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A Compromise Approach to Compromise Verdicts

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A Compromise Approach to Compromise Verdicts

Michael Abramowicz

When civil litigants cannot achieve an amicable settlement of their differences, the judicial process decides who is right and who is wrong. Trials end with verdicts, and in our system of justice, verdicts produce clear winners and losers.¹ On each count alleged, no matter how murky the facts from which the litigation was born, either the plaintiff wins and recovers damages,² or the defendant wins and pays nothing.³ This is not, however, an inevitable feature of the legal landscape. Juries might be asked not to announce verdicts for one side or the other but to produce satisfactory compromise resolutions that take into account all competing accounts of the facts.⁴ Alternatively, juries might be instructed to weigh their uncertainty about the defendant's conduct or the degree of the plaintiff's injury

1. Sometimes the complexities of the initial dispute are lost in a decision for one party or the other. "Although most litigated cases settle, the adversarial model does not depend upon persuading the parties to compromise, but simply declares who is right. It oversimplifies the conflict by reducing it to convincing one judge as to who should prevail." Lani Guinier, *Lines in the Sand*, 72 TEX. L. REV. 315, 360 (1993) (review essay).

2. A verdict for the plaintiff will not be an unequivocal victory if the jury awards only a low level of damages. Empirical evidence, however, indicates that judgments tend to produce clear winners and losers. See, e.g., Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 40 tbl.24 (1996) (showing that juries rarely issue damage awards that are between the defendant's pretrial offer and the plaintiff's pretrial demand). Moreover, a recent simulation study indicates that when juries are exposed to evidence on compensatory liability and damages, an increase in the strength of liability evidence does not spill over into damage assessments. See Stephan Landsman et al., *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 WIS. L. REV. 297, 321 (noting, however, that when jurors were exposed to evidence related to the egregiousness of the defendant's conduct for purposes of calculating punitive damages, there was some spillover into compensatory damages awards). But see Jack Ratliff, *Offensive Collateral Estoppel and the Option Effect*, 67 TEX. L. REV. 63, 80 (1988) ("The damages proof often spills over into the liability issues so that a case weak on liability is saved if the damages are strong and vice versa. Some jurisdictions forbid the separate trial of damages and liability issues in tort cases, implicitly recognizing this spillover effect.") (footnotes omitted).

3. I confine my attention in this Article primarily to suits for money damages, rather than suits seeking injunctive or declaratory relief. But see *infra* note 294 (discussing the possibility of compromise verdicts in injunction actions). In a suit seeking both money damages and injunctive relief, it would be possible to compromise on money damages without compromising on the injunction.

4. So-called primitive legal systems often seek to achieve compromise resolutions that may help reconcile the litigants. See, e.g., MICHAEL BARKUN, *LAW WITHOUT SANCTIONS: ORDER IN PRIMITIVE SOCIETIES AND THE WORLD COMMUNITY* 94-115 (1968) (arguing that primitive systems help reveal that the line between bargaining and dispute resolution need not be so clear as Western legal systems assume); TASLIM OLAWALE ELIAS, *THE NATURE OF AFRICAN CUSTOMARY LAW* 212 (1956).

when awarding damages.⁵ That is, we might ask juries to estimate the probability that the defendant acted in a way that would warrant liability for any resulting injuries and discount damages accordingly.

Aside from one article thirty-five years ago and a burst of interest twenty years later, scholars have paid almost no attention to the possibility of replacing the preponderance-of-the-evidence rule with an alternative that is not "winner-take-all."⁶ In 1964, John Coons considered the possibility of "court imposed compromise" in cases in which one party's story was no more probable than the other's.⁷ His analysis was limited, however, assessing only the possibility of "a fifty-fifty split."⁸ This was the entire literature until 1982, when David Kaye argued that from the perspective of statistical decision theory, multiplying damages by the probability of liability, what he called an "expected value rule," would produce greater

5. Jury instructions typically imply the reverse, that once jurors decide that the defendant is liable, the plaintiff should receive the entirety of the damages. See, e.g., N.Y. PATTERN JURY INSTRUCTIONS—CIVIL § 2:277 (3d ed. 1999) ("If you find that the plaintiff is entitled to recover from the defendant, you must render a verdict in a sum of money that will justly and fairly compensate the plaintiff for all losses resulting from the injuries (he, she) sustained.").

6. Problems of winner-take-all systems have received attention in various other areas of legal scholarship. E.g., Jonathan B. Baker, *Promoting Innovation Competition Through the Aspen/Kodak Rule*, 7 GEO. MASON L. REV. 495 (1999) (discussing how intellectual property regimes may produce winner-take-all competitions); Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589 (1993) (criticizing winner-take-all districting); Victor Williams & Alison M. MacDonald, *Rethinking Article II, Section 1 and Its Twelfth Amendment Restatement: Challenging Our Nation's Malapportioned, Undemocratic Presidential Election Systems*, 77 MARQ. L. REV. 201 (1994) (challenging the lack of division in most states' apportionment of their electoral votes); Lawrence Zelenak & Kemper Moreland, *Can the Graduated Income Tax Survive Optimal Tax Analysis?*, 53 TAX L. REV. 51 (1999) (discussing winner-take-all markets); Rebecca L. Sandefur & John P. Heinz, *Winner-Take-All Markets for Legal Services and Lawyers' Job Satisfaction* (Jan. 24, 2000) (unpublished manuscript, on file with author) (providing qualified support for the claims that the market for legal services is becoming winner-take-all and that this leads to dissatisfaction among the lawyers who are not winners); see also ROBERT H. FRANK & PHILLIP J. COOK, *THE WINNER-TAKE-ALL SOCIETY* (1995) (arguing that many markets are winner-take-all).

7. John E. Coons, *Approaches to Court Imposed Compromise—The Uses of Doubt and Reason*, 58 NW. U. L. REV. 750 (1964) [hereinafter Coons, *Approaches to Court Imposed Compromise*]; see also John E. Coons, *Compromise as Precise Justice*, 68 CALIF. L. REV. 250 (1980), reprinted from COMPROMISE IN ETHICS, LAW, AND POLITICS 190 (J. Roland Pennock & John W. Chapman eds., 1979) [hereinafter Coons, *Compromise as Precise Justice*] (refining the earlier argument). Coons noted that compromise would be possible even where the litigants were arguing over ownership of property:

What happens then to the disputed cow? Simply this: If the trier of fact finds the truth of the matter indeterminate in the sense of an equivalence of probabilities, the court may order the beast sold and the proceeds divided or may award her to either party upon payment of half the value to the adversary.

Coons, *Approaches to Court Imposed Compromise*, *supra*, at 757.

8. Coons, *Approaches to Court Imposed Compromise*, *supra* note 7, at 759 ("As long as we confine our attention to instances of balanced probability, any division other than fifty-fifty would discriminate against one party."). Coons did not explain why he chose to confine his attention to instances of balanced probability. See also *infra* note 255.

error costs than the preponderance-of-the-evidence approach.⁹ Soon thereafter, in 1984 and 1985, three Harvard Law School professors considered different aspects of the problem in articles in prominent journals. First, in the *Harvard Law Review*, David Rosenberg embraced a "standard of proportional liability" for mass tort cases.¹⁰ Further bolstering the case for compromise, Steven Shavell argued in the *Journal of Law and Economics* that "proportional liability" would help optimize deterrence,¹¹ though possibly at the expense of increased litigation costs.¹² Finally, Charles Nesson, also writing in the *Harvard Law Review*, offered a dim appraisal of "proportionate damages" in an article on the theory of evidence law.¹³ Since 1985, no one has evaluated any of these arguments, let alone all of them together.¹⁴

The literature is surprisingly disjointed.¹⁵ One indication of the absence of a unified body of scholarship is the slightly different terminology that the various authors use to refer to compromise verdicts: the "expected value rule,"¹⁶ "proportional liability,"¹⁷ and "proportionate damages."¹⁸ Though Shavell cites his two colleagues,¹⁹ none of the Harvard-authored articles responds directly to the others,²⁰ and as their

9. David Kaye, *The Limits of the Preponderance of the Evidence Standard: Justifiably Naked Statistical Evidence and Multiple Causation*, 1982 AM. B. FOUND. RES. J. 487; *infra* Part I.B.

10. David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984). In such cases, Rosenberg argued, courts should "impose liability and distribute compensation in proportion to the probability of causation assigned to the excess disease risk in the exposed population." *Id.* at 859. In many cases, this would result in imposition of "market share liability." *Id.* at 867-68.

11. See Steven Shavell, *Uncertainty over Causation and the Determination of Civil Liability*, 28 J.L. & ECON. 587, 589 (1985) [hereinafter Shavell, *Uncertainty over Causation*]. Parts of this argument reappear in STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* § 5.3, at 115-18 (1987) [hereinafter SHAVELL, *ECONOMIC ANALYSIS*].

12. Shavell, *Uncertainty over Causation*, *supra* note 11, at 608-09.

13. Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1382-85 (1985).

14. Carrie Menkel-Meadow recently attacked the binary nature of verdicts in our legal system, but instead of proposing some version of a compromise verdict rule, she urged that the adversary system be replaced by alternative systems of dispute resolution. Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996); see also Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663, 2674 & n.51 (1995) (mentioning Coons' approach).

15. It also suffers from a variety of analytic flaws. *Infra* Part I.A (challenging Kaye's argument); *infra* notes 129-134 and accompanying text, notes 217-219 and accompanying text (identifying significant problems in Shavell's model), notes 109-117 and accompanying text (disagreeing with Nesson).

16. Kaye, *supra* note 9.

17. Rosenberg, *supra* note 10; Shavell, *supra* note 11.

18. Nesson, *supra* note 13.

19. Shavell, *Uncertainty over Causation*, *supra* note 11, at 589 n.10.

20. This cannot be due to ignorance. Nesson cites Rosenberg for various tangential points. *E.g.*, Nesson, *supra* note 13, at 1382 n.81.

titles reveal, the structure of verdicts is tangential to their immediate concerns. Moreover, to the extent these authors do address how verdicts might respond to uncertainty, they focus on questions of uncertain causation, rather than on routine questions about whether the defendant has violated a duty or the level of damages that the plaintiff has suffered.²¹ The preponderance-of-the-evidence rule, however, applies to each of these issues. The literature is thus left without a comprehensive assessment, let alone a justification, of one of the legal system's most salient attributes: its insistence that a civil jury choose the story of one party over that of another.

Given the attention already paid to issues of causation, this Article focuses on the more basic uncertainty about what the defendant did or whether the plaintiff was injured,²² without implying that concerns about causation should be subordinated to these issues.²³ I use the phrase "compromise verdicts"²⁴ rather than one invoking some variant of the word "proportional" to clarify this focus.²⁵ Beyond shifting analysis of the preponderance rule from issues of causation to issues of factual uncertainty, the Article offers an alternative to the extremes of all-or-nothing and compromise verdicts. Ironically, commentators have implicitly assumed that either the litigants must be subject to a winner-take-all regime, or the plaintiff must receive the product of the alleged damages and the probability of liability. The literature has not considered the possibility that sometimes an all-or-nothing verdict is appropriate, while at other times a compromise verdict would be better, and that the choice between these

21. Nesson, however, does indicate an awareness that verdicts might be used to effect compromises where the jury is uncertain about what the defendant did. See *infra* note 101 and accompanying text.

22. Some of my analysis could be applied to questions of causation as easily as to questions of liability. E.g., *infra* Part III. Issues of causation, however, may produce different policy recommendations than issues of whether a duty has been breached. *Infra* notes 131-134 and accompanying text. I recognize, however, that at times issues of breach and causation may be difficult to sever. See *infra* note 134. For example, in a battery case in which it is clear that someone punched the plaintiff, the conclusion that the defendant is the puncher may erase any doubt as to causation.

23. Issues of causation can be severed from issues concerning other types of factual uncertainty. *Infra* notes 316-317. Thus, it would be possible to combine any of the verdict structures I am considering with a regime of comparative negligence or market-share liability.

24. The same term is also used to describe verdicts that result when jurors with different positions agree to some middle position, for example, by splitting the difference on damages. E.g., Elizabeth A. Faulkner, *Using the Special Verdict to Manage Complex Cases and Avoid Compromise Verdicts*, 21 ARIZ. ST. L.J. 297 (1989) (discussing this type of "compromise verdict"). Such verdicts may be problematic because they are a means of avoiding deliberation, which might lead to greater confidence in a particular answer. Cf. *infra* notes 77-80 and accompanying text (discussing the possibility that "compromise verdicts" under my definition might decrease deliberation). By "compromise verdicts," I mean simply verdicts in which the jury as an entity recognizes factual uncertainty about the defendant's conduct and achieves some compromise between two alternative versions of the facts.

25. My formulation hearkens back to Coons' reference to "court imposed compromise." *Supra* note 7. I choose this formulation rather than one invoking some variation of "proportional" to distinguish my focus on factual uncertainty from analytically distinct issues of joint causation.

approaches might be made within a particular case rather than on a systemic level. This Article embraces this possibility and thus proposes a compromise approach to compromise verdicts.

For linguistic clarity, I label this compromise approach a system of mixed verdicts. Such a system distinguishes between cases in which the jury (or other trier of fact)²⁶ has a relatively high degree of confidence in its liability determination and those in which the jury is much less sure. In any given case, if the jury's confidence in its determination of the defendant's liability (or non-liability) exceeds some predetermined threshold,²⁷ then the jury would return an all-or-nothing verdict. If the jury's confidence in its liability determination falls below the threshold (that is, if the jury estimates liability in the middle of the probability continuum), then the jury would return a compromise verdict. The all-or-nothing system of verdicts results in a large discontinuity in treatment of cases around the fifty percent probability point, while compromise verdicts produce a linear increase in damages in proportion to the jury's degree of certainty. A system of mixed verdicts would create two discontinuities, but these would be small relative to those of all-or-nothing verdicts.²⁸ Moreover, a system of mixed verdicts would avoid the most severe error costs associated with compromise verdicts by requiring an all-or-nothing verdict when jury confidence is high.

My proposed system of mixed verdicts is not an attempt to craft a political compromise.²⁹ Rather, I will argue that a system of mixed verdicts is normatively superior to either of the more extreme alternatives. This conclusion is not the unequivocal product of any one consideration, but the

26. For economy of expression, I generally use the term "jury" to refer to a trier of fact, except where clarification is needed to make a point. The analysis, however, can be extended to cases in which a judge decides factual questions.

27. I do not establish just what this threshold should be, and different considerations might militate toward the line being drawn in different places. Moreover, this threshold need not be a number, but could be a standard such as "clear and convincing evidence." *Infra* notes 74-76 and accompanying text.

28. For example, such a system might impose zero liability when the jury's estimate of the probability of liability is between 0 and 25%, proportionate liability between 25% and 75%, and full liability above 75%. It would be possible to eliminate these discontinuities altogether by making the middle of the probability spectrum correspond to the full range from zero to full liability. For example, there could be zero liability for probability estimates up to and including 25% and full liability from 100% down to and including 75%; for probability estimates between 25% and 75%, liability would rise linearly upward from 0% to 100%. I am grateful to David Haddock for this point. For a discussion of how minimizing discontinuities might promote equality, see *infra* text accompanying note 205.

29. Indeed, I make no claim about the likelihood that a statute converting to a system of mixed verdicts would likely be enacted. On one hand, there are no interest groups that would have a strong reason to oppose adoption of such a regime, since it is neither particularly pro-plaintiff nor pro-defendant. *Infra* note 170 and accompanying text. On the other hand, no group has much of an interest in pushing the proposal either. Because a system of mixed verdicts would represent a large break from tradition, judges are unlikely to adopt the proposal without legislative intervention, and private law reform groups such as the American Law Institute are unlikely to recommend reform. Cf. Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 597 (1995) (arguing that groups like the ALI are biased towards the status quo).

confluence of a number of factors each pointing tentatively toward the effectiveness of a system of mixed verdicts. The prior literature has argued about the relative merits of all-or-nothing and compromise verdicts in general, without assessing whether the strength of these arguments varies along the probability continuum. As I will show, arguments for all-or-nothing verdicts are most powerful when the jury's estimate of the probability of liability is either quite low or quite high, and arguments for compromise verdicts are strongest for cases in which the balance of evidence is relatively even. A system of mixed verdicts harnesses the advantages of all-or-nothing verdicts in the portions of the probability continuum for which these advantages are likely to outweigh the disadvantages, and the advantages of compromise verdicts elsewhere.

This Article also has a payoff quite independent of its goals of broadening the discussion of compromise verdicts and defending a system of mixed verdicts. In evaluating compromise verdicts, we must necessarily consider the uncertainty that pervades legal decision making. In the guise of simplification, legal scholarship often ignores the possibility that civil juries may err in determining whether the defendant engaged in alleged conduct, or acknowledges only that there may be some tradeoff between type I and type II error.³⁰ Such error, however, cannot merely be dismissed as an unfortunate inevitability. For even if legal error cannot be avoided, its inclusion in our models of legal decision making must change our evaluation of how institutions should be structured. We will see, in particular, that what has become the most prominent economic approach to punitive damages must be modified, for it will otherwise fail to achieve its own efficiency goals once legal error is taken into account.³¹

The remainder of this Article is divided into five Parts. Part I considers a variety of general arguments about compromise verdicts, arguments that seek to discern the best verdict structure for all cases, without asking how verdict structure will advance various aims of law. In Part II, several such aims are considered directly, including deterrence, efficient breach, restitution, retribution, and equality. The impact of compromise verdicts and a system of mixed verdicts on litigation costs is examined in Part III, which focuses on incentives to file and settle lawsuits. Part IV switches from an examination of factual uncertainty to a preliminary assessment of legal uncertainty. Though the prospect of compromise

30. Type I error is a "false positive," while type II error is a "false negative." See, e.g., HEINZ KOHLER, *ESSENTIALS OF STATISTICS* 271-72 (1988) ("Committing a type I error is equivalent to condemning a defendant in a criminal trial even though he or she is innocent. . . . Committing a type II error is equivalent to acquitting a defendant in a criminal trial even though he or she is guilty."). Some legal scholars do offer careful comparisons of the relative costs of type I and type II error in particular contexts. E.g., Lynn A. Stout, *Type I Error, Type II Error, and the Private Securities Litigation Reform Act*, 38 ARIZ. L. REV. 711 (1996).

31. *Infra* notes 144-151 and accompanying text.

solutions to legal uncertainty introduces some additional issues, a system of mixed verdicts may be a promising way to accommodate a diversity of normative approaches to legal decision making. In Part V, I briefly consider some implementation issues and conclude.

I

PRELIMINARY ARGUMENTS ABOUT ALTERNATIVE VERDICT STRUCTURES

I begin by assessing a number of preliminary arguments about compromise verdicts, including two economic arguments and two sets of institutional arguments. I label these arguments “preliminary” because they do not examine either the primary purposes that the substantive civil law seeks to promote, purposes like deterrence and restitution (which I will consider in Part II), or the procedural goal of efficient dispute resolution (which I will consider in Part III). The economic arguments are concerned with the minimization of certain kinds of costs: risk costs for one argument, error costs for the other. The institutional arguments, meanwhile, are concerned with the possibility that compromise verdicts might somehow undermine the legal system and thus indirectly hinder its aims. By evaluating these preliminary arguments first, I do not mean to imply that they are the most important arguments concerning compromise verdicts. On the contrary, although I conclude that some of the arguments have merit, none points so overwhelmingly to a particular conclusion that it would outweigh strong contrary considerations. Indeed, one of the aims of this Part is to demonstrate that examining compromise verdicts independent of the goals of substantive law and procedure does not get us far. Aside from making this point, this Part begins to show that a system of mixed verdicts greatly mitigates criticisms of compromise verdicts while still largely harnessing their advantages.

A. *Economic Arguments*

1. *For Compromise Verdicts: Risk Reduction*

The most basic justification for compromise verdicts is that some litigating parties will generally prefer them to all-or-nothing verdicts as a way of reducing litigation risk. The observation that “most cases settle” reveals that most litigants are trial-averse.³² This trial aversion is due partly to the high cost of the judicial process.³³ But it also may be a reflection of

32. See generally Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994).

33. The high cost of litigation also may cause some plaintiffs with meritorious claims not to sue at all, thus distorting the incentives of potential defendants to avoid conduct that would render them liable if sued. See, e.g., Keith N. Hylton, *Litigation Costs and the Economic Theory of Tort Law*, 46 U. MIAMI L. REV. 111 (1991).

the uncertainties of verdict outcomes.³⁴ Settlements roughly reflect an expected value assessment of the likely outcome of adjudication.³⁵ If there is a fifty percent chance that a jury would rule for the plaintiff, and a fifty percent chance that a jury would rule for the defendant, then the case is likely to settle for roughly half the amount of damages that could be expected given a plaintiff-favorable verdict. For a risk-averse party, whether plaintiff or defendant, this is better than taking chances with a jury.

Some cases, of course, do not settle, and it is only in these cases that the legal system must directly address the question of whether a verdict should be all-or-nothing or compromise. One reason that a case may fail to settle is that the parties have different predictions about the outcome of litigation.³⁶ When the plaintiff believes he has a strong case but the defendant believes the case is quite weak, each party may reject the settlement offers of the other. This does not, however, indicate that the parties are risk-neutral, only that litigation costs, including the cost of uncertainty about trial outcomes, are less than the difference between the parties' predictions. Assuming each party is risk-averse,³⁷ then both are still likely to favor compromise verdicts. If the plaintiff, for example, believes that he has a seventy-five percent chance of winning, he would prefer seventy-five percent damages to a seventy-five percent shot at full damages. Similarly, if the defendant believes that she has a seventy-five percent chance of winning, she should prefer twenty-five percent damages to a twenty-five percent risk of full damages. That one of the parties must be misestimating the strength of his or her case does not make a compromise verdict less attractive from either party's perspective.

Another reason that parties may fail to settle is strategic bargaining.³⁸ Even if the parties have the same expectations about the possible outcomes

34. But see Evan Osborne, *Courts as Casinos? An Empirical Investigation of Randomness and Efficiency in Civil Litigation*, 28 J. LEGAL STUD. 187 (1999) (reporting a study suggesting that attorneys' expectations are highly predictive of judgments).

35. For a model predicting settlement values given litigation costs and uncertainty, see John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279, 281-86 (1973).

36. See, e.g., Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169, 2225-26 (1993) (discussing "mutual optimism"); George Loewenstein et al., *Self-serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 135 (1993).

37. This is generally considered a fair assumption even for many of those whom we think of as having a taste for risk. There are far simpler and more entertaining ways to indulge risk than protracted litigation, such as hang gliding and poker. Cf. Richard Craswell, *Deterrence and Damages: The Multiplier Principle and Its Alternatives*, 97 MICH. L. REV. 2185, 2230 (1999) ("Those who would like some additional gamble can always go to the race track or play the state lottery, and it would be odd to posit a taste for gambling that could only be satisfied by wagering on a particular product defect.").

38. See, e.g., Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1, 17-29 (1982); Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982); Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1129 (1990) ("Defendant may in some instances refuse the settlement demand, and inadvertently force a trial, even

of litigation, they may be unable to reach an agreement on how to divide the "gains from trade." The plaintiff may bluff by claiming that his case is stronger than he really believes it is, and the defendant may call his bluff and then some by insisting that her case is stronger than she believes it is. Often, negotiation ultimately will result in an agreement, as puffery gradually gives way to analysis of specifics. Sometimes, though, the game of chicken will end with both parties colliding.³⁹ If this occurs, risk-averse parties will still prefer a compromise verdict to an all-or-nothing one even though they are unable to avoid trial by determining the compromise themselves.

The risk aversion argument, however, makes a critical assumption: that a party's expectation of the percentage of damages that will be awarded in a system of compromise verdicts is the same as its estimate of the probability that the plaintiff will win the lawsuit in a system of all-or-nothing verdicts. Strictly speaking, though, this need not be so. There is an analytic difference between the percentage of decision makers who believe that it is more likely than not that the defendant engaged in prohibited conduct and an average decision maker's assessment of the probability that the defendant engaged in such conduct. For example, both plaintiff and defendant might believe that one hundred percent of juries would find that there was exactly a seventy-five percent chance that the defendant engaged in the prohibited conduct. The compromise verdict, seventy-five percent damages, thus differs from the expected value of the all-or-nothing verdict, one hundred percent damages. Given this divergence, compromise verdicts cannot necessarily be justified on the ground that both parties would prefer them.⁴⁰

In practice, however, there is likely to be only a modest gap between expected damages from a compromise verdict and from an all-or-nothing verdict. To see why this is so, imagine an evidentiary strength continuum, with one side of the continuum representing a case in which the evidence conclusively demonstrates that the defendant is liable, and the other side presenting a case in which the evidence demonstrates that she is not. On the endpoints of the continuum, there is essentially no difference between expected values of compromise and all-or-nothing verdicts. At one endpoint, all rational juries would rule for the plaintiff in a system of

where the demand is lower than the costs of going to trial, because of a mistaken belief that further bargaining will lead to an even more favorable demand.").

39. For a description of the "chicken" game and another legal application, see DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 43-44 (1994). The classic instance of this "game" involves two teenage drivers speeding toward each other, each seeking to show his courage by not swerving to avoid the other. See, e.g., *REBEL WITHOUT A CAUSE* (Warner Bros. 1955).

40. Some scholars have failed to observe this difference. E.g., Kaye, *supra* note 9, at 493 (referring to compromise verdicts as embracing an "expected value" rule); see also *infra* text accompanying notes 217-219 (criticizing Shavell for making a similar assumption in a mathematical model).

traditional verdicts and allocate one hundred percent to the plaintiff under a system of compromise verdicts.⁴¹ The reverse would be true at the other endpoint. So at the extremes of evidentiary persuasiveness at least, compromise verdicts track expected values.

Such extreme cases, of course, are less likely to reach juries. Interestingly, though, the expected values of compromise verdicts are likely to be nearly identical to the expected values of all-or-nothing verdicts at the midpoint of the continuum as well. If the evidence in a case is very evenly divided, then the expected compromise verdict is fifty percent. Even though not every jury will find the evidence to be equally divided, the juries who find that the evidence slightly favors the plaintiff can be expected to balance with those who find that it slightly favors the defendant. Similarly, in an all-or-nothing system, about half of juries will rule for the plaintiff and half will rule for the defendant, assuming the legal system does not place a burden of proof on one party or the other.⁴² Thus, in the closest cases, there will be no divergence between expected values of all-or-nothing and compromise verdicts, and thus the decrease in risk that compromise verdicts provide does not come at the expense of either party.

This leaves only the cases that are neither open-and-shut nor evenly divided. If the expected value of compromise and all-or-nothing verdicts is graphed, with the evidentiary continuum from least persuasive to most persuasive case as the x-axis, then both expected value lines must rise steadily, meeting at the endpoints and at the midpoint. As illustrated in Figure 1, however, this does not mean that the functions will overlap entirely. Indeed, while the expected value of compromise verdicts should be a straight line, the all-or-nothing verdicts line might well curve under the compromise verdicts line at first and then over the line after the midpoint. As evidence becomes increasingly unbalanced, the probability that the jury will rule for the party with the apparently weaker case is likely to shrink even more rapidly. For example, when a plaintiff believes that the evidence

41. The above example, in which both parties believe that all juries will conclude that there is exactly a 75% chance that the defendant engaged in the prohibited conduct, essentially extends this endpoint all the way from 100% to 75%. Only in a stylized example can we imagine all juries reaching the exact same 75% conclusion.

42. Bruce Hay and Kathryn Spier have argued that the function of burdens of proof is to help minimize costs by designating a party that must produce the relevant evidence lest the jury assume that such evidence does not exist. Bruce L. Hay & Kathryn E. Spier, *Burdens of Proof in Civil Litigation: An Economic Perspective*, 26 J. LEGAL STUD. 413 (1997). This function can continue to be served in a system of compromise verdicts. For example, the jury might be told that if neither party produces persuasive evidence on an issue, they should assume that, if all evidence had been presented, it would favor the defendant. Burdens of proof are no longer necessary, however, to the extent that their function is simply to provide a default solution in cases in which the evidence is equally aligned. If burdens of proof are desirable for some other reason, an equivalent could be constructed in a system of compromise verdicts. *Infra* note 82. For discussion of the role of burdens of proof in the legal system, see Ronald J. Allen, *Burdens of Proof, Uncertainty, and Ambiguity in Modern Legal Discourse*, 17 HARV. J.L. & PUB. POL'Y 627 (1994).

demonstrates a ninety percent chance of the defendant's liability, more than ninety percent of juries in an all-or-nothing system would find the defendant liable. In such a case, the plaintiff might prefer an all-or-nothing verdict, while the defendant would prefer a compromise verdict, depending on the risk costs associated with the former.

Figure 1. Effect of Verdict Structure on Expected Value of Verdicts

The risk-aversion case for compromise verdicts may thus seem to depend on an empirical judgment, about whether any costs attributable to the relatively small divergence between the expected values of compromise and all-or-nothing verdicts are smaller than the risk costs that compromise verdicts save. There are two reasons, however, that the possibility of divergence between compromise and all-or-nothing verdicts does not present a strong argument for retaining the latter. First, if there is some divergence and that divergence is harmful, the legal system could compensate for it. That is, a conversion table might specify, for example, that when the jury determines that there is a ninety percent chance that the defendant is liable,

the defendant must pay ninety-eight percent damages. A system of mixed verdicts is itself a simple form of such a table and the additional complexity attributable to any such table would be minimal. Of course, a conversion table could represent only a best guess about the relationship between the all-or-nothing verdicts curve and the compromise verdicts line. But this is good enough, since what matters is only the expected value of litigation outcomes. As long as litigants believe that the conversion table is a best guess, their expected value assessments will not change from one system to the other, and they will benefit from compromise verdicts.

Second, even if in some cases one party or the other might oppose compromise verdicts because of the divergence between compromise verdicts and the expected value of all-or-nothing verdicts, those who know that they may someday be involved in a lawsuit, but cannot anticipate whether the evidence will favor or disfavor them, will prefer a system of compromise verdicts. The loss that one party suffers because of the divergence between expected values of compromise and all-or-nothing verdicts is a gain to another party. Thus, if potential litigants consider the prospect of a system of compromise verdicts from behind a sort of thin veil of ignorance,⁴³ then the losses they will incur from the deviation between expected values of all-or-nothing verdicts and compromise verdicts will be balanced by the benefits.⁴⁴ The system produces virtually no net costs and some net benefits in the form of risk reduction.

If these benefits are trivial, though, then this argument for compromise verdicts is not strong. One basis for arguing that they are trivial might be that if litigants were truly concerned about the uncertainty of outcomes at trial, then they would purchase insurance to guard themselves against the possibility of higher-than-expected losses.⁴⁵ While parties can and do purchase general liability coverage, litigants do not purchase insurance for

43. I use the word "thin" because I am not invoking the "veil of ignorance" to suggest that prospective litigants do not know who they are. Cf. JOHN RAWLS, *POLITICAL LIBERALISM* 24 & n.27 (1993) (indicating that under a "thick" veil of ignorance, "the parties are not allowed to know the social position of those they represent, or the particular comprehensive doctrine of the person each represents"). Rather, I am merely suggesting that even if a litigant in a particular case might be harmed by compromise verdicts, potential litigants might still vote to adopt a system of compromise verdicts.

44. This conclusion, of course, assumes that switching from compromise verdicts has no other effects, in terms of the primary behavior of those governed by the law or in terms of litigation behavior. *Infra* Parts II-III.

45. Richard Posner has noted a similar argument in another context, suggesting that comparative negligence cannot be justified on the basis that it serves an insurance function by reducing the risk of litigation:

Comparative negligence has insurance properties similar to divided damages in admiralty. But why in an age of much more widely available market insurance than when contributory negligence held sway in tort law there should be a desire to provide insurance through the tort system is a mystery to the positive economic theorist of the common law.

RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 189 (5th ed. 1998). Of course, Posner's reference to the "positive economic theorist" allows for the possibility that normative arguments might justify this insurance function.

particular cases. The absence of an insurance market, however, can mean either that there is little demand for the insurance service or that the costs of supplying it are too great.⁴⁶ It would be expensive for insurance companies to learn enough about a particular case to price the insurance accurately, perhaps more costly than the uncertainty risk. Moreover, the problems of adverse selection⁴⁷ and moral hazard⁴⁸ would be overwhelming. Thus, the absence of an insurance market does not suggest that litigants are indifferent to the uncertainty of trial outcomes, and if compromise verdicts efficiently accomplish an insurance function, they may be superior to any market alternatives.⁴⁹

Another basis for arguing that the risk-reduction benefits of compromise verdicts are trivial is to note that most cases settle, and so it is only in the remaining batch of recalcitrant cases that compromise verdicts could offer any substantial benefits. Moreover, the cases that do not settle are not a random sample, but will likely include many cases in which settlement does not occur because of mutual optimism by the parties.⁵⁰ In these cases, each party may believe that it has a strong case and that the risk of an unfavorable result is low. If this is because a litigant has made a small miscalculation, and the party would only barely lose under a preponderance-of-the-evidence standard, then compromise verdicts will provide a cushion. But the miscalculation may well be large; indeed, it must be large enough so that the party believed it made sense to endure the cost of trial. So compromise verdicts might do little to reduce the actual risk of trial, even if they reduce the perceived risk.

46. See, e.g., Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1845-57 (1995) (arguing that the alleged absence of consumer demand for insurance against pain and suffering does not mean that consumers would not purchase such insurance if it could be offered at actuarially fair rates).

47. Adverse selection "is the process by which low-risk insureds tend to purchase less coverage, and high-risk insureds tend to purchase more coverage than they would if prices were more accurate." KENNETH S. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* 15 (1986). The adverse selection problem here is that the litigants most likely to seek insurance would be those who believe that their cases are in fact weaker than an investigation by insurance companies would reveal. Adverse selection may produce an unraveling effect that altogether eliminates the market. Insurance companies raise costs to respond to adverse selection, leading the least risky potential insureds to drop out of the insurance pool, leading to a further rise in costs, and so on.

48. "Moral hazard is the . . . tendency of an insured to underallocate to loss prevention after purchasing insurance." *Id.* at 14. Here, litigants who purchase insurance against unexpectedly adverse verdicts would have less incentive to litigate their claims vigorously.

49. A related argument is that corporate litigants are effectively risk-neutral and do not benefit from compromise verdicts. *Cf.*, e.g., POSNER, *supra* note 45, at 630 (suggesting that litigants in corporate litigation are "probably not very" risk averse). Certainly, this is true when two insurance companies battle over who will pay for the costs of a minor automobile accident. But even large corporations seek to hedge large risks, and litigation often involves considerable sums of money. Moreover, for many litigants in many cases, the amount at stake in a particular case is a nontrivial portion of the litigants' net worth, and these litigants will tend to be risk-averse.

50. *Supra* note 36.

Even if the risk-reduction benefits of compromise verdicts are not trivial, the risk-reduction benefits of a system of mixed verdicts might be. A mixed verdicts system, after all, must have smaller risk-reduction benefits than compromise verdicts, because with a mixed verdicts system some cases will result in all-or-nothing verdicts. The risk-reduction benefits of a system of mixed verdicts, however, should be almost as high as those of compromise verdicts. Risk-reduction benefits are much more important for cases in the center of the distribution, near the turning point of a preponderance standard. It is here that a small amount of uncertainty about the relative merits of each litigant's position could potentially translate into a great deal of uncertainty about the outcome. Moreover, if there is a cost to adopting compromise verdicts attributable to a divergence in expected values between the compromise and all-or-nothing approaches, a system of mixed verdicts eliminates most of this cost. A divergence is most likely in cases with unbalanced evidence, and a system of mixed verdicts acts like all-or-nothing verdicts in such cases. A mixed verdicts system, in sum, acts like compromise verdicts in precisely the portion of the probability continuum where those verdicts are likely to produce substantial risk-reduction benefits. At the same time, mixed verdicts systems abandon the compromise approach for all-or-nothing verdicts in precisely the portions of the continuum in which a change to the compromise approach might have a significant effect on the parties' estimates of the expected recovery because of the divergence between the expected values of all-or-nothing and compromise verdicts.

2. *Against Compromise Verdicts: Minimization of Error Costs*

Perhaps the simplest argument against compromise verdicts is that a system of all-or-nothing verdicts minimizes error costs. Suppose, for example, that a jury is 60% sure that the defendant wrongfully caused the plaintiff's \$100 injury. With all-or-nothing verdicts, the defendant will be required to pay \$100 all of the time. Sixty percent of the time, the defendant will have paid just the right amount of damages, while 40% of the time, the defendant will have paid \$100 too much. The average error in such cases is thus \$40. By contrast, with a compromise verdict, the defendant will pay \$60, which will be \$40 too little 60% of the time and \$60 too much 40% of the time. The average error is $0.6 \times \$40 + 0.4 \times \$60 = \$48$. The expected average error is thus lower with the all-or-nothing approach than with compromise verdicts.

This is the essence of an argument by David Kaye.⁵¹ After considering and discounting what he regards as "some unconvincing arguments against

51. Kaye, *supra* note 9. Kaye generalizes from this example to show that error costs will always be lower with the all-or-nothing approach, as long as the jury's estimate of the probability of liability is

the expected value rule.”⁵² Kaye suggests that compromise verdicts are useful only if the goal is to equalize the expected magnitude of type I error (wrongful imposition of liability) and type II error (wrongful denial of liability).⁵³ If the goal is to minimize error, however, traditional verdicts are superior.⁵⁴ Borrowing statistical terminology, Kaye identifies traditional verdicts as reflecting a “maximum likelihood” rule: “[T]he maximum likelihood rule makes a few expensive mistakes, but it does not err at all in most cases. The expected value rule errs in every case—a small amount in most and a larger amount in the rest, producing a larger weighted sum of errors.”⁵⁵

Though Kaye demonstrates his conclusion with careful mathematics, it is easy to see even without his calculations how two simple assumptions that he makes ultimately drive his endorsement of traditional verdicts. The first is that type I and type II error are equally problematic: “A dollar mistakenly paid by defendant (a false positive) is just as onerous as a dollar erroneously paid by a plaintiff (a false negative).”⁵⁶ This assumption seems innocuous enough when there is just one dollar at stake. But it is not self-evident on the margin. Once the defendant who is 60% likely to have committed the wrongful act has already paid \$99 of the \$100 in damages, is it really just as onerous to the plaintiff not to receive the final dollar as it would be to the defendant to have to pay it? Since utility is an increasing but concave function of wealth,⁵⁷ perhaps paying the last dollar will tend to be more onerous to the defendant than would be the plaintiff’s deprivation.⁵⁸

not exactly 0%, 50%, or 100%. *Id.* In all of these cases, the error costs will be identical with either the all-or-nothing or the compromise approach.

52. *Id.* at 494-96. Kaye first considers the possibility that “jurors and judges are so inept at characterizing the strength of evidence in a quantitative fashion.” *Id.* at 494. Kaye rejects this argument, noting that “[i]t is not unusual to hear people express their opinions about one thing or another ‘on a scale of 1 to 10.’” *Id.* Kaye also briefly considers the effect of compromise verdicts on litigation costs, noting that “[g]iving damages of pD with probability 1 instead of D with probability p does not affect the ex ante value of a case.” *Id.* at 495. *But see* text accompanying note 40 (explaining that compromise verdicts are not quite the same as expected value verdicts).

53. *E.g., Kaye, supra* note 9, at 501-02.

54. *See id.* at 496-500.

55. *Id.* at 502.

56. *Id.* at 496. I believe that Kaye means to say “. . . is just as onerous as a dollar erroneously not paid to a plaintiff (a false negative).”

57. For a brief defense of this proposition, see Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 69 n.21 (1990). For a discussion of whether utility or wealth should be the maximand of law and economics, see RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 60-87 (1981).

58. In addition, the plaintiff might be poorer than the defendant, potentially justifying damages even if the defendant probably is not liable. In a footnote, Kaye notes the possibility that wealth might affect the burden of paying or not receiving damages. Kaye, *supra* note 9, at 496 n.39. He brushes the possibility off, however, noting, “One suspects, however, that an instruction to consider the depth of a litigant’s pocket would be superfluous.” *Id.* My point is not that litigant wealth should matter, but that Kaye’s analysis implies it should.

Even if the burden were equal for each dollar, this by itself does not imply that the burden should be placed on the defendant if and only if the defendant is more likely than not to be responsible for the injury. Enter Kaye's second assumption: "that the best decision rule keeps the sum of the expected costs of each type of error to a minimum."⁵⁹ Although an error would be equally burdensome to either party, an error is more likely to occur when a decision about whether to impose a marginal dollar of liability is made in favor of the party with the less persuasive case. Continuing the above example, if the defendant is required to pay the last dollar to the plaintiff, there is a forty percent chance that this will produce a one dollar error cost, while if the plaintiff does not receive this last dollar, there is a sixty percent chance that this failure will count as a one dollar error cost. The all-or-nothing approach therefore follows directly from the assumption. Minimization of the sum of error costs may initially seem like an attractive and neutral normative criterion, but it is an arbitrary one.⁶⁰ The costs of error are not simply the amounts that litigants overpay or underreceive. The legal system should be concerned about the effect of such errors, as well as the effect of dollars that are correctly redistributed, in affecting primary behavior by those who anticipate the possibility of being litigants themselves. Kaye's loss function counts inaccuracies, not social losses.

One way to see the arbitrariness of Kaye's formulation is to consider his recommendation for cases in which one of more than two defendants must have caused the plaintiff's injury.⁶¹ In this scenario, the maximum likelihood rule demands that the single defendant who is most likely to have caused the injury pay the compensation, even if there is less than a fifty percent chance of that defendant's liability.⁶² At the same time, if the

59. *Id.* at 496-97.

60. I am not the first to make this point. Shavell, for example, explains:

If making errors is felt to matter in itself, some measure of error costs would be appropriate to include as a component in the social calculus. But it would not be appropriate to adopt error-cost minimization as *the* social goal (unless of course all consequences flowing from errors were assumed to be unimportant—a supposition few analysts would wish to make).

SHAVELL, *ECONOMIC ANALYSIS*, *supra* note 11, at 117 n.12; *see also* V.C. Ball, *The Moment of Truth: Probability Theory and Standards of Proof*, 14 VAND. L. REV. 807, 815-16 (1961); Rosenberg, *supra* note 10, at 874 n.98 ("[A]pplying the preponderance rule to minimize the sum total of distributive errors completely overlooks the rule's potential for systematically subverting deterrence and compensation objectives.").

61. Kaye, *supra* note 9, at 507-08.

62. *Id.* at 507 (noting that the rule "may select a single defendant as fully liable even if the probability associated with that defendant's liability is less than 1/2"). For an example of the logic, suppose that there is a 1% chance that each of 98 defendants caused the \$100 in damages, and a 2% chance that the final defendant caused the damage. Assigning no liability at all would lead to error costs of \$1 for each of the first 98 defendants, \$2 for the 99th defendant, and \$100 for the underpaid plaintiff, for total costs of \$200. Assigning liability to the last defendant would still result in \$1 in costs for each of the first 98 defendants, but \$98 in error costs for the last defendant, and \$0 for the plaintiff who now receives the appropriate compensation, for total error costs of just \$196. This conclusion, however,

plaintiff were able to serve process only on this maximum likelihood defendant, converting the litigation into a one-on-one suit, Kaye's earlier endorsement of traditional verdicts suggests that the plaintiff should not recover at all. The inconsistency occurs because in a one-on-one suit, Kaye's approach pays no attention to the costs of error on parties not before the court. Potential defendants who are not joined in the litigation are just one example of this lack of attention.

The limits of Kaye's theory can be seen even more clearly in his analysis of *Sindell v. Abbott Laboratories*.⁶³ In *Sindell*, the California Supreme Court imposed market share liability on various pharmaceutical companies producing an identical drug, when it could not be determined from which company the plaintiff had purchased the drug.⁶⁴ Kaye approves of the result in this case, but only because he recognizes that the maximum likelihood approach over the run of cases would "produce biased results in this situation,"⁶⁵ as the largest company would always bear liability. This reveals a willingness to discard the goal of minimizing the sum of error costs when it might interfere with other goals, such as wanting companies to have the proper incentives in making decisions as to whether to pursue market share. Kaye does not consider the possibility that there may often be other goals, or that applying the maximum likelihood approach to each marginal dollar in a single case produces much the same type of "biased results" as applying it to each of a number of cases.

Moreover, the example reveals that Kaye does not consider the possibility that some "error costs" are irrelevant. Arguably, it makes no normative difference which company actually caused the plaintiff's injury, since each company was acting identically.⁶⁶ Suppose we could be certain which company in fact was the producer of the drug that injured the plaintiff. If this is truly a matter of mere happenstance, we might still prefer to have a regime of market share liability. If two firms both produced the same amount of a drug that caused injuries to some consumers, but by pure chance more of one firm's consumers suffered injury than the other's, it might be normatively undesirable to saddle one firm with a greater burden. Likewise, if one consumer happened to have purchased the product of a

depends entirely on the decision to double-count money that a defendant fails to pay to a plaintiff, a decision that Kaye neither makes explicit nor defends.

63. 607 P.2d 924 (Cal. 1980).

64. This is, of course, an issue of causation, which is not the focus of this Article. *Supra* notes 22-25 and accompanying text. Kaye's indiscriminate treatment of issues of duty and causation is another indication that his analysis is too general to lead to a conclusive assessment of a preponderance-of-the-evidence rule.

65. Kaye, *supra* note 9, at 509.

66. E.g., Glen O. Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713, 737 (1982) ("Causation is irrelevant to [minimization of accident costs] absent a consistent, positive correlation between the causation of accidents and the ability to spread or absorb losses, and there is no reason to think that such a correlation exists.").

company that later went bankrupt,⁶⁷ it might seem unfair for this consumer to receive no recovery while another receives full recovery. My purpose is not to resolve this issue,⁶⁸ but merely to demonstrate that there is a legitimate normative question, and that minimization of the sum of error costs may or may not be the best answer.

To the extent that Kaye's argument does have merit, it argues much less strongly against a regime of mixed verdicts than against compromise verdicts. Kaye's insight can be best seen in the following example: If there is a ninety percent chance that a defendant is liable, then the choice between imposing ninety percent damages and full damages is really a decision about whether to impose the last ten percent of damages. If the legal system does not impose these damages, it is essentially making a bad bet, because there is a ninety percent chance that they would be imposed if full information were available. This argument is strongest at the ends of the probability continuum. Failing to impose full damages is not as bad a bet when there is only a fifty-five percent chance of liability. So, if there are countervailing considerations that argue for compromise verdicts, they are more likely to outweigh the potential negative consequences of a bad bet in close cases. Kaye then should not dislike a system of mixed verdicts as much as he dislikes compromise verdicts, for a system of mixed verdicts avoids the worst bets by imposing all-or-nothing solutions on the ends of the probability continuum.

B. Institutional Arguments

1. The Role of Juries

Before exploring the effects of compromise verdicts, I must confront several related institutional arguments against them. These arguments do not deny the possibility that compromise verdicts are theoretically superior to all-or-nothing verdicts, but maintain that compromise verdicts are incompatible with a jury-based legal decision-making system. The first argument is that juries are simply incapable of rendering compromise verdicts effectively because it is difficult to translate subjective estimates of

67. For discussion of the effect of bankruptcy of some defendants on market share liability, see, for example, Thomas J. Currie, *Risk Contribution: An Undesirable New Method for Apportioning Damages in the DES Cases*, 10 J. CORP. L. 743, 765 & n.214 (1985).

68. Indeed, in arguing for a system of mixed verdicts, I do not mean to imply that an analogous approach would be suitable for issues of joint or uncertain causation where the defendant's conduct is known. *Infra* notes 131-134 and accompanying text. An argument against market share liability when causation is known might be that even if two companies acted identically so far as we can tell, there might be differences in care exercised that we cannot perceive. The causation requirement on this theory acts as a proxy for the reasonable care requirement. Cf. David Lewis, *The Punishment that Leaves Something to Chance*, 18 PHIL. & PUB. AFF. 53 (1989) (defending the differential treatment of unsuccessful and successful attempts in criminal law on the basis that success may be a proxy for effort).

probabilities into numbers. One need look no further than the state lottery to recognize that evolution may not have equipped humanity with visceral comprehension of the meaning of very small probabilities.⁶⁹ The concern here, however, is not with such understanding, but with whether a jury that encounters a seventy percent chance of liability will properly announce that number rather than sixty percent or eighty percent. Such imperfections, however, likely amount to mere noise, an imperfection that does not inherently favor one party or the other. Though this noise should be minimized where possible, it is no more (and may be less) disturbing than noise close to the preponderance threshold in a system of all-or-nothing verdicts. Absent systemic bias,⁷⁰ a jury's announcement of a seventy percent probability of liability provides a best guess,⁷¹ so that from the legal system's point of view, the probability is seventy percent.⁷² Even if we are not confident that juries' probability assessments are the best probability estimate that can be made on the basis of the evidence, this second-order lack of confidence does not diminish the usefulness of the jury's announcement of its confidence any more than our existing doubts about jury decision

69. This is a function of the "availability heuristic." See generally Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207 (1973) (providing the seminal description of how observation of particular events may make those events seem more probable than they otherwise would seem).

70. But what if juries' probability assessments are systematically biased rather than merely noisy? In theory, this might occur even if juries are not biased in deciding liability under a preponderance standard. Juries might systematically be overconfident or underconfident, announcing values too far or too close to 50% on either side. See, e.g., REID HASTIE ET AL., *INSIDE THE JURY* 60, 77 (1983) (reporting high degrees of jury confidence in their verdicts, even though there was considerable variability across juries in selecting the appropriate verdict). Jury overconfidence, however, cannot argue against compromise verdicts, for a system of compromise verdicts with overconfident jurors simply falls somewhere in the middle of the spectrum between compromise and all-or-nothing verdicts. Jury underconfidence is theoretically more of a concern. After all, a system in which defendants always pay 50% liability regardless of the evidence would not be effective. This extreme, though, is unrealistic, and if some lesser degree of underconfidence were recognized, the legal system could accommodate this by adopting some formula to decrease probability announcements below 50% and increase those above. Of course, one might be concerned that juries might be systematically overconfident or underconfident, but that we have no educated guess as to the direction or the degree. If this is so, however, then the possibility of such systemic bias is just noise from the perspective of a prospective litigant and concerns of systemic bias are inapplicable.

71. There remains the possibility that judges or administrative bodies might be better than juries at making accurate assessments. Of course, this is an issue even under a preponderance-of-the-evidence standard. See, e.g., *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980) (refusing a jury demand in an extraordinarily complex case on the theory that the Due Process Clause of the Fifth Amendment trumped the Seventh Amendment). Perhaps a decision to switch to a system of compromise verdicts would strengthen the case for non-jury decision makers if juries are worse than some alternative at making explicit probability calculations while not necessarily any worse at determining whether something is more likely than not. But as long as there is a positive correlation between some hypothetical correct probability estimate and the jury's estimate, this does not affect the case for compromise verdicts assuming the jury is the decision maker.

72. Probability estimates, of course, can be more or less accurate. For a formula showing how the accuracy of probability assessments can be measured, see Glenn W. Brier, *Verification of Forecasts Expressed in Terms of Probability*, 78 MONTHLY WEATHER REV. 1 (1950).

making tarnish jury verdicts. And if juries are particularly inept at computing very high or very low probabilities,⁷³ a system of mixed verdicts would save them from having to do so.

The second concern is that jurors may simply think better with standards than with numbers.⁷⁴ One reason that we ask a jury to determine a verdict by a preponderance of the evidence might be a belief that jurors will do better than if they were asked to determine whether the probability that the defendant should be held liable is greater or less than fifty percent.⁷⁵ Thus, even if juries were required to announce numeric verdicts but the traditional all-or-nothing rule were applied, verdicts might be less accurate than with a preponderance standard. If, however, standards are more conducive to jury accuracy than probabilities, then we might institute a system of compromise verdicts with words rather than numbers. Jurors, for example, might have the options of specifying that the evidence "slightly favors the defendant," "considerably favors the defendant," "clearly and convincingly favors the defendant," or "favors the defendant beyond a reasonable doubt," or the reverse of all of these in favor of the

73. See *supra* note 69 and accompanying text. Very high probabilities may introduce the same issues as estimation of very low probabilities, since, for example, an estimate that there is a 99.9% chance that the defendant is liable is equivalent to an estimate that there is a 0.1% chance that the defendant is not.

74. Laurence Tribe has argued that the explicit introduction of probabilistic evidence into trials might lead to worse rather than better outcomes. Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971); see also Lea Brilmayer & Lewis Kornhauser, *Quantitative Methods and Legal Decisions*, 46 U. CHI. L. REV. 116, 153 (1978) ("[S]ince legal problems are subtle and complex, the unquantifiable variables may well dwarf the quantifiable ones and make numeric modeling futile."); Leonard R. Jaffee, *Of Probativity and Probability: Statistics, Scientific Evidence, and the Calculus of Chance at Trial*, 46 U. PITT. L. REV. 925, 929 (1985) (arguing that "no calculus of probability is competent to measure the sufficiency or weight of litigational evidence"); Laurence H. Tribe, *A Further Critique of Mathematical Proof*, 84 HARV. L. REV. 1810, 1814 (1971) (fearing that juries might place too much weight on quantitative arguments that do not go to the ultimate issue in a case). But see, e.g., MICHAEL O. FINKELSTEIN, *QUANTITATIVE METHODS IN LAW: STUDIES IN THE APPLICATION OF MATHEMATICAL PROBABILITY AND STATISTICS TO LEGAL PROBLEMS* (1978) (providing several essays attempting to show that quantitative methods can improve legal decision making); Michael O. Finkelstein & William B. Farley, *The Continuing Debate over Mathematics in the Law of Evidence: A Comment on "Trial by Mathematics"*, 84 HARV. L. REV. 1801 (1971) (addressing Tribe's argument); Daniel Shaviro, *Statistical-Probability Evidence and the Appearance of Justice*, 103 HARV. L. REV. 530 (1989) (showing difficulties inherent in exclusion of purely statistical arguments from consideration in fact finding). Even if Tribe is right that probabilistic evidence should not be presented to the jury, this does not necessarily imply that jurors should not be asked to announce a probability. Cf. Neil B. Cohen, *Confidence in Probability: Burdens of Persuasion in a World of Imperfect Knowledge*, 60 N.Y.U. L. REV. 385 (1985) (arguing for replacing the preponderance-of-the-evidence standard with a rule that would require a jury to determine whether or not a confidence interval around the jury's best estimate of probability is entirely above 50%); D.H. Kaye, *Apples and Oranges: Confidence Coefficients and the Burden of Persuasion*, 73 CORNELL L. REV. 54 (1987) (responding to Cohen's argument).

75. This may underlie courts' reluctance to quantify burdens of proof as a matter of law. See generally JOHN M. MAGUIRE ET AL., *CASES AND MATERIALS ON EVIDENCE* 871-73 (6th ed. 1973) (discussing quantification of burdens).

plaintiff.⁷⁶ The legal system would then translate these assessments into its best estimate of the corresponding percentages. This approach would be particularly sensible in a regime of mixed verdicts, because it might seem less arbitrary to select a standard such as "clear and convincing evidence" to demarcate the boundary between compromise and all-or-nothing verdicts than to choose a pair of numbers such as twenty-five and seventy-five percent.

The third concern is that compromise verdicts might decrease the care with which juries consider cases by encouraging jurors who initially have different views to split the difference rather than deliberate.⁷⁷ This could, however, be addressed substantially with jury instructions against this form of compromise.⁷⁸ Of course, it may be impossible for twelve jurors even after deliberation to have exactly the same percentage estimate, so some compromise is inevitable once jurors' probability estimates are fairly close.⁷⁹ From an external perspective, however, such a compromise is a

76. Experimental evidence, gathered by exposing individual mock juries to either one standard or the other, suggests that juries either do not act differently when presented with "clear and convincing evidence" and "beyond a reasonable doubt" instructions or even interpret the latter as providing a lower threshold than the former. See, e.g., Dorothy K. Kagehiro & W. Clark Stanton, *Legal vs. Quantified Definitions of Standards of Proof*, 9 LAW & HUM. BEHAV. 159, 174 (1985); Norbert L. Kerr et al., *Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors*, 34 J. PERSONALITY & SOC. PSYCHOL. 282 (1976); Geoffrey P. Kramer & Doreen M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REFORM 401 (1990); Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEX. L. REV. 105, 119-25 (1999); cf. *Addington v. Texas*, 441 U.S. 418, 424-25 (1979) (recognizing that judicial distinctions among burdens of proof might not have great practical effect). This, however, may be a result of the wording of instructions on these standards. See, e.g., Lawrence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW & SOC'Y REV. 153, 194 (1982). In addition, when presented with a range of standards, juries will recognize that the beyond-a-reasonable-doubt standard corresponds to a greater degree of confidence. At the least, one should expect some positive correlation between the jury's confidence and the standard selected.

77. This could happen with standards as well as with numbers. For example, if some jurors believe the evidence "somewhat favors the defendant" and some believe that it "clearly and convincingly favors the defendant," they might compromise with "considerably favors the defendant."

78. An instruction might specify, "If different jury members initially have different perceptions about the likelihood of liability, you must not simply arrive at a compromise solution, but instead you must continue to deliberate until all agree about what the likelihood is." Jury instructions generally discourage compromise verdicts, and "Allen charges," which urge jurors to reconsider their positions and were found permissible in *Allen v. United States*, 164 U.S. 492 (1896), used to encourage jurors to break deadlock have been criticized as encouraging too much compromise. E.g., *United States v. Burgos*, 55 F.3d 933, 939-41 (4th Cir. 1995); Matthew MacKinnon Shors, Note, *United States v. Watts: Unanswered Questions, Acquittal Enhancements, and the Future of Due Process and the American Criminal Jury*, 50 STAN. L. REV. 1349, 1382-83 (1998).

79. A separate possibility is that there would be more hung juries because jurors could fail to reach exact agreement even though they would have agreed under a preponderance standard. My intuition, however, is that jurors close to reaching total agreement will likely continue deliberation, and that the increase in the number of hung juries would not be great. Indeed, research failed to reveal a single reported case, federal or state, in which the jury agreed on liability but hung on damages. *But cf.* *Capitol Hill Hosp. v. Jones*, 532 A.2d 89, 91-92 (D.C. 1987) (reporting a ease in which the jury

best estimate of the probability assuming that full deliberation has occurred. A system of mixed verdicts also greatly reduces the dangers of decreased deliberation, because jurors at least would need to agree on whether the evidence clearly favored the plaintiff or the defendant before determining the relative weight of evidence in closer cases.⁸⁰

A fourth concern is that jurors might gravitate towards focal point solutions,⁸¹ and in particular toward findings of fifty percent liability. With all-or-nothing verdicts, burdens of production and persuasion may provide juries in very close cases a default solution, but this is essentially an arbitrary choice,⁸² no less arbitrary than a fifty-fifty compromise. Even if a relatively large range of probabilities collapsed onto fifty percent, the effect is not necessarily problematic. After all, asking juries to pick from one of various standards also has the effect of limiting decision outcomes. Moreover, voluntary gravitation by a jury towards a compromise hardly seems intrinsically more worrisome in very close cases than forced gravitation towards an all-or-nothing result. In any event, if the fifty-fifty solution is unduly attractive, the court can simply take it away by instructing the jury that it cannot return a fifty percent verdict. This will force the jury to favor one side or the other, and once a jury agrees on which side to favor, it would have little reason to hedge as close as possible to fifty percent. A system of mixed verdicts using standards rather than numbers could make it easy to exclude the equality solution, forcing a jury to choose at least between the evidence slightly favoring the plaintiff and that slightly favoring the defendant.⁸³

apparently did not realize that unanimity was required for damages as well as liability). A hung jury may well occur, however, when jurors cannot agree on whether liability is more or less than the focal point of 50%. *See Shaw v. Greater Houston Transp. Co.*, 791 S.W.2d 204, 206 (Tex. App. 1990) (discussing a jury in a comparative negligence case that was unable to reach an agreement on apportioning damages, where only a majority agreed that the defendant was at least 51% responsible).

80. Evidence suggests that unanimity requirements increase the length of time that juries spend deliberating. *See, e.g., HASTIE ET AL., supra* note 70, at 44, 60. This suggests that if there is concern that a system of compromise or mixed verdicts might reduce deliberation time, these verdicts should not be applied without a unanimity requirement.

81. For a game theoretic discussion of the notion of "focal points," see THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 54-57 (1960).

82. *See Coons, Approaches to Court Imposed Compromise, supra* note 7, at 757 ("Insofar as men ought to be treated by the law without unnecessary discrimination, the imposition of a burden of persuasion on either party raises an issue of partiality."). If burdens of proof and persuasion are desirable, because they reflect some legitimate policy of favoring one side or another, equivalents could be developed in a system of compromise verdicts. For example, jurors might be told to look more favorably on one party's presentation or to resolve otherwise unresolvable ambiguities in favor of one party or the other.

83. Surveys asking whether individuals agree or disagree with various statements sometimes omit a "neither agree nor disagree" option to force those surveyed to deliberate between the two alternatives. *See, e.g., J. Howard Beales III & William C. MacLeod, Assessments of Pharmaceutical Advertisements: A Critical Analysis of the Criticism*, 50 *FOOD & DRUG L.J.* 415, 425 (1995) (assessing the consequences of forcing agreement on a particular survey). *But see* William M. Trochim, *Research Methods Knowledge Base*, available at <http://trochim.human.cornell.edu/kb/scallik.htm> (last visited

The final concern is that compromise verdicts might cause juries to apportion damages with unnecessary precision. A jury verdict of 73.4% liability may seem absurd in the same way as a political poll reporting that a leading candidate has support from 73.4% of voters, plus or minus 5%, seems to overstate confidence. Indeed, it may seem even more absurd given the smaller sample size of a jury. An illusion of precision can have substantive effect if it leads to an unjustified confidence in the legal system. There is little reason, however, to believe that juries would be unduly precise.⁸⁴ Juries are often required to calculate nonliquidated damages, yet there seems to be little concern that such damages create a false illusion of precision. Even where a jury's verdict is quite precise, it still represents a best estimate of the correct probability, and the jury presumably announces a precise verdict for some reason.⁸⁵ If precision is intrinsically a danger, juries could be required to round their probability assessments to the nearest 1%, 5%, or 10%, or, once again, to choose from a list of standards rather than numbers. Finally, since people understand that a verdict represents only a jury's degree of confidence in its liability determination, greater precision would not induce unjustified overconfidence in the ability of a jury to determine what in fact occurred. Indeed, if anything, the jury's admission of its fallibility is problematic because it undermines confidence in the legal system. It is to this and a related argument that I now turn.

2. Verdict Acceptability

Perhaps the most interesting and creative attack on compromise verdicts comes in Charles Nesson's much-cited,⁸⁶ if not universally celebrated,⁸⁷ article *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*.⁸⁸ Nesson argues that a central goal of the legal

Oct. 9, 2000) (endorsing use of the five-point Likert scale, which includes a "neither agree nor disagree" option).

84. Indeed, experimental evidence suggests that jurors routinely round numbers, typically to the nearest 10%. Shari Seidman Diamond et al., *Blindfolding the Jury*, 52 LAW & CONTEMP. PROBS. 247, 258 (1989) ("The natural tendency to offer rounded percentages was suggested by results from our survey. While the percent of fault ranged from 0 to 100%, 88% of the responses were multiples of ten; all but 1% of the remaining responses were multiples of five.").

85. That reason might simply be compromise. See *supra* text accompanying notes 77-80. But if a 62.5% verdict represented a compromise between 60% and 65%, then, in the absence of additional information, 62.5% is the legal system's best guess. Litigants and other observers, moreover, would presumably recognize the possibility that precise verdicts represented compromise, and there would thus not be a false illusion of precision.

86. As of this writing, the article has been cited at least 175 times. See Search of Westlaw, JLR database (Dec. 23, 1999). This is only about thirty citations short of the minimum that was necessary to make a 1996 list of the most-cited legal articles. Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI-KENT L. REV. 751 (1996).

87. Critics include Ronald J. Allen, *Rationality, Mythology, and the 'Acceptability of Verdicts'* Thesis, 66 B.U. L. REV. 541 (1986); Roger Park, *The Hearsay Rule and the Stability of Verdicts: A Response to Professor Nesson*, 70 MINN. L. REV. 1057 (1986); and Shavero, *supra* note 74.

88. Nesson, *supra* note 13.

system is to induce public confidence in the effectiveness of the system, which translates in individual cases to the need to produce "acceptable verdicts." Nesson defines acceptable verdicts as "verdicts that the public will view as statements about what actually happened, which the legal system can then use as predicates for imposing sanctions without further considering the evidence on which the verdicts were based."⁸⁹ Building on work suggesting "that the assimilation of behavioral norms plays a more important role in preventing criminal conduct than does the fear of punishment,"⁹⁰ Nesson seeks to challenge the privileged place that verdict accuracy has attained in legal scholarship. When the values of accuracy and acceptability point in different directions, he maintains that the former must and does give way to the latter. Though "ostensibly structured as a truth-seeking process concerned with justice for the parties," a trial "is also a drama that the public attends and from which it assimilates behavioral messages."⁹¹

This general thesis takes Nesson in two directions.⁹² First, he argues that the legal system should seek to ensure that the public accepts it in general, thus indirectly strengthening the behavioral messages of individual cases. Procedural and evidentiary rules, he explains, do and should seek to prevent a court from being proven wrong.⁹³ The legal system should promote the public's confidence in the acceptability of verdicts by limiting the possibility that events might cause the public to question the system's effectiveness. For example, he defends directed verdicts as a mechanism to prevent a jury from making what might appear to be an obvious error.⁹⁴

89. *Id.* at 1358 & n.4.

90. *Id.* at 1359 (citing EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 108 (George Simpson trans., 1933); Gerald Gardiner, *The Purposes of Criminal Punishment*, 21 MOD. L. REV. 117, 122-24 (1958)).

91. *Nesson, supra* note 13, at 1360.

92. While the organization of his article tracks this division, Nesson does not explicitly indicate that the two parts of his thesis are analytically distinct. As Allen recognizes, however, Nesson presumably "is concerned not only about the rule that 'rules' will be enforced, but also with those rules that will be enforced—the substantive rules governing behavior." Allen, *supra* note 87, at 543. One might believe, then, that it is important to ensure public acceptability of verdicts in general yet not important to cast verdicts in particular cases in a way that maximizes the behavioral message, or vice versa.

93. *Nesson, supra* note 13, at 1368-77.

94. *Id.* at 1369-71. In particular, Nesson seeks to explain why directed verdicts are more likely in cases involving circumstantial evidence than in cases involving credibility assessments. The public will accept jury verdicts based on the latter because jurors, "by their proximity and attentiveness to the witness and evidence, stand in the best position to make these assessments." *Id.* at 1370. Circumstantial evidence, by contrast, "is available for anyone to assess, and any interested observer stands in as good a position as the juror to make an evaluation." *Id.* at 1370. An immediate problem with this argument is that even if verdicts are made only by juries, a judgment will exist whether or not a court enters a directed verdict. Nesson does not explain why he is concerned about the public acceptability of verdicts, but not the public acceptability of judgments. The public confidence in judgments could be undermined should a judge enter a directed verdict that the "interested observer" considering the circumstantial evidence thought incorrect. Conversely, the judge also is better situated to make

Similarly, he defends the hearsay rule as a way to prevent out-of-court declarants from later denying statements attributed to them and thus undermining public confidence in verdicts.⁹⁵ Only if we maintain the appearance of the integrity of the legal system, Nesson believes, can we hope that the behavioral conditioning produced by the system will be effective.

Second, given general public acceptance of verdicts, he seeks to ensure that the behavioral messages conveyed by individual cases should be as strong as possible. A legal system must seek "to project to society the legal rules that underlie judicial verdicts."⁹⁶ Verdicts that emphasize proof rules, such as, "We will convict and punish you only if your violation is proved by due process of law,"⁹⁷ will encourage citizens to violate the law when they believe that they can get away with doing so. "Successful projection of a legal rule depends on a court's ability to cast a verdict not as a statement about the evidence presented at trial, but as a statement about a past act—a statement about what happened."⁹⁸ Verdicts that emphasize proof rules "transform the substantive message from one of morality . . . to one of crude risk calculation."⁹⁹

Both of these concerns seem to play a role in Nesson's subsequent attack on compromise verdicts, what he calls "proportionate damages." He begins the discussion with a consideration of the famous "blue bus"

credibility assessments than the interested observer, so the public's confidence would not be challenged by a directed verdict in such a case either. A response might be that Nesson is only defending directed verdicts for criminal defendants. *See id.* at 1369-71 (discussing the virtues of "[r]ules governing the defendant's motion for a directed verdict"). Jury verdicts are problematic on this account only when an observer's confidence in the legal system might be undermined by an erroneous finding of guilt or liability.

95. *See id.* at 1372-75. For an attack on Nesson's positive conclusion, that this is in fact the best explanation for the development and persistence of the hearsay rule, see Park, *supra* note 87, at 1064. A counter to the normative defense of hearsay rules is that the hearsay rule's exclusion of evidence might itself undermine confidence in verdicts. For example, someone might announce that a witness had made a statement to him that was inconsistent with the witness's subsequent testimony, and thus that the jury received misinformation. Nesson cannot simply argue that this would not undermine the confidence of the public, who would conclude that the sworn statement was correct. *See* George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575 (1997) (arguing that the public's confidence in the oath as a guarantee of truth-telling has declined over the centuries). After all, if this were true, the public would likewise believe the witness reporting the statement of an out-of-court declarant and put little stock in that declarant's subsequent denial that he made this statement. Nesson tries to get around this problem by arguing that the immediate acceptance of verdicts by the public is not as important as the acceptance of verdicts already issued. Nesson, *supra* note 13, at 1373. Presumably, he would thus argue that my hypothetical would only undermine continuing confidence in a verdict if the inconsistent statement were made after the trial, which would tend to diminish its credibility anyway. The problem with this argument is that if the public does not immediately accept a verdict, then there can be no continued acceptance of that verdict. Nesson's argument peculiarly places importance only in the continued acceptance of a verdict that the public initially accepted.

96. Nesson, *supra* note 13, at 1357.

97. *Id.*

98. *Id.* at 1358.

99. *Id.* at 1362.

hypothetical, which imagines that a plaintiff is injured by a negligently driven blue bus and that the only evidence against the defendant bus company is that it owns eighty percent of the blue buses in town.¹⁰⁰ Nesson correctly recognizes, however, that compromise verdicts "could be applied to all cases in which the jury is uncertain of the facts on which a defendant's liability is predicated, including cases not based on statistical evidence."¹⁰¹ He appears to believe, however, that such verdicts might undermine the acceptability of verdicts to the public, because they are an admission of the legal system's fallibility.¹⁰² Moreover, compromise verdicts "might project a behavioral message that differs from the message the court would convey by the standard application of the rule."¹⁰³

Before I turn specifically to the weaknesses of Nesson's attack on compromise verdicts, it is worth noting that others have already subjected his general thesis to several damaging criticisms. First, Nesson seems to believe that the public accepts jury verdicts because it is gullible, fooled into believing that the legal system is more accurate than it in fact is.¹⁰⁴ Yet

100. *Id.* at 1378-83. The hypothetical originates in Tribe, *supra* note 74, at 1340-41. A similar hypothetical, known as the "Paradox of the Gate Crasher," involves an event at which 501 of the 1000 attendees failed to pay admission. The hypothetical asks whether the sponsor can recover against a particular attendee or all attendees on the basis of this evidence alone. See generally L. JONATHAN COHEN, *THE PROBABLE AND THE PROVABLE* 72-76 (1977) (exploring the hypothetical); David Kaye, *The Paradox of the Gatecrasher and Other Stories*, 1979 ARIZ. ST. L.J. 101 (same).

101. Nesson, *supra* note 13, at 1382. Nesson explains the approach as follows: "If the jury, after hearing a mass of conflicting evidence in a negligence case, is 40% certain that the defendant acted negligently, then the proportionate award approach would require the defendant to pay an award of 40% of the total actual damages, instead of paying nothing." *Id.*

102. Interestingly, Nesson does not explicitly make this argument. I insert it because it seems a logical outgrowth of the first part of his thesis, and because I wish to consider his argument in its strongest possible form.

103. Nesson, *supra* note 13, at 1383. Returning to the blue bus hypothetical, Nesson claims a proportionate award would suggest that "courts will hold the defendant liable, notwithstanding the possibility that he committed no wrong, if the nature of his activity places him within a class of suspect persons." *Id.* This characterization is too strong, since with compromise verdicts courts would hold the defendant only partly liable. A defendant who drove negligently only with 40% certainty has to bear only 40% of the damages. If a jury were 80% sure that a defendant is liable, it would hold him liable in a system of traditional verdicts as well, unless there were some other reason to exclude the evidence. Nesson does find such a reason in the problem he sees with "naked statistical proof," *id.* at 1378-82, but he logically cannot use this argument to support what he recognizes as the independent issue of compromise verdicts in civil cases.

104. Allen explains:

Nesson would need to assert that the public is sufficiently intelligent and aware to grasp the overt message of the trial phase of litigation, but insufficiently intelligent or aware to qualify that message by recognizing that hotly contested fact-finding proceedings often result in erroneous conclusions precisely because it is difficult to say what actually happened.

Allen, *supra* note 87, at 546; see also Shaviro, *supra* note 74, at 544 ("Perhaps the best way to create a perception of verdict accuracy is to create the reality of verdict accuracy. Perceptions created at the expense of the reality may be unstable, especially over the long term, because not everyone is likely to be fooled."). Even if legal institutions have developed methods of fooling the public because such fooling in individual cases increases the prestige of the courts, the general practice of trying to fool the public may decrease prestige even more. This distinction is well understood in the literature on time inconsistency, and in particular the macroeconomics literature on fooling the public with inflationary

he provides no empirical evidence to support this claim.¹⁰⁵ Second, Nesson provides no account of how jury verdicts affect behavioral conditioning and norms. “[G]eneral notions of right and wrong . . . are absorbed through complex sociological processes rooted in lessons learned in everyday life,”¹⁰⁶ and while jury verdicts might be a small part of the process, it seems intuitively implausible that they play a dominant role. Third, the distinction Nesson draws between a jury verdict that is a statement about an event and one that is a statement about the evidence is tenuous.¹⁰⁷ Even a gullible member of the public would recognize that a jury’s verdict speaks to the jury’s belief about what happened, so the further information that juries can be wrong seems unlikely to undermine confidence in the legal system.¹⁰⁸

monetary policy. This literature recognizes that even if it is beneficial for a central bank to fool the public at any given time by engineering inflationary monetary growth, it might still be better for a central bank to tie its hands and prevent itself from later engineering an inflation surprise that at that time would be beneficial. See Robert J. Barro & David B. Gordon, *Rules, Discretion and Reputation in a Model of Monetary Policy*, 12 J. MONETARY ECON. 101 (1983). See generally ALEX CUKIERMAN, *CENTRAL BANK STRATEGY, CREDIBILITY, AND INDEPENDENCE: THEORY AND EVIDENCE* (1992) (providing a comprehensive overview of the effect of central bank independence, which effectively ties a government’s hands, on economic performance).

105. Indeed, what little evidence there is suggests that, at least in the United States, only a small percentage of the public has a great deal of confidence in the criminal justice system. See ROPER CTR. FOR PUB. OPINION RESEARCH, QUESTION ID USODFOX.081399 R23 (Aug. 13, 1999) (reporting that only 11% of American registered voters had a “great deal” of confidence, with the rest answering “a fair amount,” “not that much,” and “not sure”). What is relevant, Nesson might argue, is whether this confidence would be lower or higher if the legal system more often admitted its failings. The low confidence that the public has in the legal system, however, suggests that the public is skeptical already. To show that “accuracy” and “acceptability” often point in different directions, Nesson must thus establish that some accuracy-sacrificing practices succeed in fooling even this skeptical public into having more confidence in the judicial system than they otherwise would have. While I have a strong intuition that this is unlikely, and an even stronger intuition that any effect is likely to be too small to provide a moral justification for sacrificing accuracy, I should admit that I have no empirical evidence on this question either.

106. Allen, *supra* note 87, at 544.

107. Nesson weakens his argument by stating that the public need not “believe[] that the factfinder’s account is certainly true.” Nesson, *supra* note 13, at 1358 n.4. Allen notes that if this is so, “an acceptable verdict can be one that is understood as saying that the defendant (or the plaintiff) probably did what he was alleged to have done, so long as the ‘probably’ refers to the event rather than the evidence.” Allen, *supra* note 87, at 547. Even if we assume, however, that a verdict is acceptable if and only if the public believes it to be true with certainty, the distinction Nesson draws is weak. For even someone who believes that the jury is certainly correct will assume that this is so because of the strength of the evidence. Nesson’s argument would have some plausibility only if we lived in a world in which the public mistakenly thought of jury verdicts as certainly true.

108. Nesson himself recognizes that the behavior impact of the law would be undermined if this additional information did undermine confidence. He notes that “[a] student of judicial process” might understand that a verdict is a statement about the evidence. Nesson, *supra* note 13, at 1367. Nesson continues,

Yet he too may feel the ideological impact of the message. Like a theater-goer who knows he is viewing a play and yet still feels its dramatic impact, the sophisticate may be more aware than the average person of the verdict’s surrogate quality and yet still be moved by the power of its behavioral norm.

The acceptability thesis is a particularly implausible basis for an attack on compromise verdicts in civil cases.¹⁰⁹ Let us first consider the possibility that compromise verdicts undermine the public's confidence in the legal system by admitting its fallibility. The legal system already admits its fallibility in civil cases by establishing a preponderance-of-the-evidence standard. The alternative would be for the legal system not to announce any standard at all, embracing the pretense that the jury can determine what happened.¹¹⁰ Nesson's concern thus must be not that the announcement of a compromise verdict will reveal to the public the potential for uncertainty to be resolved in one party's favor or the other, but that such announcements will reveal there to be more uncertainty than the public actually supposes and that this change in the public's beliefs about the prevalence of uncertainty would undermine public acceptance of the legal process. Even if the former could be supported (an effort that Nesson does not attempt),¹¹¹ there does not seem to be any reason to suppose that a recognition of uncertainty would undermine faith in legal institutions. Perhaps the public would embrace legal institutions even more, out of a recognition that there are many difficult disputes that need resolution somehow.¹¹²

Id. at 1368. If this is so, and even someone who recognizes that a verdict is about the evidence can be behaviorally influenced, then the thesis that a verdict must be seen as being about the event is weakened. If it is not so, then Nesson's thesis applies only to those not as sophisticated as his "student of judicial process" in recognizing what a jury verdict is. In my view, this eliminates virtually the entire population. Perhaps Nesson might argue that young children, whose behavioral conditioning is most important, do not recognize the possibility of error, but it is difficult to believe that actual jury verdicts (as opposed to a hypothetical notion that evil may bring punishment) affect the conditioning of this relatively uninformed group.

109. Though most of the examples Nesson uses are based on the criminal law, he argues that "they apply equally well to civil factfinding." *Id.* at 1363. Perhaps Nesson makes this argument because he recognizes that civil and criminal law share many procedural and evidentiary practices, and an argument justifying these practices only by reference to criminal law would be seriously incomplete. Ultimately, though, Nesson's argument may reduce to the maxim that it is better to let many guilty men go free than to convict a single innocent man.

110. For example, a jury charge might read, "The evidence will show either that the defendant is liable or is not liable, and your verdict shall announce which is the case." A jury so charged might well invent a preponderance standard (or some other standard), but this would be out of the public's view. With such an instruction, the legal system would not need to admit that it is possible for evidence to be evenly divided. Our existing jury instructions do nothing of the kind. Indeed, Nesson admits that existing jury instructions say in effect, "'Give us your best judgment, and then do not worry about it further.'" *Id.* at 1365. Because jury instructions but not deliberations are in public view, this undermines Nesson's positive thesis.

111. The best argument that I can muster is that cases actually tried, and thus the only ones that result in verdicts, are not a random sample of disputes, but the most intractable ones. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). Thus, jury verdicts might give the public an exaggerated sense of how much uncertainty exists.

112. I do not mean to suggest that this would be the reaction. To the contrary, I suspect that an increased awareness of the difficulty of decision making in courts would have no effect one way or the other, given the absence of plausible alternatives. But to the extent that there are alternatives, such as private violence, the intractability of disputes makes courts seem more attractive. See generally Robert Weisberg, *Private Violence as Moral Action: The Law as Inspiration and Example*, in LAW'S

The second part of the argument against compromise verdicts is even weaker. There are two reasons that a civil jury verdict might send an imperfect behavioral message: first, an apparently innocent person might sometimes pay damages for alleged conduct in which she did not engage; and second, a person who apparently has violated legal rules and caused harm might not be held fully responsible. With both traditional and compromise verdicts, there will be an imperfect empirical connection between wrongdoing and punishment. In the traditional system, wrongdoing leads to an increased probability of being punished, and with compromise verdicts, wrongdoing leads to an increase in the expected punishment. Which approach better reinforces the behavioral message depends on the observer's firsthand experience. Traditional verdicts might perfectly accord with some particular observer's own beliefs about liability, but a single miss from the observer's perspective might greatly undercut the effectiveness of the behavioral message. With compromise verdicts, there will be more inconsistencies between what the observer believes a perfect legal system would do and what the existing system does, but these inconsistencies will be smaller in magnitude. It is thus a matter of conjecture which sends the stronger behavioral message.¹¹³

Nesson might reply that this argument assumes that the effectiveness of behavioral messages depends on firsthand experience, while in reality most observers absorb the law's messages without any independent knowledge of the cases being adjudicated.¹¹⁴ In an absence of firsthand knowledge of particular cases, he might argue, traditional verdicts will be superior, because so far as an observer can tell, the legal system has neither of these imperfections. There are two problems with this argument. First, most observers will have some experience from which they can assess the legal system, if not direct then from secondhand accounts, such as newspapers. Nesson seems to postulate a mythical observer who considers verdicts without the benefit of any outside information whatsoever.

VIOLENCE 175 (Austin Sarat & Thomas R. Kearns eds., 1992) (explaining how private violence may serve as an alternative to the public violence of law).

113. Such a conjecture might well go as follows: Compromise verdicts will lead just about everyone to conclude that the legal system roughly works, that wrongdoers will pay for their acts, more or less. Compromise verdicts will thus reinforce the message that wrongdoing brings punishment. Traditional verdicts, by contrast, would lead most people to overestimate its effectiveness, but a few, those who are exposed to cases in which the system seems to produce the wrong result, will underestimate its effectiveness. These individuals will not assimilate the behavioral message at all, and because the number of people who decide to transgress norms will be small with any enforcement mechanism, the total number of transgressors will be greater with traditional verdicts. In a world of diverse experience, traditional verdicts increase the variance of the effectiveness of the behavioral message, which in turn increases the percentage of people who fail to assimilate the message at all and thus violate social norms.

114. Nesson explains, "[A] verdict of not guilty or not liable will only undermine the legal system's projection of behavioral norms if the public has an independent basis for believing that the defendant did in fact commit the wrongful act." Nesson, *supra* note 13, at 1367.

Second, even granting this narrow frame of reference, there is no reason that an observer's a priori assumption would be that the civil jury is perfect, that the innocent are absolved and the guilty found liable. Compromise verdicts alone might give an observer a sense that a certain amount of imperfection exists, but this amount might be greater or less than what the observer initially would assume.

Let us suppose, however, that Nesson is right, and that compromise verdicts both undermine public confidence in the legal system and weaken the behavioral messages that the legal system imparts. This argument is still much less forceful against a system of mixed verdicts than against pure compromise verdicts. First, decreased confidence in the legal system because of an admission of the possibility of error is most wasteful in the cases in which a jury in fact has a great deal of confidence in a determination that the defendant is or is not liable. Supposing that the mere admission of uncertainty imposes a cost in terms of public confidence, there is relatively little reason to bear this cost in cases in which an all-or-nothing verdict almost certainly would be correct.¹¹⁵ With a system of mixed verdicts, at least the legal system will admit its fallibility only in cases in which there is a substantial chance of error. And because the most certain cases are those in which the illusion of the possibility of certainty can best be sustained, the mixed system of compromise and all-or-nothing verdicts entails less risk of reduced public confidence from observers' personal opinions conflicting with an unequivocal result. Thus, the mixed system reduces the confidence-undermining aspects of both compromise and all-or-nothing verdicts.

Second, by separating verdicts into two pools, those in which the jury has considerable uncertainty and those in which the jury has little if any uncertainty, the mixed verdicts system increases public confidence in the verdicts in the second pool. While Nesson's belief that the public assumes that civil verdicts are always accurate reflections of an event is implausible, it is somewhat plausible that the public could be made to believe that there are some verdicts that can be so viewed. By acknowledging that a verdict is about the evidence in some cases, the legal system improves its credibility in claiming that the verdict is about the event in others. Public confidence is more important in these latter cases, because it is in these cases that the

115. Nesson might counter that it is not the admission of uncertainty in a particular case that will undermine public confidence, but the admission that there may be uncertainty in any case. On this view, if the mixed system results in compromise verdicts only in a very small percentage of cases, the cost of this systemic admission exceeds its benefits. The argument, however, is weak, for it supposes that the public initially assumes a perfect legal system. Given institutional features like the preponderance-of-the-evidence standard, this seems unlikely. *Supra* text accompanying note 110. Moreover, if the public did have such a view, there might be great benefits in foreing the public to recognize the possibility of uncertainty and error in some cases, because only this recognition could spur deliberation about how to improve the system.

state is acting with the greatest force, denying or imposing liability altogether. In the remaining cases decided with a compromise verdict, public confidence that the just result is being achieved is less important, because a compromise result is inherently less coercive.¹¹⁶ A danger of a system of all-or-nothing verdicts in all cases is that greater public confidence in decisions will be needed because the result is always coercive, and yet public confidence in such verdicts will be less because the highly certain cases are lumped together with the less certain ones.

Third, the behavioral message of compromise verdicts is most problematic when a defendant who almost certainly is liable is not made to pay in full, or when one who almost certainly is not liable is nonetheless forced to make some contribution. It is in these cases that the public is most likely to view the legal system as responding to a particular event that they can clearly imagine, and where it is thus most important to convey an appropriate behavioral message that is untinged by uncertainty. And it is precisely in these cases that the mixed system does impose all-or-nothing verdicts. If all-or-nothing verdicts were used in all cases, including in those in which despite the legal system's insistence the public does not end up with a clear vision of an event, the public's association of the punishment (or liability) with the prohibited activity would be weakened.¹¹⁷ Thus, even assuming that proper behavioral conditioning requires public association of an event with an appropriately firm legal response, a system of mixed verdicts seems better suited to achieving that goal than all-or-nothing verdicts.

In sum, Nesson's concept of verdict acceptability does not pose a barrier to mixed verdicts. Even if the theory is correct, it applies much more weakly to mixed verdicts than to compromise verdicts, and it may even be that mixed verdicts will send a more appropriate behavioral message than traditional all-or-nothing verdicts. Similarly, as Part I.B.1 illustrated, the fact that the task of fact finding is generally in the province of the jury is not an obstacle to mixed verdicts, because appropriate instructions and modifications should enable juries to respond to uncertainty appropriately. Thus we are left so far only with the two competing economic arguments of Part I.A: the benefit of risk reduction versus the increased "error costs" that compromise verdicts (and, to a lesser extent, mixed verdicts) would promote. Though these may be the most obvious

116. As Robert Cover reminds us, legal decisions ultimately reflect the state's willingness to impose violence. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986). Compromises, however, seem much less violent than one-sided victories. If public confidence in the legal system is vital, as Nesson asserts, then there is the greatest need for it in the most troubling, violent cases.

117. Some commentators have argued that punishment promotes the development of conscience and thus indirectly prevents crime in a manner different from that posited by deterrence theory. See Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208 (1984). If punishment occurs irrespective of behavior, however, the connection between the acts and the punishment is weakened.

effects of adoption of a compromise or mixed verdicts system, they are not the only ones, and we must take a broader view to conduct a full evaluation of alternative verdict structures.

II

THE EFFECT OF VERDICT STRUCTURE ON THE AIMS OF LAW

In this Part, I consider how compromise verdicts affect the ultimate purposes that law seeks to promote. The purposes or values that I assess are those that in my judgment seem to be the most important in legal discourse: deterrence, efficient breach, restitution, retribution, and equality. This Part pays disproportionate attention to the first of these values, partly because arguments about efficient breach turn out to follow directly from the analysis of deterrence, but also because deterrence turns out to be the most complicated and interesting value to analyze. Though I generally examine the values in what I take to be their relative importance in civil law, my primary purpose is not to weigh the importance of each to the system. Rather, it is to inquire, assuming each is important, as to what effect compromise or mixed verdicts will have on the achievement of that purpose or value. This analysis does not lead to an unequivocal endorsement of compromise over all-or-nothing verdicts. Indeed we will see in evaluating deterrence that what might at first seem to be a strong argument for compromise verdicts turns out to be much more complicated. The analysis does, however, produce consistent tentative conclusions that a system of mixed verdicts is likely to be superior to either alternative form of verdict.

A. Deterrence

A principal goal, perhaps the dominant goal, of civil law systems is deterrence. By requiring tortfeasors to pay for the amount of harm they cause, the legal system gives them appropriate incentives to take care. As the Hand Formula demands, the law should encourage a party to take a precaution when the cost of that precaution is less than the expected benefit (that is, the reduced probability of a loss multiplied by the magnitude of the loss).¹¹⁸ A potential defendant who expects to pay in damages less than the

118. Judge Hand's statement of the formula is as follows:

[T]he owner's duty [where precautions might prevent a vessel from breaking away], as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P ; the injury, L ; and the burden, B ; liability depends upon whether B is less than L multiplied by P : i.e., whether $B < PL$.

United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.). For a useful discussion of the Hand Formula, emphasizing that it provides a conceptual framework for tort law

harm it causes will take too few precautions. A potential defendant who expects to pay in damages more than the harm it causes will take too many precautions or, in other words, will be "overdeterred." If, whenever an action causes harm, the actor is sued and forced to pay for that harm, and is never required to pay for harm that it does not cause, the appropriate amount of deterrence will be achieved.

This is the logic behind strict liability,¹¹⁹ or "enterprise liability," as the theory has been dubbed by some of its recent defenders.¹²⁰ The facts, however, are rarely so clear, and often the jury will be unsure about whether the defendant engaged in conduct that might have contributed to the plaintiff's injury. If the best estimate is that there is a seventy-five percent chance that the defendant in fact engaged in conduct that harmed the plaintiff, then an all-or-nothing verdict would overdeter similarly situated parties. This is because a defendant who expects to pay full damages in a group of cases even though it is responsible for harm only in seventy-five percent of them will internalize more harm than it has caused. On the other hand, with a twenty-five percent judgment and a verdict for the defendant, there will be underdeterrence. With compromise verdicts, by contrast, the total damages paid will always be equal to the probability-weighted estimate of the amount of harm that the defendant has caused.

This is the argument made by Steven Shavell.¹²¹ Sometimes, he acknowledges, underdeterrence and overdeterrence may cancel each other out. All that matters in deterrence are expected values, so if a defendant expects that the damages it will pay in cases in which liability is inappropriately assessed are equal to the damages it will pay in cases in which liability is inappropriately forgiven, deterrence will still be optimal. Shavell explains, however, that this assumption will often not hold. "On the one hand, a party's probability of causation might be systematically less than the threshold in ambiguous cases. . . . On the other hand, a party's probability of causation in ambiguous cases might systematically exceed

rather than a solution, see Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 328-33 (1996).

119. The situation in a negligence regime is more complicated. A negligence rule is like strict liability except that when a party does take cost-justified precautions, she will not be liable for any damages resulting from her activity. Thus, a negligence rule still gives the appropriate incentives to take cost-justified precautions, but it may encourage a potential tortfeasor to engage in too much of an activity once having taken cost-justified precautions. See, e.g., SHAPELL, *ECONOMIC ANALYSIS*, *supra* note 11, at 23-26.

120. E.g., Steven P. Croley & Jon D. Hanson, *The First-Party Insurance Externality: An Economic Justification for Enterprise Liability*, 65 CORNELL L. REV. 129 (1990); Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683 (1993). But see Mark Geistfeld, *Should Enterprise Liability Replace the Rule of Strict Liability for Abnormally Dangerous Activities?*, 45 UCLA L. REV. 611 (1998) (answering "no"). Enterprise liability is essentially the theory that businesses should be subject to strict liability for harm they cause.

121. See Shavell, *Uncertainty over Causation*, *supra* note 11.

the threshold"¹²² Given this possibility, Shavell's model straightforwardly shows that traditional all-or-nothing verdicts may overdeter or underdeter actors deciding whether to engage in an activity and, once having decided to engage in the activity, choosing whether to exercise care.¹²³

Compromise verdicts, by contrast, lead to the socially optimal results in his model.¹²⁴ Suppose that whenever harm of a particular type occurs, there is a thirty percent probability that the defendant caused it, and a seventy percent chance that the harm had some other source. For example, the harm could be a type of cancer, which might be caused by the defendant's activity or by external forces. Then, as long as the defendant expects to pay thirty percent damages in all cases in which this harm is manifested if it engages in the activity, its expected damages will be equal to expected harm,¹²⁵ and the defendant will face appropriate incentives in deciding whether to engage in the activity. Similarly, suppose the defendant, having decided to engage in the activity, decides whether to invest in a particular precaution that would reduce the estimate of the conditional probability that the defendant caused the particular type of harm to fifteen percent. The defendant's incentives will be to make an optimal decision of whether the precaution's benefits exceed its costs.¹²⁶

This analysis, however, depends on a premise that makes Shavell's generalizations about the preponderance rule inapplicable outside his immediate concern of uncertain causation.¹²⁷ In Shavell's model, the jury always correctly assesses the conditional probability that a defendant caused harm in a case in which causation is ambiguous,¹²⁸ and the jury can

122. *Id.* at 588.

123. *E.g., id.* at 592-94 (applying the model where only one party decides to engage in the activity). A simple example should help verify the logic. Suppose that a company is deciding whether to open a factory that might cause environmental damage. When such damage occurs, however, there will be no way to tell whether the new factory or one of the nine existing factories caused this damage. In a system with a preponderance rule, the company will thus expect to pay for none of the environmental damage it causes. Suppose further that once the company opens the factory, it decides whether to invest in a precaution that would reduce the chance of environmental damage by 50%. It will have no incentive to do so if this precaution is costly, since it will not pay any of the damages from its pollution anyway.

124. A caveat is that when compromise verdicts are used in a negligence regime, there will be excessive incentives to engage in the activity (but appropriate incentives to take care). *Id.* at 599. This problem, however, is not peculiar to compromise verdicts. *Id.* at 598.

125. *See id.* at 594-95.

126. *See id.* at 597.

127. The title of Shavell's article, *Uncertainty over Causation and the Determination of Civil Liability*, fairly indicates the scope of his analysis. *Id.* at 587. He does not explicitly note, however, that consideration of other types of uncertainty might lead to different conclusions about the defensibility of a preponderance rule.

128. *E.g., id.* at 591-92.

verify whether the defendant has taken care.¹²⁹ Shavell thus implicitly restricts his analysis to ex post uncertainty about whether a particular injury in fact was caused by the defendant, assuming that the decision maker will be sure about what conduct the defendant engaged in and the ex ante probability that this conduct would cause harm.¹³⁰ Shavell's argument is thus about causation, including joint causation as well as cases in which there might be a single cause of an injury but neither the defendant nor the jury can distinguish it from another.¹³¹ Even if we accept his conclusion that proportionate damages should be awarded in all such cases,¹³² we need not necessarily abandon a preponderance rule for issues of factual uncertainty—that is, for determining whether or not a defendant committed some act or failed to take a precaution leading to injury.¹³³ In theory, whether the defendant acted in a way that made it a possible cause of an injury to the plaintiff is analytically distinct from the question of whether there are other possible causes as well.¹³⁴

129. Shavell states in analyzing proportional liability, "that if the party engages in his activity and does not take care, his expected liability will be *pl*; and if he does take care, it will be *ql*." *Id.* at 597. This may seem unproblematic given an assumption of strict liability, since taking care is not a defense and only causation matters. Yet even in a strict liability regime, whether a party has taken care is relevant to an assessment of whether that party has engaged in conduct that might have caused a given injury. Shavell, however, assumes "that the same conditional probabilities . . . of accidents appearing ambiguous apply whether or not care is taken." *Id.* at 595; see also *id.* at 595 n.22 (indicating a conscious decision not to explore the matter further). When a jury cannot determine whether a party has taken care, the expected liability of both those who take care and those who do not will be somewhere between *pl* and *ql*.

130. For example, even if a jury does not know which of two actors caused particular harm, in Shavell's model it always knows the ex ante probability that each would cause harm. *Id.* at 603.

131. Shavell is thus ultimately making an argument for comparative negligence, even in cases in which some portion of an injury is attributable not to any of the litigants, but to other causes, including forces of nature. Shavell's focus is thus implicitly similar to that of Rosenberg, *supra* note 10.

132. Fully considering the question is beyond the scope of this Article. There is a large economic literature on joint causation and comparative negligence. See generally Robert D. Cooter & Thomas S. Ulen, *An Economic Case for Comparative Negligence*, 61 N.Y.U. L. REV. 1067 (1986); Aaron S. Edlin, *Efficient Standards of Due Care: Should Courts Find More Parties Negligent Under Comparative Negligence?*, 14 INT'L REV. L. & ECON. 21 (1994); David Haddock & Christopher Curran, *An Economic Theory of Comparative Negligence*, 14 J. LEGAL STUD. 49 (1985); William M. Landes & Richard A. Posner, *Joint and Multiple Tortfeasors: An Economic Analysis*, 9 J. LEGAL STUD. 517 (1980); Samuel A. Rea, Jr., *The Economics of Comparative Negligence*, 7 INT'L REV. L. & ECON. 149 (1987); Daniel L. Rubinfeld, *The Efficiency of Comparative Negligence*, 16 J. LEGAL STUD. 375 (1987).

133. For an assessment of how a regime of mixed verdicts might be combined with a regime of comparative negligence, see *infra* note 316.

134. Shavell's analysis helps clarify that there is a difference in asking whether the defendant's conduct was a possible cause of injury to the plaintiff and whether it was an actual cause. A question of whether the defendant dumped chemicals is about what the defendant did, while a question about whether the chemicals caused disease is a question about joint causation. There may be some difficult boundary cases, however, in which the distinction is not so clear. For example, if *B* complains that *A* punched him, is this a question of liability or causation? See RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 4-31 (1995) (considering the tort of battery before having introduced issues of causation); see also, e.g., *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928) (addressing together

The existence of an informational asymmetry means that a defendant may know that it has committed an act that causes harm but the jury might not be sure whether the defendant has done so. In this situation, underdeterrence is likely to result regardless of whether a regime of compromise or all-or-nothing verdicts is adopted. There may be some situations in which all-or-nothing verdicts will reduce the degree of uncertainty. Consider, for example, a factory deciding whether to dump pollutants into a river, cognizant that this action will cause a certain amount of harm. The factory might reason that if it commits the environmental violation, the ultimate jury will have some doubt about whether the pollution came from it or its neighbor and thus, say, would estimate the defendant's probability of causation at eighty-five percent. In a system of all-or-nothing verdicts, juries would likely impose damages virtually all the time,¹³⁵ and the factory will pollute if and only if the benefits exceed the harm. With compromise verdicts, in contrast, the defendant would discount the harm by the eighty-five percent probability. On the other hand, if a company believes that it might be able to commit a harm-causing act and yet persuade a jury by a preponderance of the evidence that it did not do so, compromise verdicts may provide more deterrence than all-or-nothing verdicts. The choice between compromise and all-or-nothing verdicts is thus equivocal. A system of mixed verdicts presents a tentative solution by preventing defendants from discounting the harm they expect to cause on the basis that a jury would have some small doubt that they caused it while still providing some deterrence of many defendants who are confident that they can cover their tracks well enough to persuade a jury that they probably did not commit the acts.

A system of mixed verdicts might be unnecessary and inadequate, however, if there is some other means of achieving optimal deterrence. Most promisingly, A. Mitchell Polinsky and Steven Shavell have argued that punitive damages can be used to combat underenforcement of civil law.¹³⁶ They have argued that, as a general rule,¹³⁷ punitive damages should

whether the defendant violated a duty to the plaintiff and whether the defendant caused the plaintiff's injury).

135. *Supra* text following note 42.

136. A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998). This idea, commonly known as the "multiplier principle," was earlier discussed by Robert Cooter. Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1149-53 (1989). For a recent recommendation that the multiplier proposal be modified to distinguish situations in which the defendant's gain is greater than or less than the victim's loss, see Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421 (1998). There are at least two other prominent economic theories of punitive damages. Richard Craswell has argued that optimal deterrence might be achieved with lower constant multipliers in settings in which the probability of punishment is reduced when potential defendants increase care. Craswell, *supra* note 37. David Haddock, Fred McChesney, and Menahem Spiegel, meanwhile, have argued that punitive damages help to prevent individuals from converting property rules into liability

be designed to compensate for the underdeterrence that results from tortfeasors' causing harm that is never detected, either because it is not possible to prove who caused the harm, or because victims choose not to sue.¹³⁸ If, for example, there is only a fifty percent ex ante probability that a tortfeasor will be required to pay for the harm it causes, then punitive damages should be set equal to compensatory damages. Otherwise, a potential defendant considering whether to invest in a precaution will discount the costs of not investing by a factor of two, because expected damages would be equal to only half of expected harm.

Polinsky and Shavell, however, do not directly consider the possibility that even with punitive damage multipliers as they describe them, underdeterrence might still occur,¹³⁹ because sometimes the jury will erroneously find a defendant not liable.¹⁴⁰ Perhaps they fail to discuss this explicitly because the problem might seem to have a trivial answer. These multipliers can simply be adjusted upward to compensate for this. For example, suppose that when someone commits a particular act resulting in harm, ninety percent of the time it will appear that there is less than a fifty percent chance that the act occurred, while only ten percent of the time will the act result in the jury's concluding that it was more likely than not (fifty-one percent or more) that the act occurred.¹⁴¹ A jury encountering this one-in-ten case might set total damages at ten times compensatory damages, to compensate for the fact that nine-tenths of the time someone commits the

rules. David D. Haddock et al., *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 CALIF. L. REV. 1 (1990).

137. They concede that in certain circumstances, it might make sense to impose punitive damages as a means of punishing blameworthy individuals, but they believe that these circumstances are quite narrow. Polinsky & Shavell, *supra* note 136, at 948-54.

138. *Id.* at 888. That this argument is straightforward does not mean that it is important to juries. Indeed, evidence suggests that juries give little weight to optimal deterrence. See CASS R. SUNSTEIN ET AL., DO PEOPLE WANT OPTIMAL DETERRENCE? (Univ. of Chicago Law Sch., Jolin M. Olin Law & Econ. Working Paper No. 77, 1999). Indeed, the public may care little about deterrence, even though citizens and officials use deterrence arguments to make their positions socially acceptable. See Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 435-76 (1999).

139. This will never cancel out with instances in which a defendant erroneously is found liable. This type of error results in even greater underdeterrence, because the marginal increase in expected damages attributable to engaging in the harm-causing activity will be greater. Type I error, however, will result in overdeterrence of activities. *Infra* text accompanying notes 144-146.

140. They recognize that because it might not be possible to prove that the defendant caused the harm, a suit will not be brought, but they do not discuss the possibility that a jury might make an error in a case that is brought. Polinsky & Shavell, *supra* note 136, at 888 ("[E]ven if the victim knows that he was injured by some party's conduct, he may have difficulty proving who caused the harm."). Their point appears to be that a victim may not be able to identify which of several possible actors caused the harm. The word "proving," however, also could be taken to suggest that they might not be victorious in court.

141. A similar hypothetical might imagine perfect enforcement but a mistake by the decision maker as to the appropriate level of damages. See Cooter, *supra* note 136, at 1152 ("The rule of the reciprocal is correct regardless of whether the enforcement error arises from compensation that is too little or too infrequent.").

act, a jury would find it more likely than not that the act had not occurred.¹⁴² More generally, with such a system, the expected damages from committing an act will always equal expected harm, as long as there is some probability that the jury will correctly find it more likely than not that the act was committed.¹⁴³ It might then seem that there would be no need to resort to a system of compromise or mixed verdicts, optimal deterrence having been achieved without them.

Even if this approach provides optimal deterrence of harm-causing acts,¹⁴⁴ it might cause overdeterrence in a different type of decision. In a system in which imposition of liability depends on whether proof has been made by a preponderance of the evidence, there will be some cases in which someone who has not committed an act leading to harm will nonetheless be found liable. Such damages will deter individuals from placing themselves in a position in which they might wrongly be found to be liable for acts that they do not commit.¹⁴⁵ In other words, type I error may deter participation in activities that might lead to erroneous imposition of damages and induce individuals to undertake costly precautions (such as record keeping and outside monitoring) that will allow them to prove their innocence should they be wrongly accused and thus to avoid being

142. Of course, the punitive damages multiplier would also have to be adjusted for the familiar Polinsky-Shavell factors, such as the probability that the suit is not brought. *See* Polinsky & Shavell, *supra* note 136, at 888. I am assuming for the sake of simplicity that an act leading to harm always induces suit, and the only reason for punitive damages is to compensate for the decision maker's recognition in cases where the act does seem to have occurred that sometimes the act might occur but appear more probably not to have occurred.

143. An additional assumption is that the jury's estimate of the probability that one who commits the act will be found liable is unbiased. A jury might, however, suffer from hindsight bias, overestimating the probability that one who commits a harm-causing act will be found liable because, by hypothesis, it is only conducting this estimate in cases in which it has found the defendant liable. *See generally* Baruch Fischhoff, *For Those Condemned to Study the Past: Heuristics and Biases in Hindsight*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 335, 341 (Daniel Kahneman et al. eds., 1982) (providing evidence to support the existence of hindsight bias). If juries exhibit such bias, then punitive damage multipliers will be systematically lower than intended.

144. As described so far, though, there might still be a danger of underdeterrence. Someone contemplating committing the act will calculate that if she does not commit the act that might result in harm, there is still some chance that it will appear to the jury more likely than not that she has committed the act and that it has resulted in harm. In considering whether to commit the act nonetheless, the potential tortfeasor will consider only the *marginal* increase in the probability of damages. The solution to this problem might seem to be simple once again: the punitive damages multiplier should be the inverse of the increase in the probability of being found liable attributable to committing an act that might cause harm. This, however, will lead to even more severe concerns about the type of overdeterrence discussed immediately *infra*.

145. Even those who would make an optimal choice to engage in the act might be deterred in this way. For some potential tortfeasors, expected damages will be greater than expected harm because of the increase in punitive damage multipliers attributable to addressing marginal effects. These potential tortfeasors may decide not to engage in the activity in which they would subsequently need to decide whether to commit the possibly harm-causing act.

erroneously found liable.¹⁴⁶ The greater the expected damages, the greater these costs, so adding punitive damages onto compensatory damages will exacerbate these problems.

Whenever engaging in an activity by itself (that is, irrespective of the decision whether to take care) increases the probability that one will erroneously be found to have caused harm, there will be tension between optimally deterring decisions to engage in the activity in the first place and optimally deterring participants' decisions not to take care once they are already engaged in the activity. The optimal amount of total damages is equal to total harm for each decision. Consider again the example of a business deciding whether to open a factory by the river, and suppose that one consequence of opening the factory is that the business might erroneously be found liable for pollution from some other factory. If total damages were equal to total harm for all factories by the river, we will have optimized the activity-level decision whether to open a new factory.¹⁴⁷ If total damages were equal to total harm for each factory polluting the river, we will have optimized the subsequent decision whether to take a particular precaution. Yet these are different numbers whenever there is uncertainty about which factories have taken care. If we optimize the decision whether to take care, punitive damages will be too high from the perspective of the activity decision.¹⁴⁸ If we optimize the decision whether to engage in an activity, incentives to take care will be too low.

The wedge between these two optimizations is not necessarily a small one, and in fact punitive damage multipliers that are optimal from the perspective of the decision to take care can be much too large from the perspective of the decision whether to engage in the activity. The easiest way to see why is to consider a numeric example. Suppose that for each of several factories, if the factory decides not to take care and harm results, twenty percent of the time it will appear to the jury that there is a sixty percent chance that this factory in fact caused the harm, and eighty percent of the time it will appear that there is less than a fifty percent chance. This might seem a perfect candidate for a punitive damages multiplier, because

146. "The law is intended to discourage unreasonably risky behavior and to encourage actors to adopt efficient safety precautions. The law should not, however, encourage excessively costly precautions, nor should it inhibit activities whose benefits outweigh their burdens." Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 *IND. L.J.* 59, 106 (1997).

147. That is, given our own uncertainty as to whether a particular new factory will pollute, we will induce the proper decision as to whether the factory should open. This assumes that a business considers whether to open a factory against the background of legal liability, but makes individual decisions about whether to take care only once the factory opens.

148. Optimization of the decision whether to take care cannot be the only goal. If it were, then we would need to embrace a legal system in which a defendant were found fully liable if there were any chance that it was the cause of the plaintiff's harm. In such a system, a defendant will have just the right incentives to take care, because it can be sure that total damages will equal total harm. But, at least in most contexts, we would reject such a system because of its massive overdeterrence of activities.

at least some of the time the act will lead to a determination of liability, and the appropriate multiplier would be four.¹⁴⁹ But in forty percent of cases in which the jury finds a factory liable, the finding will be erroneous.¹⁵⁰ This result means that total damages will be three times higher than they should be from the activity-level perspective.¹⁵¹ Thus, assuming that all of the erroneously awarded damages are borne by factories, there will be a large amount of overdeterrence in the decision whether to open a factory.

This tradeoff will occur in either a system of all-or-nothing verdicts or in a system of compromise verdicts. It would largely disappear, however, if punitive damages could be imposed only when the liability of the defendant were certain, as Polinsky and Shavell appear to implicitly assume.¹⁵² While it is possible to imagine applying this rule in a system of traditional verdicts,¹⁵³ it would fit more comfortably in a system of compromise verdicts, where the jury is already assessing more than just whether the preponderance-of-the-evidence threshold is met. And it would fit more comfortably still in a system of mixed verdicts. The court could allow the imposition of punitive damages only when proof is certain enough to award full compensatory damages. As stated earlier,¹⁵⁴ that threshold of

149. This multiplier is calculated from $(1-.20) / .20$. Polinsky & Shavell, *supra* note 136, at 962 n.274. The multiplier includes an adjustment for the possibility that the jury will reach an incorrect result, but not an adjustment to ensure that the marginal increase in expected damages is adequate to deter (as explained *supra* note 144). Making this adjustment would strengthen my case by raising the multiplier even higher. The exact number depends on the probability of being erroneously found liable, which in turn depends among other things on the number of factories.

150. This conclusion follows directly from the premise that whenever the jury is imposing liability, it is doing so because it calculates that there is a 60% chance that the defendant is in fact liable. Whenever we allow a jury to impose a liability when its estimate of the probability that liability is appropriate is p , then we should expect that of such cases in which liability is imposed, the decision is erroneous with probability $1 - p$. This does not, of course, mean that a preponderance rule leads to liability being incorrectly imposed in 50% of cases, because in many of those cases, the jury's estimation of the probability will be considerably greater than 50%.

151. These increased damages are imposed because the system produces excessive damages (both compensatory and punitive) of $0.4 \times (1+4) = 2$ times harm, in addition to damages equal to harm among the firms that are found liable.

152. For an argument that imposition of punitive damages on a bare preponderance of the evidence violates procedural due process, see Jewell Hargleroad, Comment, *Punitive Damages: The Burden of Proof Required by Procedural Due Process*, 22 U.S.F. L. REV. 99 (1987). But see *BMW, Inc. v. Gore*, 517 U.S. 559, 568 (1996) ("Only when an award can fairly be categorized as 'grossly excessive' in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment."); *Day v. Woodworth*, 54 U.S. (13 How.) 363, 370 (1851) (rejecting an early constitutional challenge to punitive damages in a civil suit).

153. Cooter urges that punitive damages should be applied only in circumstances in which the defendant's care is well short of that demanded by the legal standard. Cooter, *supra* note 136, at 1175-76. This is different from raising the certainty threshold, but it might have the same effect in many cases. When the defendant's care is well short of the standard, it will often, but not always, be the case that there will be very little uncertainty that the defendant is at least somewhat short of the standard. In any event, Cooter's approach could be combined with my approach to limit those cases in which punitive damages would be available.

154. See *supra* note 27.

certainty could be a numerical percentage (such as seventy-five percent) or a verbal standard (such as beyond a reasonable doubt). Raising the certainty bar for punitive damages need not mean lowering total punitive damages liability by defendants overall, as defendants in each case would presumably be required to pay more in punitive damages than they would in a system that allowed for the imposition of punitive damages on a mere preponderance of evidence. That is, following the Polinsky-Shavell approach, the punitive damages multiplier would be greater because punitive damages would be imposed less often.

The possibility of judgment-proof defendants may complicate this scheme, because if larger punitive damages are spread among fewer defendants, some might not be able to pay, and thus the prospect of larger damages might provide no marginal deterrence for such defendants.¹⁵⁵ It thus might be necessary to impose some punitive damages whenever there was some probability that the defendant would get away with conduct in which it appears to have engaged. Even if this is so, however, punitive damages should ideally increase with the jury's confidence that the defendant is liable. Applying punitive damage multipliers on top of compromise verdicts could accomplish this goal.¹⁵⁶ This would also effect an approximate tradeoff between deterring failure to take care without overdetering participation in the activity. This tradeoff is least worrisome, however, near the upper end of the probability continuum.¹⁵⁷ A regime of mixed verdicts with punitive damages may be an appropriate means of ensuring that the defendants who are most likely to be culpable pay full punitive damages, while defendants who are only somewhat more likely than not to be culpable pay much lower compensatory and punitive damages to minimize the costs of type I error. This endorsement must be a tentative one given only the crude optimization that it produces, but the analysis reinforces both the idea that damages should increase with the level of culpability and that the legal system has the least need to hedge its

155. See generally Lynn M. Lopucki, *The Death of Liability*, 106 YALE L.J. 1 (1996) (arguing that it is becoming increasingly easy for defendants to externalize liability, and thus make themselves judgment-proof).

156. The jury might be asked to announce the probability of liability (which makes possible mixed verdicts) and the ex ante probability that the defendant's conduct would lead to a trial in which the jury concluded that the defendant more likely than not was liable (which makes possible tailoring of punitive damages multipliers). If the jury answered these questions 60% and 50%, then the defendant would be obliged to pay a total of 1.2 times damages.

157. For example, let us modify the hypothetical in notes 149-151 and accompanying text. Suppose that the 20% of the time that the defendant's act resulted in the jury's concluding that it was probably liable, the jury concluded that there was a 90% chance of liability, instead of a 60% chance as discussed at note 151 and accompanying text. Imposing full compensatory liability and punitive damages would lead to damages that are 50% higher than they should be from the perspective of the activity-level decision (because five times compensatory damages would be erroneously imposed 10% of the time) instead of 200% higher (when five times compensatory damages would be erroneously imposed 40% of the time).

bets when the jury's estimate of the probability of liability is relatively certain.

In summary, a rigorous analysis reveals that a system of compromise verdicts does not achieve the aim of deterrence any better than all-or-nothing verdicts. Once one considers the effects of jury error rates, punitive damages, and the relationship between activity-level and duty-level decisions, the argument for compromise verdicts' superior achievement of deterrence aims breaks down. Initial consideration of these factors, however, leads to a tentative endorsement of a system of mixed verdicts as being better at furthering the aims of deterrence than either compromise or all-or-nothing verdicts. This is because a system of mixed verdicts minimizes the wedge between the optimal amount of damages from the activity-level and duty-level perspectives.

B. *Efficient Breach*

Although deterrence theory addresses tort law, quite similar considerations are present in contract law.¹⁵⁸ A tenet of contract theory is that remedies should encourage efficient breach. A promisor should be induced to breach if and only if the cost of performance would be greater than the benefit to the promisee.¹⁵⁹ Commentators have noted that supercompensatory remedies, the contract analogue to punitive damages,¹⁶⁰ may be appropriate where detection of breach is difficult or where high litigation costs might discourage suits for breach.¹⁶¹ These scholars, however, do not generally consider the possibility that it might be unclear whether breach has occurred.¹⁶² Supercompensatory damages could discourage the making of promises even if they optimally deter inefficient breach, just as punitive damages provide excessive disincentives to engage

158. Polinsky and Shavell similarly note that "the award of punitive damages sometimes can promote the interests of contracting parties - when a non-performing party has a chance of escaping detection and liability." Polinsky & Shavell, *supra* note 136, at 936-37.

159. See generally, e.g., POSNER, *supra* note 45, § 4.8, at 131 (explaining the theory of efficient breach).

160. Courts have generally refused to allow punitive damages in contract suits. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981) (allowing punitive damages only if "the conduct constituting the breach is also a tort for which punitive damages are recoverable").

161. See, e.g., Daniel A. Farber, *Reassessing the Economic Efficiency of Compensatory Damages for Breach of Contract*, 66 VA. L. REV. 1443, 1444-45 (1980) ("To the extent that every prospective plaintiff is not fully compensated, even though 'compensatory' damages are awarded in every litigated case, contracts are underenforced."); Barry Perlstein, *Crossing the Contract-Tort Boundary: An Economic Argument for the Imposition of Extracompensatory Damages for Opportunistic Breach of Contract*, 58 BROOK. L. REV. 877, 885 (1992) ("For the self-interested actor, the desirability of [opportunistic breach] depends on (1) there being a less than certain chance that the manipulation will be discovered and (2) that only normal compensatory damages will be imposed for the breach.").

162. Perlstein addresses the issue in a one-sentence footnote: "Ideally, courts would require quite a high level of proof of opportunism." Perlstein, *supra* note 161, at 880 n.20. Though this is unexplained, it may reflect a recognition that the danger of inappropriately assessed damages would not exist if damages were assessed only where breach was certain.

in an activity by optimizing the take care decision. The analysis is identical to that developed above in examining deterrence, and thus further treatment would be redundant. Therefore, the same preliminary endorsement of a system of mixed verdicts that was made in Part II.A with respect to deterrence can be made here with respect to efficient breach.

C. Restitution

Unlike the criminal law, the tort system is concerned not only with punishing and deterring undesirable conduct, but also with compensating the victims of that conduct.¹⁶³ Some economists have argued that the goal of restitution should not affect policy, because the administrative costs of first-party insurance are lower than those of the legal system.¹⁶⁴ This is not, however, an *a priori* truth, and the insurance solution may have its own problems, including moral hazard¹⁶⁵ and adverse selection.¹⁶⁶ In the absence of a governmental requirement that everyone obtain insurance,¹⁶⁷ some will remain uninsured, and it may well be desirable for the legal system to ensure compensation of the injured, as well as to provide for subrogation so that insurers can recover from tortfeasors.¹⁶⁸ Moreover, insurance markets may not be available to cover for all types of unexpected losses,¹⁶⁹ and thus one goal of the tort system will be to provide compensation.

A first glance at the goal of compensating plaintiffs would suggest that whichever verdict rule is the most pro-plaintiff should be chosen. On this view, though, a verdict rule that provided compensation for plaintiffs whenever there was *any* probability of injury would better ensure that the

163. Contract law, of course, also is concerned with compensating those who are victims of breaches of contract. *E.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 347 (1979) (setting damages so that the victim of a breach of contract is made whole).

164. *E.g.*, Mark Geistfeld, *The Political Economy of Neocontractual Proposals for Products Liability Reform*, 72 TEX. L. REV. 803, 811 (1994). Geistfeld explains:

The administrative costs of insurance delivered through tort law are vastly greater than the administrative costs of any first-party insurance regime. Blue Cross-Blue Shield first-party health insurance administrative costs are 10% of benefits.... In contrast, tort law administrative costs are estimated to be 53% of net plaintiff benefits.

Id. (quoting George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1560 (1987)).

165. *Supra* note 48.

166. *Supra* note 47.

167. Germany, for example, effectively requires everyone to purchase health insurance. *See generally* Karl Hinrichs, *The Impact of German Health Insurance Reforms on Redistribution and the Culture of Solidarity*, 20 J. HEALTH POL. POL'Y & L. 653 (1995) (placing this requirement in the context of the goals of the German health care system). For an assessment of the possibility of implementing such a universal requirement in the United States, see Theodore R. Marmor & Michael S. Barr, *Making Sense of the National Health Insurance Reform Debate*, 10 YALE L. & POL'Y REV. 228, 259 (1992), which evaluates the proposal advanced in STUART BUTLER, *THE COMPETITIVE PRESCRIPTION FOR HEALTH COST INFLATION* (Heritage Found. Background No. 111, 1980).

168. For a discussion of subrogation, see ABRAHAM, *supra* note 47, at 153-55.

169. *See supra* note 46 and accompanying text.

injured receive compensation than any other rule. Such a rule, though, would be unacceptable for other reasons, and so to provide a useful analysis of restitution, we cannot embrace a pro-plaintiff bias. A useful course is to assume that the choice of a verdict rule will not affect the total damages paid by defendants. Neither of the more realistic alternatives of all-or-nothing and compromise verdicts is necessarily likely to lead to greater total damages than the other.¹⁷⁰ Thus, we can ask which verdict structure does a better job of distributing a set quantum of damages among victims.

Each approach has something to recommend it. The all-or-nothing approach reduces the chance that some of the scarce damages will be allocated to undeserving plaintiffs.¹⁷¹ In allocating the entirety of damages to those who more likely than not have been wrongly injured, the approach does not eliminate altogether the possibility that damages will be allocated to an undeserving plaintiff, but any given dollar is more likely to be assigned to a deserving plaintiff than in a system that gives damages to some who more likely than not do not deserve compensation. Compromise verdicts, meanwhile, ensure that all of those who might be wrongly injured receive at least some compensation. It may well be that the first dollar of compensation is more important than the marginal dollar,¹⁷² and thus that it is more important to compensate two injured parties halfway than to compensate one fully and one not at all.¹⁷³

170. Plaintiffs would gain from compromise verdicts when the jury perceives the probability of liability to be between 0% and 50%, but defendants would gain for jury perceptions between 50% and 100%.

171. By "undeserving," I mean that a plaintiff does not have an entitlement to recover from a particular defendant. This definition means that a plaintiff who has clearly suffered an injury but not because of the actions of the defendant does not "deserve" to be compensated. This approach finds support in theories of corrective justice, which emphasize not the right of a plaintiff to recover damages, but the right of a plaintiff to recover from someone who has wrongfully caused harm. For discussions of corrective justice, see JULES L. COLEMAN, *RISKS AND WRONGS* (1992); Jules L. Coleman, *The Practice of Corrective Justice*, 37 ARIZ. L. REV. 15 (1995); and Heidi M. Hurd, *Correcting Injustice to Corrective Justice*, 67 NOTRE DAME L. REV. 51 (1991). If this is not the appropriate view of justice, then all of the verdict rules assessed here may be inferior to a system in which all damages (save some portion needed to encourage litigation) are paid to the government, which then distributes compensation to the injured regardless of the cause of injury.

172. An injured party may face a number of expenses of different priorities as a result of the injury. While some injured parties will be able to afford all these expenses even if they receive no compensation, liquidity problems may force other victims to choose among their priorities. Because it is more important that the earlier priorities are met than the later ones, the first bit of compensation is more important than the next. Relatedly, it may be more important to provide compensation for some category of injuries (such as lost pay) than for others (such as pain and suffering). *E.g.*, Mark Geistfeld, *Putting a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CALIF. L. REV. 773, 796 (1995). Because many cases involve both types of damages, the first dollar of compensation once again is more important than the marginal dollar. Finally, the first dollar may be more important because the marginal utility of income decreases with wealth. See *supra* note 57 and accompanying text.

173. This argument also raises equality issues. See *infra* Part II.E.

Given these offsetting features, it is difficult to say for certain which approach better provides compensation of victims. A system of mixed verdicts, however, may be better in distributing damages than either of the other approaches. The mixed approach assures that victims who almost certainly deserve compensation will receive it in full, while those who almost certainly do not deserve compensation will receive none. Relative to a system of compromise verdicts, a system of mixed verdicts takes from plaintiffs most likely to be undeserving and redistributes to those most likely to be deserving. At the same time, a system of mixed verdicts assures some compensation for all those who appear with a reasonable probability to deserve compensation. There is no guarantee, of course, that any particular instantiation of a system of mixed verdicts, such as a rule that implements all-or-nothing verdicts in cases where the evidence favoring one party is beyond a reasonable doubt, will achieve a perfect compromise between the goals of avoiding compensating the undeserving and wanting to provide at least some compensation to the deserving.¹⁷⁴ But the approach generally emphasizes each goal where it can most easily be achieved.

D. Retribution

Though a dominant justification for penalties in criminal law, retribution is hardly ever invoked as a civil justice value. Indeed, it may well be because retribution is so closely associated with criminal law that it seems an ill fit for civil concerns. In American criminal law, punishment can be imposed only when proof is beyond a reasonable doubt.¹⁷⁵ Assuming this limitation to be theoretically justified,¹⁷⁶ punishment seems an inappropriate goal of a civil law system that, whether with compromise or all-or-nothing verdicts, does not require such a high level of certainty before damages will be levied.¹⁷⁷ Nonetheless, a plaintiff may pursue relief

174. Exactly how well a particular instantiation balances these dual goals depends on where the minimum and maximum thresholds are set. See *supra* note 27 and accompanying text.

175. *In re Winship*, 397 U.S. 358 (1970).

176. There is little debate in the current literature about the desirability of *Winship*, but there is considerable debate over its scope. E.g., Larry Alexander, *The Supreme Court, Dr. Jekyll, and the Due Process of Proof*, 1996 SUP. CT. REV. 191; Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 CALIF. L. REV. 1665 (1987); Note, *Winship on Rough Waters: The Erosion of the Reasonable Doubt Standard*, 106 HARV. L. REV. 1093 (1993).

177. E.g., Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1807 (1992) ("In modern legal theory the criminal and civil law share the purpose of social control; however, in the conventional paradigms, which predate the modern overlapping of the civil and criminal law, it was inappropriate to label the civil law as an instrument of social control."); S.I. Strong, *Justice Scalia as a Modern Lord Devlin: Animus and Civil Burdens in Romer v. Evans*, 71 S. CAL. L. REV. 1, 40 (1997) ("[R]etribution, while an arguably valid goal for the criminal law, is not an appropriate end for the civil law. . . . [C]riminal penalties should not be imposed unless an individual has committed some sort of crime and has been proven guilty beyond a reasonable doubt.") (footnote omitted).

in part to achieve a retributive goal,¹⁷⁸ and the legal system does not deny recovery on the ground that the plaintiff's pursuit of a remedy is not cost effective. Moreover, the retributive goal may be more important in civil law and in extralegal punishment systems than rhetoric would suggest,¹⁷⁹ and the desire to punish has an obvious place in the theory and practice of "punitive" damages.¹⁸⁰ Thus, it is worthwhile to assume for argument that retribution is an important value for civil law and to assess what consequence this has for the structure of verdicts.

The choice between compromise and all-or-nothing verdicts cannot depend simply on the maxim that it is better to let some number of guilty individuals go free than to punish one wrongly.¹⁸¹ Both all-or-nothing verdicts and compromise verdicts will impose some punishment on individuals who appear liable by more than a preponderance but whose liability is not beyond a reasonable doubt, which the criminal law would not allow.¹⁸² The standard for punishment in criminal law, however, can help an analysis of the proper standard for imposing liability in a civil law system.¹⁸³ First, there seems no reason that punishment should be tempered

178. This may seem particularly true in libel law. *E.g.*, RANDALL P. BEZANSON ET AL., *LIBEL LAW AND THE PRESS: MYTH AND REALITY* 79 (1987). The motivating force for such plaintiffs, however, may not be so much retribution as vindication. A plaintiff may use the civil process to receive official validation that an accusation leveled against the plaintiff is untrue. Much of the analysis below applies to vindication as well as to retribution. Specifically, one might argue for all-or-nothing verdicts on the ground that vindication is a good that when given equivocally is not so valuable (that is, that anything short of full vindication is not vindication at all). One problem with this approach, though, is that all-or-nothing verdicts paradoxically may prevent full vindication in any case, by grouping cases in which liability is sure with those in which there is much greater uncertainty. A system of mixed verdicts once again avoids this problem, by allowing full vindication in cases in which there is sufficient certainty to justify it, partial vindication in uncertain cases, and no vindication at all in cases in which there is little probability that a finding of liability is appropriate.

179. See Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1397-1407 (1993).

180. Punitive damages are also sometimes called "exemplary damages." *E.g.*, *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 538 (1999). This name highlights the deterrence function of punitive damages. See *supra* notes 136-157 and accompanying text.

181. See generally Alexander Volokh, *N Guilty Men*, 146 U. PA. L. REV. 173 (1997) (providing a descriptive yet humorous account of this principle).

182. I thus assume that punishment inappropriately imposed is as great an evil as punishment inappropriately denied. This is similar to Kaye's first assumption. Kaye, *supra* note 9, at 496; see also *supra* notes 56-58 and accompanying text. Unlike Kaye, however, I do not assume that this is true for each dollar of punishment.

183. It is possible to imagine a civil law regime with a heightened standard of proof. See, e.g., *Moline Mfg. Co. v. Allen Group, Inc.*, 917 F.2d 538, 541 (Fed. Cir. 1990) (requiring clear and convincing evidence to overturn a patent); cf. *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) ("This Court has mandated an intermediate standard of proof—'clear and convincing evidence'—when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'"). If such a biased standard is appropriate, then a comparison between compromise and all-or-nothing verdicts decided by a preponderance of the evidence is merely a search for the lesser of two evils. I assume that where the legal system currently embraces all-or-nothing verdicts by a preponderance of the evidence, a determination has been made that no pro-defendant bias

on account of a minimal level of uncertainty that would be insufficient to reduce punishment in the criminal law. Thus, when it appears to a very high certainty that the defendant deserves punishment, full punishment ought to be imposed. Second, it would not make much sense for full punishment to be imposed between the preponderance and beyond-a-reasonable-doubt thresholds. If the legal system's goal of achieving punishment demanded this outcome, then presumably the criminal law would use a preponderance standard. This suggests that if any punishment is to be imposed at all in such civil cases, at least the punishment should be modified. Only a system of mixed verdicts fits with both of these observations.

Even paying full damages, however, may be inadequate punishment in some cases. Punitive damages, after all, are currently imposed where applicable on top of full compensatory damages, and to the extent that the reason for imposing punitive damages is retributive, this reflects a judgment that compensatory damages may be inadequate punishment. Regardless of whether the legal system uses compromise or all-or-nothing verdicts for compensatory damages, the jury can be given the opportunity to impose punitive damages. Once again, though, adoption of a system of mixed verdicts would provide a convenient opportunity to restrict punitive damages to those cases in which liability is found beyond a reasonable doubt.¹⁸⁴ This reform would answer the criticism that punitive damages are an illegitimate supercompensatory punishment because they can be imposed on a lower standard of proof than the criminal law would require. Surprisingly, then, considerations of both deterrence and retribution recommend the same solution: a system of mixed verdicts for compensatory damages in which punitive damages may be imposed only in cases that also justify full compensatory damages.¹⁸⁵ If this is not feasible, then the alternative solution proposed in analyzing deterrence may provide a second-best solution.¹⁸⁶ By discounting punitive damages by the degree of the jury's confidence in the defendant's liability when the jury's confidence is below a certain threshold, punitive damages could be considerably lower in these cases.¹⁸⁷

is appropriate. Even if a pro-defendant bias is appropriate, one might imagine achieving it with some modified form of compromise verdicts.

184. See *supra* text accompanying note 153.

185. See *supra* text accompanying notes 152-153.

186. See *supra* text accompanying notes 155-157.

187. These approaches do bring one potential complication: what if the amount of money that the deterrence value would demand is less than the amount demanded by retribution? "There can be little doubt that judgments about outrage and punishment may diverge from judgments about optimal deterrence; people would surely want to punish someone who engaged in extremely outrageous conduct via punitive damages even if the probability of detection were 100%." Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2122 (1998). Polinsky and Shavell, while generally skeptical of the appropriateness of the retributive

This analysis, however, may seem to reflect an impoverished view of what it means for a civil verdict to impose punishment. To the extent that a defendant's punishment is the defendant's loss of utility as a result of paying the damages award, it is meaningful to speak of higher or lower damage awards as corresponding to greater or lesser punishments.¹⁸⁸ But if punishment is a goal of the civil law, then surely it is about more than loss of wealth. Important as well is that civil liability may produce stigma.¹⁸⁹ An argument against compromise verdicts might be that in seeking to impose some stigma on everyone, they succeed in imposing stigma on no one. All-or-nothing verdicts, however, are subject to attack too, for in imposing stigma on everyone who is more likely than not to deserve punishment, all who are subjected to punishment have plausible deniability. A system of mixed verdicts avoids both of these problems, by carefully distinguishing different levels of stigma. A system of mixed verdicts would impose no stigma at all on those who almost certainly should be found not liable, some stigma on those about whom there is a great deal of uncertainty, and the greatest stigma on those who almost certainly deserve punishment. By reserving the harshest stigma for those who almost certainly deserve it, a system of mixed verdicts avoids both the danger of diluting stigma by punishing too many individuals in the same way and the danger of subjecting some who may well not deserve punishment to the same level of stigma as everyone else. The adoption of a system of mixed verdicts for

rationale for punitive damages when the defendants are businesses, Polinsky & Shavell, *supra* note 136, at 948-54, offer an easy solution to this problem: the court could ask the jury to determine punitive damages using both methods and then compromise between the results. *Id.* at 955. Either the jury could be asked to find an appropriate balance or the appropriate weights could be determined by the judge as a matter of law. "The weights to be used in the determination of the compromise will reflect the relative importance accorded to the goals of deterrence and punishment." *Id.* at 955-56. An additional possibility would be to require that the jury calculate deterrence damages and then allow an upward or downward adjustment if the retributive rationale demanded a compromise. This approach would represent a determination that deterrence is generally the value advanced by punitive damages theory, but that damages may need to be altered to accommodate the requirements of justice.

188. This need not mean that paying \$100 in damages is twice the punishment of paying \$50. Because utility is an increasing but concave function of wealth, paying \$100 in damages may be more than twice the punishment of paying \$50. *Supra* note 57 and accompanying text. If the difference is meaningful (as it might be for large verdicts), and if compromise verdicts are determined to be superior to all-or-nothing verdicts, there may be an argument for making the allocation nonproportional. That is, a defendant who is liable with probability of 50% would pay more than half of the damages, since this would be necessary to impose half the punishment on the defendant. This possibility becomes less attractive, however, when the goal of retribution is combined with the goal of restitution; see *supra* Part II.C, which calls for precisely the opposite adjustment.

189. Cf. Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 332 (1996) (suggesting that civil judgments sometimes can have a great a stigmatic effect as criminal judgments); Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 312-13 (1983) (discussing the stigmatic effect of different types of civil judgments). Shame sanctions are of course generally associated with criminal law, but to the extent retribution is an appropriate goal of the civil law, then the shame or stigma associated with a civil judgment matters.

both compensatory and punitive damages, regardless of whether punitive damages are calculated based on the probability of detection or based on traditional criteria, would thus make it more plausible to think of punishment as being an acceptable goal of civil law.

E. Equality

By "equality" I refer not to distributive justice,¹⁹⁰ but to the principle that likes should be treated alike and that those who are unlike should be treated differently. For almost twenty years, however, equality has been a controversial concept.¹⁹¹ Peter Westen argued that the idea of equality is normatively empty and obscures rights that should be the true basis of discussion.¹⁹² For example, to defend the proposition that a minority should not be excluded from admission to law school on account of race, one need not and ought not invoke equality. Instead, one may simply invoke the principle that is doing all the normative work: "The state shall not deny persons the right to be free from racial injury."¹⁹³ This thesis has been subject to forceful objections,¹⁹⁴ most recently from Christopher Peters,¹⁹⁵ who points out that it is possible at least to *state* a nontautological principle of equality: that the treatment of one person in a particular way is itself a reason to treat another in the same way, independent of whether the original treatment was right or wrong.¹⁹⁶ Peters ultimately rejects this nontautological principle as normatively unattractive,¹⁹⁷ and in a separate article, he has applied this argument to adjudication, maintaining that a

190. For a defense of the principle of equality in achieving distributive justice, see Ronald Dworkin, *In Defense of Equality*, 1 Soc. PHIL. POL. 24 (1983).

191. More general philosophical disputes about equality have ancient roots. See generally Marlena G. Corcoran, *Aristotle's Poetic Justice*, 77 IOWA L. REV. 837 (1992) (discussing Aristotle's conception of equality).

192. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

193. *Id.* at 568. By "racial injury," Westen denotes an injury on account of race that the Constitution forbids. He emphasizes that there may be "cases in which using race is conceded to be acceptable," suggesting affirmative action as a possible example. *Id.* at 566. This example strengthens his case by revealing that notions of equality cannot be reflexively applied. Of course, one might argue that affirmative action is offensive, but this would be an argument about whether racial criteria are relevant in a particular setting, not about whether one person is relevantly like another person.

194. E.g., Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983); Anthony D'Amato, *Is Equality a Totally Empty Idea?*, 81 MICH. L. REV. 600 (1983). Both critics suggest that equality has a value beyond that of the substantive rules it enforces. Chemerinsky maintains that equality explains why we insist that facially neutral statutes be administered neutrally, while D'Amato argues that entirely arbitrary treatment (in his hypothetical, based on whether one's license plates terminate in an even or odd number) is unequal even if no fundamental rights are infringed. For Westen's response, see Peter Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 MICH. L. REV. 604 (1983).

195. Christopher J. Peters, *Equality Revisited*, 110 HARV. L. REV. 1210 (1997).

196. E.g., *id.* at 1212 ("The fullest, nontautological claim of the egalitarian comes down to this: sometimes a person should be treated *wrongly* simply because another, identically situated person has been treated *wrongly*.").

197. *Id.* at 1231-56.

litigant should never be treated in a particular way merely because another litigant in a previous case was treated in that way.¹⁹⁸

If equality is a tautological, empty concept, then finding one approach to verdicts superior to another must in reality be a determination based on some other normative concern. Because this Article's task is to explore the relative merit of verdict rules assuming the validity of various aims, I must work from the premise that equality is not an empty concept. Even once we assume the independent validity of a nontautological explication of equality, however, it is not immediately clear that this principle supports one type of verdict or another. After all, each kind of verdict will treat identically situated litigants alike and thus trivially promote equality. An all-or-nothing verdict will result in all defendants whom the jury has found to be liable by a probability of fifty-one percent paying full damages, and a compromise verdict will result in all such defendants paying fifty-one percent of damages. Each approach thus seems internally consistent, and a system of mixed verdicts is internally consistent as well.

Before determining how to modify the definition of equality to make the concept meaningful, let us begin with an easier question: Which approach better fosters equality when the probability that the defendant is liable is exactly fifty percent? Fortunately, John Coons has already considered this question, and indeed it is the foundation of his proposal for fifty-fifty compromise verdicts. Coons writes:

The justification for doubt-compromise in cases of factual indeterminacy lies in the principle of equality before the law If in substance plaintiff and defendant have asserted equally probable versions of the facts, and if no issue of overriding policy intrudes, the impulse to judicially imposed compromise should be strong indeed.¹⁹⁹

This argument follows naturally from Coons's assumption that the assignment of burdens of persuasion is "a virtually arbitrary process."²⁰⁰ If one defendant in a case with evenly split evidence is forced to pay full damages while another in a similar case pays none merely because of a purely arbitrary legal decision, then they have been treated inequitably.

198. Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031 (1996). A principal aim of Peters's article is to attack Ronald Dworkin's argument that "integrity" provides an independent justification for consistency in adjudication. See *id.* at 2073-112 (critiquing RONALD DWORKIN, *LAW'S EMPIRE* 164-312 (1986)).

199. Coons, *Approaches to Court Imposed Compromise*, *supra* note 7, at 757. Coons here refines the conception of equality he had expressed earlier in *Compromise as Precise Justice*, *supra* note 7, at 252-57.

200. Coons, *Approaches to Court Imposed Compromise*, *supra* note 7, at 756. It is possible that, contra Coons, burdens of persuasion do serve some substantive function. See *supra* note 42. If this is so, then his argument appears to collapse, because then there is some policy justification for treating different litigants differently, and no claim in equality arises.

This special case proves easy to analyze only because it is possible to imagine two identically situated litigants that are treated differently by the traditional verdict rule but not by the rule allowing compromise. As we have seen, however, in the absence of an assumedly arbitrary factor like a burden of persuasion, verdict rules will be perfectly consistent in applying a prespecified damages proportion to each possible probability of liability. If treating identically situated litigants alike is equality's only requirement, then equality cannot be relevant to an assessment of such rules.²⁰¹ To extend our analysis of equality beyond the special case that Coons imagines, we must accept for the purpose of argument that equality may impose demands even where two litigants in different cases are not identically situated in terms of the jury's perception of the probability of liability. Let us thus consider two alternative possible extensions to our conceptions of what equality requires and the different verdict rules under each.

The first possible extension would be to define "identically situated" as depending not on decision makers' perceptions of probability, but on whether or not the defendant is in fact liable (that is, would be held liable in a world of full information). Of course, if equality demands perfect determinations of liability, then no system of verdicts can meet the demands of equality.²⁰² But perhaps equality requires that defendants who in fact are (or, alternatively, who are not) liable should be treated as consistently as possible. A rule providing a fixed quantum of damages in all cases with any uncertainty would be the best possible verdict rule on this criterion, because all uncertain cases would be treated alike, and the variance of expected outcomes would necessarily be minimized. This rule, though, would be plainly unattractive on other normative grounds, and the relevant comparison is thus, as usual, between the all-or-nothing and compromise rules.

Which of these verdict structures produces the most consistency is ultimately an empirical question, depending on the probability distribution of decision makers' perceptions of the probability of liability. For example, suppose that when a defendant is liable, the distribution is uniform, so that a jury is just as likely to find a twenty-two percent probability of liability as it is to find a sixty-one percent or eighty-three percent probability. Then, the compromise verdicts rule certainly will lead to less dispersion of outcomes than the all-or-nothing rule. Suppose, however, that uncertainty is usually slight (that is, that in the vast majority of cases in which the

201. Any one-to-one mapping of probabilities to damages proportions meets this narrow definition of equality. This criterion is satisfied by a traditional verdict with a burden of persuasion used as a tiebreaker, as well as peculiar rules such as one that would require the defendant to pay damages if and only if the probability is between 70% and 80%, as long as these rules are applied consistently.

202. Cf. Peters, *supra* note 198, at 1234 ("To posit such conditions is to say that justice demands the impossible; and to say that justice demands the impossible is to contradict oneself.").

defendant is in fact liable, the jury will have a very high degree of confidence that the defendant is liable). In this scenario, the all-or-nothing rule may well reduce the variability of outcomes, because the vast majority of cases or perhaps even all cases in fact will be decided correctly under that rule.²⁰³

In the absence of knowledge of the precise probability distribution, a system of mixed verdicts may be superior to both the all-or-nothing rule and compromise verdicts in assuring consistency. By compromising in the center of the probability distribution, a system of mixed verdicts greatly reduces the magnitude of the error that occurs when a defendant who should not be found liable is incorrectly thought by a bare preponderance of the evidence to be liable. At the same time, by imposing all-or-nothing solutions at the ends, a system of mixed verdicts minimizes the number of cases in which there is any inconsistency on account of a slight possibility of error. In practice, of course, the superiority of a system of mixed verdicts depends ultimately on what the distribution is and where the probability thresholds for switching between all-or-nothing and compromise verdicts are set.

Perhaps this extension of our conception of equality is unattractive, however, and what is relevant in assessing equality is not whether a defendant in fact is liable, but how the jury perceives the defendant. Equality according to this second extension is not about outcomes but about state action.²⁰⁴ Though we have seen that all verdict rules will trivially pass an equality test inquiring how identically perceived defendants are treated, an alternative test would be to inquire how consistently defendants who are perceived slightly differently are treated. The all-or-nothing approach will usually treat two slightly differently perceived defendants entirely consistently. However, in the case of defendants whose probabilities of liability are forty-nine percent and fifty-one percent, the all-or-nothing approach will treat these two defendants completely differently. Compromise verdicts, on the other hand, will always treat slightly differently perceived defendants slightly differently such that there will be no gross discontinuities.

It is impossible to show that one of these approaches better meets our second revised conception of equality, but there is at least a strong

203. Whether it in fact reduces variability depends both on the exact probability distribution and on the definition of variability. After all, if the range (the difference between the highest and lowest numbers) is used to measure variability, then a single error by the all-or-nothing rule will lead to a range of 100% for identically situated litigants, while compromise verdicts will usually produce a smaller range.

204. *But cf.* Charles L. Black, Jr., *The Supreme Court 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967) (arguing for a loosening of the state action requirement in equal protection doctrine). My purpose here is not to determine what the best definition of equality is, but to assess the verdict rules against various plausible definitions.

argument that the compromise verdicts approach is superior. If equality demands anything at all when two individuals are not quite identically situated, it probably does not demand that they be identically treated. On this account, the inconsistency between how the thirty-six percent and the thirty-eight percent likely liable defendants are treated under a system of compromise verdicts does not suggest inequality properly conceived at all, for the difference in treatment is a proportional response to the difference in perception. The discontinuity around fifty percent of all-or-nothing verdicts, on the other hand, is troublesome, because the difference in treatment is disproportionate to the difference in jury perceptions. If equality requires any degree of proportionality between liability imposed by the court and liability perceived by the fact finder, then compromise verdicts are superior.

A counterargument might be that if equality does make demands when individuals are not identically situated, its demands do not depend on the jury's subjective numeric probability estimate that the defendant is liable, but on whether the jury's best guess is that the defendant is or is not liable. On this account, there is no inconsistency at all in the all-or-nothing approach, because the distance that separates the forty-nine percent and fifty-one percent defendants is not two percentage points but an epistemic gulf. The discontinuity, however, could be moved to other points also representing epistemic rather than probabilistic differences. Arguably, a more meaningful "epistemic gulf" is not the point at which juries are most uncertain, but the point at which the decision maker will not leave feeling considerable uncertainty as to the verdict. The threshold of clear-and-convincing evidence, or perhaps that of beyond-a-reasonable-doubt, may well represent this point. Moreover, even if two cases might be distinguished by being just on either side of such a standard, imposing a compromise verdict (say, eighty percent damages) on one and an all-or-nothing verdict on the other produces treatment that is far less disparate than imposing zero damages in a case just on one side of the fifty percent threshold and one hundred percent damages in a case just on the other side.²⁰⁵

These dueling considerations furnish yet another argument for a system of mixed verdicts. A system of mixed verdicts enhances equality in this second sense by reducing the magnitude of discontinuities and placing them at meaningful points along the probability continuum rather than at the point of greatest uncertainty. Between these points, meanwhile, compromise verdicts reduce inequity. This argument is supported by the analysis of a recent commentator, who argues that "[t]he force of equality

205. A similar observation is relevant to analysis of settlement rates. *Infra* text accompanying note 233.

varies . . . in inverse proportion to our confidence in judgment."²⁰⁶ We may be most concerned about equality in the cases that are least certain, because in those cases the danger that an irrelevant factor may sway a decision is greatest. Thus, any inequity around the discontinuities created by a system of mixed verdicts is of less concern than inequity around the fifty percent probability threshold of the all-or-nothing system.

That the existence of large discontinuities dependent on small differences in proof is offensive to equality may not be surprising. What is perhaps more surprising is that this discontinuity is not necessary for achieving other values of law, such as deterrence, efficient breach, restitution, or retribution. Indeed, as I have shown in this Part, the traditional all-or-nothing approach to verdict structure seems inconsistent with these values. Although compromise verdicts might be problematic as well, mixed verdicts largely avoid the problems of compromise verdicts by preventing such verdicts when the evidence is unbalanced. This thereby furnishes a strong case for adopting or experimenting with such a system, as long as the monetary costs such adoption would impose on the parties are not too large.

III

THE EFFECT OF VERDICT STRUCTURE ON LITIGATION COSTS

The analysis of the effect of verdict structure on legal values applies not only to cases brought to trial, but also to cases that are settled before trial. If a system of compromise verdicts were adopted and litigants settled a particular case at seventy-five percent damages anticipating that a verdict would be in that amount, this legally binding settlement would promote the values discussed as much as an equivalent judgment after a jury trial.²⁰⁷ The dynamics of the litigation process, however, are critical to an analysis of verdict structure, because of the possibility that they might affect litigation costs.²⁰⁸ Costs might increase because compromise verdicts

206. Joshua D. Sarnoff, *Equality as Uncertainty*, 84 IOWA L. REV. 377, 380 (1999). Sarnoff explains, "The less confident we are that our criteria are morally valid, the more concerned we become that our judgments are based on irrelevant distinctions or arbitrary motivations." *Id.* at 381.

207. Two caveats are in order. First, there might be greater deterrence produced by cases that go to trial because of litigation costs. Shavell, however, persuasively argues that it is a mistake to conclude "that because settlement allows injurers to pay less than they would were they to go to trial, settlement might undesirably dilute deterrence." Steven Shavell, *The Level of Litigation: Private Versus Social Optimality of Suit and of Settlement*, 19 INT'L REV. L. & ECON. 99, 101 (1999). He explains that "a general problem of inadequate deterrence can be alleviated by the socially inexpensive means of imposing a tax on settling injurers (or by increasing court awards, which would be reflected in settlements)." *Id.* Second, for a defendant, enduring a trial might itself be a form of punishment or retribution. It may also be one for the plaintiff as well, though. Moreover, once again, a settlement tax could presumably equalize the aggregate effect of punishments for defendants who settle or go to trial if that were an important goal.

208. Rosenberg addresses the argument that compromise verdicts would increase litigation costs, but he focuses mostly on the particulars of the mass tort context. See Rosenberg, *supra* note 10, at 887-

increase the number of suits filed, because they reduce the number of cases settled, or because they increase parties' litigation expenses. This Part will consider each of these possibilities in turn and demonstrate that compromise verdicts might well not have these effects. Moreover, it will show that a system of mixed verdicts would greatly diminish the possibility of frivolous suits while reducing litigation expenses in other suits, thus likely leading to an overall decrease in litigation costs.

A. *Filing of Frivolous Litigation*

The intuition that compromise verdicts will increase the number of lawsuits filed is simple: Because plaintiffs can expect to obtain some recovery in a system of compromise verdicts as long as they can show even a small probability of liability, many will file lawsuits that they would not file in a system in which they needed to persuade juries of liability by a preponderance of the evidence. Steven Shavell expands this logic with a simple mathematical model in an appendix to his otherwise favorable assessment of compromise verdicts.²⁰⁹ Suppose, Shavell argues, that the prospective plaintiff's estimate of the probability of liability is less than fifty percent.²¹⁰ The plaintiff will then never sue in a system of traditional verdicts, but will still file suit in a system of compromise verdicts if the estimate of the probability times the loss is greater than the litigation cost.²¹¹

There are several problems with this argument. Shavell recognizes the first, which is that even in this simple model, there will be cases in which the plaintiff will bring suit in a system of traditional verdicts but not in a system of compromise verdicts.²¹² Suppose the plaintiff estimates the probability of liability at greater than fifty percent.²¹³ If the product of this probability and the loss is less than the cost of litigation, then the plaintiff

905. Kaye briefly addresses the costs of compromise verdicts, but he concludes only that the "situation . . . is complex if not downright murky." Kaye, *supra* note 9, at 495-96.

209. See Shavell, *Uncertainty over Causation*, *supra* note 11, at 608-09.

210. Shavell does not limit his analysis to verdict rules in which 50% is the threshold probability that the plaintiff must meet to obtain full recovery. Instead, his model applies to any threshold criterion t , $0 < t < 1$. *Id.* at 608. I assume a 50% criterion, without loss of generality, because that represents the preponderance rule.

211. *Id.* ("[I]f $c_p \leq t$, then the situation is simply that the plaintiff will never bring suit under the threshold criterion but will do so under the proportional approach if $c_p l > k$."). Translating Shavell's notation, c_p is the plaintiff's estimate of the probability of causation, t is the threshold probability, l is the dollar amount of the loss, and k is the cost to the plaintiff of bringing suit. *See id.*

212. Rosenberg recognizes this possibility as well. Rosenberg, *supra* note 10, at 894 ("Proportional liability would thus exclude at least some such mass exposure claims from the courts.").

213. Shavell uses the phrase "probability of causation." Shavell, *Uncertainty over Causation*, *supra* note 11, at 608-09; *see also supra* note 131 and accompanying text (noting that Shavell's main argument is about joint causation rather than factual uncertainty). The ultimate question is probability of liability. Shavell's model assumes that there are no issues other than causation, but it is easily generalized to cases in which there are a variety of uncertainties and the plaintiff calculates a probability of liability.

will not bring suit in a system of compromise verdicts. In contrast, the plaintiff in such a case will file suit in a system of traditional verdicts as long as the loss is greater than the litigation cost. Thus, the claim that there will be more litigation in a system of compromise verdicts reduces to the following assertion: Under a system of compromise verdicts, the increased volume of litigation in cases in which the probability of liability is less than fifty percent will be greater than the decreased volume of litigation in cases in which the probability of liability is greater than fifty percent.²¹⁴ Yet the reverse could hold as well,²¹⁵ and in any event the difference in the total volume of litigation is likely to be small. Perhaps the real concern is that compromise verdicts will lead to more bad suits being filed and fewer good suits. This, however, is an argument about deterrence and other values the law seeks to promote, not about litigation costs.²¹⁶

The claim, however, has a deeper flaw. Shavell assumes that when the plaintiff's estimate of the probability of liability is greater than fifty percent, the expected gain from litigation is the entire amount of the loss, and that when the plaintiff's estimate of the probability of liability is less than fifty percent, the expected gain from litigation is zero.²¹⁷ In other words, Shavell assumes that, in a system of traditional verdicts, when the plaintiff's best guess is that she will win, she acts as if she will definitely

214. See Shavell, *Uncertainty over Causation*, *supra* note 11, at 608. ("Thus the claim made in the text that suit is more likely under the proportional approach amounts to a claim that it is more likely that $c_p \leq t$ and $c_p l > k$ than it is that $c_p > t$ and yet $l > k > c_p l$.")

215. Whether the total volume of litigation under a system of compromise verdicts is more or less than under an all-or-nothing system may well depend on the size of the claims. When the loss, l , is very high, it is unlikely that the litigation cost, k , will exceed 50% of the loss. Thus, few plaintiffs with large losses who estimate the probability of liability, p , as greater than 50% will refrain from filing suit under a system of compromise verdicts. Another way of expressing this point is to see that when l is very much greater than k , reducing l by a probability p between 0.50 and 1.00 will not cause pl to be less than k . Since a difference in the volume of cases filed under the two different verdict structures will result only if $pl < k < l$, according to Shavell's model, plaintiffs with large losses who estimate the probability of liability below 50% might still sue under a system of compromise verdicts, but probably not under a system of traditional verdicts. *But see infra* text accompanying notes 217-219 (explaining why plaintiffs estimating the probability of liability below 50% might still sue under an all-or-nothing system).

When the loss is very low, the litigation cost, k , will likely exceed 50% of the loss, l , in which case compromise verdicts will deter most high probability plaintiffs from suing. That is, where l is small, pl will likely be less than k . Plaintiffs in this situation will not sue. Low probability plaintiffs with small losses also probably will not sue because pl will be even less than k in this circumstance (because p will be lower) than where the plaintiff estimates a high probability of liability.

216. For a consideration of how compromise verdicts affect the promotion of these values, see *supra* Part II. The argument, in any event, may not be a good one. Suit in a case with a probability of liability of less than 50% against any particular defendant may well serve an important social function. After all, there may be certain types of offenses that can never be demonstrated to have occurred with a probability of greater than 50%. For example, we may not be able to determine, at least not without costly technology investments, which of several adjacent factories is responsible for illegal pollution.

217. Shavell states, for example, that if c_p is "the plaintiff's estimate of the probability of causation," then "if $c_p > t \dots$ the plaintiff would receive a judgment (or settlement) of l ." Shavell, *Uncertainty over Causation*, *supra* note 11, at 608.

win, and that when her best guess is that she will lose, she assumes that she will recover nothing. The possibility that the jury's estimate of the probability of liability will differ from the plaintiff's makes this assumption untenable. A plaintiff who believes that there is a sixty percent chance that the defendant ought to be held liable will not conclude that there is a one hundred percent chance that the defendant will be held liable. Though it might be possible to imagine some case so heavily dependent on statistical evidence that any observer could be sure that all others would arrive at the same probability estimate, this is likely to be the exception.²¹⁸ Indeed, as we have seen, the plaintiff's expected gain from litigation in a system of traditional verdicts will roughly track expected gain in a system of compromise verdicts.²¹⁹ Only the expected judgment affects whether a plaintiff will file a lawsuit, and so when the expected gain from litigation is equal with both traditional and compromise verdicts, there is no effect on the volume of litigation.

There will, however, be cases in which the expected gain does differ significantly in the two systems. This difference is most likely to occur in cases in which the plaintiff's estimate of the probability of liability is very high or very low. For example, when the plaintiff's estimate of the probability of liability is only twenty percent, it is likely that the plaintiff will expect to win in only a very small proportion (say, five percent) of cases in a system of traditional verdicts, because the possibility that the jury's estimate will differ from her own by over thirty percent is remote.²²⁰ In such a case, the plaintiff might well bring suit in a system of compromise verdicts that she would not bring in a system of traditional verdicts. For this class of low-probability plaintiffs, Shavell's criticism that compromise verdicts increase the volume of litigation has bite. On the other hand, compromise verdicts will deter few suits with very high-probability plaintiffs that would be brought in a system of all-or-nothing verdicts, making it more likely that compromise verdicts will increase the total volume of litigation for cases at the end of the probability spectrum.

In a system of mixed verdicts, however, cases with very strong evidence for one side or the other result in all-or-nothing verdicts. Thus,

218. Even in cases heavily dependent on statistical evidence, the reliability of the statistical evidence may be a central, not easily quantified question. This problem arose in the O.J. Simpson case, in which the DNA evidence amassed against the defendant did not persuade a jury that thought police officer Mark Fuhrman might have planted Simpson's blood on the scene. *E.g.*, William C. Thompson, *DNA Evidence in the O.J. Simpson Trial*, 67 U. COLO. L. REV. 827, 827 (1996) ("[T]he Simpson case revealed serious problems regarding the collection and handling of biological samples and the potential for cross-contamination of evidence . . .").

219. *Supra* text following note 42.

220. One way such a plaintiff may expect to win is if the jury "nullifies" the law, but the chances of that are remote. *See generally* Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877 (1999) (arguing that juries rarely nullify judicial instructions). *See also supra* Part I.A.1 at Figure 1 and accompanying text.

even if compromise verdicts do increase slightly the probability of suit in cases in which the probability-adjusted damages are greater than the cost of litigation but still quite small, a system of mixed verdicts virtually eliminates this effect.²²¹ Similarly, a system of mixed verdicts greatly diminishes the possibility of a frivolous defense by a defendant in a case in which the probability of liability is very high and thus may reduce the number of cases that plaintiffs file after futile initial settlement negotiations.

B. Settlement

Shavell also worries that compromise verdicts will lead to a reduced settlement rate in cases that are filed, but this aspect of his argument is subject to objections similar to those described in Part III.A as well as new objections. Whenever both the plaintiff and the defendant independently agree that the probability of liability is greater than fifty percent, Shavell argues, a settlement is more likely in a system of traditional verdicts than in a system of compromise verdicts.²²² Both parties in such a case agree that the trial will end with the defendant having to pay damages, and thus with traditional verdicts, there will necessarily be a range of settlements that would be advantageous to both parties.²²³ Similarly, whenever the plaintiff believes that the probability of liability is less than fifty percent, the plaintiff will agree to any settlement in a system of traditional verdicts, for it will save the plaintiff litigation costs.²²⁴ By contrast, in both of these scenarios, a system of compromise verdicts might not produce settlements because the estimates of the probability of liability might differ by enough to make an agreeable settlement impossible to determine.²²⁵ For example, the plaintiff might estimate the probability of liability at eighty percent while the defendant estimates it at sixty percent. According to Shavell, this

221. There may still be a very small number of cases in which a plaintiff would bring a suit in a system of mixed verdicts that she would not bring in a system of traditional verdicts. Even if the plaintiff's estimate of the probability of liability is within the range for which mixed verdicts would assign zero liability, there is a possibility that the jury's estimate of the probability might be higher, perhaps sufficiently higher to pass the threshold between no liability and some liability.

222. Shavell, *Uncertainty over Causation*, *supra* note 11, at 608-09.

223. Extending his notation so that c_d is the defendant's estimate of the probability of causation and k_p and k_d are the plaintiff's and defendant's cost of trial, Shavell observes that "there will be a settlement, for both parties will agree that a judgment for l will result from trial; thus any amount in $(l - k_p, l + k_d)$ will be a mutually satisfactory settlement." *Id.* at 608.

224. *Id.* at 609. More recent scholarship suggests that plaintiffs sometimes will file and even take to trial "negative expected value" suits (that is, lawsuits in which the plaintiffs expect that the cost of trial will exceed any damages they expect from the verdict). *E.g.*, Lucian Arye Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. LEGAL STUD. 1 (1996); Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 534-77 (1997); David Rosenberg & Steven Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3 (1985).

225. *E.g.*, Rosenberg, *supra* note 10, at 897.

will lead to an easy settlement in a regime of all-or-nothing verdicts, because both parties will believe that the plaintiff will achieve a full victory, but in a regime of compromise verdicts, the difference in the parties' expected damages might thwart settlement.²²⁶

The same problem that exists in his model of incentives to bring suit exists here as well. Once again, Shavell's analysis is predicated on his assumption that in a system of traditional verdicts, a party's estimate of the probability of liability can be easily transformed into a prediction of either zero or full expected damages. If, as I have argued,²²⁷ the expected value of litigation is roughly the same in systems of all-or-nothing verdicts and in systems of compromise verdicts, then compromise verdicts will produce neither more settlements in cases that straddle the probability threshold nor fewer settlements in cases that do not straddle this threshold. A switch to a system of compromise verdicts, therefore, is unlikely to have a large effect on the frequency of settlement, and any analysis of the effect it will have must examine the divergence between the expected value curves in the alternative systems.

Shavell's model has another defect. Shavell recognizes that under his model there will be situations in which settlement might occur with compromise verdicts that would not occur in a system of traditional verdicts. If the plaintiff believes that the probability of liability is greater than fifty percent and the defendant believes that the probability is less than fifty percent, the divergence in the parties' predictions in a system of traditional verdicts is so great that settlement will not be reached unless the costs of trial exceed the amount at issue.²²⁸ The divergence, he asserts, will not be as great with compromise verdicts, thus making such verdicts more conducive to settlement in these cases.²²⁹ Because this circumstance arises "only when it happens that the plaintiff's estimate of the probability lies above the threshold and the defendant's lies below the threshold," however, Shavell announces a "suspicion" that compromise verdicts will increase the quantity of litigation.²³⁰

This inference is invalid. Cases in which the plaintiff's and the defendant's estimates straddle the probability threshold may be the minority, but in his model, this straddling leads to an enormous difference in predictions with traditional verdicts. In the other two situations, compromise verdicts will lead to fewer settlements, but perhaps not so many

226. Shavell, *Uncertainty over Causation*, *supra* note 11, at 608-09.

227. *Supra* text following note 42.

228. See Shavell, *Uncertainty over Causation*, *supra* note 11, at 608-09 ("[T]here will be a trial when $l > k_p + k_d$ (for this means that the plaintiff's minimum demand of $l - k_p$ exceeds the defendant's maximum offer of k_d).").

229. *Id.* at 609 ("Under the proportional approach, there will be a trial when $c_p l - c_d l > k_p + k_d$ (for this means $c_p l - k_p > c_d l + k_d$).").

230. *Id.*

fewer, given that the difference in expected outcomes is still relatively small. Shavell counts the frequency of scenarios in which settlement is more or less likely under the two verdict structures without exploring how much of a difference it makes. Because compromise verdicts in Shavell's model will produce far more settlements than traditional verdicts in the straddling scenario he describes, any ultimate conclusion that traditional verdicts will produce more settlements overall seems hazardous.

An analysis of compromise and all-or-nothing verdicts must take into account both of these clarifications of Shavell's analysis. Let us first consider the effect of relaxing Shavell's assumption that each litigant's expected damages will be either zero or one hundred percent in a system of all-or-nothing verdicts. The expected value of litigation in a system of compromise verdicts rises linearly with the probability of liability. Recall that the curve for the expected value of litigation in a system of all-or-nothing verdicts is likely to be above this line for probabilities greater than fifty percent and below this line for probabilities less than fifty percent,²³¹ flattening to near horizontal for very high and very low probabilities of causation. The curve for the expected value of all-or-nothing verdicts is thus likely to be steeper than the line for compromise verdicts near fifty percent and flatter on the ends of the probability continuum. The steeper the curve, the more difficult settlement becomes because of the greater effect that differences in estimates of the probability of liability will have on estimates of expected damages.

Thus, settlement is more likely in the middle of the probability spectrum with compromise verdicts and on the ends of the probability spectrum with all-or-nothing verdicts. A system of mixed verdicts consists of compromise verdicts in the probability zone where these are more likely to lead to settlement and all-or-nothing verdicts in the probability zones where these are more likely to lead to settlement. Of course, if the expected value curve for a system of mixed verdicts, which one can visualize in Figure 1 by combining the two existing curves, is a combination of the relatively flat area of one curve near fifty percent and the relatively flat areas of the other curve on the ends of the probability continuum, there

231. *Supra* Part I.A.1 at Figure 1. It is possible that the curve is more complicated than this. For example, suppose jurors naturally gravitate towards verdicts of 50%. *But cf. supra* text accompanying notes 81-83 (suggesting that jurors not be allowed to announce a verdict of exactly 50%). Then, the expected value of litigation will be lower in a system of traditional verdicts than with compromise verdicts for probabilities of causation just over 50%. In this scenario, the expected value curve for traditional verdicts will be relatively horizontal around 50% before rising steeply at around 60% or 70%. The net effect on settlement of this possibility is indeterminate. When both the plaintiff and the defendant estimate the probability of causation quite close to 50%, settlement would be more likely with traditional verdicts. Further away from 50%, settlement would be more likely with compromise verdicts. Then, at the highest (and lowest) probabilities, settlement would again be more likely with traditional verdicts.

must be someplace where the curve is quite steep.²³² This is where the second criticism of Shavell's model becomes relevant. The distance between the top and bottom of the steep portion of the curve is as important as its steepness. This gap is likely to be of much smaller magnitude under a system of mixed verdicts than under a system of all-or-nothing verdicts.²³³ Thus, unless there are more cases near these discontinuities than around the fifty percent probability threshold,²³⁴ adoption of a system of mixed verdicts seems likely to increase settlement rates relative to either of the alternatives.

A full assessment of the effects of verdict structure on settlement, however, must extend beyond this model to examine the various causes of settlement. My analysis so far fits most comfortably with the theory that settlement fails when parties have asymmetric information, and thus different predictions of the probability of victory in court.²³⁵ A distinct but similar theory is that "mutual optimism" is the cause of failure.²³⁶ On this theory, settlement negotiations fail not so much because parties have different information, but because they interpret the information that they have differently. For most analytic purposes, this distinction is without difference.²³⁷ Nevertheless, if two parties have different assessments of the probability of liability based on the same evidence, then the above analysis still applies.

It is possible, however, that opposing litigants have similar predictions of the probability that the defendant should be held liable, but have different assessments of the probability that the jury in a system of traditional verdicts will hold them liable. Stated differently, the litigants in a particular case may have different beliefs about the shape of the expected value curve for traditional verdicts. For example, even if the plaintiff and the defendant both believe that the probability of liability is fifty-five percent, the plaintiff might believe that eighty percent of jurors would conclude that the probability is greater than fifty percent, while the defendant

232. See *supra* Part I.A.1 at Figure 1.

233. *Supra* text accompanying note 205. Of course, the magnitude will not be from 0% to 100% damages around the 50% probability threshold with all-or-nothing verdicts, given the above argument. Nonetheless, the distance between the flat part of the curve at the bottom of the probability spectrum to the flat part of the curve at the top will be much less than the distance between a flat part in the middle and the flat parts on either side. See also *supra* note 28 (suggesting a way to eliminate discontinuities under a system of mixed verdicts).

234. This seems unlikely given any model of the settlement process. See *supra* note 111 (noting that the Priest-Klein selection model suggests that, if anything, litigated cases are likely to be the closest cases, and thus near the 50% probability threshold).

235. For a review of and comment on the literature, see Evan Osborne, *Who Should Be Worried About Asymmetric Information in Litigation*, 19 INT'L REV. L. & ECON. 399 (1999).

236. *Supra* note 36.

237. Robert H. Gertner & Geoffrey P. Miller, *Settlement Escrows*, 24 J. LEGAL STUD. 87, 95 (1995) ("[I]f litigants have different opinions, it is likely that the opinions themselves will be private information. In this case, the optimism model is quite similar to the asymmetric information model.").

believes that sixty percent of jurors would conclude that the probability is greater than fifty percent. In this model, the parties are not optimistic about the evidence, but about the chance that the jury will favor them.²³⁸

If this form of mutual optimism is a common cause of settlement, then a system of mixed verdicts is likely to help. This prediction, however, must be tentative, for it relies on two premises. The first is that the effect of mutual optimism will be less under a system of compromise verdicts than under a system of traditional verdicts. That is, although each party's estimation of the expected value function might be biased under both compromise and traditional verdicts, the latter expected value function will be even more biased. This seems plausible both because the shape of the expected value line is much more uncertain for traditional verdicts,²³⁹ and because a litigant is less likely to believe that a jury asked to make a probability determination would be picking which side to favor. The second is that mutual optimism is far more likely to be significant in close cases than in lopsided ones. This premise is plausible because self-deception about the possibility that a jury will favor a litigant may be easier when the evidence is relatively close than when it is truly overwhelming. If both of these premises hold, then a system of mixed verdicts addresses the mutual optimism problem in just the probability zone in which it is likely to be most problematic.

Three other possible sources of difficulty in settlement should also be considered. The first is strategic bargaining.²⁴⁰ Even if two litigants have overlapping settlement ranges (that is, even if there are some hypothetical settlements that would leave both parties better off than going to trial), settlement still may fail because the parties cannot agree on where in the particular range a settlement should be reached. Strategic bargaining is more likely to be a problem when it is easier for parties to bluff about how they perceive the strength of their own positions.²⁴¹ A bluff is most plausible where the relevant expected value function is steep and a small difference in assessments of the strength of the evidence lead to large differences in predictions about outcomes. The analysis is thus the same as that applicable for the standard asymmetric information case. A system of mixed verdicts, by choosing the relatively flat portion of both the

238. Mutual optimism, however, may well not stem from differential beliefs about the decision maker. It may simply be a product of a psychological phenomenon in which new evidence makes partisans increasingly confident in their beliefs even when that evidence is equivocal. *E.g.*, Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 111-13 (1990).

239. Although the function is likely to be linear for compromise verdicts, it is more difficult to guess the exact shape of the function for traditional verdicts. *Cf. supra* note 231 (noting an alternative possible shape of the curve).

240. See *supra* note 38 and accompanying text.

241. *Cf. e.g.*, Gross & Syverud, *supra* note 2, at 52 (noting that litigants may bluff in settlement negotiations by concealing or distorting information).

compromise and the traditional expected value functions, makes it more difficult to bluff.²⁴²

The second possibility is that settlement might be precluded because one party insists on a day in court. Often this will be an injured victim who would see anything less than full victory as another injury, though it also might be a defendant who seeks full exoneration.²⁴³ Compromise verdicts might decrease the chance that parties will refuse to settle in hopes of a complete victory because complete victories will be more rare under a system of compromise verdicts. In these cases, compromise verdicts are likely to produce more settlements than a system of either traditional or mixed verdicts. Virtual elimination of the possibility of achieving full exoneration, however, may in itself be unacceptable for reasons unrelated to settlement. It may be a goal of the legal system to vindicate litigants who should be vindicated.²⁴⁴ A system of mixed verdicts effects a compromise between the value of settlement and the value of complete exoneration. This approach preserves exoneration in the cases in which it is most appropriate while encouraging settlement in cases in which the evidence is far less clear and in which exoneration might even be inappropriate.²⁴⁵

The third possibility is that litigation might ensue because the parties have relatively little to lose from it. For example, parties might have little to lose in a case in which legal fees are not expected to be high. Litigation arising from this cause is still troubling, because even in cases where the private cost of litigation is low, the public cost may be high. Systems of compromise or mixed verdicts may make this problem worse by reducing the risk of litigation.²⁴⁶ Even if the expected value of litigation is similar with compromise and traditional verdicts, the actual results of a trial may be highly variable in close cases, and the prospect of this variability itself may contribute to settlement. This effect, however, is a weak argument for

242. It will be easier to bluff, however, in cases that are quite close to the probability thresholds at which mixed verdicts change from compromise verdicts to all-or-nothing verdicts. Thus, an ultimate comparison of settlement rates depends on the distribution of the probability of liability across cases. If many cases were concentrated at the two probability thresholds, then a system of mixed verdicts might reduce settlements. Once again, however, placing the discontinuity here seems superior to placing it at exactly 50%, as do traditional verdicts, because the *magnitude* of bluffs will be much less here. *Supra* paragraph following note 230.

243. The latter possibility may be made more frequent by insurance policies that give the defendant the right to decline settlements. See generally Robert E. Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136 (1954) (discussing possible conflicts between insurers and insureds in settlement negotiations). A defendant who only has to pay the insurance deductible will be unconcerned from a financial perspective with the magnitude of damages, but may suffer considerable reputational costs from paying anything to the plaintiff. A defendant may also be more willing to indulge a desire to defend his reputation in a public forum when he knows that an insurance company will cover the bills.

244. *Supra* note 178.

245. Cf. *supra* text following note 189 (noting that a system of mixed verdicts enhances the meaningfulness of an all-or-nothing verdict by reserving this verdict for the strongest cases).

246. *Supra* notes 77-80 and accompanying text.

preferring traditional verdicts. After all, if it were desirable to impose costs on litigants so that they would settle, a litigation tax would be preferable.²⁴⁷ The cost of risk is a deadweight loss, while a directly imposed tax is a transfer payment. Thus, if the current system imposes costs on litigants that compromise verdicts would eliminate, then even if these costs were useful in some respects, society would be better off eliminating them and substituting direct taxes that also would have the benefit of providing revenue for the treasury. Taxes on litigation may well not be desirable, but this argument shows that encouraging settlement by fostering uncertainty is even less desirable. Because all of the other reasons that cases do not settle suggest more settlement in a system of mixed verdicts, the existence of settlement only strengthens the case for the adoption of such a system.

C. *Costs of Trial*

Even if compromise verdicts or a system of mixed verdicts are unlikely to increase the number of cases tried, they might increase the cost of litigation if the cases that do end up in court cost more to try. Because the jury would need to decide not only whether the defendant is more likely liable than not, but also precisely what the likelihood is that the defendant is liable, litigants might put forward more evidence than they otherwise would. Such an increase in costs seems unlikely, however. Regardless of the verdict structure, litigants will have incentives to present any evidence that will make the decision maker think the defendant's liability considerably more or less likely. A system of compromise or mixed verdicts might affect litigants' incentives to introduce fairly equivocal evidence, but this effect will work in both directions.²⁴⁸ Compromise verdicts might cause a litigant who is losing badly to introduce relatively weak evidence that is expected to change the jury's liability assessment only slightly, say, from ninety percent to eighty-eight percent, but a system of mixed verdicts overcomes this problem by making slight doubts in strong cases irrelevant. Moreover, a system of compromise or mixed verdicts might make litigants less likely to introduce weak evidence in a close case, because a marginal piece of evidence can no longer be the proverbial straw that breaks the camel's back. A litigant would not introduce such evidence if the cost of doing so is greater than the likely corresponding change in expected damages.

247. Cf. Shavell, *supra* note 207, at 101 (noting that if settlement is too frequent, a tax on settlement could be imposed).

248. Consider, for example, evidence that the plaintiff estimates would lead the jury to a 40% liability finding. The plaintiff would never introduce this evidence in a system of traditional verdicts, but might under a system of compromise or mixed verdicts, if the plaintiff believes that the jury otherwise would be likely to assess an even lower finding. At the same time, though, a plaintiff might choose not to present evidence indicating a mere 60% chance of liability, if the plaintiff believes that the jury otherwise would assess liability at a higher percentage.

Even if the amount of evidence is unaffected by compromise verdicts, it is possible that greater resources might be expended arguing about the evidence. Lawyers, for example, might decide to make more explicitly probabilistic arguments in a system of compromise or mixed verdicts, particularly if the jury is required to provide a numeric verdict rather than select one of several standards, like "clear and convincing evidence."²⁴⁹ Lawyers generally, however, simply seek to portray the evidence as being as consistent as possible with their story of what occurred,²⁵⁰ concluding their qualitative analysis with a statement of why they should win given the standard of review. Just as lawyers typically do not now explicitly maintain that there is a sixty percent chance of liability, and therefore the preponderance standard is met, so too would they be unlikely in a system of compromise or mixed verdicts to make explicitly mathematical arguments, or at least no more likely than in a system with the preponderance standard. Rather, lawyers are likely simply to try to make as strong a case as possible and hope for the best outcome possible.²⁵¹

The one type of discussion that a system of compromise or mixed verdicts might prolong is jury deliberation. I have already noted and discounted the possibility that jury deliberations might be shorter, because jurors with different views might compromise rather than deliberate.²⁵² The obverse concern is that jurors might spend more time deliberating, as they must come to a more precise agreement than would be required in a system of all-or nothing verdicts. Additional time deliberating in itself is a minor concern, though. If anything, more deliberation should be encouraged, for the more the jury scrutinizes the evidence, the better its understanding of competing arguments is likely to be. On the other hand, a failure to agree could in some cases lead to a mistrial that would not have occurred in a system of traditional verdicts. This is likely to be rare, however, for the same reason that juries that agree on liability rarely hang on damages.²⁵³ Moreover, if this became a significant problem, the legal system could allow a judge to permit a jury to select a probability level by majority rather than unanimous vote after a jury announces it is hopelessly

249. *Supra* notes 74-76 and accompanying text (explaining that compromise or mixed verdicts need not require juries to announce numeric probabilities).

250. *Eg.*, THOMAS A. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* 380-83 (3d ed. 1992) (emphasizing the importance of developing a theory of the case that tells a story to the jury about what happened).

251. It is possible, however, that some expert witnesses might calculate probabilities of liability. Existing evidence rules probably would not exclude such testimony. *See* FED. R. EVID. 704(a) (refusing to exclude evidence on the ground that it encompasses an "ultimate issue"). If such testimony were problematic, Rule 704 might be amended to prevent witnesses from making estimates of the probability of liability.

252. *See supra* notes 77-80 and accompanying text.

253. *See supra* note 79.

deadlocked, provided all jurors agree on whether liability is more or less than fifty percent likely.

In short, litigation costs are unlikely to pose a substantial obstacle to a system of mixed verdicts, for the adoption of such a system is not likely to increase the amount of frivolous litigation filed, thwart settlement, or increase trial costs. Taken together with the conclusions of Part II that mixed verdicts may help advance various legal values, a system of mixed verdicts seems to provide a promising means of addressing factual uncertainty. Though adoption of a system of mixed verdicts would be a significant change in and of itself, it may be worthwhile to indulge in more speculative analysis by exploring whether a mixed-verdicts system could have any additional applications.

IV

DECIDING QUESTIONS OF LAW UNDER ALTERNATIVE VERDICT STRUCTURES

So far, we have considered systems of compromise and mixed verdicts as antidotes to uncertainty about facts, implicitly assuming clarity of the law. It is also possible, however, that there could be uncertainty about what the law is and, in this postrealist world, about what it should be.²⁵⁴ No commentators, however, have explored the possibility that courts might accommodate uncertainty about which of two legal rules is preferable by allocating to the plaintiff a greater share of the total recovery the stronger the plaintiff's argument. John Coons noted that compromise verdicts might be used in cases of legal uncertainty, but he envisioned such an application only where the opposing legal arguments were equally strong.²⁵⁵ For example, he argued that it might be desirable for the original owner and a bona fide purchaser of a stolen chattel to split the loss evenly.²⁵⁶ The limitation reflects that Coons imagines legally based compromise verdicts only where analysis shows no satisfactory solution to a problem, not where jurists are unsure which of two possible answers to a problem is the better

254. In the classic telling, legal realists exposed the myth that "there is . . . one true rule of law which, being discovered, will endure, without change, forever." GRANT GILMORE, *THE AGES OF AMERICAN LAW* 43 (1977). See generally Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983) (discussing how realism changed legal thought).

255. See Coons, *Approaches to Court Imposed Compromise*, *supra* note 7, at 764 (considering situations in which "rules are seen as indeterminate in the sense that diametrically opposed results would appear equally plausible or implausible to a disinterested observer"). Later, Coons briefly mentions the possibility that "competing policies realistically can be assigned varying values on a quantitative scale." *Id.* at 778. He debates this for half a paragraph, elaborating, "Each value would be given expression according to its importance. The only essential requirement would be that the division be effected by a rule that is clear and non-discretionary." *Id.* This need not be an "essential requirement" at all, however. At the end of the paragraph, Coons places the question aside, recognizing "that a multitude of new and unforeseen objections may become relevant, and the question would require more extended elaboration than can be indulged here." *Id.*

256. *Id.* at 764-67.

one. This Part shows that compromise verdicts could be used to decide legal questions as well as factual questions, and explores the particular issues that arise when verdicts are split based on legal rather than factual ambiguity.

A. *Mixed Questions of Law and Fact*

A half step towards application of the compromise verdicts approach to legal questions is to use compromise verdicts for mixed questions of law and fact. A mixed question, as the Supreme Court has defined it, is "whether the rule of law as applied to the established facts is or is not violated."²⁵⁷ Mixed questions of law and fact have long occupied a liminal space of legal confusion, producing disputes on issues such as the deference appellate courts owe district courts' findings on these questions²⁵⁸ and whether mixed questions are the proper province of judges or juries.²⁵⁹ In addressing whether judges or juries should make determinations of negligence, for example, Oliver Wendell Holmes generalized that a mixed question is for the jury to decide when it is analytically too difficult for judges.²⁶⁰ Others have been even more cynical about the possibility of separating out the legal and factual aspects of mixed questions.²⁶¹ My interest here is not in the allocation of authority to decide mixed questions, but in whether it is possible for the decision maker, whoever that might be, to compromise in deciding mixed questions.

If a mixed question of law and fact can be recast as a factual inquiry, then it would be entirely straightforward for a jury to apply a system of compromise or mixed verdicts. For example, the economist's definition of negligence is essentially fact-based: Did the defendant undertake all cost-justified precautions (that is, all precautions whose cost is less than the costs of the accidents that the precautions could have been expected to save)?²⁶² Even if a jury faced with similar instructions is sure that the defendant did not take a particular precaution, it might not know whether the precaution would have been cost-justified.²⁶³ At least in theory, there is

257. *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982).

258. See generally Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235 (1991) (describing a four-way split among the federal courts of appeal about how best to review mixed questions).

259. E.g., Francis A. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111 (1924).

260. Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 457 (1899).

261. E.g., George C. Christie, *Judicial Review of Findings of Fact*, 87 NW. U. L. REV. 14, 14 (1992) ("Mixed questions of law and fact are of course those questions on which trial judges and appellate judges will second-guess a jury and on which appellate judges will second-guess trial judges.").

262. This formulation is an approximation of the Hand Formula. *Supra* note 118 and accompanying text.

263. This simplification of the negligence problem might operate as well on a higher level of generality. A defendant, for example, may not have considered taking the particular precaution at issue,

a correct answer to the question, but the jury might be unsure about what that answer is.²⁶⁴ Under traditional verdicts, the jury would resolve this uncertainty by determining whether it is more likely than not that the precaution was cost-justified. With compromise verdicts, the jury could announce the probability that the precaution was cost-justified,²⁶⁵ and damages could be apportioned to this amount.

In the absence of such a concrete translation of a mixed problem into purely factual terms, however, compromise verdicts may seem conceptually misplaced. Suppose, for example, that the jury is simply instructed that the defendant should be found liable for damages if and only if he failed to act with "reasonable care," but the judge does not define reasonable care,²⁶⁶ perhaps because the economic definition is viewed as normatively unattractive or because of an institutional concern that juries might not be good at applying such a definition.²⁶⁷ It would, of course, be possible to instruct a jury to announce the probability that the defendant acted with reasonable care, and few jurors would raise an ontological objection, but what does it mean to speak of the probability that a particular course of conduct meets a given legal standard? It might seem that the answer depends simply on the meaning of the standard and that to speak of probabilities is meaningless. Whether, say, a failure to mop the supermarket floor was "reasonable" may be a matter of opinion or a matter of law, but it might not seem to be a matter of probabilities.

Though the notion of probability in this context does not have an immediately apparent meaning, a decision maker can be more or less confident in its application of a vague standard to a particular set of facts. Moreover, this range of confidence can operate to give meaning to the concept of probability. For example, a jury might be asked first to answer whether it believes the defendant's conduct was "reasonable," and second

in which case the question may be whether this failure to consider the problem was itself a failure of reasonable care. See Mark F. Grady, *Efficient Negligence*, 87 GEO. L.J. 397 (1998) (arguing that failure to take a cost-justified precaution may be "efficient negligence" if the level of care that would have been necessary to prevent the error would be inefficient).

264. Its answer also might be affected by hindsight bias, in that the jury may overestimate the ex ante probability of an event that in fact has occurred. *Supra* note 143. Neither traditional nor compromise verdicts directly address this problem.

265. Just as with fact-based compromise verdicts, jurors could choose from a range of standards rather than select a numeric probability. *Supra* notes 74-76 and accompanying text. For example, the jury might decide that the defendant had shown by clear and convincing evidence that the precaution was not cost-justified.

266. Jury instructions often do define "reasonable care," but with fairly vague definitions. *E.g.*, N.Y. PATTERN JURY INSTRUCTION—CIVIL § 2:42 (3d ed. 1999) ("Reasonable care means that degree of care that a reasonably prudent person would use . . ."). For an instruction that is quite a bit longer, yet still says very little, see *Downs v. American Employers Insurance Co.*, 423 F.2d 1160, 1162 n.2 (5th Cir. 1970).

267. See Stephen G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015, 1039-52 (1994) (presenting arguments that the "reasonable person" instruction should be undefined).

to estimate the probability that it would come up with the same answer if it were summoned again a year later. Alternatively, and perhaps even better, a decision maker might be asked what percentage of decision makers it believes would arrive at the same answer.²⁶⁸ Sometimes, a decision maker might take a long time to deliberate about a particular question but still in the end have a great deal of confidence that the passage of time or the selection of an alternative decision maker would not have produced a different result. At other times, a decision maker might be satisfied with an answer yet recognize that many others would have arrived at the opposite conclusion after equally careful deliberation.²⁶⁹

Accepting then that it is not nonsensical to apply a system of compromise or mixed verdicts to a mixed question of fact and law, there remains the question of whether it is normatively desirable to do so. When mixed questions are simply conceptualized as higher-order factual inquiries, the analysis should be precisely the same as that for fact-based compromise or mixed verdicts.²⁷⁰ For example, if negligence reduces to an economic calculation about cost-justified precautions, then it should not matter whether a jury is uncertain because it does not know whether the defendant mopped the floor on the day of the plaintiff's fall or is uncertain because it does not know whether the defendant mopped it in general with reasonable frequency and vigor. Either way, the jury is asking whether the defendant took cost-justified precautions, the difference being merely one of time frame. Thus, the same considerations of deterrence,²⁷¹ punishment, and so on that were applicable to analyzing fact-based compromise and mixed verdicts are applicable to these types of mixed questions as well.

It might seem that different considerations would be relevant, however, when the uncertainty inherent in a system of mixed verdicts is essentially legal. For example, suppose the decision maker recognizes that its analysis of whether the defendant's conduct is "reasonable" hinges on whether this requirement demands that a defendant take all precautions,

268. This question might be framed more narrowly to include only "reasonable decision-makers" so that a jury's belief in the existence of truly irrational decision-makers does not affect its announcement. Moreover, it might be specified that the hypothetical decision-maker would have access to all of the jury's deliberations. That way, if the jury felt it had great confidence in an ingenious analysis developed in the jury room, it would not announce a low probability based on the expectation that other decision makers might not recognize the argument.

269. There may, however, be a cognitive bias towards greater confidence than is justified. When groups that initially favor a particular view deliberate, their views are likely to become even stronger in the same direction. *See generally* CASS R. SUNSTEIN, *THE LAW OF GROUP POLARIZATION* (Univ. of Chicago Law School John M. Olin Program in Law & Econ. Working Papers No. 91, Dec. 9, 1999) (citing JOHN TURNER ET AL., *REDISCOVERING THE SOCIAL GROUP* 142 (1987)). This finding suggests that juries might systematically underestimate the percentage of other juries that would disagree with them.

270. *See supra* Part II.

271. Most of the analysis of deterrence, however, assumed a regime of strict liability. *But see supra* note 124 (noting the further conceptual difficulties in assessing a negligence standard).

only all cost-justified precautions, or some level of precautions in between.²⁷² This is not a question of what the defendant did, but of what the defendant should have done. Does this distinction make a difference?²⁷³ Though it may be preferable for a legislature to resolve such normative questions,²⁷⁴ let us assume for now that the normative question is to be resolved in the particular case (and for the particular case only).²⁷⁵ A decision as to what a defendant should have done is made only in the context of deciding what the legal system should do, which must also be asked when it is unclear what a defendant did. The distinction between the normative question and the positive question is thus merely in the source of the uncertainty about how the legal system should respond.

That distinction ought not make a difference. Consider once again the legal values that choice of verdict structure might affect. In analyzing deterrence (and by extension, efficient breach), we noted that the goal is to deter undesirable acts while not deterring desirable ones.²⁷⁶ Imposing liability because of a legal error on a defendant who has not done anything *wrong* has the same consequence as imposing liability because of a factual error on a defendant who has not *done* anything wrong: it discourages participation in the activity that places the defendant in a category potentially subject to erroneous damages.²⁷⁷ Similarly, for purposes of

272. Because this is a theoretical assessment, it might seem that it would occur only to judges. But juries given a vague "reasonableness" standard might well debate the same question, though perhaps sometimes without clearly understanding that this is the source of disagreement. Cf. HASTIE ET AL., *supra* note 70, at 231 (indicating that juries have significant trouble decoding legal instructions). Assessment of whether a system of traditional, compromise, or mixed verdicts is appropriate should not depend on who the decision maker is, unless one type of decision maker is unsuited to determining a particular type of verdict.

273. Moral philosophers stress that an "ought" cannot be derived from an "is." See generally G.E. MOORE, *PRINCIPIA ETHICA* 114 (1988) (explaining that a prescription cannot logically follow from a description). This does not necessarily mean that the best structure for deciding what someone has done is different from the best structure for deciding what someone ought to have done.

274. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 612 (1983) (Rehnquist, J., dissenting) ("[A]s this Court has said over and over again, regardless of our view on the propriety of Congress' failure to legislate we are not constitutionally empowered to act for it.").

275. The answer to the question of what a defendant should do might create a precedent about what a defendant must do in the future. Below I recognize that some formal precedential value attaches to a legal decision and assess the consequence of this for the structure of verdicts. *Infra* Section IV.B. The present assumption of no precedential effect is sensible because if the legal aspect of the question were entirely severable, then the question would be a legal one rather than a mixed question.

276. *Supra* Sections II.A-B.

277. A counterargument is that in the negligence context, imposing liability on defendants who have exercised reasonable care but whose conduct did in fact cause the injury may simply transform the negligence rule into a strict liability rule (or into something in between). Strict liability may in fact be a superior rule. E.g., SHAVELL, *ECONOMIC ANALYSIS*, *supra* note 11, at 24 ("Under both strict liability and the negligence rule injurers are led to take socially optimal levels of care, but under the negligence rule they engage in their activity to too great an extent because, unlike under strict liability, they do not pay for the accident losses they cause."); *supra* note 119. Even if so, however, this merely means that the probability that the defendant's conduct is wrongful—in the sense of being something that ought to lead to the payment of damages—is high. The relevant comparison is thus to a defendant who, we

restitution, it should not matter if the issue is whether a plaintiff's injury was caused by the defendant or whether the defendant's acts were wrongful.²⁷⁸ In imposing retribution, concerns about whether a defendant's conduct was really wrongful should be as great as concerns about whether the defendant really engaged in the alleged wrongful conduct.²⁷⁹ And if there is an inequality in treating greatly differently two defendants whose probabilities of liability are quite close, it should seem equally unequal to treat greatly differently two defendants merely because the probabilities that the law should be one way or the other differ slightly between them. In sum, the case for a system of compromise and mixed verdicts is as strong for mixed questions of law and fact as it is for purely factual questions.

B. Private Law

To relax the assumption that a legal decision has no precedential effect, let us consider first the possibility of a system of compromise or mixed verdicts in making decisions of private law.²⁸⁰ In some ways, the task of contract interpretation is much like that involved in assessing a mixed question of law and fact. Though denominated as legal, contract interpretation is potentially reducible to a question of fact concerning what the parties would have bargained for had the question been explicitly posed and addressed, though the appropriateness of this standard may itself sometimes be at issue.²⁸¹ Resolution of a contractual ambiguity differs from resolution of a mixed question of law and fact, however, in that the former

believe with the same high probability, committed an act that is clearly wrongful. Deterrence theory offers no reason that one should be treated differently from the other.

278. Arguably, it might matter whether the plaintiff was in fact injured. From the lens of restitution only, it makes more sense to distribute a set quantum of damages to a plaintiff who is certainly injured but may or may not have been wrongfully injured than to a plaintiff who may or may not have been injured in the first place. *Cf. supra* text accompanying note 170 (explaining why the proper analytic approach is to ask how damages should best be distributed). On the other hand, concerns about deterrence might lead to exactly the opposite prescription, a focus on the wrongfulness of the defendant's conduct rather than on the consequence of that conduct.

279. There are two potential but opposite counterarguments. The first is that it is worse to punish someone for something that he did not do than to punish someone for something that is not wrong. The second is that it is worse to punish someone for something that is not wrong than to punish someone for something that he did not do. Both of these assumptions seem to run afoul of the assumption of civil litigation, at least outside the punitive damages context, that an improper punishment is of equal moral weight as an improper absence of punishment. *See supra* text accompanying notes 181-183. Given this equality, inequality within the category of improper punishment is impossible.

280. For discussions of the distinction between private law and public law, see Randy E. Barnett, *Foreword: Four Senses of the Public Law-Private Law Distinction*, 9 HARV. J.L. & PUB. POL'Y 267, 269 (1994), and L. Harold Levinson, *The Public Law/Private Law Distinction in the Courts*, 57 GEO. WASH. L. REV. 1579 (1989). I will use the term loosely primarily to distinguish questions of contract interpretation from questions of statutory interpretation and common law.

281. Even economics may furnish reasons to avoid the hypothetical contract approach. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989). For an updated analysis, see Ian Ayres & Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 STAN. L. REV. 1591 (1999).

will directly affect how the courts resolve the ambiguity in future cases featuring the identical provision.²⁸² An initial objection to instantiating a system of compromise or mixed verdicts in the area of private law therefore might be that such systems prevent the formation of precedent, whether compromise is effected in a trial court or an appellate court. Logically, however, this need not be so. Suppose a court decided, for example, that because an insurance contract was ambiguous on whether a certain type of injury was covered,²⁸³ the plaintiff would be allowed to recover sixty percent damages. The rules of precedent could specify²⁸⁴ that all future plaintiffs in cases involving the same contract provision would also receive sixty percent damages.²⁸⁵

A better argument against a system of compromise or mixed verdicts with respect to precedent is that these verdict structures might increase the cost of litigation. If plaintiffs are entitled to forty percent damages in a certain class of contract cases, then plaintiffs might well file suits in such cases, though they would not if a precedent made unequivocally clear that they would not be entitled to any compensation at all.²⁸⁶ This possibility may furnish an argument for some defendant-favoring combination of traditional and compromise verdicts, with probabilities under but not over fifty percent being treated as in a system of traditional verdicts. In other words, whenever the apparently more reasonable interpretation of an ambiguous provision favors the defendant, recovery would be barred en-

282. In contrast, when a mixed question of law and fact is decided by a judge, it will still directly control only identical cases. At other times, the precedential effect will be determined only by a process of "analogical reasoning." For discussions of analogical reasoning, see Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923 (1996); Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179 (1999); and Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993).

283. Ordinarily, such an ambiguity would be resolved by special rules of interpretation applicable in the insurance context, particularly the rule that insurance contracts should be interpreted against the insured. For an assessment, see James M. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation?: Text Versus Context*, 24 ARIZ. ST. L.J. 995 (1992).

284. These rules, however, would not necessarily have to impose such an absolute rule of stare decisis.

285. Contracting parties after the decision is rendered could explicitly resolve the issue and thus in effect overturn the judicial interpretation. *But cf.* Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1587-92 (1998) (describing a psychological bias against contracting around default terms). Moreover, the precedential rules would presumably allow future judges to distinguish the case if a subsequently adjudicated contract included other provisions placing the existing provision in context. This possibility is a general limitation of precedential effect, not a particular problem attributable to compromise verdicts.

286. In this context, Shavell's model of plaintiffs' incentives to bring suit is valid. *See supra* notes 217-219 and accompanying text. The problem with Shavell's model in the factual context was that a plaintiff's estimate from the evidence of a 40% chance that the defendant committed the wrongful act would not translate into a conclusion that no jury would find that the defendant had committed the act. In contrast, a clearly applicable precedent precluding recovery would successfully prevent plaintiffs from suing.

tirely, but when the better interpretation favors the plaintiff, the recovery would be apportioned. This would eliminate any incentive that plaintiffs would have to file cases that would be legally barred in a traditional system.

This analysis, however, is strongest only when an interpretation of the provision in favor of the defendant would end the litigation, and an interpretation in favor of the plaintiff would cause it to continue, for merely adding an additional legal issue to a case that will exist anyway adds no legal complexity if the precedent is clear. These conditions may not hold very often. The interpretative issue may appear in a complex case or in a simple one. A plaintiff in a complex case may well state alternative bases for relief. The savings from eliminating a single issue in such a case might be small. In a simple case, meanwhile, there might not be any complex additional issues once the forty percent solution is established, and suits involving the ambiguous contract provision would thus be averted by settlements in the shadow of the initial precedent. It is only in cases that are between these extremes that a compromise verdict approach would increase litigation costs.

A system of mixed verdicts is probably a better concession to litigation costs. It seems unlikely that parties to a contract would agree to a rule of construction that is biased in favor of the defendant.²⁸⁷ In general, parties would prefer to share the risk of truly ambiguous provisions rather than have them resolved entirely in favor of one party or the other.²⁸⁸ At the same time, they will recognize that using compromise verdicts when the court is very confident that it has reached the appropriate interpretation is problematic. It may encourage additional litigation, not only by granting the plaintiff some small recovery after a particular precedent is established, but also by encouraging parties to seize on slight ambiguities in contractual provisions. Moreover, when one interpretation seems greatly superior to another, a compromise verdict is in effect a bad bet about what the parties intended.²⁸⁹ At the same time, a system of mixed verdicts produces a

287. The law of contract interpretation is itself biased towards construing ambiguous provisions against the draftsman. *RESTATEMENT (SECOND) OF CONTRACTS* § 206 (1979). The justification for this canon, however, is to discourage drafters from strategic ambiguity. *Id.* cmt. a (noting the danger that the draftsman "may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert"). It would not apply in cases of arm's-length negotiation between the parties.

288. This preference follows from the general assumption of risk aversion. If two parties had different degrees of risk aversion, then one might imagine placing the burden of risk entirely on one party, in exchange for some form of payment from the other. The problem, however, is that in most contracts, one cannot predict in advance which party will be the plaintiff and which will be the defendant in any litigation that ensues. Given that litigation may ensue, however, risk-averse litigants will *ex ante* favor compromise solutions rather than all-or-nothing gambles. *Cf. supra* text accompanying notes 34-35.

289. Thus, when it is 90% clear that one interpretation is best, a decision to impose 90% damages rather than 100% damages is almost surely wrong (i.e., 90% wrong). When one interpretation seems better than another with only 60% probability, then the decision to impose 60% damages is more likely

sharing of the burden of risk in close cases. In such cases, there often will be no correct answer about what the parties intended,²⁹⁰ and the compromise approach is least disruptive of contractual expectations.

C. Public Law

By establishing that it would be plausible to apply a system of compromise or mixed verdicts to mixed questions of law and fact and private law questions, I have already anticipated two objections to the possibility of applying them to questions of public law, such as how to interpret ambiguous statutes.²⁹¹ First, I have argued that although interpretation of mixed questions of law and fact may sometimes require normative analysis, this necessity does not alter either the plausibility or the desirability of a system of compromise or mixed verdicts.²⁹² Similarly, a judge faced with a particularly challenging exercise in statutory construction might conclude that there was a sixty percent chance that Congress intended a particular interpretation,²⁹³ or that sixty percent of judges would agree that this was the better interpretation. If a suit for money damages turned on this issue,²⁹⁴ then the plaintiff could recover a

than not wrong, but not almost surely wrong. *See supra* text following note 68 (discussing Kaye's theory).

290. Even where a contract is unambiguous, there may be uncertainty about what the courts should do. *See, e.g.,* Kent Greenawalt, *How Law Can Be Determinate*, 38 UCLA L. REV. 1, 68-69 (1990) ("A text may provide a definite answer to what one should do, even if there is no correct answer to the question of whether one really should do that, all things considered."). Such ambiguity is less common in contract law than in, for example, statutory interpretation, to which we now turn.

291. In this context, "compromise verdicts" and "mixed verdicts" may be misnomers. It would be more accurate to speak of "holdings" and "judgments." Nonetheless, I will continue to use the word "verdicts" for consistency.

292. *See supra* notes 272-279 and accompanying text.

293. Perhaps it would be more accurate to conclude that, assuming Congress had been forced to address the question prompted by the ambiguity, there is a 60% chance that it would have favored a particular interpretation. This construction avoids the well-known difficulties associated with discussing the intent of a collective body. *E.g.,* WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 38 (1994); Mark L. Movsesian, *Are Statutes Really "Legislative Bargains"?* *The Failure of the Contract Analogy in Statutory Interpretation*, 76 N.C. L. REV. 1145, 1181-88 (1998). *But see* Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 874-75 (1994). This construction, however, introduces a new problem, namely the possibility that if Congress had been forced to address the question, it would not have been able to pass the statute at all. *Cf. Landgraf v. USI Film Prods.*, 511 U.S. 244, 263 (1994) (concluding that members of Congress "agreed to disagree" about a critical question on which they could not reach consensus).

294. As this qualifier suggests, a regime of compromise or mixed verdicts would be more difficult to apply to legal challenges in suits for injunctions or in cases in which resolution of a legal question is relevant to how the jury is to be instructed but does not necessarily resolve the case. There are, however, theoretically plausible workarounds. For example, in an action for an injunction, the court might grant the injunction on account of an interpretation that 60% favors the plaintiff but at the same time order the plaintiff to pay to the defendant 40% of the damages the defendant will incur as a result of the injunction. This strategy builds on Guido Calabresi and A. Douglas Melamed's famous "Rule 4," which effectively grants the plaintiff an injunction but requires the plaintiff to pay damages. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the*

corresponding percentage of the damages. Second, I have shown that precedent can survive the adoption of a system of mixed verdicts.²⁹⁵ Similarly, a splitting of the difference on one legal point could establish an unambiguous precedent for future cases.

Nonetheless, the notion of allocating the law, "there is a sixty percent chance that 'person' was meant to include corporate entities in the Act," may be more disconcerting than allocating the facts under a system of compromise verdicts. That the legal system might accommodate factual ambiguity through compromise seems less strange than the notion that it might accommodate legal ambiguity in this way. Perhaps this reaction arises because law is itself part of the legal system, and although we no longer succumb to the fallacy that judges engaging in interpretation are always saying what the law is, we remain willing to entrust the interpretive task to the practical wisdom of judges.²⁹⁶ Even if the legal values against which we have measured the systems of compromise and mixed verdicts apply just the same in the face of legal ambiguity,²⁹⁷ we must ask whether there are other normative reasons for judges to announce their own best views rather than compromise views.

A rule that would require judges to predict the probability that the legislature, if it had been forced to confront the issue, would have opted for a particular interpretation is problematic. This approach would enshrine one particular interpretive methodology—originalism—over all others.²⁹⁸ It would limit judicial analysis to considering what the legislature intended, excluding subsequent developments and issues of policy. Arguably, statutory interpretation should be a dynamic process, in which a statute is

Cathedral, 85 HARV. L. REV. 1089, 1121 (1972). With respect to an issue that must be resolved merely for the purpose of jury instructions, a jury could be asked to resolve the case under both interpretations, and if there were any discrepancy, the verdicts could be apportioned according to the legal determination. Naturally, both of these technical solutions are vulnerable to practicality objections.

295. *Supra* text accompanying notes 283-285.

296. In this sense, the twentieth-century trend that Anthony Kronman identifies and decries, an abandonment of faith in practical wisdom for scientific law reform, is incomplete. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 18-23 (1993). Kronman's vision furnishes interesting arguments both for and against legally based compromise verdicts. He emphasizes that legal decisions often involve choices among incommensurate goods and that, rather than engaging in the futile task of building a decision-making process that seeks to make the best decision, we should entrust choices to statesmen who, regardless of the actions they take, promote the goal of political fraternity. *E.g., id.* at 93-101. Thus, Kronman might object to legally based compromise verdicts on the ground that they replace our faith in practical wisdom with a scientific solution that seeks to commensurate incommensurables. On the other hand, because legally based compromise verdicts are a form of social compromise, they might be thought to promote fraternity directly.

297. *See supra* text accompanying notes 276-279.

298. Perhaps it would be more accurate to say that this approach embraces "purposivism." Redish & Chung, *supra* note 293, at 813-17 (distinguishing intentionalism and purposivism as two distinct strands of originalism). For a discussion of originalism and related approaches to interpretation, see Symposium, *Originalism, Democracy, and the Constitution*, 19 HARV. J.L. & PUB. POL'Y 237 (1996).

adapted to current conditions.²⁹⁹ Even an advocate of originalism might concede that the choice among interpretive methodologies ought not be made by a rule concerning the structure of verdicts. Thus, we must look to the defensibility of the other approach, in which judges would allocate law based on their perception of what proportion of judges would arrive at the two different conclusions. An assessment of this approach can be disentangled into two separate questions: first, whether a judge should make a legal decision based on what most judges would decide; and second, whether a legal decision should be apportioned where there would be disagreement among judges about the proper course.

To make the first question concrete, suppose that an analysis of only the text of a statute at issue in a particular case would produce an interpretation denying the plaintiff recovery, but an analysis of both text and legislative history would produce an opposite interpretation allowing recovery.³⁰⁰ The judge assigned the case believes that an approach that excludes consideration of legislative history is theoretically superior but believes that most judges and scholars would reject this view.³⁰¹ If it were possible to establish a rule that judges should try to suppress their own normative views,³⁰² would we want to do so, recognizing that this would cause our hypothetical judge to look to legislative history?³⁰³ Though this

299. See generally ESKRIDGE, *supra* note 293 (arguing for dynamic statutory interpretation).

300. Justice Scalia, who argues against the consultation of legislative history, bases his argument in part on the fact that legislative history almost never would change the result of a proper textualist reading. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 36-37 (1997) ("In the only case I recall in which, had I followed legislative history, I *would* have come out the other way, the rest of my colleagues (who *did* use legislative history) did not come out the other way either."). Whether he is correct about this matter is irrelevant to my stylized example, which could be reformulated to consider alternative methodologies.

301. This empirical statement of what judges and scholars generally believe is, I believe, accurate. But see Gregory E. Maggs, *Reconciling Textualism and the Chevron Doctrine: In Defense of Justice Scalia*, 28 CONN. L. REV. 393, 397-98 (1996) (arguing that Justice Scalia's position has led to a significant reduction in the Supreme Court's reliance on legislative history). Nonetheless, this too is irrelevant to my hypothetical.

302. This is different from asking what a judge should do in the absence of such a rule. It is plausible to argue that a rule of deferring to a hypothetical majority is desirable, and that a judge should follow this rule if it exists, while still arguing that in the absence of it, a judge should defer to the majority opinion only if that causes him to believe that his own position must be unsound. That is, even a supporter of legal deference might conclude that in the absence of such a requirement, a judge should defer only if the force of epistemological deference is sufficiently great. Cf. Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1278 (1996) (distinguishing legal and epistemological deference).

303. An argument against the establishment of the rule might be that some judges would *not* follow it. These judges would have a disproportionate influence on the development of the law, as only the judges following the rule would suppress their beliefs in favor of the majority's. The judges ignoring the rule might not be as good as the other judges. The problem with this argument, however, is that proportionate influence is not the relevant consideration. If the rule were beneficial if it were followed by everyone, it must be because cases are decided "better" under this rule. Thus, if some follow the rule and some ignore it, then some cases are being decided better and some just as they would have been before.

question deserves further consideration than I can give it here,³⁰⁴ when the position of the median judge on a binary question would differ from the position of the judge who happens to have been assigned the question,³⁰⁵ the median judge's view is more likely than not to be the "better" one.³⁰⁶ Thus, if a judge admits that even if all other judges carefully considered the arguments that he can offer,³⁰⁷ the other judges would reject his position, then a rule requiring the judge to defer to majority sentiment is likely to reflect the "better" view than the existing norm that a judge follow his or her own normative lights.³⁰⁸ Thus, a verdict rule ought not be rejected merely because it requires a judge to shed a subjective perspective.

304. For some preliminary thoughts, see Michael Abramowicz, *En Banc Revisited*, 100 COLUM. L. REV. 1600, 1630-36 (2000). A possible route for future inquiry is to explore the relevance of the prediction theory of law, created by Justice Holmes's famous statement that "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897). Richard Posner, for example, is enthusiastic about applying the prediction theory to judicial decision making, but concedes that it can make sense only in the sense that judges in a lower court can predict what judges in a superior court would do. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 224 (1990). Judges sitting alone or in panels, however, could use the prediction theory to ask what all judges of the court would do, or even what all judges on the same level in the same jurisdiction would do (for example, what the majority of all courts of appeals judges would do). Moreover, it is not logically untenable to argue that judges of the highest court should assess what the median lower court judge, faced with all the arguments and given adequate opportunity for reflection, would do. The views of the swing vote on the highest court might be more a product of random factors than the views of the hypothetical median judge on the lower courts, given the larger size of this body. Indeed, judges might look not to the actual membership of the judiciary, but ask hypothetically what the median lawyer, or even the median citizen given a chance to reflect on these issues, would do. Such a rule would not entail an opinion poll, but would encourage judges to suppress their own ideological fancies for broader social norms.

305. The analysis becomes more difficult if a particular question is nonbinary. For example, there might be three interpretations of a statute. Under the first, the plaintiff recovers from the defendant; under the second, the defendant wins a counterclaim against the plaintiff; and under the third, no one recovers at all. Suppose one-third of judges favor each interpretation. Then the result depends on the order in which the interpretations are considered. This problem is familiar to social choice theory. See generally DENNIS C. MUELLER, *PUBLIC CHOICE* II 65-74 (1989) (discussing "cycling").

306. This conclusion follows from the simple assumption that the majority of identically situated interpreters are more likely to be right than the minority. See Ken Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283 (1989) (arguing that law is not "radically indeterminate").

307. Individual judges might not be accurate predictors of what other judges would decide. Any bias, however, is likely to work out in favor of the deciding judges' own positions, since people tend to believe that everyone would agree with them if only everyone thought long enough and hard enough. Imperfect prediction is thus no more problematic than imperfect compliance with the rule. *Supra* note 303. The rule would be counterproductive only if judges concluding that others would disagree with their own views were wrong more than half of the time.

308. Four final objections are worth considering. First, it may be useful for minority views to be aired sometimes because these views eventually might influence other judges. This reasoning, however, ignores that judges could still indicate their own views in opinions before assessing the views of the majority of judges and thus could still influence the views of others. (They could even write law review articles.) Perhaps mere dicta does not challenge one's views so much as an actual holding. If this is so, then the rule could be narrowed so that judges would reject their own views only when they concede that their views are unlikely to prevail in the future. Cf. Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1132-34 (1995) (arguing that Alexander Bickel's constitutional theory is future-looking in a similar way). Of course, such an admission might be so rare as to make the rule

This analysis suggests that the second question, whether a judge should apportion holdings based on perceived differences in perspective, cannot be answered in the negative on the basis that it prevents individual judges from doing what they individually think is best. Justifying a compromise verdicts approach, however, entails an additional step: requiring an explanation of why judges should decide cases as the average judge would, rather than as the median judge would. Indeed, the above analysis seems to suggest that the median judge approach (and thus all-or-nothing verdicts based on what a majority of judges would do) is superior. Continuing the previous example, suppose sixty percent of judges would consult legislative history and allow recovery, while forty percent would not. This imbalance suggests that consulting legislative history is the better approach, and so it might seem that the law should enshrine the resulting plaintiff-favoring interpretation rather than a six-tenths compromise. Why should the law be based in part on an interpretation that is correct with a forty percent probability rather than entirely on one that is correct with a sixty percent probability?³⁰⁹

Just because sixty percent of judges believe a particular interpretation to be better does not mean that there is a corresponding probability that this interpretation is "correct." In some cases, the best inference that can be drawn from a substantial difference of opinion is that the best answer is between the two extremes, though probably closer to the answer with the greater amount of support. Just because the legal question is clearly defined (for example, whether defendant *X* was entitled to do *Y*) does not mean that the answer must be clearly "yes" or clearly "no." *X* or *Y* may be in a gray area, an area in which there are some factors militating toward each conclusion. Substantial disagreement about the best answer to a legal question indicates not only that there is a great deal of ambiguity about statutory meaning, but also that judges fill the statutory gaps in different ways.³¹⁰

useless. Second, an assessment of what other judges believe might have resource costs that are unacceptably high. I do not, however, envision judges conducting opinion polls. Rather, judges would approximate what a moderate judge would do. Third, the rule might be so ineffective as to be useless. If such a rule really were established, however, it would be an epithet to call a judge "conservative" or "liberal." Many judges now proudly bear these labels, and some might suffer reputational loss by falsely claiming that their views are moderate. The prospect of appearing disingenuous (rather than merely different) might lead some to temper their beliefs. Fourth, it might seem impossible to establish such a rule. If so, then it also would seem impossible to establish a regime of legally based compromise or mixed verdicts. Unless a statute mandating the rule or establishing such verdicts were found unconstitutional (perhaps on separation-of-powers grounds, a question beyond my scope here), then it should be able to accomplish the feat.

309. This is once again Kaye's argument in a new form. *Supra* Part I.A.2. An answer, once again, would be that we must look to legal values to assess verdict structure.

310. Not all interpretation, however, takes place using the two-step process of *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), which demands that judges assess first whether a statute is ambiguous and then whether an administrative regulation is reasonable. *Cf.* Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997)

This disagreement indicates that opposing interpretations are likely to favor different values or principles and that the balance among these is a close call. Compromise may be a way of accommodating all relevant values without slighting any entirely.³¹¹ It results in treating gray areas not with a white line of no liability or a black line of liability, but with a gray line of some liability.

On the other hand, when an overwhelming proportion of judges would agree on one interpretation rather than another, the best answer is probably that chosen by the majority, not some compromise solution. Those favoring the minority interpretation may still be honoring different values, but the great imbalance suggests that the difference in values is not a close call and that the values honored by the minority should be slighted entirely. The lesser the amount of disagreement over the best interpretation, the (more than proportionally) greater the chance that a compromise to accommodate the different positions somewhat would be welfare-reducing rather than welfare-enhancing. The degree of agreement, in short, is a proxy (perhaps a weak proxy) of whether some concession to the losers will make everyone as a whole better off.

A system of mixed verdicts provides a rough way of drawing the line. Such a system reflects the intuition that when all one knows is that there are many different people allied on both sides of an issue, the best answer is probably between the two extremes, but when the vast majority are in agreement, it is better to ignore the extremists entirely. This intuition,

(arguing that the second step of *Chevron* should be an inquiry into whether the administrative agency's policy choice is acceptable, just like the inquiry in "hard look" review); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 977 (1992) ("*Chevron* transformed a regime that allowed courts to give agencies deference along a sliding scale into a regime with an on/off switch."). In statutory interpretation in the absence of administrative agencies, judges do not ordinarily first assess ambiguity and then assess policy. Thus disagreement among judges may represent disagreement on several different levels, including interpretive methodology, actual interpretation, and policy. Nonetheless, substantial disagreement about the best interpretation is likely to indicate that there are differences about methodology and/or policy, and these types of disputes are about the ultimate goals of law.

311. Not slighting a value entirely is beneficial if there are decreasing returns in honoring particular values. Returning to the legislative history example, rejecting altogether the position that the text should control might slight entirely the value of encouraging the legislature to place its desires in the statute rather than in the legislative history. See generally Bernard W. Bell, *Using Statutory Interpretation to Improve the Legislative Process: Can It Be Done in the Post-Chevron Era?*, 13 J.L. & POL. 105, 110-12 (1997) (explaining how consideration of legislative history by courts may provide legislatures with incentives to place important details in the legislative history rather than in statutes). Were this pattern consistent over a range of cases, Congress might respond by making little effort to differentiate statutes from legislative history. The majority by hypothesis believes that this type of forward-looking effect is not of great enough concern that courts should deprive themselves of the benefits of backward-looking reflection. Nonetheless, basing 40% of a statutory interpretation on a purely textual analysis may advance the forward-looking goal more than it harms the backward-looking goal. Note that weighing the different interpretive approaches in this way can lead to a difference in outcome if the legislative history approach leads to only a slight preference for one view, while the purely textual approach leads to a decisive preference for the other.

however, may not be powerful, especially in contexts where compromise approaches would increase litigation costs.³¹² A system of mixed verdicts for legal issues may have additional virtues, however. For example, by distinguishing issues of great disagreement from those of near unanimity, a system of mixed verdicts may call attention to legal issues on which more deliberation is required.³¹³

More interestingly, a system of mixed verdicts might provide a way to delay the definitive establishment of a precedent when arguments for alternative positions seem closely aligned. That is, in a regime of mixed verdicts, when a judge is not sufficiently confident of a resolution to reach an all-or-nothing decision, the rules of precedent could provide that the ruling shall not have precedential value.³¹⁴ There are some issues, of course, on which substantial disagreement will persist even after being aired a number of times.³¹⁵ A system of precedent could respond to this by providing, for example, that if the first three courts to consider an issue all issue compromise verdicts, the precedent shall be set at the average compromise verdict. Alternatively, if it is undesirable for the final precedent to be a compromise, an all-or-nothing precedent could be established depending on the first three compromises. This system makes it less likely that the precedent settled upon will be one that in fact only a minority of judges would subscribe to.

V

CONCLUSION

This Article has surveyed a variety of theoretical reasons that a system of mixed verdicts may be superior to all-or-nothing verdicts. Though the reasons are diverse, a system of mixed verdicts accommodates two different but powerful intuitions. The first is a matter of fairness in close cases; to allow judicial outcomes to turn on the single grain of sand that upsets the balance turns litigation into a lottery. The second is that when a decision maker is very sure but not positive that it is making the correct

312. *Supra* text accompanying note 286.

313. This review might, for example, take place in an en banc court or in the legislature. Of course, these mechanisms are already more likely to be employed in cases of substantial disagreement than in cases in which only a few disagree with the outcome.

314. This approach recognizes that sometimes issues are not as clear in one litigation as they might be in the next. Existing features of the legal system may reflect an attempt to balance the goals of resolving legal uncertainty and waiting until more information is available. *See generally* William M. Landes & Richard A. Posner, *The Economics of Anticipatory Adjudication*, 23 J. LEGAL STUD. 683 (1994) (discussing preliminary injunctions and other analogous issues).

315. Sometimes deliberation pulls opposing parties farther apart rather than toward a consensus. *Cf.* DAVID SCHKADE ET AL., ARE JURIES LESS ERRATIC THAN INDIVIDUALS? DELIBERATION, POLARIZATION, AND PUNITIVE DAMAGES (Univ. of Chicago Law Sch. John M. Olin Program in Law & Econ. Working Paper No. 81, 1999) (concluding tentatively that jury deliberations may produce polarization).

decision, there is much less of a reason for the legal system to hedge its bets than in closer cases. This analysis, of course, does not exhaust the issues that would need to be considered before a system of mixed verdicts could be implemented. Settling on appropriate jury instructions might require experimentation, either in a real courtroom or in simulation studies. Particularly difficult would be questions about how to implement a mixed verdicts system in jurisdictions that embrace comparative negligence³¹⁶ or special verdicts.³¹⁷ Applying some form of a mixed verdicts system to legal decisions would require substantial changes to legal culture and possibly to the rules of precedent.

A mixed verdicts regime, however, could begin modestly. I have argued that even where litigants are unable to reach a settlement, there may be circumstances in which they would prefer a system of compromise or mixed verdicts to the all-or-nothing alternative.³¹⁸ Courts might allow such litigants to agree to be bound by a mixed verdict structure, and the litigants

316. The existence of comparative negligence complicates the question about how the jury should be instructed in a jurisdiction that embraces both a regime of comparative negligence and mixed verdicts. One possibility is that the comparative negligence rule alone effectively does the job, as the opportunity to allocate damages will lead juries to factor any uncertainty they have about the defendant's conduct into the mix. Alternatively, the jury could be explicitly instructed to weigh any uncertainty about whether a particular party caused the injury in the damages allocation. Most elaborately, the jury might for each party first indicate its degree of confidence about whether the party violated a duty. Next, it might be asked to assume that each defendant did violate a duty and then asked to allocate the degree of causal responsibility among them. The results would then be multiplied together, unless the jury's confidence in the first answer were so low that a verdict of zero damages would be appropriate. For example, if there were a 50% chance that a defendant violated a duty and a 50% allocation of responsibility to this defendant, the defendant would be required to pay one-fourth damages. To apply a system of mixed verdicts, a very low probability assessment on the first question would lead to a zero allocation for that party, with the allocation among all remaining parties adjusted to add up to 100%. One question in such a scheme would be whether to inform juries of the consequences of answering the questions. For a discussion about the costs and benefits of informing juries in another context, see Stuart F. Schaffer, *Informing the Jury of the Legal Effect of Special Verdict Answers in Comparative Negligence Actions*, 1981 DUKE L.J. 824.

317. Special verdicts, in which the jury addresses different elements of the offense separately, introduce the so-called conjunction problem. Just because juries find each element of an offense proved by a preponderance of the evidence does not mean that they would find the offense as a whole proved by the same standard. Thus, special verdicts (or general verdicts where the jury is instructed that each element must be proved by a preponderance) arguably benefit the plaintiff by making it easier to prove a case. See COHEN, *supra* note 100, at 60; Ronald J. Allen, *A Reconceptualization of Civil Trials*, 66 B.U. L. REV. 401, 425 (1986); Richard Lempert, *The New Evidence Scholarship: Analyzing the Process of Proof*, 66 B.U. L. REV. 439, 451-54 (1986); David A. Lombardero, *Do Special Verdicts Improve the Structure of Jury Decision-Making?*, 36 JURIMETRICS J. 275 (1996); Nesson, *supra* note 13, at 1385-90. A system of mixed verdicts does not solve this theoretical problem, but it makes it possible for either solution to be translated into policy. That is, if it is theoretically justified for damages to be awarded only if the probability that all independent elements are met is greater than 50%, then these probabilities can be multiplied together to produce the ultimate damages allocation. Indeed, I have suggested that uncertainty about causation should be treated differently from uncertainty about the defendant's conduct. *Supra* text accompanying notes 131-134. Special verdicts make possible this conceptual separation.

318. *Supra* Part I.A.

themselves might be responsible for jointly crafting the jury instructions. A few instances of exercising such an option could help work out any kinks in the process. More significantly, it would help undermine the notion that the legal process inherently must be winner-take-all. Civil trials are not sporting events in which the dramatics of the competition justify the need to identify a winner.³¹⁹ A system of mixed verdicts would still result in a clear winner being selected much of the time, but at other times it would produce compromises that better promote the aims of the legal system.

319. Cf. Arthur Allen Leff, *Law and*, 87 YALE L.J. 989, 989-1005 (1978) (analogizing the American legal system to a ritualistic game).