Washington Law Review

Volume 75 | Number 3

7-1-2000

Bifurcation Unbound

Steven S. Gensler

BIFURCATION UNBOUND

Steven S. Gensler*

Abstract: The bifurcation of issues in a federal trial under Federal Rule of Civil Procedure 42(b) offers many benefits for both litigants and the judiciary. One of the greatest potential benefits of issue bifurcation is increased judicial efficiency. Frequently the jury's disposition of the first issue will obviate the need to try the remaining issues. Despite this efficiency potential, bifurcation is controversial. Historically, the opponents of bifurcation have leveled three primary criticisms against bifurcation: (1) that it skews verdict outcomes in favor of defendants, (2) that it infringes on the role of the civil jury, and (3) that it creates a sterile and unnatural trial atmosphere. The critics have carried the day with a majority of federal judges, who employ a presumption against issue bifurcation and bifurcate infrequently. This Article scrutinizes the reasons underlying the presumption against issue bifurcation and concludes that the presumption is unjustified. Accordingly, this Article proposes changes to Rule 42(b) that would eliminate the presumption against issue bifurcation and communicate to federal judges two important messages: (1) bifurcation is not antithetical to the role of the civil jury or justice, and (2) in the long run, analyzing each case to identify issues to try separately should improve judicial efficiency.

Since 1938 Federal Rule of Civil Procedure 42(b) has authorized federal judges to try issues separately—a procedure commonly known as bifurcation.[1] In its most familiar form, the issues of liability and damages are tried separately, with the jury usually hearing and deciding liability first.[2] But bifurcation comes in many other shapes and sizes.[3] Judges have

* Visiting Assistant Professor of Law, University of Illinois, 1999–2000; Associate Professor of Law, University of Oklahoma. Jim Pfander, Tom Mengler, Rick Marcus, and Tom Ulen provided extremely helpful comments on an earlier draft. Susan Lauer provided indispensable research assistance.

1. Federal Rule of Civil Procedure 42(b) provides, in pertinent part:

> (b) Separate Trials. The Court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim . . . or of any separate issue . . . always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

Fed. R. Civ. P. 42(b). The term "bifurcation" means to divide into parts and is "widely used to describe the separation of claims or issues pursuant to Rule 42(b)." 8 James Wm. Moore et al., *Moore's Federal Practice* § 42.20(3) (3d ed. 1999) [hereinafter *Moore's Federal Practice*]. An analogous practice is available in class actions. *See* Fed. R. Civ. P. 23(c)(4) ("When appropriate . . . an action may be brought or maintained as a class action with respect to particular issues.").

2. *See* 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2390 (3d ed. 1995) [hereinafter *Federal Practice and Procedure*]; *Moore's Federal Practice*, *supra* note 1, § 42.20(6)(b). Occasionally the trial is "reverse bifurcated," with the jury deciding damages first. In asbestos litigation, for example, it is common for the first phase to reserve liability and try damages first because the damages issue is the most contentious. *See* Angelo v. Armstrong World Indus., Inc., 11 F.3d 957, 964 (10th Cir. 1993).

used Rule 42(b) to separate the trial of discrete issues, such as affirmative defenses[4] or punitive damages.[5] The flexibility of Rule 42(b) has allowed judges to divide the trial into three or more separate parts.[6] Given the variety of cases within the federal docket, the potential for federal judges to find new and imaginative ways to bifurcate is enormous.[7]

On the surface, issue bifurcation promises a substantial potential for trial efficiency.[8] In a unitary trial, the jury hears all of the evidence and decides all of the issues at the same time.[9] In the large share of those cases where the jury finds for the defendant on liability,[10] however, all of the trial time spent presenting evidence on damages has been wasted.[11] Bifurcation also saves trial time even in cases where the plaintiff prevails on liability because the parties will often settle instead of proceeding with the damages stage.[12] In either way, bifurcation can substantially shorten many of the

---

3. As the Seventh Circuit recently explained, "there is no rule that if a trial is bifurcated, it must be bifurcated between liability and damages. The judge can bifurcate (or for that matter trifurcate, or slice even more finely) a case at whatever point will minimize the overlap in evidence between the segmented phases or otherwise promote economy and accuracy in adjudication." Hydrite Chem. Co. v. Calumet Lubricants Co., 47 F.3d 887, 891 (7th Cir. 1995).

4. *See infra* note 134.

5. *See infra* note 136.

6. The use of trifurcation and polyfurcation has become increasingly common in complex litigation. *See* Albert P. Bedecarré, *Rule 42(b) Bifurcation at an Extreme: Polyfurcation of Liability Issues in Environmental Tort Cases*, 17 B.C. Envtl. Aff. L. Rev. 123, 138–47 (1989).

7. *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, 300 ("Rule 42(b) makes it possible for a judge to divide a lawsuit in virtually any conceivable way.").

8. *See id.* Besides promoting expedition and efficiency, the text of Rule 42(b) suggests two further potential benefits that might result from trying issues separately: eliminating prejudice and furthering convenience to the court and litigants. *See* Fed. R. Civ. P. 42(b); *see generally* 9 *Federal Practice and Procedure*, *supra* note 2, § 2388.

9. *See* Landsman et al, *supra* note 7, at 377 ("[I]n a unitary trial, a jury makes one decision, after hearing all the evidence."); James A. Henderson, Jr. et al., *Optimal Issue Separation in Modern Products Liability Litigation*, 73 Tex. L. Rev. 1653, 1675 (1995); Lewis Mayers, *The Severance for Trial of Liability from Damage*, 86 U. Pa. L. Rev. 389, 389–90 (1938).

10. *See* Mayers, *supra* note 9, at 390.

11. The waste would be even greater in situations where the jury found for the defendant on an affirmative defense, or where the case had been trifurcated and the defendant prevailed on the preliminary issue of causation. In *In re Bendectin Litigation*, 857 F.2d 290 (6th Cir. 1988), for example, the jury's decision that the drug Bendectin did not cause birth defects obviated the need to try specific causation and damages individually in any of the 844 cases that were a part of those consolidated proceedings. *Id.* at 293.

12. *See* Hans Zeisel & Thomas Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 Harv. L. Rev. 1606, 1607–08 (1963).

cases currently being tried in full in the federal courts.[13] For example, suppose that defendants win 50% of the cases that are tried[14] and that another 20% settle after a liability verdict for the plaintiff.[15] If all trials were bifurcated between liability and damages stages, 70% would end without reaching the damages phase. Assuming the damages evidence takes up one-third of the average trial, bifurcation of liability and damages alone would cut the overall amount of trial time in the federal courts by 23%.[16]

Given the modern emphasis on judicial management and efficiency in the federal courts,[17] one might expect bifurcation to be commonplace. Yet bifurcation is not common in the federal courts, nor has it ever been. When Rule 42(b) first took effect in 1938, the federal judiciary took a cautious, almost grudging approach to this new procedural tool[18] and used it only in

---

13. "If a single issue could be dispositive of the case or is likely to lead the parties to negotiate a settlement, and resolution of it might make it unnecessary to try the other issues in the litigation, separate trial of that issue may be desirable to save the time of the court and reduce the expenses of the parties." 9 *Federal Practice and Procedure*, *supra* note 2, § 2388, at 476; *see also* 8 *Moore's Federal Practice*, *supra* note 1, § 42.20(6)(a) ("Resolution of a key issue may determine the outcome of an entire proceeding.").

14. Current best estimates are that cases that go to trial are close cases and therefore yield roughly 50-50 win rates. Priest and Klein first predicted (and empirically demonstrated) that plaintiffs and defendants will tend towards a 50-50 success rate in tried cases. *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. Leg. Stud. 1, 5–6 (1984) (asserting that litigants tend to try cases where liability is close because close cases are harder to value and therefore less likely to yield zone of settlement agreement). More recent empirical work suggests that plaintiffs win fewer than 50% of trials. *See* Daniel Kessles et al., *Explaining Deviations from the Fifty-Percent Rule: A Multimodel Approach to the Selection of Cases for Litigation*, 25 J. Leg. Stud. 233, 236 (1996); *see also* Leandra Lederman, *Which Cases Go to Trial?: An Empirical Study of Predictors of Failure to Settle*, 49 Case W. Res. L. Rev. 315, 325 n.37 (1999) (collecting studies). Recent work also suggests that, even if plaintiffs win 50% of the time in the aggregate, success rates may vary across different types of cases. *See* Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 Mich. L. Rev. 319, 334 (1991). If defendants in fact win more than 50% of trials, then the trial savings from bifurcation would be even greater.

15. This is a conservative estimate. One judge reports this figure to be closer to 90%. *See* Robert Satter, *Doing Justice: A Trial Judge at Work* 138 (1990).

16. Twenty-three percent trial savings calculated by: $0.70 \times 0.33 = 0.231$.

17. *See* Fed. R. Civ. P. 16(c) (listing case-management considerations to be discussed at pretrial conference). Rule 16 was amended in 1993 specifically to "call attention to the opportunities for structuring of trial under Rules 42, 50, and 52" and to reaffirm "the authority of the court to ... provide for an efficient and economical trial." Fed. R. Civ. P. 16 advisory committee's note (1993). Rule 1 also was amended in 1993 to state that the rules "shall be construed *and administered* to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1 (changes italicized). The words "and administered" were added to emphasize "the affirmative duty" of the federal courts to use the procedures authorized in the federal rules to minimize cost and delay. Fed. R. Civ. P. 1 advisory committee's note (1993).

18. *See* Note, *Separate Trials on Liability and Damages in "Routine Cases": A Legal Analysis*, 46 Minn. L. Rev. 1059, 1060 (1962).

limited circumstances.[19] Federal courts rarely bifurcated the issues of liability and damages; when federal courts did, they usually bifurcated patent cases or other "complex cases" where the expected damages evidence was so specialized or lengthy that the chance of avoiding a damages trial was too attractive to pass up.[20]

The fact that the federal judiciary gave bifurcation a cool reception is not surprising. Until 1938, federal law courts did not even have the option to bifurcate.[21] Thus, the unitary trial was an entrenched part of the federal civil jury system.[22] The surprise is how little bifurcation practice has changed in the last sixty years. The procedural landscape today is vastly different from that which existed in 1938; modern innovations such as managerial judges[23] and expanded summary judgment practice,[24] though sometimes criticized, are largely accepted, particularly within the federal judiciary. Bifurcation,

---

19. *See* Landsman et al., *supra* note 7, at 304 (charting cases); Note, *Separate Trial of a Claim or Issue in Modern Pleading: Rule 42(b) of the Federal Rules of Civil Procedure*, 39 Minn. L. Rev. 743, 757 (1955) (listing cases bifurcating defenses of statute of limitations, res judicata, estoppel by judgment, and statute of frauds).

20. *See* Bedecarré, *supra* note 6, at 133; Note, *supra* note 19, at 759–60 (discussing bifurcation of liability and damages in mass-tort and patent-infringement cases).

21. In contrast, by the early twentieth century, state courts and federal courts sitting in equity had been granted the power to bifurcate. *See* Henderson et al., *supra* note 9, at 1676.

22. *See id.* at 1675.

23. *See generally* Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374 (1982). Many question the wisdom of active judicial case management. *See, e.g., id. passim*; E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. Chi. L. Rev. 306, 334–35 (1986) (stating that managerial judging is only stopgap solution to more fundamental problem of inappropriate litigation incentives within federal rules). However, the 1993 amendments to Rule 16 appear to evidence a consensus among lawmakers and the judiciary that federal judges should embrace a more hands-on approach to case management. *See* Charles R. Richey, *Rule 16 Revised, and Related Rules: Analysis of Recent Developments for the Benefit of Bench and Bar*, 157 F.R.D. 69, 71 ("[T]he amended rule advocates the use of various creative legal procedures to clear out our bulging court dockets.").

24. As the U.S. Supreme Court admonished, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). "[I]t seems clear that the Court's purpose [in *Celotex*] was to make summary judgment easier to obtain, and the lower courts . . . appear to have gotten this message." Richard L. Marcus, *Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure*, 50 U. Pitt. L. Rev. 725, 740 (1989). As with the development of managerial judges, not everyone agreed that expanded summary judgment practice was a good idea. *See* Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 Ohio St. L.J. 95, 99 (1988) (describing Supreme Court's 1986 trilogy of summary judgment cases as "faulty and ill-conceived . . . in light of purposes for which civil litigation system exists"); *see also* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 Yale L.J. 73, 75 (1990) ("[L]iberalized summary judgment inhibits the filing of otherwise meritorious suits and results in a wealth transfer from plaintiffs as a class to defendants as a class.").

however, has not evolved at the same rate. While some federal judges seem to welcome opportunities to bifurcate, most federal judges still view issue bifurcation as a specialized tool rather than an everyday trial technique.[25]

Why has bifurcation failed to become a more prominent part of the procedural landscape? It is not for a lack of advocates. For decades, scholars have championed bifurcation as a means to decrease trial time, increase efficiency, and ensure the faithful application of the law.[26] In 1959, the bifurcation movement rose to prominence under the leadership of Judge Julius Miner, who persuaded his colleagues on the United States District Court for the Northern District of Illinois to adopt Local Rule 21, encouraging the routine bifurcation of liability and damages in personal injury cases.[27] Soon thereafter, a study of Local Rule 21 by a group from the University of Chicago seemed to vindicate Judge Miner: the study showed that bifurcation was yielding trial savings of approximately twenty percent.[28]

The backlash against routine bifurcation, however, was swift and powerful. Critics from the legal academic community and the local bar derided Local Rule 21 as a too drastic measure that infringed the traditional province of the jury and threatened to alter the verdict landscape dramatically, primarily by taking away the jury's power to use compromise verdicts to temper harsh legal rules like strict contributory negligence.[29] Thus, the battle lines were drawn between those who viewed bifurcation as

---

25. *See* Part I.B.2.

26. *See* Mayers, *supra* note 9, at 389; Julius H. Miner, *Court Congestion: A New Approach*, 45 A.B.A. J. 1265, 1268 (1959); Warren F. Schwartz, *Severance—A Means of Minimizing the Role of Burden and Expense in Determining the Outcome of Litigation*, 20 Vand. L. Rev. 1197, 1206–07 (1967).

27. *See* N.D. Ill. R. 21 (vacated Aug. 19, 1995); Miner, *supra* note 26, at 1268 (discussing adoption of Local Rule 21). For details on Local Rule 21, see also *infra* note 75 and accompanying text.

28. *See* Zeisel & Callahan, *supra* note 12, at 1619.

29. *See* Philip H. Corboy, *Will Split Trials Solve Court Delay? A Negative Response*, 52 Ill. B.J. 1004, *passim* (1964); Jack B. Weinstein, *Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power*, 14 Vand. L. Rev. 831, 834 (1961); Charles Alan Wright, *The Federal Courts—A Century After Appomattox*, 52 A.B.A. J. 742, 747 (1966). More recent scholarship continues this theme and adds the argument that the more extreme forms of issue separation such as trifurcation harm plaintiffs and the civil jury system by creating a sterile trial environment where important issues are decided in a cold and compassionless setting. *See* Jennifer M. Granholm & William J. Richards, *Bifurcated Justice: How Trial-Splitting Devices Defeat the Jury's Role*, 26 U. Tol. L. Rev. 505, 513 (1995); Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. Ill. L. Rev. 69, 81; Sandra A. Smith, Comment, *Polyfurcation and the Right to a Civil Jury Trial: Little Grace in the Woburn Case*, 25 B.C. Envtl. Aff. L. Rev. 649, 665 (1998) (discussing *Erie* concerns). For details about the *Erie* doctrine's relevance to bifurcation, see *infra* notes 199–213.

a tool for efficient and lawful jury decision making and those who viewed bifurcation as a device that overstepped the line between substantive law and procedure and threatened the sanctity of the civil jury system itself.

The opponents of bifurcation scored a decisive victory in that battle in 1966, when Rule 42(b) was amended as part of the union of civil procedure and admiralty practice.[30] Although the changes to the text of Rule 42(b) were essentially neutral,[31] the advisory committee notes had a significant and long-standing impact on the bifurcation movement. The notes nominally encouraged courts to consider bifurcation, but then sternly added that the "separation of issues was not to be routinely ordered."[32] This language galvanized a presumption against bifurcation that persists to this day,[33] and bifurcation practice—particularly in ordinary cases—has been at a standstill ever since.[34]

This Article examines whether the presumption against bifurcation of issues in ordinary cases has current justification.[35] Stated otherwise, is there any good reason for courts to presume to try all of the issues together when trying them separately would be more expedient?[36] Efficiency is not the only criteria for choosing procedures; accuracy and fairness are also

30. *See* 9 *Federal Practice and Procedure*, *supra* note 2, § 2388, at 475.

31. For example, the amendments specified that efficiency was a proper ground for bifurcation. *See* 8 *Moore's Federal Practice*, *supra* note 1, § 42 app.02 (providing "red-lined" textual changes). That addition was deemed "quite unnecessary," however, since the courts had long considered efficiency to be an appropriate basis for bifurcation. 9 *Federal Practice and Procedure*, *supra* note 2, § 2388, at 475. The addition of an express reference to preserving the right to jury trial was similarly superfluous, given the supremacy of the Seventh Amendment and the existing protection supplied by Rule 38. Fed. R. Civ. P. 38.

32. Fed. R. Civ. P. 42(b) advisory committee's note (1966).

33. *See infra* notes 113–121 and accompanying text.

34. As Professor Marcus recently noted, "despite the rather longstanding debate about the desirability of bifurcation under Rule 42(b), there has been rather little direction on when bifurcation should be employed." Richard L. Marcus, *Confronting the Consolidation Conundrum*, 1995 BYU L. Rev. 879, 916 (discussing treatment of bifurcation in *Complex Litigation Project*, *infra* note 130).

35. This article does not address claim bifurcation, which is also authorized under Rule 42(b). In general, the standards for claim bifurcation and issue bifurcation are the same. *See* 8 *Moore's Federal Practice*, *supra* note 1, § 42.20(4)(a). The dynamics are often very different, however, largely because the resolution of one claim ordinarily is not dispositive of the others. Two areas where claim bifurcation receives considerable attention are civil-rights claims against municipalities and bad-faith insurance litigation. *See, e.g.*, Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining* Monell *in Police Brutality Cases*, 44 Hastings L.J. 499 (1993); Kevin M. LaCroix, *Trial Bifurcation Provides Important Benefits to Insurers*, 7 Inside Lit., Oct. 1993, at 15.

36. One answer may be to contest the predicate assumption that issue-bifurcated trials are more expedient. Part IV addresses that question.

important, if not paramount.[37] Perhaps those values support an inefficient presumption. And sometimes the Constitution forbids a potentially more efficient procedure.[38] This Article, however, concludes that the Constitution does not require the presumption against bifurcation and that the presumption disserves the goals of Rule 42(b). Rather, a more aggressive approach to bifurcation in the federal courts would better serve those goals.

Part I begins by tracing the history of bifurcation, paying particular attention to the mid-1960s when bifurcation enjoyed fervid but fleeting popularity. Part I concludes with an overview of modern bifurcation practice, emphasizing the disconnection between what federal judges say about bifurcation—they say they are big fans[39]—and what they actually do. For the most part, bifurcation practice in the federal courts has changed little since the mid-1960s. There is still a strong presumption against issue bifurcation and the federal judiciary largely relegates its use to a few narrow areas.[40]

This Article then discusses the possible justifications for the presumption against bifurcation. Part II starts the inquiry by exploring two potential constitutional limits on issue bifurcation: the *Erie* doctrine and the Seventh Amendment to the U.S. Constitution. The *Erie* doctrine, which limits federal procedural encroachment on state substantive law,[41] poses little resistance to bifurcation under Rule 42(b). And while the Seventh Amendment contains important instructions on *how* to bifurcate issues within cases, it places few if any restrictions on the ability to bifurcate generally.[42] Part II concludes that neither the Seventh Amendment nor the

---

37. *See A Self-Study of Federal Judicial Rulemaking: A Report from the Subcommittee on Long Range Planning to the Committee on Rules of Practice, Procedure and Evidence of the Judicial Conference of the United States*, 168 F.R.D. 679, 692–93 (1995) (listing simplicity, consensus, and uniformity as procedural values as well); *see generally*, Michael Bayles, *Principles for Legal Procedure*, 5 Law & Phil. 33, 41–57 (1986) (identifying nine principles of procedure, including efficiency, accuracy, and fairness).

38. The rule prohibiting federal judges from deciding factual disputes on summary judgment, for example, exists not because it best advances the goals of accuracy or efficiency but because the Seventh Amendment requires it. *See* 10A *Federal Practice and Procedure*, *supra* note 2, § 2714.

39. *See* Louis Harris et al., *Judges Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend At Least Half Their Time on General Civil Cases*, 69 B.U. L. Rev. 731, 743–45 (1989) (reporting poll results and analysis) [hereinafter *Harris Poll*].

40. *See infra* notes 113–46 and accompanying text.

41. *See infra* note 199 and accompanying text.

42. The Seventh Amendment guarantees both that the right to a jury trial in civil cases will be preserved and that issues once decided will not be re-examined. U.S. Const. amend. VII.

Erie doctrine requires or explains the longstanding presumption against bifurcation in federal courts.

Because the Constitution has little to say about bifurcation, the presumption against bifurcation represents a policy choice—made partly by the drafters of the federal rules and partly by the federal judiciary—to disfavor bifurcation notwithstanding its potential for efficiency. Part III addresses whether the choice was a wise one: specifically, whether any important policies support choosing what appears to be an inefficient presumption. This area has seen the most heated debate, as critics of bifurcation have interposed policy objections that have bedeviled bifurcation almost since its inception.[43] This Article identifies the three most prominent policy criticisms and scrutinizes their validity.[44]

Part III first examines the argument that bifurcation is pro-defendant, a conclusion grounded in early empirical studies indicating that bifurcation reduced plaintiffs' success in establishing liability.[45] While bifurcation almost certainly can affect outcomes, the "pro-defendant" label appears unwarranted, or at least incomplete and misleading. First, the label is applied to too many different types of cases without sufficient qualification. The studies that detected an impact on outcomes all dealt with personal-injury tort situations, yet personal-injury torts are but a share of the federal docket.[46] There is little basis to think that bifurcation will affect other types of lawsuits in the same fashion. Second, even in the personal-injury tort context, recent studies suggest that bifurcation may actually increase the amount of damages recovered by the plaintiffs who are successful.[47] In short, the critics of bifurcation have not shown the purported pro-defendant effects of bifurcation to be sufficiently widespread to support a presumption against bifurcation in all federal cases.

Part III then considers the argument that bifurcation infringes on the proper role of the civil jury. This entails examining the impact of bifurcation on the four primary functions of the civil jury: (1) deciding

43. *See* Joseph Sanders, *Scientifically Complex Cases, Trial by Jury, and the Erosion of the Adversarial Process*, 48 DePaul L. Rev. 355, 383 n.201 (1998) (noting that bifurcation "is an idea that has been suggested and opposed for over 50 years").

44. *See infra* Part III.

45. *See* Wright, *supra* note 29, at 747 (noting study showing increase in defense verdicts from 42% to 79%).

46. *See infra* notes 241–44 and accompanying text.

47. *See* Landsman et al., *supra* note 7, at 329; Irwin A. Horowitz & Kenneth S. Bordens, *An Experimental Investigation of Procedural Issues in Complex Tort Trials*, 14 Law & Hum. Behav. 269, 283–84 (1990).

cases; (2) checking the abuse of government power; (3) legitimizing verdicts; and (4) creating a forum for citizen participation in government.[48] First, Part III concludes that bifurcation does not impair jury decision making. According to Pennington and Hastie, juries decide cases by constructing stories based on the evidence presented at trial.[49] Because bifurcation alters the evidence presented by separating the issues at trial, it could impair jury story construction. This Article concludes, however, that bifurcation probably enhances story construction by ordering the evidence into smaller, issue-centered segments where it is easier to recall and assimilate.[50] Second, Part III concludes that bifurcation does not improperly limit the jury's ability to check government abuse. Opponents of bifurcation have argued that juries who hear issues separately are less likely to temper a harsh legal result through jury nullification or compromise verdicts.[51] However, the U.S. Supreme Court has rejected civil nullification and compromise verdicts for nearly a century.[52] Moreover, bifurcation itself does not preclude nullification—a jury hearing only the liability issue remains free to reject the law by rendering a counter-factual decision on that point. Without the damages evidence, however, the jury may have no desire to nullify liability standards. Nevertheless, a procedure that merely reduces the incentive for a jury to do that which the U.S. Supreme Court has forbidden cannot be said to impair any valued role of the civil jury. Finally, this Article concludes that bifurcation is consonant with the jury's function of legitimizing verdicts and creating a forum for deliberative democracy, because those functions inhere in the institution of the citizen jury, regardless of the trial format. Accordingly, this Article concludes that jurors in bifurcated trials can perform the primary functions of civil jurors as well as—if not better than—jurors in unitary trials.

Part III concludes by examining whether the goal of avoiding prejudice supports the presumption against bifurcation. Here, the argument fails entirely. The "prejudice" that Rule 42(b) is trying to avoid is the risk that the jury will improperly let evidence from one issue influence its decision

---

48. *See Developments in the Law—The Civil Jury*, 110 Harv. L. Rev. 1408, 1423 (1997) [hereinafter *Civil Jury*].

49. Nancy Pennington & Reid Hastie, *A Cognitive Theory of Jury Decision Making: The Story Model*, 13 Cardozo L. Rev. 519, 520–21 (1991).

50. *See infra* notes 278–304 and accompanying text.

51. *See* Paula L. Hannaford, et al., *How Judges View Civil Juries*, 48 DePaul L. Rev. 247, 260 (1998) (discussing critics' contention that bifurcation removes jury's ability to interject community values into its deliberations).

52. *See infra* notes 311–14 and accompanying text.

on another issue.[53] Logically, bifurcation can never *cause* that type of prejudice because its very effect is to segment the trial so that the jury does not even hear the prejudicial evidence. Recently, however, some courts and commentators have warned that bifurcation can cause prejudice by creating a "sterile trial atmosphere" where plaintiffs cannot present their entire cases before juries.[54] The argument merits consideration but ultimately fails. It is true that jurors in bifurcated cases are less likely to feel sympathy for the plaintiff because they do not hear testimony regarding the plaintiff's damages.[55] And if, as a result, the jurors pay less attention to the merits or do not take their roles as jurors seriously, then bifurcation might prejudice a plaintiff by impairing the overall quality of the jury's decision.[56] The argument is flawed, however, because the courts have other means available to ensure that jurors understand the significance of the case and their roles as jurors.[57]

Part IV revisits the assertion that increased bifurcation will increase efficiency by reducing overall trial time. Though not conclusive, the available evidence supports the general conclusion that bifurcation offers substantial efficiencies.[58] This does not mean that bifurcation will be more efficient in all cases. A presumption for bifurcation might be just as bad as a presumption against bifurcation. This Article concludes that a rule of no presumption will maximize efficiency. Such a rule would require the trial judge to determine independently whether to try any issues in a case separately to achieve increased efficiency.

Part V proposes to eliminate the presumption against bifurcation and urges judges to aggressively seek opportunities to bifurcate. This approach does not require any changes to the existing criteria for bifurcation in Rule

---

53. *See infra* notes 345–49 and accompanying text.

54. The Sixth Circuit decided the seminal cases discussing the risk of a sterile trial environment. *See In re* Bendectin Litig., 857 F.2d 290, 315–16 (6th Cir. 1988); *In re* Beverly Hills Fire Litig., 695 F.2d 207, 217 (6th Cir. 1982).

55. *See* Brian H. Bornstein, *From Compassion to Compensation: The Effect of Injury Severity on Mock Jurors' Liability Judgments*, 28 J. Applied Soc. Psychol. 1477, 1485 (1998) (demonstrating that severity of plaintiff's injuries significantly increased both sympathy jurors felt for plaintiff and plaintiff's likelihood of prevailing on liability).

56. *See* Neil R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 Tenn. L. Rev. 1, 29–30 (1997) (arguing that sympathy plays important role in alerting juries that they should pay attention because there may be "justice-related matter worth looking into").

57. *See infra* notes 363–70 and accompanying text.

58. *See infra* notes 390–402 and accompanying text. The existing studies all indicate that bifurcation is more efficient in the long run. *See* George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. Rev. 527, 554 (1989); Zeisel & Callahan, *supra* note 12, at 1619.

42(b), which already authorizes judges to bifurcate issues in their discretion to enhance judicial administration.[59] What is needed is a change in attitude. That change can best be accomplished by adding language to Rule 42(b) specifying that there is no presumption against bifurcation and amending the advisory committee's notes—which currently disfavor the "routine" use of bifurcation in ordinary cases[60]—to encourage judges to seek bifurcation opportunities aggressively. The notes should also make clear that litigants and courts share responsibility for deciding whether bifurcation of any issues can be more efficient. Unbound from the historic policy objections and the belief that bifurcated trials should be the exception to the unitary trial rule, the federal judiciary should increase bifurcation to its most efficient usage.

I. THE RISE AND FALL OF BIFURCATION

A. A Brief History of Bifurcation

Bifurcation does not get much press, but it has a relatively vibrant past populated by some prominent players in the procedure world. Bifurcation as it currently exists began in 1938 with the adoption of the Federal Rules of Civil Procedure.[61] While the concept of trying issues separately was familiar in equity courts,[62] the enactment of Rule 42(b) marked the first time a statute or rule expressly authorized federal judges to try issues separately within a single action at law.[63]

At almost the same time that Rule 42(b) first authorized separated trials, Professor Lewis Mayers condemned the unitary trial as irrational and absurd.[64] Professor Mayers argued that the law courts should follow the lead of the equity courts and try issues separately to avoid wasting time trying

59. Fed. R. Civ. P. 42(b).

60. *See* Fed. R. Civ. P. 42(b) advisory committee's note (1966).

61. The Federal Rules of Civil Procedure took effect on September 16, 1938. *See* 4 *Federal Practice and Procedure*, *supra* note 2, § 1004.

62. Equitable actions for accounting, for example, frequently bifurcated the existence of liability from the measure of damages. *See* Mayers, *supra* note 9, at 389. Ironically, the bifurcated equitable action for accounting itself derived from a similar bifurcated action at law used in England in the 17th and 18th centuries. *See id.* at 391. Over time, however, the action at law became so complicated that it eventually "lapsed into disuse." *Id.* at 392–93.

63. *See* Note, *supra* note 18, at 1060.

64. *See* Mayers, *supra* note 9, at 389, 391.

what often turn out to be irrelevant issues.[65] He considered the judicial effort spent on trying ultimately irrelevant issues to be "sheer waste."[66]

Professor Mayers further argued that bifurcation, while primarily a tool of efficiency, would yield the additional benefit of reducing compromise and sympathy verdicts.[67] He had observed a phenomenon familiar to all trial lawyers, then and today: juries often ignore the evidence and instructions pertaining to liability and award damages to undeserving plaintiffs when they feel sorry for the plaintiff and believe that the defendant is better able to bear the cost.[68] Although strict application of some of the existing laws might yield harsh results, he argued that the cause of reform was better served in the long run by exposing the harshness of the rules through rigid application than by having juries mitigate their harshness on a case-by-case basis:

> Outworn the doctrines may be; but surely, if so, there is a better way of modernizing them than by permitting juries to ignore them. If the adoption of the present proposal should result in these cases in a more rigorous application of our negligence doctrines than now obtains, the natural outcome will be to bring to a head whatever just dissatisfaction exists, with resultant reform or amelioration of the doctrines.[69]

Thus, Professor Mayers believed that bifurcation would ultimately advance the interests of efficiency, the rule of law, and genuine law reform.

While Professor Mayers almost certainly would have welcomed a statute or rule authorizing bifurcation of actions at law,[70] he realized that neither

---

65. Professor Mayers compared how equity and law courts would handle a comparable dispute arising out of an employee's claim to business profits from his employer. In an equitable action for accounting, the trial might end after one day if the jury found the plaintiff had not proved a right to share in the profits. *See id.* at 389–90. In an action at law, however, the jury would be required to hear several days of testimony relating to damages before it could return a defense verdict of no liability. *See id.*

66. *Id.* at 390. Professor Mayers minced no words in stating his dislike of unitary trials: "The process is inherently so absurd, so at variance with the procedure followed in investigations in every other department of life, that only our lifelong inurement to it makes it possible for us to accept it without question." *Id.* at 389.

67. *See id.* at 394 ("A jury confronted solely with the issue of negligence might well be more heedful of the law as laid down by the court.").

68. *See id.* at 394. Professor Mayers wryly put it this way: "[O]ur juries have come largely to ignore the issue of liability except as a factor in the mitigation or appreciation of damages." *Id.*

69. *Id.* at 394–95.

70. At the time the article was written, the Advisory Committee's final draft of what was to become the Federal Rules of Civil Procedure had deleted a proposed Rule 43(b) authorizing federal courts to

would be enough. Recognizing that any workable rule would necessarily vest vast discretion in the trial judge, Professor Mayers foresaw that the actual effect of any such rule or statute would still depend on "a change in the traditional attitude of bench and bar toward the matter."[71] He was not optimistic, and appropriately so. For the next twenty years, bifurcation made only limited and infrequent inroads into everyday federal procedure.[72]

Then something interesting happened. With court congestion and delay reaching what then seemed to be critical levels,[73] proceduralists began thinking about ways to speed up trials, thereby reducing the hardship caused by delay. At the forefront of this movement was Judge Julius Miner of the U.S. District Court for the Northern District of Illinois, who proposed to his colleagues that they adopt a rule providing for an initial trial on liability in personal injury and other civil litigation as a prerequisite to adjudicating the extent of injury and measure of damages.[74] The Eastern Division of the U.S. District Court for the Northern District of Illinois agreed and adopted what became Local Rule 21, which encouraged but did not require bifurcation of liability and damages in tort cases.[75] Judge Miner predicted that Local Rule

---

"order separate trials, and determine the order thereof, of any distinct issues arising in an action." *Id.* at 396 n.18 (internal quotations omitted).

71. *Id.* at 397.

72. *See* 2B William W. Barron et al., *Federal Practice and Procedure* § 943 (1961) (identifying situations in which courts granted bifurcation). This treatise, the predecessor to the "Wright and Miller" of modern trial practice, showed little enthusiasm for bifurcation: "The trial piecemeal of separate issues in a single suit is not to be the usual course. It should be resorted to only in the exercise of informed discretion and in a case and at a juncture which move the court to conclude that such action will really further convenience or avoid prejudice." *Id.* at 187. A 1955 student note, for example, could find only six cases where liability and damages were tried separately, four of which were patent cases. *See* Note, *supra* note 19, at 763 app. A; *see also* Landsman et al., *supra* note 7, at 305 (charting cases).

73. *See* Hans Zeisel et al., *Delay In The Courts* xxi (2d ed. 1978) ("One of the urgent problems in law today is court congestion and delay.").

74. *See* Miner, *supra* note 26, at 1268.

75. The Local Rule provided in full:

> Pursuant to and in furtherance of Rule 42(b), Federal Rules of Civil Procedure, to curtail undue delay in the administration of justice in personal injury and other civil litigation wherein the issue of liability may be adjudicated as a prerequisite to the determination of any or all other issues, in jury and non-jury cases, a separate trial may be had upon such issue of liability, upon motion of any of the parties or at the Court's discretion, in any claim, cross-claim, counterclaim or third-party claim.
>
> In the event liability is sustained, the court may recess for pretrial or settlement conference or proceed with the trial on any or all of the remaining issues before the Court, before the same jury or before another jury as conditions may require and the Court shall deem meet.
>
> The court, however, may proceed to trial upon all or any combination of issues if, in its discretion, and in furtherance of justice, it shall appear that a separate trial will work a hardship upon any of the parties or will result in protracted or costly litigation.

21 would obviate the need for damages evidence in the 40% of trials that result in defense verdicts, leading to an overall savings of trial time of between 28% and 32%.[76]

Rule 21 garnered immediate attention from the local bar and beyond, much of it critical.[77] Its most formidable opponent was Jack Weinstein, then a professor at Columbia University, who contended that bifurcation interfered with the role of the jury. Professor Weinstein argued that the true value of juries was not to find facts or apply law, but to satisfy "a strongly felt need for a 'fair decision,' for the judgment of reasonable and unbiased peers instead of the logical, legally proper, result."[78] Professor Weinstein considered negligence cases (an express target of Rule 21) a perfect example, because juries often ignored the rule of strict contributory negligence, finding for the plaintiff on liability but then discounting damages to reflect the plaintiff's responsibility.[79] Professor Weinstein acknowledged that proponents of bifurcation such as Professor Mayers had praised bifurcation precisely because it limited that type of jury conduct.[80] In his mind, however, procedural devices that forced juries to stay within the law prevented them from "keeping the actual operation of the law more responsive to human needs than an archaic substantive law would permit if it were carried out in letter and spirit."[81] Stated otherwise, Professor

---

Id. at 1268, 1333 (internal quotation omitted). While Local Rule 21 technically did not grant any more power or discretion to judges than already existed under Rule 42(b), it sent a clear signal to the judges in the Eastern Division of the Northern District that separate trials should be ordered in routine negligence cases, contrary to previous practice under Rule 42(b). *See* Note, *supra* note 63, at 1065.

76. *See* Miner, *supra* note 26, at 1333 (citing Hans Zeisel et al., *Delay In The Courts* 99 (1959)). Judge Miner estimated (but provided no citation) that damages evidence in personal injury cases consumed between 70% to 80% of the trial time which would alone yield an overall trial savings of between 28% and 32%. *See id.*

77. An early critic was Philip Corboy, a prominent Chicago personal injury lawyer. *See* Corboy, *supra* note 29, at 1022–23 (basing his writing on speech given at 1963 American Bar Association convention). The rule and the case law applying it also spawned several law review notes. *See generally, e.g.*, James J. Harrington, *Legislation and Administration*, 36 Notre Dame L. Rev. 388 (1961) (discussing Hosie v. Chicago & Northwest Ry. Co., 282 F.2d 639 (7th Cir. 1960)); Recent Case, 74 Harv. L. Rev. 781 (1961); (same); Thomas D. Aitken, Comment, *Trial Practice: Separate Trials on the Issues of Liability and Damages*, 17 Okla. L. Rev. 114 (1964); Thomas E. Maloney, Comment, *Implications of Bifurcation in the Ordinary Negligence Case*, 26 U. Pitt. L. Rev. 99 (1964); Note, *supra* note 18; Note, *Separation of Issues of Liability and Damages in Personal Injury Cases: An Attempt to Combat Congestion by Rule of Court*, 46 Iowa L. Rev. 815 (1961).

78. *See* Weinstein, *supra* note 29, at 833.

79. *See id.* at 833–34 (discussing jury practice of applying de facto comparative-negligence standard).

80. *See id.* at 834 & n.13.

81. *Id.* at 834 (internal quotation omitted).

Weinstein depended on *juries* to keep the law current, rather than judges or legislatures, and it was this role, rather than the traditional fact-finding role, that made the jury system worth defending.[82]

Professor Weinstein was also skeptical about the efficiency of bifurcation. He argued, for example, that any efficiency benefits of bifurcation could disappear once juries learned that they needed to find liability in order to award tempered damages to a partially responsible plaintiff.[83] He also cautioned that routine bifurcation might actually increase the number of jury trials overall by reducing pre-trial settlements or jury waivers.[84] Thus, while Professor Weinstein began his case against bifurcation on quasi-constitutional grounds, he ended it on a purely practical note, emphasizing that "[n]o study published to date furnishes acceptable quantitative proof that the split trial, routinely applied, over the long run will appreciably reduce calendar congestion."[85]

The proof was just around the corner. Prior to promulgating Local Rule 21, the Northern District asked Hans Zeisel of the University of Chicago Law School to study the actual effect of Local Rule 21 on the court's trial load.[86] Professor Zeisel hypothesized that routine bifurcation under Local Rule 21 would save substantial trial time because many cases (he estimated 40%) would end with a finding of no liability and many other cases would settle after a determination of liability.[87] What was not known was whether

---

82. *See id.* at 832. The effect of bifurcation on jury verdicts triggered a second objection—that Local Rule 21 ran afoul of the *Erie* doctrine. Under the "outcome-determination" standard in effect at the time, Professor Weinstein suggested that Local Rule 21 might be "substantive" because of its "substantial impact on the law of contributory negligence." *Id.* at 836. However, Professor Weinstein was clearly not arguing that bifurcation itself was unconstitutional. Rather, he found Local Rule 21's substantive impacts especially disturbing because, being a local rule, Local Rule 21 did not benefit from the "mature consideration of informed opinion" given to the Federal Rules by relevant authorities including the U.S. Supreme Court and Congress. *Id.* at 839 (citing Miner v. Atlass, 363 U.S. 641, 650 (1960)). Professor Weinstein built on this theme in his later book on rulemaking. *See* Jack B. Weinstein, *Reform of Court Rule-Making Procedures* 117–54 (1977).

83. *See* Weinstein, *supra* note 29, at 849.

84. *See id.* at 849–50. Professor Weinstein conceded that there is usually a countervailing factor, such as the likelihood of post-liability settlements. *Id.* at 850. Similarly, Professor Weinstein acknowledged that a possible increase of cases removed to federal courts would likely be offset by the possibility that plaintiffs might file their lawsuits in state courts to avoid Rule 21. *Id.*

85. *Id.* at 853.

86. *See* Zeisel & Callahan, *supra* note 12, at 1607. The study did not attempt to determine whether Local Rule 21 altered the substance of the jury verdicts. *See id.* While the study stated that Professor Zeisel and his colleagues were busy "collecting data which might have a bearing on this problem," *id.* at 1625, it does not appear any such study was ever published.

87. *See id.* at 1607–08. Professor Zeisel based these figures on the nationwide study of civil jury trials that culminated in his earlier book, Hans Zeisel et al., *Delay in the Courts* (1959).

countervailing factors such as a decrease in pre-trial settlements or jury waivers might offset these savings. Increased bifurcation could also create inefficiencies by increasing the rate of hung juries or overall trial time.[88] Accordingly, Professor Zeisel studied Local Rule 21 in action to see if bifurcation was in fact more efficient and, if so, how much more efficient.

The study confirmed Professor Zeisel's hypothesis: bifurcation had reduced trial time by about 20%.[89] Moreover, none of the feared countervailing effects were detected. First, the bifurcated trials that required two verdicts were no longer than unitary trials (and indeed may have been shorter overall).[90] Second, bifurcation did not increase overall deliberation time because, while juries in bifurcated trials deliberated significantly longer than juries in unitary trials, they had to decide damages in so few cases that on average jury deliberation time dropped by about twenty minutes per case.[91] Third, Professor Zeisel discerned no statistically significant variance in jury waivers or hung juries.[92] Finally, Local Rule 21 had absolutely no effect on the frequency of pre-trial settlements.[93] Professor Zeisel concluded that bifurcation was more efficient, that there were *no* countervailing offsets to bifurcation, and, therefore, that courts should bifurcate as frequently as possible if they want to realize maximum efficiency.[94]

---

88. *See* Zeisel & Callahan, *supra* note 12, at 1608.

89. *See id.* at 1619. Strictly speaking, this figure is limited to personal injury actions, because the study did not have statistically significant samples to analyze contract and other non-tort cases. *See id.* at 1610. Professor Zeisel at least was willing to suggest comparable savings for non-tort cases "within reason." *Id.*

90. *See id.* at 1610, 1621 (stating that full bifurcated trials averaged of 4.0 days; unitary trials averaged 4.7 days).

91. Juries in bifurcated cases took on average only 2.7 hours to decide liability, whereas juries in unitary cases took on average 3.7 hours to decide liability and damages. *See id.* at 1621. While juries in bifurcated cases took an additional 3.4 hours to decide damages, they were called on to do so in only 12% of the cases, whereas juries in unitary trials reached verdicts 73% of the time. *See id.* Thus, overall average jury time dropped from 2.7 hours per case to 2.33 hours per case. *See id.*

92. *See id.* at 1622–23.

93. The numbers in this regard are rather remarkable. During the two-year period prior to the implementation of Local Rule 21, 1435 personal injury cases were filed, of which only 217 reached trial. *See id.* at 1623. During the two-year period after Local Rule 21, 1433 personal injury cases were filed, of which only 216 reached trial. *See id.* Thus, the pre-trial settlement rate remained constant at 84.9% of personal injury cases. *See id.*

94. *See id.* at 1624. In this respect, Professor Zeisel points out that judges should not attempt to select "good candidates" for bifurcation based on the likelihood of a defense verdict. *Id.* Even to the extent judges could make informed decisions in this regard, it overlooks the fact that two-thirds of cases finding liability terminate in pre-damages settlement. *See id.*

Despite these impressive results, the bifurcation movement came to an abrupt halt in 1966, when Rule 42(b) was amended as part of the union of admiralty and civil procedure.[95] The amendments to the rule itself took no position on the merits of increased bifurcation, but the accompanying advisory committee notes spelled doom for the bifurcation movement: "While separation of issues for trial is not to be routinely ordered, it is important that it be encouraged where experience has demonstrated its worth."[96]

It has been suggested that the amendments to the text of Rule 42 were "carefully couched so as to take no position with respect to severance in civil actions,"[97] and perhaps the committee intended this language to straddle the fence between Professor Weinstein and Judge Miner. Its impact, however, has been anything but neutral. To this day, the advisory committee note is cited as creating a rule-based presumption against issue bifurcation.[98] The leading procedure treatise at the time echoed that view, commenting that the advisory committee note "though cryptic, suggests that in addition to reassuring the admiralty bar, the changes in Rule 42 were intended to give rather Delphic encouragement to separate trial of liability issues, while warning against routine bifurcation of the ordinary negligence case."[99]

With that, the bifurcation movement beat a hasty and whimpering retreat. Perhaps the 1966 amendment—combined with the criticism of bifurcation by several leading figures—effectively ended the debate. Bad timing may also have played a role. One suspects that Judge Miner had been eagerly awaiting the results of Professor Zeisel's study, coiled to counterattack Professor Weinstein's assault on Local Rule 21. But it was not to be. Judge

---

95. The purpose of the amendment was to assure the admiralty bar that the practice of bifurcating liability and damages in admiralty cases would not change. 9 *Federal Practice and Procedure*, *supra* note 2, § 2388, at 475; *see also* Fed. R. Civ. P. 42(b) advisory committee's note (1966) ("In certain suits in admiralty separation for trial of the issues of liability and damages . . . has been conducive to expedition and economy.").

96. 9 *Federal Practice and Procedure*, *supra* note 2, § 2388, at 475; *see also* Fed. R. Civ. P. 42(b) advisory committee's note (1966).

97. Schwartz, *supra* note 26, at 1210.

98. *See infra* notes 113–21 and accompanying text.

99. 2B Barron et al., *supra* note 72, § 943, at 67 (Supp. 1970). By 1970, Professor Charles Alan Wright had taken over editing of the treatise which now bears his name. This view was foreshadowed in Professor Wright's earlier commentary on the law explosion in which he advanced the view—much as had Professor Weinstein—that routine bifurcation effected so strong a change in the outcome of jury trials that, if it could be implemented at all, it had to come at the hands of Congress and not the courts. Wright, *supra* note 29, at 747.

Miner died the same day Professor Zeisel submitted his report to the Northern District,[100] leaving bifurcation without its most prominent and most vocal advocate.[101] Whatever the cause, the lively bifurcation debate of the 1960s did not live to see the 1970s.

B. After the Fall: Modern Bifurcation Practice

Bifurcation practice today has changed little from bifurcation practice in the 1960s. While bifurcation currently lacks an individual champion from the bench like Judge Miner, the federal judiciary as a whole is overwhelmingly supportive of bifurcation.[102] As then, however, this support rarely extends beyond its use in commonly accepted contexts such as complex litigation and patent cases.[103] Few judges seem willing to break from tradition and employ bifurcation in ordinary, single-plaintiff cases. Overall, bifurcation remains controversial and is used infrequently.[104]

1. The View From the Bench

Judges *love* bifurcation, or at least so they say. According to a 1987 Harris poll, federal judges "overwhelmingly support" bifurcation.[105] Of the federal judges whose jurisdictions' rules allowed bifurcation,[106] 94% said

---

100. *See* Zeisel & Callahan, *supra* note 12, at 1606 n.2.

101. Professor Mayers could have re-assumed that role, and his later writings clearly signaled his continuing belief in the benefits of expanded bifurcation, but by that time he had apparently shifted his attention to larger, big-picture projects. *See* Lewis Mayers, *The Machinery of Justice* 39 (1973) ("[G]eneral adoption [of routine bifurcation] by the courts of law would greatly expedite the business of the courts and save time for litigants, counsel, and witnesses as well."). Bifurcation did garner a new champion in Professor Warren Schwartz, a colleague of Professor Wright at the University of Texas Law School. *See* Schwartz, *supra* note 26, at 1197. His article did not generate much activity, however, possibly because people viewed bifurcation as a dead issue, or perhaps because his proposed rule—which called for a stay of all proceedings, including discovery, until resolution of the severed issue and mandatory jury waivers by the moving party—simply went too far. *See id.* at 1207.

102. *See infra* notes 105–10 and accompanying text.

103. *See infra* notes 111–12, 122–30 and accompanying text.

104. *See* Henderson et al., *supra* note 9, at 1684.

105. *Harris Poll*, *supra* note 39, at 733–34; *see also* John K. Setear, *Comments on Judges' Opinions On Procedural Issues*, 69 B.U. L. Rev. 765, 778 (1989) ("The enthusiasm for bifurcation of trials verges on the glowing.").

106. Two percent of the federal judges said the judicial rules of their jurisdiction did not allow bifurcation. *See Harris Poll*, *supra* note 39, at 743 tbl.5.1. However, Rule 42(b) empowers federal judges to bifurcate any case, be it federal question or diversity, regardless of contrary state law. *See infra*, notes 207–208. There is no way of knowing whether these judges would bifurcate if they thought they could, although one suspects a predisposition against bifurcation may have contributed to the misconception.

they had bifurcated at least one case.[107] When they did bifurcate, the judges were very pleased with the results. Of the group who had bifurcated, 84% stated that bifurcation helped the process, compared to only 3% who stated it did not help the process.[108] When asked if bifurcation had a positive or negative impact on specific aspects of litigation, the federal judges were similarly ebullient: 82% said bifurcation speeded up the trial process, 85% said bifurcation expedited settlement, 79% said bifurcation reduced transaction costs, and 80% said bifurcation improved the fairness of the outcome.[109] Thus, as the authors of the Harris poll noted, "[b]ifurcation has few critics among judges."[110]

But what do these rave reviews really mean? Other poll results suggest that when judges say they like bifurcation, what they really mean is that they like bifurcation within its traditional parameters. For example, while 94% of the federal judges said they had bifurcated at least one case, less than half of them had bifurcated more than five cases during the previous three-year period.[111] Only 19% had bifurcated more than ten cases during that three-year period.[112] Thus, relatively few judges bifurcated frequently enough during that period to indicate that they had been aggressively looking for opportunities to bifurcate. Instead, they had simply been willing to bifurcate the obvious candidates.

---

107. *See Harris Poll*, *supra* note 39, at 744 tbl.5.2.

108. *See id.* at 744 tbl.5.3. Another 9% indicated bifurcation made no material difference. The poll does not account for the remaining 4%. *See id.*

109. *See id.* at 745 tbl.5.6.

110. *Id.* at 743. The state judges polled also raved about bifurcation. Like their federal counterparts, 84% of the state judges who had bifurcated thought it helped the process. *See id.* at 744 tbl.5.3. Just under 80% of those judges agreed that bifurcation generally speeded up the trial process, expedited settlements, reduced transaction costs, and improved the fairness of the outcomes. *See id.* at 745 tbl.5.6. A recent poll of California state judges lends further support. *See* Franklin Strier, *The Road to Reform: Judges on Juries and Attorneys*, 30 Loy. L.A. L. Rev. 1249, 1261 (1997) (quoting one judge as saying that bifurcated trials "are shorter and settlement during the trial is more likely"); *id.* at 1273 n.127 ("The endorsement[] of issue separation . . . confirmed the sentiments of the judges in the major prior survey of judicial opinions."). *But see id.* at 1261–62 (quoting another judge as saying, "I believe that issue-separated trials denigrate the intelligence of jurors to keep issues separate, and are a tremendous waste of courtroom resources.").

111. *See Harris Poll*, *supra* note 39, at 744 tbl. 5.4.

112. *See id.* (12% had bifurcated 11–20 times; 7% had bifurcated 21 times or more). The state judges in the Harris poll reported similar figures. Of the judges who did bifurcate, only 21% reported having bifurcated 11 or more cases during the three-year period preceding the poll. *See id.* In contrast, 57% reported having bifurcated five or fewer cases during that period. *See id.*

2. *Bifurcation in the 1990s*

Despite lauding bifurcation in the polls, in practice most federal judges employ a presumption against bifurcation.[113] Federal judges commonly preface bifurcation discussions by saying that bifurcation is "not to be routinely ordered."[114] Also typical are statements that bifurcation is the exception to the rule of unitary trials,[115] that bifurcation should be limited to exceptional circumstances,[116] and that bifurcation is an "extraordinary measure."[117] Frequently, this presumption manifests itself as a burden of proof to be satisfied by the party seeking bifurcation.[118] Beyond citing to precedent or the 1966 advisory committee note,[119] courts today rarely articulate a basis for the presumption against bifurcation.[120] However, some courts still view bifurcation as an affront to the sanctity of the civil jury trial:

---

113. *See* 8 *Moore's Federal Practice*, *supra* note 1, § 42.23 (asserting that bifurcation should not be used in "simple" cases); 9 *Federal Practice and Procedure*, *supra* note 2, § 2388, at 474 ("The piecemeal trial of separate issues in a single lawsuit . . . is not to be the usual course.").

114. Brown v. Advantage Eng'g, Inc., 732 F. Supp. 1163, 1170 (N.D. Ga. 1990) (internal quotations omitted); Marshall v. Overhead Door Corp., 131 F.R.D. 94, 98 (E.D. Pa. 1990). This view has been applied even in the Northern District of Illinois. *See* Malone v. Pipefitters' Assoc. Local Union No. 597, No. 87-C-9966, 1992 WL 73520, at *1 (N.D. Ill. Mar. 30, 1992) (citing Local Rule 21).

115. *See* Monaghan v. SZS 33 Assoc., 827 F. Supp. 233, 245 (S.D.N.Y. 1993).

116. *See* ABB Indus. Sys., Inc. v. Prime Tech., Inc., 32 F. Supp. 2d 38, 43 (D. Conn. 1998); Marisol v. Guiliani, 929 F. Supp. 662, 693 (S.D.N.Y. 1996); Sunenblick v. Harrell, 145 F.R.D. 314, 317 (S.D.N.Y. 1993) ("[S]eparation of issues is not the usual course that should be followed.") (internal quotations omitted).

117. Mangabat v. Sears Roebuck & Co., No. 92-1742, 1992 WL 211561, at *2 (E.D. Pa. Aug. 26, 1992).

118. *See* 9 *Federal Practice and Procedure*, *supra* note 2, § 2388, at 83 (Supp. 1998); *see, e.g.*, Novopharm Ltd. v. Torpharm, Inc., 181 F.R.D. 308, 310 (E.D.N.C. 1998); Princeton Biochemicals, Inc. v. Beckman Instruments, Inc., 180 F.R.D. 254, 256 (D.N.J. 1997); Industrias Metalicas Marva, Inc. v. Lausell, 172 F.R.D. 1, 2 (D.P.R. 1997); Ake v. General Motors Corp., 942 F. Supp. 869, 877 (W.D.N.Y. 1996); Home Elevators, Inc. v. Miller Elevator Serv. Co., 933 F. Supp. 1090, 1091 (N.D. Ga. 1996); *Marshall*, 131 F.R.D. at 97.

119. The advisory committee's note states that "separation of issues for trial is not to be routinely ordered." Fed. R. Civ. P. 42(b) advisory committee's note. Courts frequently cite to the note as establishing a presumption against routine bifurcation. *See, e.g.*, Angelo v. Armstrong World Indus., Inc., 11 F.3d 957, 964 (10th Cir. 1993); Lis v. Robert Packer Hosp., 579 F.2d 819, 824 (3d Cir. 1978); *Lausell*, 172 F.R.D. at 2; Hamm v. American Home Prods. Corp., 888 F. Supp. 1037, 1039 (E.D. Cal. 1995); Brown v. Advantage Eng'g, Inc., 732 F. Supp. 1163, 1170 (N.D. Ga. 1990).

120. A few cases assert the "general principle that a single trial tends to lessen the delay, expense, an [sic] inconvenience to all parties." *Mangabat*, 1992 WL 211561, at *1; *see, e.g.*, Hirschheimer v. Associated Metals & Minerals Corp., No. 94-CV-6155JFK, 1997 WL 528057, at *9 (S.D.N.Y. Aug. 27, 1997).

> [T]he court should remain mindful of the traditional role of the factfinder; i.e., to make an ultimate determination on the basis of the case presented in its entirety. Because bifurcation works an infringement on such an important aspect of the judicial process, courts are cautioned that it is not the usual course that should be followed.[121]

The presumption against bifurcation is not insurmountable. Indeed, federal judges regularly employ bifurcation in complex litigation such as mass tort cases.[122] Bifurcation is also common in patent litigation,[123] complex environmental litigation,[124] antitrust litigation,[125] and complex employment litigation.[126] In these situations, the courts typically support the

---

121. Kimberly-Clark Corp. v. James River Corp., 131 F.R.D. 607, 608 (N.D. Ga. 1989) (internal quotations omitted); *see also* Monaghan v. SZS 33 Assoc., 827 F. Supp. 233, 246 (S.D.N.Y. 1993) ("[T]he fundamental presumption which favors the trial of all issues to a single jury and underlies the assumption of Rule 42(b) that bifurcation, even in personal injury actions, is reserved for truly extraordinary situations of *undue* prejudice.").

122. *See* Shetterly v. Raymark Indus., Inc., 117 F.3d 776, 782 (4th Cir. 1997) (allowing bifurcation in asbestos case); *Angelo*, 11 F.3d at 964–65 (allowing reverse bifurcation in asbestos case); Borman v. Raymark Indus., Inc., 960 F.2d 327, 329 (3d Cir. 1992) (same); Adams v. Shell Oil Co., 136 F.R.D. 588, 593 (E.D. La. 1991) (finding Rule 23(b)(3) class for common issues arising out of refinery explosion); *see generally* N. Kathleen Strickland, *How to Structure a Mass Toxic Tort Trial—Bifurcation, Trifurcation, or Neither: Practical Considerations*, 406 PLI/Lit. 287 (March 1991).

123. *See* Johns Hopkins Univ. v. Cellpro, 160 F.R.D. 30, 33 (D. Del. 1995) ("Historically, courts have found it worthwhile to hold separate trials on liability and damages issues in patent cases.") A special application arises where the infringer relies on advice of counsel as a defense to willfulness. *See, e.g.*, Novopharm Ltd. v. Torpharm, Inc., 181 F.R.D. 308, 311–12 (E.D.N.C. 1998) (placing willfulness in damages phase); *see generally* Thomas L. Creel & Robert P. Taylor, *Bifurcation, Trifurcation, Opinions of Counsel, Privilege and Prejudice*, 424 PLI/Pat. 823 (Nov. 1995) (discussing appropriate uses of bifurcation in patent litigation).

124. *See In re* Paoli R.R. Yard PCB Litig., 113 F.3d 444, 452 n.5 (3d Cir. 1997) (obviating need for months of additional trial on liability when jury returned defense verdict after 13-day trial on exposure and causation); United States v. Alcan Aluminum Corp., 990 F.2d 711, 720 (2d Cir. 1993) (bifurcating liability issues from party responsibility issues). Though the reported opinions provide little analysis under Rule 42(b), the Woburn litigation is a now-famous example of polyfurcation in complex environmental litigation. *See* Jonathan Harr, *A Civil Action* (1995). For an excellent and detailed examination of the history behind the polyfurcation in the Woburn litigation, see Lewis A. Grossman & Robert G. Vaughn, *A Documentary Companion to A Civil Action* 528–41 (1999).

125. *See, e.g.*, Barr Lab., Inc. v. Abbott Lab., 978 F.2d 98, 115 (3d Cir. 1992) (bifurcating definition of the relevant product market); *In re* Brand Name Prescription Drugs Antitrust Litig., No. 94-C-897, 1998 WL 326721, at *3 (N.D. Ill. June 12, 1998) (bifurcating liability and damages in class action); SCFC ILC, Inc. v. Visa, Inc., 801 F. Supp. 517, 528–29 (D. Utah 1992) (bifurcating antitrust liability from damages and trial of other claims).

126. "The majority of courts have held the bifurcation of liability and relief phases of Title VII suits to be an appropriate means of litigating employment discrimination claims." Herbert Newberg & Alba Conte, 5 *Newberg on Class Actions* § 24.123 (3d ed. 1992); *see, e.g.*, EEOC v. Foster Wheeler Constructors, Inc., No. 98-C-1601, 1999 WL 528200, at *2–3 (N.D. Ill. July 13, 1999) (bifurcating

decision to bifurcate by saying that bifurcation will be more efficient, save trial time, and improve juror comprehension.[127] This attitude parallels (or perhaps follows) that of the Manual for Complex Litigation, which also endorses the use of bifurcation in complex litigation[128] as a means of promoting efficiency, reducing the length of trial, improving juror comprehension, and increasing settlement rates.[129] Recently, the American Law Institute's Complex Litigation Project similarly concluded that bifurcation could promote efficiency and fairness in multi-party, multi-forum complex litigation.[130] Thus, in the complex-litigation arena, the role of bifurcation appears firmly entrenched and, if anything, seems likely to grow even larger.

Bifurcation under Rule 42(b) occurs in ordinary cases as well. Indeed, there are many recent examples of judges bifurcating ordinary tort cases,[131]

---

existence of hostile work environment from individual injury and damages in class action). *But see* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 419, 424–25 (5th Cir. 1998) (refusing to certify employment class action on either all or some issues because of concern that common issues were not distinct from individual issues).

127. *See, e.g.*, *Barr*, 978 F.2d at 115 (enhancing juror comprehension of complex antitrust issue); Princeton Biochemicals, Inc. v. Beckman Instruments, Inc., 180 F.R.D. 254, 258 (D.N.J. 1997) ("[T]he complexity of the liability issues as well as the resulting potential threat of prejudice due to jury confusion present a controversy ripe for bifurcation."); *id.* at 259 ("[B]ifurcation will encourage judicial economy and efficiency in light of the complexity of the damages issues."); Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439, 459 (N.D. Cal. 1994) (bifurcating liability and relief in employment class action because "when liability is found during an initial phase, bifurcated cases often settle, thereby obviating the need for adjudicating issues of class damages").

128. *Manual for Complex Litigation* § 21.632 (3d ed. 1995). The manual highlights bifurcation opportunities in mass-tort cases, *see id.* § 33.28, antitrust litigation, *see id.* § 33.11, employment-discrimination class actions, *see id.* § 33.53, patent litigation, *see id.* § 33.62, and CERCLA litigation, *see id.* § 33.73.

129. *See id.* § 21.632. The manual cautions, however, that these benefits must be balanced against potential off-setting factors such as increased cost, delay in reaching a final outcome, delay in reaching settlement, inconvenience to the parties and witnesses, and "unfairness if the result is to prevent a litigant from presenting a coherent picture to the trier of fact." *Id.*

130. *See* American Law Institute, *Complex Litigation: Statutory Recommendations and Analysis* § 3.06(a) (1994) (supporting authority of transferee judge to separate issues for trial to promote its just, efficient, and fair resolution) [hereinafter *Complex Litigation Project*]. The proposal identified the following substantive areas where complex multi-party, multi-forum litigation might call for issue separation: antitrust, securities, products-liability, mass-disaster, copyright and patent, and contract litigation. *See id.* cmt.c, at 114.

131. *See, e.g.*, Miller v. New Jersey Transit Auth. Rail Ops., 160 F.R.D. 37, 39–41 (D.N.J. 1995) (bifurcating personal injury claim resulting from contact with electrified train); Witherbee v. Honeywell, Inc., 151 F.R.D. 27, 28–30 (N.D.N.Y. 1993) (bifurcating personal injury claim arising out of water heater explosion); Greening v. B.F. Goodrich Co., No. 90-C-2891, 1993 WL 134781, at *1–4 (N.D. Ill. April 23, 1993) (bifurcating wrongful death claims arising out of explosion of chemical storage tank);

contract cases,[132] and employment cases.[133] The issues bifurcated in these cases are varied, including affirmative defenses,[134] liability and damages,[135] and punitive damages.[136] The reasons for bifurcating are typical: to gain efficiency,[137] to avoid prejudice,[138] or both.[139] Thus, it would be unfair—and

---

Zofcin v. Dean, 144 F.R.D. 203, 204–06 (S.D.N.Y. 1992) (bifurcating personal injury and wrongful death claims arising out of car crash).

132. *See, e.g.*, Hydrite Chem. Co. v. Calumet Lubricants Co., 47 F.3d 887, 888–89 (7th Cir. 1995) (breach of warranty); Raphaely Int'l, Inc. v. Waterman S.S. Corp., 764 F. Supp. 47, 52 (S.D.N.Y. 1991) (bifurcating breach of warranty issue from damages in shipping case, noting that it was the practice in admiralty cases to bifurcate); Vadakin v. International Bhd. of Boilermakers, 748 F. Supp. 550, 555 (S.D. Ohio 1990) (bifurcating breach of contract issue from damages).

133. *See, e.g.*, Gafford v. General Elec. Co., 997 F.2d 150, 171–72 (6th Cir. 1993) (bifurcating in gender-discrimination case); Brom v. Bozell, Jacobs, Kenyon & Eckhardt, Inc., 867 F. Supp. 686, 689–90 (N.D. Ill. 1994) (bifurcating in age-discrimination case); Buscemi v. Pepsico, Inc., 736 F. Supp. 1267, 1271–72 (S.D.N.Y. 1990) (same).

134. *See* American Nat'l Red Cross v. Travelers Indem. Co., 924 F. Supp. 304, 308 (D.D.C. 1996) (bifurcating affirmative defenses from insurance coverage issues); Dixon v. Certainteed Corp., 166 F.R.D. 487, 488–89 (D. Kan. 1996) (bifurcating whether plaintiff was statutory employee limited to workers' compensation remedies); *Greening*, 1996 WL 134781, at *4 (bifurcating affirmative defenses that injured plaintiff was an "employee" limited to workers' compensation remedies).

135. *See, e.g.*, *Witherbee*, 151 F.R.D. at 29–30; *Brom*, 867 F. Supp. at 690.

136. *See, e.g.*, Scheufler v. General Host Corp., 895 F. Supp. 1411, 1414–15 (D. Kan. 1995); *cf.* Mattison v. Dallas Carrier Corp., 947 F.2d 95, 110 (4th Cir. 1991) (endorsing bifurcation of punitive damages from liability and compensatory damages); Simpson v. Pittsburgh Corning Corp., 901 F.2d 277, 283 (2d Cir. 1990) (stating that bifurcation of punitive damages is "preferred method"). One defender of punitive-damage awards has suggested the use of bifurcation as a safeguard against excessive or unjust awards. *See* Cynthia R. Mabry, *Warning! The Manufacturer of This Product May Have Engaged in Cover-Ups, Lies, and Concealment: Making the Case for Limitless Punitive Awards in Product Liability Lawsuits*, 73 Ind. L.J. 187, 239 (1997).

137. *See Brom*, 867 F. Supp. at 690 (regarding extensive and complex damages evidence in age-discrimination case); *Vadakin*, 748 F. Supp. at 555 (bifurcating breach of contract and damages because damages evidence was "difficult and cumbersome" and would become moot if plaintiff failed to prove a breach of contract in first place).

138. *See Witherbee*, 151 F.R.D. at 30 ("By separating the issues of liability and damages, the court will minimize the risk that the defendants . . . will be unfairly prejudiced by testimony relating to the damages which involve extensive burn injuries sustained by [plaintiff]."); Zofcin v. Dean, 144 F.R.D. 203, 205 (S.D.N.Y. 1992) (finding that the evidence of damages posed "substantial risk of impairing the jury's objectivity on the liability issue" in car accident case where plaintiff intended to offer "detailed evidence of extreme pain and suffering, including burning flesh and screams of pain"); Lagudi v. Long Island R.R. Co., 775 F. Supp. 73, 75 (E.D.N.Y. 1991) (bifurcating liability and damages because of risk of sympathy verdict); *Buscemi*, 736 F. Supp. at 1272 (bifurcating liability and damages in age-discrimination case because of risk of sympathy verdict).

139. *See* Raposo v. Honda Motor Co., No. 92-CV-1087, 1996 WL 63526, at *3–4 (N.D.N.Y. Jan. 29, 1996) (bifurcating liability and damages evidence in all-terrain vehicle products-liability action to avoid prejudice to defendant from severity of plaintiff's injuries and to further economy in the event of a defense verdict or mid-phase settlement); *Scheufler*, 895 F. Supp. at 1414 (splitting determination of actual and punitive damages promotes efficiency and prevents prejudice); *Greening*, 1993 WL 134781, at *3–4 (bifurcating affirmative defense that injured plaintiff was an "employee" limited to workers'

inaccurate—to suggest that today's federal judges shun bifurcation entirely.[140]

However, the presumption against bifurcation remains a very real and substantial obstacle to bifurcation in ordinary cases. The presumption has been invoked to deny bifurcation if the plaintiff stands any chance of prevailing on liability[141] or if the second issue would take less than a week to try.[142] Courts have invoked the presumption to deny bifurcation based on the plaintiff's mere allegation that there will be overlapping evidence.[143] When the basis for bifurcation is prejudice, many judges cite the presumption as requiring the movant to show an extraordinary risk of a sympathy verdict,[144] sometimes asserting that ordinary prejudice can be countered through limiting instructions.[145] Finally, some judges openly rely on the presumption to avoid bifurcation even where bifurcation might otherwise seem warranted for fear of taking one step too far down a slippery

---

compensation remedies for efficiency and to prejudice against defendant due to severity of plaintiff's injuries).

140. There are judges that already take an aggressive approach to bifurcation. *See, e.g.*, White v. SMI of Pattison Ave., L.P., No. 92-1724, 1998 WL 633697, at *3 (E.D. Pa. Aug. 11, 1998) (noting that Judge Weiner had bifurcated 64% of his cases during the preceding 14 months).

141. *See* Ayers v. Wal-Mart Stores, Inc., 941 F. Supp. 1163, 1165–66 (M.D. Fla. 1996) (denying bifurcation because liability was not "so tenuous that it is likely the parties will not reach the issue of damages"); Aldous v. Honda Motor Co., No. 94-CV-1090, 1996 WL 312189, at *2 (N.D.N.Y. May 30, 1996) (stating that projected savings contingent on defense liability verdict was "by no means guaranteed"); Monaghan v. SZS 33 Assoc., 827 F. Supp. 233, 246 (S.D.N.Y. 1993) (requiring two trials if plaintiff established liability).

142. *See Aldous*, 1996 WL 312189, at *2 (finding "three to four days" of potential trial savings insufficient to support bifurcation of liability and damages); Thompson v. First Interstate Info. Sys., Inc., No. 4-91-CV-20104, 1992 WL 317572, at *5 (S.D. Iowa Oct. 28, 1992) (finding defendant failed to show that "a significant amount of time would be saved by bifurcating the trial" even though damages testimony would consist at minimum of testimony of six plaintiffs and one expert). An extreme example is *Samuels v. Albert Einstein Medical Center*, No. 97-3448, 1998 WL 770624 (E.D. Pa. Nov. 5, 1988), where the court relied on the presumption to deny bifurcation of whether the plaintiff had timely filed an administrative claim because the trial was only expected to last four to five days, despite the fact that a decision on timeliness likely would have obviated most of that trial time. *Id.* at *2.

143. *See* Ake v. General Motors Corp., 942 F. Supp. 869, 877 (W.D.N.Y. 1996); *Aldous*, 1996 WL 312189, at *2; *Monaghan*, 827 F. Supp. at 246 (noting inevitable overlap of testimony alone defeats the claim of judicial economy).

144. *See Monaghan*, 827 F. Supp. at 246 ("[B]ifurcation, even in personal injury actions, is reserved for truly extraordinary situations of undue prejudice."); *see also Ayers*, 941 F. Supp. at 1165 (noting defendant must show more than usual amount of sympathy).

145. *See Ake*, 942 F. Supp. at 877; Brown v. Advantage Eng'g, Inc., 732 F. Supp. 1163, 1171 (N.D. Ga. 1990); *see also* Hirschheimer v. Associated Metals & Minerals Corp., No. 94-CV-6155JFK, 1997 WL 528057, at *10 (S.D.N.Y. Aug. 27, 1997) ("With regard to the sympathetic jurors issue . . . the Court will instruct the jury that sympathy for the Plaintiff is to play no part in their decision.").

slope towards bifurcating all trials.[146] Of course, that just begs the question: If considerations such as prejudice and efficiency do call for bifurcating most trials, why does the legal community cling to the unitary-trial format by refusing to step onto the slope? Stated otherwise, does the presumption against bifurcation exist because it best serves the values of the civil jury trial, or simply to perpetuate the primacy of the traditional unitary trial? The rest of the Article seeks to answer these questions.

II. CONSTITUTIONAL LIMITATIONS ON BIFURCATION IN THE FEDERAL COURTS

Before turning to the policy implications of bifurcation, it is necessary to first explore the constitutional boundaries of issue separation. After all, if the Constitution erects substantial requirements or prohibitions on bifurcation in federal court, the wisdom of a rule-based presumption against bifurcation is irrelevant. The obvious starting point is the Seventh Amendment.[147] Because of its apparent effects on verdict outcomes, bifurcation also requires a brief look at the *Erie* doctrine.[148] Ultimately, neither the Seventh Amendment nor *Erie* justifies a presumption against bifurcation. The Seventh Amendment, however, does provide important instructions on how to separate issues to preserve the substance of the right to jury trial.

A. The Seventh Amendment

The Seventh Amendment provides in pertinent part that "[1] the right of trial by jury shall be preserved, and [2] no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[149] These two clauses are generally viewed as

146. *See Monaghan*, 827 F. Supp. at 246 (asserting that ordinary prejudice and sympathy not enough because otherwise "the single trial of virtually any personal injury action arising from a violent crime would require bifurcation"); *Brown*, 732 F. Supp. at 1171 (finding possibility of defense liability verdict and risk that jury will sympathize with plaintiff insufficient to support bifurcation because they would apply in any negligence action).

147. U.S. Const. amend. VII.

148. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). While the constitutional implications of *Erie* are their own subject of debate, *see* Charles Alan Wright, *The Law of Federal Courts* § 56 (4th ed. 1983) (discussing whether *Erie* is constitutional doctrine), this Article assumes that the application of a federal bifurcation procedure in direct conflict with a state policy favoring unitary trials implicates the federalism aspects of the *Erie* doctrine.

149. U.S. Const. amend. VII.

distinct.[150] The first clause, the Trial-by-Jury Clause, guarantees litigants in federal courts the right initially to have their claims decided by juries.[151] The second clause, the Re-examination Clause, protects the trial-by-jury right by preventing judges or later juries from second-guessing the first jury's decision.[152]

1. *Preserving the Right to Trial by Jury:* Gasoline Products Co. v. Champlin Refining Co.

Almost every analysis of bifurcation under the Seventh Amendment begins with the U.S. Supreme Court's decision in *Gasoline Products Co. v. Champlin Refining Co.*,[153] which addressed the constitutionality of a partial remand after appeal.[154] In that case, the Champlin Refining Company had prevailed on a counterclaim against the Gasoline Products Company.[155] On appeal, the First Circuit held that the jury's damage award on the counterclaim could not stand because the trial court erred in the damage instructions.[156] Instead of remanding the entire claim, the First Circuit left intact the liability finding and remanded for re-trial only the measure of damages.[157] Champlin wanted the court to reverse the entire verdict against it on the counterclaim. Accordingly, Champlin argued that the proposed partial remand was not a procedure available at common law and thus violated the Seventh Amendment right to trial by jury.[158]

The U.S. Supreme Court first rejected the argument that the Seventh Amendment confined modern federal court procedure to English common-

150. *See, e.g.*, Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 432 (1996) (distinguishing trial-by-jury clause from re-examination clause).

151. *See* Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537 (1958).

152. *See* Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 Iowa L. Rev. 499, 516 (1998).

153. 283 U.S. 494 (1931).

154. *See, e.g.*, *Complex Litigation Project*, *supra* note 130, at 118 (discussing *Gasoline Products*); Note, *supra* note 77, at 829 (same); Henderson et al., *supra* note 9, at 1679, 1683–84 (same); Woolley, *supra* note 152, at 536–42.

155. *See Gasoline Products*, 283 U.S. at 496. Gasoline Products had also prevailed on its claims, but those claims were not appealed. *See* Gasoline Prod. Co. v. Champlin Refining Co., 39 F.2d 521, 522 (1st Cir. 1930), *rev'd*, 283 U.S. 494 (1931).

156. The trial court had erroneously instructed the jury that it could not award damages if it was "in any degree uncertain" about them, whereas the prevailing standard required only "reasonable certainty." *Gasoline Products*, 39 F.2d at 523.

157. *See Gasoline Products*, 283 U.S. at 496.

158. *See id.* at 497.

law trial practice.[159] Thus, the fact that partial remand departed with prior practice did not render it unconstitutional per se.[160] The Court held, however, that the partial remand in that case did violate the Seventh Amendment because the issue to be retried separately was not sufficiently "distinct and separable from the others [such] that a trial of it alone may be had without injustice."[161] The original jury issued only a general verdict for breach of contract, even though the plaintiff's proof involved a lengthy series of negotiations and transactions which could have given rise to different contracts at different times.[162] On remand, a second jury would have to calculate damages for breach of contract, but nothing in the record would tell that jury when the contract came into existence, what its terms were, or when it was breached.[163] Thus, "the question of damages on the counterclaim [was] so interwoven with that of liability that the former [could not] be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial."[164]

Although *Gasoline Products* never mentions bifurcation, "[t]here is a near universal consensus among the authorities that *Gasoline Products* upholds the constitutionality of the bifurcation procedure."[165] This consensus stands on strong footing. First, by rejecting a static reading of the Seventh Amendment, the Court threw open the doors for lower courts to experiment with new trial procedures such as bifurcation.[166] Second, the

---

159. The Court explained:

> All of vital significance in trial by jury is that issues of fact be submitted for determination with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law. Beyond this, the Seventh Amendment does not exact the retention of old forms of procedure.

Id. at 498 (internal citations omitted).

160. *See id.* at 498–99.

161. *Id.* at 500.

162. *See id.* at 499–500.

163. *See* Woolley, *supra* note 152, at 540 (explaining that contract terms and breach were outside scope of First Circuit's re-trial order).

164. *Gasoline Products*, 283 U.S. at 500.

165. *Complex Litigation Project*, *supra* note 130, § 3.06 n.12, at 119; *see generally* 8 *Moore's Federal Practice*, *supra* note 1, § 42.22 (discussing Seventh Amendment impact on bifurcation).

166. While the Court confirms that the right to trial by jury is one of substance over form and encourages lower courts to experiment with new trial procedures, the text itself sheds little light on what the substance of trial by jury is. *See Gasoline Products*, 283 U.S. at 498. The ensuing citations to *Walker v. New Mexico & Southern Pacific Railroad Co.* and *Ex Parte Peterson* leave little doubt that the substance of the jury trial is factfinding. *See Gasoline Products*, 283 U.S. at 498; *Ex parte* Peterson, 253 U.S. 300, 310 (1920) ("The limitation imposed by the Amendment is merely that enjoyment of the right

Court, by definition, held that the Trial-by-Jury Clause permits separate consideration of separable issues.[167]

Gasoline Products, however, does little to clarify when issues are separable. The outcome of the case certainly did not turn on generally applicable principles of issue separability.[168] The partial remand order proposed to separate the issues of liability and damages.[169] However, the Court did not base its reversal of the partial remand order on a finding that the issues of liability and damages are inherently inseparable. Rather, it did so because the first jury's general verdict did not establish crucial facts (for example, the terms of the contract or when it was breached) that the second jury needed in order to decide damages.[170] This problem had nothing to do with inherent separabilty. Indeed, a remand of damages only would have been proper if either: (1) the first jury had rendered a special verdict identifying when the contract came into existence, its terms, and when it was breached, or (2) the partial remand had been to the same jury. In either situation, the remand jury would have had the information it needed to calculate damages properly. Thus, the Court's actual holding suggests no more than that, on these facts and at this stage of the litigation, separation was improper because the first jury's general verdict knitted the issues of liability and damages together in a way the second jury could not unravel.

The last paragraph of *Gasoline Products* contains two statements that seem like they might be criteria for separability, but probably were not intended as such. The Court stated that a partial remand is proper only if "the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice."[171] The Court then concluded that the proposed partial remand was improper because damages and

---

of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with."); *Walker v. Southern Pac. R.R. Co.*, 165 U.S. 593, 596 (1897) (finding aim of Seventh Amendment "is not to preserve mere matters of form but substance of right. This requires that questions of fact in common law actions shall be settled by a jury . . . . So long as this substance of right is preserved the procedure by which this result shall be reached is wholly within the discretion of the legislature.").

167. *Gasoline Products*, 283 U.S. at 499 (deciding that Seventh Amendment was satisfied "even though another and separable issue must be tried again").

168. The concept of separability "goes beyond the question of whether two juries are used." 9 *Federal Practice & Procedure*, *supra* note 2, § 2391. In other words, a generally applicable principle of issue separability would regulate separability in all settings, including those where a court ordered separate trial of issues in a single (but segmented) proceeding to the same jury. *See id.*

169. *See Gasoline Products*, 283 U.S. at 496.

170. *See id.* at 499–500.

171. *Id.* at 500.

liability were "so interwoven" that they could not be tried separately "without confusion and uncertainty."[172] One could read these statements as transcending the procedural posture and the facts of the case to define generally applicable principles of separability.[173] But the Court did not purport to articulate generally applicable principles of separability, and the context of the decision counsels against that interpretation.[174]

The Court's reference to "injustice" appears to address an issue unique to partial remands. The precedent cited in this last paragraph of *Gasoline Products* indicates that the "injustice" the Court was referring to concerned errors in the unremanded portion of the verdict, and not errors stemming from separation. In one of these cases, the plaintiff presented alternate theories of liability, one of which was reversed on appeal.[175] A partial remand order was improper in that case because it was unclear whether the jury found liability based on the proper or improper theory.[176] In another case, the Court held that partial remand was inappropriate because the original jury verdict appeared to be a compromise verdict.[177] In two of the other cases the Court cited as precedent, partial remands of liability could not be ordered without causing "injustice" because errors in the liability aspect of the trials had infected the juries' otherwise proper calculations of damages.[178] The common thread running through all of these cases is that the "injustice" that prevented the partial remand had to do with flaws in the unremanded portion of the verdict, not the propriety of having the jury decide the remanded portion of the case separately.

---

172. *Id.*

173. *See, e.g., In re* Bendectin Litig., 857 F.2d 290, 308–09 (6th Cir. 1988) ("Many courts consider the issue's ability to be tried separately, *and without injustice*, to be the standard for determining whether the Seventh Amendment has been violated.") (emphasis added); 9 *Federal Practice and Procedure*, *supra* note 2, § 2391, at 514–15 ("[S]eparate trial of a particular issue cannot be ordered in the first instance when the issue is so interwoven with the other issues in the case that it cannot be submitted to the jury independently of the others without confusion and uncertainty.").

174. *See infra* notes 175–83 and accompanying text.

175. *See Gasoline Products*, 283 U.S. at 500 (citing American Locomotive Co. v. Harris, 239 F. 234, 240 (1st Cir. 1917) (noting plaintiff relied on assumpsit and quantum meruit)).

176. *See* American Locomotive Co. v. Harris, 239 F. 234, 240 (1st Cir. 1917). Presumably, the problem in this case, like the defect in *Gasoline Products*, would have been obviated by a special verdict, which would have told the court whether the jury had properly found liability.

177. *See Gasoline Products*, 283 U.S. at 500 (citing Simmons v. Fish, 97 N.E. 102, 103, 105–06 (Mass. 1912)).

178. *See Gasoline Products*, 283 U.S. at 500 (citing McBride v. Huckins, 81 A. 528, 532–33 (N.H. 1911) and LeFebvre v. Central Vt. Ry. Co., 123 A. 211, 218 (Vt. 1924)).

The Court did not appear to have meant its reference to "confusion and uncertainty" to be a generally applicable principle of separability either. At that point of the opinion, the Court had finished making statements regarding the law and was now applying the law of partial remands to the facts of the case.[179] Read in its proper context, the Court's reference to "confusion and uncertainty" sounds far more like a conclusion of fact (that trying damages to a different jury would be confusing and uncertain *in this case*) than a standard for issue separation generally.[180]

Because the U.S. Supreme Court has not defined "separability," it is difficult to know if the Trial-by-Jury Clause imposes any meaningful limits on issue separation.[181] This Article does not need to determine the outer limits of separability, however, because it does not urge courts to separate issues to those limits. Indeed, the thesis of this Article is quite the opposite: this Article urges a more aggressive use of *ordinary* issue separation in *ordinary* cases. *Gasoline Products* already clarifies that the U.S. Supreme Court thinks liability and damages are separable for trial, even if they cannot always be separated after the fact on appeal.[182] Moreover, Rule 42(b), like all of the Federal Rules of Civil Procedure, emanates from the

179. *See id.*

180. In many ways, this part of *Gasoline Products* reads more like a Fifth Amendment procedural due process case than a Seventh Amendment Trial-by-Jury Clause case. Interestingly, the Court states that the "confusion and uncertainty" that would result from the proposed partial remand "would amount to a denial of a fair trial." *Gasoline Products*, 283 U.S. at 500. To the extent *Gasoline Products* means only that jury verdicts are infirm when they are based on inadequate information, it sounds like "a specialized application of a general due process concern for the accuracy of the decisionmaking process." Woolley, *supra* note 154, at 538; *see also* Bedecarré, *supra* note 6, at 129 (noting Seventh Amendment violated when issue separation results in jury being given incomplete information). The Trial-by-Jury Clause and the Due Process Clause, however, serve distinct purposes. The Trial-by-Jury Clause ensures that juries will decide disputed facts. *See supra* note 159 and accompanying text. The Due Process Clause, on the other hand, protects litigants from arbitrary outcomes. *See* Richard O. Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 Mich. L. Rev. 68, 88–89 (1981) (explaining that Due Process Clause guarantees capable factfinder and rational verdict). Indeed, the clauses can be antagonistic in complex litigation, where the jury trial right may conflict with rational decision making because the facts, while abundantly supplied, are simply too complex to be understood by lay jurors. *See, e.g.*, *In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1084 (3d Cir. 1980) (holding that Fifth Amendment Due Process Clause trumped Seventh Amendment where case was too complex for lay jury to decide rationally).

181. Even if the "without injustice" and "without confusion and uncertainty" standards did define separability (as a function of either the Seventh Amendment or Due Process), they are so subjective, value-laden, and imprecise that it is hard to see how they would significantly clarify the issue or lead to predictable outcomes.

182. *See supra* notes 165–71 and accompanying text.

Court.[183] It seems highly unlikely that the Court would promulgate a procedural rule authorizing issue separation if it thought that rule would violate the Constitution when put to its basic use.

2. *Preventing Re-examination*

The Re-examination Clause[184] also fails to support the presumption against bifurcation. For years, courts have scrutinized bifurcation under the Re-examination Clause, finding that the "right to jury trial includes the right to have a single issue decided one time by a single jury."[185] Fundamentally, the Re-examination Clause applies only when different juries decide the separated issues.[186] In mass-tort cases involving hundreds or thousands of plaintiffs, the courts must use different juries for practical and logistical reasons.[187] The thrust of this Article, however, is not to justify bifurcation in mass-tort cases (where it is already common),[188] but to launch bifurcation into the procedural mainstream. In most ordinary single-plaintiff cases, the court will have the same jury hear all of the issues for efficiency reasons.[189]

---

183. The Federal Rules are drafted and amended under the auspices of the U.S. Supreme Court, which then submits them to Congress for approval. *See* 28 U.S.C. § 2072–74.

184. The Seventh Amendment provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

185. Greenhaw v. Lubbock County Beverage Ass'n, 721 F.2d 1019, 1025 (5th Cir. 1983); *see also* Alabama v. Blue Bird Body Co., 573 F.2d 309, 318 (5th Cir. 1978) ("[I]nherent in the Seventh Amendment guarantee of a trial by jury is the general right of a litigant to have only one jury pass on a common issue of fact."); EEOC v. McDonnell Douglas Corp., 960 F. Supp. 203, 204 (E.D. Mo. 1996) (same).

186. *See In re* Rhone-Poulenc Rover Inc., 51 F.3d 1293, 1303 (7th Cir. 1995); 9 *Federal Practice and Procedure*, *supra* note 2, § 2391, at 512–13.

187. After first-phase resolution of the common issue, the individual plaintiffs typically go elsewhere for the individualized phases of their own lawsuits. *See Complex Litigation Project*, *supra* note 130, at 125 (noting that remanded individual plaintiffs moved to transferor court after resolving common issues). Those plaintiffs necessarily would get different juries. Even as to the plaintiffs who might choose to remain in the first phase court, it seems unlikely that the same jury would be impaneled in perpetuity to hear and decide all of those individual trials.

188. *See supra* note 122 and accompanying text.

189. Where possible, using the same jury is the preferred practice. *See* 9 *Federal Practice and Procedure*, *supra* note 2, § 2391, at 512. To start, a second jury would require new voir dire. More importantly, re-using the first jury is likely to make the second-issue phase proceed much faster because that jury will already be educated about the case, is likely to be familiar with some of the witnesses, and may even have heard some of the second-phase evidence. Accordingly, the litigants often will be able to proceed directly with second-phase evidence. *Cf. Civil Jury*, *supra* note 48, at 1531 (noting that use of same jury minimizes duplication of testimony).

Thus, in the vast majority of cases, bifurcation will not even pose a risk of re-examination.

Nor does the risk of re-examination justify a presumption against bifurcation in cases involving separate juries. Like Rule 42(b), many procedural rules could be used in a manner that violates the Seventh Amendment. For example, Federal Rule of Civil Procedure 56 governing summary judgment could be used in a manner that violates the Trial-by-Jury Clause if a judge uses it in a way that deprives a litigant of her right to have contested material facts resolved by a jury.[190] That risk, however, does not give rise to a presumption against the use of summary judgment methodology, but rather requires the courts to be attentive to its application.

The risk of re-examination presented when separate juries hear bifurcated issues calls for sound case management, not avoidance of the procedure. The Re-examination Clause does not prohibit different juries from hearing the same evidence; it only prohibits different juries from deciding the same issue.[191] The federal courts can manage the risk of re-examination by taking a few simple precautions.[192] First, the court needs to carefully define the roles of the two juries so that the first jury does not decide issues within the prerogative of the second jury.[193] Second, the court must carefully craft the

---

190. *See* 10A *Federal Practice and Procedure*, *supra* note 2, § 2714, at 250–51 (noting federal courts must "take great care" to assure that summary-judgment procedure does not violate to trial-by-jury right).

191. *See* Woolley, *supra* note 154, at 531–32. As the Fifth Circuit recently stated:

> The existence of common factual *issues* is to be distinguished from the existence of overlapping *evidence*. For purposes of the Seventh Amendment, the question is whether factual issues overlap, thus requiring one trier-of-fact to decide a disputed issue that must be decided by a subsequent jury, not whether the two fact-finders will merely have to consider similar evidence . . . .

Allison v. Citgo Petroleum Corp., 151 F.3d 402, 423 n.21 (5th Cir. 1998); *see also* EEOC v. McDonnell Douglas Corp., 960 F. Supp. 203, 205 (E.D. Mo. 1996) (noting that in bifurcated, multi-plaintiff, pattern-and-practice age-discrimination case, phase-one determination that employer engaged in pattern and practice of discrimination was separate issue from phase-two determination of whether that pattern or practice was cause of discrimination toward individual plaintiffs, despite likelihood of substantial evidentiary overlap).

192. For an excellent overall discussion of this subject and application of the necessary management principles, see *In Re* Dow Corning Corp., 211 B.R. 545, 588–89 (Bankr. E.D. Mich. 1997).

193. *See In re* Paoli R.R. Yard PCB Litig., 113 F.3d 444, 452 n.5 (3d Cir. 1997) (rejecting argument that second jury re-examined proximate cause because "[t]he first jury did not determine the foreseeability of plaintiffs' alleged or prospective injuries, and instead determined only whether the plaintiffs were exposed to PCBs and injured from that exposure."); *see also* EEOC v. Foster Wheeler Constructors, Inc., No. 98-C-1601, 1999 WL 528200, at *3 (N.D. Ill. July 13, 1999) (bifurcating existence of hostile work environment from individual injury and damages in class-action hostile-work-environment case and noting that "a well-constructed bifurcation scheme, used in tandem with clear instructions to the juries can delineate the roles of the two juries in order to avoid reexamination of any

verdict form for the first jury so that the second jury knows what has been decided already.[194] If the first jury makes sufficiently detailed findings, those findings are then akin to instructions for the second jury to follow.[195] In the federal courts, "the law presumes almost without exception that a jury will follow its instructions."[196] If the second jury does not follow these instructions, the judge can throw out the second jury's verdict and retry the second phase issue.[197] Just as there is always a risk that a judge will violate the Trial-by-Jury Clause when granting summary judgment, there is also always a risk that a second jury will violate the Re-examination Clause by not following the first jury's instructions. That risk, however, does not warrant a presumption against bifurcating under Rule 42(b) in the first place.[198]

---

factual issues"). The *Paoli* court appears to have been meticulous in its efforts to keep the issues separate: "The district court did not instruct the jury on foreseeability, neither the plaintiffs nor the defendants requested an instruction on that issue, and the jury interrogatories did not refer to the foreseeability of the alleged harms." 113 F.3d at 452 n.5. Problems arise only when the court fails to either create or preserve issue boundaries. *See In re* Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1182–84 (3d Cir. 1993) (noting court violated Seventh Amendment in bifurcated antitrust action when first jury decided fact of antitrust injury by allowing defendant to argue same issue to second jury).

194. In passing on a bifurcated antitrust class action, Judge Higginbotham put it this way:

> [S]eparating liability and damages must be done in a manner that does not allow the jury in phase two to determine again the damages established in phase one. The art of bifurcation is then ultimately the art of devising interrogatories for submission under Rule 49 that will elicit a jury answer in essentially formulaic terms.

Greenhaw v. Lubbock County Beverage Ass'n. 721 F.2d 1019, 1025 (5th Cir. 1984). The Second Circuit, for example, recently reversed the plaintiffs' verdicts in the 25-year-old Attica riot litigation because the verdict form for phase one of the trial on liability did not identify the specific unlawful acts for which the second jury in the damages phase awarded damages. *See* Blyden v. Mancusi, 186 F.3d 252, 268–69 (2d Cir. 1999). The Second Circuit characterized this as a Re-examination Clause violation because it felt that the second jury necessarily had to re-determine which of the defendants' acts were unlawful. *See id.* The court could as easily have characterized this as a Trial-by-Jury Clause violation in the *Gasoline Products* mold because the damages jury was asked to calculate damages for unidentified acts.

195. *See* Woolley, *supra* note 154, at 525 ("If the first jury renders a sufficiently detailed verdict, later juries can be instructed to apply the first jury's findings."). A first jury's specific instructions from one stage of the trial should receive at least as much, if not more, respect from the second jury than abstract standards of law. *See id.* at 526.

196. *Id.*

197. *See* Fed. R. Civ. P. 59 (authorizing new trial "on all or part of the issues").

198. The Seventh Circuit's recent decision in *In re Rhone-Poulenc* suggested that re-examination problems were inevitable when one jury decides causation and a second jury decides related issues such as proximate causation or comparative negligence. 51 F.3d 293, 1303 (7th Cir. 1995) (decertifying Rule 23(c)(4) issue class to determine whether blood-solid manufacturers were negligent in not screening for HIV soon enough); *see also* Castano v. American Tobacco Co., 84 F.3d 734, 750 (5th Cir. 1996) (denying certification of nicotine-dependent tobacco smokers class due to risk of re-examination); Arch

B. *Bifurcation and the* Erie *Doctrine*

Some courts and commentators have raised the *Erie* doctrine[199] as another constitutional doctrine that might impact bifurcation in federal courts sitting in diversity jurisdiction. Professor Weinstein, writing in 1961, worried that the "routine" bifurcation contemplated by Northern District of Illinois Local Rule 21 interfered with the jury's power to modify the law.[200] Specifically, he was concerned that a jury trying a state-law claim in state court would be free to apply de facto comparative negligence (that is, by rejecting contributory negligence but discounting damages) whereas bifurcation in the federal court would effectively deprive a federal jury trying an identical state law claim of a comparative-negligence rule of decision.[201] He concluded that Local Rule 21 was "substantive" because it had a "substantial impact on the law of contributory negligence."[202]

Although Professor Weinstein's position may have been correct under the *Erie* doctrine of 1961,[203] Rule 42(b) almost certainly passes muster

---

v. American Tobacco Co., 175 F.R.D. 469, 491 (E.D. Pa. 1997) (following *Castano*). The effect of *Rhone-Poulenc* is debatable. First, the court did not actually find a violation of the Re-examination Clause. Rather, it issued a writ of mandamus ordering the trial judge to decertify the common-issue classes because the class structure was not superior, in part because of the risk of re-examination. *See Rhone-Poulenc*, 51 F.3d at 1299 (stating that risk of re-examination was one of three concerns Seventh Circuit had, "none of them necessarily sufficient in itself but cumulatively compelling"); *see also Castano*, 84 F.3d at 751 ("The risk of... reevaluation is so great that class treatment can hardly be said to be superior to individual adjudication."). Second, provided the first jury specified the basis for its finding of negligence, it is unclear why a second jury could not use that verdict, as an instruction, in ascertaining proximate cause or comparative negligence. *See* Laurie C. Uustal, Note, In the Matter of Rhone-Poulenc Rorer: *Shielding Defendants Under Rule 23*, 51 U. Miami L. Rev. 1247, 1271–72 (1997) (analyzing overlap between negligence and proximate cause and concluding that issues would be "completely separate"). Indeed, the *Castano* court acknowledged that the only way a second jury's decision on comparative fault could be inherently inconsistent with a first jury's determination that the defendant was negligent would be to apportion 100% of the fault to the plaintiff. 84 F.3d at 751.

199. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). The *Erie* doctrine holds that "federal courts sitting in diversity apply state substantive law and federal procedural law." Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 427 (1996). As the U.S. Supreme Court noted in *Gasperini*, however, classifying a rule of law as substantive or procedural "is something of a challenging endeavor." 518 U.S. at 427.

200. Weinstein, *supra* note 29, at 833–36. The *Erie* doctrine remains a part of bifurcation analysis to this day. *See, e.g.*, *Complex Litigation Project*, *supra* note 130, § 3.06 cmt. f, at 151 (discussing *Erie* doctrine as a limitation on bifurcation in consolidated complex litigation); Smith, *supra* note 29, at 665 (discussing *Erie*).

201. Weinstein, *supra* note 29, at 834–35.

202. *Id.* at 836.

203. At the time, all *Erie* cases were still guided by the "outcome determinative" test, *see* Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945) (stating that "outcome of the litigation in the federal court should be substantially the same"), subject to countervailing federal interests, *see* Byrd v. Blue Ridge

under the modern *Erie* doctrine. With *Hanna v. Plumer*,[204] the U.S. Supreme Court created a practically irrebutable presumption that federal statutes and the federal rules, if on point, will supplant conflicting state procedures.[205] Today, one can almost reflexively respond that bifurcation under Rule 42(b) does not contravene the *Erie* doctrine because it is part of the federal rules.[206] Indeed, since *Hanna*, there is no reported opinion where a federal court has declined to invoke Rule 42(b) because of a conflicting state bifurcation rule or practice.[207] In fact, one federal court bifurcated a state law claim even though the state's highest court had declared bifurcation to be contrary to the state's "'long standing policy and practice.'"[208]

Rural Elec. Coop., 356 U.S. 525, 537 (1958). It is entirely plausible that courts in the early 1960s would have found the significant shift in plaintiffs' success rates identified by Judge Weinstein could have been found to be "outcome determinative." *But see* Moss v. Associated Trans., Inc., 344 F.2d 23, 27 (6th Cir. 1965) (rejecting *Erie* challenge to bifurcation because there was "no such assurance, or even likelihood, of different outcomes" between a bifurcated and unitary trial). If federal courts had found bifurcation to be outcome determinative, the countervailing federal interest in efficiency might have been accorded less weight because of the belief that bifurcation, while constitutional, does alter the jury's traditional role. *Cf.* Weinstein, *supra* note 29, at 836 (noting "doubt about the outcome of a collision between the federal policy of *Erie* and the federal policy favoring the jury system").

204. 380 U.S. 460 (1965).

205. *Id.* at 472–73; *see also Moore's Federal Practice*, *supra* note 1, § 124.02[2].

206. Bifurcation certainly regulates procedure, *see Hanna*, 380 U.S. at 464, and Rule 42(b) is sufficiently broad to supplant a contrary state rule. *See* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29–31 (1988) (analyzing *Erie* implications of federal venue transfer statute).

207. Most cases have involved a state rule against bifurcation. *See* Shugart v. Central Rural Elec. Coop., 110 F.3d 1501, 1504 (10th Cir. 1997) (bifurcating punitive damages from actual damages despite contrary Oklahoma rule); Oulds v. Principal Mut. Life Ins. Co., 6 F.3d 1431, 1435 (10th Cir. 1993) (bifurcating insurance-coverage and bad-faith claims despite contrary Oklahoma Supreme Court precedent); Simpson v. Pittsburgh Corning Corp., 901 F.2d 277, 283 (2d Cir. 1990) (applying discretionary Rule 42(b) rather than mandatory state rule); Sellers v. Baisier, 792 F.2d 690, 694 (7th Cir. 1986) (bifurcating liability and damages in medical-malpractice case despite contrary state-law practice); Rosales v. Honda Motor Co., 726 F.2d 259, 262 (5th Cir. 1984) (bifurcating liability and damages in personal-injury suit despite contrary Texas Supreme Court precedent); *In re* Breast Implant Cases, 942 F. Supp. 958, 962–63 (E.D.N.Y. & S.D.N.Y. 1996) (noting bifurcation governed by federal standard, but noting that state rule appeared consistent and therefore did not present actual *Erie* conflict); Cook v. United Servs. Auto. Ass'n, 169 F.R.D. 359, 361 n.1 (D. Nev. 1996) (noting that request to bifurcate coverage and bad-faith claims was governed by federal rather than state law); Robinson v. Adco Metals, Inc., 663 F. Supp. 826, 829 (D. Del. 1987) (bifurcating claims against insurer from those against other defendants without regard to state law). In one case, the court exercised its discretion under Rule 42(b) to decline bifurcation despite a state rule of mandatory bifurcation. *See* Hamm v. American Home Prods. Corp., 888 F. Supp. 1037, 1038 (E.D. Cal. 1995) (denying motion to bifurcate amount of punitive damages from liability and culpability for punitive damages despite contrary California rule mandating bifurcation).

208. *Rosales*, 726 F.2d at 261 (quoting Iley v. Hughes, 311 S.W.2d 648, 651 (Tex. 1958)).

The presumption against bifurcation in federal court would not be justified even if bifurcation ran afoul of the *Erie* doctrine. First, the presumption against bifurcation is applied to all cases in federal court, including cases involving only federal questions.[209] The *Erie* doctrine, which posits that federal courts sitting in diversity must defer to the substantive laws of the states in which they are located,[210] cannot sustain a presumption when applied to federal-question cases. Second, even in diversity cases, a presumption against bifurcation is inconsistent with *Erie* to the extent that the state trial practice does not have such a presumption.[211] In short, if the *Erie* doctrine should play any role in bifurcation under Rule 42(b), it would abolish any presumption against bifurcation in diversity cases and require federal courts to defer to the prevailing state practice.

The most enduring part of Professor Weinstein's critique of Local Rule 21 was that guidelines on bifurcation in federal courts should come from Congress.[212] To this day, *Hanna* affords no shelter to local rules or practices that threaten state autonomy.[213] The possibility of *Erie* scrutiny highlights the need to address bifurcation standards at the national level so that any alterations could proceed under the largely *Erie*-proof authority of the federal rules.

---

209. *See, e.g.*, Novopharm Ltd. v. Topharm, Inc., 181 F.R.D. 308, 310 (E.D.N.C. 1998) (applying presumption to patent infringement); Buscemi v. Pepsico, Inc., 736 F. Supp. 1267, 1271 (S.D.N.Y. 1990) (applying presumption to age discrimination).

210. *See supra* note 199; *see generally Moore's Federal Practice*, *supra* note 1, § 124.01[1].

211. New York, for example, encourages bifurcating liability and damages in personal-injury cases. *See* N.Y. Uniform Rule § 202.42 (2000). Similarly, many states encourage—or even require—bifurcating punitive-damage issues. *See* James R. McKown, *Punitive Damages: State Trends and Developments*, 14 Rev. Litig. 419, 446–53 (1995).

212. Professor Weinstein argued that submitting rules for legislative approval conveyed the "assurance that 'basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters.'" Weinstein, *supra* note 29, at 839 (quoting Miner v. Atlass, 363 U.S. 641, 650 (1960)). He felt that local rules came with no such guarantees. *See id.* It is interesting to note that the recent experience with the Civil Justice Reform Act has again galvanized the view that procedural reform is best accomplished at the national level. *See* Carl Tobias, *Civil Justice Reform Sunset*, 1998 U. Ill. L. Rev. 547, 617 ("The multiple phases of review and revision . . . and its provision for substantial public participation . . . insure that the amendments adopted are clear, fair, and responsive to the needs of all participants in federal civil litigation."). Nevertheless, even the national rule-making process has come under criticism for being too substantively powerful. *See generally* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficiency*, 87 Geo. L.J. 887, 909–10 (discussing criticism of procedural rules based on their substantive effects).

213. *See, e.g.*, Ashland Chem. Inc. v. Barco, Inc., 123 F.3d 261, 264 n.2 (5th Cir. 1997) (declining to extend *Hanna* deference to local rule on fee-shifting).

III. NO ROUTINE BIFURCATION: IS THERE POLICY BEHIND THE PRESUMPTION?

Bifurcation strikes at the heart of many of the fundamental policies associated with civil jury trials because it affects how juries decide cases. Indeed, one of the earliest concerns among scholars was empirical data showing that, at least in personal injury cases, juries in bifurcated trials were less likely to find liability than their counterparts in unitary trials.[214] For many, this impact alone might be sufficient cause to avoid bifurcation.[215]

The reasons underlying this shift in verdict outcomes evoke their own policy issues. Commentators generally agree that the elimination of sympathy accounts for much of the shift in verdict outcomes.[216] What the scholars do not agree about is whether that effect is good or bad. Was Professor Weinstein right when he said that the value of juries is to temper the law based on a community sense of fairness,[217] or was Judge Miner right when he said that eliminating "sympathy, prejudice and other improper pressures from jury trials . . . [is] fundamental in the true administration of justice"?[218] Alternatively, might the separation of issues hinder jury performance in other ways, such as impairing attentiveness, comprehension, or decision making? Any of these effects, if substantial, could justify a presumption in favor of unitary trials and against bifurcation.

A. The Impact of Bifurcation on Verdicts: A Mixed Blessing for Both Sides

Many people view bifurcation as pro-defendant because they believe that defendants have a better overall win rate in bifurcated trials than in unitary

---

214. *See infra* notes219–40 and accompanying text.

215. *See* Wright, *supra* note 29, at 747 (stating that decrease in plaintiffs' verdicts suggested that bifurcation was "too heroic a cure for the problem of delay") (internal quotations omitted). Later commentators continue this theme. *See* Granholm & Richards, *supra* note 29, at 513 ("Bifurcation . . . appears to tilt the scales of justice in favor of defendants.").

216. *See Complex Litigation Project*, *supra* note 130, at 120.

> There also is little debate that bifurcation . . . favors defendants because it deprives plaintiffs of the ability to evoke jury sympathy by presenting evidence on damage issues before liability is decided. Studies indicate that juries who are moved by compassion for the injured victim tend to fuse liability and damages in favor of the plaintiff.

Id.

217. Weinstein, *supra* note 29, at 832.

218. O'Donnell v. Watson Bros. Transp. Co., 183 F. Supp. 577, 585 (N.D. Ill. 1960).

trials.[219] This perception arose out of the Zeisel and Callahan study, which concluded that plaintiffs prevailed 66% of the time in unitary trials compared to only 44% of the time in bifurcated trials.[220] While these results were not conclusive due to possible selection effects,[221] they provided strong evidence that bifurcation was pro-defendant in the sense that bifurcated trials resulted in fewer plaintiff victories overall.

Two more recent studies seem to confirm this effect. A 1990 study by Horowitz and Bordens found that mock juries were less likely to find for plaintiffs on causation or liability when the trial was bifurcated.[222] In that study, for example, 100% of the mock juries found for the plaintiff in the unitary trial settings, but that number dropped to 74.3% when the trial was bifurcated.[223] Similarly, the mock juries found that the plaintiff had

---

219. *See, e.g.*, Doyle W. Curry & Rosemary T. Snider, *Bifurcated Trials: How to Avoid Them—How to Win Them*, 24 Trial 47 (1988) (noting that plaintiffs win less when the trial is bifurcated and advising plaintiffs to "develop a strategy to oppose bifurcation").

220. *See* Zeisel & Callahan, *supra* note 12, at 1612 tbl.2. In the unitary trials, plaintiffs won at trial in 42% of the cases and reached settlement—after the start of the case but before the jury rendered its verdict—in 24% of the cases, for a total "prevail" rate of 66%. *See id.* In the bifurcated trials, plaintiffs won at trial only 12% of the cases but reached settlement in 32% of the cases, for a total prevail rate of 44%. *See id.* Qualitatively, one cannot call settlements "victories" for either side without knowing more, such as the amount of the settlement and the relative merits of the case. However, this Article assumes that settlements, in the aggregate if not individually, are sufficiently meaningful to justify saying that the plaintiff "prevailed." *Cf.* Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 Ariz. L. Rev. 849, 872 (1998) (including settlements in calculating plaintiff "prevail rates").

221. The Zeisel and Callahan study analyzed real case figures from the Northern District of Illinois applying Local Rule 21, which promoted bifurcation but ultimately left it to the discretion of the trial judge. Zeisel & Callahan, *supra* note 12, at 1608–09. While Zeisel and Callahan were able to factor out selection effects in determining whether bifurcation saved trial time, it remains possible that the judges' bifurcation decisions were influenced by whether they thought the plaintiff would prevail. *See id.* at 1613–16. Thus, the actual effect of bifurcation on plaintiff outcomes could be more or less. *See* Vidmar, *supra* note 220, at 872; *see generally* Kevin Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 Cornell L. Rev. 581, 588–92 (1998) (discussing selection effects on empirical outcome data).

222. *See* Horowitz & Bordens, *supra* note 47, at 281–82. The study consisted of having 66 six-person juries view a four-hour audiotape and slide presentation of a mock multi-plaintiff toxic-tort trial. *See id.* at 274–75. The trial consisted of opening statements, initial instructions, presentation of liability evidence, presentation of causation evidence, presentation of damage evidence, examination and cross-examination of all witnesses, closing statements, and final instructions to the jury. *See id.* at 275. The plaintiffs alleged that the defendant chemical company had discharged pollutants into their ecosystem, that they had ingested these pollutants, and that the pollutants caused both physical and psychological injuries. *See id.* The alleged physical injuries were moderate, ranging from skin rash to high blood pressure; the alleged psychological injuries were all a variant of "cancerphobia"—the fear that they already had an undiagnosed cancer or would develop some form of cancer in the future. *Id.*

223. *See id.* at 278.

established general causation in 85.4% of the unitary trials, but found general causation in only 68.6% of the bifurcated trials.[224] The most striking differences arose when juries were given only one issue to decide.[225] When causation was the sole issue to be decided, 87.5% of the unitary trial juries found for the plaintiff, while only 25% of the bifurcated trial juries found for the plaintiff after hearing just the causation component of the trial.[226] Similarly, when liability was the sole issue to be decided, 100% of the unitary trial juries found for the plaintiff, while only 62.5% of the bifurcated trial juries found for the plaintiff after hearing just the liability component of the trial.[227] Based on the audiotaped deliberations, the authors of the study explained these results by stating that the juries in the unitary trials appeared to use damages evidence to support their substantive decisions, particularly causation.[228]

Another recent study led by Stephan Landsman yielded similar results.[229] The participants in this study watched a videotaped mock trial designed to mirror an asbestos lawsuit.[230] The purpose of the study was to measure the effect, if any, of bifurcating the liability for and amount of punitive damages from the jury's determination of compensatory liability and damages.[231] Thus, approximately half of the participants heard and decided compensatory liability and damages and punitive liability and damages in a single unitary proceeding.[232] The other half of the participants first heard and decided compensatory liability and damages only; participants who

---

224. *See id.* at 277.

225. To create comparison groups with the bifurcated trial groups, some of the unitary trial juries were asked to decide only certain issues. *See id.* at 272. These juries, however, still heard the same amount of evidence. *See id.*

226. *See id.* at 278.

227. *See id.*

228. *See id.* at 282. The authors found it intriguing that, when the juries were asked to decide only liability, the figures jumped from 62.5% in bifurcated trials to 87.5% in unitary trials. Based on the estimate by a panel of neutral professors that the liability evidence was "moderately favorable" to the plaintiffs the authors suggested that the 62.5% from the bifurcated trials appeared consistent with the merits, implying that the results from the unitary trials were inflated relative to the merits. *Id.* at 276, 282. Based on the small samples to compare, however, the authors stopped short of drawing any formal conclusions. *See id.*

229. *See* Landsman et al., *supra* note 7, at 308.

230. The lawsuit actually involved a fictional product called "beryllium," which the experimenters substituted for asbestos because of concern the participants might find an asbestos case stale or might have preconceived views. *See id.* In all other respects, the lawsuit looked and felt like a typical asbestos case. *See id.* at 309–310.

231. *See id.* at 308–09.

232. *See id.* at 311, 314 tbl.2.

found for the defendant were done, while the participants who found for the plaintiff then heard and decided punitive liability and damages.[233] The study also varied the strength of the plaintiff's liability case from weak to moderate within the unitary and bifurcated trial groups.[234] Thus, the study could compare the effect of bifurcating punitive damage issues in weak and moderate compensatory liability cases.[235]

Again, the results showed that bifurcation does affect liability outcomes. The participants found the chemical company liable only 42.8% of the time in bifurcated cases, but found the company liable in 55.2% of the unitary trials.[236] Comparing the weak unitary cases with the strong bifurcated cases yields an especially eye-catching result. The jurors found compensatory liability in 40.6% of the weak, bifurcated cases.[237] When the evidence of compensatory liability was strengthened from weak to moderate, the plaintiff's success rate in the bifurcated case rose to 45.1%.[238] But when the weak case was presented in a unitary trial, the plaintiff's success rose to approximately 48%.[239] Thus, in terms of increasing the likelihood of winning, plaintiffs did better by securing a unitary trial of the compensatory and punitive issues than by presenting a stronger case for compensatory liability.[240]

---

233. *See id.* at 311–12, 314 tbl.2.

234. *See id.* at 311.

235. "The basic design of the study was a 2 X 2 factorial that tested the impact of bifurcation across and within variations in the strength of the plaintiff's case on liability." *Id.* at 312. The study also sought to test the effect of varying the defendant's net worth, but only did so against the unitary trial set since, by definition, net-worth evidence cannot alter liability outcomes in bifurcated trials because it is presented only after a finding of liability. *See id.* at 312. It remains possible, however, that bifurcation could alter a jury's use of a defendant's net worth in deciding whether to award punitive damages and, if so, in what amount. Nevertheless, all of the data relevant to the effect of bifurcation was derived from test groups in which the defendant was given similar worth. For a specific description of the study, see *id.* at 311–13.

236. This is an average comparing unitary versus bifurcated trials across the different variants of strength of case and defendant net worth. *See id.* at 316. The largest impact of bifurcation occurred in the moderate-strength cases, where liability jumped from 45.1% in bifurcated cases to 60.9% in unitary/high net-worth cases and 63.4% in unitary/low net-worth cases. *See id.* at 317.

237. *See id.* at 317 tbl.3.

238. *See id.*

239. The plaintiff prevailed in 47.3% of the weak/unitary cases where the defendant had low net worth, and in 49.1% of the weak/unitary cases where the defendant had high net worth, for an approximate average of 48%. *See id.*

240. The study randomly assigned participants to decide the case alone or as part of a jury to test the impact of deliberations. *See id.* at 313. While the individual jurors were affected by trial structure, the *juries* deliberating as a group were not. The only difference between outcomes in the unitary and

The outcome shift detected in these studies, however, falls short of establishing that bifurcation is inherently or categorically pro-defendant for two reasons. First, the studies are not representative of the federal docket because they focus narrowly on personal-injury litigation. Second, even in the personal-injury context, the newer studies suggest that bifurcation may have a pro-plaintiff effect on damages that offsets its pro-defendant effect on liability.

The existing bifurcation studies are focused too narrowly on one type of case—personal-injury litigation—to support the categorical conclusion that bifurcation is pro-defendant. Although the studies to date all have been based on personal-injury or similar tort claims,[241] most federal court jury trials occur in non-personal-injury cases. For the twelve-month period ending March 31, 1999, the federal courts conducted 4229 jury trials.[242] Only 1214 of those trials were tort actions.[243] Thus, more than 3000—almost 75%—of the federal court jury trials were non-tort cases. For example, the federal courts conducted jury trials in 485 contract cases, 978 employment civil-rights cases, 739 other civil-rights cases, and 347 prisoner civil-rights cases.[244] No studies to date have demonstrated any pro-defendant bias for this 75% of the federal docket.

The personal-injury case studies do not support extrapolating an outcome shift to other types of cases.[245] In personal injury cases, the outcome shift appears to result from jurors feeling sympathy for the plaintiff after hearing about the plaintiff's injuries.[246] In non-personal injury cases, the damages evidence may not generate any sympathy at all, or might even generate antipathy toward the plaintiff. In employment-discrimination cases, for example, the evidence regarding lost wages would not seem to generate the

---

bifurcated trials when presented to a full jury was that the unitary trials yielded many more hung juries. *See id.* at 322 & tbl.5.

241. *See* Horowitz & Bordens, *supra* note 47, at 275 (studying mock toxic-tort trial); Landsman et al., *supra* note 7, at 309 (studying mock asbestos trial); Zeisel & Callahan, *supra* note 12, at 1609 (studying personal-injury cases).

242. *See* Administrative Office of the U.S. Courts, *Federal Judicial Caseload Statistics* Mar. 31, 1999 tbl.C-4.

243. There were 1039 diversity tort cases, 162 federal-question tort cases, and 13 other tort cases involving the United States as a litigant. *See id.*

244. *See id.* As with the figures for tort actions, the numbers aggregate the figures in Table C-4 for United States cases, federal-question cases, and diversity-of-citizenship cases. *See id.*

245. *Cf. Complex Litigation Project*, *supra* note 130, § 3.06 at 120 ("[M]ost of the cautions against severance, as well as the data on how bifurcation has worked, are limited to the personal injury area.").

246. *See* Bornstein, *supra* note 55, at 1485; Edith Greene et al., *The Effects of Injury Severity on Jury Negligence Decisions*, 23 Law & Hum. Behav. 675, 689–90 (1999).

same sympathy as evidence regarding physical injury. Indeed, since fired employees generally must mitigate their damages by securing other employment,[247] higher damages correlate with continued unemployment. This might lead the jury to think less of the plaintiff if the jury views the plaintiff's failure to find a new job as evidence that the employee is not a good worker or is not serious about working. Damages evidence in breach-of-contract cases similarly lacks the same sympathy quotient as evidence regarding physical injuries. Because sympathy appears to drive the outcome shift in the personal injury cases, there is good reason to doubt that the less sympathetic claims will yield a similar outcome shift.

The "pro-defendant" label may be unwarranted even where the outcome shift is present. Although the studies to date consistently show that personal-injury plaintiffs win fewer liability verdicts when the case is bifurcated,[248] win/loss ratios may give an incomplete picture of the impact of bifurcation. Specifically, bifurcation may have a countervailing pro-plaintiff effect on the size of damages awards.

Anecdotal evidence of a pro-plaintiff damages shift appeared shortly after the Northern District of Illinois adopted Local Rule 21. One judge, for example, reported that the initial opposition to Local Rule 21[249] soon subsided when the plaintiffs' bar realized that its damage awards were rising.[250] More recently, two studies added empirical support to the idea that, once liability is fixed, bifurcation can "switch sides" and become "pro-plaintiff."

In the mock toxic-tort study performed by Horowitz and Borden, mock jurors first decided whether a chemical company was liable for injuries to the plaintiffs caused by alleged pollution and, if so, awarded damages.[251] While bifurcation favored the defendants at the liability stage,[252] the tables turned dramatically once liability was established, with average damage

247. *See* Charles R. Richey, *Manual on Employment Discrimination Law and Civil Rights Actions in Federal Court* § 1.195 (2d ed. 2000).

248. *See supra* notes 220–28 and accompanying text.

249. *See, e.g.*, Corboy, *supra* note 29, at 1023 ("Until evidence is presented which is much more persuasive than that which has been shown, courts . . . should not promiscuously separate issues of liability from those of damages in negligence actions.").

250. *See* Richard S. Miller, *A Program for the Elimination of the Hardships of Litigation Delay*, 27 Ohio St. L.J. 402, 418 n.44 (1966) (citing 1962 address by the Hon. Bernard M. Decker of the Circuit Court of Illinois).

251. *See supra* notes 222–28 and accompanying text.

252. The plaintiffs established liability in all of the unitary trials but in only 62.5% of the bifurcated trials. *See* Horowitz & Bordens, *supra* note 47, at 278.

awards jumping from $274,000 in the unitary trials to $429,000 in the bifurcated trials.[253] Due to the structure of the study, the authors could not determine whether the difference reflected a pro-plaintiff bias once liability was established or simply the absence of compromise verdicts that would bring down the average.[254] The authors did conclude, however, that bifurcation was a "double-edged sword for the defendants' bar" in that defendants would win more cases at the liability stage but pay much larger damage awards if they lost.[255]

The Landsman study (the mock beryllium/asbestos trial)[256] adds yet another wrinkle. Bifurcation reduced the incidence of plaintiffs' liability judgments in that study as well; indeed, the structure of the trial had more impact than the strength of the plaintiff's case.[257] Once again, the tables turned at the damages stage, this time with respect to punitive damages.[258] First, while unitary trials in which the defendant was found liable resulted in punitive damages only 75.3% of the time, the bifurcated trials in which liability was established resulted in punitive damages 92% of the time.[259] Second, the punitive-damage awards in the bifurcated trials were two- to four-times larger than those in the unitary trials.[260] The results of this study cannot be dismissed as a function of omitting compromise verdicts. Even after taking into account all of the possible outcomes including cases where the defendant wins on liability or escapes punitive damages entirely, the average expected loss for the defendant was greater in bifurcated trials.[261]

---

253. *See id.* at 278.

254. *See id.* at 283.

255. *Id.* at 283–84.

256. *See supra* notes 229–40 and accompanying text.

257. *See* Landsman et al., *supra* note 7, at 317 tbl.3; *supra* notes 236–39 and accompanying text.

258. The study showed no statistically significant differences in the amount of compensatory damages resulting from unitary versus bifurcated trials, in part because of the presence of several extremely high awards. *See id.* at 318. Re-analysis to suppress the effect of the outlier high awards yielded only one significant trend: jurors in unitary moderate-strength cases awarded substantially higher compensatory damages when exposed to punitive-damages evidence. *See id.* at 321. The effect did not appear when the plaintiff's case was weak. *See id.*

259. *See id.* at 322.

260. The actual average punitive-damage awards were $1,080,400 in unitary trials versus $4,042,890 in bifurcated trials. *See id.* at 325. Even after compressing the few outlying high awards, the averages were $544,555 in unitary trials versus $1,112,831 in bifurcated trials. *See id.*

261. The average defendant loss before the non-deliberating jurors was $641,487 in bifurcated trials versus $569,677 in unitary trials. *See id* at 329. The average defendant loss before the deliberating juries was $1,676,563 in bifurcated trials versus $450,293 in unitary trials. *See id* at 330.

B. The Role of the Jury

Another common argument against bifurcation is that it alters the role of the jury.[262] Indeed, how one views the proper role of the civil jury is perhaps the single most accurate predictor of how one views bifurcation: those who view the civil jury as a fact-finding body bound to follow the law usually support bifurcation, while those who view the civil jury as serving a broader social purpose that allows the jury to depart from the strict letter of the law usually oppose bifurcation.[263] To advance the analysis beyond this longstanding conceptual rift, this Article examines the impact of bifurcation on the specific functions performed by the civil jury. Most people view civil juries as serving four primary functions: (1) resolving disputes, (2) overriding arbitrary or unfair government conduct, (3) legitimizing case outcomes, and (4) providing a forum for deliberative democracy.[264] This Article concludes that bifurcation does not significantly frustrate any of these functions and in some cases may further them.[265] Accordingly, the real or perceived impact of bifurcation on the role of the jury cannot justify the presumption against bifurcation.

---

262. *See* Trangsrud, *supra* note 29, at 81 ("[B]ifurcation is rare in ordinary tort litigation because for decades most courts have felt that the fusion of liability and damage issues by a tort jury is necessary to allow the jury to play its proper and traditional role as an institution that directly reflects current norms, concerns, and thinking."). Some critics view these changes as diminishing the power of the jury. *See* Smith, *supra* note 29, at 654 ("The current law interpreting Rule 42(b) fails to recognize the loss of jury power as a result of issue polyfurcation.").

263. *Compare* Mayers, *supra* note 9, at 394–95 (arguing that juries should follow law), *with* Weinstein, *supra* note 29, at 832–34 (arguing that true value of civil jury stems from its ability and willingness to depart from letter of law as guided by jury's collective sense of fairness).

264. *See Civil Jury*, *supra* note 48, at 1423. This Article largely adopts that article's analytical framework in the hope that doing so will simplify the discussion and provide a ready source for background reading, without straying too far from the core procedural issues of this Article. For an argument that the traditional framework adopted in this Article is incomplete in its failure to elucidate how the civil jury creates opportunities for historically marginalized groups, see Phoebe A. Haddon, *Rethinking the Jury*, 3 Wm. & Mary Bill Rts. J. 29, 53–62 (1994).

265. Civil juries also have a regulatory function in that their decisions send signals to future litigants about expected outcomes. *See Civil Jury*, *supra* note 48, at 1427 (citing Marc Galanter, *The Regulatory Function of the Civil Jury*, *in Verdict: Assessing the Civil Jury System* 61–63 (Robert E. Litan ed., 1993)). This Article assumes that unitary trials and bifurcated trials will be equally proficient (or equally deficient) at sending accurate signals.

1. The Jury as Decision Maker

The primary purpose of civil juries is to decide cases. First, the jury must determine the relevant facts.[266] Second, the jury must apply the law to those facts when the facts and law combined do not compel judgment for either party.[267] While many jury critics argue that juries perform these tasks poorly and expensively,[268] this Article's purpose is not to praise or condemn civil juries in an absolute sense. The only relevant question is a relative one—whether bifurcation makes juries better or worse at deciding cases, regardless of how well or poorly they performed the task generally.

To date, the story model provides the most satisfying model of how juries decide cases.[269] According to the story model, jurors organize and digest information by a process of continually constructing, updating, and revising plausible stories explaining the events.[270] The foundation for the story is the actual evidence presented at trial.[271] Jurors then draw from two extra-legal sources to supplement the trial evidence: (1) their own ideas and experience about similar events, and (2) their own "generic expectations about what makes a complete story."[272] In other words, jurors use their own experiences or expectations as models, fitting the evidence presented into the most analogous model and then filling in the gaps with inferences from their own lives.[273] The story that emerges is the one that best accounts for

---

266. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 336 (1979) (finding jury trial unnecessary where "there is no further factfinding function for the jury to perform"); Colgrove v. Battin, 413 U.S. 149, 157 (1973) ("[T]he purpose of the jury trial in . . . civil cases [is] to assure a fair and equitable resolution of factual issues.").

267. Stated otherwise, the function of the jury ends when the undisputed facts compel judgment as a matter of law. *Cf.* Fed. R. Civ. P. 56 (regarding summary judgment); Fed. R. Civ. P. 50 (regarding judgment as a matter of law).

268. The classic condemnation of the civil jury remains Jerome Frank, *Courts on Trial* 108–25 (1949).

269. *See* Richard Lempert, *Telling Tales In Court: Trial Procedure and the Story Model*, 13 Cardozo L. Rev. 559, 560 (1991) (asserting that story model "provides us with the most adequate portrait we have to date of how individual jurors assemble evidence in a form that allows them to determine legal consequences").

270. *See* Pennington & Hastie, *supra* note 49, at 520–521.

271. *See id.* at 522.

272. *Id.* Ironically, the evidentiary rules that ban speculation by witnesses probably are the cause of speculation by jurors, since the jurors will default to their own experiences and expectations in the absence of specific evidence on the subject. *See id.* at 523.

273. *See id.* at 522–23. The process of modeling and gap-filling can be quite ordinary. Pennington and Hastie used the example of someone saying he went to a birthday party where the guests all sang "Happy Birthday" and then Johnny "blew out the candles." Most people would conclude that there was a cake at

the evidence presented ("coverage") and is most consistent, plausible, and complete ("coherence").[274] At the end of the trial, jurors then compare the story they have constructed with the verdict categories and choose the verdict that is the best fit, a process referred to as verdict matching.[275]

Assuming civil jurors decide cases along the lines of the story model,[276] a strong argument for the presumption against bifurcation would exist if bifurcation interferes with either story construction or verdict matching. On the surface, the dangers are obvious. If juries resolve disputes by constructing stories for *cases*, then splitting a trial into separate parts might result in the jury being unable to form a story for that case as a whole. If jurors cannot construct stories to decide cases, they might resort to prejudices or stereotypes as a substitute.[277] On the other hand, one must also consider the possible ways that bifurcation might *improve* story construction. If, overall, bifurcation is either a neutral or positive influence on story construction and jury decision making, then the presumption against bifurcation must find its support elsewhere.

---

the party, because their own models for birthday parties usually include cake and because the reference to candles implies they were on a cake. *See id.* at 523 n.11.

274. *See id.* at 527–28.

275. *See id.* at 530–31. Collectively, Pennington and Hastie characterize the overall story process as having three components: "(1) evidence evaluation through story construction, (2) representation of the decision alternatives by learning verdict category attributes, and (3) reaching a decision through the classification of the story into the best fitting verdict category." *Id.* at 521. Story construction begins at the earliest stage of the trial and continues through deliberations, as the jurors struggle at all points to identify facts, sort through models, and fill in gaps. *See id.* at 531. While the juror may re-evaluate and adjust the story as new evidence is presented, it is equally likely that the juror will simply ignore evidence that is not consistent with his or her story, focus on the evidence that is consistent, and fill in the rest. In one interview study, for example, Pennington and Hastie found that only 55% of the actions, mental states, and goals that formed the jurors' stories were actually included in the testimony. *See id.* at 536. In other words, almost half of their stories consisted of inference.

276. Pennington and Hastie developed the story model to explain decision making by criminal juries. *See id.* at 551. The early returns indicate that civil juries also employ a story model decision-making paradigm. *See* Kenneth S. Bordens & Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 Judicature 22, 27 (1989); Reid Hastie, *The Role of "Stories" In Civil Jury Judgments*, 32 U. Mich. J.L. Reform 227, 234 (1999). Thus, while still not thoroughly tested in the civil context, the story model is the clear front runner as the best paradigm for explaining civil-jury behavior as well. *See* Lempert, *supra* note 269, at 560 & n.8.

277. *See* Bordens & Horowitz, *supra* note 276, at 27.

a. *How Bifurcation Might Assist Jury Decision Making*

Many scholars have endorsed bifurcation in complex cases as a method of improving juror comprehension.[278] Specifically, bifurcation might enhance jury decision making in two ways: (1) by presenting the evidence in a manner that is easier for the jurors to understand, and (2) by limiting the number of legal issues the jury must address at any particular time. These benefits should help jurors perform the story-construction and verdict-matching tasks described by the story model of jury decision making.

Bifurcation should enhance jurors' story construction by ordering and simplifying the litigants' presentations. In a unitary trial, the jury hears all of the evidence regarding all of the issues before deciding any of them.[279] Witnesses in a unitary trial typically present all of their testimony during one examination, even though that testimony may relate to different issues such as liability and damages.[280] As a result, the presentation of evidence in a unitary trial jumps between issues as the various witnesses are called to testify. When the jury retires to deliberate, it must recall, sort through, and analyze evidence relating to multiple issues that it heard scattered over the course of several days, if not weeks.

In comparison, a bifurcated trial offers several advantages that should aid jury comprehension. First, it substantially reduces the amount of evidence the jury must absorb, integrate, or recall at any one time.[281] Second, because

---

278. *See, e.g.*, Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 Am. U. L. Rev. 727, 767 (1991) (separating issues for trial promotes logical presentation of evidence and reduces bias and confusion in jury decision making); *Civil Jury*, *supra* note 48, at 1498; William W. Schwarzer, *Reforming Jury Trials*, 1990 U. Chi. Legal F. 119, 143–44 (stating that bifurcation "permits the jury to concentrate on one major issue at a time therefore improving jury comprehension"); Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. Davis L. Rev. 95, 156–58 (1996) (listing comprehension benefits of bifurcation); Maloney, Comment, *supra* note 77, at 100–01; *see also Complex Litigation Project*, *supra* note 130, § 3.06, at 110–11 (discussing issue separation to promote jury comprehension in complex cases). *But see* Landsman et al., *supra* note 7, at 333–34 (finding no or modest gains in comprehension from bifurcation).

279. *See supra* note 9; *see also* William M. Landes, *Sequential Trials Versus Unitary Trials: An Economic Analysis*, 22 J. Leg. Stud. 99, 100 (1993) (describing unitary trial as trial "in which all of the issues are presented before deciding the case"); Strier, *supra* note 278, at 140 ("All the evidence on all the potential issues—no matter how lengthy, complicated, technical or scientific—is heard in one nonsegmented continuous trial.").

280. *See* Thomas A. Mauet, *Trial Techniques* 75 (4th ed. 1996) (describing typical direct examination of personal injury plaintiff as covering events of injury, medical treatment required, and present medical problems and physical limitations).

281. For example, the plaintiffs in *In re Bendectin Litigation*, 857 F.2d 290 (6th Cir. 1988), objected to the court's plan to try first the issue of whether Bendectin caused birth defects, arguing that the

the jury decides the phases of a bifurcated trial separately, each segment is substantially shorter than the whole trial would have been, therefore keeping the evidence on the separated issues fresher in the minds of the jurors when they deliberate. Third, by limiting the scope of each witness's testimony, the parties are more likely to present their evidence in the order that the events unfolded.[282] While the benefits from these differences are most pronounced in lengthy or complex trials, in principle they should also be available in ordinary trials, albeit to a lesser degree.[283]

Bifurcation should also aid jurors at the verdict-matching stage. Reid Hastie's most recent study of civil-jury deliberation paints a disturbing picture of the quality and accuracy of verdict matching.[284] Consistent with

---

causation issue was the one the jury was least capable of understanding. 857 F.2d at 315. The Sixth Circuit disagreed:

> [W]e conclude that if the issues were indeed difficult, their resolution was not rendered more difficult due to trifurcation. If anything, the narrowing of the range of inquiry through trifurcation substantially improved the manageability of the presentation of proofs by both sides and enhanced the jury's ability to comprehend the causation issue.

Id. Interestingly, the court offered to try causation to a "blue ribbon jury" that would have had no trouble understanding the technical causation evidence, but the plaintiffs rejected that idea. *Id.*

282. *See* Strier, *supra* note 278, at 140 (finding unitary trials result in "hodgepodge" that "confounds the logical ordering of evidence necessary to a systematic consideration of findings on specific issues"). Pennington and Hastie's story model suggests that the order of the evidence plays a significant role in story construction. *See* Pennington & Hastie, *supra* note 49, at 542. In their study, for example, the conviction rate by mock jurors was 78% when the prosecution presented its case in story order and the defense used the traditional witness order, but dropped to 31% when the prosecution and defense swapped tactics. *See id.* at 542–43.

283. One recent study challenges the claim that bifurcation improves juror comprehension. The Landsman mock asbestos trial study quizzed its mock jurors and found no difference in recall of testimony between the unitary-trial jurors and the bifurcated trial jurors. Landsman et al., *supra* note 7, at 330 & tbl.9. The authors interpreted the results as "suggest[ing] that bifurcation does not enhance memory of compensatory case facts." *Id.* at 333. While that study itself yielded no evidence that bifurcation improves jury comprehension, neither does it prove that bifurcation will never improve jury comprehension. The "mock trial in the Landsman study was not long enough to meaningfully contrast jury comprehension between the unitary and bifurcated trial formats. The mock jurors in the Landsman study heard only two hours and forty-five minutes of taped testimony and deliberated the same day. *See id.* at 315. Thus, the difference between hearing the entire trial and hearing only the compensatory component was very small—perhaps an hour or so. A more realistic setting might involve a five-day trial with three days of testimony on liability and two days of testimony on damages. In that scenario, the jurors in the unitary-trial setting would have to recall five days worth of testimony. By comparison, the jurors in the bifurcated-trial setting would have to recall, at most, only three days worth of testimony at any given time. While hearing an extra hour of damages testimony did not appear to significantly impair the jurors' ability to recall the two hours of liability evidence that preceded it, hearing an extra two days of damages testimony might well impair the ability of jurors to recall three days' worth of liability evidence.

284. Reid Hastie et al., *A Study of Juror and Jury Judgments in Civil Cases: Deciding Liability for Punitive Damages*, 22 Law & Hum. Behav. 287 (1998).

earlier studies, the study found that jurors often did not understand or apply the judge's instructions on the law.[285] Part of the problem, according to Hastie, is that the underlying legal standards deviate from lay concepts of liability and that the process of analyzing issues by conscientiously and methodically considering specific elements is foreign to most jurors.[286] Thus, "the jurors fall back on their rough-and-ready reasoning habits, probably influenced by their sympathies for one party or the other, and they fail to complete the task presented to them in their instructions from the judge."[287]

If jurors are overwhelmed by the verdict-matching process due to its complexity and unfamiliarity, then any measures that simplify the task or isolate the steps involved should help. Hastie, for example, suggests using special interrogatories or special verdicts as a way of forcing jurors to consider each legal element.[288] Those measures certainly would force the jury to do its job properly,[289] but would not necessarily make the job any easier: in a unitary trial, the jury would still face the daunting task of understanding and applying all of the legal standards at the same time. However, a bifurcated trial will improve the jury's ability to conceptualize the case under the legal standards because the jury will be able to focus on the legal standards separately.

b. Bifurcation as a Barrier to Jury Decision Making

Bordens and Horowitz were the first to suggest that bifurcation might impair jury decision making by interfering with story construction.[290] In their mock-trial study, Bordens and Horowitz researched the separation of

---

285. *See id.* at 304; *see also* Hannaford et al., *supra* note 51, at 256 ("Juries routinely struggle with jury instructions on the applicable law, often misunderstanding legal concepts that are critical to the correct application of the governing law to the facts.").

286. Hastie et al., *supra* note 284, at 307.

287. *Id.* at 308.

288. *See id.*

289. Isolating issues also forces the litigants to meet the informational needs of the jury by making it harder to gloss over issues or engage in diversionary tactics. All too often, jury trials devolve into a battle of themes that rewards litigants who simply repeat catchy phrases and penalizes litigants who attempt a detailed and methodical presentation of the facts. Many juries may end up guessing about complex issues in unitary trials because the lawyers figured it was better to "dumb down" their case than to hit the merits hard and risk the jury losing sight of their overall themes. Focusing on a single issue might reduce the "merits penalty" by allowing litigants to make detailed presentations on complicated issues with less worry that they will overwhelm the rest of their cases.

290. *See* Bordens & Horowitz, *supra* note 276, at 27.

general causation, liability, and damages in a complex toxic-tort setting.[291] They found evidence that, while the unitary-trial juries were generally using the story model to decide issues, the trifurcated-trial juries were instead using "other, perhaps less sophisticated, heuristics," such as "corporate-capitalist versus the little guy" or "good guy versus bad guy."[292] At first blush, these results seem a damning indictment of bifurcation: few would support a procedure that replaces evidence-based decision making with adjudication by stereotype. Upon closer examination, however, the results of that study do not support the conclusion that increased bifurcation will replace good jury decision making with bad jury decision making. Indeed, Bordens and Horowitz's observations possibly illustrate a problem inherent in jury decision making that neither a bifurcated nor unitary trial structure can correct.

On the whole, the evidence does not support the conclusion that issue separation leads to unsophisticated decision-making heuristics. The phenomenon that Bordens and Horowitz observed occurred in a study of multiple-issue separation in complex cases.[293] The fact that juries struggle to construct stories to explain general causation in a toxic-tort trial does not mean that juries will struggle to construct separate narratives in other contexts, such as the separation of liability and damages. The story model indicates that juries build their stories by first constructing smaller stories, known as sub-stories or episodes.[294] Each episode might consist of smaller component episodes.[295] To the extent jurors naturally analyze cases by breaking them down and constructing sub-stories, bifurcation seems consonant with story-model decision making in most ordinary litigation.[296]

---

291. *See id.* at 24.

292. *Id.*

293. *See id.*

294. *See* Pennington & Hastie, *supra* note 49, at 526.

295. *See id.*

296. In an ordinary car-accident case, for example, it seems likely that jurors inherently construct separate episodes to address what caused the accident (liability) and how badly the parties were hurt (damages). Similarly, in a typical employment-discrimination case, it would seem natural that jurors would construct separate stories to address why someone was fired and the damages they suffered as a result. Many of the less common forms of issue separation also seem in harmony with the construction of sub-stories. In a contract case, for example, nothing in the story model suggests that juries would be unable to distinguish the issue of whether a contract existed from the issue of whether that contract was breached. Nor does the story model suggest any reason why a jury could not determine whether a plaintiff stood in the right capacity to bring a suit separately from the merits of the suit. An example of this is where a company defends a personal-injury claim by asserting that the plaintiff was a statutory employee limited to the remedies available under workers' compensation. *See* Dixon v. Certainteed Corp., 166 F.R.D. 487, 488–89 (D. Kan. 1996) (bifurcating issue of statutory employee status).

A more challenging question is whether juries can construct meaningful sub-stories to address discrete and technical issues like causation.[297] Bordens and Horowitz's observations and conclusions are helpful here. The first thing they observed was that juries tended to deviate from story-model decision making when general causation was tried separately.[298] The simple mechanics of the story model can fully explain this result. Story construction is a convergence of the evidence presented and the juror's own life experiences, with those life experiences providing both a model for what the story should consist of and content where the trial evidence leaves gaps.[299] Most jurors' life experiences will be informative when the issue to be decided involves everyday life events such as what caused a traffic accident or why someone was fired. However, some issues will be so far removed from the experiences of everyday people that jurors have no models upon which to construct a story, or have no information to fill in the gaps.[300] For instance, the experiences of most citizens would probably supply an inadequate framework for a story that focused exclusively on causal relationships in toxic-tort cases. So perhaps the fact that Horowitz and Bordens' jurors abandonded story-model decision making when asked to decide causation separately should come as no surprise.

Nevertheless, the unitary-trial setting is not necessarily preferable. If the jurors truly lack the models or gap fillers needed to construct a story explaining a particular issue or element, and the pertinent evidence does not bridge that gap, expanding the scope of the trial will not cure the deficiency. Rather, a unitary trial only covers up the deficiency by putting the jurors in a position where they can either: (1) ignore the issue, or (2) use evidence from other parts of the trial to resolve that issue, regardless of the relevance of that evidence. In the Bordens and Horowitz study, the authors specifically noted that the unitary trial juries (which rendered a higher

297. In the *Bendectin* litigation, for example, the trial judge trifurcated the case and had the jury first determine the sole issue of whether Bendectin caused birth defects at all. *See In re* Bendectin Litig., 857 F.2d 290, 298 (6th Cir. 1988). For a more detailed description of this case, see *infra* notes 357–362 and accompanying text.

298. *See* Bordens & Horowitz, *supra* note 276, at 27.

299. *See supra* notes 269–75 and accompanying text.

300. Some scientific evidence may be so inherently complex that no jury could ever follow it. An improbable (but entertaining and illustrative) example might be to imagine a jury in the 1930s trying to follow a quantum-physics issue pitting Niels Bohr and Werner Heisenberg as rival experts. *See* Michael Frayn, *Copenhagen* (1998) (illustrating the elusiveness of complex and abstract principles even when presented in their most simplified form). In most situations the litigants probably *can* present complex issues in an understandable form if those issues are separated from the rest of the case so the jury could focus on those issue alone.

number of plaintiff verdicts) waited to hear the damages evidence before making up their minds and then "utilize[d] all the trial evidence while deciding each individual trial issue."[301]

In the end, when jurors are unable to make meaningful judgments about causation, they appear to misbehave in both the unitary and bifurcated trial settings. In the unitary trial setting, the jurors appear to have used the damages evidence as a substitute for causation; in the bifurcated trials, the jurors based causation on the stereotypes of the bad company versus the innocent individual.[302] Thus, neither setting yielded a legally principled result. While this phenomenon may be a reason to reject trying technical issues to juries in the first place,[303] it does not support favoring a unitary trial over a bifurcated trial.[304]

In summary, the story model of juror decision making does not justify the presumption against bifurcation. First, in most cases, bifurcation will not interfere with story modeling at all because it aligns with the jurors' normal construction of sub-stories. If bifurcation does result in the jury being presented with an issue it cannot model, that is a sign that the jury might not understand the issue well enough to render a principled decision, regardless of the structure of the trial. Second, a unitary trial may actually deprive juries of the many comprehension benefits that come with hearing issues separately. Thus, the presumption against bifurcation may impair both juror story construction specifically and jury comprehension generally by forcing

301. Bordens & Horowitz, *supra* note 276, at 27.

302. *See id.*

303. *See In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1084 (3d Cir. 1980) (finding jury trial violated Due Process Clause where merits were beyond jury's comprehension). One commentator has proposed to solve this problem by selecting only well-educated jurors for complex cases. *See* Franklin Strier, *The Educated Jury: A Proposal for Complex Litigation*, 47 DePaul L. Rev. 49, 62–63 (1997) (arguing that educated jury allows meaningful decision making while preserving right to jury trial).

304. The *Bendectin* litigation also illustrates this phenomenon. Commenting on the use of the story model, one article asserted that "[w]hen a defendant's fault (or a plaintiff's damages) assists in understanding causal uncertainties, [the jury] may be able to formulate a more coherent story than when causation is tried first, in isolation from the rest of the case." Wendy A. Wagner, *Choosing Ignorance in the Manufacture of Toxic Products*, 82 Cornell L. Rev. 773, 829 n.202 (1997). The article does not elaborate on how evidence of the defendant's fault or the plaintiff's damages sheds any light on causation, nor could it, other than to support an assumption by the jurors that there must be causation whenever poor testing procedures and severe injuries are present. For a more thorough discussion of how the plaintiffs in the Bendectin cases successfully commingled negligence and damages evidence with the issue of causation, see Joseph Sanders, *From Science to Evidence: The Testimony on Causation in the Bendectin Cases*, 46 Stan. L. Rev. 1, 53–54 (1993).

juries to hear evidence "out of order" and then grapple with all of the legal issues simultaneously.

2. *The Jury as a Check on Government Conduct*

During colonial times, the jury was viewed as an important mechanism for constraining the power of the government.[305] The Anti-Federalists argued, for example, that civil juries were necessary to counteract corrupt judges.[306] They also argued that civil juries would be needed for suits against the government, because judges, being a part of the government, would be expected to side with the government.[307] Finally, many viewed the common sense of the civil juror as the final safeguard against unwise or unfair legislation.[308]

None of these values support the presumption against bifurcation today. Some of these concerns no longer apply. Few would argue today, for example, that the federal judiciary is so corrupt (if at all) that citizens need to participate in every case as a prophylactic measure. While civil juries may still be a counterweight to pro-government judges in cases where the government is a party, that rationale cannot support the existing presumption that applies in all cases.

If the civil jury still serves a general regulatory function against the government, that function is to nullify unjust laws by refusing to follow them in civil cases. Critics often argue that bifurcation limits the ability of the jury to "temper" their verdicts—to replace a harsh legal doctrine with a less severe one.[309] Despite the romantic appeal of nullification, it is not a valid basis to oppose bifurcation.

---

305. *See* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 708 (1973). Other ratification-era arguments for civil juries included the protection of debtors from creditor-friendly federal courts. *See id.* at 673.

306. *See id.* at 708. On this point alone, Alexander Hamilton agreed with the Anti-Federalists. *See id.* at 709–10 (arguing are juries harder to corrupt because there are 12 and sit for only one case at a time).

307. *See id.* at 708.

308. *See Civil Jury*, *supra* note 48, at 1430 ("[T]he jury frustrates the application of unjust laws enacted by misguided legislatures."). Indeed, the Anti-Federalists favored the less efficient jury trial over the quicker and cheaper judge trial "precisely because in important instances, through its ability to disregard substantive rules of law, the jury would reach a result that the judge either could not or would not reach." Wolfram, *supra* note 305, at 671.

309. *See* Weinstein, *supra* note 29, at 833–34; *see also Complex Litigation Project*, *supra* note 130, § 3.06, at 120–21 (discussing "lively debate among commentators and judges over what is the 'proper' jury function").

First, nullification of any kind is anti-democratic. It is one thing for a jury to ignore the king's law. There, it can be said that the jury is acting as the voice of the people. But when the law is made by democratically elected officials (or the judges those officials appoint), the people have already spoken. A jury's refusal to enforce the law is just as likely the product of ignorance or bias as the result of those twelve (or six) citizens having a better sense of the public's will than the public's democratically elected representatives.[310] At the very least, nullification's questionable political legitimacy makes it a slender reed upon which to hang a system-wide procedural presumption against bifurcation.

Second, even if nullification or tempering were consistent with representative government, that battle has already been fought and lost. The U.S. Supreme Court first outlawed jury nullification in the federal courts more than 100 years ago[311] and shows no interest in revisiting the issue.[312] Recently the Court has expressly stated that civil juries "*must follow the law* and act as impartial factfinders."[313] The federal courts similarly reject compromise verdicts because they represent a form of liability not authorized under the law.[314] Indeed, modern federal civil practice includes numerous procedural devices, strategically positioned along the litigation path, that ensure that decisions faithfully follow the law.[315] If anything, the

310. *See Civil Jury*, *supra* note 48, at 1431.

311. *See generally* Sparf v. United States, 156 U.S. 51 (1895). Jury nullification is "unlawful" in the sense that juries are not supposed to do it and are no longer instructed that they are the judge of the facts *and law*. Of course, since juries deliberate in secrecy, it is virtually impossible to detect nullification. *See* Lawrence M. Friedman, *Some Notes on the Civil Jury in Historical Perspective*, 49 DePaul L. Rev. 201, 209 (1998).

312. The U.S. Supreme Court officially declared the nullification debate over more than 50 years ago:

> If the intention is to claim generally that the [Seventh] Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made consistently for nearly a century. More recently, the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure. The objection therefore comes too late.

Galloway v. United States, 319 U.S. 372, 389 (1943) (footnote and citations omitted).

313. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630 (1990) (holding that civil litigants may not exercise preemptory challenges based on race) (emphasis added).

314. *See* Nichols v. Cadle Co., 139 F.3d 59, 63 (1st Cir. 1998) (noting federal courts view compromise verdicts with "a settled hostility.") A compromise verdict occurs when the jury cannot agree on liability, so instead compromises by finding for the plaintiff but awarding less in damages than the plaintiff otherwise would deserve. *See* Carter v. Chicago Police Officers, 165 F.3d 1071, 1082 (7th Cir. 1998); Shugart v. Central Rural Elec. Coop., 110 F.3d 1501, 1505 (10th Cir. 1997).

315. These devices include motions to dismiss, motions for summary judgment, motions for judgment as a matter of law (both before and after the defense is presented), special verdicts and interrogatories, and motions for new trial. *See* Fed. R. Civ. P. 12(b), 56, 50, 49, 59.

federal system has evolved to the point where decisions contrary to the law may actually violate the Due Process Clause of the Fifth Amendment.[316] Thus, any argument for unitary trials predicated on jury "lawlessness"[317] finds no support in today's federal court system.

Finally, even if in the federal system juries should have a case-by-case legislative veto, juries would not need to hear the entire case in order to exercise that function.[318] Bifurcation critics credit tempering with stimulating the development of comparative-negligence law.[319] One might ask, though, why a jury would need to hear damages evidence to know that a strict rule of contributory negligence was too harsh for the automobile age. For example, assume plaintiffs are driving through an intersection and have a green light, but are traveling five miles over the speed limit. The plaintiffs see another vehicle negligently pull out in front of them from the cross-street but cannot slow down in time to avoid the hazard. Under a strict contributory-negligence scheme, the plaintiffs' speeding might have constituted contributory negligence and precluded all recovery.[320] By contemporary standards, that result would seem unfair. But is it any more or less unfair depending on whether the plaintiffs' injuries are minor or severe? A jury hearing only the liability issue of that lawsuit could still render a counter-factual decision that nullified strict contributory negligence, thereby allowing the plaintiff to recover something. Of course, not having heard the damages evidence, the jury might not feel any desire to

316. *See* Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. Chi. Legal F. 33, 46. The advisory committee's note to the 1991 amendments to Rule 50 is instructive: "The revision of this subdivision aims to facilitate the exercise by the court of its responsibility to assure the fidelity of its judgment to the controlling law, a responsibility imposed by the Due Process Clause of the Fifth Amendment." Fed. R. Civ. P. 50 advisory committee's note (citing *Galloway*, 319 U.S. 372).

317. Wolfram, *supra* note 305, at 705.

318. *See* Schwartz, *supra* note 26, at 1213 ("[I]t is not necessary that judge or jury be apprised of all the facts in the entire litigation in order to reach a decision which 'tempers' substantive law.").

319. *See, e.g.*, Lempert, *supra* note 180, at 80–84 (attributing comparative negligence and workers' compensation statutes to influence of civil jury); Weinstein, *supra* note 29, at 833–34; Stephen C. Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 U. Chi. Legal F. 87, 113 (crediting jury tempering with rewriting law of negligence). Looking back, though, it is perhaps presumptuous to say that these reforms would not have occurred but for the fact of the civil jury. By the early 1900s, contributory negligence was already being criticized by academics and abolished by legislatures. *See* Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 Hastings L.J. 579, 609 (1993). One will never know whether the civil jury advanced justice by implementing de facto reform while legislatures spun their wheels, or whether it hurt the cause by removing the urgency and therefore delaying actual reform. *See* Mayers, *supra* note 9, at 394–95 (arguing that jury tempering masks effects of unfair law and therefore suppresses grass-roots legal reform).

320. *See Restatement (Second) of Torts* § 467 (1965) (explaining plaintiff's contributory negli-gence bars recovery against defendant whose negligent conduct would otherwise make him liable to plaintiff).

do so. But if a rule of law is so unfair that juries should nullify it, the unfairness should transcend the severity of the injury. Otherwise, the jury is not updating the law, but is really just applying ad hoc standards of recovery based on sympathy.

Once again, the Bendectin litigation is illustrative.[321] The plaintiffs were never able to muster much evidence that Bendectin caused birth defects at all.[322] On the other hand, there was strong evidence that Merrell Dow had done a poor job of testing Bendectin.[323] While not all of the juries found liability, those that did may have done so not because they found causation but to punish Merrell Dow for its testing inadequacies.[324] Would those juries have been willing to impose liability against Merrell Dow based on its reportedly shoddy testing if the injuries at issue were minor or temporary in nature, rather than severe, long-term physical deformities? If the juries' basis for nullifying causation was a belief that the law should punish drug manufacturers for poor testing, the only evidence they needed was the evidence relating to Merrell Dow's testing and *not* the evidence relating to the plaintiffs' injuries. Thus, if juries truly want to relieve plaintiffs of proving causation in drug cases generally, they are just as free to do so in trifurcated trials as they are in unitary trials. The absence of damages evidence may eliminate one incentive for nullifying the causation requirement (sympathy or anger),[325] but it does not limit the correct incentive for doing so (the belief that requiring the plaintiff to bear the often impossible burden of proving causation in pharmaceutical cases is unfair) or the jury's ability to do it.[326]

---

321. *See In re* Bendectin Litig., 857 F.2d 290 (6th Cir. 1988). For a history and criticism of the numerous cases filed against Merrell Dow alleging Bendectin caused birth defects, see Michael D. Green, *Bendectin and Birth Defects: The Challenges of Mass Toxic Substances Litigation* (1996).

322. *See* Sanders, *supra* note 304, at 25 ("[T]he evidence has persuaded most of the scientific community that Bendectin is not a teratogen."); *id.* at 53 (noting causation was "the weakest part of the plaintiff's case").

323. *See id.* at 53–54.

324. *See* Wagner, *supra* note 304, at 828–29.

325. *See* Richard L. Marcus, *Reexamining the Bendectin Litigation Story*, 83 Iowa L. Rev. 231, 248 (1997) (reviewing Green, *supra* note 321, and noting that plaintiffs in Bendectin litigation should have lost and that polyfurcation appeared to enhance accuracy of the jury's verdict by preventing prejudice from sympathy).

326. Professor Trangsrud, for example, criticized the trifurcation of the *Bendectin* case because of the possibility that "juries presented with the entire case against the manufacturer . . . would have awarded discounted damages to the plaintiffs before them, *mindful of the serious character of the plaintiffs' injuries* and the inconclusive evidence that the injuries were caused by the defendant's drug." Trangsrud, *supra* note 29, at 82 (emphasis added). He concluded that the judge's trifurcation order prevented the jury from anticipating legal reform that would "allow a discounted recovery when a defendant's product

In summary, bifurcation is not at odds with the civil jury's role as a government watchdog. In large part, that job has eroded over time: society no longer needs juries to sniff out corrupt or biased judges, and no longer wants or allows juries to substitute their views of what the law should be. To the extent that society secretly wants juries to disregard existing law as outdated or unfair, bifurcation is no obstacle. Indeed, bifurcation may provide the best litmus test available. If society is going to delegate to a handful of randomly selected citizens the job of determining when a legal rule is so unfair that it should be disregarded, those citizens should exercise that power only when they deem the legal rule to be overtly, obviously, and unambiguously unfair standing alone, without regard to the extent of a plaintiff's injuries or the conduct of the litigants.

3. *The Jury as a Legitimizer of Verdicts*

Civil juries can also promote public acceptance of verdicts in the judicial system. Civil juries are often called upon to resolve questions that defy logic or legislative predetermination.[327] The civil jury, for example, shoulders the burden of assigning dollar values to inherently incalculable losses such as pain and suffering[328] or loss of consortium.[329] Juries are often in a better position to make these difficult decisions than judges. The public may be more willing to accept a controversial verdict from a group of its peers than a single judge.[330] At the very least, the jury, being temporary and diffuse, will make less of a target than the judge.[331] Thus, the jury insulates

---

increases the risk of disease or injury beyond natural levels, but strict causation cannot be proven due to the passage of time or the imperfect nature of our science." *Id.* Note that the anticipated reform *does not include* using the severity of the plaintiff's injuries as a determinant for whether to relax the causation requirement. Thus, a verdict rendered by a jury "mindful of the serious character of the plaintiff's injuries" falls outside the scope of both current causation law *and* the anticipated reform standard.

327. *See Civil Jury*, *supra* note 48, at 1434–35.

328. *See Restatement (Second) of Torts* § 912 cmt. b (1979) (explaining because there is no "market price" for pain and suffering, jury must determine amount of damages that "a reasonable person would estimate as fair compensation").

329. *See* Illinois Pattern Jury Instructions (Civil) § 32.04 (3d ed. 1994) (measuring damages for loss of consortium by "[t]he reasonable value of the society, companionship and sexual relationship" of a spouse that other spouse has lost so far and is reasonably certain to be deprived of in future).

330. *See Civil Jury*, *supra* note 48, at 1433.

331. *See id.* at 1433–34; *see also* Michael J. Saks, *Public Opinion About the Civil Jury: Can Reality Be Found in the Illusions?*, 48 DePaul L. Rev. 221, 239–40 (1998). Professor Saks suggests that the public's displeasure with juries may be proof that juries in fact do protect judges by acting as "lightning rods." *Id.* at 240. Studies consistently show that judges agree with most jury verdicts. *See* Hannaford et al., *supra* note 51, at 249. Assuming this to be true, it should be no surprise that judges are comparatively

the judicial system from criticism, both by serving as a "lightning rod" for criticism of unpopular verdicts[332] and by protecting the judiciary from allegations of elitism, judicial bias, or political influence.[333] Finally, many tough decisions submitted to civil juries lie at gaps in the law, which common sense and societal norms must fill.[334] Whereas a judge would have to articulate both the existence of the gap and the content of the filler, a jury verdict sweeps those items under the rug, revealing only the outcome.[335] Thus, juries fill the role of answering questions through unstated societal standards where express legal rules would be inadequate or even destructive.[336]

Bifurcation does not undermine the jury's role as a legitimizer of verdicts. As with unitary trials, the judge and judicial system are still insulated from criticism. Juries can still apply unspoken societal norms when legal rules fail. Even when trials are bifurcated, juries' verdicts will still achieve greater public acceptance as the product of community values rather than the political leanings of one person perched high in an ivory tower. Because the juries' verdicts in bifurcated trials will serve the same

---

supportive of civil juries, since the civil jury can be counted on to take the fall in deciding difficult or unpopular cases. *See* Saks, *supra*, at 240 & n.84.

332. *See id.* at 239; *see also* Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 Va. L. Rev. 1055, 1062 (1964); George L. Priest, *The Role of the Civil Jury in a System of Private Litigation*, 1990 U. Chi. Legal F. 161, 167.

333. *See* Hannaford et al., *supra* note 51, at 251. An increased reliance on judges, for example, would make the judges' own political preferences more important and would give "wealthy repeat player litigants [additional] reason to spend lavishly to influence the selection of even low level trial judges." Richard Lempert, *Why Do Juries Get A Bum Rap? Reflections on the Work of Valerie Hans*, 48 DePaul L. Rev. 453, 462 (1998).

334. *See Civil Jury*, *supra* note 48, at 1434–34.

335. In actions tried to the court, the judge must "set forth the findings of fact and conclusions of law which constitute the grounds of no action." Fed. R. Civ. P. 52(a). In contrast, unless the court submits a special verdict or a general verdict with interrogatories, *see* Fed. R. Civ. P. 49, the jury will issue a general verdict that identifies only which party prevailed and the amount of damages awarded, if any. *See* 3 *Moore's Federal Practice*, *supra* note 1, § 22.70(1)(a). Because the jury does not identify its reasoning in a general verdict, general verdicts commonly are referred to as "black box" decisions. *See Civil Jury*, *supra* note 48, at 1500 & n.70. "Courts and commentators agree that the majority of federal jury-tried cases are submitted to the jury using a general charge." Elizabeth G. Thornburg, *The Power and the Process: Instructions and the Civil Jury*, 66 Fordham L. Rev. 1837, 1840 (1998).

336. *See Civil Jury*, *supra* note 48, at 1435–36. Many of the most troublesome jury questions, such as reasonableness, are said to be mixed questions of law and fact. It is more accurate to say that every mixed determination yields a legal rule: does that particular rule of law apply or extend to a very specific set of facts as determined by the jury? In this sense, juries who decide mixed-question cases make law, but "they do it quietly; and their work does not leave many visible traces." Friedman, *supra* note 311, at 211.

legitimating function as those arising out of unitary trials, the juries' legitimating function cannot support the presumption against bifurcation.

4. *The Jury as a Forum for Deliberative Democracy*

Finally, the civil jury is a forum for ordinary citizens—people of the "middling sort"—to participate in the everyday administration of government.[337] Jury service has been praised as a forum to educate the citizens about the law and the judicial system.[338] In this regard, the civil jury is a right not of the litigants, but of the jurors themselves.[339] Moreover, the civil jury promotes democratic values by forcing legislatures, judges, and attorneys to articulate the law in a clear and common-sense fashion, comprehensible by the ordinary citizen.[340]

Bifurcation does not conflict with these values or purposes. First, bifurcation as a procedure simply does not remove the people from the jury. Thus, the lay citizenry retains its role in the administration of the government. As discussed above, the separation of issues does not diminish the jury's role; juries remain free to evaluate laws and cases through lenses of common sense and equity to the same extent allowed by pre-existing

---

337. *Civil Jury*, *supra* note 48, at 1437 (quoting Landsman et al, *supra* note 319, at 588–89). The U.S. Supreme Court made this point expressly in the criminal context: "The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system." Powers v. Ohio, 499 U.S. 400, 406 (1990) (holding that race-based peremptory challenges violate Equal Protection Clause even when defendant and stricken juror are of different races, in part because challenges impair rights of stricken juror to participate in judicial system).

338. *See* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 Cornell L. Rev. 203, 221 (1995). Cumulatively, then, the citizens would "learn self-government by doing self-government." Akhil R. Amar, *Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1187 (1991). Not everyone subscribes to this view. George Priest, for example, studied jury service in Cook County, Illinois, which includes Chicago, and concluded that the citizens of that county had only a 20% chance of serving on a civil jury in their lifetime and that most of the cases they might sit on were ordinary cases devoid of complex social values. Priest, *supra* note 332, at 187–91. Accordingly, while civil jury service in the early 19th century may have served the educational purpose identified by Alexis de Tocqueville, it may no longer serve that purpose today. *See* Alexis de Tocqueville, *Democracy in America* 275 (Phillip Bradley trans., Alfred A. Knopf 1945) (1835) (stating that jury service should "be regarded as a gratuitous public school, ever open, in which every juror learns his rights and becomes practically acquainted with the law").

339. *See Civil Jury*, *supra* note 48, at 1437; *cf.* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 629 (1990) (discussing civil litigants' standing to raise juror's right not to be excluded from jury because of race) *Powers*, 499 U.S. at 407 ("[W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.").

340. *See Civil Jury*, *supra* note 48, at 1439 ("The civil jury is a welcome limit on the esotericism of the law, a reminder that legal rules should ideally be comprehensible to the average citizen.").

limitations.[341] Second, jurors in bifurcated trials still learn about the law and the judicial system. Any differences in education due to trials that end after an early finding on some issue are differences in degree and not in nature.[342] Finally, bifurcation does not conflict with the goal of bringing clarity to the law. Whether or not trials are bifurcated will not cause judges or legislatures to lapse into esotericism. If anything, bifurcation promotes clarity at the back end by allowing jurors to decide cases in more focused and manageable segments.[343]

5. *Bifurcation and the Role of the Jury: A Summation*

The bifurcation debate should not be framed as a debate about the merits or the future of the civil jury system. This Article assumes that civil juries are valuable and asks only whether bifurcation significantly undermines any of the functions or benefits afforded by a unitary civil jury trial. This Article concludes that bifurcation does not interfere with the role of the jury and, indeed, often better promotes the values served by the jury than the unitary trial. Unlike other reforms, which sacrifice one value of the civil jury to promote another, increased bifurcation yields a "happy confluence of different objectives."[344] Thus, the impact of bifurcation on the role of the jury does not support the presumption against bifurcation in federal courts.

C. *Prejudice, Sympathy, and the Sterile Trial Environment*

Rule 42(b) allows federal judges to bifurcate issues to "avoid prejudice."[345] The prejudice Rule 42(b) seeks to avoid is the risk that

341. *See supra* notes 318–26 and accompanying text.

342. In a case bifurcating liability and damages, for example, the jury would receive the same education regarding substantive liability as the jury in a unitary trial. Although the jury in the bifurcated trial might not be educated about damages law if the defendant prevails on liability, this cannot be a basis to oppose bifurcation. If citizen education as a justification for civil juries extended beyond the needs of the case, it would warrant education not just about unnecessary damages law, but all sorts of other laws as well. Indeed, there would be no reason why the law to be taught had to relate to the merits at all.

343. *See supra* notes 278–89 and accompanying text.

344. *Civil Jury*, *supra* note 48, at 1442. This may explain why many who acknowledge the faults of the civil jury but wish to preserve it consider bifurcation to be a valuable contribution to jury reform. *See* Carrington, *supra* note 316, at 66–67 ("[P]art of the answer to the problem of jury competence lies in more frequent use of the court's discretion under Rule 42 to sever issues for separate trial."); Schwarzer, *supra* note 278, at 143–44.

345. Fed. R. Civ. P. 42(b).

evidence pertaining to one issue will improperly influence the jury's decision on another issue. In tort cases, for example, defendants often ask the court to bifurcate liability and damages to avoid the risk of a sympathy verdict.[346] As one court explained, a unitary trial "may result in sympathetic jurors more concerned with compensating the plaintiff for his injury than whether or not the defendant is at fault."[347] Sometimes, however, the plaintiff seeks bifurcation to avoid prejudice. Plaintiffs may seek to bifurcate liability and damages, for example, where the damages testimony is likely to evoke antipathy rather than sympathy.[348] When faced with a bifurcation motion based on prejudice, the courts usually consider whether the risk of prejudice can be ameliorated by limiting instructions.[349]

---

346. *See, e.g.*, Helminski v. Ayerst Lab., Inc., 766 F.2d 208, 212 (6th Cir. 1985) (bifurcating liability and damages to avoid prejudice to defendant in pharmaceutical products-liability case); Lagudi v. Long Island R.R. Co., 775 F. Supp. 73, 76 (E.D.N.Y. 1991) (bifurcating liability and damages in personal-injury case because it was "clear that evidence about plaintiff's alleged injuries may well serve to confuse the jury as to the separate questions of liability and damages").

347. Buscemi v. Pepsico, Inc., 736 F. Supp. 1267, 1272 (S.D.N.Y. 1990); *see also* Miller v. New Jersey Transit Auth. Rail Ops., 160 F.R.D. 37, 41 (D.N.J. 1995) ("[S]ympathetic jurors might be inclined to award Plaintiff some money, no matter how small, regardless of fault, if they were aware of the magnitude of the injuries incurred and the damages sought."); Witherbee v. Honeywell, Inc., 151 F.R.D. 27, 29 (N.D.N.Y. 1993) (noting that bifurcation of liability and damages was warranted because "courts have found there is a potential that a jury may be adversely and improperly affected in considering the issues of liability fairly, impartially, and objectively"). The prejudice from sympathy may be more than just the jury feeling sorry for the plaintiff. Rather, sympathy for the plaintiff may actually cause the jury to dislike the defendant. In one study of a hypothetical birth-defects lawsuit against a drug company, the mock jurors developed increasingly negative feelings toward the defendant drug company depending on the severity of the plaintiff's injuries, even though the jurors all heard the same evidence regarding the drug company's conduct. *See* Bornstein, *supra* note 55, at 1485.

348. In *Berry v. Deloney*, 28 F.3d 604 (7th Cir. 1994), for example, a high school student sued her truant officer under 42 U.S.C. § 1983 for emotional distress arising from a coerced sexual relationship and subsequent abortion. 28 F.3d at 605–06. When the defendant announced his intention to introduce evidence of previous sexual activity and abortions to refute her claim of emotional distress, the plaintiff moved to bifurcate liability and damages for fear the jury would hold those activities against her in determining liability. *See id.* at 609–10; *see also, e.g.*, Kerman v. City of New York, No. 96-C-7865, 1997 WL 666261, at *5 (S.D.N.Y. Oct. 24, 1997) (regarding plaintiff moving to bifurcate liability and damages in unlawful-detention action against police where evidence of his mental problems relevant to damages would affect jury's determination of liability); Mann v. University of Cincinnati, 157 F.R.D. 40, 41–42 (S.D. Ohio 1994) (denying student's motion to bifurcate liability and damages in lawsuit alleging arbitrary grading where damages evidence would include her entire academic record showing that she was "not a serious student"); Bierne v. Security Heating-Clearwater Pools, Inc., 759 F. Supp. 1120, 1124 (M.D. Pa. 1991) (granting plaintiff's motion to trifurcate issue of cause of fire from liability and damages where defendant planned to introduce evidence that decedent was intoxicated at time of fire to refute decedent's claims for pain and suffering).

349. *See, e.g.*, Ake v. General Motors Corp., 942 F. Supp. 869, 877 (W.D.N.Y. 1996) (deciding danger of prejudice in products-liability case alleging defective fuel system caused car fire would be addressed "through appropriate jury instructions"); Brown v. Advantage Eng'g, Inc., 732 F. Supp. 1163,

Logically, the risk of juries improperly using evidence cannot be the basis for the presumption against bifurcation. In a bifurcated trial, the jury cannot improperly use evidence pertaining to the separated issue because the jury simply does not hear the evidence at that stage of the trial. In contrast, the unitary trial creates opportunities for prejudice by presenting multiple issues to the jury at the same time. Accordingly, the risk that juries will use evidence in an improper way would support a presumption *for* bifurcation, not against it.

One permutation of the prejudice argument, however, could logically support a presumption against bifurcation. The sterile-trial theory asserts that bifurcation *causes* prejudice by creating a sterile trial environment that obscures the gravity of the underlying events and strips the trial of its human element.[350] This theory seems to have derived from a pair of Sixth Circuit decisions during the 1980s. In the first case, *In re Beverly Hills Fire Litigation*,[351] the plaintiffs sued the manufacturers of aluminum electrical wiring alleging that a defect in the wiring caused a supper-club fire that killed 165 people.[352] The trial court bifurcated the trial so that the jury would first determine whether the aluminum wiring could have caused the fire in the manner claimed by the plaintiffs.[353] The jury found for the defendants.[354] The Sixth Circuit affirmed, but cautioned that the separate trial of causation might "deprive plaintiffs of their right to place before the jury the circumstances and atmosphere of the entire cause of action . . . replacing it with a sterile or laboratory trial atmosphere."[355] The Sixth Circuit discounted any such effect in that case, however, because the fire

---

1171 (N.D. Ga. 1990) ("The court is confident that with the aid of cautionary instructions, a jury will be able to fairly and impartially determine both liability and damages in a single trial."). These cautionary instructions presumably would be in addition to the standard federal jury instruction against sympathy. *See* Edward J. Devitt et al., 1 *Federal Jury Practice and Instructions* § 71.01 (1987) ("The law does not permit you to be governed by sympathy, prejudice or public opinion. All parties expect that you will . . . follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.").

350. *See, e.g.*, Mark C. Weber, *Managing Complex Litigation in the Illinois Courts*, 27 Loy. U. Chi. L.J. 959, 980 (1996) (arguing against issue separation in Illinois because of resultant sterile trial setting).

351. 695 F.2d 207 (6th Cir. 1982).

352. *Id.* at 209.

353. *See id.* at 210. The plaintiffs' theory was that the fire was caused when a portion of the defendants' aluminum wiring connected to an electrical outlet overheated. *See id.* The defendants countered that the fire had been the result of one of the many other reported fire code violations at the supper club. *See id.* at 211.

354. *See id.* at 211.

355. *Id.* at 217.

was "a major disaster in Kentucky history . . . generally known to the jurors from the outset" and because the evidence presented was "fully adequate to apprise the jury of the general circumstances of the tragedy and the environment in which the fire arose."[356]

The Sixth Circuit revisited the sterile-trial theme six years later in *In re Bendectin Litigation*,[357] a consolidated products-liability case alleging that Bendectin, a morning-sickness drug, caused birth defects.[358] The trial judge divided the case into three phases: (1) the threshold causation issue of whether Bendectin caused birth defects, (2) the remaining liability issues, and (3) damages.[359] The jury found that the plaintiffs had not proved causation and the court entered judgment for the defendants.[360] The Sixth Circuit again acknowledged the risk of a sterile trial environment, but this time characterized that concern as "the potential danger that the jury may decide the causation question without appreciating the scope of the injury that defendant has supposedly caused and without the realization that their duties involve the resolution of an important, lively and human controversy."[361] As in *Beverly Hills*, the Sixth Circuit decided that the court and the litigants had taken adequate steps to ensure that the jury appreciated the importance of its task and the interests at stake and affirmed.[362]

In one sense, the bifurcation critics appear to be on the right track. According to the sterile-trial theory, bifurcation obscures the magnitude of

---

356. *Id.*

357. 857 F.2d 290 (6th Cir. 1988).

358. *Id.* at 293.

359. *See id.* at 298. The other liability issues included whether Bendectin was unreasonably dangerous and whether Merrell Dow, the manufacturer of Bendectin, provided adequate warnings about possible dangers. *See id.*

360. *See id.*

361. *Id.* at 316.

362. *See id.* The court cited to the trial judge's instructions to the jury and the plaintiffs' attorney's closing arguments. *See id.* The trial judge instructed the jury as follows:

> Let me suggest to you that what you are about to do may be one of the most important things you will ever do in your entire life. This is a significant case. It involves a lot of people. It involves not only the plaintiffs who are individuals, it involves people, scientists, people who have done experiments, people who are employees of the defendant company. The totality of this case involves people and while you will hear technical evidence, I do point out to you that at all times, you should keep in mind that on both sides, there are people involved.

Id.

the case itself and the significance of the jury's decision.[363] In other words, juries that do not hear evidence regarding the plaintiff's injuries and damages will not feel sympathy, and therefore are less likely to care about what they are doing. This concern may be valid because sympathy does appear to be an emotional trigger for taking matters more seriously.[364] In this respect, sympathy enhances legal decision making by acting as a natural emotional signpost that points out: (1) the existence of a "justice-related matter," (2) relevant facts that might be overlooked in a non-sympathetic environment, or (3) the path towards the "just" outcome.[365] Hence, sympathy can help juries decide cases within the law by grabbing their attention and highlighting the fact that someone has been hurt and may deserve the juries' help. By putting aside evidence that might invoke sympathy, bifurcation presents a risk that the jurors will lack the natural stimulus to give the issues serious consideration.

The loss of the sympathy stimulus, however, does not mean that juries in cases bifurcating liability and damages cannot or will not take their job seriously. What it does mean is that judges who choose to bifurcate should consider ways to substitute for sympathy's attention-grabbing function. For example, in *Beverly Hills* the Sixth Circuit found that the notoriety of the fire and the litigation was an adequate substitute.[366] In *Bendectin*, the Sixth Circuit found a sympathy substitute in the judge's instructions[367] and the plaintiffs' attorney's final argument.[368] Where the circumstances require a greater impression,[369] the trial court might allow the plaintiff to present a

363. *See id.* One respected scholar has asserted that trifurcation "inevitably leads to the sterile trial of technical issues related to causation divorced from the fact of the plaintiff's injury and a full account of the defendant's role in the tragedy." Trangsrud, *supra* note 29, at 80.

364. *See* Feigenson, *supra* note 56, at 29. Other potential benefits of sympathy include stimulating the jury to engage in more careful and deliberate decision making and allowing juries to make decisions under conditions that are most familiar and natural. *See id.* at 37–38.

365. *Id.* at 29–34. Once the individual decides who needs and deserves help, sympathy then motivates the individual to act. *See id.* at 36–37.

366. *See In re* Beverly Hills, 695 F.2d 207, 217 (6th Cir. 1982).

367. *See supra* note 362 and accompanying text.

368. 857 F.2d at 316. The plaintiffs' attorney "told the jury that the trial was not an academic exercise, and that the case involved many real people who sought justice, and who would, as children, be affected by the jury's verdict well into the next century." *Id.*

369. Not everyone agrees that these are adequate substitutes. Professor Trangsrud, for example, characterized the Sixth Circuit's reliance in the *Bendectin* case on the judge's instructions and the attorneys' brief remarks as "incredible on its face." Trangsrud, *supra* note 29, at 81. However, Professor Trangsrud was also referring to the fact that the trial judge excluded from the courtroom all children under the age of ten and all visibly deformed plaintiffs regardless of age. *See id.*; *see also Bendectin*, 857 F.2d at 316 n.19.

limited amount of injury evidence during the separated liability stage so the jury can "begin to comprehend the significance of the claims to the plaintiffs."[370] Trial judges and litigants can and will think of other means to ensure that the jury appreciates the significance of the issues and takes its role seriously.

In its more familiar sense, however, sympathy does not positively influence jury behavior. While surprisingly little is known about the sympathies juries bring into the jury box,[371] the available evidence confirms the longstanding suspicion that litigants who capture the jury's sympathy during trial fare much better. In one recent study by Brian Bornstein, mock jurors heard a claim by a woman against the large drug company that made her birth control pills, alleging that the pills caused her to develop ovarian cancer.[372] Half of the participants were told that the cancer was detected early enough that the woman lost only one ovary, could still have children, and had an excellent prognosis with minimal chance of recurrence.[373] The other half of the participants were told that the cancer was detected late; as a result, both ovaries were removed, she could no longer have children, and her life expectancy was short because of a high risk the cancer would return and spread.[374] The mock jurors in the high-severity group reported increased

370. *Complex Litigation Project*, *supra* note 130, at 122; *see, e.g.*, McElroy v. Arkansas Log Homes, Inc., No. 82-1642-C, 1989 WL 18755, at *2 (D. Kan. Feb. 13, 1989) (rejecting, on motion for new trial after court had tried causation separately, sterility argument because court allowed plaintiffs to develop evidence of their physical symptoms and injuries and because "[p]laintiff's counsel effectively conveyed to the jury the gravity of their decision").

371. Current research calls into question older notions of whether jurors are predisposed to like or dislike plaintiffs or defendants generally. The belief that jurors are biased against corporate defendants, for example, appears to be on the wane, *see* Valerie P. Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants*, 48 DePaul L. Rev. 327, 352 (1998) (arguing that increased liability occurs not because jurors think corporations are evil but because they hold corporations to higher standard of judgment and responsibility), while the view that jurors dislike tort plaintiffs is on the rise, *see* Valerie P. Hans & William S. Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 L. & Soc'y Rev. 85 (1992) (finding many jurors biased against plaintiffs because they feel that if same thing had happened to them they would not have sued). Even background characteristics tell researchers little about what jurors think or how jurors will decide a particular case. *See* Shari Seidman Diamond et al., *Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DePaul L. Rev. 301, 306, 313 (1998) (arguing background characteristics such as age, gender, and race show only small association with verdict preferences). Predictions based on jurors' self-reported attitudes fare better, but still fall far short of the accuracy rates one might expect to obtain by knowing jurors' biases in advance. *See id.* at 313.

372. Bornstein, *supra* note 55, at 1481–82.

373. *See id.* at 1482.

374. *See id.*

sympathy for the plaintiff and were almost twice as likely to find for the plaintiff.[375] An even more recent study used a mock automobile-negligence trial to test the effect of injury severity on liability decisions.[376] This study also found that jurors considered the extent of the plaintiff's pain and suffering in assessing the defendant's liability.[377]

Assuming that evidence of injury and damages is the engine for generating sympathy, bifurcation is likely to limit the ability of litigants to use damages evidence to boost their cases for liability. However, courts should use bifurcation to avoid precisely this aspect of sympathy.[378] First, the increase in plaintiffs' verdicts associated with sympathy results from a form of nullification in which juries ignore or alter the legally defined standards for liability.[379] As discussed previously, nullification is neither within nor necessary to the jury's government-regulatory function.[380] Second, altering legal outcomes based on sympathy is flawed policy because sympathy sends too many false signals about who deserves help and who is to blame. During trial, the jury can easily miscalculate the sympathies of the case if the jurors do not realize that by helping a particular plaintiff, they may hurt others who are not present.[381] Even when

375. *See id.* at 1485. The participants filled out a questionnaire which asked them to determine liability, estimate causation on a scale from 0 to 100, award compensation if they found the defendant liable, and assign "sympathy" ratings for the plaintiff and defendant on a scale from -100 to +100. *See id.* at 1483.

376. *See* Greene et al., *supra* note 246, at 679.

377. *See id.* at 689–70. The impact of sympathy in criminal trials has been extensively documented. *See* Feigenson, *supra* note 56, at 20 & n.3 (collecting studies).

378. The very idea that courts should deny bifurcation to preserve prejudice is ironic, because the text of Rule 42(b) calls for exactly the opposite result. Fed. R. Civ. P. 42(b) (authorizing courts to bifurcate to "avoid prejudice").

379. In the Bornstein study, for example, increased injury severity always increased sympathy, but it only increased liability when the participants were in a position to compensate the injured parties. Bornstein, *supra* note 55, at 1491–92. Since all of the groups heard the full evidence and were therefore apprised of the full significance of the case, Bornstein concluded that the juries were not deciding differently because they were paying better attention or taking their job more seriously, but rather were deciding differently out of a desire to relieve the suffering of the plaintiff. *Id.* at 1492–93. Because the conduct of the defendants was either factored out or held constant, the participants necessarily were altering their liability standards based on sympathy. *See id.*

380. *See supra* notes 310–26 and accompanying text.

381. The classic example involves future suffering by absent victims, such as individuals who will be deprived of affordable housing because of a jury's desire to alleviate present suffering through rent control. *See* Feigenson, *supra* note 56, at 52–53 (discussing Judge Posner's economic analysis theory of sympathy). In the tort context, one example might be the tendency of juries to find that certain drugs have caused injuries. The jury's desire to help the present victim by finding liability where none properly lies creates future victims by depriving subsequent patients of a safe and effective drug. *See, e.g.*, Henderson et al., *supra* note 9, at 1695–96 (noting that imposition of unwarranted liability on drug

the plaintiff is unambiguously sympathetic, sympathy can still distort liability judgments due to its tendency to shift blame from the plaintiff to the defendant.[382] Third, sympathy seems ill-suited to the jury box because it is an emotional tool designed to help people know when *they* should act, not when *others* should act.[383] The cost to an individual of volunteering aid is a natural regulating force. Since juries do not "pay" the cost of the "help" they give—the defendants pay that cost—sympathy is without its natural brake.

In the end, the sterile-trial argument does not justify the presumption against bifurcation (or, in this context, a presumption for unitary proceedings). Bifurcation probably reduces the impact of sympathy in jury trials, and correspondingly reduces the frequency of sympathy verdicts. That result, however, is more consistent with the proper role of the federal civil jury and avoids the problem of juries disregarding the law or evidence based on false signals of sympathy. Another effect of bifurcation might be to reduce jurors' ability to appreciate the significance of the issues they are deciding, and therefore reduce their natural incentive to decide the issues with care and in earnest. The remedy to that risk, however, is not to erect a barrier to bifurcation but to see that judges find other ways to ensure the jury takes its job seriously.

IV. BIFURCATION AND THE QUEST FOR EFFICIENCY

One of the primary goals of Rule 42(b) is to promote efficiency.[384] Indeed, while courts had long construed Rule 42(b) as authorizing bifurcation for efficiency, the text was amended in 1966 to specifically include "expedition and economy" as grounds for bifurcation.[385] While some people have lauded bifurcation as a means of cutting trial time,[386]

---

companies hurts society by discouraging prescription drug research and development). *But see* Vidmar, *supra* note 220, at 870 (discussing study in which mock participants "fussed over the financial consequences for the doctor and the doctor's practice at the same time that they expressed grief over a severely retarded child and sympathy for its parents").

382. *See* Feigenson, *supra* note 56, at 59–60.

383. The point is simple but crucial: as an individual, one may help others simply because one feels sorry for them, notwithstanding the fact that the person has no legal or moral blame for the other people's suffering, and in spite of the fact that the help comes at a cost to the first person.

384. Fed. R. Civ. P. 42(b); *see also In re* Dow Corning, 211 B.R. 545, 583 (Bankr. E.D. Mich. 1997) ("[J]udicial efficiency is a major objective of Rule 42(b).").

385. 9 *Federal Practice and Procedure*, *supra* note 2, § 2388, at 475.

386. *See* Mayers, *supra* note 9, at 389; Miner, *supra* note 26, at 1333; Schwartz, *supra* note 26, at 1206–07.

others have argued that bifurcation will have no effect or the opposite effect.[387] Currently, there is no conclusive answer as to which side is right. This Article concludes, however, that the available evidence regarding efficiency does not support the presumption against bifurcation. Rather, to maximize efficiency, courts should aggressively look for opportunities to bifurcate the ordinary cases that make up the bulk of the federal docket.

A. The Case for Efficiency

The efficiency of bifurcation in multi-plaintiff, complex litigation is unquestioned. While this author is not aware of any empirical studies in this area, the clear consensus is that bifurcation offers huge potential trial savings in multi-plaintiff, complex litigation because the resolution of a common issue can eliminate the need for hundreds or thousands of separate trials to resolve individual issues.[388] The issue here, though, is whether efficiency supports the presumption against bifurcation in ordinary single-plaintiff cases. While this is a closer case,[389] the available evidence indicates that the presumption against bifurcation probably hinders judicial efficiency.

The natural starting point is Zeisel and Callahan's 1960 study of Northern District of Illinois Local Rule 21,[390] which concluded that routine bifurcation of liability and damages promised to cut trial time by approximately 20%.[391] In rough terms, this reflected their conclusion that the damages phase represents approximately 40% of most cases, and that half of the cases would not need a damages trial because they would terminate after the liability stage through either a defense verdict or settlement.[392] While Zeisel and Callahan's figures are limited by the scope

387. *See* Corboy, *supra* note 29, at 1016; Weinstein, *supra* note 29, at 847.

388. As the reporters of the Complex Litigation Project noted: "Given the difficulties and inefficiencies of the present handling of complex litigation, even fervent supporters of the traditional jury role have conceded that the judicious use of separate trials is essential to the effective functioning of the jury system." *Complex Litigation Project*, *supra* note 130, at 123; *see also Manual for Complex Litigation* § 21.632 (3d ed. 1995) (endorsing bifurcation in complex litigation to promote efficiency).

389. *See* Sanders, *supra* note 43, at 384 ("It is a closer question whether bifurcation can be justified on the basis of efficiency and expedition in cases with single plaintiffs and single defendants.").

390. *See supra* note 75.

391. Zeisel & Callahan, *supra* note 12, at 1619.

392. *See id.* Zeisel and Callahan broke down their empirical data from two other angles, both of which yielded results consistent with a projected 20% savings. *Id.* at 1613–18.

of their study and possible selection effects,[393] they provided early support for the use of bifurcation to cut trial time.

A 1982 study of civil cases from Cook County, Illinois (which includes Chicago) from 1959 to 1979 provides additional support.[394] During that time, the parties agreed to bifurcation in 979 cases (out of a sample of roughly 13,000).[395] The average trial length of all cases during this period was 6.325 days.[396] The length of bifurcated trials was significantly shorter: trials on liability only averaged 3.82 days, whereas trials on damages averaged 3.27 days.[397] Thus, trials that concluded after one phase would cut trial time by as much as 48%.[398]

What about the fact that many cases will proceed to the second phase? The study apparently did not track the length of bifurcated cases that required trial of both issues. Assuming that the single issue cases were representative,[399] however, it can be estimated that the trial length of bifurcated cases requiring trial of both issues would be 7.09 days (3.82 days + 3.27 days). Based on this estimate, full trials of bifurcated cases may run longer than the 6.325 days required to try the average unitary trial. Of course, the efficiency potential of bifurcation lies in whether it results in enough partial trials to offset any lengthening of the full trials, and here is where the results of the Cook County study are most useful. Projecting from the results of the study and the estimates drawn above, bifurcation is more efficient if just 25% of bifurcated trials either result in a defense verdict or

---

393. The study did not have statistically significant samples to draw conclusions regarding the impact of bifurcation on contract or other non-personal injury cases. *See id.* at 1610. In addition, the study is subject to selectivity bias because the judges chose whether to bifurcate depending on the facts of the case: some judges bifurcated frequently, while some judges bifurcated rarely or not at all. *See id.* at 1614; *see generally* Clermont & Eisenberg, *supra* note 221, at 588–92 (discussing selectivity effect); Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 Cornell L. Rev. 1124, 1173 (1992) (demonstrating that while studies showed judges found for plaintiffs more than juries in medical-malpractice cases, this was not because juries were less sympathetic but because parties sent stronger cases to judges). Zeisel and Callahan tried to factor out selectivity by using the judges who shunned bifurcation as a control group and concluded that the results were not significantly skewed by selection effects. Zeisel & Callahan, *supra* note 12, at 1613–16.

394. *See* Priest, *supra* note 58, at 531 & n.27.

395. *See id.* at 553–54.

396. *See id.* at 554.

397. *See id.*

398. A damages only trial that concluded without the liability phase would cut trial time by 48%: *3.27/6.325 = 0.52.* A liability only trial that concluded without the damages phase (the most likely scenario) would cut trial time by 40%: *3.82/6.325 = 0.60.*

399. If anything, the cases in which the litigants chose to bifurcate are likely to be more complex, and therefore would be expected to take longer to try. *See id.* at 554.

precipitate a settlement after resolving the first issue.[400] If the case was resolved after the liability verdict 40% of the time, the average length of a bifurcated trial will be just 5.78 days,[401] a savings of 9%. If liability verdicts lead to the dismissal or settlement of 60% of the cases, the savings increase to 19%.[402] As noted previously, defense verdicts on liability alone are likely to resolve approximately half of the cases that reach trial, with post-liability verdict settlements resolving even more.[403] Thus, this study supports the hypothesis that, over time, it is more efficient to separate issues within a case and try the second (and maybe the third) issue only when necessary.

B. Potential Offsets

The decrease in the time it takes to try cases is only part of the picture, since any savings of trial time might be offset by changes to the courts' trial dockets. The most significant potential offsetting consequence of bifurcation is its effect on pretrial settlements.[404] As Professor Weinstein astutely noted, any trial savings resulting from bifurcated trials would be offset by even fractional reductions in pre-trial settlements.[405] More recently, law-and-economics scholars also have warned that bifurcation might hinder pre-trial settlement by lowering overall litigation costs.[406] The lowered litigation costs could also offset trial savings by increasing the

400. At a 25% resolution rate, the average trial length would be 6.27 days [*(3.82 x 0.25) + (7.09 x 0.75)*], versus 6.325 days for unitary trials. The precise break even point based on these figures would be a 23.39% resolution rate, with the solution, n, to the following: $3.82n + 7.09(1-n) = 6.325$.

401. At a 40% resolution rate, the average trial length would be 5.78 days [*(3.82 x 0.40) + (7.09 x 0.6)*], a savings of 0.545 days off the 6.325 days for a unitary trial. This equates to a savings of 9% (*0.545/6.325*).

402. At a 60% resolution rate, the average trial length would be 5.13 days [*(3.82 x 0.6) + (7.09 x 0.4)*], a savings of 1.20 days off the 6.325 days for unitary trials. This equates to a savings of 19% (*1.20/6.325*).

403. *See supra* notes 14–15.

404. Other previously feared offsetting inefficiencies, such as the risk of an increase in the frequency of hung juries (thereby requiring duplicate trials) have been refuted. *See* Zeisel & Callahan, *supra* note 12, at 1623. Indeed, the Landsman study suggests the opposite effect. Landsman et al., *supra* note 7, at 322 tbl.5 (finding incidence of hung juries was three times greater in unitary trials than bifurcated trials).

405. Weinstein, *supra* note 29, at 850. Because only a small percentage of cases go to trial, a small reduction in pre-trial settlements—with the coordinate increase in trials—will offset the savings of having shorter trials.

406. Lowering litigation costs increases the overall value of the claim to plaintiffs while decreasing the value of settlement for defendants, thus narrowing the range of mutually acceptable settlements. *See* Douglas G. Baird et al., *Game Theory and the Law* 251–53 (1994); Landes, *supra* note 279, at 115.

number of cases filed in the first place.[407] While the theoretical validity underlying these concerns is not in doubt,[408] they are not persuasive reasons to shun bifurcation.

The economic models identify possible offsets but cannot predict the likelihood or the magnitude of those offsets. For example, while the model notes that a less expensive trial will reduce the incentive to settle, it does not and cannot predict how large the offset will be, either in absolute terms or in comparison to the savings from reduced trial time, because it cannot predict the value of the underlying variables.[409] Thus, the ultimate answer necessarily lies in empirics, and the empirical evidence available does not support the theory.[410]

The economic-model prediction that bifurcation might increase the number of jury trials also fails to account for the impact of bifurcation on liability verdicts. One of the law-and-economics arguments, for example, is that the decreased litigation costs resulting from bifurcation will increase

---

407. *See* Baird et al., *supra* note 406, at 252; Landes, *supra* note 279, at 114–15.

408. More precisely, this Article does not question that the economic models are mathematically accurate. Like all law-and-economics theories, however, these models are only as prescriptively accurate as the assumption that litigants are unwaveringly rational actors, an assumption that no longer appears capable of support. *See* Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics* Cal. L. Rev. (forthcoming) (on file with author).

409. *See* Landes, *supra* note 279, at 114–15 ("[T]he net effect of bifurcation on the aggregate cost of litigation is unclear."). The economic model simply cannot estimate either the size of the cost savings from bifurcation or the number of cases where the cost savings will push the parties outside their settlement range. Specifically, if bifurcation saves each side $5000 in trial costs, it will impair settlements only in those cases where the parties' settlement ranges overlap by more than $1 but less than $10,000. Moreover, for purposes of comparing the savings with the offsets, the economic model cannot estimate how many bifurcated cases will end after the first phase or how large the savings will be from not having to try the second phase.

Baird and his co-authors also argue that bifurcation creates an incentive for parties to withhold the information needed for the litigants to reach realistic conclusions about the value of the plaintiffs' claims. Baird et al., *supra* note 406, at 252–59. As a result, Baird suggests that however large the settlement-gap group is in unitary trials, it will be larger in bifurcated trials, therefore decreasing the frequency of settlements and increasing the risk of offsetting inefficiencies. *Id.* at 259. Here too, this author does not question the general theory of the economic model. However, it is questionable whether it applies to bifurcation in federal courts because it assumes that parties have the *ability* to withhold information about the value of their lawsuits from their adversaries. *See, e.g., id.* ("A low-damage victim has an incentive to mimic the high-damage victim, because high-damage victims receive large settlement offers after they prevail during the liability trial."). Some of this no doubt occurs, but the discovery rules provide ample basis for litigants in federal courts to obtain damages discovery.

410. In the Zeisel and Callahan study, the pre-trial settlement rate was *identical* during the two years before and after the Northern District of Illinois implemented Local Rule 21. Zeisel & Callahan, *supra* note 12, at 1623. The theoretical conclusion that bifurcation creates a disincentive to settle is also inconsistent with the experiences of most federal judges, 85% of whom reported that bifurcation expedited settlements in their courts. *See Harris Poll*, *supra* note 39, at 745 tbl.5.6.

case filings by making the average case more profitable for plaintiffs.[411] Among those increased case filings will be cases that are weak on the legal merits. To the extent bifurcation punishes weak cases by limiting compromise verdicts,[412] however, bifurcation may more than offset the financial incentive to bring weak cases created by decreased litigation costs.[413] In addition, the fact that bifurcation (at least in tort cases) appears to yield fewer liability verdicts with higher damages could also increase settlements by *closing* the settlement gap.[414] Finally, any bifurcation effects on settlement and filings might offset each other. If bifurcation reduces the incentive for defendants to settle, for example, it will create a corresponding disincentive for litigants to bring the weaker cases in the first place because, absent the prospect of settlement, those weaker cases are doomed to failure at trial.[415]

In summary, the potential for offsetting inefficiencies is a valid concern, but one that depends on numerous incalculable variables and that stands or falls on the accuracy of its assumptions. In contrast, the available empirical

411. The profitability of a case is equal to its expected value less litigation costs. *See, e.g.*, Baird et al., *supra* note 406, at 252 (calculating profitability of case based on expected value and litigation costs). The expected value of a case is equal to the expected damages awarded discounted by the likelihood of winning. To illustrate, assume a plaintiff estimates that he or she has a 40% chance of winning $100,000, for an expected value of $40,000. That case is ex ante profitable if he or she estimates litigation costs to be $25,000, but is unprofitable if he or she estimates litigation costs to be $50,000.

412. *See supra* notes 220–40 and accompanying text.

413. *See Complex Litigation Project*, *supra* note 130, at 110. ("Plaintiffs are somewhat less likely to bring nuisance suits when the defendant's liability is doubtful because they will not be able to invoke jury sympathy with evidence of their damages until liability is determined.")

414. Both plaintiffs and defendants could view bifurcation as disadvantageous if the plaintiffs fear a total loss and the defendants fear a large judgment. In that case, increased bifurcation should increase the likelihood of settlement because defendants will offer more and plaintiffs will accept less. A more likely effect is that bifurcation will not alter settlement frequency but will drive down the price by making trial less attractive to plaintiffs but more attractive to defendants. According to Kahneman and Tversky, risk tolerance depends on whether the person perceives the outcome to be a loss or a gain. Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 Econometrica 263, 268–69 (1979). In general, people will prefer a certain but small gain to an uncertain larger gain, but will prefer an uncertain large loss to a certain smaller loss. *See id.* In the context of litigation, that means that plaintiffs have an increased desire to settle to achieve the certain gain, but defendants have a decreased desire to settle and pay a certain loss. *See* Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. Cal. L. Rev. 113, 144–46 (1996). Bifurcation would exacerbate both desires. Plaintiffs would have an even greater urge to settle because the risk of a take-nothing verdict would increase; defendants would have an even greater urge to go to trial because the chance of paying nothing increases. Ultimately, though, this would only decrease settlement price, because the reduction in defendants' offering price would be met by a corresponding reduction in plaintiff's asking price.

415. *See* Robert Cooter & Thomas Ulen, *Law and Economics* 412 (3d ed. 2000) (noting that reduction in settlements in bifurcated cases would create disincentive for plaintiffs to file low-probability cases).

evidence shows that bifurcated trials are shorter overall and do not cause offsetting inefficiencies. On balance, the evidence falls far short of showing that bifurcated trials are presumptively inefficient compared to unitary trials. If anything, the case *for* efficiency is stronger, and therefore warrants the present conclusion that, in the long run, an increase in bifurcation will promote trial efficiency. Accordingly, the presumption against bifurcation cannot be sustained as a rule of efficiency.

C. *Maximizing Efficiency*

If the current presumption against bifurcation is inefficient, what is the best replacement? One alternative might be to bifurcate every issue (at least to the constitutional limits). However, common sense alone dictates that a non-discretionary rule would be extremely inefficient. In some cases, bifurcation of any kind will be inefficient.[416] Even where some bifurcation would be efficient, courts must draw the line where to stop separating issues. In an ordinary tort case, for example, it might be perfectly efficient to bifurcate liability and damages but inefficient to try the elements of liability separately.[417] Thus, the most efficient usage of bifurcation must fall somewhere between the current presumption against bifurcation and absolute issue separation.

Federal judges are in the best position to determine how much more bifurcation would maximize efficiency. First, it seems unlikely that either empirical studies or economic models will be able to prescribe a standard or formula for determining maximum bifurcation efficiency. The multitude and nature of variables inherent in each bifurcation decision defy experimental duplication, empirical measurement, and mathematical

416. A one-day trial, for example, stands to gain little from issue bifurcation of any kind based on administrative hassle alone.

417. Professor Woolley makes substantially this point in discussing the constitutional implications of overlapping evidence when separate juries are used. *See* Woolley, *supra* note 154, at 533. The repetition of evidence required when one jury decides general causation but another jury decides comparative negligence or proximate causation is much more likely to be an efficiency problem than a re-examination problem. *See id.* ("It is not re-examination per se that is troublesome, but its consequences, which may include . . . the burdening of litigants or the court system."). While overlapping evidence may make trying issues within liability inefficient in single-plaintiff cases, efficiency almost always dictates bifurcating issues within liability in class-action mass-tort cases: "[I]f the court approves bifurcation in the face of crossover issues, the parties in essence trade the risk of repetition should the plaintiffs win the class trial for the end of litigation and significantly reduced costs should the defendants win the class trial." *Id.* at 534.

prediction. Second, Rule 42(b) is and always has been a rule of discretion.[418] Thus, any studies or models can only offer generalizations that help test existing practices and suggest new uses, but cannot prescribe rules. Third, federal judges have demonstrated their ability to make efficiency-related bifurcation decisions in the areas of patent litigation and complex litigation.[419]

The judge's decision ordinarily should depend on how much evidence overlaps the separated issues. Judges should not limit bifurcation to those cases where they think the defendant is likely to prevail on the separated issue.[420] Such a practice is underinclusive, because many cases will settle after the jury finds for the plaintiff in the first phase.[421] Judges also should not limit bifurcation to cases where the damages evidence predominates. Judges have been conditioned to think of bifurcation efficiencies in terms of the weeks, months or even years that can be saved in mass-tort cases with thousands of individual plaintiffs. In ordinary cases, however, the savings from bifurcation will register in days.[422] The existing evidence suggests that, consistently achieved, these smaller savings can and will add up over time, perhaps to as much as a 20% savings in trial time overall.[423]

If evidence overlap is the crux of bifurcating for efficiency, then how does the court know when the evidence overlaps too much? Courts should not reject bifurcation when they detect any overlap.[424] Instead, courts must

418. The trial judge's decision whether to bifurcate issues is reviewed for abuse of discretion. *See* 8 *Moore's Federal Practice*, *supra* note 1, § 42.20(5)(b); 9 *Federal Practice and Procedure*, *supra* note 2, § 2388, at 481–82.

419. *See supra* notes 19, 122–26 and accompanying text.

420. In one personal-injury case, for example, the district judge stated that "[b]ifurcation will normally only shorten the total length of a trial if the defendant *prevails* on the question of liability and thereby renders a trial on damages unnecessary" and denied bifurcation of liability and damages because the defendant had not "demonstrated that its probability of prevailing in a separate trial of liability [was] sufficiently substantial to warrant ordering a bifurcated trial . . . on the basis of 'judicial economy.'" Fetz v. E & L Truck Rental Co., 670 F. Supp. 261, 266 (S.D. Ind. 1987).

421. *See supra* notes 12–13 and accompanying text. One colleague astutely suggested that this result could be further enhanced by a provision like Federal Rule of Civil Procedure provision that required offers of settlement between the phases, with Rule 68-like penalties where good offers are rejected. *Cf.* Fed. R. Civ. P. 68 (requiring plaintiff who rejects an offer of judgment in excess of ultimate recovery to pay the defendant's post-offer costs). While such a device is beyond the scope of this paper, the idea merits additional thought.

422. *See supra* notes 388–402 and accompanying text.

423. *See supra* notes 388–402 and accompanying text.

424. *See* Schwartz, *supra* note 26, at 1202–03.

compare the likely overlap with the potential savings.[425] Naturally, parties who feel disadvantaged by bifurcation have an incentive to exaggerate the expected overlap of evidence, while parties who feel advantaged by bifurcation will have a corresponding incentive to understate the expected overlap of evidence. Therefore, judges must use their experience to assess the likelihood of overlap independently. When the same jury is used, as it almost always will be, the party claiming overlap should need to explain why the evidence must be repeated in its entirety.[426] The judge must also be mindful of inconveniencing repeat witnesses by probing into the need for the proffered testimony.[427] Perhaps improvements in courtroom technology, such as videoconferencing for witnesses, will provide a suitable solution as well.[428]

V. ALTERING THE PRESUMPTION AGAINST BIFURCATION IN ORDINARY CASES

The presumption against bifurcation in ordinary cases is unjustified. First, neither the Seventh Amendment nor the *Erie* doctrine oppose the increased use of bifurcation of ordinary cases.[429] Second, the longstanding policy objections that bifurcation creates a sterile, pro-defendant atmosphere and is antithetical to civil jury practice do not survive

---

425. In an ordinary single-plaintiff, products-liability case, for example, bifurcating liability and damages may create little evidence overlap, but separating causation from proximate causation or comparative negligence would create substantial evidence overlap. While that type of bifurcation is nevertheless efficient in multi-plaintiff cases, it is less likely to be efficient in single-plaintiff cases. *See* Woolley, *supra* note 154, at 533–34. The judge must consider each case on its facts; trifurcation as discussed above might still be efficient if general causation required only a day or two of testimony but proximate causation or comparative negligence would be substantially longer.

426. *See, e.g.*, Witherbee v. Honeywell, Inc., 151 F.R.D. 27, 29 (N.D.N.Y. 1993) (finding duplicative testimony unnecessary where same jury is used); Buscemi v. Pepsico, Inc., 736 F. Supp. 1267, 1272 (S.D.N.Y. 1990) (same). This Article addresses bifurcation of ordinary cases, not month-long ordeals. If a party has a witness testify to events in phase one on Monday, there is no reason the witness would need to duplicate that testimony in its entirety in phase two on Thursday. While a lawyer may say the witness will repeat testimony in full when opposing bifurcation, the lawyer may feel differently during trial, knowing that the jury may not appreciate having its jury duty unnecessarily lengthened by needless repeat testimony. This is particularly true if the judge is telling the lawyer to "move on."

427. In an article titled *Bifurcated Trials: How to Avoid Them—How to Win Them*, the authors expressly instruct lawyers to fight bifurcation by finding ways to call witnesses who can testify to multiple parts of the trial. Curry & Snider, *supra* note 219, at 48–49.

428. *See generally* Paul D. Carrington, *Virtual Civil Litigation: A Visit to John Bunyan's Celestial City*, 98 Colum. L. Rev. 1516 (1998) (speculating how technology might affect trial practice).

429. *See supra* Part II.

scrutiny.[430] Third, the presumption against bifurcation in ordinary cases is inefficient. The available evidence strongly suggests that courts could substantially reduce overall trial time by aggressively looking for bifurcation opportunities in ordinary cases.[431]

Rather than default to a presumption, judges should independently assess whether there are issues they could try separately to promote efficiency.[432] The parties, of course, will remain free to file motions or make suggestions, but the courts should neither rely on the litigants to raise the issue nor accept their assessments at face value because the parties' perceptions of bifurcation may be biased by perceived strategic advantages or disadvantages. In many cases, efficiency will call for some variant of bifurcation. While the most obvious candidate for efficiency will be to bifurcate liability and damages, courts should consider carving at other joints within the case if those joints are better suited for carving. As Judge Posner explained, "[t]he judge can bifurcate (or for that matter trifurcate, or slice even more finely) a case at whatever point will minimize the overlap in evidence between the segmented phases or otherwise promote economy and accuracy in adjudication."[433]

Prejudice remains an important, but in many ways secondary, concern under Rule 42(b). As used in Rule 42(b), "prejudice" means the risk that the jury will improperly use evidence from one part of the trial to decide a different part of the trial.[434] Bifurcation *relieves* prejudice rather than causes it, so prejudice should not stand in the way of bifurcating cases for efficiency. Conversely, the risk of prejudice could warrant bifurcation even where it would be inefficient. In those situations, the trial judge will need to determine whether the risk of prejudice is so great as to justify an inefficient bifurcation rather than the traditional use of curative jury

430. *See supra* Part III.

431. *See supra* Part IV.

432. Federal judges already have the power to bifurcate under Rule 42(b) sua sponte. *See* 8 *Moore's Federal Practice*, *supra* note 1, § 42.20(5)(a); 9 *Federal Practice and Procedure*, *supra* note 2, § 2388, at 483.

433. Hydrite Chem. Co. v. Calumet Lubricants Co., 47 F.3d 887, 891 (7th Cir. 1995). This case also provides a useful discussion of creative severance. The trial judge bifurcated the plaintiff's breach-of-contract claim between liability and damages, but included the fact of injury in the liability portion of the trial. *See id.* at 889. While that division is appropriate in tort cases, where the fact of injury is an element of liability, it was inappropriate in the contract setting, since the jury could have found a breach but also found—as it appeared to have done there—that the breach caused no damage. *See id.* at 891.

434. *See supra* notes 345–49 and accompanying text.

instructions.[435] Where efficiency scales are relatively even, a valid showing of prejudice by either party should warrant bifurcation.

Some change to Rule 42(b) is needed before federal judges will aggressively consider which of their cases are good candidates for bifurcation. As written, Rule 42(b) is already broad enough to support the aggressive bifurcation this Article advocates. For sixty years, however, federal courts have not bifurcated to the full extent authorized by Rule 42(b), and this trend is not likely to change on its own.[436] In addition, the 1966 Advisory Committee's Note endorses bifurcation "where experience has demonstrated its worth," but otherwise instructs that "the separation of issues for trial is not to be routinely ordered."[437] While not binding statements of the law, the Advisory Committee's Notes are "akin to a 'legislative history' of the rules" and often are given considerable weight by the courts.[438] Whether the 1966 Advisory Committee's Note to Rule 42(b) was intended to be neutral or to create a presumption against bifurcation no longer matters: in practice, federal courts have consistently cited this language in support of a presumption against bifurcation in ordinary cases.[439] Ultimately, the key to achieving increased bifurcation is to change judges' attitudes about how they apply their discretion.[440] Given the history

435. *See supra* note 362 and accompanying text. The nature and degree of the risk of prejudice may make this choice a difficult one for the judge given the questionable efficacy of curative jury instructions. As one commentator stated: "As far as [limiting] instructions are concerned, there is not a single study anywhere, good or bad, that shows that such instruction does a bit of good. In fact, it may do harm." *Panel One: What Empirical Research Tells Us, and What We Need to Know About Juries and the Quest for Impartiality*, 40 Am. U. L. Rev. 547, 562 (1991) (reporting statement of Dr. Norbert L. Kerr, Professor of Psychology, Michigan State University); *see also* Jeffrey T. Frederick, *The Psychology of the American Jury* 275 (1987) ("[T]he burden has shifted to those who maintain that judicial instructions are an effective remedy for possible prejudicial events or information to demonstrate the parameters of effectiveness of such instructions.").

436. In the late 1980s and early 1990s, requests to bifurcate increased, but the success rate of these requests plummeted. *See* Landsman et al., *supra* note 7, at 305.

437. Fed. R. Civ. P. 42(b) advisory committee's note.

438. 4 *Federal Practice and Procedure*, *supra* note 2, § 1029, at 124; *see also* Mississippi Pub'g Co. v. Murphree, 326 U.S. 438, 444 (1946) (noting that Advisory Committee's construction of federal rules is "of weight"); *see, e.g.*, Waters v. Young, 100 F.3d 1437, 1441 (9th Cir. 1998) (relying on Advisory committee's notes to Rule 50 to show that deficiency in evidence must be brought to opposing party's attention prior to close of evidence to give opposing party chance to cure deficiency).

439. *See, e.g.*, Lis v. Robert Packer Hosp., 579 F.2d 819, 824 (3d Cir. 1978); Brown v. Advantage Eng'g, Inc., 732 F. Supp. 1163, 1170 (N.D. Ga. 1990).

440. Professor Mayers presciently stated in 1938 that bifurcation would never catch on until the lawyers and the judges let go of the belief that unitary trials were the right and just way of trying civil cases. Mayers, *supra* note 9, at 396–97.

of bifurcation in the federal courts, it may take a textual amendment to Rule 42(b) to change the way the federal judges perceive bifurcation.

The changes to Rule 42(b) should not be dramatic, however. First, the existing text of Rule 42(b) already contains all of the tools needed to do the job properly: it is discretionary, it already references convenience, prejudice, and efficiency, and it pays direct homage to the Seventh Amendment. Second, Rule 42(b) applies also to separation of claims.[441] Thus, any changes to the existing text would either require separate treatment of separation of issues—making the rule more complex and cumbersome—or would risk unintended consequences on the trial of joined claims. Accordingly, the changes should leave the text of the existing Rule 42(b) intact while communicating the need for judges to more aggressively consider whether bifurcation would further the goals stated by the existing Rule 42(b) criteria.

This Article proposes an amendment to Rule 42(b) by adding a sentence at the end of the existing text stating that the court should independently consider in each case, without presumption, whether a unitary or bifurcated trial better serves the goals expressed in the preceding sentence. The Advisory Committee's Note accompanying the amendment should reinforce several themes. First, the note should confirm that the decision to conduct a unitary or bifurcated trial should be made independently, without predisposition, based on the court's analysis of efficiency and the risk of prejudice. Second, the note should specify that bifurcation is not unfair or antithetical to the values served by the civil jury. Third, the note should instruct courts to look aggressively for issues in each case which, if tried separately, offer the potential for a shorter, more efficient trial. While liability and damages should be a candidate in every case, courts should not bifurcate liability and damages reflexively, nor should they erect blinders to other forms of bifurcation. Fourth, the note should explain that prejudice to a litigant may not be sufficient to support an inefficient bifurcation, but ordinarily should be dispositive in situations where a unitary trial and a bifurcated trial are comparably efficient.

VI. CONCLUSION

Rule 42(b) authorizes federal courts to separate issues for trial. This procedure holds great promise for increasing efficiency by eliminating unnecessary trial time. Although there is no conclusive data on how much

441. Fed. R. Civ. P. 42(b).

trial time bifurcation will save, the available evidence suggests that aggressive bifurcation of liability and damages alone could yield savings of as much as 20%.

The same case for efficiency could have been made forty years ago. In fact it was. At that time, however, neither the bench nor the bar were ready for such a drastic change in the way federal courts try cases. Many critics complained that bifurcation undermined the role of the civil jury. The critics pointed to studies showing that plaintiffs in personal injury cases won much less often when the jury decided liability and damages separately. The critics acknowledged that this decrease in plaintiff victories reflected the loss of sympathy verdicts and compromise verdicts, but argued that such jury behavior was one of the values of the civil jury itself—the ability of laypersons to use their common sense and community values to temper harsh legal rules. The critics prevailed[442] and thus was born a rule-based presumption against bifurcation that has been in place ever since.

The time has come to resume the bifurcation debate and bring it to center stage. The case for efficiency has not changed; indeed, it appears to be as strong as ever. What has changed is the receptivity of the bench and bar to a more aggressive approach to bifurcation. Bifurcation has become more common as the incidence of complex cases has risen. Thus, bifurcation has become more familiar to those who staff and patronize the federal courts. In addition, the trend toward managerial judges has gradually changed attitudes regarding innovative procedures. Thus, judges and lawyers are more likely to welcome the aggressive approach to bifurcation than they did in the early 1960s.

This is not just a case of a procedure whose time has come in terms of audience receptivity. Rather, new work in the field of jury decision making tends to dispel many of the feared harmful side effects of bifurcation. First, recent empirical studies suggest that bifurcation is a double-edged sword that can reduce liability verdicts but might also increase damages awards. Thus, bifurcation should not be cast aside as a boon to defendants. Second, the development of the story model of jury decision making supports bifurcation as a procedure that promises to enhance, rather than harm, jury decision making.

The bifurcation debate has existed for almost as long as Rule 42(b) itself. While the bifurcation debate has lingered at the fringe of procedural reform

442. As one commentator put it, the bifurcation movement of the 1960s was beaten back by "tradition" and a "fondness for the intricacies of compromise verdicts." Maloney, *supra* note 77, at 112–13.

generally, forty years have passed since the legal community directly and comprehensively addressed the validity and utility of the presumption against bifurcation. During those forty years, the nature of federal court dispute resolution has changed, as has the understanding of how juries decide cases. Thus, the presumption against bifurcation stands in need of a contemporary evaluation. This Article does not presume to resolve conclusively the many issues that underlie the debate. Others no doubt will see issues that this Article does not address. Still others will see the issues this Article does address in a far different light. This Article merely offers one view in the hope that it will revive the debate for everyone.