong evidence of culpability have not prompted the doctrinal reforms favored by those who applaud this type of nullification. Courts have not, for instance, shifted the burden of proof on general causation to the defendants in toxic tort litigation. On the contrary, while the verdicts in these cases may go undisturbed, courts have reacted by clamping down on rules for the admissibility of expert evidence (and increasingly insisting that only epidemiological evidence counts), n180 thereby depriving jurors of potentially relevant evidence or taking cases away from juries that in the past would have gone to trial. Whether or not one favors this development, it should give some pause to those who defend jury independence as promoting enlightened doctrinal reforms.

Unlike criminal statutes that must proscribe misconduct with great specificity, n181 negligence claims often invite juries to define the standard of reasonable conduct under the circumstances. n182 Some defend criminal jury nullification as granting the same power to apply community values that civil juries already have when they resolve tort litigation under a vague negligence standard, n183 adding that an act of jury nullification sets no **[*1650]** precedent for subsequent applications of a criminal statute. The same need for flexibility does not arise in civil litigation where jurors already define the standard of care in many cases as a matter of course. Moreover, even if they set no precedent, civil verdicts have an undoubted regulatory effect that differs in important respects from criminal acquittals. n184

Debates about the proper allocation of power between judges and jurors in tort litigation continue, and some courts recently have moved away from broad formulations of the duty of care in order to reduce the extent of jury discretion. n185 Perhaps courts or legislatures need to craft rules that provide for exceptions or opt for standards that invite flexible application by juries. n186 It's one thing to leave questions for juries, but it's another to **[*1651]** tolerate unpredictable jury intrusions on issues that have not been left to them. n187 Properly conceived, civil juries do not dispense equity, n188 and they do not provide a mechanism for sanctioning unreasonable behavior that did not in fact cause injury to anyone. n189 Even if everyone agrees that the old contributory negligence defense operated too harshly, and therefore invited civil jury nullification, does anyone believe that requiring the plaintiff to prove causation or negligence before recovering damages in tort suffers from a similar illogic or obvious unfairness? n190 Perhaps courts or legislatures should relieve plaintiffs of some of these burdens, but a single jury would have no basis for making such a momentous departure from traditional doctrine.

[*1652] Thus, nullification occurs when juries intentionally disregard their instructions concerning subjects that legislators or judges have withdrawn from the fact-finder's domain in litigation. n191 The objection to criminal jury nullification as undemocratic seems even more powerful in the context of modern civil litigation. n192 Unlike the relatively simple and straightforward collision cases that tort law has always managed to address, nowadays high stakes class action lawsuits heard by a single panel of a dozen or fewer jurors may imperil entire industries. n193 When criminal juries occasionally decide to acquit technically guilty defendants, they do not act in a legislative capacity and effectively rewrite criminal statutes, but it seems harder to accept the societal implications of the rare multi-million (or even billion) dollar verdict based on a single jury's sense of the equities rather than conscientious adherence to the trial judge's instructions concerning the applicable legal standards.

[*1653]

D. Combating Civil Jury Nullification

A variety of mechanisms exist to improve decisionmaking by juries, though most of these seek to reduce the chance of misunderstanding rather than the intentional deviation from instructions. n194 Some scholars have advocated that courts allow jurors to take notes during trial and otherwise become more actively engaged in the proceedings. n195 Others have emphasized the need for clearer instructions. n196 If one wants to minimize the possibility of civil jury nullification, however, reforms would have to attempt to reduce the occasions for the exercise of unreviewable discretion.

In addition to more vigorous screening by trial judges before and after the fact, the increased use of special verdict forms or general verdicts with interrogatories could enhance the transparency of the jury's decisionmaking process. n197 In fact, a few commentators have noted that trial judges can use such devices to combat civil jury nullification. n198

Dean Prosser argued that **[*1654]** special verdicts or interrogatories provided the best mechanism for reining in "the unreliable and irresponsible jury" under a system of comparative negligence, n199 and he readily conceded that this would overwhelmingly operate in favor of defendants. n200 Some commentators have objected, however, that such tools inappropriately interfere with the role of the jury and its ability to do justice in the individual case. n201

Along similar lines, judges might decide to bifurcate by trying causation before liability. n202 Splitting up trials in this fashion facilitates sequenced decisionmaking by juries, and courts originally viewed it as a mechanism for saving time by resolving dispositive issues without the necessity of a full trial. n203 Studies of the procedure demonstrate that defendants prevail in bifurcated trials more often than in unitary trials, n204 which suggests that jury **[*1655]** nullification occurs more often in unitary trials and argues for the value of issue separation. n205 A survey of trial judges found support for the belief that bifurcation improves fairness, n206 and "there is evidence that jurors hearing bifurcated cases are less likely to trade off weak causal evidence against strong evidence on liability or damages." n207

As with special verdicts and interrogatories, some commentators object that trial bifurcation intrudes unduly on the civil jury's role, n208 but that brings us back to the central question of whether a jury's role should include **[*1656]** the right to deviate from the law. Opponents of bifurcation argue that evidence of reduced success by plaintiffs demonstrates that the technique results in unjust verdicts, and they point to examples such as the litigation involving Bendectin: when juries resolved questions of causation separately, they held for the defendant, but, when juries heard these cases in unitary trials, they often returned multi-million dollar damage awards for plaintiffs suffering from birth defects. n209

This record suggests precisely the opposite proposition, namely, that juries in unitary trials inappropriately ignored the fact that plaintiffs could not establish any causal link between Bendectin and limb reduction birth defects. n210 The judges involved in the unitary Bendectin trials thought so, whether in resolving bench trials, ruling on post-trial motions, or reviewing judgments on appeal. n211 Although these cases provide powerful evidence of civil jury nullification (and/or jury confusion), they also suggest that judges can correct such obviously mistaken verdicts, even if only belatedly. n212 As previously suggested, however, nullification verdicts may go undisturbed in closer or lower stakes cases.

No matter how sympathetic the plaintiff, a judgment against the drug manufacturer under such circumstances highlights the trouble with civil jury nullification. n213 Such lawless verdicts have serious societal effects: Bendectin, which the Food and Drug Administration (FDA) continues to regard as safe **[*1657]** and effective, is no longer available to patients even though it served an important therapeutic role, n214 and other pharmaceutical companies have gotten the clear message that marketing any drugs for the treatment of conditions during pregnancy will attract tort litigation because some juries will not overly concern themselves with questions of causation. Trial judges did keep several Bendectin lawsuits from reaching juries, and ultimately all of the verdicts for the plaintiffs were reversed on appeal, but the expense of litigating these cases made for a hollow victory in the end. n215 More rigorous pre-trial screening and greater use of special verdicts or bifurcation may have protected the "accused" in these cases from jury lawlessness. n216

At present, judges generally reserve these mechanisms for channeling or compartmentalizing jury deliberations for extremely complex cases. Of course, if jury nullification happens only infrequently, such mechanisms may not be worth the trouble. Perhaps future research can help pinpoint certain types of cases that pose heightened risks of jury lawlessness and might, therefore, justify the use of special verdicts or bifurcation.

V. Conclusion

When civil juries nullify, in the sense of intentionally ignoring the trial judge's instructions, they engage in conduct that differs in important respects from criminal juries that acquit defendants who have in fact violated the law. This Article does not mean to suggest that juries in civil cases are out of control, casually disregarding their instructions in order to do justice, just as no serious commentator suggests that juries routinely do so in criminal cases. It would be equally implausible, however, to argue that it never happens. The record in cases involving contributory negligence leaves little doubt that juries sometimes deviate from what the law would require. A more recent example from tort litigation, though less well documented, **[*1658]** involves the apparent willingness of some juries to overlook plaintiffs' failures to prove causation in cases where the defendants appear to have acted unreasonably. Unlike acquittals, of course, trial and appellate judges have opportunities to intercede in these civil cases, but in practice they may find it difficult to do so.

The fact that juries in criminal cases rarely engage in nullification has not discouraged scholars from evaluating the merits of this occasional practice. Without suggesting any resolution, this Article has reviewed that extensive debate as a prelude to considering the possible arguments for and against civil jury nullification. Because no one has directly made

the case in favor of jury defiance of instructions in civil litigation, this Article attempted to construct historical, structural, and normative claims that might support the recognition of a law-dispensing power for civil juries.

Although a number of scholars praise aspects of unguided lay decisionmaking in this context, the case for civil jury nullification is much weaker than in the criminal arena. Concerns about protecting citizens against oppressive government action do not arise in wholly private lawsuits. Although the beneficiaries of nullification may applaud the civil jury's function in softening the application of seemingly harsh rules, the other parties to the lawsuit will have legitimate complaints that nullification sacrifices their due process rights. In addition, when a jury chooses to disregard the laws adopted by legislatures or courts, it undemocratically usurps the lawmaking function lodged in those institutions. For these reasons, trial and appellate judges should more readily embrace tools such as special verdicts and bifurcation in order to minimize juries' opportunities to deviate from their instructions, at least in those classes of cases presenting a particular risk of nullification.

FOOTNOTES:

n2. See, e.g., Richard B. Stewart, Regulatory Compliance Preclusion of Tort Liability: Limiting the Dual-Track System, *88 Geo. L.J. 2167, 2174 (2000)* (referring, without elaboration, to the problem of jury "nullification" in tort litigation); see also infra Part II (elaborating on instances of civil jury nullification).

n3. See Lawrence M. Friedman, Some Notes on the Civil Jury in Historical Perspective, *48 DePaul L. Rev. 201, 209 n.59 (1998)* ("There is a large literature on nullification, ... but, as far as I can tell, all of this concerns criminal trials only."). Professor Friedman offered the following thoughts on the subject: "If nullification is so awful, why is it that the whole system is set up in such a way that a jury that wanted to nullify can do so very easily? In fact, what is impossible is detecting or controlling nullification." *Id. at 209;* see also *id. at 209-10* (suggesting that civil jury nullification is not necessarily a bad thing because it allows for flexibility in the application of rules).

n4. See Darryl K. Brown, Jury Nullification Within the Rule of Law, *81 Minn. L. Rev. 1149, 1150 & n.3 (1997)* ("I use nullification here in its narrow and traditional sense, which refers only to criminal court verdicts of acquittal... . Civil jury verdicts do not nullify law, because their verdicts, whether for or against liability, can be reversed."); Anne Bowen Poulin, The Jury: The Criminal Justice System's Different Voice, *62 U. Cin. L. Rev. 1377, 1386 (1994)* ("Unlike criminal verdicts, civil verdicts must comport with the law; nullification is not an aspect of civil litigation.").

n5. See Roscoe Pound, Law in Books and Law in Action, *44 Am. L. Rev. 12, 18 (1910)* ("Jury lawlessness is the great corrective of law in its actual administration."); John H. Wigmore, A Program for the Trial of Jury Trial, 12 J. Am. Judicature Soc'y 166, 170 (1929) ("The jury, in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case. Thus the odium of inflexible rules of the law is avoided ... .").

n6. See Jerome Frank, Law and the Modern Mind 176-78, 304-08 (1930); see also id. at 172 ("The general-verdict jury-trial, in practice, negates that which the dogma of precise legal predictability maintains to be the nature of law. A better instrument could scarcely be imagined for achieving uncertainty, capriciousness, lack of uniformity, disregard of former decisions - utter unpredictability."); Charles E. Clark & Harry Shulman, Jury Trial in Civil Cases - A Study in Judicial Administration, *43 Yale L.J. 867, 884 (1934)* (criticizing civil juries as inefficient).

n7. Developments in the Law - The Civil Jury, *110 Harv. L. Rev. 1408, 1419-20 (1997)* [hereinafter

Developments] ("As a formal matter, however, the nullification power of modern juries (criminal or civil) is just that. The jury's ability to ignore the law is analytically distinct from the (now defunct) power to say what the law is."); see also *id. at 1432* (adding that "procedural weapons" such as directed verdicts, judgments notwithstanding the verdict, and orders for new trials have curtailed opportunities for civil jury nullification).

n8. See Irwin A. Horowitz & Thomas E. Willging, Changing Views of Jury Power: The Nullification Debate, 1787-1988, 15 Law & Hum. Behav. 165, 176 (1991) ("For a civil jury to have nullification power, the parties to the suit have to be able to insist on a jury trial free of judicial control and resulting in a general verdict."); Nancy S. Marder, The Myth of the Nullifying Jury, *93 Nw. U. L. Rev. 877, 881 (1999)* ("At the most general level, jury nullification occurs when jurors choose not to follow the law as it is given to them by the judge. Theoretically, this could occur in a civil or criminal case." (footnotes omitted)); *id. at 881-82 & n.14, 915* (adding, however, that trial judges exercise greater control over civil jury verdicts, and therefore focusing only on acquittals in criminal cases); Aaron T. Oliver, Jury Nullification: Should the Type of Case Matter?, Kan. J.L. & Pub. Pol'y, Winter 1997, at 49, 64 ("Jury nullification probably does occur in some civil cases. However, it does not appear to be a major problem."); Alan W. Scheflin & Jon M. Van Dyke, Merciful Juries: The Resilience of Jury Nullification, *48 Wash. & Lee L. Rev. 165, 166 n.7 (1991)* (declining to "discuss two evolving questions [including] the application of jury nullification in civil trials"); *id. at 177* ("Application of jury nullification in civil cases is less pressing an issue because the judge always maintains the authority to alter or reject the verdict... . Discussions of jury nullification in the context of civil cases thus tend to be rare."); see also Stephen C. Yeazell, The New Jury and the Ancient Jury Conflict, *1990 U. Chi. Legal F. 87, 105* ("The [civil] jury remains a potentially volatile voice of popular sentiment ... . The jury's ability to turn this sentiment into judgments is limited by the judge's power to enter judgments notwithstanding the verdict and to order new trials, but the jury still enjoys a significant discretionary power.").

n9. See Marder, supra note 8, at 882-84 (distinguishing nullification from mistake); see also Dale W. Broeder, The Functions of the Jury: Facts or Fictions?, *21 U. Chi. L. Rev. 386, 412 (1954)* ("While it is generally recognized that juries often return verdicts contrary to law, we cannot be sure whether this results from conscious law-dispensing or pure bungling."); Robert P. Charrow & Veda R. Charrow, Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions, *79 Colum. L. Rev. 1306, 1359 (1979)* ("If many jurors do not properly understand the laws that they are required to use in reaching their verdicts, it is possible that many verdicts are reached either without regard to the law or by using improper law."); Phoebe C. Ellsworth, Jury Reform at the End of the Century: Real Agreement, Real Changes, *32 U. Mich. J.L. Reform 213, 222 (1999)* ("Social science research provides ample evidence that the greatest weakness of juries is their lack of understanding of the law. Most surprising jury decisions are not the result of a careful analysis of the law and a principled - or even an unprincipled - decision to ignore it, but of an inability to figure out what the instructions mean in the first place." (footnote omitted)); Horowitz & Willging, supra note 8, at 177 ("The [civil] jury cannot directly nullify law it does not understand."); Christopher N. May, "What Do We Do Now?": Helping Juries Apply the Instructions, *28 Loy. L.A. L. Rev. 869, 872-73 (1995)* (same).

n10. See infra notes 95-99 and accompanying text.

n11. Most judges express confidence in civil juries and concur with the accuracy of their verdicts. See David W. Broeder, The University of Chicago Jury Project, *38 Neb. L. Rev. 744, 750 (1959);* Paula L. Hannaford et al., How Judges View Civil Juries, *48 DePaul L. Rev. 247, 248-50 (1998);* The View from the Bench, Nat'l L.J., Aug. 10, 1987, at S8; see also Michael J. Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System - And Why Not?, *140 U. Pa. L. Rev. 1147, 1235-39 (1992)* (documenting high rates of agreement between judges and juries about appropriate verdicts). But cf. Richard A. Posner, The Problems of Jurisprudence 208 (1990) (attributing these inflated rates of judicial confidence in juries to efforts at "resolving cognitive dissonance"). Lawyers express somewhat lower confidence. See R. Perry Sentell, Jr., The Georgia Jury and Negligence: The

View from the Trenches, *28 Ga. L. Rev. 1, 120-21* tbls.13 & 14 (1993).

n12. See Clarence Morris & C. Robert Morris, Jr., Morris on Torts 34 (2d ed. 1980) ("Of course jurors sometimes do not understand their instructions and sometimes accidentally or intentionally ignore them."); Friedman, supra note 3, at 210-11 ("Were there unwritten tort laws? Almost certainly the answer is yes. But it would take patient research, in long buried documents, to determine the extent to which civil juries enforced unwritten laws."); see also Abram Chayes, The Role of the Judge in Public Law Litigation, *89 Harv. L. Rev. 1281, 1303 n.93 (1976)* ("The impulse that accounts for the volume of personal injury litigation is not the demand of the parties for an adjudication under law, but the plaintiff's desire for access to a jury where the governing legal rules are at odds with popular sentiment." (emphasis added)).

n13. See generally Walter F. Abbott et al., Jury Research: A Review and Bibliography (1993); Stephen Daniels & Joanne Martin, Civil Juries and the Politics of Reform 60-198 (1995); Shari S. Diamond & Jonathan D. Casper, Understanding Juries (2000); Valerie P. Hans & Neil Vidmar, Judging the Jury (1986); Reid Hastie et al., Inside the Jury (1983); Saul M. Kassin & Lawrence S. Wrightsman, The American Jury on Trial: Psychological Perspectives 12-19 (1988); Robert J. MacCoun, Getting Inside the Black Box: Toward a Better Understanding of Civil Jury Behavior (1987); Mark A. Peterson, Civil Juries in the 1980s: Trends in Jury Trials and Verdicts in California and Cook County, Illinois (1987); Robert MacCoun, Inside the Black Box: What Empirical Research Tells Us About Decisionmaking By Civil Juries, in Verdict: Assessing the Civil Jury System 137 (Robert E. Litan ed., 1993) [hereinafter Verdict].

n14. See Bob Van Voris, Voir Dire Tip: Pick Former Juror, Nat'l L.J., Nov. 1, 1999, at A1, A6. Although the jury nullification question failed to distinguish between civil and criminal cases, the entire survey instrument entailed both types of litigation. Id.

n15. See Peter Aronson et al., Jurors: A Biased, Independent Lot, Nat'l L.J., Nov. 2, 1998, at A1 ("More than 75 percent of the 1,012 people questioned said that as jurors, they would do what they believed was right regardless of what a judge says that the law requires.").

n16. See Phoebe C. Ellsworth, Are Twelve Heads Better Than One?, Law & Contemp. Probs., Autumn 1989, at 205, 206, 223 (concluding that the deliberative process is important though only minimally useful in grappling with confusing jury instructions about the law); Richard Lempert, Juries, Hindsight, and Punitive Damage Awards: Failures of a Social Science Case for Change, *48 DePaul L. Rev. 867, 870-71, 877, 885 (1999);* Philip G. Peters, Jr., Hindsight Bias and Tort Liability: Avoiding Premature Conclusions, *31 Ariz. St. L.J. 1277, 1300-03 (1999).* Note, however, that bench testing of pattern jury instructions may rely on the responses of individual mock jurors. See Harvey S. Perlman, Pattern Jury Instructions: The Application of Social Science Research, *65 Neb. L. Rev. 520, 528-31 (1986);* see also Brian H. Bornstein, The Ecological Validity of Jury Simulations: Is the Jury Still Out?, 23 Law & Hum. Behav. 75, 87-88 (1999) (defending the use of mock juries in research).

n17. See Marder, supra note 8, at 885-87 (arguing that only juror interviews can provide reliable proof of nullification). See generally Abraham S. Goldstein, Jury Secrecy and the Media: The Problem of Postverdict Interviews, *1993 U. Ill. L. Rev. 295;* Nancy S. Marder, Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors, *82 Iowa L. Rev. 465 (1997);* Note, Public Disclosures of Jury Deliberations, *96 Harv. L. Rev. 886 (1983).*

n18. See, e.g., Steven Brill, Inside the Jury Room at the Washington Post Libel Trial, Am. Law., Nov. 1982, at 1, 94 (reporting on a $2 million verdict that resulted from a jury's disregard of its instructions on defamation law); Vanessa O'Connell & Paul M. Barrett, Open Season: How a Jury Placed the Firearms Industry on the Legal Defensive, Wall St. J., Feb. 16, 1999, at A1 (describing a jury that "devised their own quirky system to determine that 15 of the companies distributed handguns negligently and that three of them should pay damages to one plaintiff" but not the other six plaintiffs); Julia Flynn Siler, 3 Jurors See Searle Case Improprieties, N.Y. Times, Nov. 22, 1988, at D5 (reporting complaints by some jurors that other jurors had ignored the judge's instructions in the course of reaching a multi-million dollar verdict for the plaintiff in a products liability case against the manufacturer of an intrauterine device); see also Molly Selvin & Larry Picus, The Debate over Jury Performance: Observations from a Recent Asbestos Case 35, 53, 61 (1987) (discussing one jury's deviation from instructions). The courts ultimately set aside the defamation verdict against the Washington Post on sufficiency of the evidence grounds. See *Tavoulareas v. Piro, 817 F.2d 762, 776-98 (D.C. Cir. 1987)* (en banc) (reinstating the trial judge's decision to enter a judgment notwithstanding the verdict). In contrast, the trial judge in the lawsuit against the handgun manufacturers entered the jury's verdict for the plaintiff. See *Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 835-39 (E.D.N.Y. 1999).*

n19. See David E. Bernstein, The Breast Implant Fiasco, *87 Cal. L. Rev. 457, 495-97 (1999).* One of these cases was reversed on appeal for insufficient evidence of causation. See *Minn. Mining & Mfg. Co. v. Atterbury, 978 S.W.2d 183, 196-203 (Tex. Ct. App. 1998).*

n20. See Michael D. Green, Bendectin and Birth Defects: The Challenges of Mass Toxic Substances Litigation 263, 289 (1996); Richard A. Nagareda, Outrageous Fortune and the Criminalization of Mass Torts, *96 Mich. L. Rev. 1121, 1136-37, 1168-70 (1998)* (discussing the tendency of juries to commingle strong evidence of culpability with weak evidence of causation); see also Joseph Sanders, Bendectin on Trial: A Study of Mass Tort Litigation 12-13, 130-39 (1998) (explaining how each side's trial strategies may prompt commingling by juries); id. at 186 (noting that juries may "decide cases in ways that are contrary to jury instructions that they should consider each element separately").

n21. See Randall R. Bovbjerg et al., Juries and Justice: Are Malpractice and Other Personal Injuries Created Equal?, Law & Contemp. Probs., Winter 1991, at 5, 38 ("Our regression showed that probability of plaintiffs winning rose with higher observed severity of injury. This finding is consistent with a sympathy effect ... ."); Edith Greene et al., The Effects of Injury Severity on Jury Negligence Decisions, 23 Law & Hum. Behav. 675, 689-91 (1999); Jack Ratliff, Offensive Collateral Estoppel and the Option Effect, *67 Tex. L. Rev. 63, 89 (1988)* (describing a "spillover effect" where strong evidence on damages may make up for weak evidence of negligence); see also Neal R. Feigenson, Sympathy and Legal Judgment: A Psychological Analysis, *65 Tenn. L. Rev. 1, 20-22, 56-64 (1997)* (discussing possible jury-biasing effects of sympathy). Although judgments about liability should not vary by the severity of injury, the amount of compensatory damages should, and the available research suggests that jurors do a reasonably good job of setting such awards. See Roselle L. Wissler et al., Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers, *98 Mich. L. Rev. 750, 758-62, 805, 812-13 (1999).*

n22. See Aaron D. Twerski, The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics, *22 U.C. Davis L. Rev. 1125, 1139-40 (1989);* see also Audrey Chin & Mark A. Peterson, Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials 17, 24 (1985) (speculating that corporate defendants may be "tacked on to" lawsuits by plaintiffs searching for a deep pocket to satisfy a judgment); id. at 42 (finding that, "when they were sued by plaintiffs with severe, permanent injuries, corporations were found liable more often than other defendants," though there were no differences in cases brought by less seriously injured plaintiffs); infra note 155 and accompanying text (discussing research finding that juries appear to hold corporate defendants to a higher

standard of care).

n23. *Curtis v. Loether, 415 U.S. 189, 191-92 (1974);* see also *id. at 198* (recognizing "the possibility that jury prejudice may deprive a victim of discrimination of the verdict to which he or she is entitled," but adding that "the trial judge's power to direct a verdict, to grant judgment notwithstanding the verdict, or to grant a new trial provides substantial protection against this risk"); Douglas Laycock, The Triumph of Equity, Law & Contemp. Probs., Summer 1993, at 53, 66 ("Courts and Congress have agreed to treat back pay to victims of racial, sexual, or religious discrimination as equitable restitution, not triable to a jury, originally for fear of jury nullification in the race cases.").

n24. See Randall Kennedy, Race, Crime, and the Law 65-66 (1997).

n25. See John P. Relman, Overcoming Obstacles to Federal Fair Housing Enforcement in the South: A Case Study in Jury Nullification, *61 Miss. L.J. 579, 587, 595 (1991).* A survey of 115 jury verdicts rendered in fair housing or public accommodation cases over a twelve-year period revealed that the defendants accused of discrimination prevailed in 56% of the cases nationwide but 83% of the handful of cases brought in the deep South. *Id. at 593;* see also Doug Rendleman, Chapters of the Civil Jury, *65 Ky. L.J. 769, 795 (1977)* (criticizing the notion that "a civil jury may "acquit' governmental defendants" in disregard of the law in civil rights cases); cf. Theodore Eisenberg, Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases, *77 Geo. L.J. 1567, 1594-98 (1989)* (describing the suspicion that civil rights plaintiffs will fare less well before juries, but finding just the opposite effect even while conceding that the types of cases resolved in bench trials will differ from those sent to juries).

n26. See Kevin M. Clermont & Theodore Eisenberg, Trial by Jury or Judge: Transcending Empiricism, *77 Cornell L. Rev. 1124, 1136-38 (1992);* see also Theodore Eisenberg, Judicial Decisionmaking in Federal Products Liability Cases, 1978-1997, *49 DePaul L. Rev. 323, 323 (1999)* ("The striking difference in trial win rates between judge and jury trials continues. Plaintiffs prevail in over 40% of the judge trials and only about 30% of the jury trials."). The same pattern appeared in a survey of all tort, contract, and real property cases decided in 1996 in the state trial courts of the seventy-five largest counties. See Carol J. DeFrances & Marika F.X. Litras, Civil Trial Cases and Verdicts in Large Counties, 1996, Bur. Justice Stats. Bul., Sept. 1999, at 1, 6 ("Plaintiffs were more likely to win in bench trial cases (62%) than in jury trial cases (49%)."); see also Thomas A. Eaton et al., Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990s, *34 Ga. L. Rev. 1049, 1084 (2000);* Deborah Jones Merritt & Kathryn Ann Barry, Is the Tort System in Crisis? New Empirical Evidence, *60 Ohio St. L.J. 315, 381-90 (1999); id. at 398* ("Our comprehensive analysis of medical malpractice and product liability verdicts reveals a system of few trials, low [plaintiff] win rates, declining verdicts, and rare punitive awards. Our research includes all [state court] verdicts from a representative urban county over a full twelve years ... ."); Brian J. Ostrom et al., A Step Above Anecdote: A Profile of the Civil Jury in the 1990s, 79 Judicature 233, 235 (1996) ("Overall, plaintiffs are successful in 49 percent of [state] tort jury trials.").

n27. Although potential jurors convey distrust of corporate defendants, they also express skepticism about plaintiffs' claims. See *DeHanes v. Rothman, 727 A.2d 8, 12-13 (N.J. 1999);* Valerie P. Hans & William S. Lofquist, Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate, 26 L. & Soc'y Rev. 85, 93-97 (1992); Edward Felsenthal, Juries Display Less Sympathy in Injury Claims, Wall St. J., Mar. 21, 1994, at B1; see also infra notes 84-88 and accompanying text (describing three cases in which plaintiffs asserted that juries had nullified in favor of tort defendants).

n28. See Eisenberg, supra note 26, at 326 ("Plaintiffs, their lawyers, and most other observers of the legal system believe the jury to be more sympathetic to plaintiffs, on average, than the judge. Plaintiffs therefore route a weaker set of cases to juries."). Some researchers speculate that, in fact, no significant differences exist in the way judges and juries assess cases. See id.; Clermont & Eisenberg, supra note 26, at 1173-74; cf. Eric Helland & Alexander Tabarrok, Runaway Judges? Selection Effects and the Jury, 16 J.L. Econ. & Org. 306, 327-29 (2000) (finding differences even after accounting for case mix). The impression of differences may, however, be well-founded though still not strong enough to result in high plaintiff success rates for this weaker class of cases. Cf. Neil Vidmar, The Performance of the American Civil Jury: An Empirical Perspective, *40 Ariz. L. Rev. 849, 852-53 (1998)* (cautioning that "nothing substantial can be validly inferred" from lower plaintiff win rates before juries).

n29. See Neil Vidmar, Pap and Circumstance: What Jury Verdict Statistics Can Tell Us About Jury Behavior and the Tort System, *28 Suffolk U. L. Rev. 1205, 1218 & n.74 (1994).*

n30. See Mark P. Gergen, A Grudging Defense of the Role of the Collateral Torts in Wrongful Termination Litigation, *74 Tex. L. Rev. 1693, 1736 (1996)* (noting that plaintiffs prevailed in thirty-three out of the thirty-nine Texas jury trials surveyed, and that judges later set aside seventeen of those verdicts); see also Yeazell, supra note 8, at 115 ("Jury verdicts [in wrongful discharge litigation] are in the process of creating, slowly and unevenly, a form of job security that the common law doctrine of employment-at-will denied.").

n31. Although the data set is far smaller, the numerous lawsuits involving Bendectin - where juries and trial judges around the country resolved essentially identical disputes about general causation - may satisfy this constraint, and plaintiffs did far better with juries in these cases. See Sanders, supra note 20, at 118-19 (noting that the defendant won 57% of the jury trials and 100% of the bench trials).

n32. See Wex S. Malone, The Formative Era of Contributory Negligence, *41 Ill. L. Rev. 151* passim (1946).

n33. *Alibrandi v. Helmsley, 314 N.Y.S.2d 95, 96-97 (Civ. Ct. 1970).* Even so, the judge refused to reach his decision in the same manner: "My duty is to apply the law as I understand it, and I do not understand that, no matter what a jury might do, a judge may pretend to make a decision on the basis of contributory negligence while actually deciding on comparative negligence." *Id. at 97;* see also *Maki v. Frelk, 229 N.E.2d 284, 290 (Ill. App. Ct. 1967)* ("We are not impressed with the argument that the contributory negligence rule is not as bad as it seems to be because juries have the good sense not to follow it implicitly."), rev'd, *239 N.E.2d 445 (Ill. 1968);* **Joseph N. Ulman,** A Judge Takes the Stand 30-34 (1933) (offering a similar account of jury behavior in such cases); Milton D. Green, Juries and Justice - The Jury's Role in Personal Injury Cases, *1962 U. Ill. L.F. 152, 159* ("In actual practice it is well known that many juries find the judge's law too harsh for their liking, and they indulge in a little legislating.").

n34. See, e.g., *Haeg v. Sprague, Warner & Co., 281 N.W. 261, 263 (Minn. 1938)* ("We but blind our eyes to obvious reality to the extent that we ignore the fact that in many cases juries apply [comparative negligence] in spite of us."); *Karcesky v. Laria, 114 A.2d 150, 154 (Pa. 1955)* ("[A] trial judge has the power to uphold the time-honored right of a jury to render a compromise [comparative negligence] verdict ... .").

n35. See Mark P. Gergen, The Jury's Role in Deciding Normative Issues in the American Common Law, *68*

Fordham L. Rev. 407, 427 n.91 (1999):

Juries could not have done these things by themselves. Juries have to act with the complicity of judges who choose to submit a case to the jury that the judge might well have decided himself under the law on the books. The presence of the jury enables judges ... to undermine laws they find offensive without challenging them directly.

Professor Gergen's article focuses on the formal/doctrinal division of labor between judges and jurors, whereas I am interested in the more elusive informal/practical division in their decisionmaking responsibilities. See James K. Hammitt et al., Tort Standards and Jury Decisions, *14 J. Legal Stud. 751, 752 (1985)* ("This power of juries to nullify legal rules too often goes unacknowledged by legal reformers. Perhaps this is inevitable, given the paucity of our understanding of how juries implement different rules."); see also Stephan Landsman, The Civil Jury in America: Scenes from an Unappreciated History, *44 Hastings L.J. 579, 610 (1993)* ("The shift to comparative negligence was accompanied by a growing reliance on jurors to ameliorate the consequences of harsh tort doctrines. When judges tired of their ill-conceived principles, they turned to the jury for relief. They permitted jurors, sub silentio, to whittle away at the contribution rule."); Yeazell, supra note 8, at 114 (crediting jury verdicts with the emergence of products liability).

n36. Along similar lines, even if both negligence and contributory negligence were contested but damages were not, a compromise verdict for less than full damages should not be accepted. See *Hatfield v. Seaboard Air Line R.R., 396 F.2d 721, 723-24 (5th Cir. 1968); Freshwater v. Booth, 233 S.E.2d 312, 315-18 (W. Va. 1977);* see also *Carter v. Chi. Police Officers, 165 F.3d 1071, 1082-83 (7th Cir. 1998); Nichols v. Cadle Co., 139 F.3d 59, 63 (1st Cir. 1998); Timmerman v. Schroeder, 454 P.2d 522, 525 (Kan. 1969)* ("A jury verdict which manifests a disregard for the plain instructions of the court on the issue of damages ... should be set aside on motion for new trial.").

n37. See Michael J. Saks, Judicial Nullification, *68 Ind. L.J. 1281, 1283 (1993)* ("Judges do not actually instruct jurors in the law - if by instructing we mean ... not merely performing a ritual where bewildering words are uttered in a jury's presence. Put differently, judges routinely nullify the law by rendering it meaningless, thereby compelling jurors to invent the law themselves."). Other legal professionals may play a role in nullification. See William H. Simon, Ethical Discretion in Lawyering, *101 Harv. L. Rev. 1083, 1116-18 (1988)* (describing acquiescence by divorce lawyers in perjury by clients who alleged fault as once required, and calling this a legitimate form of "lawyer nullification" of "obsolete and unjust" divorce laws).

n38. Saks, supra note 37, at 1286-87; see also id. at 1287 ("Persistent reliance on incomprehensible jury instructions creates the very anarchy that these judges insist they abhor."); id. at 1289 ("The question confronting us is why judges insist on the power to interpret the law to jurors ... but then keep the law a virtual secret from jurors so that they must decide cases on their own intuitions and equities?").

n39. Id. at 1291; see also id. at 1295 ("Most judges agree most of the time with the jury's verdict. Thus, it would appear that the intuitions of a group of lay jurors regarding justice generally correspond to the policies of the law, or at least of trial judges." (footnotes omitted)); id. at 1287 n.27 ("When jurors do nullify, we can infer that judges usually agree with them - indeed, probably approve of their departures - because judges rarely exercise their power to set aside jury verdicts."). Another way of understanding this hesitancy to set aside a verdict, however, is similar to the likely explanation for retaining incomprehensible jury instructions, namely, a fear of inviting appellate reversal.

n40. See id. at 1281 ("By effectively and persistently offering juries instructions that cannot be understood,

judges regularly nullify the law... . In essence, the failure to instruct jurors nullifies the law and leaves jurors free to decide cases using their own intuitions about justice.").

n41. See id. at 1293-95. Professor Saks elaborated as follows:

The institution of the jury permits the law to have it both ways. By instructing juries in the law, and insisting that they are duty-bound to follow that law, we reinforce the consistency and uniformity of the abstract law. By instructing juries in a way that makes it impossible for them to understand what the law is, we increase the likelihood that they will do particularized justice in the concrete case before them. The ninety-five percent or more of cases that are dismissed or settled will be decided in light of the abstract law. The five percent or fewer that are decided at trial will receive individualized justice. In this way, the law is able at once to provide both uniformity and flexibility ... .

Id. at 1294 (footnotes omitted); see also Marc Galanter et al., The Crusading Judge: Judicial Activism in Trial Courts, *52 S. Cal. L. Rev. 699, 708 (1979);* M.B.E. Smith, May Judges Ever Nullify the Law?, *74 Notre Dame L. Rev. 1657, 1659-60, 1671 (1999).* Judicial nullification may occur in criminal litigation as well, for instance when trial judges routinely refuse to apply the exclusionary rule. See *Brown, supra* note 4, at 1172 & n.102, 1195 n.179.

n42. See David L. Shapiro, In Defense of Judicial Candor, *100 Harv. L. Rev. 731, 736-50 (1987);* see also infra note 186 (describing calls for greater judicial candor in reforming doctrine); cf. Samuel Estreicher, Judicial Nullification: Guido Calabresi's Uncommon Common Law for a Statutory Age, *57 N.Y.U. L. Rev. 1126, 1130, 1158-65 (1982)* (book review) (challenging the suggestion that judges should exercise the power to nullify obsolete statutes).

n43. See Ariz. Const. art. XVIII, 5 ("The defense of contributory negligence or assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury."); Okla. Const. art. XXIII, 6 (same); see also *Reddell v. Johnson, 942 P.2d 200, 203 (Okla. 1997)* (interpreting the latter provision); Noel Fidel, Preeminently a Political Institution: The Right of Arizona Juries to Nullify the Law of Contributory Negligence, *23 Ariz. St. L.J. 1, 19-60 (1991)* (elaborating on the case law interpreting both of these constitutional provisions). Although one might argue that such provisions sought to affect a change in substantive tort law by eliminating contributory negligence as an automatic bar to recovery, the courts have read these provisions as solely procedural. See *Hall v. A.N.R. Freight Sys., Inc., 717 P.2d 434, 438-39 (Ariz. 1986);* see also *Herron v. S. Pac. Co., 283 U.S. 91, 92-96 (1931)* (holding that, in diversity cases in Arizona, federal judges could direct a verdict against a contributorily negligent plaintiff notwithstanding that state's constitutional provision reserving such questions for juries in all cases).

n44. See *Dickinson v. Cole, 177 P. 570, 570-71 (Okla. 1918)* (mentioning that, absent the constitutional provision, the defendant would have been entitled to judgment as a matter of law given this contributory negligence).

n45. See *Chi., Rock Island & Pac. R.R. v. Cole, 251 U.S. 54, 56 (1919)* ("As [a state] may confer legislative and judicial powers upon a commission not known to the common law, ... it may confer larger powers upon a jury than those that generally prevail."). Justice Holmes' more famous grade crossing accident decision, see *Balt. & Ohio R.R. v. Goodman, 275 U.S. 66, 69-70 (1927)* (reversing judgment for the plaintiff), was later explained as involving an instance of clear contributory negligence that the jury had improperly ignored, see *Pokora v. Wabash Ry., 292 U.S. 98, 102 (1934).*

n46. See Shari Seidman Diamond & Jonathan D. Casper, Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury, 26 L. & Soc'y Rev. 513, 517-18 (1992).

n47. See *Seppi v. Betty, 579 P.2d 683, 689-92 (Idaho 1978); Thomas v. Bd. of Township Trs., 582 P.2d 271, 273, 280 (Kan. 1978)* (sustaining such an instruction in a case where the jury thereupon found the defendant 51% responsible); *Dilaveris v. W.T. Rich Co., 673 N.E.2d 562, 565-66 (Mass. 1996); Wheeler v. Bagley, 575 N.W.2d 616, 619-21 (Neb. 1998); Roman v. Mitchell, 413 A.2d 322, 327 (N.J. 1980)* (rejecting concerns that such an instruction would invite jury nullification because the trial judge can set aside a verdict founded on bias or prejudice); *McIntyre v. Balentine, 833 S.W.2d 52, 59 (Tenn. 1992); Adkins v. Whitten, 297 S.E.2d 881, 884 (W. Va. 1982).* But see *Delvaux v. Langenberg, 387 N.W.2d 751, 759-60 (Wis. 1986)* (prohibiting such disclosure). See generally Stuart F. Schaffer, Comment, Informing the Jury of the Legal Effect of Special Verdict Answers in Comparative Negligence Actions, *1981 Duke L.J. 824, 830-51* (describing and criticizing the movement away from the traditional rule against informing juries of the legal consequences of their apportionment of fault). This question has an analogue in the criminal context with regard to whether judges should inform juries of sentencing consequences. See infra note 66 and accompanying text.

n48. See *McGowan v. Story, 234 N.W.2d 325, 329 (Wis. 1975);* Martin A. Kotler, Reappraising the Jury's Role as Finder of Fact, *20 Ga. L. Rev. 123, 138, 165 (1985)* ("When a legislature enacts law providing that a plaintiff who is fifty percent at fault is not entitled to recovery, the only possible function of a disclosure rule is to permit the jury to circumvent that substantive rule."); Schaffer, supra note 47, at 842-46.

n49. See Jordan H. Leibman et al., The Effect of Lifting the Blindfold from Civil Juries Charged with Apportioning Damages in Modified Comparative Fault Cases: An Empirical Study of the Alternatives, *35 Am. Bus. L.J. 349, 396 (1998)* ("The mean verdict data strongly support the proposition that jurors who are aware of a percentage bar to recovery will react in ways generally perceived to be more favorable to the plaintiff than will jurors who are not privy to that information."). The study found, however, that the mock juries tempered this effect by also reducing their assessment of damages. *Id. at 400.* In tandem, these two effects operate as a form of pure comparative negligence.

n50. See *Rosenthal v. Kolars, 231 N.W.2d 285, 288 (Minn. 1975)* (reversing this particular judgment); see also *Porche v. Gulf Miss. Marine Corp., 390 F. Supp. 624, 632 (E.D. La. 1975)* (defending the use of a clarifying instruction in such a case). As one commentator suggested:

Although I have no empirical evidence to support my conclusions, I strongly suspect that when juries are sympathetic to the plaintiff, they either refuse to apply comparative fault principles at all or they increase the size of their award (after all no one can objectively measure pain and suffering) prior to applying the comparative fault formula, thereby ending up with the verdict they would have reached anyway.

Richard C. Ausness, When Warnings Alone Won't Do: A Reply to Professor Phillips, *26 N. Ky. L. Rev. 627, 645 (1999).*

n51. See Neal Feigenson et al., Effect of Blameworthiness and Outcome Severity on Attributions of Responsibility and Damage Awards in Comparative Negligence Cases, 21 Law & Hum. Behav. 597, 608-12 (1997);

Douglas J. Zickafoose & Brian H. Bornstein, Double Discounting: The Effects of Comparative Negligence on Mock Juror Decision Making, 23 Law & Hum. Behav. 577, 591 (1999).

n52. See Note, Informing the Jury of the Effect of Its Answers to Special Verdict Questions - The Minnesota Experience, *58 Minn. L. Rev. 903, 927 (1974)* (explaining that the blindfolding "rule does not consider the role of the common sense wisdom of juries in mitigating unfair laws and producing just results in individual cases"). In part, it also may reflect a jury's concern that otherwise tortfeasors might get the wrong message about their culpability. In one recent case where a jury dutifully adhered to a state's modified comparative negligence rule and denied recovery to a smoker's estate in a lawsuit against a tobacco company, members of the jury took "the nearly unprecedented step of holding a press conference" immediately after the trial to emphasize that they did not thereby condone the defendant's behavior. Mike France, Who Got Smoked in Indianapolis?, Bus. Wk., Sept. 9, 1996, at 44; see also *Rogers v. R.J. Reynolds Tobacco Co., 731 N.E.2d 36, 43-46 (Ind. Ct. App. 2000)* (holding that the judge erred by granting a request from the jury in the midst of deliberations to hold such a press conference without having consulted with counsel for the parties).

n53. See Price Ainsworth & Mike C. Miller, Removing the Blindfold: General Verdicts and Letting the Jury Know the Effects of Its Answers, *29 S. Tex. L. Rev. 233, 238 (1987)* ("Concealing from the jury the effect of its answers does not always work to the defendant's advantage... . [It] may determine that one defendant is significantly less at fault than the others, without knowing that each defendant will be jointly and severally liable for the entire amount of the judgment."); Elliot Talenfeld, Instructing the Jury as to the Effect of Joint and Several Liability: Time for the Court to Address the Issue on the Merits, *20 Ariz. St. L.J. 925, 941 (1988);* see also *Kaeo v. Davis, 719 P.2d 387, 395-96 (Haw. 1986)* (justifying disclosure in such cases as preferable to leaving juries to guess incorrectly about the effects of their allocations of fault among the parties). But cf. *Colo. Rev. Stat. 13-21-111.5(5)* (1996) (blindfolding the jury on the rules of joint and several liability but not comparative negligence).

n54. See Hans & Vidmar, supra note 13, at 162 ("Juries may have a moderate bias against corporations. Nevertheless, it should be apparent that the charge that juries are lawless in civil trials is not proven."); Jonathan D. Casper, Restructuring the Traditional Civil Jury: The Effects of Changes in Composition and Procedures, in Verdict, supra note 13, at 414, 418 ("Examples of [jury] nullification are more common in the criminal than the civil arena, perhaps because community values are more often implicated in cases where liberty and life are at stake, but they occur in the civil context as well."). On the value of evaluating atypical cases, see Albert W. Alschuler, Explaining the Public Wariness of Juries, *48 DePaul L. Rev. 407, 414-16 (1998)* (questioning the excessive emphasis on empirical studies). One prominent jury researcher dismisses the idea out of hand, adamantly claiming that juries are not asked to resolve questions of law. See Neil Vidmar, Juries Don't Make Legal Decisions! And Other Problems: A Critique of Hastie et al. on Punitive Damages, 23 Law & Hum. Behav. 705, 705, 709 (1999).

n55. See *Brown, supra* note 4, at 1151 n.8, 1195 n.179; Ellsworth, supra note 9, at 220-21; Marder, supra note 8, at 885-87 & n.35, 898, 946-47 n.318. One commentator recently speculated "that the power is rarely exercised." Andrew D. Leipold, Rethinking Jury Nullification, *82 Va. L. Rev. 253, 259 (1996);* see also *id. at 259 n.14* ("For our purposes it is not critical to decide precisely how often a jury nullifies. It is enough to accept that there is some number of cases where the jury acquits against the evidence."); Norman J. Finkel, Commonsense Justice: Jurors' Notions of the Law 41-62 (1995); Harry Kalven, Jr. & Hans Zeisel, The American Jury 494-95 (1966); Martha A. Myers, Rule Departures and Making Law: Juries and Their Verdicts, 13 L. & Soc'y Rev. 781, 783-84, 795 (1979). Recent media reports suggest a possible upsurge in criminal jury nullification. See Joan Biskupic, In Jury Rooms, a Form of Civil Protest Grows; Activists Registering Disdain for Laws with a "Not Guilty," Wash. Post, Feb. 8, 1999, at A1. But cf. Neil Vidmar et al., Should We Rush to Reform the Criminal Jury?, 80 Judicature 286, 287 (1997) (arguing that rising conviction rates disprove it); Jack B. Weinstein, The Many Dimensions of Jury Nullification, 81 Judicature 168, 171 (1998) (cautioning against an overreliance on anecdotes as a basis for concluding that criminal

jury nullification is on the rise).

n56. See Clay Conrad, Jury Nullification: The Evolution of a Doctrine 6-7 (1998); David C. Brody, Sparf and Dougherty Revisited: Why the Court Should Instruct the Jury of Its Nullification Right, *33 Am. Crim. L. Rev. 89, 106-22 (1995);* David N. Dorfman & Chris K. Iijima, Fictions, Fault, and Forgiveness: Jury Nullification in a New Context, *28 U. Mich. J.L. Reform 861, 891-906, 918-27 (1995);* James P. Levine, The Role of Jury Nullification Instructions in the Quest for Justice, 18 Legal Stud. F. 473, 491-92 (1994); Marder, supra note 8, at 958-59; Poulin, supra note 4, at 1399-402; Alan Scheflin & Jon Van Dyke, Jury Nullification: The Contours of a Controversy, Law & Contemp. Probs., Autumn 1980, at 51, 85-115.

n57. See George C. Christie, Lawful Departures from Legal Rules: "Jury Nullification" and Legitimated Disobedience, *62 Cal. L. Rev. 1289, 1296-305 (1974)* (reviewing Mortimer R. Kadish & Sanford Kadish, Discretion to Disobey: A Study of Lawful Departures from Legal Rules (1973)); Leipold, supra note 55, at 260-83, 296-311; Phillip B. Scott, Jury Nullification: An Historical Perspective on a Modern Debate, *91 W. Va. L. Rev. 389, 420-24 (1989);* Gary J. Simson, Jury Nullification in the American System: A Skeptical View, *54 Tex. L. Rev. 488, 507-16, 524-25 (1976);* Richard St. John, Note, License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking, *106 Yale L.J. 2563, 2577-97 (1997);* Steven M. Warshawsky, Note, Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy, *85 Geo. L.J. 191, 211-23 (1996).*

n58. See Jeffrey Abramson, We, the Jury: The Jury System and the Ideal of Democracy 57-95 (1994); Finkel, supra note 55, at 2-3, 29-40; James P. Levine, Juries and Politics 100-16 (1992); *Brown, supra* note 4, at 1171-96; see also Marder, supra note 8, at 879 ("First, a jury may nullify to avoid applying a law to a particular defendant. Second, a jury may nullify to avoid applying a law that it regards as bad. Third, a jury may nullify as a response to social conditions."); id. at 935-43 (elaborating on these categories).

n59. See Clay S. Conrad, Jury Nullification as a Defense Strategy, 2 Tex. F. on C.L. & C.R. 1, 8, 15-16, 30-31 (1995); Marder, supra note 8, at 888-903.

n60. See Thomas Andrew Green, Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800, at 153-264 (1985); Lloyd E. Moore, The Jury: Tool of Kings, Palladium of Liberty 77-79, 83-87 (2d ed. 1988). Although not yet immune from punishment, acts of jury nullification occurred as early as in the middle of the Sixteenth Century. See *United States v. Wilson, 629 F.2d 439, 443 (6th Cir. 1980).* After reviewing the English authorities at great length, members of the U.S. Supreme Court disagreed sharply on the question of whether juries enjoyed the power to decide questions of law during the *Founding era. Compare Sparf & Hansen v. United States, 156 U.S. 51, 90-99 (1895)* (rejecting such an interpretation) with *id. at 114-42* (Gray, J., dissenting).

n61. See Albert W. Alschuler & Andrew G. Deiss, A Brief History of the Criminal Jury in the United States, *61 U. Chi. L. Rev. 867, 874-75, 902-06 (1994);* John W. Gordan, III, Juries as Judges of the Law: The American Experience, *108 Law Q. Rev. 272, 272 (1992)* ("For the first 40 years of the Republic the settled rule ... in America was that jurors were the judges of the law as well as the fact, and juries were instructed that they had the right to substitute their own view of the law for the court's."). Again, the U.S. Supreme Court offered conflicting historical accounts on this score. Compare *Sparf, 156 U.S. at 64-90* (finding no support in early American authorities for the claim that juries should decide questions of law) with *id. at 142-69* (Gray, J., dissenting).

n62. See Mark DeWolfe Howe, Juries as Judges of Criminal Law, *52 Harv. L. Rev. 582, 591 (1939).*

n63. See Stanton D. Krauss, An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America, *89 J. Crim. L. & Criminology 111, 212-14 (1999);* Leipold, supra note 55, at 285-96; David A. Pepper, Nullifying History: Modern-Day Misuse of the Right to Decide the Law, *50 Case W. Res. L. Rev. 599, 609 (2000)* ("The right to decide the law swept narrowly, placing a clear duty on juries to follow the law as they saw it, rather than reject the law as pro-nullification scholars would have them do."); Scott, supra note 57, at 393-419; Simson, supra note 57, at 491-507; id. at 499 ("Early federal judges contemplated juries interpreting but almost certainly not invalidating the law.").

n64. See *United States v. Edwards, 101 F.3d 17, 19 (2d Cir. 1996)* (per curiam) ("While juries have the power to ignore the law in their verdicts, courts have no obligation to tell them they may do so. It appears that every circuit that has considered this issue agrees."); *United States v. Perez, 86 F.3d 735, 736 (7th Cir. 1996)* ("The defendant has no right to invite the jury to act lawlessly."); accord *United States v. Funches, 135 F.3d 1405, 1408-09 (11th Cir. 1998); United States v. Avery, 717 F.2d 1020, 1027 (6th Cir. 1983); United States v. Trujillo, 714 F.2d 102, 105-06 (11th Cir. 1983); United States v. Drefke, 707 F.2d 978, 982 (8th Cir. 1983).* Judges seem more willing to inform grand juries of their power to refuse to indict for any reason. See 4 Wayne R. LaFave et al., Criminal Procedure 15.2(G), at 284 (2d ed. 1999).

n65. See, e.g., *Reale v. United States, 573 A.2d 13, 15 (D.C. 1990); State v. Hendrickson, 444 N.W.2d 468, 473 (Iowa 1989); State v. McClanahan, 510 P.2d 153, 159-60 (Kan. 1973); Medley v. Commonwealth, 704 S.W.2d 190, 191 (Ky. 1985); Commonwealth v. Leno, 616 N.E.2d 453, 457 (Mass. 1993); State v. Green, 458 N.W.2d 472, 477 (Neb. 1990); State v. Brown, 567 A.2d 544, 548 (N.H. 1989); People v. Weinberg, 631 N.E.2d 97, 100 (N.Y. 1994); State v. Taylor, 771 S.W.2d 387, 396-97 (Tenn. 1989).*

n66. See *United States v. Lewis, 110 F.3d 417, 422 (7th Cir. 1997); United States v. Manning, 79 F.3d 212, 219 (1st Cir. 1996); United States v. Chesney, 86 F.3d 564, 574 (6th Cir. 1996);* see also *United States v. Johnson, 62 F.3d 849, 850-51 (6th Cir. 1995)* ("The only possible purpose that would be served by informing jurors of the mandatory sentence would be to invite jury nullification of the law... . Every circuit to address this issue has held that a defendant is not entitled to an instruction about a mandatory sentence."). But cf. *United States v. Datcher, 830 F. Supp. 411, 412-18 (M.D. Tenn. 1993)* (allowing counsel for the defendant to inform the jury of mandatory sentencing consequences); Milton Heumann & Lance Cassak, Not-So-Blissful Ignorance: Informing Jurors About Punishment in Mandatory Sentencing Cases, *20 Am. Crim. L. Rev. 343, 386-89 (1983)* (urging disclosure solely in order to equalize opportunities for jury nullification in favor of all similarly-situated defendants); Kristen K. Sauer, Note, Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences, *95 Colum. L. Rev. 1232, 1260-72 (1995)* (defending disclosure as a way of facilitating legitimate jury nullification). A few states require that, if a defendant asks, the judge inform the jury of sentencing consequences. See, e.g., *State v. Hooks, 421 So. 2d 880, 886 (La. 1982).*

n67. See, e.g., *United States v. Sepulveda, 15 F.3d 1161, 1189-90 (1st Cir. 1993); United States v. Krzyske, 836 F.2d 1013, 1021 (6th Cir. 1988); People v. Sanchez, 69 Cal. Rptr. 2d 16, 21-22 (Ct. App. 1997); State v. Bonacorsi, 648 A.2d 469, 470-72 (N.H. 1994).* Courts may use other mechanisms to reduce the prospect of jury nullification in criminal trials, such as allowing the prosecution to strike certain jurors and exclude evidence. See Chaya Weinberg-Brodt, Note, Jury Nullification and Jury-Control Procedures, *65 N.Y.U. L. Rev. 825, 846-70 (1990)* (arguing that the preoccupation with limiting the risk of nullification in these ways inappropriately undermines the defendant's Sixth Amendment rights); Warshawsky, supra note 57, at 224-34 (urging the use of such tools to discourage nullification).

n68. See *United States v. Thomas, 116 F.3d 606, 614-25 (2d Cir. 1997); United States v. Geffrard, 87 F.3d 448, 450-52 (11th Cir. 1996); United States v. McCarthy, 961 F.2d 972, 976 (1st Cir. 1992); United States v. Joseph, 892 F.2d 118, 122-24 (D.C. Cir. 1989); People v. Williams, 21 P.3d 1209, 1214, 1221-23 (Cal. 2001); State v. Smith, 850 S.W.2d 934, 938-39 (Mo. Ct. App. 1993);* see also *Lockhart v. McCree, 476 U.S. 162, 172 (1986)* (observing "that "nullifiers' may properly be excluded from the guilt-phase jury" in capital cases); *Wainwright v. Witt, 469 U.S. 412, 423 (1985)* ("The quest is for jurors who will conscientiously apply the law and find the facts."); Nancy J. King, Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom, *65 U. Chi. L. Rev. 433, 438-91 (1998)* (defending exclusion of potential nullifiers from criminal juries).

n69. See *Strickland v. Washington, 466 U.S. 668, 695 (1984)* ("An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification,' and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed."); *United States v. Gonzalez, 110 F.3d 936, 947-48 (2d Cir. 1997)* (holding that any error in stipulating facts was harmless if it simply reduced the opportunity for jury nullification); see also Tom Stacy & Kim Dayton, Rethinking Harmless Constitutional Error, *88 Colum. L. Rev. 79, 142 (1988)* ("Jury nullification, then, should not enable the jury to acquit "unreasonably.' Instead, it should only permit the jury to acquit for reasons that, though legally irrelevant, reflect fundamental community values.").

n70. 1A Kevin F. O'Malley et al., Federal Jury Practice and Instructions 10.01, at 5 (5th ed. 2000) (setting forth the preliminary charge, which also informs the jury that its deliberations will occur in secret and that the jury will not need to explain its verdict); see also id. 12.01, at 122 (providing the same admonition in the final jury charge); cf. *United States v. Bruce, 109 F.3d 323, 327 (7th Cir. 1997)* (rejecting a defendant's objection to a similar instruction claiming that it inappropriately prevented jury nullification).

n71. See *United States v. Desmond, 670 F.2d 414, 417 (3d Cir. 1982)* (calling it a "safety valve"); see also *Taylor v. Louisiana, 419 U.S. 522, 530 (1975)* ("The purpose of a jury is to guard against the exercise of arbitrary power - to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge."); *Duncan v. Louisiana, 391 U.S. 145, 156 (1968)* ("Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."); *United States ex rel. Toth v. Quarles, 350 U.S. 11, 18-19 (1955)* ("On many occasions, fully known to the Founders of this country, jurors - plain people - have manfully stood up in defense of liberty against the importunities of judges and despite prevailing hysteria and prejudices.").

n72. *McCann v. Adams, 126 F.2d 774, 776* (2d Cir.), rev'd on other grds., *317 U.S. 269, 278-80 (1942);* see also *Seiden v. United States, 16 F.2d 197, 198 (2d Cir. 1926)* (Hand, J.) (refusing to give a nullification instruction); Jack B. Weinstein, Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice, *30 Am. Crim. L. Rev. 239, 240-41, 250-53 (1993)* (defending occasional acts of jury nullification, and suggesting that judges admit otherwise irrelevant evidence when it may facilitate nullification in appropriate cases, but rejecting calls for an explicit nullification instruction).

n73. See *Brown, supra* note 4, at 1173-76, 1188-90 & n.158 ("Refusing to convict a factually guilty defendant is a decision identical to decisions police and prosecutors make when they sometimes elect not to arrest or prosecute a factually guilty citizen."); Alan W. Scheflin, Jury Nullification: The Right to Say No, *45 S. Cal. L. Rev. 168, 181*

(1972); Peter Westen & Richard Drubel, Toward a General Theory of Double Jeopardy, *1978 S. Ct. Rev. 81, 130 n.230;* see also Daniel T. Kobil, The Quality of Mercy Strained: Wresting the Pardoning Power from the King, *69 Tex. L. Rev. 569 (1991)* (discussing executive grants of clemency). Of course, the use of the President's pardon power has gotten some bad press lately.

n74. See *Brown, supra* note 4, at 1173 & n.102, 1195 & n.179. Indeed, some have argued that the criminal jury clause in Article III of the U.S. Constitution serves as a separations-of-power check on the federal judiciary. See Akhil Reed Amar, The Bill of Rights as a Constitution, *100 Yale L.J. 1131, 1196-97 (1991).*

n75. See *Standefer v. United States, 447 U.S. 10, 22-23 (1980);* see also Patrick Devlin, The Conscience of the Jury, *107 Law Q. Rev. 398, 402-04 (1991);* Poulin, supra note 4, at 1385 ("We value the jury ... because it speaks with a different voice that tempers the rationality of the law."); id. at 1400 ("The jury's power to nullify provides an accommodation between the rigidity of the law and the need to hear and respond to positions that do not fit legal pigeonholes ... ."); Note, Trial By Jury in Criminal Cases, *69 Colum. L. Rev. 419, 425 (1969)* ("The jury functions as a sort of mini-legislature to check against the tyranny of the majority will."); cf. Charles P. Curtis, The Trial Judge and Jury, *5 Vand. L. Rev. 150, 157-58 (1952)* (suggesting that juries craft exceptions to otherwise rigid rules and, thereby, help promote the myth that the law has worked out an appropriate answer for every case).

n76. See *Brown, supra* note 4, at 1169-70, 1187 & n.152, 1198-99; Darryl K. Brown, Plain Meaning, Practical Reason, and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes, *96 Mich. L. Rev. 1199, 1263-68 (1998);* see also Marder, supra note 8, at 921-25 (praising the nullifying jury's law interpretation function). For a summary of the debates about dynamic and other approaches to statutory interpretation, see Lars Noah, Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules, *51 Hastings L.J. 255, 264-74 (2000).*

n77. See *Brown, supra* note 4, at 1186-87 (suggesting that criminal jury verdicts "broadly contribute to an ongoing, democratic dialogue among institutional players that facilitate law reform"); Marder, supra note 8, at 926-34 (arguing that jury nullification operates as a valuable feedback mechanism for the legislative and executive branches of government); Scheflin & Van Dyke, supra note 56, at 71 ("The repeal of [Prohibition] laws is traceable to the refusal of juries to convict those accused of alcohol traffic."); see also Gerard N. Magliocca, The Philosopher's Stone: Dualist Democracy and the Jury, *69 U. Colo. L. Rev. 175, 186-212 (1998)* (applauding the signaling function once fulfilled by juries when they were explicitly invited to judge the law as well as the facts).

n78. See Paul Butler, Racially Based Jury Nullification: Black Power in the Criminal Justice System, *105 Yale L.J. 677, 679, 715-25 (1995).* But see Andrew D. Leipold, The Dangers of Race-Based Jury Nullification: A Response to Professor Butler, *44 UCLA L. Rev. 109 (1996)* (roundly criticizing this suggestion). Other commentators urged jury nullification favoring defendants who had engaged in acts of civil disobedience. See William M. Kunstler, Jury Nullification in Conscience Cases, *10 Va. J. Int'l L. 71, 83-84 (1969);* Joseph L. Sax, Conscience and Anarchy: The Prosecution of War Resisters, 57 Yale Rev. 484, 491 (1968).

n79. See Robert C. Black, FIJA: Monkeywrenching the Justice System?, *66 UMKC L. Rev. 11, 18-23 (1997)* (offering a detailed account and spirited endorsement of this movement); M. Kristine Creagan, Note, Jury Nullification: Assessing Recent Legislative Developments, *43 Case W. Res. L. Rev. 1101, 1115-30 (1993)* (documenting some of the initial proposals); Erick J. Haynie, Comment, Populism, Free Speech, and the Rule of Law: The "Fully Informed" Jury Movement and Its Implications, 88 J. Crim. L. & Criminol. 343, 344-46, 350-53, 364-78 (1997) (describing the scope of FIJA efforts, and suggesting ways to counteract them); Stephen J. Adler,

Courtroom Putsch? Jurors Should Reject Laws They Don't Like, Activist Group Argues, Wall St. J., Jan. 4, 1991, at A1; see also *Fauvre v. Roberts, 791 P.2d 128, 129-30 (Or. 1990)* (reviewing an effort to enshrine jury nullification in one state constitution); King, supra note 68, at 492-99 (describing and defending judicial efforts to restrict jury tampering by nullification proponents).

n80. *Sparf & Hansen v. United States, 156 U.S. 51, 103 (1895);* see also *United States v. Washington, 705 F.2d 489, 494 (D.C. Cir. 1983)* ("Such [nullification] verdicts are lawless, a denial of due process and constitute an exercise of erroneously seized power."); *United States v. Gorham, 523 F.2d 1088, 1098 (D.C. Cir. 1975)* ("The right to equal justice under law inures to the public as well as to individual parties to specific litigation, and that right is debased when juries at their caprice ignore the dictates of established precedent and procedure."); *United States v. Dougherty, 473 F.2d 1113, 1137 (D.C. Cir. 1972)* ("An explicit instruction to a jury conveys an implied approval that runs the risk of degrading the legal structure requisite for true freedom, for an ordered liberty that protects against anarchy as well as tyranny."); *United States v. Simpson, 460 F.2d 515, 519-20 & n.12 (9th Cir. 1972); United States v. Moylan, 417 F.2d 1002, 1005-09 (4th Cir. 1969); People v. Dillon, 668 P.2d 697, 726 n.39 (Cal. 1983);* Irwin A. Horowitz, Jury Nullification: The Impact of Judicial Instructions, Arguments and Challenges on Jury Decision Making, 12 Law & Hum. Behav. 439, 452 (1988) ("When juries are given unfettered nullification arguments or instructions, they are more likely to act upon their sentiments or parochial biases."). But see *Brown, supra* note 4, at 1171-91 (responding at length to the anarchy objection); Keith E. Niedermeier et al., Informing Jurors of Their Nullification Power: A Route to a Just Verdict or Judicial Chaos?, 23 Law & Hum. Behav. 331, 348-50 (1999) (concluding that nullification instructions do not cause chaos).

n81. See Robert F. Schopp, Verdicts of Conscience: Nullification and Necessity as Jury Responses to Crimes of Conscience, *69 S. Cal. L. Rev. 2039, 2058 (1996)* ("By engaging in nullification, jurors - who are not democratically elected - reject laws established through a democratic process in order to apply standards - to which they are not themselves subject - to individuals who had no opportunity to vote in the process by which these standards were selected."); Scott, supra note 57, at 422-23; Simson, supra note 57, at 517-18; St. John, supra note 57, at 2577-97 (arguing that nullification by unrepresentative and unaccountable juries lacks democratic legitimacy); Warshawsky, supra note 57, at 211-23 (same); id. at 213 ("Rather than being an expression of democracy, jury nullification is fundamentally antidemocratic.").

n82. See Leipold, supra note 55, at 300-01; Simson, supra note 57, at 514-15 ("The jury's ad hoc repeal of the law via nullification is not an unqualified good, because it rescues one person from unjust conviction at the expense of increasing the probability that the law will remain on the books to prove a source of oppression for others.").

n83. See Simson, supra note 57, at 515-16; see also Horowitz & Willging, supra note 8, at 172-74 (documenting this effect); id. at 174 ("In both the field and experimental studies, the less sanguine face of nullification does appear: Juries will occasionally be more severe with unsympathetic defendants than the law mandates.").

n84. *715 P.2d 624 (Cal. 1986)* (plurality opinion).

n85. See *id. at 629-30* (declining to resolve this objection because the plaintiff failed to provide a transcript of the damages phase or the post-trial hearing on his new trial motion); see also *Briggs v. Marshall, 93 F.3d 355, 360-61 (7th Cir. 1996)* (rejecting the plaintiff's claim that the jury had nullified in favor of the defendant by returning a verdict of only nominal damages in a 1983 lawsuit against a police department alleging the use of excessive force).

n86. See *Ballard, 715 P.2d at 631* (Mosk, J., concurring) ("I am confident it is not uncommon for a juror or jurors to express ill-considered disagreement with the law recited by the judge.").

n87. See *id. at 630-32;* see also *Golden Eagle Archery, Inc. v. Jackson, 24 S.W.3d 362, 369-75 (Tex. 2000)* (refusing to consider juror affidavits offered by the plaintiff to demonstrate misconduct by another juror who allegedly had concealed a bias against products liability claims); infra note 127 (noting restrictions on using juror affidavits to impeach a verdict).

n88. See *Ballard, 715 P.2d at 647-48* (Bird, C.J., concurring and dissenting) ("While jury nullification may be debatable in the criminal trial context, it certainly has no place in a civil trial where neither party has a right to a general verdict ... and where there is no double jeopardy bar."); *id. at 648* ("Championing a jury's refusal to apply the law as instructed is inconsistent with the very notion of the rule of law.").

n89. See supra note 63 and accompanying text.

n90. Renee B. Lettow, New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America, *71 Notre Dame L. Rev. 505, 517 (1996);* see also William E. Nelson, The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence, *76 Mich. L. Rev. 893, 904-17 (1978).* In England, however, civil juries were not thought to exercise any law-finding role at this time. *Green, supra* note 60, at 372.

n91. See *Honda Motor Co. v. Oberg, 512 U.S. 415, 446-47 (1994)* (Ginsburg, J., dissenting) (referring to the jury law-finding tradition); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 938-40 & n.90 (E.D. Pa. 1979)* (same), vacated sub nom. *In re Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980).*

n92. See U.S. Const. amend. VII ("In suits at common law, ... the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."); see also *Thiel v. S. Pac. Co., 328 U.S. 217, 220 (1946)* (equating the two for purposes of imposing impartiality and cross-section requirements); Colleen P. Murphy, Integrating the Constitutional Authority of Civil and Criminal Juries, *61 Geo. Wash. L. Rev. 723, 742-43 (1993)* (explaining that the Founders did "not differentiate between civil and criminal juries"). But cf. *id. at 749-54* (distinguishing the criminal jury's unreviewable power to acquit from a claim of law-finding); *id. at 767* ("Although the [civil] jury has the constitutional authority to find facts and to apply standards requiring qualitative assessment of the facts, it does not have constitutional authority to flout governing rules or standards."). However, to the extent that nullification proponents focus on the jury clause in Article III instead of the Sixth Amendment, its reference only to criminal trials would limit any extension to civil litigation. Similarly, if nullification depends on the double jeopardy clause, it would have no application to civil cases.

n93. See Charles W. Wolfram, The Constitutional History of the Seventh Amendment, *57 Minn. L. Rev. 639, 670-71, 705-10 (1973);* see also 1 Alexis de Tocqueville, Democracy in America 294-95 (A. Knopf ed. 1987) (1835) (praising the political role of the civil jury in particular); Amar, supra note 74, at 1183 ("Spanning both civil and criminal proceedings, the key role of the jury was to protect ordinary individuals against governmental

overreaching."); id. at 1185 ("Ordinary Citizens would check executive overreaching and monitor the professional judiciary."); Kenneth S. Klein, The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial, *53 Ohio St. L.J. 1005, 1034-36 (1992)* (arguing that the Seventh Amendment sought to create a popular check on the lawmaking power of appointed federal judges); Stephan Landsman, The History and Objectives of the Civil Jury System, in Verdict, supra note 13, at 22, 23 ("During the formative period of the Republic, the jury came to be viewed as the essential counterbalance to the threat of excessive judicial power."); Douglas G. Smith, Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform, *48 Ala. L. Rev. 441, 475-78 (1997)* (same).

n94. Wolfram, supra note 93, at 671; see also id. at 705 (noting that during the ratification debates some argued in favor "of the utilization of the jury because of its presumed willingness to act "lawlessly"').

n95. See id. at 673-705 (describing a concern with the protection of debtors as the central impetus behind the Seventh Amendment); id. at 678 ("The last resort for the hounded debtor was a hopefully sympathetic jury in his local federal court."); id. at 703-05 (explaining that the antifederalists alluded to the role of "the jury to find against the law" in debt cases).

n96. See Godfrey D. Lehman, We the Jury ... : The Impact of Jurors on Our Basic Freedoms 211-20 (1997); see also Dierdre A. Harris, Note, Jury Nullification in Historical Perspective: Massachusetts as a Case Study, *12 Suffolk U. L. Rev. 968, 988 (1978)* (discussing an instance of jury nullification in a civil trespass case in the 1760s); cf. Lysander Spooner, An Essay on the Trial By Jury 112 (1852) ("Nearly the same oppressions can be practised in civil suits as in criminal ones... . If the laws of the king were imperative upon a jury in civil suits, the king might enact laws giving one man's property to another ... and authorizing civil suits to obtain possession of it.").

n97. *Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 (1794)* (Jay, C.J.); see also *Bingham v. Cabbot, 3 U.S. (3 Dall.) 19, 33 (1795)* (Iredell, J.) (explaining in another civil case that, "though the jury will generally respect the sentiments of the court on points of law, they are not bound to deliver a verdict conformably to them"); *Coffin v. Coffin, 4 Mass. (3 Tyng) 1, 25-26 (1808)* (same).

n98. See Matthew P. Harrington, The Law-Finding Function of the American Jury, *1999 Wis. L. Rev. 377, 404-05, 414-23.* Professor Harrington asserts:

The jury's law-finding function disappeared much earlier in the civil context because it was seen to be a drag on the development of predictable legal rules. The desire of the commercial classes for predictability was nothing more than a demand to know the nature of the laws that would govern their economic relations. The unpredictability of jury verdicts and the inability to discern any formal rules from a general verdict made juries wholly inadequate as law-finders.

Id. at 437-38; see also Paul D. Carrington, The Seventh Amendment: Some Bicentennial Reflections, *1990 U. Chi. Legal F. 33, 45* (explaining that "jury nullification in civil cases" led to greater supervision by the judiciary in order to promote predictability so as not to inhibit expanding commercial activity during the Nineteenth Century). In fact, judges began using directed verdicts in civil trials at about this same time. See *Parks v. Ross, 52 U.S. (11 How.) 362, 373 (1850);* William Wirt Blume, Origin and Development of the Directed Verdict, *48 Mich. L. Rev. 555, 568-73 (1950).*

n99. Note, The Changing Role of the Jury in the Nineteenth Century, *74 Yale L.J. 170, 191-92 (1964);* see also Morton J. Horwitz, The Transformation of American Law, 1780-1860, at 28-29, 84, 141-43, 228 (1977) (explaining restrictions on the civil jury as growing from commercial concerns about unpredictable verdicts); William E. Nelson, Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830, at 8, 165-71 (1975) (same).

n100. See Lawrence M. Friedman, A History of American Law 470-71 (2d ed. 1985); see also *Haring v. N.Y. & Erie R.R., 13 Barb. 2, 15-16 (N.Y. App. Div. 1852)* ("Compassion will sometimes exercise over the deliberations of a jury; an influence which, however honorable to them as philanthropists, is wholly inconsistent with the principles of law and the ends of justice."); cf. *Wilkerson v. McCarthy, 336 U.S. 53, 61-62 (1949)* (leaving the question of negligence in a FELA action to the jury notwithstanding fears that this is tantamount to imposing strict liability on the railroads).

n101. See *Hickman v. Jones, 76 U.S. (9 Wall.) 197, 201 (1869); Duffy v. People, 26 N.Y. 588, 591-93 (1863);* see also Alschuler & Deiss, supra note 61, at 906-21; Harrington, supra note 98, at 425 ("The instrumentalist pressures behind efforts to limit the jury's law-finding function in civil cases were not immediately apparent in criminal proceedings. This was no doubt a result of the fact that commercial interests had no direct interest in criminal prosecutions."); id. at 436 ("The jury's law-finding function in civil cases was all but extinct long before the Civil War. Although the jury's power over the criminal law survived much longer, it, too, eventually went into decline."). In some antebellum criminal cases the courts rejected the claim that juries should find the law, but they did so in part by analogy to the demise of that right in civil cases. See *United States v. Morris, 26 F. Cas. 1323, 1335-36 (C.C.D. Mass. 1851)* (No. 15,815); *Stettinius v. United States, 22 F. Cas. 1322, 1331 (C.C.D.C. 1839)* (No. 13,387); *United States v. Battiste, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835)* (Story, J.) (No. 14,545); *Commonwealth v. Porter, 51 Mass. (10 Met.) 263, 276 (1845); Pierce v. State, 13 N.H. 536, 542, 553-54 (1843).*

n102. See *Horning v. District of Columbia, 254 U.S. 135, 138-39 (1920)* (Holmes, J.) ("The judge cannot direct a verdict it is true, and the jury has the power to bring in a verdict in the teeth of both law and facts. But the judge always has the right and duty to tell them what the law is ... ."); see also *Dunn v. United States, 284 U.S. 390, 393 (1932)* (Holmes, J.) ("We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity." (internal quotation marks omitted)); supra Part III.A.

n103. See *Sparf & Hansen v. United States, 156 U.S. 51, 99-106 (1895); id. at 105* ("With few exceptions, the rules which obtain in civil cases in relation to the authority of the court to instruct the jury upon all matters of law arising upon the issues to be tried, are applicable in the trial of criminal cases."); see also *United States v. Gaudin, 515 U.S. 506, 513 (1995)* ("In criminal cases, as in civil, [Sparf] held, the judge must be permitted to instruct the jury on the law and to insist that the jury follow his instructions."); cf. *Sparf, 156 U.S. at 174-75* (Gray, J., dissenting) (arguing that juries should decide questions of law in criminal but not in civil cases).

n104. See *Walker v. N.M. & S. Pac. R.R., 165 U.S. 593, 598 (1897)* (holding that a trial judge could enter a judgment based on the jury's special findings rather than its inconsistent general verdict); see also *Galloway v. United States, 319 U.S. 372, 390 (1943)* (upholding directed verdict, and explaining that trial judges historically enjoyed the power to take civil cases from juries); *Balt. & Carolina Line, Inc. v. Redman, 295 U.S. 654, 659-61 (1935)* (rejecting a Seventh Amendment objection to a judgment notwithstanding the verdict); *Fid. & Deposit Co.*

v. United States, 187 U.S. 315, 319-21 (1902) (rejecting a Seventh Amendment objection to an entry of summary judgment).

n105. See *Monterey v. Del Monte Dunes, 526 U.S. 687, 720 (1999); id. at 731* (Scalia, J., concurring) ("recognizing the historical preference for juries to make primarily factual determinations and for judges to resolve legal questions"); *Colgrove v. Battin, 413 U.S. 149, 157 (1973)* (observing that it is "the purpose of the jury trial in criminal cases to prevent government oppression ... and, in criminal and civil cases, to assure a fair and equitable resolution of factual issues"); *Dimick v. Schiedt, 293 U.S. 474, 486 (1935)* ("Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."), quoted with approval in *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry, 494 U.S. 558, 565 (1990); Slocum v. N.Y. Life Ins. Co., 228 U.S. 364, 387-88 (1913); Walker, 165 U.S. at 596* ("The Seventh Amendment ... requires that questions of fact in common-law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative."); see also Margaret L. Moses, What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence, *68 Geo. Wash. L. Rev. 183, 199-207 & n.113, 256 (2000)* (concluding that the law/fact distinction remains important).

n106. See Sally Lloyd-Bostock & Cheryl Thomas, Decline of the "Little Parliament": Juries and Jury Reform in England and Wales, Law & Contemp. Probs., Spring 1999, at 7, 13-14; see also Patrick E. Higginbotham, Continuing the Dialogue: Civil Juries and the Allocation of the Judicial Power, *56 Tex. L. Rev. 47, 50-53, 60 (1977)* (arguing that the British abandonment of civil juries does not cast any doubt on their continued utility in this country).

n107. See *Chi., Rock Island & Pac. R.R. v. Cole, 251 U.S. 54, 56 (1919).* Note also that a few states still reserve questions of law for criminal juries. See Ga. Const. art. I, 1, P 11; Ind. Const. art. I, 19; Md. Const., Decl. of Rights, art. 23; Or. Const. art. I, 16; see also *Parker v. State, 698 N.E.2d 737, 742 (Ind. 1998)* (interpreting the Indiana provision); cf. *Sparks v. State, 603 A.2d 1258, 1277 (Md. App. 1992)* ("Case law has made it clear that [Maryland's] curious constitutional relic has, through the interpretative process, been shrivelled up to almost nothing."); St. John, supra note 57, at 2566-74 (explaining how such constitutional provisions have been eviscerated by the courts in those states). Most state constitutions preserve a right to a jury trial in civil cases. See Fleming James, Jr., Right to a Jury Trial in Civil Actions, *72 Yale L.J. 655, 655 & n.2 (1963);* Paul B. Weiss, Comment, Reforming Tort Reform: Is There Substance to the Seventh Amendment?, *38 Cath. U. L. Rev. 737, 739 & n.12 (1989)* (adding that state courts may treat interpretations of the Seventh Amendment as persuasive authority).

n108. See *Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537-40 (1958);* see also *Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 432-39 (1996)* (struggling to reconcile the Seventh Amendment's re-examination clause with a state's special standard for appellate review of allegedly excessive damage awards); *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 354 (1979)* (Rehnquist, J., dissenting) ("It is precisely because the Framers believed that they might receive a different result at the hands of a jury of their peers than at the mercy of the sovereign's judges, that the Seventh Amendment was adopted."); cf. *Dice v. Akron, C. & Y. R.R., 342 U.S. 359, 363 (1952)* (holding "that the right to trial by jury is too substantial a part of the rights accorded by the [Federal Employers' Liability] Act to permit it to be classified as a mere "local rule of procedure' for denial in the manner that Ohio has here used," namely, allowing the trial judge to resolve the factual question of fraud in the execution of a release).

n109. See Edith Guild Henderson, The Background of the Seventh Amendment, *80 Harv. L. Rev. 289, 291, 299-337 (1966)* (describing various mechanisms trial judges used to keep cases from juries, and rejecting claims that

juries enjoyed a right to decide the law except insofar as they had an unreviewable power to acquit in criminal cases); Lettow, supra note 90, at 508-53 (describing jury-control devices used in England during the Eighteenth Century and the rapid incorporation of these devices, especially orders for new trials, in the United States immediately after the Founding); John Marshall Mitnick, From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror, *32 Am. J. Legal Hist. 201, 233 (1988)* ("What civil jurors lost in the process [as English courts increasingly used orders for new trial in the Eighteenth Century] was the theoretical power to nullify the law."); see also Stephen N. Subrin, How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective, *135 U. Pa. L. Rev. 909, 916-17, 927-29 (1987)* (describing the English system of "single issue pleading" and the more gradual reception of devices to control jury discretion in the United States).

n110. See Roger W. Kirst, The Jury's Historic Domain in Complex Cases, *58 Wash. L. Rev. 1, 11-12, 18-20, 31 (1982)* (discussing the "nullification roots" of the Seventh Amendment, but placing these in context with the use of a variety of jury-control devices); see also Richard O. Lempert, Civil Juries and Complex Cases: Let's Not Rush to Judgment, *80 Mich. L. Rev. 68, 86-87 (1981); id. at 82* (arguing that the Court "should take the seventh amendment seriously and respect its underlying purpose even if the Justices are uneasy with the idea that the civil jury might "nullify' the law in cases that are neither overtly political nor obvious occasions for mercy").

n111. See *Fed. R. Civ. P. 50(a)*, *56*; see also Jack H. Friedenthal, Cases on Summary Judgment: Has There Been a Material Change in Standards?, *63 Notre Dame L. Rev. 770, 786-87 (1988)* (noting that, before a 1986 trilogy of Supreme Court decisions clarifying the standards for entering judgments before trial, judges tended "to deny summary judgment in cases where it should have been granted"); Samuel Issacharoff & George Loewenstein, Second Thoughts About Summary Judgment, *100 Yale L.J. 73, 76-93 (1990)* (same); Jeffrey W. Stempel, A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process, *49 Ohio St. L.J. 95, 192 (1988)* (criticizing the liberalization of the standard for granting motions for summary judgment).

n112. See *Sullivan v. Louisiana, 508 U.S. 275, 277 (1993)* ("Although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence."); *Connecticut v. Johnson, 460 U.S. 73, 84 (1983)* (same); *United States v. Kerley, 838 F.2d 932, 937-38 (7th Cir. 1988);* see also Peter Arenella, Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies, *72 Geo. L.J. 185, 215 (1983)* ("The criminal process could limit jury nullification power by adopting civil jury-control devices, such as directed verdicts, special verdicts, and [JNOVs]. One could argue that the absence of these devices in criminal procedure reflects the system's unwillingness to limit the criminal trial jury to the role of factfinding.").

n113. See Peter Westen, The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences, *78 Mich. L. Rev. 1001, 1017 (1980)* ("To say that a judge may not constitutionally direct a verdict against a defendant in a criminal case means that he may not constitutionally confine the criminal jury to the role of fact-finding.").

n114. See supra notes 4 & 8 and accompanying text.

n115. See *Fed. R. Civ. P. 49*. See generally 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure 2501-2513 (2d ed. 1994).

n116. See *United States v. Spock, 416 F.2d 165, 180-83 (1st Cir. 1969)* (distinguishing between civil and criminal trials in this regard); cf. *Fed. R. Crim. P. 31(e)* (requiring special verdicts in cases of criminal forfeiture); *United States v. Desmond, 670 F.2d 414, 416-19 (3d Cir. 1982)* (recognizing the nullification rationale for disfavoring special verdicts in criminal trials, but allowing the use of jury interrogatories where they did not prejudice the defendant); *United States v. Childress, 746 F. Supp. 1122, 1140-41 (D.D.C. 1990)* (rejecting an objection that the use of a verdict form asking whether the government had proved its case beyond a reasonable doubt as to each defendant interfered with the jury's nullification power).

n117. See Donald Olander, Note, Resolving Inconsistencies in Federal Special Verdicts, *53 Fordham L. Rev. 1089, 1090-91 (1985).*

n118. See *Fed. R. Civ. P. 50(b)*, *59* (allowing post-trial motions for a judgment as a matter of law and/or a new trial); see also *Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 36 (1980)* (per curiam) ("The authority to grant a new trial ... is confided almost entirely to the exercise of discretion on the part of the trial court.").

n119. See Shaun P. Martin, Rationalizing the Irrational: The Treatment of Untenable Federal Civil Jury Verdicts, *28 Creighton L. Rev. 683, 688-713 (1995); id. at 708-09* (rejecting "the argument for civil jury nullification" as a basis for tolerating inconsistent verdicts).

n120. *Will v. Comprehensive Acct. Corp., 776 F.2d 665, 677 (7th Cir. 1985).* In contrast, courts will not disturb inconsistent criminal verdicts because they attribute any apparent inconsistency that works in favor of the defendant as reflecting nullification by the jury. See *United States v. Powell, 469 U.S. 57, 65-66 (1984);* Eric L. Muller, The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts, *111 Harv. L. Rev. 771, 784-85 (1998).*

n121. See *Sanabria v. United States, 437 U.S. 54, 64 (1978);* Akhil Reed Amar, Double Jeopardy Law Made Simple, *106 Yale L.J. 1807, 1846 (1997);* see also Thomas M. DiBiagio, Judicial Equity: An Argument for Post-Acquittal Retrial When the Judicial Process Is Fundamentally Defective, *46 Cath. U. L. Rev. 77, 107-08 (1996)* (criticizing this prohibition).

n122. See *United States v. Diebold Inc., 369 U.S. 654, 655 (1962)* ("On summary judgment the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion."); *In re Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1087-88 (3d Cir. 1980)* (explaining that directed verdicts and JNOVs provide only limited protection to litigants impacted by an erroneous jury verdict); *Lind v. Schenley Indus., Inc., 278 F.2d 79, 90 (3d Cir. 1960)* (restricting the power of a trial judge to grant a motion for new trial premised on the claim that the verdict was against the weight of the evidence because this assumes that the jury had failed to fulfill its duty); Victor J. Gold, Jury Wobble: Judicial Tolerance of Jury Inferential Error, *59 S. Cal. L. Rev. 391, 404-05 (1986).* But cf. Michael J. Saks, Public Opinion About the Civil Jury: Can Reality Be Found in the Illusions?, *48 DePaul L. Rev. 221, 239 (1998)* ("In civil cases, jury verdicts are, as a practical matter, little more than advisory opinions... . Obviously erroneous decisions made by juries can easily be set right by judges."). Courts may approve generous settlements of "virtually baseless" litigation in recognition of the value to the defendants of avoiding the risk that jury sympathy for the plaintiffs might lead to an erroneous verdict. See In re "Agent Orange" *Prod. Liab. Litig., 818 F.2d 145, 151 (2d Cir. 1987).*

n123. See Twerski, supra note 22, at 1140 ("Courts should really police juries, but their ability to do so is seriously circumscribed."); id. at 1139 ("Institutional defendants believe that the mechanisms to thwart improper jury verdicts are simply not operative... . Juries, they say, parcel out small portions of liability without significant evidence to support the verdict, and appellate courts are close to impotent if they wish to reverse. The evidence may be just enough to squeak by ... ."); see also Stephan Landsman, The Civil Jury in America, Law & Contemp. Probs., Spring 1999, at 285, 304 ("Despite this impressive array of possible responses to jury error, trial courts are expected to respect jury decisions... . The rules regarding appellate court reversal are even more circumscribed."); George L. Priest, Justifying the Civil Jury, in Verdict, supra note 13, at 103, 105 ("The most unusual characteristic of the jury - and especially the civil jury - is that, in a regime devoted primarily to the principled rule of law, jurors are intentionally allowed to make their decisions without requiring that they be justified or subjected to review, except on grounds of gross error."). One could make a similar point about jury nullification resulting in convictions because reviewing courts have only limited capacity to reverse based on insufficiency of the evidence. See St. John, supra note 57, at 2584-85.

n124. See *Portage II v. Bryant Petro. Corp., 899 F.2d 1514, 1519 (6th Cir. 1990);* see also *Mateyko v. Felix, 924 F.2d 824, 827 (9th Cir. 1990)* (explaining that the decision to use special verdicts or interrogatories resides in the discretion of the trial judge).

n125. *Skidmore v. Balt. & Ohio R.R., 167 F.2d 54, 57-58 (2d Cir. 1948)* (footnotes omitted); see also *Guidry v. Kem Mfg. Co., 598 F.2d 402, 405 (5th Cir. 1979)* (explaining that a general verdict "permits the jurors to import notions of lay justice, to temper legal rules and to render a verdict based on their consciences and their ideas of how the case ought to be decided without strict compliance with the rules laid down by the court"). Professor Yeazell calls general verdicts issued by juries in civil cases "translucent" rather than opaque because trial and appellate judges have a factual record against which to review the decision. See Yeazell, supra note 8, at 94-95 & n.26 (adding that "transparency" would require that the jury return a special verdict).

n126. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 243 (1993)* (observing that "a reasonable jury is presumed to know and understand the law"); *Richardson v. Marsh, 481 U.S. 200, 206 (1987)* (noting "the almost invariable assumption of the law that jurors follow their instructions"); *United States v. Powell, 469 U.S. 57, 66 (1984)* ("Jurors, of course, take an oath to follow the law as charged, and they are expected to follow it."); Graham C. Lilly, The Decline of the American Jury, *72 U. Colo. L. Rev. 53, 68-69 (2001);* J. Alexander Tanford, The Law and Psychology of Jury Instructions, *69 Neb. L. Rev. 71, 79-87, 111 (1990);* cf. Alan Reifman et al., Real Jurors' Understanding of the Law in Real Cases, 16 Law & Hum. Behav. 539, 540 (1992) ("Among social scientists who have studied jury decision making the opposite assumption prevails ... ."); Richard L. Wiener et al., The Social Psychology of Jury Nullification: Predicting When Jurors Disobey the Law, 21 J. Applied Soc. Psychol. 1379, 1397 (1991) (same).

n127. See *Fed. R. Evid. 606(b)*; *McDonald v. Pless, 238 U.S. 264, 266-69 (1915);* see also *Tanner v. United States, 483 U.S. 107, 117-27 (1987)* (discussing the origins of, and rationales for, this rule); *Scogin v. Century Fitness, Inc., 780 F.2d 1316, 1318-20 (8th Cir. 1985)* (rejecting an affidavit introduced to demonstrate that some of the jurors had not understood the consequences of apportioning 55% fault to the plaintiff in a modified comparative negligence jurisdiction); *Kociemba v. G.D. Searle & Co., 707 F. Supp. 1517, 1539 n.23 (D. Minn. 1989); Katz v. Eli Lilly & Co., 84 F.R.D. 378, 380 (E.D.N.Y. 1979)* (explaining that defendant could not impeach verdict with two jurors' statements that the liability verdict reflected a compromise). See generally Susan Crump, Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified?, *66 N.C. L. Rev. 509 (1988);* James W. Diehm, Impeachment of Jury Verdicts: Tanner v. United States and Beyond,

65 St. John's L. Rev. 389, 438-39 (1991); Benjamin M. Lawsky, Note, Limitations on Attorney Postverdict Contact with Jurors: Protecting the Criminal Jury and Its Verdict at the Expense of the Defendant, *94 Colum. L. Rev. 1950 (1994);* Annotation, *65 A.L.R. Fed. 835 (1983).*

n128. See *Dawson v. Chrysler Corp., 630 F.2d 950, 962-63 (3d Cir. 1980).*

n129. See Kevin M. Clermont & Theodore Eisenberg, Appeal from Jury or Judge Trial: Defendants' Advantage, 3 Am. L. & Econ. Rev. 125, 125 (2001) (finding that, in federal civil trials over the last decade, defendants succeeded on appeal from jury verdicts for plaintiffs at a 31% rate, while plaintiffs succeeded on appeal from jury verdicts for defendants at a 13% rate); Eric Schnapper, Judges Against Juries - Appellate Review of Federal Civil Jury Verdicts, *1989 Wis. L. Rev. 237, 250, 354* (finding a similar pattern in reviewing one year of reported decisions by the federal appellate courts). Note that, unlike the comparison of verdict patterns across similar but not identical cases, such asymmetries might provide some evidence that juries find in favor of plaintiffs more often than judges think appropriate, though researchers have cautioned against making such vertical comparisons. See Robert J. MacCoun, Epistemological Dilemmas in the Assessment of Legal Decision Making, 23 Law & Hum. Behav. 723, 724, 726-28 (1999).

n130. See *Hudson v. United States, 522 U.S. 93, 98-105 (1997)* (holding that the double jeopardy clause does not prevent the government from seeking to impose both criminal and civil sanctions for the same act); *Tull v. United States, 481 U.S. 412, 425-27 (1987)* (holding that the Seventh Amendment guaranteed defendant a jury trial on liability, though not on the assessment of civil penalties, in an enforcement action brought by the government under the Clean Water Act); cf. *Towner v. Moore, 604 So. 2d 1093, 1099 (Miss. 1992)* ("The right of trial by jury, nullification variety, is a function of special federal and state constitutional law we have never found to reach civil penalty or forfeiture cases."). In fact, some versions of the Fully Informed Jury Act introduced in state legislatures would have provided a nullification instruction in all cases in which the government is a party, which would have included these civil enforcement actions as well as criminal trials. See Black, supra note 79, at 18; see also Creagan, supra note 79, at 1145 (justifying the inclusion of this subset of civil cases).

n131. See Wendy E. Wagner, Rough Justice and the Attorney General Litigation, *33 Ga. L. Rev. 935, 957-66 (1999);* Marc Lacey, Tobacco Industry Accused of Fraud in Lawsuit by U.S., N.Y. Times, Sept. 23, 1999, at A1; see also George L. Priest, The Role of the Civil Jury in a System of Private Litigation, *1990 U. Chi. Legal F. 161, 170, 181* ("The second principle justification of the civil jury is its role, like that of the criminal jury, as a democratic counterforce to the state in actions that implicate the exercise of governmental power."); *id. at 186* (finding, however, that this role "was trivial in comparison [to automobile accident cases], suggesting that the occasions upon which civil juries are actually employed in a political role are very limited"); cf. Kotler, supra note 48, at 161 & n.127 ("Even in those instances in which the government is a party to civil litigation, its role is more like that of a private litigant than a prosecutor," though noting that "the traditional justification for jury nullification may work in an eminent domain case since governmental authority is being asserted."); Lempert, supra note 110, at 81 (positing an assumption of equality between parties "even when it is the state that brings suit against a citizen"); Murphy, supra note 92, at 738 ("Although the fear of governmental overreaching may be present when the government is a civil plaintiff, ... [it] does not threaten oppression in the way that government as a prosecutor does.").

n132. See *Monterey v. Del Monte Dunes, 526 U.S. 687, 708-11 (1999)* (plurality opinion) (holding that the Seventh Amendment applied to an inverse condemnation claim brought against a city); *id. at 723-33* (Scalia, J., concurring); *Los Angeles v. Heller, 475 U.S. 796, 798-99 (1986)* (per curiam) (rejecting an inconsistent verdict returned by a jury in a lawsuit against a police officer and municipality); see also *Mobil Oil v. United States, 530*

U.S. 604 (2000) (reviewing a breach of contract action against the federal government that was tried without a jury).

n133. See *28 U.S.C. 2402* (2000) (excluding certain taxpayer actions from this restriction). Separate federal statutes may, however, provide a right to request a jury trial in litigation against the federal government.

n134. See *Lehman v. Nakshian, 453 U.S. 156, 160-61 & n.8 (1981)* ("It is not difficult to appreciate Congress' reluctance to provide for jury trials against the United States."); see also Roger W. Kirst, Jury Trial and the Federal Tort Claims Act: Time to Recognize the Seventh Amendment Right, *58 Tex. L. Rev. 549, 582-83 (1980)* (arguing that the expressed "fear of the exorbitant verdict" was unfounded).

n135. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 174-75 (2000);* Michael S. Greve, The Private Enforcement of Environmental Law, *65 Tul. L. Rev. 339, 339-40 (1990);* Jeremy A. Rabkin, The Secret Life of the Private Attorney General, Law & Contemp. Probs., Winter 1998, at 179, 179-80.

n136. See Calvin R. Massey, The Excessive Fines Clause and Punitive Damages: Some Lessons from History, *40 Vand. L. Rev. 1233, 1269-74 (1987);* Edward L. Rubin, Punitive Damages: Reconceptualizing the Runcible Remedies of Common Law, *1998 Wis. L. Rev. 131, 145-47, 154-55.* The Supreme Court rejected the application of the Eighth Amendment to punitive damages, at least when they are paid only to private parties. See *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 275-76 & n.21 (1989);* see also Darryl K. Brown, Structure and Relationship in the Jurisprudence of Juries: Comparing the Capital Sentencing and Punitive Damages Doctrines, *47 Hastings L.J. 1255, 1307-11 (1996)* (drawing a parallel to the Court's Eighth Amendment case law governing the death penalty). In some jurisdictions, however, a portion of any punitive damage award escheats to the state government. See, e.g., *Mack Trucks, Inc. v. Conkle, 436 S.E.2d 635, 639 (Ga. 1993)* (rejecting a constitutional challenge to a Georgia statute that takes a 75% cut for the state).

n137. See, e.g., *TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 474 (1993)* (O'Connor, J., dissenting) ("Jurors are not infallible guardians of the public good... . Arbitrariness, caprice, passion, bias, and even malice can replace reasoned judgment and law as the basis for jury decisionmaking."); Paul Mogin, Why Judges, Not Juries, Should Set Punitive Damages, *65 U. Chi. L. Rev. 179, 207-21 (1998);* Alan Howard Scheiner, Note, Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power, *91 Colum. L. Rev. 142, 223-26 (1991);* Lisa M. Sharkey, Comment, Judge or Jury: Who Should Assess Punitive Damages?, *64 U. Cin. L. Rev. 1089, 1127-36 (1996).* The Supreme Court has used the due process clause to impose both substantive and procedural limits on punitive damage awards by juries. See *Cooper Indus., Inc. v. Leatherman Tool Group, Inc. 121 S. Ct. 1678, 1684-89 (2001); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568-85 (1996)* (holding that a punitive damage award was so grossly excessive as to offend due process); *Honda Motor Co. v. Oberg, 512 U.S. 415, 433-35 (1994)* (holding that punitive damage awards by juries had to be made subject to judicial review, in part because of "the possibility that a jury will not follow those instructions and may return a lawless, biased, or arbitrary verdict").

n138. See generally Symposium, The Intersection of Tort and Criminal Law, *76 B.U. L. Rev. 1 (1996).*

n139. See Conrad, supra note 56, at 71 ("Jury independence serves a distinct purpose in criminal cases, which it does not serve in ordinary civil cases: to protect the accused from injustice or oppression on the part of the government."); Mark S. Brodin, Accuracy, Efficiency, and Accountability in the Litigation Process - The Case for

the Fact Verdict, *59 U. Cin. L. Rev. 15, 109 (1990)* ("[A] private civil dispute over money represents a very different event than a criminal prosecution, with far different stakes and players."); Kotler, supra note 48, at 161 ("Even if one accepts or endorses jury nullification in a criminal context, ... [it] makes little sense in the context of a civil lawsuit. In the civil case, the government's role in the trial process is essentially limited to formulating the rules by which private litigants resolve their disputes."); id. at 171 ("The jury nullification theory is dependent upon a view of government as a threat to individual liberty and the need to interject the jury as a shield to protect the individual from the abuses of government. In the non-criminal case ... the essential justification is lost."); Murphy, supra note 92, at 736-38 (same).

n140. See Creagan, supra note 79, at 1133 ("In Massachusetts and Texas, ... the proposed legislation would require the nullification instruction to be given in all jury trials."); id. at 1127 ("The Texas proposal was criticized as being too broad because it would apply in both civil and criminal trials. The purpose of nullification, it was argued, is to protect people from the government, not to release them from contractual obligations they voluntarily entered into with other private citizens." (footnotes omitted)).

If jury nullification is applied in a civil case, it will serve merely as an escape route for people who have willingly entered into agreements or who, by their negligence, have harmed another person. Jury nullification would serve as a mechanism by which such people can avoid the legal consequences of their actions. This cannot be said to promote justice and, since the government is not directly involved, such a result could not be justified as a protective measure.

Id. at 1145. Current proposals would, however, allow for nullification instructions in civil cases in which the government is a party. See id.; Black, supra note 79, at 18.

n141. See Harry Kalven, Jr., The Dignity of the Civil Jury, *50 Va. L. Rev. 1055, 1072 (1964)* ("Debate about the merits of the jury system should center far more on the value and propriety of the jury's sense of equity, of its modest war with the law, than on its sheer competence."); *id. at 1062-63* (noting that this "cluster of issues goes to the adherence of the jury to the law, to what its admirers call its sense of equity and what its detractors view as its taste for anarchy"); Harry Kalven, Jr., The Jury, the Law, and the Personal Injury Damage Award, *19 Ohio St. L.J. 158, 164-72 (1958)* (offering several "examples of the jury's polite war with the law"); *id. at 168* ("What is so impressive about the jury's equity often is that its view is in fact the law in another state or country or is at least a reform proposal that has articulate spokesmen in the literature."); *id. at 178* (conceding that if the reactions of juries and judges differ too much "we are disturbed by how easily jury equity elides into jury anarchy"); Developments, supra note 7, at 1429-32 (elaborating on "the civil jury's equity function"); see also Patrick Devlin, Trial by Jury 151-55 (1956); id. at 154 ("The fact that juries pay regard to considerations which the law requires them to ignore is generally accepted. I do not mean by that that they frequently and openly flout the law, but that they do not always succeed in separating the wheat from the chaff."); Nancy Gertner, Is the Jury Worth Saving?, *75 B.U. L. Rev. 923, 924-25, 936-37 (1995)* (reviewing Stephen J. Adler, The Jury: Trial and Error in the American Courtroom (1994)) (applauding the jury's equity function).

n142. See supra note 21; see also Neil Vidmar & Jeffrey J. Rice, Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals, *78 Iowa L. Rev. 883, 884-90, 896-901 (1993);* cf. Michelle C. Anderson & Robert J. MacCoun, Goal Conflict in Juror Assessments of Compensatory and Punitive Damages, 23 Law & Hum. Behav. 313, 328 (1999) ("While our findings [that mock juries inflate pain and suffering damages if they cannot award punitive damages] raise some doubts about juror compliance with tort rules, nothing in our analysis implies that judges are less vulnerable to these spillover effects."). But cf. Reid Hastie et al., A Study of Juror and Jury Judgments in Civil Cases: Deciding Liability for Punitive Damages, 22 Law & Hum. Behav. 287, 304 (1998) ("The low levels of comprehension by individual jurors and the lack of thoroughness

in jury deliberation imply that juries rely on legal concepts only partly in making their decisions on liability for punitive damages.").

n143. The Supreme Court has decided that such questions lie at the core of the jury's function under the Seventh Amendment. See *Int'l Terminal Operating Co. v. N.V. Nederl. Amerik Stoomv. Maats., 393 U.S. 74, 75 (1968)* (per curiam); *Richmond & Danville R.R. v. Powers, 149 U.S. 43, 45 (1893)* ("It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury ... ."); *R.R. Co. v. Stout, 84 U.S. (17 Wall.) 657, 663-64 (1874)* (same); *id. at 664* ("Although the facts are undisputed it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence."); see also Stephen A. Weiner, The Civil Jury Trial and the Law-Fact Distinction, *54 Cal. L. Rev. 1867, 1876-94 (1966)* (elaborating this point).

n144. See John Guinther, The Jury in America 227-30 (1988); see also Gergen, supra note 35, at 409-10 ("It is common place in negligence law that the values of popular judgment factor significantly in the choice to evaluate conduct under a standard that the jury administers."); Steven D. Smith, Rhetoric and Rationality in the Law of Negligence, *69 Minn. L. Rev. 277, 301-02 (1984);* Catharine Pierce Wells, Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication, *88 Mich. L. Rev. 2348, 2387-89, 2393 (1990)* (noting that concepts of negligence, product defectiveness, and proximate causation invite juries to exercise discretion).

n145. See supra notes 37-41 and accompanying text.

n146. See Fleming James, Jr., Functions of Judge and Jury in Negligence Cases, *58 Yale L.J. 667, 682, 686-90 (1949)* (recognizing that juries have the power to ignore their instructions, and concluding that this may serve a "catalytic function in hastening legal change"); Kalven, The Dignity of the Civil Jury, supra note 141, at 1071 (noting that "jury resistance to a rule is often a catalyst of change"); Charles E. Wyzanski, Jr., A Trial Judge's Freedom and Responsibility, *65 Harv. L. Rev. 1281, 1286 (1952)* ("Traditionally juries are the device by which the rigor of the law is modified pending the enactment of new statutes."); Yeazell, supra note 8, at 116 ("Civil jury verdicts make law. Civil juries create changes that the unaided judiciary could not ... . The jury need not expose its calculations of liability or damages to public scrutiny: the "black box' quality of the general verdict keeps these aspects of its lawmaking hidden and less susceptible to criticism."); see also id. at 113 ("In torts, the civil jury has wrought much. It has, with a modest assist from the courts, rewritten the law of ordinary negligence."). Earlier in his article, Professor Yeazell claimed to "take no position on the desirability of that power." Id. at 105. Even so, in discussing the role of jury nullification in the emergence of comparative negligence, products liability, wrongful discharge litigation by at-will employees, and punitive damage awards, he clearly applauds this phenomenon. See id. at 113-16; see also id. at 105-06 ("Lawyers, perhaps especially law teachers, are often critical about departures from the regime of "hard' law.").

n147. See Friedman, supra note 3, at 210-11 ("Were there unwritten tort laws? Almost certainly the answer is yes. But it would take patient research, in long buried documents, to determine the extent to which civil juries enforced unwritten laws."); see also Walter O. Weyrauch, Unwritten Constitutions, Unwritten Law, *56 Wash. & Lee L. Rev. 1211, 1231-38 (1999)* (discussing the strategic importance of an awareness of the operation of unwritten laws).

n148. See Yeazell, supra note 8, at 114 ("Ultimately, law caught up with the jury. Courts and legislatures formally adopted the system [of comparative negligence] that jury verdicts had been applying informally for

years."); see also Developments, supra note 7, at 1432 ("The law of contributory negligence is one area in which civil jury nullification has a historic and continuing relevance. Regrettably, however, the civil jury's ability to perform its equity function effectively [given the use of procedural devices for greater judicial control] is doubtful." (footnote omitted)).

n149. See Kirst, supra note 110, at 29 ("Perhaps the jury as an institution should be considered an ongoing referendum. Each jury panel provides one bit of data that in sum, over all juries, provides an enormously useful amount of information about the substantive law.").

n150. See, e.g., *Li v. Yellow Cab Co., 532 P.2d 1226, 1231 (Cal. 1975); Hoffman v. Jones, 280 So. 2d 431, 437 (Fla. 1973);* see also *Vascoe v. Ford, 54 So. 2d 541, 542 (Miss. 1951)* (modifying a rule against awarding damages for disfigurement in part because juries ignored it: "It is frequently said that our juries are prone to disregard the rule as heretofore established ... and award damages for physical mutilation irrespective of the law; such an attitude is but proof of the fact that the sense of justice of the average man revolts against the rule.").

n151. See Henry Woods & Beth Deere, Comparative Fault 22-25 (3d ed. 1996). Sensibly or not, a handful of states remain committed to the traditional rule that contributory negligence completely bars recovery, even after having considered the various arguments against it. See, e.g., *Williams v. Delta Int'l Mach. Corp., 619 So. 2d 1330, 1333 (Ala. 1993).* Once a pattern of jury nullification has failed to move the state's legislature and highest court, continued refusals to abide by judicial instructions seem even less defensible.

n152. See *Alvis v. Ribar, 421 N.E.2d 886, 898 (Ill. 1981);* Restatement (Third) of the Law of Torts: Apportionment of Liability 7 & cmt. a (2000); see also Gary T. Schwartz, Contributory and Comparative Negligence: A Reappraisal, *87 Yale L.J. 697, 699 (1978)* (defending the shift to comparative negligence without distinguishing between pure and modified forms of the defense).

n153. See William L. Prosser, Comparative Negligence, *51 Mich. L. Rev. 465, 484 (1953)* ("The fear of such misbehavior of the jury has played a considerable part in the limitation which a number of the states have placed upon the application of their apportionment acts."); see also Lewis F. Powell, Jr., Contributory Negligence: A Necessary Check on the American Jury, *43 A.B.A. J. 1005, 1006-08, 1062 (1957)* (arguing for the retention of the defense as an absolute bar to recovery in part because juries already apply a form of comparative negligence in practice and should not be given any greater freedom than they already enjoy to apportion damages).

n154. See Victor E. Schwartz, Comparative Negligence 17-4(h), at 370 (3d ed. 1994) ("Comparative negligence usually is the result of comparatively recent legislative judgment. Therefore, the law should be applied as the legislature intended it, or it should be changed at that level."); Schaffer, supra note 47, at 846, 850; id. at 851 ("Informing the jury of the legal effect of its special verdict answers in a comparative negligence action violates the comparative negligence scheme established by the legislature or the highest court of a state ... ."). A few statutes, however, invite juries to apply the threshold flexibly by directing the court to inform the jury of the consequences of an assignment of fault to the plaintiff. See, e.g., *Wyo. Stat. Ann. 1-1-109(c)(i)(B)* (Lexis 1999).

n155. See Valerie P. Hans, The Illusions and Realities of Jurors' Treatment of Corporate Defendants, *48 DePaul L. Rev. 327, 352-53 (1998); id. at 328* ("The application of this distinctive standard appears to be consistent

with the political function of the American jury."); Robert J. MacCoun, Differential Treatment of Corporate Defendants By Juries: An Examination of the "Deep-Pockets" Hypothesis, 30 L. & Soc'y Rev. 121, 123-24, 140-42 (1996); id. at 126 ("Both archival analyses and mock jury experimentation indicate that in similar cases, juries do treat corporations differently from individuals."); see also Valerie P. Hans, Business on Trial: The Civil Jury and Corporate Responsibility (2000); Brian H. Bornstein, David, Goliath, and Reverend Bayes: Prior Beliefs About Defendants' Status in Personal Injury Cases, 8 Applied Cognitive Psychol. 233, 250-52 (1994); William R. Darden et al., The Role of Consumer Sympathy in Product Liability Suits: An Experimental Investigation of Loose Coupling, 22 J. Bus. Res. 65, 83 (1991); Hammitt et al., supra note 35, at 754 ("Compared with individual defendants, our model predicts that corporate defendants pay 34 percent larger awards, after controlling for plaintiffs' injuries and type of legal case."); Neil Vidmar, Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases, *43 Duke L.J. 217, 227-41, 256-66 (1993)* (criticizing studies that claimed to find a deep pocket effect, but confirming research that juries hold certain types of defendants to a higher standard of care); Catharine Pierce Wells, Corrective Justice and Corporate Tort Liability, *69 S. Cal. L. Rev. 1769, 1778 (1996)* (defending differential).

n156. See Bruce Chapman, Corporate Tort Liability and the Problem of Overcompliance, *69 S. Cal. L. Rev. 1679, 1683-87 (1996);* Steven P. Croley, Vicarious Liability in Tort: On the Sources and Limits of Employer Reasonableness, *69 S. Cal. L. Rev. 1705, 1705-06 (1996).* Thus, courts often instruct juries that "the fact that the plaintiffs are individuals and defendant is a corporation must not enter into or affect your verdict... . A corporation is entitled to the same fair trial at your hands as a private individual." In re Richardson-Merrell, Inc. "Bendectin" *Prods. Liab. Litig., 624 F. Supp. 1212, 1266 (S.D. Ohio 1985),* aff'd, *857 F.2d 290 (6th Cir. 1988);* accord 3 Edward J. Devitt et al., Federal Jury Practice and Instructions 71.04 (4th ed. 1987).

n157. See Rebecca S. Dresser et al., Breast Implants Revisited: Beyond Science on Trial, *1997 Wis. L. Rev. 705, 740-43; id. at 741* ("Jurors may be "commingling' or nullifying the causation rule to produce a legal outcome that compensates for the lack of legal incentives to test products earlier in the development process."); *id. at 742-43* ("Indeed, juries in the breast implant cases may simply be doing sub rosa what the legal system should do formally: shift the burden of proof to the manufacturers to disprove causation when the absence of safety research is due to the manufacturer's own neglect."); Rochelle Cooper Dreyfuss, Galileo's Tribute: Using Medical Evidence in Court, *95 Mich. L. Rev. 2055, 2070 (1997)* (book review) ("We may be seeing something of a new liability rule rather than a mistake in factfinding."); Wendy E. Wagner, Choosing Ignorance in the Manufacture of Toxic Products, *82 Cornell L. Rev. 773, 828 & n.200 (1997);* cf. Margaret A. Berger, Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts, *97 Colum. L. Rev. 2117, 2147, 2152 (1997)* (noting commingling by juries, but advocating doctrinal changes instead). Causation lapses may, however, reflect juror confusion with the evidence or the judge's instructions as much as anything else. See supra note 9; cf. *Mitchell v. Gonzales, 819 P.2d 872, 877-79 (Cal. 1991)* (rejecting a pattern jury instruction on proximate causation that researchers had identified as incomprehensible).

n158. See Jerry L. Mashaw, A Comment on Causation, Law Reform, and Guerilla Warfare, *73 Geo. L.J. 1393, 1396 (1985)* ("For some reason the system is ignoring the rules of causation ... in order to let plaintiffs win. Why? One answer may be that ignoring legal and scientific precepts allows the tort system to play a role in social mobilization ... . Imagine judges and juries, therefore, engaged in politics."). Professor Mashaw elaborated as follows:

I am tempted to suggest that in the toxic torts context we should describe the tort system as primarily a system of guerilla warfare. We seem to have a lot of potential revolutionaries (plaintiffs and jurors) who are throwing bombs (litigation) and who aren't too interested in what shape the rubble (the civil liability system) takes after the litigation is over. The major social goal of this activity may be to ensure that society is sufficiently shaken up to do something

about these fearful toxic risks... . Causation becomes the main line of defense of the established order.

Id. at 1395; see also *id. at 1396-97* ("Even the more swashbuckling approaches to causation now inhabiting the toxic torts jurisprudence may be good law, that is, they may represent what we currently want from a system that needs to be dismantled and reconstructed in a very different fashion."); E. Donald Elliott, Why Courts? Comment on Robinson, *14 J. Legal Stud. 799, 799-800 (1985)* (objecting to a pattern of "courts and juries straining to nullify the unrealistic hurdle that allowed victims of toxic substances poisoning to recover only by proving" causation, thereby managing to "permit the system to evolve by legal fiction").

n159. See Lawrence M. Friedman & Jack Ladinsky, Social Change and the Law of Industrial Accidents, *67 Colum. L. Rev. 50, 61, 68-69 (1967).*

n160. See Clayton P. Gillette & James E. Krier, Risk, Courts, and Agencies, *138 U. Pa. L. Rev. 1027, 1043-45, 1054-58 (1990)* (focusing, however, on supposedly pro-plaintiff tort doctrines rather than overly generous juries).

n161. See Neal Feigenson, Legal Blame: How Jurors Think and Talk About Accidents 5, 109-10, 226-30 (2000); id. at 12 ("The deference generally accorded to the jury, through such devices as the general verdict and limited posttrial and appellate review, allows jurors considerable latitude to use their common sense to implement, and sometimes to oppose, the substantive legal rules."); id. at 209 (defending a mock jury's reduction in their original apportionment of fault to the plaintiff when informed of the threshold for the modified comparative negligence defense); see also Neal R. Feigenson, The Rhetoric of Torts: How Advocates Help Jurors Think About Causation, Reasonableness, and Responsibility, *47 Hastings L.J. 61, 160-61 (1995)* (observing that "the legal system tolerates and even encourages jurors to augment (and sometimes, if necessary, to nullify) legal rules by applying their own senses of justice"); John F. Manzo, "You Wouldn't Take a Seven-Year-Old and Ask Him All These Questions": Jurors' Use of Practical Reasoning in Supporting Their Arguments, 19 L. & Soc. Inquiry 639, 643, 662 (1994) (making a similar point based in part on an analysis of jury deliberations in a simple breach of contract case).

n162. See Kirst, supra note 110, at 31 ("This kind of a nullification role for the jury is logically unsound. In ordinary negligence cases it assumes juries will exercise a consistent pro-plaintiff, anti-corporation, anti-insurer bias... . The proponents of this nullification role never fully analyzed or discussed what were good or bad biases.").

n163. See Kate Stith, The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal, *57 U. Chi. L. Rev. 1, 50-55 (1990);* see also Lawrence M. Solan, Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt, *78 Tex. L. Rev. 105, 146-47 (1999)* (explaining that juries have difficulty understanding the differences between criminal and civil standards of proof).

n164. See Ronald J. Allen, A Reconceptualization of Civil Trials, *66 B.U. L. Rev. 401, 428, 436 (1986);* Murphy, supra note 92, at 737 ("In a civil case between private litigants ... there is little in the institutional alignment of the parties to indicate that one litigant should at the outset be favored over another."). Substantive rules may, however, allocate burdens of proof in ways that will systematically benefit one side or the other.

n165. See Jerome Frank, Courts on Trial: Myth and Reality in American Justice 130 (1949) ("We do not have uniform jury-nullification of harsh rules; we have juries avoiding - often in ignorance that they are so doing -

excellent as well as bad rules, and in capricious fashion."); Kotler, supra note 48, at 169 ("Some juries will be in favor of the law while others will be opposed. Furthermore, some juries may recognize the existence of their power to nullify and exercise such power, while others may not... . [This] will result in inconsistent, unpredictable, and unfair verdicts.").

n166. William L. Prosser, Comparative Negligence, *41 Cal. L. Rev. 1, 4 (1953)* (footnote omitted); see also Robert E. Keeton, Venturing to Do Justice: Reforming Private Law 74-77 (1969) (same, adding that "one can favor candid adoption of comparative negligence ... and yet find the adoption of that system by subterfuge deeply disturbing"); Hans Zeisel et al., Delay in the Court 90-91 (1959) ("For the plaintiff the attraction of the new formula is that he exchanges the risk that the jury will in fact heed the contributory negligence defense for the certainty that the judge will apply comparative negligence."); Schaffer, supra note 47, at 846-48 (contending that compromise verdicts under the regime of contributory negligence sacrificed honesty, uniformity, and predictability).

n167. See Coleman Gay, "Blindfolding" the Jury: Another View, *34 Tex. L. Rev. 368, 380 (1956)* ("If juries are to be allowed to disregard the court's instructions and to decide for one party or the other regardless of the evidence, the parties' rights will depend solely on the conscience of the particular jury trying the case."); Kotler, supra note 48, at 154 ("Decisions based upon fixed, known rules of law are necessarily more predictable than decisions based upon community values as reflected by a small group of persons randomly selected from that community."); Charles T. McCormick, Jury Verdicts Upon Special Questions in Civil Cases, 27 J. Am. Judicature Soc'y 84, 85 (1943) ("This hidden escape-valve from the hardships of fixed law may become an abuse, and may degenerate into a system in which juries tend not merely to temper law with equity in occasional cases of conflict, but to disregard the law generally and follow prejudice or personal favor."); see also Broeder, supra note 9, at 412-13 (criticizing the role of juries in tort litigation).

n168. See *Vegodsky v. City of Tucson, 399 P.2d 723, 726 (Ariz. Ct. App. 1965)* ("[Jurors] may grant relief to a negligent plaintiff because they have an affinity for him and/or an aversion for the defendant, or, conversely, they may deny relief for equally capricious reasons."). For instance, minority plaintiffs have less success in pursuing tort claims. See Frank M. McClellan, The Dark Side of Tort Reform: Searching for Racial Justice, *48 Rutgers L. Rev. 761, 774-76 (1996);* see also supra note 25 (discussing evidence of jury nullification in favor of defendants who allegedly violated civil rights statutes that provide a damages remedy for victims of discrimination).

n169. See Stephen G. Gilles, The Invisible Hand Formula, *80 Va. L. Rev. 1015, 1021-22 (1994)* ("Better ex ante to specify negligence in some contexts and strict liability in others than to leave the choice up for grabs in each case. Moreover, from a rule-of-law standpoint, the choice already has been made ... ."); *id. at 1026-27* ("This de facto [strict liability] rule is the result of wasteful expenditures directed at the jury as rule-chooser. Because juries (even those attempting to follow the law) are left with great latitude in choosing which liability rule to apply, the system is pervaded by costly and unnecessary uncertainty."); *id. at 1045-48* (doubting "that explicit cost-benefit instructions may lead to jury nullification" in negligence cases). Some commentators have explained that, because juries make judgments about foreseeability in hindsight, tort law has shifted to a de facto and perhaps suboptimal strict liability standard. See Jeffrey J. Rachlinski, A Positive Psychological Theory of Judging in Hindsight, *65 U. Chi. L. Rev. 571, 595-602 (1998);* see also Kim A. Kamin & Jeffrey J. Rachlinski, Ex Post Ex Ante: Determining Liability in Hindsight, 19 Law & Hum. Behav. 89, 99-102 (1995); Susan J. LaBine & Gary LaBine, Determinations of Negligence and the Hindsight Bias, 20 Law & Hum. Behav. 501, 510-15 (1996).

n170. See Kirst, supra note 110, at 11, 19 (objecting to civil jury nullification because "the idea of constitutional government and due process of law requires some consistency in the application of the law as well as equal treatment

of all litigants"); see also Kent Greenawalt, Conflicts of Law and Morality 360 (1987) (explaining that, although the arguments favoring civil and criminal jury nullification overlap, "the claim of the opposing party to have his lawful expectations satisfied is a powerful argument against subverting the rules of civil liability to his disadvantage"); Brodin, supra note 139, at 109 ("Reasonable predictability of results and equitable distribution of compensation are goals that separate the tort recovery system from the criminal process."); Pamela J. Stephens, Controlling the Civil Jury: Towards a Functional Model of Justification, *76 Ky. L.J. 81, 139-42, 147-51 (1987)* (canvassing arguments for and against jury nullification as they might apply to civil trials); *id. at 159* ("In a commercial law civil suit, the arguments for the jury's right to ignore the law become less compelling, particularly in view of the commercial law's interest in uniformity and predictability.").

n171. *Honda Motor Co. v. Oberg, 512 U.S. 415, 434 (1994);* see also Dorsey D. Ellis, Jr., Punitive Damages, Due Process, and the Jury, *40 Ala. L. Rev. 975, 988-1007 (1989)* (elaborating on the due process argument for limiting the jury's role in awarding punitive damages); Roger W. Kirst, Judicial Control of Punitive Damage Verdicts: A Seventh Amendment Perspective, *48 SMU L. Rev. 63, 87-96 (1994)* (criticizing the reliance on jury nullification arguments in response to the due process objections to unrestricted discretion).

n172. See *BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585 (1996)* ("The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business."); *First Nat'l Bank v. Bellotti, 435 U.S. 765, 780 n.15 (1978)* ("It has been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment."); Herbert Hovenkamp, The Classical Corporation in American Legal Thought, *76 Geo. L.J. 1593, 1640-51 (1988)* (discussing the evolution of "constitutional personhood" for corporations).

n173. See Nancy J. King & Susan R. Klein, Essential Elements, *54 Vand. L. Rev. 1467 (2001).*

n174. See Lempert, supra note 110, at 88 (explaining that the Supreme Court has only applied against the states a right to a jury in criminal cases by incorporation through the Fourteenth Amendment, which suggests that procedural due process does not require a civil jury); cf. *TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 475-76 (1993)* (O'Connor, J., dissenting) ("Influences such as caprice, passion, bias, and prejudice are antithetical to the rule of law. If there is a fixture of due process, it is that a verdict based on such influences cannot stand."). In another context, the Supreme Court has shifted its procedural due process inquiry from a noninstrumental calculus to a more utilitarian focus on whether granting a hearing would reduce the risk of erroneous decisionmaking. See *Mathews v. Eldridge, 424 U.S. 319, 335, 343-47 (1976);* Edward L. Rubin, Due Process and the Administrative State, *72 Cal. L. Rev. 1044, 1105, 1142 (1984).*

n175. See *In re Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1084-89 (3d Cir. 1980);* see also Note, The Case for Special Juries in Complex Civil Litigation, *89 Yale L.J. 1155, 1169-70 (1980)* (elaborating on the due process argument). But cf. *In re U.S. Fin. Sec. Litig., 609 F.2d 411, 427-31 (9th Cir. 1979)* (rejecting any due process objection premised on doubts that a jury could rationally resolve a complex case). The Third Circuit did not, however, suggest that jury nullification would violate due process, focusing instead on concerns that a jury could not function as intended when it could not understand the facts and/or the law. See *Japanese Elec. Prods., 631 F.2d at 1085* ("The function of "jury equity' may be legitimate when the jury actually modifies the law to conform to community values. However, when the jury is unable to determine the normal application of the law to the facts of a case ... , its operation is indistinguishable from arbitrary and unprincipled decisionmaking.").

n176. See Carrington, supra note 98, at 46 ("It would arguably be a violation of the Fifth Amendment for a federal judge in a civil case to instruct a jury that it might disregard instructions on the law if they found the law so described to be unjust.").

n177. See *Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 163-69 (1979); Rosenblatt v. Baer, 383 U.S. 75, 88 n.15 (1966)* (explaining that the "public figure" limitation will "lessen the possibility that a jury will use the cloak of a general verdict to punish unpopular ideas or speakers"); Christopher G. Scanlon, Note, The Applicability of the Constitutional Privilege to Defame: Question of Law or Question of Fact?, *55 Ind. L.J. 389, 404-06 (1980)* (same).

n178. See *Skidmore v. Balt. & Ohio R.R., 167 F.2d 54, 59 n.14 (2d Cir. 1948)* (speculating "that reliance on jury nullification of legal rules has retarded desirable remedial legislation by the elected legislatures"); Frank, supra note 6, at 176 n.l ("Is it not possible that the courts failed to abolish the fellow-servant rule ... because the juries made that abolition unnecessary? ... The jury is an unnecessarily cumbersome agency for the process of nullifying undesirable rules."); Broeder, supra note 9, at 413 ("It is probable, however, that the legal remains of these doctrines would long ago have passed out of our law had not the jury made their presence less disturbing. Instead of facilitating desirable changes in the law, jury verdicts may in many cases retard such changes."); Schaffer, supra note 47, at 848 ("Tolerance of compromise verdicts in negligence cases tended to ease public pressure for abrogation of the all-or-nothing contributory negligence defense... . The compromise-verdict practice delayed the adoption of the equitable comparative negligence principle by the states."); cf. Lars Noah, Pigeonholing Illness: Medical Diagnosis as a Legal Construct, *50 Hastings L.J. 241, 299 (1999)* (suggesting that, when physicians distort diagnoses in order to circumvent payment restrictions, they reduce pressures for necessary reforms).

n179. See supra note 153 and accompanying text.

n180. See Erica Beecher-Monas, The Heuristics of Intellectual Due Process: A Primer for Triers of Science, *75 N.Y.U. L. Rev. 1563, 1608-24 (2000);* David L. Faigman et al., How Good Is Good Enough? Expert Evidence Under Daubert and Kumho, *50 Case W. Res. L. Rev. 645, 659-67 (2000);* Lucinda M. Finley, Guarding the Gate to the Courthouse: How Trial Judges Are Using Their Evidentiary Screening Role to Remake Tort Causation Rules, *49 DePaul L. Rev. 335, 347-76 (1999);* Joseph Sanders, Scientific Validity, Admissibility, and Mass Torts After Daubert, *78 Minn. L. Rev. 1387, 1429-41 (1994).*

n181. See *City of Chicago v. Morales, 527 U.S. 41, 55 (1999)* (invalidating an ordinance that prohibited gang loitering as void for vagueness); *Montana v. Stanko, 974 P.2d 1132, 1135-38 (Mont. 1998)* (invalidating a statute that used the equivalent of a reasonable person standard to regulate the operation of vehicles as void for vagueness).

n182. See Kalven, The Dignity of the Civil Jury, supra note 141, at 1071 ("In certain areas of law jury equity is fully legitimated by the system. Here, it is not what we suspect the jury may do in bending the law; it is what the jury is instructed to do according to the official view."). Perhaps the argument for civil jury nullification would be stronger in more rule-bound areas of litigation such as contract law, but even there one has seen a movement toward more flexible standards. See Melvin Aron Eisenberg, The Responsive Model of Contract Law, *36 Stan. L. Rev. 1107, 1167 (1984).*

n183. See *United States v. Dougherty, 473 F.2d 1113, 1142 (D.C. Cir. 1972)* (Bazelon, C.J., concurring in

part and dissenting in part) ("The drafters of legal rules cannot anticipate and take account of every case where a defendant's conduct is "unlawful' but not blameworthy, any more than they can draw a bold line to mark the boundary between an accident and negligence."); see also *McGautha v. California, 402 U.S. 183, 199 (1971)* ("In order to meet the problem of jury nullification [in capital cases], legislatures ... adopted the method of forthrightly granting juries discretion which they had been exercising in fact."). Critics of criminal jury nullification point out, however, that defenses such as necessity, duress, or self-defense already offer juries such opportunities. See Leipold, supra note 55, at 310. But cf. Finkel, supra note 55, at 329-31, 337 (responding that some of these rules lack sufficient nuance).

n184. See Marc Galanter, The Civil Jury as Regulator of the Litigation Process, *1990 U. Chi. Legal F. 201, 211* ("The jury casts a shadow across the wider arena of claims and settlements by communicating signals about what future juries might do."); Marder, supra note 8, at 909 ("Although the jurors do not have the vehicle of a judicial opinion in which to explain their interpretation, it is through a verdict that the jury gives shape to the law, albeit incrementally."); Lars Noah, Rewarding Regulatory Compliance: The Pursuit of Symmetry in Products Liability, *88 Geo. L.J. 2147, 2159-60 & n.54 (2000)* (describing the nature of the regulatory effect of jury verdicts in tort litigation).

n185. See Stephen D. Sugarman, Judges as Tort Law Un-Makers: Recent California Experience with "New" Torts, *49 DePaul L. Rev. 455, 470 (1999)* (explaining that the effect of the liberalization of tort doctrine "was to transfer much power from judges to juries," which "increasingly meant that the law was what an individual group of jurors said it was"); see also *id. at 472* ("The [California Supreme C]ourt is now strongly inclined to re-introduce more detailed rules into tort law - to take power back for judges and away from juries (and thereby give defendants clearer ideas about just what their precise legal obligations are)."); William Powers, Jr., Judge and Jury in the Texas Supreme Court, *75 Tex. L. Rev. 1699, 1719 (1997)* ("The court is shifting more of the normative work in tort litigation away from juries and toward judges ... by particularizing the issue of duty."); Mark Curriden, Putting the Squeeze on Juries, A.B.A. J., Aug. 2000, at 52 (calling this an alarming nationwide trend, and one that is not limited to tort litigation).

n186. See Frank, supra note 165, at 132-33 ("Individualization should be accomplished openly, not furtively by such a surreptitious technique as "jury lawlessness' ... . If any legal rules are so inflexible that they work injustice, they should avowedly be made more flexible."); Kotler, supra note 48, at 166 ("Legislatures can and frequently do recognize this and provide for the amelioration of harsh results either directly or by vesting discretionary power in the judge or jury."); see also *Escola v. Coca-Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944)* (Traynor, J., concurring) ("In leaving it to the jury to decide whether the [res ipsa loquitur] inference has been dispelled, regardless of the evidence against it, the negligence rule approaches the rule of strict liability. It is needlessly circuitous to [designate as] negligence ... what is in reality liability without negligence."); Roger J. Traynor, Fact Skepticism and the Judicial Process, *106 U. Pa. L. Rev. 635, 638-40 (1958)* (emphasizing the need to reform substantive rules openly and uniformly instead of relying on circumvention by juries); cf. A.A. White, The Reasonably Just Man, *5 Hous. L. Rev. 575, 603-13 (1968)* (proposing that courts give juries complete discretion to decide tort cases).

n187. See Gergen, supra note 35, at 426 (noting that jurors may impose a form of absolute liability in tort, but adding that "it is difficult to claim this as a normative judgment that the jury is entitled to make within negligence law"). In the course of reacting to a passage in an article by Oliver Wendell Holmes about the desirability of leaving questions of negligence to the jury, one commentator made the same point as follows:

Holmes is not speaking of the jury's strictly legal function as fact-finder, in which the law has accorded the jury ample room for injecting community sentiment into issues upon which reasonable men may differ. He is instead praising jury lawlessness, the process by which juries nullify laws although the facts on which their de facto legal determinations are based are ones upon which reasonable men could not differ. These two questions are entirely different.

Broeder, supra note 9, at 411 n.127; see also Kirst, supra note 110, at 32 ("The nullification argument was primarily an overstated position by those in favor of more relaxed limits on jury factfinding.").

n188. See Gergen, supra note 35, at 411 n.9 (pointing out that judges have reserved for themselves the application of equitable doctrines: "Equity confers a power to override normal rules of law under broad standards of justice. It makes a great deal of sense to confine such awesome power to judges, because judges appreciate better than juries the gravity of overriding rules."); Murphy, supra note 92, at 753 n.146 (same). But cf. Stephen R. Mysliwiec, Note, Toward Principles of Jury Equity, *83 Yale L.J. 1023, 1048-54 (1974)* (explaining that juries inevitably apply equitable notions that may deviate from their instructions).

n189. See Nagareda, supra note 20, at 1173-74 ("The ordinary people who become commingling jurors are on to something important, but they are putting into effect their moral intuitions through channels wildly unsuited to their implicit goal."); id. at 1197 ("Mass tort litigation has become a troubling and unwieldy vehicle for the application of moral condemnation, wholly apart from the causation of harm.").

n190. See Mark Geistfeld, Scientific Uncertainty and Causation in Tort Law, *54 Vand. L. Rev. 1011, 1024 (2001);* Joseph Sanders, From Science to Evidence: The Testimony on Causation in the Bendectin Cases, *46 Stan. L. Rev. 1, 77 (1993)* ("This argument demonstrates both an ambivalence about the existing law [of causation] and a belief that this mild form of jury nullification [by commingling] softens an otherwise harsh rule. It was more persuasive when contributory negligence barred recovery to even the minimally negligent plaintiff ... ."); see also David W. Robertson, The Common Sense of Cause in Fact, *75 Tex. L. Rev. 1765, 1766 (1997)* ("Dean Keeton explained why sympathy-inspiring victims of defective products nevertheless must normally lose lawsuits in which they cannot trace the injury to a particular manufacturer ... ."); Aaron Twerski & Anthony J. Sebok, Liability Without Cause? Further Ruminations on Cause-in-Fact as Applied to Handgun Liability, *32 Conn. L. Rev. 1379, 1379 (2000)* ("It is one of the axioms of tort law that a defendant may not be held liable unless he caused the injury ... . Culpability in the air, so to speak, is not the business of tort law, but of public law.").

n191. See John E. Coons, Consistency, *75 Cal. L. Rev. 59, 79 (1987)* (explaining that, in instances of jury nullification, "jurors ignore their instructions and smuggle in their private preferences, thereby defeating the intent of legislative and judicial rules"). Similarly, one can applaud the enlightened exercise of discretion by regulatory agencies but still object when they stray beyond the jurisdiction granted to them. See Lars Noah, Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority, *1997 Wis. L. Rev. 873, 941;* Lars Noah, Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law, *41 Wm. & Mary L. Rev. 1463, 1530 (2000).*

n192. See Brodin, supra note 139, at 105-09; id. at 106 ("When returning a general verdict, this group [of six or twelve jurors] may nonetheless nullify law enacted by democratically elected legislatures, or in effect make new law, and it may do so without having to provide any explanation whatever."); Kotler, supra note 48, at 164-66, 172; see also id. at 150 ("A determination of the legal consequence ... was a legislative function and not properly left to the jury's discretion. Although this particular jury may have felt a pure comparative negligence system would

be preferable ... , it should not be permitted to substitute its judgment for that of elected officials."); Edson R. Sunderland, Verdicts, General and Special, *29 Yale L.J. 253, 260-61 (1920)* (explaining that jury nullification "has often been defended in criminal cases, and there is much to be said for it there; but in civil cases, which should be treated as essentially business controversies, such political meddling by the jury is ... out of place" (footnote omitted)). Strictly speaking, juries may represent our only truly "democratic" institutions. See Edward L. Rubin, Getting Past Democracy, *149 U. Pa. L. Rev. 711, 720 (2001).* Instead, the point is that juries do not function as accountable representatives of the community.

n193. See Gergen, supra note 35, at 422 (explaining that class action litigation has put "great pressure on the jury because of the complexity of issues and the magnification of the effects of a single decision (a concern with the unrepresentativeness of a single jury is allayed by a belief that it takes the accumulated decisions of many juries to affect change)"); Mark Curriden, Power of 12, A.B.A. J., Aug. 2001, at 36; see also William W. Schwarzer & Alan Hirsch, The Modern American Jury: Reflections on Veneration and Distrust, in Verdict, supra note 13, at 399 ("While many jury cases are routine, increasingly they affect large numbers of people; they can jeopardize the survival of major enterprises, carry profound social and political implications, and bring about far-reaching transfers of wealth."); Lempert, supra note 110, at 84 ("Complex cases - such as large-scale antitrust litigation - are some of the most "political' cases that the system hears. Vast sums of money are involved, and the structure of the nation's largest companies may be at issue.").

n194. See Steven D. Penrod & Larry Heuer, Tweaking Commonsense: Assessing Aids to Jury Decision Making, *3 Psychol. Pub. Pol'y & L. 259, 280 (1997);* Leonard B. Sand & Steven Alan Reiss, A Report on Seven Experiments Conducted By District Court Judges in the Second Circuit, *60 N.Y.U. L. Rev. 423, 424 (1985);* William W. Schwarzer, Reforming Jury Trials, *1990 U. Chi. Legal F. 119.* See generally Symposium, Communicating with Juries, *67 Tenn. L. Rev. 517 (2000).*

n195. See B. Michael Dann, "Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries, *68 Ind. L.J. 1229, 1247-79 (1993);* Steven Friedland, The Competency and Responsibility of Jurors in Deciding Cases, *85 Nw. U. L. Rev. 190, 204-20 (1990);* see also Valerie P. Hans et al., The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The Views of Trial Participants, Judges, and Jurors, *32 U. Mich. J.L. Reform 349, 350, 375 (1999)* (assessing proposals for initiating juror deliberations mid-trial); Natasha K. Lakamp, Comment, Deliberating Juror Predeliberation Discussions: Should California Follow the Arizona Model?, *45 UCLA L. Rev. 845, 877 (1998)* (same).

n196. See Amiram Elwork et al., Making Jury Instructions Understandable 4-5, 12-26 (1982); William W. Schwarzer, Communicating with Juries: Problems and Remedies, *69 Cal. L. Rev. 731, 737-47 (1981);* Walter W. Steele, Jr. & Elizabeth G. Thornburg, Jury Instructions: A Persistent Failure to Communicate, *67 N.C. L. Rev. 77, 108-09 (1988).*

n197. See Brodin, supra note 139, at 21, 50-111; Peter H. Schuck, Mapping the Debate on Jury Reform, in Verdict, supra note 13, at 306, 326 (describing the many virtues of special verdicts, and speculating about the reasons for their infrequent use); Franklin Strier, Making Jury Trials More Truthful, *30 U.C. Davis L. Rev. 95, 174-75 (1996);* Elizabeth A. Faulkner, Comment, Using the Special Verdict to Manage Complex Cases and Avoid Compromise Verdicts, *21 Ariz. St. L.J. 297, 308-16 (1989);* see also Elizabeth C. Wiggins & Steven J. Breckler, Special Verdicts as Guides to Jury Decision Making, *14 Law & Psychol. Rev. 1, 30-31 (1990)* (reporting mixed results with the use of special verdicts). In a few states, special verdicts are the norm. See, e.g., *Wis. Stat. 805.12(1)* (1999). Other states require itemized damages in verdicts. See, e.g., Fla. Stat. ch. 768.77 (1999).

n198. See Frank, supra note 165, at 141 ("The jury seems, by this device, to be shorn of its power to ignore the rules or to make rules to suit itself."); Frank A. Kaufman, The Right of Self-Representation and the Power of Jury Nullification, *28 Case W. Res. L. Rev. 269, 287-88 (1978)* ("In civil cases, jury nullification can be disclosed and so made subject to reversal, when it does occur, by the trial judge's use of special verdicts, or a general verdict accompanied by written interrogatories."); Ronald S. Longhofer, Jury Trial Techniques in Complex Civil Litigation, *32 U. Mich. J.L. Reform 335, 347 (1999)* ("Special verdicts limit the jury's opportunity to nullify the law and render verdicts based on their view of the just result in a particular case."); Stephens, supra note 170, at 162-63 (same); see also Clifford Holt Ruprecht, Comment, Are Verdicts, Too, Like Sausages?: Lifting the Cloak of Jury Secrecy, *146 U. Pa. L. Rev. 217, 265-67 (1997)* (suggesting the more radical approach of transcribing jury deliberations in order to create a limited record for judicial review to facilitate the identification of verdicts that spring from jury deviations from the law).

n199. See Prosser, supra note 166, at 28, 32, 37.

n200. See id. at 32 ("All of these advantages clearly operate in favor of the defendant in the majority of apportionment cases, and the proposal for compulsory special verdicts or special interrogatories has met with no enthusiasm at all on the part of the plaintiffs' attorneys ... ."). But cf. David A. Lombardero, Do Special Verdicts Improve the Structure of Jury Decision-Making?, *36 Jurimetrics J. 275, 311-15 (1996)* (explaining that special verdicts may work to the advantage of plaintiffs).

n201. See *Amendments to Rules of Civ. Proc. for the U.S. Dist. Cts., 374 U.S. 861, 867-68 (1963)* (statements by Justices Black and Douglas opposing the adoption of certain amendments); Charles T. McCormick, Jury Verdicts Upon Special Questions in *Civil Cases, 2 F.R.D. 176, 177 (1943);* Elizabeth G. Thornburg, The Power and the Process: Instructions and the Civil Jury, *66 Fordham L. Rev. 1837, 1858-63, 1893 (1998)* (applauding civil jury nullification, and objecting to detailed special verdicts as interfering inappropriately with this function of the jury); Robert Dudnik, Note, Special Verdicts: *Rule 49 of the Federal Rules of Civil Procedure*, *74 Yale L.J. 483, 496-97 (1965).*

n202. See *Fed. R. Civ. P. 42(b)*; *In re Paoli R.R. Yard PCB Litig., 113 F.3d 444, 452-53 n.5 (3d Cir. 1997)* (rejecting Seventh Amendment objection to bifurcation); In re Richardson-Merrell, Inc. "Bendectin" *Prods. Liab. Litig., 624 F. Supp. 1212, 1221-22 (S.D. Ohio 1985),* aff'd, *857 F.2d 290, 306-09, 315-17 (6th Cir. 1988)* (rejecting Seventh Amendment and due process objections to trifurcation); see also *Hydrite Chem. Co. v. Calumet Lubricants Co., 47 F.3d 887, 891 (7th Cir. 1995)* (discussing the variety of ways to split issues at trial); *Helminski v. Ayerst Labs., Inc., 766 F.2d 208, 212 (6th Cir. 1985)* (affirming decision to bifurcate liability and damages to minimize risk of prejudice against defendant in drug products liability claim); *Lis v. Robert Packer Hosp., 579 F.2d 819, 824 (3d Cir. 1978)* ("[A] routine order of bifurcation in all negligence cases is a practice at odds with our requirement that discretion be exercised and seems to run counter to the intention of the rule drafters."). Some states routinely bifurcate certain types of cases. See *Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 30 (Tex. 1994).*

n203. See Warren F. Schwartz, Severance - A Means of Minimizing the Role of Burden and Expense in Determining the Outcome of Litigation, *20 Vand. L. Rev. 1197, 1204-14 (1967)* (praising the efficiency gains, and dismissing objections that separation interferes with the jury's ability to "temper" the application of the law); Thomas E. Maloney, Comment, Implications of Bifurcation in the Ordinary Negligence Case, *26 U. Pitt. L. Rev. 99, 100-07 (1964).* See generally Note, Separate Trials on Liability and Damages in "Routine Cases": A Legal

Analysis, *46 Minn. L. Rev. 1059 (1962).*

n204. See Meiring de Villiers, A Legal and Policy Analysis of Bifurcated Litigation, *2000 Colum. Bus. L. Rev. 153, 190-92;* Shari Seidman Diamond et al., Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency, *48 DePaul L. Rev. 301, 312 (1998);* Irwin A. Horowitz & Kenneth S. Bordens, An Experimental Investigation of Procedural Issues in Complex Tort Trials, 14 Law & Hum. Behav. 269, 277-78, 281-83 (1990); Stephan Landsman et al., Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages, *1998 Wis. L. Rev. 297, 334-35* (adding, however, that bifurcation increased the size of awards in those instances where plaintiffs prevailed); see also Edith Greene et al., Compensating Plaintiffs and Punishing Defendants: Is Bifurcation Necessary?, 24 Law & Hum. Behav. 187, 202-03 (2000) (confirming that bifurcation of trial led to higher punitive damage awards).

n205. See Joe S. Cecil et al., Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials, *40 Am. U. L. Rev. 727, 768 (1991)* ("One explanation for this difference [in success rates for defendants in bifurcated trials] is that sympathy engendered by evidence of plaintiffs' injuries affects jurors' determinations of liability. If this reasoning proves accurate, it strengthens the case for bifurcated trials." (footnote omitted)); see also Dresser et al., supra note 157, at 742 n.135 (noting that research finding fewer plaintiff verdicts in bifurcated trials "lends support to a jury nullification hypothesis," but viewing nullification as a desirable phenomenon that judges should not discourage).

n206. See Louis Harris & Assocs., Inc., Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half Their Time on General Civil Cases, *69 B.U. L. Rev. 731, 743 (1989)* ("The overwhelming majorities of both state and federal judges believe the impact of bifurcation is positive on ... improving the fairness of the outcome."); see also Neil Vidmar, Are Juries Competent to Decide Liability in Tort Cases Involving Scientific/Medical Issues? Some Data from Medical Malpractice, *43 Emory L.J. 885, 908 (1994)* ("Nothing in the data argues against experimenting with procedural modifications such as bifurcated trials [and] special verdicts ... to assist the jury.").

n207. Joseph Sanders, Scientifically Complex Cases, Trial By Jury, and the Erosion of Adversarial Process, *48 DePaul L. Rev. 355, 384 (1998);* see also *id. at 384-85* ("Insofar as we believe that jurors should make independent decisions as to each element of a tort, there is evidence that bifurcation will facilitate such decision-making."); Steven S. Gensler, Bifurcation Unbound, *75 Wash. L. Rev. 705, 713, 757-61, 783 (2000)* (emphasizing the efficiencies gained with trial bifurcation, and disputing the notion that the reduced opportunity for civil jury nullification represents a compelling argument against issue separation); Horowitz & Willging, supra note 8, at 179 ("Separation of trial issues in a complex trial is also a jury control device, one that negates the jury's nullification power."); Lewis Mayers, The Severance for Trial of Liability from Damage, *86 U. Pa. L. Rev. 389, 394-95 (1938)* (same).

n208. See Jennifer M. Granholm & William J. Richards, Bifurcated Justice: How Trial-Splitting Devices Defeat the Jury's Role, *26 U. Tol. L. Rev. 505, 511-18, 543 (1995);* Lempert, supra note 110, at 113; Roger H. Trangsrud, Mass Trials in Mass Tort Cases: A Dissent, *1989 U. Ill. L. Rev. 69, 80-82;* Jack B. Weinstein, Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power, *14 Vand. L. Rev. 831, 832-40 (1961);* see also Albert P. Bedecarre, Comment, Rule 42(b) Bifurcation at an Extreme: Polyfurcation of Liability Issues in Environmental Tort Cases, *17 B.C. Envtl. Aff. L. Rev. 123, 164 (1989)* (arguing that it transforms jurors into special masters and violates the Seventh Amendment).

n209. See Granholm & Richards, supra note 208, at 517-18; see also Roger H. Trangsrud, Joinder Alternatives in Mass Tort Litigation, *70 Cornell L. Rev. 779, 828 (1985)* ("Whatever the reason, any procedure which so drastically reduces the number of cases in which plaintiffs prevail affects the fairness of the adjudicative process."); Charles Alan Wright, Procedural Reform: Its Limitations and Its Future, *1 Ga. L. Rev. 563, 569-70 (1967)* (same).

n210. Indeed, I have never fully understood this apparently widespread assumption that outcomes favoring defendants are somehow inherently more suspect. Cf. E. Donald Elliott, Re-Inventing Defenses/Enforcing Standards: The Next Stage of the Tort Revolution?, *43 Rutgers L. Rev. 1069, 1075 n.19 (1991)* ("When I was in law school twenty years ago, we used to joke that the purpose of the first year torts class was to teach us why the widows and orphans could not always win. That lesson may be less frequent today.").

n211. See Sanders, supra note 20, at 118-19 (noting that the defendant won 57% of the jury trials and 100% of the bench trials); id. at 156-72 (summarizing the defendant's uniform success on appeal after trial); see also id. at 189-92 (suggesting that unique features of this mass tort litigation triggered greater than normal judicial intervention).

n212. See *Green, supra* note 20, at 344 ("In the end, it was the judiciary that got Bendectin right."). One should note that trial judges did not invariably grant the defendant's post-trial motions, which necessitated appellate intervention. A sole plaintiff's verdict survived the appeals process only to be undone more than a decade later by the trial court in granting extraordinary relief from the judgment based on newly acquired scientific evidence. See *Oxendine v. Merrell Dow Pharms., Inc., 1996 WL 680992, at 31-35* (D.C. Super. Ct. Oct. 24, 1996).

n213. See *Turpin v. Merrell Dow Pharms., Inc., 959 F.2d 1349, 1349 (6th Cir. 1992)* ("For a judicial system founded on the premise that justice and consistency are related ideas, the inconsistent results reached by courts and juries nationwide on the question of causation in Bendectin birth defect cases are of serious concern."); de Villiers, supra note 204, at 194-97 (same).

n214. See Gina Kolata, Controversial Drug Makes a Comeback, N.Y. Times, Sept. 26, 2000, at F1 (reporting that a generic version of Bendectin may soon be introduced in the United States market in part because the litigation-induced withdrawal of the drug in 1983 left an unmet therapeutic need for pregnant women who suffered from severe nausea resulting in weight loss and dehydration that sometimes necessitated hospitalization).

n215. See W. Kip Viscusi, Corporate Risk Analysis: A Reckless Act?, *52 Stan. L. Rev. 547, 584 (2000)* ("The wave of Bendectin litigation ultimately cost manufacturers so much that they stopped marketing the product. Although no jury verdict that Bendectin causes birth defects has ever been upheld on appeal, plaintiffs have received a favorable verdict in approximately 36% of the cases that have gone to trial."); id. ("The risk of juror error coupled with high litigation costs led manufacturers to withdraw Bendectin from the market notwithstanding the continuing assessment by the FDA and the scientific community that Bendectin provides benefits exceeding its risks.").

n216. See James A. Henderson, Jr. et al., Optimal Issue Separation in Modern Products Liability Litigation, *73 Tex. L. Rev. 1653, 1694-96 (1995)* (applauding the use of trial bifurcation to resolve several of the Bendectin cases); Richard L. Marcus, Reexamining the Bendectin Litigation Story, *83 Iowa L. Rev. 231, 248 (1997)* (book review) (same); Sanders, supra note 190, at 74-77 (same).