JURY NULLIFICATION IN MODIFIED COMPARATIVE NEGLIGENCE REGIMES

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Abstract

This paper 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% 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

Over half of the jurisdictions in the United States have adopted some form of modified comparative negligence. While the regimes vary in their specific details, they share an important oddity: nearly identically situated parties are treated very differently. Under modified comparative negligence, a difference of 1% of fault is all it takes for a plaintiff to go from recovering half of her damages to recovering nothing. Until a certain threshold (either 49 or 50%), a plaintiff can recover a proportionally reduced damage award, but after that threshold is crossed, no damages are awarded. In pure comparative negligence jurisdictions, there is no threshold and all plaintiffs recover in proportion to their responsibility.

This paper attempts to determine whether juries in negligence suits apportion percentages of responsibility consistently across jurisdictions, or if there are systematic differences between jury findings in modified comparative negligence jurisdictions and pure comparative negligence jurisdictions. We found it hard to believe that the two regimes' drastically different treatment of plaintiffs who are slightly above the 50% threshold would not lead to inconsistencies in juries' findings. We expected that juries in modified comparative negligence jurisdictions would be less likely to find that a plaintiff was just slightly more than 50% 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 paper 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. In Part IV, we present 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% negligent and significantly more likely to find that a plaintiff was slightly less than 50% negligent.

In Part V, we discuss the potential responses to this finding. We argue that rather than ignore it or enact procedural rules that would minimize the jury's ability to manipulate around the harsh results of modified comparative negligence, legislatures in the states that have not chosen pure comparative negligence should consider 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. Part V also discusses damage awards. We found no statistically significant

difference between damages awarded in pure and modified comparative negligence regimes. By lowering the percentage of fault assigned to plaintiffs but not lowering damage awards, juries in modified comparative negligence jurisdictions may have ironically turned modified comparative negligence into the more plaintiff-friendly of the two regimes. This counterintuitive finding could provide momentum for legislative reform because it shows that the powerful interest groups typically thought to benefit from modified comparative negligence actually may be better off with 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.[1] This scholarly trend eventually gained a practical foothold and "[t]he late 1960s saw the beginning of an all-out attack on the fault system of liability."[2] Between 1969 and 1974, the number of states applying some form of comparative negligence skyrocketed from six to twenty-five.[3] The movement continued over the following twenty years and by the mid-90s, comparative negligence was clearly the dominant doctrine, having replaced contributory negligence in forty-six states.[4]

The movement away from contributory negligence was spurred by growing sentiment that its economic and moral justifications were outdated.[5] 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 included 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

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[1] *See, e.g.*, Albert Averbach, *Comparative Negligence Legislation: A Cure for Our Congested Courts*, 19 ALB. L. REV. 4 (1955); Fleming James, Jr., *Contributory Negligence*, 62 YALE L.J. 691(1953); William L. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953).

[2] VICTOR E. SCHWARTZ & EVELYN F. ROWE, COMPARATIVE NEGLIGENCE 2 (4th ed. 2002).

[3] *Id*. at 2-3.

[4] *Id*. at 4.

[5] *See* John J. Haugh, *Comparative Negligence: A Reform Long Overdue*, 49 OR. L. REV. 38, 39, 48 (1969). On the economic point specifically, see Guido Calabresi, *Optimal Deterrence and Accidents: To Fleming James, Jr.,* il miglior fabbro, 84 YALE L.J. 656, 662-63 (1975).

danger;" and others.[6] 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.[7] 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."[8] 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.[9]

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 today.[10] Starting with the most plaintiff-friendly and descending, they are:

(1) Pure comparative negligence: used in 12 states. In these jurisdictions, plaintiffs can recover a proportional amount of damages unless their share of the negligence is 100%, (that is, a plaintiff found to be 90% negligent could still recover 10% of the damage award): Alaska, Arizona, California, Florida, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, New York, Rhode Island, and Washington.

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[6] *See* Haugh, *supra* note 5, at 39-40.

[7] *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, *supra* note 5, at 41 (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, 1612-18 (2001) (documenting the history of jury nullification in contributory negligence regimes).

[8] Alibrandi v. Helmsley, 314 N.Y.S.2d 95, 97 (Civ. Ct. 1970).

[9] What is surprising is that five jurisdictions in the United States still cling to contributory negligence.

[10] There is a surprising amount of confusion among authorities about what regime some states fall into. *Compare* SCHWARTZ & ROWE *supra* note 2, at 513 (suggesting that Arizona uses modified comparative negligence as of 1993); *and* COMPARATIVE NEGLIGENCE MANUAL (3d Ed. 1995) (same); *with* http://library.findlaw.com/1999/Sep/1/130745.html (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 (2003).

(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% form of modified comparative negligence (described below) is applied to non-economic damages.[11] In other words, plaintiffs that are 50% negligent or less recover a proportion of all of their damages, but plaintiffs who are more than 50% negligent recover a proportion of their economic damages and none of their non-economic damages.

(3) Modified comparative negligence, 50% form: used in 20 states. The 50% 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% negligent can recover 50%, but a plaintiff who is 51% negligent recovers nothing): Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Vermont, Wisconsin, Wyoming.

(4) Modified comparative negligence, 49% form: used in 12 states. In jurisdictions following the 49% 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% negligent recovers 51%, but one who is 50% negligent recovers nothing): Arkansas, Colorado, Georgia, Idaho, Kansas, Maine, Nebraska, North Dakota, Oklahoma, Tennessee, Utah, West Virginia.

(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 to the negligence of the defendant."[12]

(6) Contributory negligence is still used in 5 jurisdictions. In these jurisdictions, any finding of comparative fault bars recovery for the plaintiff: Alabama, Maryland, North Carolina,[13] Virginia, District of Columbia.

It is not entirely clear what drives the inconsistency among U.S. jurisdictions, but political considerations are almost certainly an important factor. Between 1969 and 1984, eleven states moved to comparative

[11] *See* MICH. COMP. LAWS § 600.2959 (2000).
[12] S.D. CODIFIED LAWS § 20-9-2 (2004).
[13] A bill that would change North Carolina's regime from contributory negligence to modified comparative negligence (50% form) recently passed through the North Carolina House. *See* http://www2.journalnow.com/content/2009/jul/13/injury-bill-gets-to-nc-senate/.

negligence via the judiciary. Of these eleven states, only one decided on a modified system and ten chose pure. 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.[14] Modified comparative negligence is the "clear preference of legislatures [and] [l]obbying by insurance interests apparently played a significant role in the legislative process."[15]

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."[16] 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.[17]

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% 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 they can be aware of the consequences of their deliberations has not gone unnoticed.[18] It has been described as "[a]mong the most contentious issues in American procedural law."[19] In the context of

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[14] *See* Best, *supra* note 7, at 6.
[15] *Id*. at 11.
[16] Prosser, *supra* note 1, at 494.
[17] SCHWARTZ & ROWE, *supra* note 2, at 83. For more on the theoretical merits of modified and pure comparative negligence, see *infra* Section V.A.
[18] *See* Jordan H. Leibman, Robert B. Bennett, Jr. & 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; Stuart F. Schaffer, Comment, *Informing the Jury of the Legal Effect of Special Verdict Answers in Comparative Negligence Actions*, 1981 DUKE L.J. 824.
[19] Leibman et al., *supra* note 18, at 349.

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. On the other hand, if jurors are not informed, systematic differences in findings can 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. While the latter scenario is plausible, it requires less of a leap to ascribe discrepancies across regimes to jury nullification if juries are explicitly informed. 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.[20]

We need not discuss jury instructions in pure jurisdictions because the only contentious and relevant issue is whether juries are aware of the 50% cutoff in modified jurisdictions. As is presented in detail below,[21] there are thirteen modified regimes represented in this paper's sample. Of those thirteen regimes, only Wisconsin requires that the jury be blindfolded[22] and we have been unable to find the rule in South Carolina.[23] Over half of the jurisdictions in the sample require a fully informed jury: Connecticut,[24] Hawaii,[25] Illinois,[26] Massachusetts,[27] Ohio,[28] and Pennsylvania.[29] And several others permit the jury to be informed in a way

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[20] *See* COMPARATIVE NEGLIGENCE MANUAL, *supra* note 10, at page 13-6 – page 13-7 ("[T]he overwhelming majority of jurisdictions either permit or require the court to inform the jury of the effect of its answers.").

[21] *See infra* Part III.

[22] *See* McGowan v. Story, 234 N.W.2d 325 (Wisc. 1975).

[23] Because only 2 of the 823 observations come from South Carolina, this bit of uncertainty does not seem crucial.

[24] CONN. GEN. STAT. ANN. § 52-572h(e) (2005) ("[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.).

[25] HI. R. CIV. JURY INSTR., Instr. 6.4 (1999) ("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.")

[26] Best v. Taylor Mach. Works, 689 N.E.2d 1057,1064 (Ill. 1997) (finding broad tort reform act unconstitutional and holding that the "blindfold" provision is unconstitutional as well because it is unseverable); ILL. PATTERN JURY INSTR.-CIV. B45.01, B45.01.B, B45.01.C (2009).

[27] MASS. SUP. CT. CIV. PRAC. JURY INSTR. Vol. I, Ch. 2, Exh. 2-A (2008) (instructing juries not to calculate damages if they find that the plaintiff is over 50% responsible).

[28] OHIO JURY INSTR., Vol. I – Civ. 403.01 (same as above).

[29] Peair v. Home Ass'n of Enola Legion, 430 A.2d 665, 671-72 (Pa. Super. 1981) ("We . . . conclude[] that the jury should be informed of the consequence of its apportionment of negligence.").

that strongly favors jury awareness: Indiana,[30] Minnesota,[31] Montana,[32] and New Jersey.[33] Finally, the Texas Rules of Civil Procedure express a preference against informing the jury,[34] but in practice, it seems the jury is informed on a regular basis.[35]

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. Further, the observations from Wisconsin plausibly suggest that those juries were aware as well, despite the lack of formal instructions from the court.[36] With this understanding of the underlying substantive and procedural law in hand, we can now move on to discuss our predictions and then present our findings.

II. PREDICTIONS AND PRIOR STUDIES

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 that occurred to soften the harshness of contributory negligence, one would expect juries to behave similarly when faced with plaintiffs whose negligence is slightly above the 50% cutoff in modified jurisdictions. If a jury believes a plaintiff was truly

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[30] IND. CODE § 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 [50%] . . . 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.

[31] MINN. R. CIV. P. 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.")

[32] Martel v. MT Power Co., 752 P.2d 140, 145-46 (Mont. 1988) (same as above).

[33] Roman v. Mitchell, 413 A.2d 322, 327 (N.J. 1980) (same as above).

[34] *See* TEX. R. CIV. P. 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.").

[35] Pattern jury instructions in Texas also seem to support informing the jury. *See* 34 TX. PRAC., Jury Charge in Texas Civil Litigation § 4.23 (3d ed. 2009) (explaining that the pattern jury instruction conditions consideration of damages on the plaintiff being 50% negligent or less, and that this is permissible based on a Texas Court of Appeals' holding in Borden, Inc. v. Price, 939 S.W.2d 247, 253-54 (Tex. App. 1997)).

[36] Only 1 of 28 Wisconsin juries found a plaintiff to be more than 50% negligent.

51% negligent, it seems highly likely that they would manipulate their findings out of sympathy.[37]

Therefore, we began this research expecting to see fewer findings of plaintiff's negligence above 50% and more below 50% in modified jurisdictions, with the differences being more dramatic close to the 50% 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% threshold, the prospect of the plaintiff going home with nothing seems less harsh and jury's sympathy decreases. Further, we expect that findings far below 50% will be unaffected by the manipulation that occurs around the 50% threshold because it seems unlikely that jurors would make a dramatic manipulation and return findings far below 50% for plaintiffs whose true negligence was more than 50%.

While several commentators have acknowledged the possibility of jury nullification in modified comparative negligence regimes,[38] almost no empirical work has been done to discover whether it actually occurs. The sole exception we have found is a study by Jordan Leibman, Robert Bennett, and Richard Fetter.[39] 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.[40] 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 attributable to plaintiffs."[41] However, they also found that the same juries tended to return smaller damage awards so the "aggregate effect of the two rules . . . [is] about the same."[42]

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[37] *See* Leibman et al., *supra* note 18, at 352 ("[B]lindfolding proponents argue that the percentage bar rule must be kept from the jury to reduce the effects of sympathy and bias.").

[38] *See, e.g.*, Noah, *supra* note 7, at 1616 (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").

[39] Leibman et al., *supra* note 18. 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. Hammitt, Stephen J. Carroll & 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.

[40] *Id*. at 355.

[41] *Id*. at 400.

[42] *Id*.

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, Leibman, Bennett, and Fetter's research provides an interesting background for our study of actual jury findings.[43] As outlined above, U.S. jurisdictions are divided among several negligence regimes, but particularly between pure comparative negligence and modified comparative negligence.[44] The study will provide evidence that should influence courts and legislatures to reconsider these choices.

III. DATA

The data for this project comes from two datasets funded by the United States Department of Justice, Bureau of Justice Statistics and compiled by the National Center for State Courts. 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 [United States]* and *Civil Justice Survey of State Courts, 2001: [United States]*.

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. 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.

Because the dataset consists of a wide variety of civil cases, from the 16,910 cases there are 902 observations with a value for the percentage of negligence assigned to the plaintiff. To arrive at the 823 observations analyzed in this paper, we removed all observations that were not coded as jury trials, 12 observations that came from states using the 49% rule, and 19 observations that came from Michigan, which uses the unique hybrid regime described above. 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%) 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 paper by regime and state.

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[43] In their experiment, Leibmann et al. essentially were 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 study will either bolster or undermine their simulated results.

[44] *See supra* Part II.

Table 1: Selection of Data	
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 a 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% 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**

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

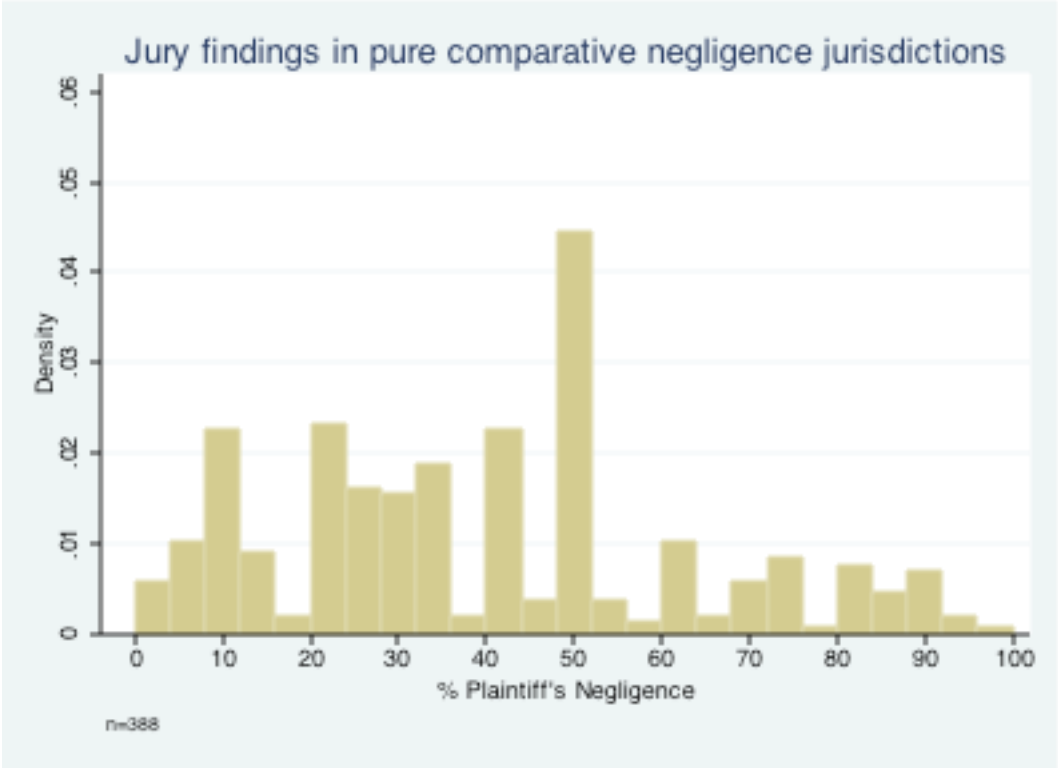
IV. METHODOLOGY AND RESULTS

A. Preliminary Analysis

The table 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% negligent less frequently than juries in pure regimes. As expected, the lower frequency of findings above 50% is countered by a higher frequency of findings in the ranges slightly below 50% 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% are almost empty in modified regimes and the bins between 40 and 50% are substantially larger.

Figure 1


Jury findings in pure comparative negligence jurisdictions
Density
0
.01
.02
.03
.04
.05
.06
0
10
20
30
40
50
60
70
80
90
100
% Plaintiff's Negligence
n=388

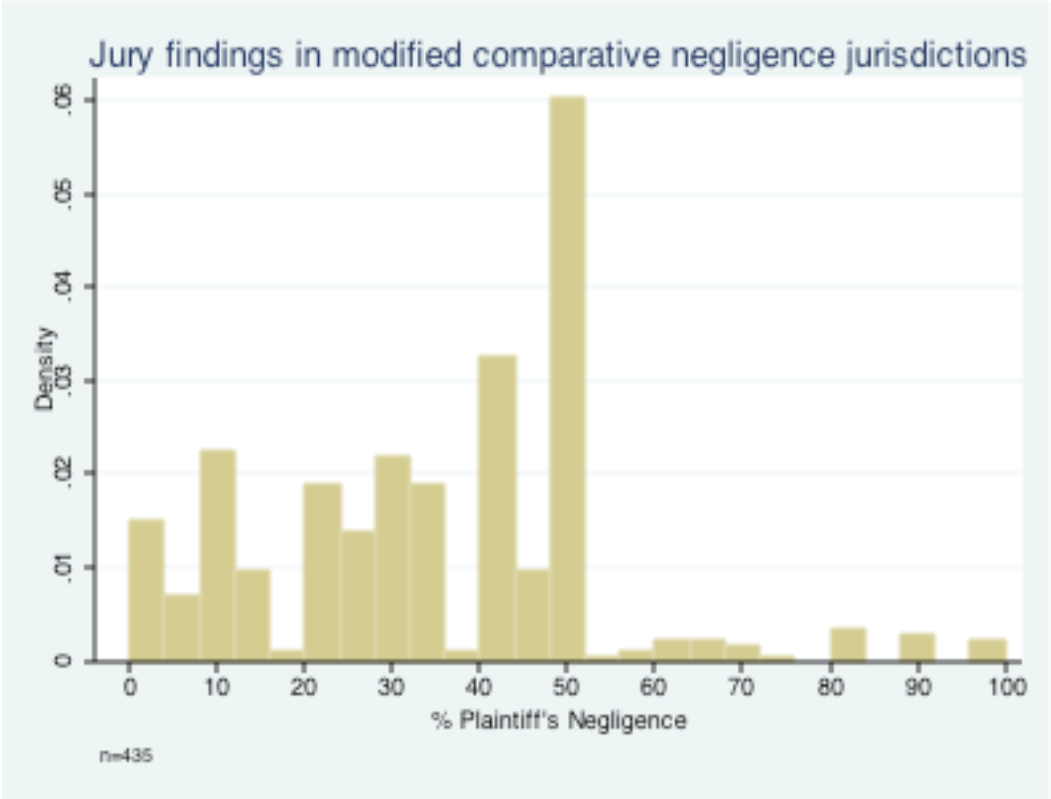

Jury findings in modified comparative negligence jurisdictions
Density
0
.01
.02
.03
.04
.05
.06
0
10
20
30
40
50
60
70
80
90
100
% Plaintiff's Negligence
n=435

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%) are divided into four even ranges. Notably, juries found the plaintiff between 0 – 25% negligent with nearly identical frequency in the two regimes, but found the plaintiff between 26 – 50% negligent more frequently in modified regimes and between 51 – 100% 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%	57.5%
51 - 75	12.9%	4.1%
76 - 100	9%	3.4%

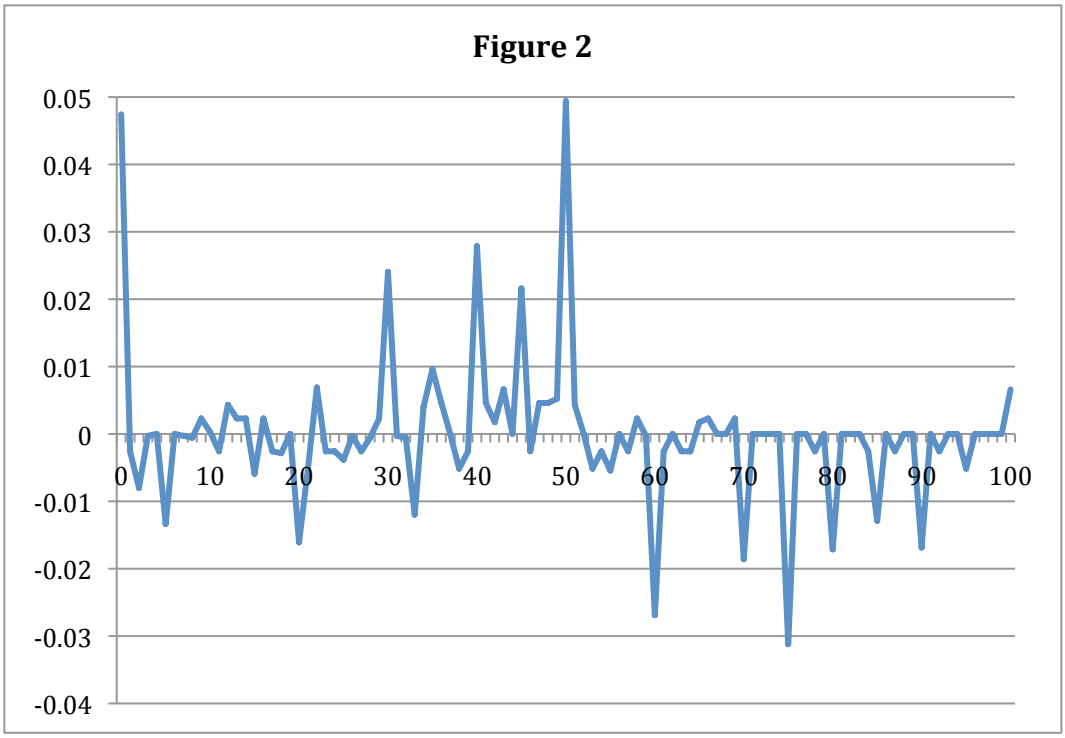
Table 4 is similar to Table 3, but instead of four even ranges, it attempts to zero in on where the inconsistencies between the jurisdictions occur. This table shows that from 0-39%, there is little difference in the frequency of jury findings in pure and modified regimes. Thus, the range of percentages where the frequency in modified regimes is greater is quite narrow, 40-49%.

Table 4: Distribution of Juries' Findings

Percentage of Negligence Assigned to Plaintiff	Frequency in Pure Jurisdictions	Frequency in Modified Jurisdictions
0 – 39	50%	52%
40 – 49	12.1%	19.5%
50	16%	20.9%
51 - 100	21.9%	7.6%

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% reflects the fact that juries in modified jurisdictions found the plaintiff to be 50% negligent in 20.9% of cases while juries in pure jurisdictions found the plaintiff to be 50% negligent in 16% of cases, (20.9 – 16 = 4.9). The strongest trends appear to be that as we approach 50%, the frequency of findings in modified comparative negligence jurisdictions is greater, and when the 50% threshold is crossed, the frequency of findings in pure comparative negligence jurisdictions is clearly greater.

Figure 2



B. Regression Analysis

We ran linear probability regressions to determine the significance of the trends that are suggested by the raw data. Each regression took the following form:

$$Percent\ negligence = \beta_1 Regime + \beta_2 Claim\ type + \beta_3 Plaintiff\ characteristics + \beta_4 Defendant\ Characteristics + \beta_5 Demographics + \varepsilon$$

where the dependent variable is an indicator set equal to one if the percentage of negligence the jury assigned to the plaintiff is within a specified range and zero if otherwise, and 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. As such, β_1 measures the effect of a negligence regime on jury findings of plaintiff's negligence. Claim type, plaintiff characteristics, and defendant characteristics are control variables relating to the case observed and demographics are control variables relating to the state in which the case occurred.[45] 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.

[45] The full list of controls is located in the Appendix.

Table 5: The Effect of Negligence Regimes on Jury Findings of Percent Plaintiff Negligence

Dependent variable: Percentage of negligence assigned to plaintiff (set equal to one if within specified range and zero otherwise)

Percent negligence	0-39	40-49	50	51-100
Regime	-0.034	0.12**	0.129**	-0.215**
	(0.06)	(0.037)	(0.045)	(0.040)
Constant	3.815*	-0.583	-2.192	-0.04
	(1.875)	(1.25)	(1.43)	(1.43)
N	822	822	822	822
R^2	0.08	0.06	0.06	0.13

Note: ** and * denote statistically significant at the 1% and 5% level, respectively.

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% more likely to be found to be between 40 and 49% negligent, approximately 12.9% more likely to be found to be exactly 50% negligent, and approximately 21.5% less likely to be found to be between 51 and 100% negligent. The results are statistically significant at the 1% level and coincide with our intuitions about how juries are likely to behave in modified comparative negligence jurisdictions.[46]

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 systems, juries in modified comparative negligence jurisdictions are substantially less likely to find that a plaintiff was more than 50% negligent. And unsurprisingly,

[46] Interestingly, neither a simple analysis of the raw data or regression analysis confirmed our hypothesis that as the plaintiff's negligence approached 100% the differences between the two regimes would disappear. *See supra* Part II. It appears that even when a plaintiff's negligence is quite high, juries may still be uncomfortable with them being entirely deprived of compensation.

juries in modified comparative negligence jurisdictions are more likely to find that a plaintiff was between 40 and 50% 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?[47] The primary options are to (a) make substantive legal changes we believe will minimize juries' desire to nullify, (b) make procedural changes such as blindfolding the jury, minimizing opportunities for nullification, or (c) do nothing.

Option (c) is far from optimal. While 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."[48] Parallel arguments can now appropriately be made about what seems to be a de facto adoption of pure comparative negligence in modified comparative negligence jurisdictions. While some might argue that reform is unnecessary if juries are already manipulating their results to avoid the harshest applications of modified comparative negligence, ignoring this problem is an unsatisfactory response.

In the most thorough scholarly treatment of jury nullification in civil cases to date, 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."[49] On the exact type of nullification discussed in this paper, Noah argues that "[i]f juries continue to nullify when made aware of [the 50% threshold], they register a lack of respect for a political compromise struck by the duly elected members of

[47] As a side note, some argue that civil jury nullification does not exist because the civil jury's decisions are always reviewable. *See, e.g.*, 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 paper show that civil juries do, in fact, successfully manipulate their findings from time to time 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 is limited by the judge's power to enter judgments notwithstanding the verdict and to order new trials, . . . the jury still enjoys significant discretionary power").

[48] Haugh, *supra* note 5, at 41.

[49] Noah, *supra* note 7, at 1658.

the state legislature."[50] 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."[51] However, this characterization is not entirely sensible. It fails to consider whether widespread and consistent nullification may reflect a clear social consensus.

In contrast to Noah, many commentators praise the power of the civil jury to nullify. By ignoring instructions and reaching decisions they find more satisfactory, juries can "mitigate[] unfair laws and produc[e] just results in individual cases."[52] In a broader sense, civil juries can inspire social change by nullifying in cases where the law is out of touch with public sentiment.[53]

So which of these highly contradictory depictions of civil jury nullification is at play here? By manipulating findings to avoid the harsh 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 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 most the second half of the twentieth century. As people grew increasingly aware of the contributory negligence doctrine'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 consequence of harsh tort doctrines. When judges grew tired of their ill-conceived principles . . . . [t]hey permitted jurors, *sub silentio*, to whittle away at the . . . rule."[54] Even Noah, who strongly criticizes civil jury nullification, acknowledges that "everyone agrees that the old contributory negligence defense operated too harshly, and therefore invited jury nullification."[55] The evidence in this paper suggests that juries in modified

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[50] *Id*. at 1641-42.
[51] *Id*. at 1652.
[52] Note, *Informing the Jury of the Effect of Its Answers to Special Verdict Questions—The Minnesota Experience*, 58 MINN. L. REV. 903, 927 (1974).
[53] *Cf.* Fleming James, Jr., *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667, 690 (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.").
[54] Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 610 (1993).
[55] Noah, *supra* note 7, at 1651.

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 negligence regimes. Accepting the former as legitimate while characterizing the latter as undemocratic seems difficult to defend. There may 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 law 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,[56] 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. Composed of the elected representatives of the people, state legislatures are expected to respond to the will of the people and make law that is generally approved by the public. However, the frequency with which jurors manipulate findings in modified comparative negligence regimes suggests that they strongly disagree with the law. Our analysis shows that we are not dealing with merely a handful of renegade, pro-plaintiff, anti-industry juries unjustly depriving defendants of their legal entitlements.[57] Instead, there seems to be close to consensus among jurors that modified comparative negligence suffers from the same flaws as contributory negligence. By adopting modified comparative negligence, state legislatures seem to have failed to protect the public's preferences and instead were influenced by the insurance industry and other special interest groups that preferred the modified regime.

If courts or legislatures 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, Victor Schwartz states that "the law should be applied as a legislature intended it, or it should be changed at that level."[58] To ensure this result, Noah argues that trial judges should apply "more vigorous screening" to jury decisions, "increase[] [the] use of

[56] *See supra* Part II.
[57] Taken to these extremes, Noah's argument that civil jury nullification could violate the Due Process Clause seems plausible. Noah, *supra* note 9, at 1646.
[58] SCHWARTZ, *supra* note 2, at 373.

special verdict forms," and sometimes "bifurcate [trials] by trying causation before liability."[59]

Procedural reform might be appropriate if there was reason to believe public sentiment was unenlightened or misguided and juries were undermining a sensible law. History shows that lawmakers should not *always* follow public sentiment. The most glaring example is evidence of juries in the South refusing to convict or find liability white defendants accused of civil rights violations.[60] Very few would object to paternalistically limiting the jury's ability to nullify in those situations. 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 are stronger, 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."[61] A plaintiff that is found to be fifty percent negligent receives half of his damages, while a plaintiff that is fifty-one percent negligent receives nothing. Results so arbitrary and imbalanced have no place in our legal system.

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 fifty percent to blame bears a portion of the loss, while a defendant that is less than fifty percent to blame bears none; and a plaintiff that is more than fifty percent to blame bears all of the loss, while

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[59] Noah, *supra* note 7, at 1653-54.

[60] *See* John P. Relman, *Overcoming Obstacles to Federal Fair Housing Enforcement in the South: A Case Study in Jury Nullification*, 61 MISS. L.J. 579, 589-92 (1991) (discussing the longstanding concern with racist jury nullification in the South).

[61] Christopher J. Robinette & Paul G. Sherland, *Contributory or Comparative: Which is the Optimal Negligence Rule?*, 24 N. ILL. U. 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.").

a defendant that is more than fifty percent to blame bears only a portion.[62] In cases where plaintiffs are more than fifty percent (but not entirely) to blame, this asymmetry undermines both compensation[63] and deterrence,[64] which are two of the tort system's principle rationales. Further, even if it made sense to distinguish between the fault of plaintiffs and defendants, one might argue that the fault of a defendant, which jeopardized the safety of another, is more blameworthy than the fault of plaintiffs, which jeopardized one's own safety.[65]

Despite the criticisms above, some commentators support modified comparative negligence on the basis of a different kind of fairness argument: that it is somehow unjust for a plaintiff to recover, even proportionally, when his culpability was greater than that of the defendant.[66] At first blush, the argument is intuitively appealing. As the plaintiff's responsibility gets closer and closer to one hundred 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.[67] 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. And third, if pure comparative negligence truly does offend a basic view of justice, juries are free to exercise their will and find highly

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[62] *See* Best, *supra* note 7, at 9.
[63] *See* Robinette & Sherland, *supra* note 61, at 50-51.
[64] *See* Best, *supra* note 7, at 9.
[65] *See id.* ("[A] strong argument might be made that it is worse to endanger others than it is to endanger oneself.").
[66] *See e.g.*, 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, 47-48 (1989) (arguing that barring recovery when the plaintiff's culpability exceeds that of the defendant reflects "a basic view of justice"); *cf.* McIntyre v. Balentine, 833 S.W.2d 52, 57 (Tenn. 1992) (adopting modified comparative negligence rather than pure because allowing recovery to plaintiffs that are more than fifty percent at fault would be to "abandon totally our fault-based tort system").
[67] In states that still recognize joint and several liability, this may not always be the case. *See e.g.*, Walt Disney World v. Wood, 515 So. 2d 198 (Fla. 1987) (upholding a judgment against the defendant for eighty-six percent of the harm, despite the defendant only being found one-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.

culpable plaintiffs one hundred percent at fault. As the evidence in this paper displays, juries have been willing to override the seemingly unjust aspects of modified comparative negligence in some cases.[68]

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.[69] 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 that argues that modified comparative negligence represents the "will of the people,"[70] the author acknowledges "the force . . . that is expressed by the insurance industry when a major change in the law of tort . . . is at stake."[71] For this reason, we hesitate to draw conclusions based on the relative popularity of the two regimes in state legislatures. 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.[72] Like the

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

[69] *See* Little, *supra* note 66, at 48-49.

[70] *Id.* at 49.

[71] *Id.* at 46 n.115.

[72] *See* Best, *supra* note 7, at 6. 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, *supra* note 66, at 49. A few examples are sufficient to show that Professor Little's unsupported conjecture is not borne out in the cases. 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 "it is the system most favored by modern jurists and commentators." Kaatz v. Alaska 540 P.2d 1037, 1049 (Alaska 1975). The court did not chose pure over modified because it feared overstepping its bounds. *Id.* ("[I]ncreasingly it is perceived that a rule that 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. of Cali., 532 P.2d 1226, 1232-39 (Cal. 1975). The California Court selected the pure form because it believed "the '50 percent' system simply shifts

majority of courts that have decided the issue, we favor pure comparative negligence based on our assessment of the competing fairness arguments and the evidence of jury nullification presented above.[73]

Respect for the rule of law and confidence in the judiciary are values we should foster.[74] 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 paper 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 contributory to comparative negligence in the second half of the twentieth century, courts and legislatures in the thirty-nine jurisdictions not already governed by pure comparative negligence should succumb to public sentiment and adopt the more logical and fair regime.[75]

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the lottery aspect of the contributory negligence rule to a different ground." *Id.* at 1242. Concerns of institutional competence were non-existent. 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 v. Balentine, 833 S.W.2d 52, 57 (Tenn. 1992).

[73] We do not confront the question of which system leads to economically efficient behavior, a popular question in the torts literature. One article argues 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 modified comparative negligence is truly more efficient, those efficiency gains would need to be balanced against other factors, such as which system is more logical and fair. *Cf.* Hilen v. Hays, 673 S.W.2d 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.") Additionally, further studies could well reach conclusions that contradict Professor Kratzke. The economic merits of contributory versus comparative negligence have been wrestled with for decades, with no conclusive result. *Compare* Robert D. Cooter & Thomas S. Ulen, *An Economic Case for Comparative Negligence*, 61 N.Y.U. L. REV. 1067 (1986), *with* Oren Bar-Gill & Omri Ben-Shahar, *The Uneasy Case for Comparative Negligence*, 5 AM. L. & ECON. REV. 433 (2003).

[74] *See, e.g.*, *Li*, 532 P.2d 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").

[75] Because some patterns of jury nullification are pernicious, rather than enlightened, see *supra* note 60 and accompanying text, courts and legislatures

B. Damages

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 that they would also manipulate the gross damages award, so that the end result of a modified regime would essentially mimic that of a pure regime.[76] While we found evidence of the first type of manipulation, we did not find evidence of the second. The gross awards returned by juries in modified comparative negligence regimes were not statistically significantly different than those returned in pure comparative negligence regimes.[77]

Thus, our findings suggest that the modified regime ironically hurts defendant in many cases. Common wisdom suggests defendants should prefer a modified regime and plaintiffs should prefer a pure regime, but these findings complicate those assumptions. When a jury manipulates the percentage of negligence to avoid the harsh result of a 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 in the rare instances when a jury returns a finding of plaintiff's negligence above 50%, 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 defendant's 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 fall into this camp, it is interesting to test whether or not their preferred rule is actually more defendant-friendly, as they hoped.

Using the actual percentages of plaintiff's negligence from our data, a stylized calculation demonstrates the surprising aggregate effect of

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should not always bow to public sentiment. However, strong trends of jury nullification like the one presented in this paper should, at the very least, motivate legislatures to carefully reexamine the legal regime they have selected.

[76] *See supra* notes 39-43 and accompanying text.

[77] Regression results are in the Appendix.

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.[78] Then we calculate the average recovery for the 388 plaintiffs in pure jurisdictions and the 435 plaintiffs in modified jurisdictions, reducing the $100 dollar 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%.[79] 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% more in modified jurisdictions than in the pure jurisdictions.

Thus, ironically and 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 negligence, but also in the aggregate. No doubt this would come as a surprise to the insurance companies and corporations that played a powerful role in the legislative process that led to many states' adoption of modified comparative negligence. 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 affects 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.

CONCLUSION

Our research confirmed 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% and much more likely to find that it was between 40 and 50%. 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

[78] Assigning an equal value to all claims may provide a reasonable picture of what happens in reality because we found that the gross awards were not statistically significantly different across regimes.

[79] For example, if there were 3 plaintiffs with $100 claims, one found 25% negligent, one found 50% negligent, and one found 75% 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% rule ((75+50+0) / 3 = 41.67).

out-of-sync with general views of fairness and logic. Not only is it a concern that the law conflicts with public sentiment, but the manipulation and dishonesty that is occurring in modified comparative negligence jurisdictions undermines the public's faith and confidence in the judicial system generally.

Further, we find that juries in modified comparative negligence jurisdictions do not appear to engage in a 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 plaintiff's negligence. Even more strongly, we find that modified comparative negligence may hurt defendants in the aggregate, despite helping them in the few cases where juries find the plaintiff to be more than 50% negligent.

In theory, pure comparative negligence is the more sensible and more defensible rule. In practice, if modified comparative negligence causes jurors to manipulate their findings, the case for pure comparative negligence is even stronger. Legislatures and courts in the 39 jurisdictions not governed by pure comparative negligence should strongly consider adopting it.

APPENDIX

A. Data Cleaning

The authors 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 was 0%. If the plaintiff's negligence had actually been 100%, 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%.

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

B. Additional Results

i. Percentage of Plaintiff's 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 Plaintiff Negligence

Dependent variable: Percentage of negligence assigned to plaintiff (set equal to one if within specified range and zero otherwise)

Percent Negligence	0-39	40-49	50	51-100
Regime	-0.034	0.12**	0.129**	-0.215**
	(0.06)	(0.037)	(0.045)	(0.040)
Plaintiff Claim Type:				
Wrongful Death Claimed	-0.027	-0.023	-0.05	0.099
	(0.09)	(0.07)	(0.07)	(0.07)
Motor Vehicle Tort	-0.256	-0.184	0.306**	0.134
	(0.29)	(0.24)	(0.094)	(0.12)
Premises Liability	-0.397	-0.103	0.36**	0.14
	(0.29)	(0.24)	(0.100)	(0.12)
Product Liability, asbestos	0.189	-0.24	0.157	-0.106
	(0.30)	(0.25)	(0.15)	(0.14)

Product Liability, other	-0.315	-0.047	0.418**	-0.056
	(0.33)	(0.27)	(0.155)	(0.15)
Intentional Tort	-0.176	-0.211	0.229	0.158
	(0.31)	(0.25)	(0.12)	(0.14)
Malpractice: medical/dental	-0.324	-0.192	0.303*	0.213
	(0.31)	(0.25)	(0.138)	(0.16)
Malpractice: other professional	-0.258	-0.034	0.382	-0.091
	(0.34)	(0.30)	(0.21)	(0.14)
Slander/ libel/ defamation	-0.784**	0.132	0.545	0.106
	(0.291)	(0.42)	(0.37)	(0.12)
Animal Attack	-0.331	-0.003	0.438	-0.104
	(0.37)	(0.32)	(0.22)	(0.12)
Other negligent act / unknown tort	-0.243	-0.11	0.306*	0.047
	(0.30)	(0.25)	(0.119)	(0.13)
Fraud	-0.2	-0.251	0.382**	0.069
	(0.32)	(0.24)	(0.132)	(0.14)
Seller Plaintiff (contract)	-0.573	0.442	0.178	-0.047
	(0.38)	(0.35)	(0.11)	(0.13)
Buyer Plaintiff (contract)	-0.386	0.012	0.238*	0.136
	(0.32)	(0.27)	(0.107)	(0.15)
Employment, Discrimination	0.08	-0.207	0.195*	-0.069
	(0.29)	(0.24)	(0.097)	(0.12)
Employment, Other	-0.308	-0.313	0.226	0.395
	(0.41)	(0.24)	(0.13)	(0.35)
Intentional / Tortious interference	-1.032**	-0.08	0.291*	0.821**
	(0.328)	(0.25)	(0.139)	(0.158)
Defendant Characteristics:				
Total Number	-0.04	-0.007	0.017	0.03
	(0.06)	(0.04)	(0.05)	(0.05)
Individual	0.039	0.032	-0.021	-0.05
	(0.06)	(0.04)	(0.05)	(0.05)
Insurance Company	0.253**	0.018	-0.108	-0.163**
	(0.076)	(0.06)	(0.06)	(0.063)
Other Business	0.055	0.022	-0.043	-0.034

	(0.06)	(0.04)	(0.05)	(0.05)
Hospital	0.131	0.003	-0.079	-0.055
	(0.11)	(0.09)	(0.09)	(0.08)
Law enforcement	0.083	-0.006	-0.035	-0.042
	(0.06)	(0.04)	(0.06)	(0.06)
Plaintiff Characteristics:				
Total number	-0.141	0.08	0.151	-0.09*
	(0.24)	(0.27)	(0.29)	(0.044)
Individual	0.128	-0.071	-0.139	0.082
	(0.24)	(0.27)	(0.29)	(0.05)
Insurance Company	0.104	-0.152	-0.113	0.162
	(0.25)	(0.27)	(0.30)	(0.08)
Other business	0.314	-0.258	-0.212	0.156
	(0.26)	(0.28)	(0.30)	(0.09)
Hospital	0.533*	-0.284	-0.331	0.082
	(0.241)	(0.28)	(0.29)	(0.06)
Law enforcement	0.53*	-0.214	-0.195	-0.122
	(0.261)	(0.28)	(0.30)	(0.09)
State-Level Controls				
Unit Rule	-0.147	0.018	-0.11	0.239**
	(0.10)	(0.07)	(0.07)	(0.071)
Sex Ratio	0	-0.006	0.005	0.001
	(0.02)	(0.01)	(0.01)	(0.01)
Percent of Population over 65	-0.056**	0.023	0.033*	0
	(0.021)	(0.02)	(0.017)	(0.01)
Percent Bush	-0.006	0.003	-0.004	0.008*
	(0.01)	(0.01)	(0.01)	(0.004)
Percent White	-0.009	0.003	0.007*	-0.001
	(0.01)	(0.00)	(0.003)	(0.01)
Income	0	0	0	0
	0.00	0.00	0.00	0.00
Unemployment Rate	-0.022	0.033	-0.005	-0.006
	(0.05)	(0.03)	(0.04)	(0.03)
Poverty	-0.04	0.02	0.037*	-0.017
	(0.02)	(0.01)	(0.015)	(0.01)
College	-0.001	0.005	-0.014	0.01
	(0.01)	(0.01)	(0.01)	(0.01)

Constant	3.815*	-0.583	-2.192	-0.04
	(1.875)	(1.25)	(1.43)	(1.43)
N	822	822	822	822
R^2	0.08	0.06	0.06	0.13

Notes: ** and * denote statistically significant at the 1% and 5% level, respectively. 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 defendant's whose share of negligence is greater than that of the plaintiff). Sex ratio is the number of males per 100 females. Percent Bush is the percentage of the population that voted for George W. Bush in the most recent presidential election. Poverty is the percentage of the population in poverty.

ii. 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. The reduced sample size is largely the result of removing observations with missing data for original award, final award, or both. We also removed certain anomalous datapoints. For example, there were some observations where plaintiff's negligence was greater than 50% 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. We ran the regressions before removing the anomalous datapoints and the results were equally insignificant for regime's effect on original award.

The dependent variable is the 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. 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.

Table 7. The Effect of Regime on Original Damages Awarded

Dependent variable: Gross damages awarded by jury

	Gross Damages Awarded
Regime	86801.08
	(279210.8)
Plaintiff Claim Type:	
Wrongful Death Claimed	1386715*
	(539000.8)
Motor Vehicle Tort	-1360326

	(1501613)
Premises Liability	-1541852
	(1507465)
Product Liability, asbestos	1.50e**
	(2792542)
Product Liability, other	5806209**
	(1674836)
Intentional Tort	-1301814
	(1596989)
Malpractice: medical/dental	-1065705
	(1660198)
Malpractice: other professional	-1684247
	(2008783)
Slander/ libel/ defamation	-1309647
	(2692376)
Animal Attack	-1580847
	(1974814)
Other negligent act / unknown tort	-1683759
	(1566588)
Fraud	-2101044
	(1651385)
Seller Plaintiff (contract)	-1494280
	(2152758)
Buyer Plaintiff (contract)	-782035
	(1730597)
Employment, Discrimination	-1523115
	(2649871)
Employment, Other	-1973149
	(2666921)
Intentional / Tortious interference	-3137329
	-2788086
Damages Variables	
Amount fees/costs awarded	8.545**
	(2.139)
Amount of punitive damages awarded	-1.223
	-8.421

Reduced for plaintiff's negligence? (=1 if yes =0 if no)	-3502099**
	(1312470)
Reduced for prior settlement? (=1 if yes =0 if no)	36614.67
	(710491.4)
Defendant Characteristics:	
Total Number	189594.3
	(289045.3)
Individual	-99245.4
	-288054.0
Insurance Company	-416541.0
	(428092.2)
Other Business	136349.6
	(292190.8)
Hospital	228285.2
	(574998.0)
Law enforcement	223113.8
	(1331403.0)
Plaintiff Characteristics:	
Total number	429217.5
	(1302131.0)
Individual	-180069.0
	(1304982.0)
Insurance Company	-1199936.0
	(1396515.0)
Other business	649763.6
	(1464455.0)
Hospital	-649992.2
	(2556661.0)
Law enforcement	799861.1
	(2594972.0)
State-Level Controls	
Unit Rule	617264.2
	(494980.9)
Sex Ratio	22198.82

	(90151.3)
Percent of Population over 65	143114.3
	(105127.2)
Percent Bush	3788.956
	(29591.17)
Percent White	26844.19
	(32052.78)
Income	336092.4
	(214902.7)
Unemployment	33819.39
	(107416.0)
Poverty	107136.2
	(59928.3)
College	-26.494
	(58.36)
Constant	-5514374
	(9517606)
N	651
R^2	0.3

Notes: ** and * denote statistically significant at the 1% and 5% level, respectively. See notes to Table 6 for an explanation of control variables that are not clear from their titles.