

## Jury Nullification in Modified Comparative Negligence Regimes

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*This Article analyzes jury findings from nearly one thousand negligence suits to determine whether juries in modified comparative negligence jurisdictions apportion percentages of negligence differently than juries in pure comparative negligence jurisdictions. We find that juries in modified comparative negligence jurisdictions are substantially less likely to find that a plaintiff was more than 50 percent negligent. This evidence of jury manipulation strengthens the case for pure comparative negligence, which we argue is already superior on theoretical and policy grounds.*

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### INTRODUCTION

Well over half of the jurisdictions in the United States have adopted some form of modified comparative negligence, as opposed to pure comparative negligence. While the modified regimes vary in

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their specific details, they share an important oddity: nearly identically situated parties are treated very differently. Under modified comparative negligence, a difference of 1 percent of fault is all it takes for a plaintiff to go from recovering half of her damages to recovering nothing. Up to a certain threshold (either 49 or 50 percent), a plaintiff can recover a proportionally reduced damage award, but after that threshold is crossed, no damages are awarded.<sup>1</sup> In pure comparative negligence jurisdictions, there is no threshold and all plaintiffs recover in proportion to their responsibility.<sup>2</sup>

This Article attempts to determine whether juries in negligence suits apportion percentages of responsibility consistently across jurisdictions or if there are systemic differences between jury findings in modified comparative negligence jurisdictions and pure comparative negligence jurisdictions. We expected that the two regimes' drastically different treatment of plaintiffs who are slightly above the 50 percent threshold would lead to inconsistencies in juries' findings. Specifically, we predicted that juries in modified comparative negligence jurisdictions would be less likely to find that a plaintiff was just slightly more than 50 percent negligent—that they would prefer to manipulate their findings to avoid an arguably harsh and arbitrary result.

Part I provides background on the law of comparative negligence in the United States. It describes the trend away from classic contributory negligence, explains where the law currently stands in each jurisdiction, and describes whether the jurisdictions studied in this Article inform or “blindfold” juries about the effects of their findings. Part II explains our hypotheses in more detail and describes relevant prior research. Part III describes the data we analyzed.

Part IV presents the results of our empirical analysis. We find that, as expected, juries in modified comparative negligence jurisdictions are significantly less likely to find that a plaintiff was more than 50 percent negligent and significantly more likely to find that a plaintiff was exactly 50 percent negligent or slightly less than 50 percent negligent.

Part V discusses the potential responses to this finding. We argue that rather than ignore it or enact procedural rules that would minimize jurors' ability to manipulate their findings to avoid the harsh results of modified comparative negligence, jurisdictions that have not chosen pure comparative negligence should consider

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<sup>1</sup> See Victor E. Schwartz and Evelyn F. Rowe, *Comparative Negligence* § 2.01[b] at 32–33 (LexisNexis 4th ed 2002).

<sup>2</sup> *Id.* at § 2.01[a] at 31–32 (cited in note 1).

adopting it. Pure comparative negligence is superior on theoretical and policy grounds, and the evidence of jury nullification in this Article bolsters the argument that modified comparative negligence strikes the public as arbitrary and unfair.

Finally, Part VI discusses damage awards. We found no statistically significant difference between damages awarded in pure and modified comparative negligence regimes. Although our finding is complicated by a selection bias that might impact the type of claims that are brought in modified regimes, by lowering the percentage of fault assigned to plaintiffs but not lowering damage awards, juries in modified comparative negligence jurisdictions may ironically turn modified comparative negligence into the more plaintiff-friendly of the two regimes. This tentative, counterintuitive finding could provide momentum for legislative reform because it suggests that the powerful interest groups typically thought to benefit from modified comparative negligence actually might have reasons to prefer pure comparative negligence.

## I. BACKGROUND ON THE LAW OF COMPARATIVE NEGLIGENCE

### A. From Contributory to Comparative Negligence

While there were occasional grumblings about moving away from contributory negligence in earlier decades, in the 1950s the scholarly movement in support of comparative negligence picked up steam.<sup>3</sup> This scholarly trend eventually gained a practical foothold, and “[t]he late 1960’s saw the beginning of an all-out attack on the fault system of liability.”<sup>4</sup> Between 1969 and 1974, the number of states applying some form of comparative negligence skyrocketed from seven to more than twenty-five.<sup>5</sup> The movement continued over the following twenty years and by the mid-1990s, comparative negligence was clearly the dominant doctrine, having replaced contributory negligence in forty-six states.<sup>6</sup>

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<sup>3</sup> See, for example, Albert Averbach, *Comparative Negligence Legislation: A Cure for Our Congested Courts*, 19 Albany L Rev 4, 9–12 (1955) (advocating for comparative negligence on the ground that it would resolve the inequities inherent in a contributory negligence regime); Fleming James Jr., *Contributory Negligence*, 62 Yale L J 691, 704–06 (1953) (arguing that there are no policy or doctrinal justifications for an all-or-nothing rule); William L. Prosser, *Comparative Negligence*, 51 Mich L Rev 465, 465–67 (1953) (describing the trend toward comparative negligence in state legislatures years after many European countries had already adopted the rule).

<sup>4</sup> Schwartz and Rowe, *Comparative Negligence* § 1.01 at 2 (cited in note 1).

<sup>5</sup> See *id.* at 2–3.

<sup>6</sup> See *id.* at 3–4.

The movement away from contributory negligence was spurred by growing sentiment that its economic and moral justifications were outdated.<sup>7</sup> A large number of doctrines had developed to soften contributory negligence, which demonstrated a general belief that the doctrine led to unduly harsh results for many plaintiffs. These doctrines include the last clear chance rule; an exception when the defendant's conduct was wanton, willful, reckless, or grossly negligent; an exception when the plaintiff was only negligent for a "failure to discover the danger"; and others.<sup>8</sup> As the exceptions began to swallow the rule, abandoning contributory negligence seemed an inevitable development.

Further motivation to move toward comparative negligence came from the notion that contributory negligence was leading to widespread dishonesty by jurors.<sup>9</sup> One trial judge in New York found that a plaintiff was contributorily negligent but blatantly stated that "as every trial lawyer knows, the jury would likely have ignored [the court's] instructions on contributory negligence and applied a standard of comparative negligence."<sup>10</sup> In short, there was a strong belief that jury nullification occurred with great frequency under contributory negligence. Considering all these factors militating against contributory negligence, the dramatic shift in the doctrine is unsurprising.<sup>11</sup>

While the United States has approached consensus on the point that some form of comparative negligence is preferable to classic contributory negligence, there is nothing resembling consensus among jurisdictions about which form of comparative negligence is preferable. There appear to be six regimes used in the United States

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<sup>7</sup> For a discussion of economic criticisms of contributory negligence regimes, see John J. Haugh, *Comparative Negligence: A Reform Long Overdue*, 49 Or L Rev 38, 39, 48 (1969). For an elaboration on the economic point specifically, see Guido Calabresi, *Optimal Deterrence and Accidents*, 84 Yale L J 656, 662–63 (1975).

<sup>8</sup> See Haugh, 49 Or L Rev at 39–40 (cited in note 7).

<sup>9</sup> See Arthur Best, *Impediments to Reasonable Tort Reform: Lessons from the Adoption of Comparative Negligence*, 40 Ind L Rev 1, 4 (2007) (arguing that contributory negligence "could be criticized as forcing citizens into unethical conduct as jurors"); Haugh, 49 Or L Rev at 41 (cited in note 7) (criticizing the contributory negligence regime for "wink[ing] with approval at a jury's violation of its oath"). See also Lars Noah, *Civil Jury Nullification*, 86 Iowa L Rev 1601, 1612–15 (2001) (documenting the history of jury nullification in contributory negligence regimes).

<sup>10</sup> *Alibrandi v Helmsley*, 314 NYS2d 95, 97 (NY County Ct 1970).

<sup>11</sup> What is surprising is that five jurisdictions in the United States still cling to contributory negligence. See Schwartz and Rowe, *Comparative Negligence* § 1.05[e][3] at 29 (cited in note 1) (suggesting that Maryland, Virginia, North Carolina, Alabama, and the District of Columbia have retained contributory negligence because of tradition and a desire "to preserve a favorable climate for industry"). See also note 19 and accompanying text.

today.<sup>12</sup> Starting with the most plaintiff-friendly and descending, they are:

(1) Pure comparative negligence is used in twelve states: Alaska, Arizona, California, Florida, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, New York, Rhode Island, and Washington. In these jurisdictions, plaintiffs can recover a proportional amount of damages unless their share of the negligence is 100 percent (that is, a plaintiff found to be 90 percent negligent could still recover 10 percent of the damage award).<sup>13</sup>

(2) One state uses a unique hybrid of pure and modified comparative negligence. In Michigan, pure comparative negligence is applied to economic damages, but the 50 percent form of modified comparative negligence (described below) is applied to noneconomic damages. In other words, plaintiffs who are 50 percent negligent or less recover a proportion of all of their damages, but plaintiffs who are more than 50 percent negligent recover a proportion of their economic damages and none of their noneconomic damages.<sup>14</sup>

(3) Modified comparative negligence (50 percent form) is used in twenty-one states: Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Vermont, Wisconsin, and Wyoming. The 50 percent rule is the most plaintiff-friendly of the common modified comparative negligence systems in use. In these jurisdictions, plaintiffs can recover unless their negligence exceeds that of the defendant (that is, a plaintiff who is 50

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<sup>12</sup> There is some amount of confusion among authorities about which regime some states fall into. Compare Schwartz and Rowe, *Comparative Negligence* Appendix A at 513–18 (cited in note 1) (suggesting that Arizona uses modified comparative negligence as of 1993) and 2 *Comparative Negligence Manual* § 20:1 at 20-1 (CBC 3d ed 1995) (suggesting that Arizona uses modified comparative negligence), with Greer & Alles, PLC, *Comparative Negligence in Arizona* (FindLaw 1999), online at <http://library.findlaw.com/1999/Sep/1/130745.html> (visited Sept 18, 2012) (suggesting that legislative efforts in 1993 failed and Arizona still uses pure comparative negligence). The latter appears to be correct. See Ariz Rev Stat Ann § 12-2505 (stating that the claimant's damages in a tort case "shall be reduced in proportion to the relative degree of the claimant's fault"). Our summary of jurisdictions includes the fifty states and the District of Columbia. For a more exhaustive survey of jurisdictions, see William E. Westerbeke, *In Praise of Arbitrariness: The Proposed 83.7% Rule of Modified Comparative Fault*, 59 U Kan L Rev 991, 991-94 (2011).

<sup>13</sup> See 2 *Comparative Negligence Manual* Appendix III at Appx-33–35 (cited in note 12).

<sup>14</sup> See Mich Comp Laws Ann § 600.2959.

percent negligent can recover 50 percent, but a plaintiff who is 51 percent negligent recovers nothing).<sup>15</sup>

(4) Modified comparative negligence (49 percent form) is used in eleven states: Arkansas, Colorado, Georgia, Idaho, Kansas, Maine, Nebraska, North Dakota, Tennessee, Utah, and West Virginia. In jurisdictions following the 49 percent rule, plaintiffs can recover as long as their share of the negligence is smaller than that of the defendant (that is, a plaintiff who is 49 percent negligent recovers 51 percent, but one who is 50 percent negligent recovers nothing).<sup>16</sup>

(5) A slight-gross rule is used in one state. In South Dakota, a plaintiff's "contributory negligence does not bar a recovery when the contributory negligence of the plaintiff was slight in comparison with the negligence of the defendant."<sup>17</sup>

(6) Contributory negligence is still used in five jurisdictions: Alabama, Maryland, North Carolina,<sup>18</sup> Virginia, and the District of Columbia. In these jurisdictions, any finding of comparative fault bars recovery for the plaintiff.<sup>19</sup>

It is not entirely clear what drives the inconsistency among US jurisdictions, but political considerations are almost certainly an

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<sup>15</sup> See 2 *Comparative Negligence Manual* Appendix III at Appx-33–35 (cited in note 12). As with Arizona, there is also a discrepancy regarding the characterization of Minnesota's regime. Compare Schwartz and Rowe, *Comparative Negligence* § 2.01[b][3] at 33 (cited in note 1) (characterizing Minnesota as having the 50 percent form of modified comparative negligence), with 2 *Comparative Negligence Manual* Appendix III at Appx-34 (cited in note 12) (characterizing Minnesota as having the 49 percent form of modified comparative negligence). The former appears to be correct. See Minn Stat Ann § 604.01 ("Contributory fault does not bar recovery . . . if the contributory fault was not greater than the fault of the person against whom recovery is sought.").

<sup>16</sup> Schwartz and Rowe, *Comparative Negligence* § 2.01[b][3] at 33 (cited in note 1).

<sup>17</sup> SD Cod Laws § 20-9-2 (noting, however, that even when the plaintiff's fault is slight, the damages are to be "reduced in proportion to the amount of plaintiff's contributory negligence").

<sup>18</sup> The North Carolina legislature considered adopting modified comparative negligence (49 percent) in early 2011. See Svend H. Deal, *North Carolina Revisiting Contributory Negligence* (Subrogation & Recovery Law Blog May 31, 2011), online at <http://www.subrogationrecoverylawblog.com/2011/05/articles/subro-roundup/north-carolina-revisiting-contributory-negligence> (visited Sept 18, 2012). Ultimately, the bill's text was modified to simply set up a tort reform panel and awaits further consideration. See HB732, NC General Assembly, 2011–2012 (reported out of subcommittee on June 8, 2011), online at <http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2011%20%20&BillID=h732> (visited Sept 18, 2012).

<sup>19</sup> See 2 *Comparative Negligence Manual* Appendix III at Appx-33–35 (cited in note 12).

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important factor. Between 1969 and 1984, eleven states moved to comparative negligence via the judiciary.<sup>20</sup> Of these eleven states, only one decided on a modified system and ten chose pure.<sup>21</sup> The judicial preference is clearly for the pure system and the pure system's symmetrical treatment of plaintiffs and defendants seems logically sound. However, during the same time span, twenty-six states moved to comparative negligence via the legislature. Of these twenty-six states, twenty-two adopted modified systems and only four chose pure.<sup>22</sup> Modified comparative negligence is the "clear preference of legislatures" and "[l]obbying by insurance interests apparently played a significant role in the legislative process."<sup>23</sup>

Professor William Prosser noted the political interests at play in 1953. Criticizing Wisconsin's modified comparative negligence system, he argued that "[i]t appears impossible to justify the rule on any basis except one of pure political compromise."<sup>24</sup> One could argue that there is something morally untenable about allowing a plaintiff to recover damages from someone who was less to blame for the accident than the plaintiff, but this rationale does not seem as persuasive as the political explanation.<sup>25</sup>

Regardless of what motivated some states to adopt pure systems and others to adopt modified systems, the treatment of plaintiffs who are just above 50 percent negligent in modified jurisdictions seems arbitrary and harsh, not unlike classic contributory negligence. This perceived harshness and the historical prevalence of jury nullification in contributory negligence regimes led us to suspect that similar nullification still occurs in modified jurisdictions. Before we can move on to test these suspicions, one more aspect of the law needs explaining.

## B. Jury Awareness

The importance of whether juries are "blindfolded" or if there is "sunshine" so that jurors can be aware of the consequences of their

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<sup>20</sup> See Best, 40 Ind L Rev at 6 (cited in note 9) (listing Arkansas, California, Florida, Illinois, Iowa, Kentucky, Michigan, Missouri, New Mexico, Rhode Island, and West Virginia as having moved to comparative negligence during this timeframe).

<sup>21</sup> See id.

<sup>22</sup> See id.

<sup>23</sup> Id at 11.

<sup>24</sup> Prosser, 51 Mich L Rev at 494 (cited in note 3).

<sup>25</sup> Consider Schwartz and Rowe, *Comparative Negligence* § 3.05[b][3] at 83 (cited in note 1). For more on the theoretical merits of modified and pure comparative negligence, see Part V.B.

deliberations has not gone unnoticed.<sup>26</sup> It has been described as “[a]mong the most contentious issues in American procedural law.”<sup>27</sup> In the context of comparative negligence, if jurors are informed about the effect of their findings, we can attribute systematic differences between findings in pure and modified regimes to intentional nullification.<sup>28</sup> On the other hand, if jurors are not informed, systematic differences in findings could only be attributed to jury nullification if we assume jurors know the law or make accurate inferences about the law during the course of the trial. For our purposes, this issue is not a threat to our analysis for a simple reason: across the country, and in the vast majority of states represented in the data analyzed below, the preference appears to be to fully inform the jury.<sup>29</sup>

We need not discuss jury instructions in pure jurisdictions because the only relevant issue is whether juries are aware of the 50 percent cutoff in modified jurisdictions. As is presented in detail below,<sup>30</sup> there are thirteen modified jurisdictions represented in this Article’s sample. Of those thirteen jurisdictions, only Wisconsin requires that the jury be blindfolded,<sup>31</sup> and we have been unable to find the rule in South Carolina.<sup>32</sup> Over half of the jurisdictions in the sample require a fully informed jury: Connecticut,<sup>33</sup> Hawaii,<sup>34</sup> Illinois,<sup>35</sup>

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<sup>26</sup> See Jordan H. Leibman, Robert B. Bennett Jr, and Richard Fetter, *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, 349–52 (1998); Stuart F. Schaffer, Comment, *Informing the Jury of the Legal Effect of Special Verdict Answers in Comparative Negligence Actions*, 1981 Duke L J 824, 839–49.

<sup>27</sup> Leibman, Bennett, and Fetter, 35 Am Bus L J at 349 (cited in note 26).

<sup>28</sup> It is also possible that some jurors’ decisions are impacted by the modified comparative negligence cutoff on an unconscious level, though we do not explore this possibility due to the difficulty of observing it and because our policy prescription would be the same whether the nullification was intentional or the result of unconscious behavior.

<sup>29</sup> See 1 *Comparative Negligence Manual* § 13:2 at 13-6 to -7 (CBC 3d ed 1995) (“[T]he overwhelming majority of jurisdictions either permit or require the court to inform the jury of the effect of its answers.”).

<sup>30</sup> See Part III.

<sup>31</sup> See *McGowan v Story*, 234 NW2d 325, 328–30 (Wis 1975).

<sup>32</sup> At least one court in South Carolina has employed a sunshine rule. See *Reiland v Southland Equipment Service, Inc.*, 500 SE2d 145, 157 (SC Ct App 1998) (relying upon case law requiring judges to instruct juries on the law to determine that juries must be informed of the consequences of finding plaintiff liability). However, this has not been endorsed by the South Carolina Supreme Court, and so it seems that the state of the law remains unsettled. Because only 2 of the 823 observations used in this Article come from South Carolina, this bit of uncertainty does not seem crucial.

<sup>33</sup> Conn Gen Stat Ann § 52-572h(e) (“[T]he instructions to the jury given by the court shall include an explanation of the effect on awards and liabilities of the percentage of negligence found by the jury to be attributable to each party.”).

<sup>34</sup> Hawaii Civil Jury Instructions, 1999 edition § 6.4 (“If . . . you find that plaintiff’s(s) negligence is more than 50%, the Court will enter judgment for defendant(s) and plaintiff(s) will not recover any damages.”).



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Massachusetts,<sup>36</sup> Ohio,<sup>37</sup> and Pennsylvania.<sup>38</sup> And several others permit the jury to be informed in a way that strongly favors jury awareness: Indiana,<sup>39</sup> Minnesota,<sup>40</sup> Montana,<sup>41</sup> and New Jersey.<sup>42</sup> Finally, the Texas Rules of Civil Procedure express a preference against informing the jury,<sup>43</sup> but in practice it seems the jury is informed on a regular basis.<sup>44</sup>

Given these rules, statutes, and cases, it is a safe assumption that nearly all the juries in the sample were aware of the effect of their apportionment of responsibility. Additionally, in the one state that formally calls for the blindfolding of juries on this issue, Wisconsin,

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<sup>35</sup> *Best v Taylor Machine Works*, 689 NE2d 1057, 1104 (Ill 1997) (finding broad tort reform act unconstitutional and holding that the “blindfold” provision is unconstitutional as well because it is unseverable); Illinois Pattern Jury Instructions: Civil §§ B45.01, B45.01.B, B45.01.C.

<sup>36</sup> Patrick F. Brady and Joseph D. Lipchitz, eds, 1 *Massachusetts Superior Court Civil Practice Jury Instructions* Exhibit 2-A at 2-75 (MCLE 2d ed 2008) (instructing juries not to calculate damages if they find that the plaintiff is over 50 percent responsible).

<sup>37</sup> Ohio Jury Instructions: Civil § 403.01 (instructing the jury to assign percentages of fault and then providing a corresponding framework for assigning damages).

<sup>38</sup> *Peair v Home Association of Enola Legion No. 751*, 430 A2d 665, 671–72 (Pa Super Ct 1981) (“We . . . conclude[ ] that the jury should be informed of the consequence of its apportionment of negligence.”).

<sup>39</sup> Ind Code Ann § 34-51-2-7(b)(2) (stating that unless all the parties agree otherwise, the court shall instruct the jury that “[i]f the percentage of fault of the claimant is greater than fifty percent . . . the jury shall return a verdict for the defendant and no further deliberation of the jury is required”). Because plaintiffs presumably favor an informed jury due to the possibility of a sympathetic nullification, it seems unlikely they would agree to a different instruction that would leave the jury uninformed.

<sup>40</sup> See Minn R Civ Pro 49.01(b):

[T]he court shall inform the jury of the effect of its answers to the comparative fault question and shall permit counsel to comment thereon, unless the court is of the opinion that doubtful or unresolved questions of law or complex issues of law or fact are involved which may render such instruction or comment erroneous, misleading, or confusing to the jury.

<sup>41</sup> *Martel v Montana Power Co*, 752 P2d 140, 145–46 (Mont 1988) (“Montana juries can and should be trusted with the information about the consequences of their verdict.”).

<sup>42</sup> *Roman v Mitchell*, 413 A2d 322, 327 (NJ 1980) (“[The jury’s] deliberations on percentages of negligence will not be had in a vacuum, or possibly based on a mistaken notion of how the statute operates.”).

<sup>43</sup> Tex R Civ Pro 277:

The court shall not in its charge . . . directly . . . advise the jury of the effect of their answers, but the court’s charge shall not be objectionable on the ground that it incidentally . . . advises the jury of the effect of their answers when it is properly a part of an instruction or definition.

<sup>44</sup> Pattern jury instructions in Texas also seem to support informing the jury. See T. Ray Guy, *The Jury Charge in Texas Civil Litigation* § 4.23 at 90–91 (West 3d ed 2003) (explaining that the pattern jury instruction conditions consideration of damages on the plaintiff being 50 percent negligent or less, and that this is permissible based on a Texas appellate court’s holding in *Borden, Inc v Price*, 939 SW2d 247, 253–54 (Tex App 1997)).

only one of twenty-eight cases (3.6 percent) in our sample involved a jury finding of plaintiff contribution to fault in excess of 50 percent, which is much closer to the rate we saw in modified jurisdictions other than Wisconsin (7.9 percent) than we observed in the pure comparative negligence jurisdictions (21.9 percent).<sup>45</sup> This may suggest that Wisconsin juries were aware as well, despite the lack of formal instructions from the court.<sup>46</sup>

With this understanding of the underlying substantive and procedural law in hand, we can now move on to discuss our predictions and present our findings.

## II. PRIOR STUDIES AND PREDICTIONS

While several commentators have acknowledged the possibility of jury nullification in modified comparative negligence regimes,<sup>47</sup> almost no empirical work has been done to discover whether it actually occurs. The sole exception we have found is a study by Professors Jordan Leibman, Robert Bennett, and Richard Fetter.<sup>48</sup> These researchers conducted an experiment with mock jurors to determine whether a “sunshine” rule led to different findings than a “blindfold” rule in a case governed by modified comparative negligence.<sup>49</sup> Their results were not dramatic, but they did find “weak evidence that sunshine plaintiffs . . . recover damages more frequently” because “civil juries respond to sunshine rules by lowering the percentage of fault

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<sup>45</sup> See Table 4.

<sup>46</sup> Only two Wisconsin juries found a plaintiff to be exactly 50 percent negligent, which is a surprisingly small number in light of how frequently juries in modified jurisdictions (and even pure jurisdictions) returned a result of 50 percent. However, six Wisconsin juries (21.4 percent of the Wisconsin observations) found a plaintiff to be between 40 and 49 percent negligent, which is closer to the results observed in other modified jurisdictions (19.4 percent) than in pure jurisdictions (12.1 percent). We hesitate to infer much from the small number of Wisconsin observations, but comparing trends in Wisconsin to trends in pure jurisdictions and modified jurisdictions other than Wisconsin suggests that juries in Wisconsin might have been aware of the impact of their findings.

<sup>47</sup> See, for example, Noah, 86 Iowa L Rev at 1616 (cited in note 9) (arguing that lifting the jury’s blindfold in modified comparative negligence cases “can serve no other purpose than inviting the jury to cook the numbers to ensure that the victim receives some award”).

<sup>48</sup> See Leibman, Bennett, and Fetter, 35 Am Bus L J at 355 (cited in note 26) (explaining that their experiment allows for a comparison of the economic effects of various negligence regimes in combination with a blindfold rule or sunshine rule). Another study examined the size of damage awards in one comparative negligence jurisdiction to find out if juries were faithfully reducing awards by the appropriate proportions. James K. Hammit, Stephen J. Carroll, and Daniel A. Relles, *Tort Standards and Jury Decisions*, 14 J Legal Stud 751, 756–58 (1985). They found that even before reductions were made for comparative negligence, awards for plaintiffs who were partially negligent were smaller than for entirely innocent plaintiffs. *Id.* at 757.

<sup>49</sup> Leibman, Bennett, and Fetter, 35 Am Bus L J at 355 (cited in note 26).

attributable to plaintiffs.”<sup>50</sup> However, they also found that the same juries tended to return smaller damage awards so that the “aggregate effect of the two rules . . . [is] about the same.”<sup>51</sup>

Professors Leibman, Bennett, and Fetter were interested in the differences between informed and uninformed juries in modified comparative negligence regimes. Because almost all jurors in modified regimes seem to be informed (either explicitly or implicitly), we are more interested in the differences across regimes. Nonetheless, Professors Leibman, Bennett, and Fetter’s research provides an interesting background for our study of actual jury findings.<sup>52</sup> As outlined above, US jurisdictions are divided among several negligence regimes, but particularly between pure comparative negligence and modified comparative negligence.<sup>53</sup> This Article will provide evidence that should influence courts and legislatures to reconsider these choices.

In modified comparative negligence regimes, a seemingly trivial difference of a single percentage point in a jury’s finding can be the difference between a plaintiff recovering half of her damages and no damages. Given the history of jury nullification in response to the harshness of contributory negligence, one would expect juries to behave similarly when faced with plaintiffs whose negligence is slightly above the 50 percent cutoff in modified jurisdictions. If a jury believes that a plaintiff were truly 51 percent negligent, it seems likely that the jurors would manipulate their findings out of sympathy.<sup>54</sup>

Therefore, we began this research expecting to see fewer findings of a plaintiff’s negligence above 50 percent and more below 50 percent in modified jurisdictions, with the differences being more dramatic closer to the 50 percent cutoff and less dramatic when the plaintiff’s negligence was very high or very low. Presumably, as a plaintiff’s true negligence rises further above the 50 percent threshold, the prospect of the plaintiff going home with nothing seems less harsh and the jury’s sympathy decreases. Further, we expect that findings far below 50 percent will be unaffected by the manipulation

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<sup>50</sup> Id at 400.

<sup>51</sup> Id.

<sup>52</sup> In their experiment, Professors Leibman, Bennett, and Fetter were essentially testing for differences between modified and pure regimes because their blindfolded juries “received what was essentially a pure comparative fault instruction.” Id at 397. Therefore, our findings in this Article will either bolster or undermine the results of their experiment.

<sup>53</sup> See Part I.A.

<sup>54</sup> See Leibman, Bennett, and Fetter, 35 Am Bus L J at 352 (cited in note 26) (“[B]lindfolding proponents argue that the percentage bar rule must be kept from the jury to reduce the effects of sympathy and bias.”).

that occurs around the 50 percent threshold because it seems unlikely that jurors would make a dramatic manipulation and return findings far below 50 percent for plaintiffs whose true negligence was more than 50 percent.

As mentioned above, Professors Leibman, Bennett, and Fetter's experimental study showed evidence that jurors engage in two layers of manipulation in modified comparative negligence regimes.<sup>55</sup> We entered this research with strong predictions respecting the first layer of manipulation (the percentage of the plaintiff's negligence) but without strong predictions regarding the second layer (damages).

On the one hand, it is plausible that jurors would lower damage awards in cases where they have manipulated the plaintiff's percentage of negligence downward. If jurors are lowering the percentage of negligence out of a sense of fairness to plaintiffs, the jury might also lower the damage award out of a sense of fairness to defendants. By engaging in two layers of manipulation, the jury would simulate a pure comparative negligence system. The plaintiff would go home with a dollar amount equal to the total damages reduced by the plaintiff's true share of the negligence but would not receive the windfall that would occur if juries reduced only the percentage of negligence. If jurors were actually motivated by a desire that plaintiffs receive a proportional share of their true total damage award, regardless of whether the plaintiff's true total percentage of negligence was above or below 50 percent, two layers of manipulation would be needed to achieve this result in modified comparative negligence regimes.

On the other hand, jurors might be less inclined to engage in a second layer of manipulation. First, they may simply be uncomfortable with manipulating their findings so extensively. Second, performing two layers of manipulation would require a more subtle attention to the fairness of the results than simply performing the first layer of manipulation to save a plaintiff who was barely more than 50 percent negligent from going home empty-handed. It is possible that many juries would grasp the need for the first and not the second or find the need for the first more urgent. Third, it is at least arguable that the damages award is arrived at more scientifically than the percentage of negligence.<sup>56</sup> The jury's decision on a percentage of negligence is highly subjective and cannot easily be contradicted by objective facts. Conversely, certain portions of the damage award are derived

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<sup>55</sup> See text accompanying notes 47–51.

<sup>56</sup> This is truer of items like medical expenses and lost wages than it is of noneconomic damages, like pain and suffering, which are highly subjective and easy to manipulate.

from objective facts. Perhaps jurors would find it more difficult or uncomfortable to manipulate the damages figure, which is calculated in a somewhat more transparent fashion.

Thus, we approached this research without a strong prediction as to whether jurors would lower damage awards to coincide with their manipulation of the plaintiff's percentage of negligence. Professors Leibman, Bennett, and Fetter's experiment suggested they might, which would make sense if jurors thought the principles guiding pure comparative negligence were fairer and wanted to achieve the results that would occur under that regime. However, there are also reasons to hypothesize that jurors who thought modified comparative negligence was arbitrary and unfair would stop at one layer of manipulation, thereby avoiding the harshness of modified comparative negligence but creating small windfalls for those plaintiffs in the process and not achieving the exact results of a pure comparative negligence regime.

### III. DATA

The data for this project comes from two datasets compiled by the National Center for State Courts and funded by the US Department of Justice, Bureau of Justice Statistics. The datasets are available through the Inter-University Consortium for Political and Social Research (ICPSR) and are called *Civil Justice Survey of State Courts, 2005* and *Civil Justice Survey of State Courts, 2001*.

The 2001 dataset consists of 8,038 tort, contract, and real property cases that were disposed of in 2001 in 46 of the 75 most populous counties in the United States.<sup>57</sup> The 2005 dataset consists of 7,682 tort, contract, and real property cases disposed of in 2005 from the same 46 counties, as well as 1,190 cases from a 91-county sample of counties outside of the top 75 most populous, for a total of 8,872 cases.<sup>58</sup>

Because the dataset consists of a wide variety of civil cases, from the 16,932 cases there are only 902 observations with a value for the percentage of negligence assigned to the plaintiff.<sup>59</sup> To arrive at the 823 observations analyzed in this Article, we removed all observations that were not coded as jury trials, 12 observations that came

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<sup>57</sup> See US Department of Justice, Bureau of Justice Statistics, *Civil Justice Survey of State Courts, 2001* (National Center for State Courts (NCSC) 2001), online on a restricted basis at <http://dx.doi.org/10.3886/ICPSR03957.v3> (visited Sept 18, 2012).

<sup>58</sup> See US Department of Justice, Bureau of Justice Statistics, *Civil Justice Survey of State Courts, 2005* (NCSC 2005), online on a restricted basis at <http://dx.doi.org/10.3886/ICPSR23862.v2> (visited Sept 18, 2012).

<sup>59</sup> The rest of the dataset consists of a range of contract disputes, real property disputes, and non-negligence tort disputes. See notes 57–58.

from states using the 49 percent rule, and 19 observations that came from Michigan, which uses the unique hybrid regime described above.<sup>60</sup> While it would have been interesting to analyze patterns of findings in all regimes and in bench as well as jury trials, the number of observations in categories other than jury trials in pure jurisdictions and jury trials in modified (50 percent) jurisdictions was too small to allow for meaningful analysis. Table 1 shows how the data was selected and Table 2 breaks down the 823 observations analyzed in this Article by regime and state.

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<sup>60</sup> See note 14 and accompanying text.

TABLE 1. SELECTION OF DATA

Category	Number
Total number of observations	16,932
Number of observations dropped because the case did not call for the judge or jury to determine the percentage of plaintiff's negligence	16,030
Number of observations dropped because they came from regimes where there were not enough observations to allow for meaningful analysis	31 (19 from Michigan, which uses a unique hybrid system, and 12 from 49 percent states)
Number of observations dropped because the cases were not jury trials or were disposed of in a fashion that does not allow for analysis of jury behavior	48 (42 bench trials, 3 judgments notwithstanding the verdict, 2 directed verdicts, 1 jury trial for a defaulted defendant)
Number of observations remaining for analysis	823

Source: US Department of Justice, Bureau of Justice Statistics, *Civil Justice Survey of State Courts, 2005* (NCSC 2005), online on a restricted basis at <http://dx.doi.org/10.3886/ICPSR23862.v2> (visited Sept 18, 2012); US Department of Justice, Bureau of Justice Statistics, *Civil Justice Survey of State Courts, 2001* (NCSC 2001), online on a restricted basis at <http://dx.doi.org/10.3886/ICPSR03957.v3> (visited Sept 18, 2012).

TABLE 2. OBSERVATIONS BY STATE

## Pure Comparative Negligence Jurisdictions (n=388)

Arizona	63
California	114
Florida	97
Kentucky	15
Missouri	33
New Mexico	1
New York	42
Rhode Island	2
Washington	21

## Modified Comparative Negligence Jurisdictions (n=435)

Connecticut	32
Hawaii	1
Illinois	76
Indiana	20
Massachusetts	15
Minnesota	52
Montana	2
New Jersey	71
Ohio	15
Pennsylvania	66
South Carolina	2
Texas	55
Wisconsin	28

Source: US Department of Justice, Bureau of Justice Statistics, *Civil Justice Survey of State Courts, 2005* (NCSC 2005), online on a restricted basis at <http://dx.doi.org/10.3886/ICPSR23862.v2> (visited Sept 18, 2012); US Department of Justice, Bureau of Justice Statistics, *Civil Justice Survey of State Courts, 2001* (NCSC 2001), online on a restricted basis at <http://dx.doi.org/10.3886/ICPSR03957.v3> (visited Sept 18, 2012).



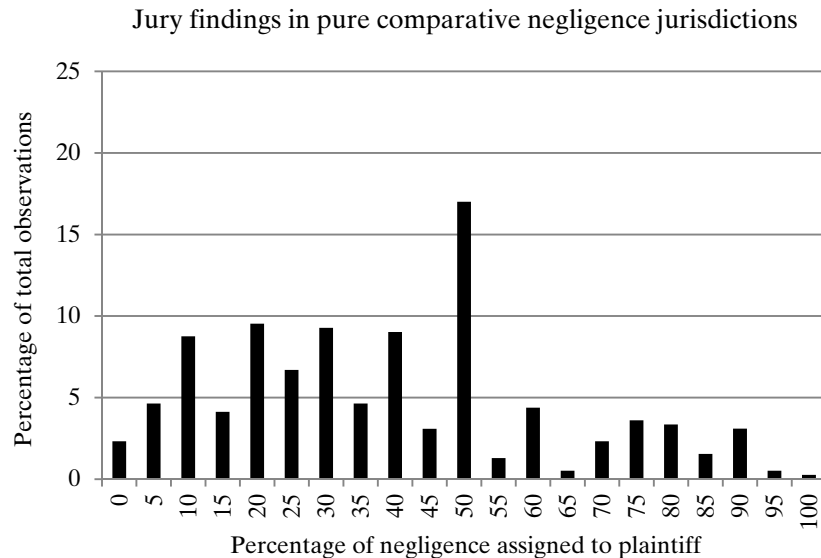
#### IV. METHODOLOGY AND RESULTS

##### A. Preliminary Analysis

The tables and figures below compare jury findings in pure and modified jurisdictions, giving a preliminary sense of what the data looks like. It appears that juries in modified regimes find plaintiffs to be more than 50 percent negligent less frequently than juries in pure regimes. As expected, the lower frequency of findings above 50 percent is countered by a higher frequency of findings in the ranges slightly below 50 percent in modified regimes.

Figure 1 presents the frequency of jury findings in histograms. The differences between the first and second histogram are apparent to the naked eye. The bins above 50 percent are almost empty in modified regimes, and the bins between 40 and 50 percent are substantially larger.

FIGURE 1. JURY FINDINGS IN PURE AND MODIFIED COMPARATIVE NEGLIGENCE JURISDICTIONS



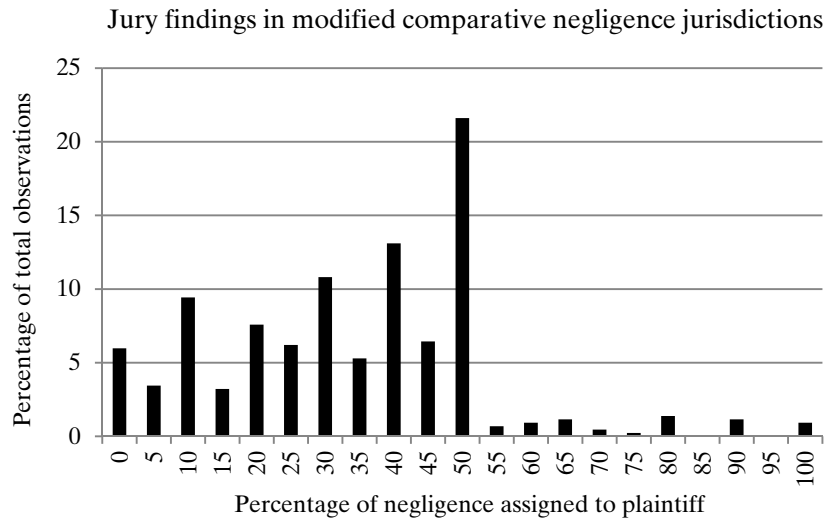


Table 3 shows how frequently juries in pure and modified regimes found the plaintiff's negligence to fall within particular ranges. The possible jury findings (0–100 percent) are divided into four even ranges. Notably, juries found the plaintiff between 0 and 25 percent negligent with nearly identical frequency in the two regimes but found the plaintiff between 26 and 50 percent negligent more frequently in modified regimes and between 51 and 100 percent more frequently in pure regimes.

TABLE 3. DISTRIBUTION OF JURIES' FINDINGS

Percentage of Negligence Assigned to Plaintiff	Frequency in Pure Jurisdictions	Frequency in Modified Jurisdictions
0–25	35.1%	34.9%
26–50	43.0%	57.5%
51–75	12.9%	4.1%
76–100	9.0%	3.4%

Source: US Department of Justice, Bureau of Justice Statistics, *Civil Justice Survey of State Courts, 2005* (NCSC 2005), online on a restricted basis at <http://dx.doi.org/10.3886/ICPSR23862.v2> (visited Sept 18, 2012); US Department of Justice, Bureau of Justice Statistics, *Civil Justice Survey of State Courts, 2001* (NCSC 2001), online on a restricted basis at <http://dx.doi.org/10.3886/ICPSR03957.v3> (visited Sept 18, 2012).

Table 4 is similar to Table 3, but instead of dividing the data into four equal ranges of plaintiff negligence, it attempts to zero in on where the inconsistencies between the jurisdictions occur. This table shows that from 0 to 39 percent, there is little difference in the frequency of jury findings in pure and modified regimes. Thus, the range of percentages where the frequency in modified regimes is greater is quite narrow, from 40 to 49 percent. Juries in modified regimes also assigned exactly 50 percent of the negligence to the plaintiff more frequently than juries in pure regimes.

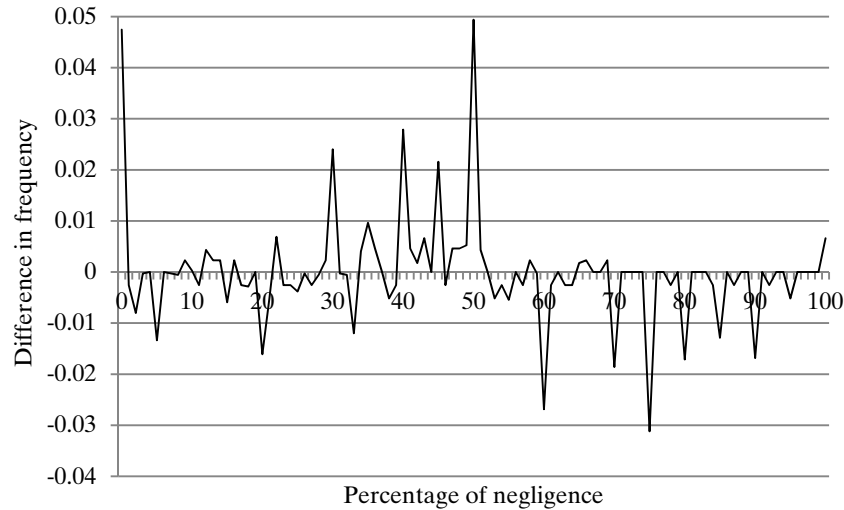
TABLE 4. DISTRIBUTION OF JURIES' FINDINGS

Percentage of Negligence Assigned to Plaintiff	Frequency in Pure Jurisdictions	Frequency in Modified Jurisdictions
0–39	50.0%	52.0%
40–49	12.1%	19.5%
50	16.0%	20.9%
51–100	21.9%	7.6%

Source: US Department of Justice, Bureau of Justice Statistics, *Civil Justice Survey of State Courts, 2005* (NCSC 2005), online on a restricted basis at <http://dx.doi.org/10.3886/ICPSR23862.v2> (visited Sept 18, 2012); US Department of Justice, Bureau of Justice Statistics, *Civil Justice Survey of State Courts, 2001* (NCSC 2001), online on a restricted basis at <http://dx.doi.org/10.3886/ICPSR03957.v3> (visited Sept 18, 2012).

Figure 2 demonstrates these trends in another manner by showing the difference in how frequently juries in modified and pure regimes found each possible percentage of plaintiff's negligence. For example, the spike above 50 percent reflects the fact that juries in modified jurisdictions found the plaintiff to be 50 percent negligent in 20.9 percent of cases while juries in pure jurisdictions found the plaintiff to be 50 percent negligent in 16 percent of cases, ( $20.9 - 16.0 = 4.9$ ). The strongest trends appear to be that as we approach 50 percent, the frequency of findings in modified comparative negligence jurisdictions is greater, and when the 50 percent threshold is crossed, the frequency of findings in pure comparative negligence jurisdictions is clearly greater.

FIGURE 2. DIFFERENCE IN FREQUENCY OF JURY FINDINGS ON PERCENT PLAINTIFFS' NEGLIGENCE



### B. Regression Analysis

We ran a series of linear probability regressions to determine the significance of the trends that are suggested by the raw data.<sup>61</sup> Each regression took the following form:

$$\text{Percent Negligence}_{is} = b_0 + \beta_1 \text{Modified Comp Neg Regime}_s + b_2 \text{Claim Type}_i + b_3 \text{Plaintiff Characteristics}_i + b_4 \text{Defendant Characteristics}_i + b_5 \text{Demographics}_s + \mathcal{E}_i$$

where the dependent variable is an indicator set equal to 1 if the percentage of negligence the jury assigned to the plaintiff is within a specified range and 0 if otherwise, and the variable of interest is an indicator set equal to 1 if the case occurred in a modified jurisdiction and 0 if the case occurred in a pure jurisdiction. As such,  $\beta_1$  measures the effect of a modified comparative negligence regime on jury findings of plaintiff's negligence (relative to a pure negligence regime). Claim type, plaintiff characteristics, and defendant characteristics are control variables relating to the case observed and demographics are

<sup>61</sup> We ran all of our regression models using both the logistic model and the linear probability model. The results were all substantively identical. We just report the linear probability results here for ease of interpretation, but the logit results are available from the authors on request.

control variables relating to the state in which the case occurred.<sup>62</sup> We ran four regressions, where the range of percent negligence was specified as 0–39 in the first, 40–49 in the second, 50 in the third, and 51–100 in the fourth. The results are shown in Table 5.

TABLE 5. THE EFFECT OF NEGLIGENCE REGIMES ON JURY FINDINGS OF PERCENT PLAINTIFFS' NEGLIGENCE

Percent negligence	0–39	40–49	50	51–100
Indicator of Modified Regime	-0.034 (0.060)	0.120** (0.037)	0.129** (0.045)	-0.215** (0.040)
Constant	3.815* (1.875)	-0.583 (1.250)	-2.192 (1.430)	-0.040 (1.430)
N	822	822	822	822
R <sup>2</sup>	0.08	0.06	0.06	0.13

\*p < 0.05, \*\*p < 0.01

Note: The dependent variable is the percentage of negligence assigned to the plaintiff (set equal to one if within specified range and zero otherwise). One observation was dropped by STATA.

These results show that modified comparative negligence motivates juries to manipulate their findings in predictable ways with significant frequency. All else equal, if a case occurs in a modified comparative negligence jurisdiction as opposed to a pure comparative negligence jurisdiction, a plaintiff is approximately 12.0 percentage points more likely to be found to be between 40 and 49 percent negligent, approximately 12.9 percentage points more likely to be found to be exactly 50 percent negligent, and approximately 21.5 percentage points less likely to be found to be between 51 and 100 percent negligent. The results are statistically significant at the 99 percent confidence level and coincide with our intuitions about how juries are likely to behave in modified comparative negligence jurisdictions.

Interestingly, neither a simple analysis of the raw data nor a regression analysis confirmed our hypothesis that as the plaintiff's negligence approached 100 percent the differences between the two re-

<sup>62</sup> We attempted to control for anything that might impact a jury's findings, including features of the specific cases and the demographic makeup of the pool of jurors in each state. For a full list of controls, see Appendix.

gimes would disappear.<sup>63</sup> One possible explanation for this is that even when a plaintiff's negligence is quite high, juries are still uncomfortable leaving the plaintiff entirely deprived of compensation.

But selection effects could also be driving this finding. It is likely that a jurisdiction's negligence regime affects the types of suits that are brought to trial. In a modified comparative negligence regime, a plaintiff who is certain his or her negligence far exceeded 50 percent would be unlikely to bring suit because the expected recovery would be zero. These selection effects probably explain the smaller number of jury findings in the very high ranges in modified comparative negligence regimes.

The type of regime probably also affects the cases that are brought in the middle ranges. A plaintiff who believes his or her negligence is somewhere around 50 percent would be less likely to bring the claim in a modified regime because there is some risk of zero recovery. Thus, one might argue that selection effects could explain our Table 5 regression results.

But while selection effects probably do explain the discrepancies in the high ranges, we do not believe they explain the dramatic discrepancies that appear near 50 percent and at exactly 50 percent. The reason is that plaintiffs and their attorneys cannot predict the plaintiff's share of negligence with enough accuracy to explain the discrepancies in jury findings near 50 percent across jurisdictions.

For example, a plaintiff may be able to accurately predict that he or she was somewhere between 75 and 100 percent at fault. If that is the case, the plaintiff would be less likely to bring suit in a modified regime, and this selection effect would explain our finding of few such suits in such jurisdictions. On the other hand, a plaintiff may predict that his or her negligence was between 40 and 60 percent. That plaintiff would also be less likely to bring the suit in a modified regime where the expected value of the claim is lower because there is some chance of a zero recovery. This could explain the small number of observations in the ranges just above 50 percent in modified regimes.<sup>64</sup> However, it would not explain the overrepresentation of

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<sup>63</sup> See Part II.

<sup>64</sup> Settlement incentives also lead us to expect to see fewer total observations in modified regimes where the plaintiff's negligence is near 50 percent or higher. A plaintiff who predicts he or she was between 40 and 60 percent negligent, for example, not only has a lower expected value in a modified regime but also faces a much wider range of possible results. Plaintiffs as a group are typically thought to be more risk averse than defendants. Because the standard deviation of the range of possible results is so much larger for plaintiffs in modified regimes, risk aversion will make plaintiffs more likely to settle their claims that are near 50 percent in modified regimes than in pure regimes. As we note, this would explain a smaller number of total

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observations at exactly 50 percent or from 40 to 49 percent in modified regimes.

In fact, the overrepresentation in those ranges is particularly persuasive evidence of jury manipulation when we consider the selection effects that are likely at play. As we have explained, one would expect there to be some reduction in the number of observations near 50 percent in modified regimes because plaintiffs who think they are somewhere near 50 percent responsible—maybe slightly more, maybe slightly less—will know they face some risk of a zero recovery that they would not face in a pure regime. The fact that we see *more* observations from 40 to 49 percent and at exactly 50 percent in modified regimes, in the ranges where we would expect to see fewer observations resulting from selection effects, is strong evidence that jury manipulation is driving the result.

## V. DISCUSSION

### A. Potential Responses to Civil Jury Nullification

The analysis described in Part IV confirmed our suspicion that modified comparative negligence leads juries to manipulate their findings. Compared to juries in pure comparative negligence jurisdictions, juries in modified comparative negligence jurisdictions are substantially less likely to find that a plaintiff was more than 50 percent negligent. And unsurprisingly, juries in modified comparative negligence jurisdictions are more likely to find that a plaintiff was between 40 and 50 percent negligent.

These findings give rise to a number of important questions and concerns. The overarching question is this: Now that we have evidence that jury nullification occurs in modified comparative negligence jurisdictions, what is the appropriate reaction?<sup>65</sup> The primary

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observations in the ranges around 50 percent in modified regimes. But crucially, it would not explain the overrepresentation of observations at exactly 50 percent or in the range slightly below 50 percent. Our results could be caused by selection effects only if plaintiffs and their attorneys were able to predict the plaintiff's share of responsibility with remarkable accuracy.

<sup>65</sup> As a side note, some argue that civil jury nullification does not exist because the civil jury's decisions are always reviewable. See, for example, 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."). However, this conception understates the civil jury's power. The data in this Article show that some civil juries do, in fact, successfully manipulate their findings despite the constant oversight of the court. See also Stephen C. Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 U Chi Legal F 87, 105 (arguing that the civil jury is a "potentially volatile voice of popular sentiment" and that although its "ability to turn this sentiment into judgments

options are to (a) make substantive legal changes we believe will minimize juries' desire to engage in nullification; (b) make procedural changes such as blindfolding the jury, minimizing opportunities for nullification; or (c) do nothing.

Option (c) is far from optimal. Even when contributory negligence was still the norm, critics of the doctrine were not satisfied with having an unjust law on the books that was consistently undermined by juries. It was said that "[w]e live a lie . . . in allowing such a result" and that "[i]f comparative negligence is to be accepted, it should be above, not below, the table."<sup>66</sup> Parallel arguments can now be made about what seems to be a tendency toward de facto adoption of pure comparative negligence in modified comparative negligence jurisdictions. While one could argue that reform is unnecessary if juries are already manipulating their results to avoid the harshest applications of modified comparative negligence, modified comparative negligence should be rejected "above, not below, the table," just as contributory negligence has been formally rejected by almost all jurisdictions.

In one of the most thorough scholarly treatments of jury nullification in civil cases to date, Professor Lars Noah concludes that "the case for civil jury nullification is much weaker than in the criminal arena [because] [c]oncerns about protecting citizens against oppressive government action do not arise in wholly private lawsuits."<sup>67</sup> On the exact type of nullification discussed in this Article, Professor Noah argues that "[i]f juries continue to nullify when made aware of [the 50 percent threshold], they register a lack of respect for a political compromise struck by the duly elected members of the state legislature."<sup>68</sup> If we characterize civil jury nullification as "a single jury's sense of the equities" taking precedence over carefully crafted legislation passed by elected, accountable lawmakers, then it certainly does seem undemocratic.<sup>69</sup> However, this characterization may not be sensible if it fails to consider whether widespread and consistent nullification reflects a clear social consensus.

In contrast to Professor Noah, many commentators praise the power of the civil jury to nullify.<sup>70</sup> By ignoring instructions and reach-

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is limited by the judge's power to enter judgments notwithstanding the verdict and to order new trials, . . . the jury still enjoys a significant discretionary power").

<sup>66</sup> Haugh, 49 Or L Rev at 41 (cited in note 7).

<sup>67</sup> Noah, 86 Iowa L Rev at 1658 (cited in note 9).

<sup>68</sup> Id at 1641-42.

<sup>69</sup> Id at 1652, 1658.

<sup>70</sup> See, for example, Kaimipono David Wenger and David A. Hoffman, *Nullificatory Juries*, 2003 Wis L Rev 1115, 1148-56 (contending that nullificatory juries perform a valuable



ing decisions they find more satisfactory, juries can “mitigat[e] unfair laws and produc[e] just results in individual cases.”<sup>71</sup> In a broader sense, civil juries can inspire social change by nullifying in cases where the law is out of touch with public sentiment.<sup>72</sup>

So which of these highly contradictory depictions of civil jury nullification is at play here? By manipulating findings to avoid the intended results of modified comparative negligence, are juries undemocratically usurping the will of the legislature or are they democratically voicing displeasure with results they perceive as arbitrary and unjust? The latter seems a more appropriate characterization.

The current situation is closely analogous to the situation that led to the dramatic transition from contributory to comparative negligence in the second half of the twentieth century. As people grew increasingly aware of contributory negligence’s detachment from public conceptions of fairness, juries nullified with greater frequency. As one commentator describes it, “[t]he 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 . . . [t]hey permitted jurors, *sub silentio*, to whittle away at the [ ] rule.”<sup>73</sup> Even Professor Noah, who strongly criticizes civil jury nullification, acknowledges “everyone agrees that the old contributory negligence defense operated too harshly, and therefore invited jury nullification.”<sup>74</sup> The evidence in this Article suggests that juries in modified jurisdictions frequently view modified comparative negligence as similarly harsh and arbitrary.

It is difficult to distinguish between the jury nullification that historically occurred in contributory negligence regimes and the jury nullification that currently occurs in modified comparative negli-

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social function by preventing oppression in individual cases, providing the legal system with the flexibility required to achieve equitable results, and fostering participation and dialogue with government actors); Lawrence M. Friedman, *Some Notes on the Civil Jury in Historical Perspective*, 48 DePaul L Rev 201, 209–10 (1998) (arguing that jury nullification creates flexibility in the law and that “there is a good case to be made for flexibility”).

<sup>71</sup> Note, *Informing the Jury of the Effect of Its Answers to Special Verdict Questions—The Minnesota Experience*, 58 Minn L Rev 903, 927 (1974).

<sup>72</sup> See Fleming James Jr., *Functions of Judge and Jury in Negligence Cases*, 58 Yale L J 667, 689 (1949):

Any procedural device which effectively keeps the jury within their theoretical sphere tends to . . . prevent the jury from performing their possible role of keeping the actual operation of the law more responsive to human needs than an archaic substantive law would permit if it were carried out in letter and spirit.

<sup>73</sup> Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 Hastings L J 579, 610 (1993).

<sup>74</sup> Noah, 86 Iowa L Rev at 1651 (cited in note 9).

gence regimes. Accepting the former as legitimate while characterizing the latter as undemocratic seems difficult to defend. There might be a form of hindsight bias at play: Looking back on jury nullification in contributory negligence regimes, we see that those juries predicted a wave of legal reform away from contributory negligence. However, because so many jurisdictions presently embrace modified comparative negligence, it is more difficult to see that the present-day jury nullification is an equally legitimate reincarnation of what historically occurred in contributory negligence regimes.

As we discussed above, state legislatures are largely responsible for there being thirty-four states with some form of modified comparative negligence and only twelve with pure comparative negligence.<sup>75</sup> But our results suggest that jurors perceive the break point that characterizes modified comparative negligence and entirely deprives some injured plaintiffs of any recovery as unjust and arbitrary, just as they showed similar concerns under contributory negligence. The discrepancy between legislative judgment and the apparent preferences of juries to soften the edges of comparative negligence regimes suggests that in choosing modified comparative negligence regimes legislatures are being more responsive to special interests than to a broad democratic consensus.<sup>76</sup> By adopting modified comparative negligence, state legislatures seem to have been more influenced by the insurance industry and other special interest groups that preferred the modified regime than by the general will of the people.

If the jurisdictions currently using modified comparative negligence do decide to take action, there are two diametrically opposed paths they could follow. One path is procedural reform—such as blindfolding the jury to the results of the percentages it assigns, thereby eliminating the temptation to nullify. The other is substantive reform—moving away from modified comparative negligence. Advocating the former solution—retaining modified comparative negligence and adopting procedural mechanisms to prevent jury nullification—Professor Victor Schwartz states that “the law should be applied as a legislature intended it, or it should be changed at that level.”<sup>77</sup> To ensure this result, Professor Noah argues that trial judges should apply “more vigorous screening” to jury decisions, “in-

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<sup>75</sup> See Part I.A.

<sup>76</sup> See notes 80–82 and accompanying text.

<sup>77</sup> Schwartz and Rowe, *Comparative Negligence* § 17.04[h] at 373 (cited in note 1).

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crease[ ] [the] use of special verdict forms,” and sometimes “bifurcate [trials] by trying causation before liability.”<sup>78</sup>

Procedural reform might be appropriate if there is reason to believe public sentiment is unenlightened or misguided and juries are undermining a sensible law. Thus, if theory and policy suggest that modified comparative negligence is preferable to pure comparative negligence, it would be defensible to reduce the jury’s role to stop a good law from being undermined by individual acts of nullification. On the other hand, if the theoretical and policy arguments for pure comparative negligence were stronger, then removing the jury’s opportunity to nullify would be a mistake.

#### B. The Theory and Policy of Pure and Modified Comparative Negligence

On balance, the case for pure comparative negligence seems stronger than the case for modified comparative negligence. The latter’s most apparent flaw is that it “treats similarly situated litigants in a very different manner.”<sup>79</sup> A plaintiff that is found to be 50 percent negligent receives half of his damages, while a plaintiff that is 51 percent negligent receives nothing. Absent some compelling justification, allowing this degree of avoidable arbitrariness seems imprudent.

Another way that modified comparative negligence treats similarly situated parties differently is by applying more stringent standards to partially responsible plaintiffs than partially responsible defendants. A plaintiff that is less than 50 percent to blame bears a portion of the loss, while a defendant that is less than 50 percent to blame bears none, and a plaintiff that is more than 50 percent to blame bears all of the loss, while a defendant that is more than 50 percent to blame bears only a portion.<sup>80</sup> In cases where plaintiffs are more than 50 percent (but not entirely) to blame, this asymmetry undermines both compensation<sup>81</sup> and deterrence,<sup>82</sup> which are two of the tort system’s principal rationales. Further, even if it made sense to distinguish between the fault of plaintiffs and defendants, one

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<sup>78</sup> Noah, 86 Iowa L Rev at 1653–54 (cited in note 9).

<sup>79</sup> Christopher J. Robinette and Paul G. Sherland, *Contributory or Comparative: Which Is the Optimal Negligence Rule?*, 24 NIU L Rev 41, 50 (2003). See also Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 Yale L J 697, 727 (1978) (“To distinguish in an all-or-nothing way between the party . . . who is deemed forty-five percent negligent and the party who is deemed fifty-five percent negligent is substantially unfair.”).

<sup>80</sup> See Best, 40 Ind L Rev at 9 (cited in note 9).

<sup>81</sup> See Robinette and Sherland, 24 NIU L Rev at 50–51 (cited in note 79).

<sup>82</sup> See Best, 40 Ind L Rev at 9 (cited in note 9).

might argue that the fault of a defendant, which jeopardized the safety of another, is more blameworthy than the fault of a plaintiff, which jeopardized one's own safety.<sup>83</sup>

Despite the criticisms above, some commentators support modified comparative negligence on the basis of a different kind of fairness argument. They contend that it is somehow unjust for a plaintiff to recover, even proportionally, when his culpability was greater than that of the defendant.<sup>84</sup> At first blush, the argument has some appeal. As the plaintiff's responsibility gets closer and closer to 100 percent, it seems less and less legitimate to force the defendant to answer the complaint and pay damages. However, at least three factors may outweigh this apparent problem. First, the notion of proportional recovery responds to the perceived injustice of a minimally responsible defendant paying damages. The less responsible defendants are, the less they pay.<sup>85</sup> Second, the more culpable plaintiffs are, the less likely they are to bring suit. The costs and burdens of litigation will prevent many highly culpable plaintiffs from bringing suit when their best possible outcome is a severely reduced award.<sup>86</sup> And third, if pure comparative negligence truly offends a basic view of justice, juries are free to exercise their will and find highly culpable plaintiffs 100 percent at fault. As the evidence in this Article displays, juries have been willing to override the seemingly unjust aspects of modified comparative negligence in some cases.<sup>87</sup>

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<sup>83</sup> See *id.* (“[A] strong argument might be made that it is worse to endanger others than it is to endanger oneself.”).

<sup>84</sup> See, for example, Martin A. Kotler, *The Myth of Individualism and the Appeal of Tort Reform*, 59 Rutgers L Rev 779, 803 (2007) (“[M]uch of the post-1970s tort reform efforts seem to be directed toward ensuring that the highly culpable plaintiff be barred from any recovery.”); Joseph W. Little, *Eliminating the Fallacies of Comparative Negligence and Proportional Liability*, 41 Ala L Rev 13, 48–49 (1989) (arguing that barring recovery when the plaintiff's culpability exceeds that of the defendant reflects “a basic view of justice”). See also *McIntyre v Balentine*, 833 SW2d 52, 57 (Tenn 1992) (adopting modified comparative negligence rather than pure because allowing recovery to plaintiffs that are more than 50 percent at fault would be to “abandon totally our fault-based tort system”).

<sup>85</sup> In states that still recognize joint and several liability, this may not always be the case. See, for example, *Walt Disney World Co v Wood*, 515 S2d 198, 199, 202 (Fla 1987) (upholding a judgment against the defendant for 86 percent of the harm, despite the defendant only being found 1 percent to blame). If that result seems unjust, the most direct course of action is to abolish joint and several liability, not to adopt modified comparative negligence.

<sup>86</sup> See *Westerbeke*, 59 U Kan L Rev at 1009 (cited in note 12).

<sup>87</sup> There may be some irony in defending pure comparative negligence based on the possibility of jury nullification. After all, the thrust of this Article is to criticize modified comparative negligence because it invites jury nullification. However, it is better to use the system supported by logic and symmetry as a baseline than the system with an arbitrary cutoff point. If evidence mounts that juries are uncomfortable with pure comparative negligence, we might reconsider this Part's arguments.

The fact that modified comparative negligence is currently more popular than pure comparative negligence does not provide empirical proof that pure comparative negligence offends basic views of justice, as at least one commentator argues.<sup>88</sup> To conclude that the popularity of modified comparative negligence in state legislatures suggests it is the regime favored by the general public ignores the power that the insurance industry and other special interest lobbyists wield. In fact, in the same article arguing that modified comparative negligence represents the “will of the people,”<sup>89</sup> the author acknowledges “the force . . . that is expressed by the insurance industry when a major change in the law of tort . . . is at stake.”<sup>90</sup> For this reason, we hesitate to conclude that the relative popularity of the two regimes in state legislatures reflects their actual levels of social desirability. Further, if we were to draw conclusions based on the institutions that adopted pure and modified systems, the fact that courts have almost universally chosen pure systems would be powerful evidence that in the absence of political pressures, pure comparative negligence is the preferred system.<sup>91</sup> Like the majority of courts that have decided the issue, we favor pure comparative negligence based on our

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<sup>88</sup> See Little, 41 Ala L Rev at 48–49 (cited in note 84) (suggesting that the preference of legislatures for modified comparative negligence in itself indicates that it is the morally superior doctrine).

<sup>89</sup> Id at 49.

<sup>90</sup> Id at 46 n 115.

<sup>91</sup> See Best, 40 Ind L Rev at 6 (cited in note 9). Professor Little attempts to brush off this powerful trend by arguing that most courts “have adopted pure comparative negligence because to do so is more in keeping with their competence rather than because it is more in keeping with the judges’ perceptions of public sentiment.” Little, 41 Ala L Rev at 49 (cited in note 84). A few examples are sufficient to show that Professor Little’s conjecture does not fully capture judicial motivations. When the Alaska Supreme Court chose pure comparative negligence in 1975, it did so because “the pure system is the one which is the simplest to administer and which is best calculated to bring about substantial justice in negligence cases” and because “[i]t is the system most favored by modern jurists and commentators.” *Kaatz v Alaska*, 540 P2d 1037, 1049 (Alaska 1975). The court did not choose pure over modified because it feared overstepping its bounds. Id (“[I]ncreasingly it is perceived that a rule which is judicial in origin can be, and appropriately should be, altered by the institution which was its creator.”) (citations omitted). The California Supreme Court also wholeheartedly rejected arguments that decisions about comparative negligence should be left to the legislature. See *Li v Yellow Cab Co*, 532 P2d 1226, 1232–39 (Cal 1975). The California court selected the pure form because it believed “the 50 percent system simply shifts the lottery aspect of the contributory negligence rule to a different ground.” Id at 1242 (quotation marks and citation omitted). Concerns about institutional competence were nonexistent. The Tennessee Supreme Court, one of the rare courts to select modified comparative negligence, expressed no misgivings about the legislative quality of the action and spent less than one page justifying its decision. See *McIntyre*, 833 SW2d at 57.

assessment of the competing fairness arguments and the evidence of jury nullification presented above.<sup>92</sup>

Respect for the rule of law and confidence in the judiciary are values we should foster.<sup>93</sup> The public perception of the law is already threatened by a negligence regime that seems to conflict with public sensibilities. Paternalistically limiting the jury's role with blindfold rules would be an undesirable way to address a disconnect between the rule of law and public sentiment, particularly when theory and policy suggest that the juries that nullify are getting it right. However, public perception of the judicial system is also threatened when the law is applied in seemingly manipulative or unpredictable ways. The evidence of jury nullification in this Article suggests that this is exactly what is currently happening. Thus, it appears that as long as modified comparative negligence is on the books, whether juries are blindfolded or aware, the outcome will be far from ideal. A better solution is substantive reform. Just as there was a shift from

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<sup>92</sup> We do not rest our preference for a pure comparative negligence system over a modified comparative negligence regime on grounds of economic efficiency because the theoretical arguments and empirical evidence on this point have not been sufficiently advanced for a consensus to emerge. The economic merits of the related but distinct issue of contributory versus comparative negligence have been wrestled with for decades, with no conclusive result. Compare Robert D. Cooter and Thomas S. Ulen, *An Economic Case for Comparative Negligence*, 61 NYU L Rev 1067, 1070–71 (1986) (arguing that comparative negligence is the most efficient and equitable negligence rule when “parties are symmetrically situated with respect to the ability of each to take precaution”), with Oren Bar-Gill and Omri Ben-Shahar, *The Uneasy Case for Comparative Negligence*, 5 Am L & Econ Rev 433, 433–37 (2003) (contending that two assumptions underpinning the efficiency argument, that symmetrical deviations from optimal care are better than lopsided deviations and that comparative negligence induces symmetric deviations, are “not generally satisfied”). The major factor that Professors Cooter and Ulen have stressed in advocating the efficiency of comparative negligence is that it diminishes the amount of risk that parties bear when there is evidentiary uncertainty (as there is in real-world litigation). See Cooter and Ulen, 61 NYU L Rev at 1086–94 (cited in note 92). This factor would cut in favor of a pure comparative negligence regime. On the other hand, litigation is costly and comparative negligence increases the number of lawsuits, so the advantage that Professors Cooter and Ulen identify comes at a price. If the economic literature has been unable to resolve this controversy for the far more divergent systems of contributory and comparative negligence, it will be unlikely to do so for the finer question of whether pure comparative negligence dominates modified comparative negligence on efficiency grounds.

We do note, however, that one isolated article has tried to make the case that modified comparative negligence is the more efficient rule. See William P. Kratzke, *A Case for a Rule of Modified Comparative Negligence*, 65 UMKC L Rev 15, 21–28 (1996). Even if true, such efficiency gains for this tweak in the law would be small and would need to be balanced against other factors, such as which system is more logical and fair. See *Hilen v Hays*, 673 SW2d 713, 718 (Ky 1984) (“To those who speculate that comparative negligence will cost more money or cause more litigation, we say there are no good economies in unjust law.”).

<sup>93</sup> See, for example, *Li*, 532 P2d at 1231 (arguing that jury manipulation in contributory negligence systems “can only detract from public confidence in the ability of law and legal institutions to assign liability on a just and consistent basis”).

contributory to comparative negligence in the second half of the twentieth century, the many jurisdictions not already governed by pure comparative negligence should abandon modified comparative negligence and adopt the more logical and fair regime.

## VI. THE COUNTERINTUITIVE IMPACT OF MODIFIED COMPARATIVE NEGLIGENCE ON DAMAGES

Professors Leibman, Bennett, and Fetter's 1998 experiment suggested that informed juries in modified comparative negligence regimes would not only manipulate the percentage of plaintiff's negligence, allowing more plaintiffs to recover, but also that they would manipulate the gross damages award, so that the end result of a modified regime would essentially mimic that of a pure regime.<sup>94</sup> While we found evidence of the first type of manipulation, we did not find evidence of the second. There was no statistically significant difference between the gross awards<sup>95</sup> returned by juries in modified comparative negligence regimes and those returned in pure comparative negligence regimes.<sup>96</sup>

Our finding that some juries seem to adjust their findings of liability to protect plaintiffs in modified comparative negligence regimes but do not commensurately reduce the damages may lead to the unexpected conclusion that modified comparative negligence can at times hurt defendants. While selection bias could be playing an important role in the gross awards,<sup>97</sup> our findings still complicate the common assumption that defendants should prefer a modified regime and plaintiffs should prefer a pure regime.<sup>98</sup> When a jury manipulates the percentage of negligence to avoid the harsh result of a

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<sup>94</sup> See Leibman, Bennett, and Fetter, 35 Am Bus L J at 400 (cited in note 26).

<sup>95</sup> "Gross award" refers to the amount of compensatory damages the jury finds, which is then reduced by the plaintiff's share of the negligence and increased if the plaintiff is awarded punitive damages, fees or costs, or interest.

<sup>96</sup> For regression results, see Appendix.

<sup>97</sup> In modified regimes, attorneys know there is a greater risk of taking home \$0 than there is in pure regimes. This means that higher expected compensatory damages will be required before an attorney will agree to take a case to trial. If the plaintiff's share of the negligence was substantial and there is a good chance the jury will find that he or she was over 50 percent negligent, an attorney will not proceed to trial unless the plaintiff's potential damages are high enough to make up for the high risk that the compensation will be \$0 (both for the plaintiff and the attorney who is paid on commission).

Thus, it is possible that the true gross awards in modified regimes in our dataset were higher because of this selection effect, but juries lowered the awards in cases where they lowered the plaintiff's percentage of negligence. Those two effects would cancel each other out and produce our finding that the negligence regime had no significant impact on damages awarded.

<sup>98</sup> See, for example, Liebman, Bennett, and Fetter, 35 Am Bus L J at 397 (cited in note 26).

plaintiff arbitrarily going home empty-handed, the defendant pays a larger percentage of the damages than it would have in a pure system where the percentages were allocated faithfully. While defendants save money in modified regimes when a jury returns a finding of plaintiff's negligence above 50 percent, they lose money in every case where the jury manipulates the result in order to allow a recovery for the plaintiff. The important question from the defendants' perspective, though, is which of these effects dominates in the aggregate.

We define a rule as more "defendant-friendly" if it leads to smaller average recoveries for plaintiffs. Although a one-shot, risk-averse plaintiff might think smaller recoveries that are spread across more plaintiffs are more plaintiff-friendly, we approach this discussion from the perspective of a repeat-player defendant that is likely to be diversified across many cases. For these parties, the aggregate numbers are more meaningful than the result in any individual case. Because the main supporters of modified comparative negligence regimes tend to be major repeat players, it is interesting to test whether their preferred rule is actually more defendant-friendly, as they presumably hoped.

Using the actual percentages of plaintiffs' negligence from our data, a stylized calculation demonstrates the surprising aggregate effect of modified comparative negligence on defendants. First, we assume each of the 823 claims in our dataset is worth \$100 before any reduction for plaintiffs' negligence.<sup>99</sup> Then we calculate the average recovery for the 388 plaintiffs in pure jurisdictions and the 435 plaintiffs in modified jurisdictions, reducing the \$100 claims by the percentage of plaintiff's negligence found and reducing them to \$0 for the observations in modified regimes where plaintiff's negligence was greater than 50 percent.<sup>100</sup> Interestingly, the average recovery for the plaintiffs in pure jurisdictions was \$60.81, while the average recovery for the plaintiffs in modified jurisdictions was \$63.69. This suggests that defendants pay close to 5 percent more in modified jurisdictions than in the pure jurisdictions.

Thus, counterintuitively, modified comparative negligence may be more plaintiff-friendly than pure comparative negligence, not only in the cases where juries manipulate their finding of plaintiff's

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<sup>99</sup> Assigning an equal value to all claims might provide a reasonable picture of what happens in reality because we found that there were no statistically significant differences in gross awards across regimes.

<sup>100</sup> If, for example, there were three plaintiffs with \$100 claims, one found 25 percent negligent, one found 50 percent negligent, and one found 75 percent negligent, the average recovery would be \$50 in a pure jurisdiction  $((75 + 50 + 25) / 3 = 50)$ , and the average recovery would be \$41.67 in a modified jurisdiction using the 50 percent rule  $((75 + 50 + 0) / 3 = 41.67)$ .



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negligence, but also in the aggregate. The insurance companies and corporations that played a powerful role in the legislative process that led to many states' adoption of modified comparative negligence might still prefer the modified rule because of reduced litigation costs,<sup>101</sup> but they would likely be surprised to learn of the possible off-setting cost they pay under the modified regime.

These groups might respond to this discovery by urging courts and legislatures to blindfold juries so they are unable to undermine the desired defendant-friendly effects of modified comparative negligence. Blindfolding is difficult to achieve in practice, though, as citizens may become aware of the law over time and jurors might predict what the law is over the course of the trial. More importantly, even if perfect blindfolding were attainable, it would be a perverse reaction to this evidence that the law is out of sync with public conceptions of fairness and logic. As stressed above, the more satisfying and democratic response would be to adopt pure comparative negligence. Our tentative, counterintuitive finding on damages could provide momentum for legislative reform because it suggests that the powerful interest groups typically thought to benefit from modified comparative negligence actually might have reasons to prefer pure comparative negligence.

#### CONCLUSION

Our research confirms that jury manipulation or nullification occurs with some regularity in modified comparative negligence regimes. Juries in those jurisdictions were much less likely to find that a plaintiff's share of the negligence was greater than 50 percent and much more likely to find that it was between 40 and 50 percent. This finding casts doubt on the legislative process that led many states to adopt forms of modified comparative negligence. Modified comparative negligence appears to be out of sync with general views of fairness and logic. Not only is it concerning that the law conflicts with public sentiment, but the jury manipulation occurring in modified comparative negligence jurisdictions can also undermine the public's faith and confidence in the judicial system generally.

Further, although the possible influence of selection effects requires caution, the facial evidence suggests that juries in modified comparative negligence jurisdictions do not appear to engage in a

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<sup>101</sup> As we explained above, plaintiffs in modified comparative negligence regimes are probably somewhat less likely to bring lawsuits and somewhat more likely to settle the lawsuits they do bring. See Part IV.B.

second layer of manipulation by lowering the gross damage award. There is no statistically significant difference in gross awards across regimes, which means that modified comparative negligence hurts defendants in the cases where juries lower the percentage of plaintiffs' negligence. Indeed, a simple estimate based on our evidence of juries' manipulations of the percentage of negligence assigned to plaintiffs suggests that modified comparative negligence could hurt defendants in the aggregate, despite helping them in the few cases where juries find the plaintiff to be more than 50 percent negligent.

In theory, pure comparative negligence is the more sensible and defensible rule. In practice, if modified comparative negligence causes jurors to manipulate their findings, then the case for pure comparative negligence is even stronger. The jurisdictions not already governed by pure comparative negligence should consider these findings and reassess their negligence regimes.

## APPENDIX

### A. Data Cleaning

We changed the value for the percentage of plaintiff's negligence from 100 to 0 for one of the 823 observations. Analysis of the other variables for that particular observation strongly suggested that the original value of 100 was an error. First, the "original award" and "final award" were identical as they would be if the plaintiff's negligence were 0 percent. If the plaintiff's negligence had actually been 100 percent, the final award would have been reduced to \$0. Second, the dataset contains a variable that shows whether the award was reduced for plaintiff's negligence and—for this observation—that variable was coded as "no difference," again strongly suggesting that the plaintiff's negligence was actually 0 percent.

We performed the analysis before and after making the alteration and the alteration did not affect where we found statistical significance.

### B. Additional Results

#### 1. Percentage of plaintiffs' negligence.

Table 6 presents the full results of the regression analysis for the percentage of plaintiff's negligence.

TABLE 6. THE EFFECT OF NEGLIGENCE REGIMES ON JURY FINDINGS OF PERCENT PLAINTIFFS' NEGLIGENCE

Percent Negligence	0-39	40-49	50	51-100
<b>Modified Comp Neg Regime</b>	-0.034 (0.06)	0.12** (0.037)	0.129** (0.045)	-0.215** (0.040)
<b>Plaintiff Claim Type:</b>				
Wrongful death claimed	-0.027 (0.09)	-0.023 (0.07)	-0.05 (0.07)	0.099 (0.07)
Motor vehicle tort	-0.256 (0.29)	-0.184 (0.24)	0.306** (0.094)	0.134 (0.12)
Premises liability	-0.397 (0.29)	-0.103 (0.24)	0.36** (0.100)	0.14 (0.12)
Product liability, asbestos	0.189 (0.30)	-0.24 (0.25)	0.157 (0.15)	-0.106 (0.14)
Product liability, other	-0.315 (0.33)	-0.047 (0.27)	0.418** (0.155)	-0.056 (0.15)
Intentional tort	-0.176 (0.31)	-0.211 (0.25)	0.229 (0.12)	0.158 (0.14)
Malpractice, medical/dental	-0.324 (0.31)	-0.192 (0.25)	0.303* (0.138)	0.213 (0.16)
Malpractice, other professional	-0.258 (0.34)	-0.034 (0.30)	0.382 (0.21)	-0.091 (0.14)
Slander/Libel/Defamation	-0.784** (0.291)	0.132 (0.42)	0.545 (0.37)	0.106 (0.12)
Animal attack	-0.331 (0.37)	-0.003 (0.32)	0.438 (0.22)	-0.104 (0.12)
Other negligent act/Unknown tort	-0.243 (0.30)	-0.11 (0.25)	0.306* (0.119)	0.047 (0.13)
Fraud	-0.2 (0.32)	-0.251 (0.24)	0.382** (0.132)	0.069 (0.14)
Breach of contract, seller plaintiff	-0.573 (0.38)	0.442 (0.35)	0.178 (0.11)	-0.047 (0.13)
Breach of contract, buyer plaintiff	-0.386 (0.32)	0.012 (0.27)	0.238* (0.107)	0.136 (0.15)
Employment, discrimination	0.08 (0.29)	-0.207 (0.24)	0.195* (0.097)	-0.069 (0.12)
Employment, other	-0.308 (0.41)	-0.313 (0.24)	0.226 (0.13)	0.395 (0.35)
Intentional/Tortious interference	-1.032** (0.328)	-0.08 (0.25)	0.291* (0.139)	0.821** (0.158)
<b>Defendant Characteristics:</b>				
Total number	-0.04 (0.06)	-0.007 (0.04)	0.017 (0.05)	0.03 (0.05)
Individual	0.039 (0.06)	0.032 (0.04)	-0.021 (0.05)	-0.05 (0.05)

Insurance company	0.253** (0.076)	0.018 (0.06)	-0.108 (0.06)	-0.163** (0.063)
Other business	0.055 (0.06)	0.022 (0.04)	-0.043 (0.05)	-0.034 (0.05)
Hospital	0.131 (0.11)	0.003 (0.09)	-0.079 (0.09)	-0.055 (0.08)
Law enforcement	0.083 (0.06)	-0.006 (0.04)	-0.035 (0.06)	-0.042 (0.06)
<b>Plaintiff Characteristics:</b>				
Total number	-0.141 (0.24)	0.08 (0.27)	0.151 (0.29)	-0.09* (0.044)
Individual	0.128 (0.24)	-0.071 (0.27)	-0.139 (0.29)	0.082 (0.05)
Insurance company	0.104 (0.25)	-0.152 (0.27)	-0.113 (0.30)	0.162 (0.08)
Other business	0.314 (0.26)	-0.258 (0.28)	-0.212 (0.30)	0.156 (0.09)
Hospital	0.533* (0.241)	-0.284 (0.28)	-0.331 (0.29)	0.082 (0.06)
Law enforcement	0.53* (0.261)	-0.214 (0.28)	-0.195 (0.30)	-0.122 (0.09)
<b>State-Level Controls:</b>				
Unit rule	-0.147 (0.10)	0.018 (0.07)	-0.11 (0.07)	0.239** (0.071)
Sex ratio	0 (0.02)	-0.006 (0.01)	0.005 (0.01)	0.001 (0.01)
Percent of population over 65	-0.056** (0.021)	0.023 (0.02)	0.033* (0.017)	0 (0.01)
Percent voted Bush	-0.006 (0.01)	0.003 (0.01)	-0.004 (0.01)	0.008* (0.004)
Percent white	-0.009 (0.01)	0.003 (0.00)	0.007* (0.003)	-0.001 (0.01)
Income	0 (0.00)	0 (0.00)	0 (0.00)	0 (0.00)
Unemployment rate	-0.022 (0.05)	0.033 (0.03)	-0.005 (0.04)	-0.006 (0.03)
Poverty	-0.04 (0.02)	0.02 (0.01)	0.037* (0.015)	-0.017 (0.01)
College	-0.001 (0.01)	0.005 (0.01)	-0.014 (0.01)	0.01 (0.01)
Constant	3.815* (1.875)	-0.583 (1.25)	-2.192 (1.43)	-0.04 (1.43)
N	822	822	822	822
R <sup>2</sup>	0.08	0.06	0.06	0.13

\* p &lt; 0.05, \*\* p &lt; 0.01

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Note: The dependent variable is the percentage of negligence assigned to the plaintiff (it is set equal to one if within specified range and zero otherwise).

“Unit rule” is a dummy set equal to one if the state uses the unit rule (where the plaintiff’s percentage of fault is compared to the fault of all defendants as a unit) and set equal to zero if the state uses the individual rule (where the plaintiff’s percentage of fault is compared to each individual defendant and a plaintiff can only recover from individual defendants whose share of negligence is greater than that of the plaintiff).

“Sex ratio” is the number of males per 100 females and comes from the 2004 American Community Survey for both 2001 and 2005. See US Census Bureau, *2004 American Community Survey: State-Level, Subject Table*, online at [http://www2.census.gov/acs/downloads/Core\\_Tables/2004](http://www2.census.gov/acs/downloads/Core_Tables/2004) (visited Sept 18, 2012) (storing the state sex ratio data within the ST0402004.csv filename).

“Percent of population over 65” comes from the US Statistical Abstract. 2001 figures are from 2002 estimates, 2005 figures are from 2005 estimates. See US Census Bureau, *Statistical Abstract of the United States* \*24 (2003), online at <http://www.census.gov/prod/2004pubs/03statab/pop.pdf> (visited Sept 18, 2012); US Census Bureau, *Statistical Abstract of the United States* \*24 (2007), online at <http://www.census.gov/prod/2006pubs/07statab/pop.pdf> (visited Aug 14, 2012).

“Percent white” is the percent of population that is white and comes from the same US Statistical Abstracts. See US Census Bureau, *Statistical Abstract: 2003* \*25 (cited in note to Table 6); US Census Bureau, *Statistical Abstract: 2007* \*26 (cited in note to Table 6).

“Unemployment rate” comes from the Bureau of Labor Statistics. See Bureau of Labor Statistics, *Local Area Unemployment Statistics: Unemployment Rate for States* (2001), online at <http://www.bls.gov/lau/lastrk01.htm> (visited Sept 18, 2012); Bureau of Labor Statistics, *Local Area Unemployment Statistics: Unemployment Rate for States* (2005), online at <http://www.bls.gov/lau/lastrk05.htm> (visited Sept 18, 2012).

“Income” is the median household income in 2005 dollars and comes from the US Census Bureau, Current Population Survey. 2001 estimates are the two-year average for 2000 to 2001. 2005 estimates are the two-year average for 2004–2005. See US Census Bureau, *Table H-8A. Median Household Income by State—2 Year Average*, online at <http://www.census.gov/hhes/www/income/data/historical/household> (visited Sept 18, 2012).

“Poverty” is the percent of population in poverty. Figures for 2001 and 2005 are both the three-year average (2002–2004). See US Census Bureau, *Comparison of Poverty Rates Between States Using 3-Year Averages: 2002 to 2004*, online at <http://www.census.gov/hhes/www/poverty/data/incpovhlth/2004/tables.html> (visited Sept 18, 2012).

“Percent voted Bush” is the percent of voters who voted for President George W. Bush in the 2000 and 2004 presidential elections. 2001 figures are from 2000 election, 2005 figures are from 2004 election. See Federal Elections Commission, *2000 Presidential General Election Results*, online at <http://www.fec.gov/pubrec/fe2000/2000presge.htm> (visited Sept 18, 2012); Federal Elections Commission, *Official General Election Results for United States President*, online at <http://www.fec.gov/pubrec/fe2004/2004pres.pdf> (visited Sept 18, 2012).

“College” is the percent of people twenty-five years old or older who have completed a bachelor’s degree and comes from the US Census Bureau’s 2003 American Community Survey. See US Census Bureau, *2003 American Community Survey: State-Level, Single-Year Data Profile*, online at [http://www2.census.gov/acs/downloads/Core\\_Tables/2003](http://www2.census.gov/acs/downloads/Core_Tables/2003) (visited Sept 18, 2012) (storing the state educational attainment data under the Profile0402003.csv filename).

## 2. Damages.

Table 7 presents the results of the damages analysis. We found no statistically significant difference between the gross damages

awarded by juries in the two regimes.<sup>102</sup> The dependent variable is the natural log of gross damages awarded by the jury. This is the variable that is relevant to our inquiry because if juries were manipulating damages to compensate for the fact that they were also manipulating the percentage of plaintiff's negligence, they would have to manipulate the gross award.<sup>103</sup> The variable of interest is an indicator set equal to one if the case occurred in a modified jurisdiction and zero if the case occurred in a pure jurisdiction.<sup>104</sup>

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<sup>102</sup> The mean gross award was substantially smaller for our observations from modified regimes (roughly \$430,000) as opposed to pure regimes (roughly \$540,000). Thus, the raw data initially seemed to suggest juries were lowering their awards in some cases in modified regimes. However, the differential in the means was proven statistically insignificant by regression analysis.

A slight imperfection in the data is also responsible for the difference in the means. In modified regimes, unless the jury uses a special verdict, when the plaintiff's negligence is over 50 percent we never learn what the gross award would have been and it is reported in the dataset as zero. This flaw impacted a small number of cases because there were few observations in modified regimes where juries found a plaintiff to be over 50 percent negligent, and of those observations, about half apparently returned special verdicts because there is a nonzero gross award.

<sup>103</sup> What we call "gross award" was a variable called GENCOMP (amount of general compensatory damages) in the 2001 dataset and COMPTOT (total economic plus noneconomic damages) in the 2005 dataset. It represents the value the jury assigned to the plaintiff's compensatory harm before anything was added to the plaintiff's damages (for example, costs, fees, punitive damages, and interest) and before anything is taken away from it (that is, before it is reduced for plaintiff's negligence). We confirmed that this is what the variable represents by starting with the GENCOMP/COMPTOT value, reducing it in accordance with the plaintiff's share of the negligence, and then adding the values provided for costs, fees, punitive damages, and interest that were awarded. These manual calculations produced a number equal to the observation's value for "final award" in the large majority of cases.

<sup>104</sup> The reduced sample size is the result of removing observations with missing data for original award, final award, or both and removing observations with awards data that appeared untrustworthy. For example, there were some observations where plaintiff's negligence was greater than 50 percent and the case occurred in a modified comparative negligence regime, meaning the final award should have been zero, but the dataset did not reflect the reduction. There were also some observations where the damages variables simply did not add up for inexplicable reasons. We ran the regressions before removing the anomalous data points, and the results were equally insignificant for the regime's effect on original award.

TABLE 7. THE EFFECT OF REGIME ON ORIGINAL DAMAGES AWARDED

	ln(gross damages awarded)
<b>Modified Comp Neg Regime</b>	-0.004 (0.213)
<b>Plaintiff Claim Type:</b>	
Wrongful death claimed	2.055*** (0.416)
Motor vehicle tort	0.02 (1.216)
Premises liability	0.768 (1.221)
Product liability, asbestos	1.945 (2.266)
Product liability, other	2.087 (1.346)
Intentional tort	0.209 (1.285)
Malpractice, medical/dental	2.272 (1.327)
Malpractice, other professional	1.513 (1.63)
Slander/Libel/Defamation	-0.269 (2.165)
Animal attack	0.33 (1.513)
Other negligent act/Unknown tort	0.823 (1.267)
Fraud	0.55 (1.339)
Breach of contract, seller plaintiff	0.33 (1.618)
Breach of contract, buyer plaintiff	1.702 (1.38)
Employment, discrimination	-0.593 (2.159)
Employment, other	1.186 (2.171)
Intentional/Tortious interference	-11.277*** (2.26)
<b>Defendant Characteristics:</b>	
Total number	0.557* (0.235)
Individual	-0.522* (0.234)
Insurance company	-0.305 (0.341)

Other business	-0.006 (0.235)
Hospital	-0.102 (0.458)
Law enforcement	-0.423 (0.342)
<b>Plaintiff Characteristics:</b>	
Total number	1.22 (1.06)
Individual	-1.041 (1.063)
Insurance company	-1.513 (1.135)
Other business	-0.595 (1.171)
Hospital	0.984 (2.085)
Law enforcement	2.152 (2.113)
<b>State-Level Controls:</b>	
Unit rule	-0.051 (0.389)
Sex ratio	0.118 (0.07)
Percent of population over 65	0.174* (0.081)
Percent voted Bush	-0.009 (0.024)
Percent white	-0.047 (0.025)
Income	-6.47e <sup>-6</sup> (0.00005)
Unemployment rate	0.176 (0.169)
Poverty	0.004 (0.082)
College	0.065 (0.047)
Constant	-1.992 (7.22)
N	685
R <sup>2</sup>	0.327

\* p < 0.05, \*\* p < 0.01, \*\*\* p < 0.001

Note: The dependent variable is ln(gross damages awarded by jury). For an explanation of the control variables, see note to Table 6.