REVERSE BIFURCATION

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Reverse bifurcation is a trial procedure in which the jury determines damages first, before determining liability. The liability phase of the trial rarely occurs, because the parties usually settle once they know the value of the case. This procedure is already being used in thousands of cases—nearly all the asbestos and Fen-phen cases—but this is the first academic article devoted to the subject. This article explains the history of the procedure and analyzes why it encourages settlements, simplifies jury instructions, and produces better outcomes for the parties.

I. INTRODUCTION

The diet drug Fen-phen shrunk a few waistlines, but then bloated judicial dockets with thousands of product liability cases. Legally, the cases are interesting because almost all of them reverse the traditional trial order, determining damages first, and liability second. In Fen-phen litigation, most cases never even proceed to the liability determination because they settle after the first phase, once the parties know the value of the case.

The same is true for asbestos cases. Originally, asbestos shielded buildings everywhere from losses caused by fires but left manufacturers exposed to losses from liability over asbestosis and mesothelioma. Asbestos cases became a staple for many litigation firms; and almost all asbestos cases, like Fen-phen cases, reverse the order of proceedings and determine damages before liability.[1] The liability question rarely needs

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1. William Jordan, *5.5 Million Verdict in Asbestos Suit,* 23 VERDICTS, SETTLEMENTS & TACTICS Dec. 2003 at 39. (Pennsylvania products liability cases where majority of defendants settled

resolution; the cases usually settle after the determination of damages, which the jury decides before deciding whether the defendant did anything wrong.[2] Although two of the largest areas of mass tort litigation, as well as a growing number of cases in other areas of law,[3]

prior to $5.5 million jury award for death of plaintiff's husband due to health problems caused by asbestos exposure);William Jordan, *6.6 Million Verdict in Asbestos Suit*,, 23 VERDICTS, SETTLEMENTS & TACTICS Dec. 2003 at 40. ($6.6 Million award; majority of defendants settled prior to the verdict while one, Chesterton, settled after the verdict and another, Asten, Inc., settled after three days of phase two determining liability); Antonelli v. Keene Corp., 9 PA. JURY VERDICTS REV. & ANALYSIS 3 Jan. 1991 (Three plaintiffs sued for damage caused by asbestos during their employment and received a $2,782,000 award; several defendants settled prior to trial); Camamarota v. Johns-Manville Corp., 7 PA. JURY VERDICTS REV. & ANALYSIS 1 Nov. 1988 (Mild asbestosis case resulting in $850,000 award for the sole remaining defendant; 7 of 8 defendants settled after phase one); Walker v. Western Macarthur Co., 31 JURY VERDICT WKLY. Jan. 1987 (Plaintiff settled with various defendants prior to trial for a total of $45,010. A reduced judgment of $118,992 was entered); Phillips v. Owens-Corning Fiberglas, 35 JURY VERDICT WKLY. (CAL.) March 1991 (All six cases settled for an undisclosed amount after the conclusion of phase one); Oranje v. Dowman Products, Inc., 42–50 VERDICTSEARCH CAL. REP. (2002) (17 of 19 cases settled before trial); Bertillo v. Fibreboard Corp., 37 JURY VERDICT WKLY. Mar. 1993 (Total award $3,877,002; all defendants settled before the second phase of trial for undisclosed amounts); Kartachak v. Celotex Corp., 7 PA. JURY VERDICTS REV. & ANALYSIS 1 Nov. 1988. (7 of 9 defendants settled after the jury awarded $75,000 during phase one); Kershaw vs. Celotex Corp., et al., 7 PA. JURY VERDICTS REV. & ANALYSIS 8 June, 1989 (9 of 10 named defendants settled prior to a $4,000,000 verdict and the sole remaining defendant states it will only be responsible for 10% of any verdict that is ultimately upheld. Defense post trial motions are pending); Morey v. Celotex, 8 PA. JURY VERDICTS REV. & ANALYSIS 10 Aug. 1990 ($200,000 gross verdict and all but one of the defendants had settled before trial. Following the phase one, the remaining parties stipulated that the non-settling defendant would have 12% liability and the case settled); Mortelliti v. Johns-Manville Corp. et al., 8 PA. JURY VERDICTS REV. & ANALYSIS 1Nov., 1989. ($315,000 Verdict; Most of ten named defendants settled prior to trial and the remaining four defendants regarding stipulated that they will each be responsible for 10% of any judgment which is ultimately sustained. Defense post trial motions are pending.); *Plaintiff Verdict in Asbestos Case,*. 11 VERDICTS, SETTLEMENTS & TACTICS Oct. 1991 at 357. (Prior to trial, plaintiff settled with other defendants for $186,835. Following the 1,500,000 verdict, Owens Corning Fiberglas settled for approximately $ 1,200,000.); *Jury Finds Asbestos Manufacturers Liable for Shipworker's Injuries* 9 VERDICTS, SETTLEMENTS & TACTICS Mar. 1989 at 91 (After the damages phase, 7 defendants in a severe asbestosis case settled**.** A jury then awarded $850,000 and assessed 1/8 of the verdict against the non-settling defendant.); Roane v. Celotex,, 8 PA. JURY VERDICTS REV. & ANALYSIS 7 May 1990. (Consolidated cases where one plaintiff was awarded $200,000 and 9 of 12 named defendants settled prior to trial. Following the damages phase, all but one of the three remaining defendants settled.)

2. Reverse bifurcation has been extensively used in asbestos and other mass tort cases to advance the efficient resolution of cases. *See, e.g.,* Shetterly v. Raymark Indus., Inc., 117 F.3d 776 (4th Cir. 1997) (asbestos); *In re* New York City, 593 N.Y.S.2d 43 (N.Y. App. Div. 1993) (asbestos); Campolongo v. Celotex Corp., 681 F.Supp. 261 (D.N.J. 1988) (asbestos); Malcolm v. National Gypsum Co., 995 F.2d 346 (2nd Cir. 1993). It has also been used in complicated mass torts for harm caused by exposure to chemicals, discrimination suits, and benedectin. *In re* Richardson-Merrell, Inc., 624 F.Supp. 1212 (S.D. Ohio 1985) (benedectin); State *ex rel* Atkin*s* v. Burnside, 569 S.E.2d 150 (W.Va. 2002) (chemical exposure).

3. Dalzell v. Transworld Airlines, Inc., 39 JURY VERDICTS WKLY. no. 3, (1994) (California airplane accident case awarding thee plaintiffs $89,890 for emotional distress was settled before going to liability phase); *In re* Paoli R..R.. Line, 14 PA. JURY VERDICTS REV. & ANALYSIS, May 1996 (26 individuals filed toxic tort action for compensation for loss in property value and personal injury; several defendants settled prior to trial; case was reverse bifurcated and jury found in favor of defendants);

use this nontraditional, bifurcated order for their trials, almost all legal education and academic writing about trial procedure focuses exclusively on the older, liability-then-damages process of unitary trials. "Reverse bifurcation"—the severance of trials into distinct phases for liability and damages, plus inversion of the usual order—is a significant feature of the modern litigation landscape, but it receives almost no attention in the training of lawyers or in scholarly research about our legal system.[4]

Several rationales exist for separating and inverting the order of issues at trial, many of them falling under the general rubric of encouraging settlements[5] and yielding better results for the parties.[6] A simple comparison can help clarify the reasons: Our traditional trial system,

Mudrick v. G.B. Ltd., 20 N.J. JURY VERDICT REV. & ANALYSIS no 8, Jan. 2000 (Case where large tree fell on plaintiff and jury awarded $5.9 million in damages. Parties settled for $1.25 million prior to phase two); Wei Chang Li v. K. Dew Realty Corp., 18 VERDICTSEARCH N.Y. REP., (2001) (Judge granted defendant's request for reverse bifurcation in case where construction worker fell from beam with serious brain injuries. Jury awarded $1.8 million); Friederichs v. Confidential Ins., 1 JURY VERDICTS WKLY. no. 30, (2002) (Breach of contract and bad-faith claim was reverse bifurcated; jury awarded $40,300 and parties settled prior to liability phase for $150,000); Jalali v. Simplex Time Records Co., 42 JURY VERDICTS WKLY. no. 31 (1998) (California employment sex discrimination case where plaintiff was awarded $750,000 in phase one and the case later settled for a confidential amount).

4. Bifurcation (or any division of lawsuits into separate trials) is authorized in federal district courts by Fed. R. Civ. P. 42(b), and decisions to bifurcate receive great deference by appellate courts. *See* Hydrite Chem. Co. v. Calumet Lubricants Co., 47 F.3d 887, 891 (7th Cir. 1995); *In re* Rhone Poulenc Rorer, Inc., 51 F.3d 1293, 1302 (7th Cir. 1995); Sellers v. Baisier, 792 F.2d 690, 694 (7th Cir. 1986); Berry v. Deloney, 28 F.3d 604, 610 (7th Cir. 1994*);* De Witt, Porter, Huggett, Schumacher & Morgan, S.C. v. Kovalic, 991 F.2d 1243, 1245 (7th Cir. 1993); Barr Labs., Inc. v. Abbott Labs., 978 F.2d 98, 105 (3d Cir.1992).

5. FED. R. CIV. P. 42(b) allows separate trials for convenience, to avoid prejudice, and for expedition and economy. William J. Richards, *Bifurcated Justice: How Trial-Splitting Devices Defeat the Jury's Role*, 26 U.TOL. L. REV. 505, 511–514 (1995). Meredith Hammers, *Bifurcated Criminal Trials: A New Mandate Without Guidance*, 72 UMKC L. REV. 1137, 1156 (2004) (stating three purposes for bifurcation in criminal trials: eliminate prejudice, allow juries to hear evidence relevant to punishment, and promote the goal of deterrence.). In the criminal context, defendants charged with murder under newer "repeat offender" statutes should have the new offense tried separately from their previous criminal record, to avoid double jeopardy problems or juries re-punishing someone for an earlier offense. *Id*.

Similarly, in felon in possession cases, bifurcated proceedings are frequently requested to avoid the introduction of a defendant's prior felony which would be prejudicial. Susan W. Callan, *Inherent Prejudice of a "Felon-In Posession" of a Firearm Trial: Bifurcation, Stipulation, and Jury Instruction as Effective but Judicially Rejected Remedies*, 28 RUTGERS L. J. 201, 201–28 (1996).

6. Joseph F. Rice & Nancy Worth Davis, *Judicial Innovation in Asbestos Mass Tort Litigation,* 33 TORT & INS. L. J. 127, 136 (1997) (stating that the defendant's motive was to "'place a substantial burden on the plaintiff . . . tax the limits of the plaintiff's counsel's ability and decrease the quality of plaintiff's counsel's product.'").

The Wyoming Supreme Court adopted bifurcation for all cases considering punitive damages because a "[d]efendant's wealth should not be a weapon to be used by plaintiff to enable him to induce the jury to find the defendant guilty of malice, thus entitling plaintiff to punitive damages." Campen v. Stone, 635 P.2d 1121, 1129 (Wyo. 1981) (quoting Rupert v. Sellers, 48 A.D.2d 265, 272 (N.Y. App. Div. 1975)).

though adversarial, is more like a poker game, where the final prize for the winner is unknown to the parties when the trial begins, and often increases as the adversarial process goes forward, than it is like a sports competition for a predetermined prize, title, or trophy. Traditional tort trials are not like sporting events because the parties usually have different ideas at the outset about the likely verdict—or range of possible verdicts—and because the stakes of the case can increase as litigation drags on, new evidence comes in, and juror feeling ratchets upwards. Rather, traditional a tort trial is more similar to poker, which can have increasing stakes as the parties bet more with each drawn card, or meet each other's antes; a game that started with bets for a few dollars can reach astronomical amounts by the end. To offer a second analogy, television game shows, similarly, usually have prize amounts that increase as the contestants move through the rounds; the size of the prize is limited by how quickly the game ends. Traditional unitary trials are therefore more like poker or a game show. The unpredictable growth of the stakes in a given case can skew the parties' incentives, and make it harder for anyone to "fold" or settle—just as poker induces players to stay in a game long beyond what their common sense would dictate.

An insidious aspect is present in many gambling games: as the stakes get higher, the players must either forfeit (acceding to a loss that may be much larger than the amount they had originally hoped to win) or raise the stakes. The prospect of forfeiting the entire amount leads many gamblers to bet much amounts beyond the limits of their disposable funds. The players have too much disincentive to abandon the enterprise even after a game exceeds their risk-tolerance.

The gambler's bind makes casinos controversial from a policy standpoint. Strangely, however, we run our courts the same way. The same dilemma that can keep players in a poker game after they would prefer to exit—because the stakes are too high to cut their losses—can keep parties in a lawsuit where the potential losses (and winnings, for the plaintiff at least) often spiral upward. The parties' incentives get directed away from settlement. Reverse bifurcation corrects for this effect by settling the amount at stake first, so that the remainder of the proceedings are more like a sports competition in that the parties know the final amount of the "prize" to be won or lost. Unlike sports competitions, however, the parties must invest resources to continue. Thus, they estimate their chances of winning, and the one most likely to lose forfeits the match, perhaps for a token price.

Despite the great success of this innovative procedure—it produces settlements in almost all cases in which it is used—most litigation continues to use the traditional trial sequence. Likewise, most legal

education and scholarship perpetuate it. It is time for change. The first step toward change was the widespread adoption of regular bifurcation, where separate trials or hearings determine liability and damages.[7] Surveys of judges have found widespread endorsement of bifurcation, because judges believe that it produces better results (i.e., results more correlated to the merits of the case)[8] and increases judicial economy and efficiency.

This Article is the first in the legal academic literature to analyze the general procedure of reverse bifurcation,[9] and it is long overdue because

7. The seminal case that started the widespread use of severable trials in recent times was *Gasoline Prods. Co., Inc. v. Champlain Ref. Co.,* 283 U.S. 494 (1931) (holding that a trial severable to determine separate issues was not a violation of the 7th Amendment). In the criminal context, regular bifurcation often involves separate proceedings for guilt and sentencing, but also separate *ex ante* proceedings to separate "guilt" from "responsibility" when the defendant raises certain affirmative defenses (like necessity or insanity). Bifurcation has been used in criminal trials for felon-in possession cases to reduce prejudice to defendant where the jury may determine that if the defendant was guilty of the prior felony, then he must be guilty of the possession of the firearm. It has also been employed in RICO trials where the jury hears evidence of predicate acts and determines if there were indeed two predicate acts, and phase two is reserved to determine the defendant's guilt. "A bifurcated proceeding permits the preservation of judicial resources while avoiding potential prejudice to the defendant resulting from the introduction of a defendant's prior felony." Callan, *supra* note 5, at 201–28

8. *See supra* text accompanying note 1; *see* discussion *infra* Part III.

9. Reverse bifurcation receives frequent mention in the academic literature on trial procedures, but always in passing, not as the main subject of discussion. *See, e.g.,* James A. Schoenfeld & Michael M. Butterworth, *Limitation of Liability: The Defense Perspective*, 28 TUL. MAR. L.J. 219, 223, 224 (2004); Michelle J. White, *Why the Asbestos Genie Won't Stay in the Bankruptcy Bottle*, 70 U. CIN. L. REV. 1319, 1336 (2002); Joel Slawotsky, *New York's Article 16 and Multiple Defendant Product Liability Litigation: A Time to Rethink the Impact of Bankrupt Shares on Judgment Molding*, 76 St. JOHN'S L. REV. 397, 405 (2002); Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DEPAUL L. REV. 401, 416 (2002); Joseph P. Helm, Comment, *Asbestos Litigation and the Proposed Administrative Remedy: Between the Values of Individualism and Distributive Justice*, 50 EMORY L.J. 631, 641 (2001); Edward F. Sherman, *Class Actions in the Gulf South Symposium*, 74 TUL. L. REV. 1603, 1612 (2000); Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867, 1880 (2000); Meiring de Villiers, *A Legal and Policy Analysis of Bifurcated Litigation*, 2000 COLUM. BUS. L. REV. 153, 186 (2000); Hon. Helen E. Freedman, *Product Liability Issues in Mass Torts—View from the Bench*, 15 TOURO L. REV. 685, 689–90 (1999); Sandra Mazer Moss, *Response to Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute from a State Judge's Perspective*, 73 TEX. L. REV. 1573, 1574 (1995); *Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1583, 1591 (1995); Stephen B. Burbank, *Case Five: Complex Litigation and Prior Rulings Issues*, 29 NEW ENG. L. REV. 724, 725 (1995); Valle Simms Dutcher, Comment, *The Asbestos Dragon: The Ramifications of Creative Judicial Management of Asbestos Cases*, 10 PACE ENVTL. L. REV. 955, 987 (1993); Deborah R. Hensler, *Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman*, 13 CARDOZO L. REV. 1967, 1975 (1992); Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1879 (1992); Patricia Zimand, *National Asbestos Litigation: Procedural Problems Must be Solved*, 69 WASH. U. L. Q. 899, 904, 909–10 (1991); Richard A. Solomon, Comment, *Clearing the Air: Resolving the Asbestos Personal Injury Litigation Crisis*, 2 FORDHAM ENVTL. L. REV. 125, 136 (1991); Linda S. Mullenix, *Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation*, 32 WM. & MARY L. REV. 475, 483, 564 (1991); Steven J. Parent, Comment, *Judicial Creativity in Dealing with Mass Torts in Bankruptcy*, 13 GEO. MASON U. L. REV. 381, 387

the procedure is already in use in thousands of cases and has been for several years.[10] This Article offers some much-needed theoretical discussion of the practice, and calls for an expanded role for this innovative method of structuring trials. Reverse bifurcation fosters settlements; it generally yields verdicts more reflective of the merits of a case; and it discourages frivolous litigation driven by spite or desire to protect one's reputation.

Disproportionate damages sometimes reflect the jury's annoyance with a defendant for repeatedly denying all wrongdoing during the liability phase of the trial, which traditional, unified trials encourage. In the traditional trial format, both parties have an incentive to invest disproportionately in the either-or liability determination at the beginning of the case; the defendant hopes to escape without paying compensation and without reputational damage from admitting liability, and the plaintiff must fend off the possibility of such a complete loss. This strange alignment of the parties' investment incentives drives the stakes of the liability question upward even as the reliability of the jury's

(1990); Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 667 (1987); Hubert H. "Skip" Humphrey III, *The Decision to Reject the June, 1997 National Settlement Proposal and Proceed to Trial*, 25 WM. MITCHELL L. REV. 397, 419.

There is one recent article with reverse bifurcation in the title, but the discussion is very narrow, focusing only on legal malpractice claims: Dwayne J. Hermes, Jeffrey W. Kemp & Paul B. Moore, *Leveling the Legal Malpractice Playing Field: Reverse Bifurcation of Trials*, 36 ST. MARY'S L.J. 879, 917–20 (2005).

10. *See, e.g., In re* Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prod. Liab. Litig., 123 Fed. Appx. 465, 469–72 (3d Cir. 2005); Fraysure v. A Best Products Co., No. 83017, 2003 WL 22971024 (Ohio Ct. App. Dec. 18, 2003); State *ex rel.* Atkins v. Burnside, 569 S.E. 2d. 150, 155–57, 161, 162 (W.Va. 2002); State *ex rel.* Crafton v. Burnside, 528 S.E.2d 768, 770–75 (W.Va.2000); Greenleaf v. Garlock, Inc., 174 F.3d 352, 359 (3d Cir. 1999); Walker Drug Co., Inc. v. La Sal Oil Co., 972 P.2d 1238, 1242, 1245 (Utah 1998); ACandS, Inc. v. Godwin, 667 A2d 116, 148 (Md. 1995); Johnstone v. American Oil Co., 7 F.3d 1217, 1218 (5th Cir. 1993); Angelo v. Armstrong World Indus., Inc. 11 F.3d 957, 958, 964, 965 (10th Cir. 1993); Galloway v. Keene Corp., 621 So.2d 982, 983 (Ala. 1993); Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 473 (5th Cir. 1986); *In re* Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prod. Liab. Litig., 2004 WL 2110687 (E.D.Pa. Sept. 22, 2004); Kasali v. Tereshko, No. Civ.A. 01-CV-4043, 2002 WL 32348342 (E.D. Pa. Mar. 13, 2002); Simon v. Philip Morris, Inc., 200 F.R.D. 21, 25, 32 (E.D.N.Y. 2001); U.S. v. Yonkers Bd. Of Educ., No. 80 Civ. 6761, 1997 WL 311943 (S.D.N.Y. June 9, 1997); Anderson v. Sam Airlines, No. 94 Civ. 1935, 1997 WL 1179955 (E.D.N.Y. April 25, 1997); Coates v. AC and S, Inc., 844 F.Supp. 1126, 1127, 1138 (E.D.La. 1994); *In re* Report of Advisory Group, 1993 WL 30497 (D.Me. Feb. 1, 1993); Dunn v. Owens-Corning Fiberglass, 774 F.Supp. 929, 938, 939 (D.V.I. 1991); *In re* Asbestos Prods. Liab. Litig., 771 F.Supp. 415, 420 (Jud.Pan.Mult.Lit., 1991); Henderson v. Keene Corp., Civ.A. No. 87-7973, 1991 WL 218118 (E.D.Pa. July 17, 1991); *In re* Joint Eastern and Southern Districts Asbestos Litig., 769 F.Supp. 85, 89 (E.D.N.Y. 1991); *In re* Joint Eastern and Southern Dist. Asbestos Litig., 129 B.R. 710, 748, 815 (E.D.N.Y. 1991); Exxon Corp. v. Jarvis Christian Coll., No. TY-80-432-CA, 1991 WL 771247 (E.D.Tex., February 15, 1991); Cimino v. Raymark Indus., Inc., 751 F.Supp. 649, 665 (E.D.Tex. 1990); Parker v. Bell Asbestos Mines, Ltd., Civ.A. No. 83-3289, 1986 WL 4471 (E.D.Pa. Apr. 14, 1986); Parker v. Bell Asbestos Mines, Ltd., Civ.A. No. 83-3829, 1986 WL 2894 (E.D.Pa. Mar. 3, 1986).

decision sags lower and lower.[11] The traditional trial format polarizes the possible outcomes between a higher chance of zero and a larger verdict otherwise.

The value of an individual case in a traditional trial therefore escalates. The defendant has an incentive to stridently deny all liability at the outset of a trial, uncertain about the potential damages but certain that damages will be zero if the plaintiff fails to convince the jury about liability first.[12] If the jurors, however, are even mildly unconvinced by the denial of culpability, they will resent the repeated, overstated denials as both dishonest and remorseless. Jury resentment is likely to augment the damages, increasing the value or stakes of the case for both parties. A defendant who senses this happening has an even greater incentive to deny wrongdoing, even to the point of risking the appearance of unreasonableness, so the problem becomes an upward spiral. Similarly, as the value of the case increases, and the defendant's denials become more strenuous, the stakes of the liability question itself become higher for the plaintiff as well, creating a disproportionate incentive (urgency) to counter the denials with more inflammatory, prejudicial evidence early on in the case. The result in a unified trial is a process workflow where the stakes go up as the reliability of the jury's verdict goes down; and this effect can escalate out of control.[13] Reverse bifurcation eliminates this spiraling or cascading effect. *Ex ante* resolution of the case's value allows the defendant to make a more balanced answer to the allegations, lowers the incentive for the plaintiff to offset denials with inflammatory evidence, and reduces the likelihood that the jury is punishing the defendant merely for denying culpability in court.

11. The problem is that punitive damages should reflect the seriousness of the wrongdoing itself, not the caddishness of the defendant's trial testimony. Steven Pollack refers to this as "backdoor punitives." Steven H. Pollack, *eFen Trials May Test New System*, DAILY REP., Nov. 30, 2004. This same problem arises in criminal cases following the traditional order at trial; defendants must worry that their sentence will be higher merely as a punishment for denying their guilt during the earlier phase of the case.

One concern that losing plaintiffs have raised about reverse bifurcation is that it gives jurors an incentive to find for the defendant after the first phase so they can be dismissed, rather than having to return to court for the second phase. *See, e.g.,* Angelo v. Armstrong World Indus., Inc. 11 F.3d 957, 965 n.6 (10th Cir. 1993) (the Tenth Circuit observes that simply using separate juries for each phase of a bifurcated trial resolves this potential problem).

12. This is similar to the effects described by Peter J. Jost, *Sequential Tournaments*, (Working Paper No. 01-04, 2001), *available at* http://ssrn.com/abstract=310067 (arguing that agents are risk-averse, this difference leads to the result that the principal prefers a sequential rather than a simultaneous tournament). Jost explains, "Before the second agent [i.e., "attorney"] acts, he observes the effort decision of the first [attorney]. Thereafter the agents' output are [sic] produced and the one with the highest output receives the winner prize, whereas the other agent gets the loser prize." *Id.* at 2.

13. The point is that unitary trials create a type of "prisoner's dilemma" regarding each party's insistence on the liability issue early on, greatly elevating the risks for both parties at the same time.

The value of reverse bifurcation is its elimination of uncertainty and unpredictability about the stakes in any given case,[14] thus allowing parties to assess more accurately the relative costs of continuing with the litigation. Realistic information about the value of the case does more than foster settlements.[15] It also produces better settlements, that is, agreements more reflective of the true value of the case. *Ex ante* valuation of the case also provides a benchmark with which parties can compare non-monetary stakes, such as the setting of precedent for future cases, reputational damage to the parties, and the professional reputation of the lawyers.[16] It also facilitates the management of exhibits and testimonial evidence, making it easier for judges to schedule appropriate time periods for hearings, which should reduce wasted time on the docket. Evidentiary rulings such as objections or motions in limine are narrower and more precise. *Ex ante* valuation gives parties intermissions between key parts of the trial to resume negotiations toward settlements, with the parties having better information in each round.[17]

Jury instructions would become more intelligible, focusing on simpler, more discreet questions, instead of muddling up the instruction about fault with suggestions about various remedies or sanctions they could prescribe.[18] The easier question for untrained jurors to

14. The biggest uncertainty and the biggest impediment to settlement in asbestos cases was how juries would value asbestos related injuries. *See* Daniel Wise, *Examining Disparity in Asbestos Suit Awards,* N.Y. L. J., Feb. 19, 1991, at 5.

15. Defense attorneys state that reverse bifurcation promotes earlier settlements. By knowing how much the defendant is "on the hook for" they can decide relatively early whether or not to go forward to the second phase of the trial. *See* Pollack, *supra* note 11. Procedure experts say it is clear that J. Freedman was concerned about judicial economy when she ordered reverse bifurcation. "If the jury returns big numbers, and the defendants are staring that in the face . . . there is powerful incentive to settle" says Jay Carlisle, procedure professor at Pace University Law School, on the other hand, he suggests, low numbers would create incentive for plaintiffs to cut their losses. *See* Daniel Wise, *Damages—First Asbestos Trial Under Way; Judge's Novel Procedure Seen as Incentive to Settle*, N.Y. L. J., Oct. 15, 1990.

16. For a full citation list, *see supra* note 9. *See* John T. Simpson Jr., Comment, *Discovery of Net Worth In Bifurcated Punitive Damages Cases: A Suggested Approach After* Transportation Insurance Co. v. Moriel, 37 S. TEX. L. REV. 193, 208 (1996). "Bifurcation is generally designed to aid courts in managing complex litigation and to conserve judicial resources. Advocates maintain that bifurcated proceedings simplify the jury's task, reduce the court's docket when the defendant is not found liable, induce the defendant to settle if found liable, eliminate 'nuisance' cases with tenuous liability claims, discourage dilatory tactics, encourage efficient attorney preparation, and reduce the expenses of both parties."

17. Where the severed issue is dispositive such as jurisdiction, an affirmative defense, or statute of limitations, bifurcation serves an efficient discovery advantage. Jennifer M. Granholm & William J. Richards, *Bifurcated Justice: How Trial Splitting Devices Defeat the Jury's Role,* 26 U. TOL. L. REV. 505, 512 (1995).

18. Bifurcation can help jurors by separating the case into a clear and logical format. *Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1583, 84–86, 89, 91–93

understand—the amount of compensation required to make the victim whole—comes first. The more abstract questions of "duty" and "intent" may never come before the jury, because of the great likelihood that the parties will settle after the first phase. Moreover, reverse bifurcation allows parties make independent choices about jury and bench trials, perhaps opting for a bench trial on questions of legal responsibility after the damages are established.[19] Jurors rarely understand all the jury instructions,[20] and jury instructions are a common source of reversals by

(1985); Joe S. Cecil, Valerie P. Hans & Elizabeth C. Wiggins, *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U.L. REV. 727, 766–68 (1991) (separate trials for separate claims or issues reduces complexity and may promote expediency and economy). For an example of a reverse-bifurcated case that resulted in streamlined jury instructions ,which, naturally, the losing party challenged on appeal, *see* Angelo v. Armstrong World Indus., Inc., 11 F.3d 957, 965–67 (10th Cir. 1993).

There are, admittedly, advocates on the other side of this issue who argue that distinct verdicts are actually more confusing. *See, e.g.,* Elizabeth G. Thornburg, *The Power and the Process: Instructions and the Civil Jury*, 66 FORDHAM L. REV. 1837 (1998) (separate and distinct special verdicts would cause the most problems to the role of the jury and would create problems, rather than solve problems); Jack Ratliff, *Offensive Collateral Estoppel and the Option Effect*, 67 TEX. L. REV. 63, 89 (1988) ("The damages proof often spills over into the liability issues so that a case weak on liability is saved if the damages are strong and vice versa. Some jurisdictions forbid the separate trial of damages and liability issues in tort cases, implicitly recognizing this spillover effect. Logically or not, these jurisdictions tacitly acknowledge one's 'right' to have a single jury hear both his bad liability case and his good damages case before rendering a verdict on either.").

19. Liability overlaps more with questions of law, the area where the judge has the greatest competence.

20. Robert Charrow & Veda Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979); Amiram Elwork, James J. Alfini & Bruce D. Sales, *Toward Understandable Jury Instructions*, 65 JUDICATURE 432 (1982); AMIRAM ELWORK, BRUCE D. SALES & JAMES J. ALIFINI, MAKING INSTRUCTIONS UNDERSTANDABLE (1982) (average juror in a criminal case might understand only half of the instructions presented; stating that jurors with higher level of education were more likely to answer questions correctly; a step by step guide to drafting understandable jury instructions); Amiram Elwork, Bruce D. Sales & James J. Alfini, *Juridic Decisions: In Ignorance of the Law or in Light of It?* 1 LAW & HUM. BEHAV. 163 (1977); Peter Meijes Tiersma, *Reforming the Language of Jury Instructions*, 22 HOFSTRA L. REV. 37 (1993) (discussing the California civil jury instructions criticized 15 years ago in an article by Robert and Veda Charrow, by reviewing linguistic characteristics that make comprehension difficult, analyzing the progress that has been made, and emphasizing the need to inform jurors of their right to ask questions about instructions they do not understand); Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions,* 66 BROOK. L. REV. 1081, 1099 n.75 (2001) (noting a tension between legal accuracy and jury comprehension); Erik Lillquist, *Absolute Certainty and the Death Penalty,* 42 AM. CRIM. L. REV. 45, 88 (2005); Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform,* 48 ALA. L. REV. 441, 506–07 (1997) (studies indicate that more educated jurors are better equipped to understand jury instructions and that not only do jurors fail to understand the vocabulary but also the overall meaning of the instructions); Jody Weisberg Menon, *Adversarial Medical and Scientific Testimony and Lay Jurors: A Proposal for Medical Malpractice Reform,* 21 AM. J.L. & MED. 281, 286 (1995); Susan R. Schwaiger, *The Submission of Written Instructions and Statutory Language to New York Criminal Juries*, 56 BROOK. L. REV. 1353, nn.18, 24 & 27 (1991); Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL'Y. & L. 589 (1997) (critical examination of social science research relevant to evaluating the efficacy of judicial instructions); William W.

higher courts, most often because of concerns that the explanation of the

Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CAL. L. REV. 731, 740 (1981); Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW & SOC'Y REV. 153 (1982) (studying ways to prepare effective jury instructions); Alan Reifman et al., *Real Jurors' Understanding of the Law in Real Cases*, 16 LAW & HUM. BEHAV. 539 (1992) (stating that the most dangerous situation occurs not when a juror merely fails to understand, but rather the most dangerous situation occurs when a juror does not realize that they do not understand so they proceed anyway); David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478 (1976) (citing empirical research indicating that jurors often do not understand the judge's instructions; 50% of jurors interviewed after instructions were read did not understand the principle of the presumption of innocence); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 4–12 (1993) (presenting evidence that jurors in capital cases do not understand jury instructions); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324 (1987) (discussing unconscious racism and proposing that courts "evaluate governmental conduct to determine whether it conveys a symbolic message to which the culture attaches a racial significance"); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1678–79 (1985) (noting that jury instructions on racial bias are ineffective, because jurors often do not understand or pay attention to jury instructions, and because personal acknowledgement of race and guilt bias is subconscious); Irving R.Kaufman, *The Media and Juries,* N.Y. TIMES, Nov. 4, 1982, at A27 (stating that jurors do not understand "all the constitutional subtleties"); William H. Erickson, *Criminal Jury Instructions*, 1993 U. ILL. L. REV. 285 (Justice Erickson of the Colorado Supreme Court asks judges and attorneys to make greater efforts to fashion understandable jury instructions); Nicole B. Casarez, *Examining the Evidence: Post-Verdict Interviews and the Jury System*, 25 HASTINGS COMM. & ENT. L.J. 499, 518 (2003) (stating examples of jury explanations to the media revealing that the jury failed to understand jury instructions); Neal R. Feigenson, *The Rhetoric of Torts: How Advocates Help Jurors Think About Causation, Reasonableness, and Responsibility*, 47 HASTINGS L.J. 61, n. 9 (1995); REID HASTIE ET AL., INSIDE THE JURY 80–81 (1983) (noting that jurors attempted to follow the judge's instructions, but often made a number of mistakes); David Barron, Note, *I Did Not Want to Kill Him But Thought I Had To: In Light of* Penry II's *Interpretation of* Blystone*, Why the Constitution Requires Jury Instructions on How to Give Effect to Relevant Mitigating Evidence in Capital Cases*, 11 J.L. & POL'Y 207 (2002); Firoz Dattu, *Illustrated Jury Instructions: A Proposal*, 22 LAW & PSYCHOL. REV. 67 (1998) (proposing to aid jury comprehension by including illustrations to accompany the verbal jury instructions); Charles M. Cork, III, *Annual Survey of Georgia Law June 1, 2001–May 31, 2002: A Better Orientation for Jury Instructions*, 54 MERCER L. REV. 1 (calling for a different orientation to jury instructions); Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REFORM 401 (1990); David A. Christman, *Federal Rule of Evidence 606(b) and the Problem of "Differential" Jury Error*, 67 N.Y.U. L. REV. 802, 804–09 (1992); Robert F. Forston, *Sense and Non-Sense: Jury Trial Communication*, 1975 BYU L. Rev. 601, 612–23 (1975) (reviewing empirical research indicating that jury instructions are often misunderstood); Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 109 (1988) (conducting experiments on Texas jurors and concluding that "the problem is evident: juror comprehension of their instructions is pitifully low"); Kimball R. Anderson & Bruce R. Braun, *The Legal Legacy of John Wayne Gacy: The Irrebuttable Presumption That Juries Understand and Follow Jury Instructions*, 78 MARQ. L. REV. 791, 793 (1995) (stating that despite using paid college students to measure juror comprehension of court instructions, juror studies show high levels of miscomprehension); Geoffery P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REFORM 401 (1990) (examining potential jurors and actual jurors regarding the application of jury instructions, which indicates that jurors who received instructions did not understand the law any better than those who had never received instructions).

legal rules could have confused the jury.[21] Relegating the more arcane liability questions to a second phase that is unlikely to occur, or to a bench hearing, could therefore eliminate many reversals and retrials.

A bench hearing for the second phase also resolves one concern about reverse bifurcation—that it might cause prejudice in the jury, because they see all the evidence about the victim's pain and suffering before they reach the liability decision.[22] This concern is not overly worrisome, however, because it is moot where the jury's role ends after the first phase, which almost always occurs in reverse bifurcation cases. In the exceptional case that fails to settle after the first phase, a bench hearing

21. *See, e.g.,* Susie Cho, Comment, *Capital Confusion: The Effect of Jury Instructions on the Decision to Impose Death*, 85 J. CRIM. L. & CRIMINOLOGY 532, 554–61 (1994); Mitchell v. Gonzales, 819 P.2d 872 (Cal. 1991); Maupin v. Widling, 237 Cal. Rptr. 521 (Cal. Ct. App. 1987) (noting that many academic studies of jury instructions did not apply to appellate opinions); Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 109 (1988) (judges and attorneys might approach change in instructions with more zeal if unclear jury instructions were grounds for an appeal); Steele & Thornburg, *supra*, at 99 ("[J]udges who draft jury instructions . . . are unlikely to risk having a case reversed on appeal because they failed to use language already approved by the appellate court"); Steele & Thornburg, *supra*, at 108 (appellate courts should use an objective standard to determine jury comprehension); John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 AM. CRIM. L. REV. 1187, 1216–19 (2002) (stating that a significant reason jury instructions remain such a problem is simply that judges fear reversal by the appellate court—appellate courts tend to only evaluate the accuracy of the law, not the clarity of the instruction); Henry A. Diamond, *Reasonable Doubt: To Define, or Not to Define*, 90 COLUM. L. REV. 1716, n.83 (1990) ("Judges are acutely aware of the fact that the presentation of legally inaccurate instructions is a very frequent cause for reversals by appellate courts. Thus, they often sacrifice comprehensibility and spend a great deal of time piecing together quotations from statutes and appellate court decisions in order to ensure legal accuracy.") (quoting Elwork, Sales & Alfini, *Juridic Decisions*, *supra* note 20, at 164); Cork, *supra* note 20, at 8 (judges are faced with biased requests for instructions by both parties and acting in accordance to what the appellate court would approve); Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 21–22 ("[T]he right to clarification or additional instruction is virtually useless if the judge simply refers jurors back to their instructions or rereads the original charge. Unfortunately, this is all too often how judges respond to such requests, largely because they fear reversal if an appellate court finds fault with their clarification. Even when judges sincerely try to respond by reading a definition from a law dictionary or legal encyclopedia, neither of these sources is written for a lay audience.")

22. Jeff Blumenthal*, The Year of the Diet Drug Litigation Avalanche,* THE LEGAL INTELLIGENCER, Dec. 23, 2004 (Plaintiff attorneys argue that allowing jurors to hear liability and damages evidence at different times is unfair). Melissa Nann, *Fen-Phen Trials Get Under Way In Philadelphia,* THE LEGAL INTELLIGENCER, July 30, 2004. Defense attorneys complained that because the jury had seen a "parade of injured plaintiffs," the jury was not likely to find the defendants innocent. Edward A. Adams, *Judge's Unusual Approach A Hallmark of Her Career; Homeless Ruling Called Characteristic for Freedom,* N.Y. L. J., Nov. 27, 1992, at col. 3.

On the other hand, in *Angelo v. Armstrong World Indus., Inc.* 11 F.3d 957, 965 n.6 (10th Cir. 1993), it is clear that the court was using separate juries for each phase of the reverse-bifurcated trial; the second phase, however, did not occur because the case settled. The Tenth Circuit entertains the objection (on appeal) that using the same jury creates an incentive for the jurors to end the case (find for the defendant) in the first phase so they can go home; this possibility evaporates when separate juries are used, even if the second jury is never really needed.

(or even a second jury) for the second phase resolves the problem,[23] and even the same jury could be used if the parties agreed.[24]

Reverse bifurcation has an additional advantage: it allows better-informed public policy decisions about liability rules. This is, in some ways, the flip side of concerns about manipulating the jurors' emotions with graphic presentations of the victim's horrific injuries or losses as in a traditional trial. Rather, this means that the court knows the scope of the harm or costs, which is especially important in cases where a policy decision is unavoidable. To use the classic Hand Formula as an illustration:

$$B < Lp$$

23. For example, some judges seal the verdict in phase one so that the new jury knows nothing about the stakes of the liability decision entrusted to them. *See, e.g.,* Margaret Cronin Fisk, *Hey! We just won…Shhhhh! An $112 Million Award in 2001, a Lawyer's Career High, Was Ordered Sealed*, NAT'L L. J., Dec. 2, 2002, at A5. As soon as the verdict from the damages phase was awarded in a reverse bifurcated trial, the judge sealed the verdict. The judge sealed the record to prevent prospective jurors from being biased. The amount was revealed when the phase two jurors decided liability. Jury verdict awarded $111.61 million to 9 plaintiffs with mesothelioma. The awards ranged from $7.2 million to retired 69 year old brake mechanic to $18.18 million to sheet metal worker diagnosed at age 56. Five other plaintiffs received over $12 million. After the damages phase, the cases started to settle. Four cases began the damages phase but settled before the verdict. After the last case had settled, plaintiffs' attorney wrote a letter requesting the verdict to be unsealed since the reason was now invalid. Defendants objected, but the judge unsealed the verdict. Various defendant attorneys stated: "There was no liability finding against anyone," and "This was not really a verdict . . . [i]t was an assessment of damages." *Id.*; *see also, $111 Million Verdict from Asbestos Trial Unsealed*, MEALEY'S LIT. REP.: ASBESTOS, Oct. 30, 2002.

The Seventh Circuit has held, however, that using separate juries for different phases of a bifurcated trial can violate the Seventh Amendment right to a jury trial, especially if different juries consider overlapping issues—the judge must be careful to "carve at the joint." *See* Hydrite Chem. Co. v. Calumet Lubricants, 47 F.3d 887, 890–91 (7th Cir. 1995); *In re* Rhone Poulenc Rorer, Inc., 51 F.3d 1293, 1302 (7th Cir. 1995). Because issues indeed overlap much of the time, the use of separate juries can be "inconsistent with the principle that the findings of one jury are not to be reexamined by a second, or third, or nth jury." *Id.* at 1303. In reverse bifurcation, however, the issue rarely arises because the cases settle before a jury decides the second set of issues. *But see,* Angelo v. Armstrong World Indus., Inc., 11 F.3d 957, 965 n.6 (10th Cir. 1993) (where the Tenth Circuit used different juries for each phase (the second one never actually being needed), and extolled this practice as more fair, because it offsets the incentive of a single jury to resolve the case after the first phase in a way that ensures they can go home and not proceed to phase two.)

24. Using the *same* jury may be useful if the rendering of a final decision on damages creates a feeling of "closure" for the jurors, and allows them to turn their attention entirely to questions of conduct and causation. They cannot do this in a traditional trial. This is an area for further research (the "closure" effect of reverse bifurcation); I mention it only in passing as a possibility. Defendants may find that concerns about prejudice are offset by the cooling-down effect of a final decision on damages early on, combined with the chance to have the evidence of the defendant's actual innocence be the last thing the jury hears, rather than the first. If not, a new jury or a bench trial might be better options

In the criminal context, the use of two juries for different phases of a bifurcated trial could present constitutional issues. This is especially true where the issues overlap somewhat; there could be a violation of the 7th Amendment and could implicate double jeopardy in criminal cases. Melissa Hart, *Will Employment Discrimination Class Action Suits Survive*, 37 AKRON L. REV. 813, 813–46 (2004).

B refers to the burden or cost for the defendant (potential or present) of averting the harm; *L* refers to the victim's total losses; and p refers to the probability of such harm or losses in similar circumstances.[25] This adjustment for probability is appropriate because more resources should be devoted to avoiding tragedies that are very likely to occur without such safeguards, while very remote harms justify less expenditure. This formula became famous, however, not for its novelty, but instead for how well it captured what common law courts had been doing all along, and have done since.[26] "*B* <" captures the idea of the liability question; "*B*<" means "liable," and "*B*>" means "not liable."

Notice, however, that one can only determine the "<" or ">" if we know the amounts, and that "*B*" is somewhat inseparable from the ultimately question of liability. The traditional trial sequence places the decision about "duty" at the beginning, in both unitary trials and with regular bifurcation. Duty is the "<", usually determined mostly with reference to *B,* and without a conclusive *L*. The fact finder's perception of *B* is going to be muddled with the ultimate question of whether the defendant was "supposed" to take the precaution or bear the cost. This muddling produces disturbing results if the *L* derived from the pre-

25. United States v. Carroll Towing Co., 159 F.2d 169, 173 (1947). Learned Hand proposed this formula to explain that the defendant could have a "duty" to use safety measures, regardless of whether such measures were customary in the industry, if the cost was less (in fact, it was negligible) compared to the scope of the harm adjusted for the probability. In Hand's words:

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

The Hand Formula continues to generate a constant stream of academic commentary, even sixty years later. *See, e.g.,* Donald P. Blydenburgh, *Analyzing Inconsistent Verdicts in Products Liability Cases,* 73 DEF. COUNS. J. 46 (2006); Maria Altmann, *A Student-Centered Balancing Test: When Strip Searches Cross the Constitutional Line,* 35 J.L. & EDUC. 133 (2006); Ronen Avraham, *Putting a Price on Pain and Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change*, 100 NW. U.L. REV. 87 (2006); Richard Posner, *Guido Calabresi's The Costs of Accidents: A Reassessment,* 64 MD. L. REV. 12, 20 (2005); Vishal Gupta, *A Mathematical Approach to Benefit-Detriment Analysis as a Solution to Compulsory Licensing of Pharmaceuticals Under the Trips Agreement,* 13 CARDOZO J. INT'L & COMP. L. 631 (2005); Allan M. Feldman & Jeonghyun Kim*, The Hand Rule and* United States v. Carroll Towing Co*. Reconsidered*, 7 AM. L. & ECON. REV. 523 (2005); Martha Chamallas*, Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss,* 38 LOY. L.A. L. REV. 1435 (2005).

26. *See* Posner, *supra* note 25, at 20. Judge Hand actually proposed the same concept in an earlier (less famous) case, *Conway v. O'Brien*, 111 F.2d 611, 612 (2nd Cir. 1940) ("The degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid risk.").

determined "$B<$" is visibly incongruent with the real-world L sitting at the plaintiff's table, the actual victim's losses. The Hand Formula is elegant, but it forces the conclusion that we should determine L first, as that is often the most concrete number known. The Hand Formula favors reverse bifurcation.[27]

Liability designates who should bear the costs or burden of insuring against certain harms.[28] When we say that no duty or liability exists, we merely put the burden of insuring against that harm onto the plaintiff (and other potential plaintiffs); when we affix liability on the defendant, we force parties in the defendant's position to insure against the particular harm.[29] Where to affix liability becomes a question of where to assign the burden or costs of prevention or insurance against loss. The amount of loss at stake is useful information for this determination, and therefore determining the stakes first becomes important. The focus should be on the harms first, and then the legal rules that address the harm; reverse bifurcation approaches cases in this order.[30]

The Coase Theorem suggests that parties would normally reach mutually agreeable settlements if there were no transaction costs.[31] The role that transaction costs play in settlements implies another benefit of reverse bifurcation. A Coasian view of trials suggests that the specific procedures or assigned burdens of proof are irrelevant to the outcome of a case, if the parties' information is complete and their transaction costs are low. [32] In other words, the splitting of issues, much less the order of issues, should have no bearing on decisions to settle a case, or on the jury's verdict, in an ideal world. In reality, however, parties do not

27. There is a sense in which reverse bifurcation, viewed from the perspective of the Hand Formula, produces something more akin to strict liability than negligence-based fault. The liability decision rarely gets litigated, because the parties settle after the initial damages phase. From a positivist standpoint, therefore, liability has become strict, but voluntarily so (the result of a settlement), which goes against the usual positivist analysis of law.

28. *See* DAVID A. MOSS, WHEN ALL ELSE FAILS 216–52 (2002)

29. Either party can insure against harms in any of three basic ways (or some combination thereof): risk reduction (classic prevention), risk spreading (usually in the form of purchased liability insurance), and risk shifting (indemnification mechanisms).

30. *See, e.g.,* Xinyu Hua & Kathryn E. Spier, *Information and Externalities in Sequential Litigation,* (Nat'l Bureau of Econ. Research, Research, Working Paper No. W10943, 2004), *available at* http://ssrn.com/abstract=629585. Hua and Spier argue that litigation produces and disseminates information that is useful to society overall, especially regarding the scope of the harm or damages, and that settlements (especially confidential settlements) can therefore be undesirable. "The accurate determination of damages—even those that may become known years later [when litigation is complete]—provides those engaging in similar risky activities with valuable information for future decision making." *Id.* at 2.

31. R. H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 18 (1960) (where there are no transaction costs, individuals will efficiently bargain to accommodate externalities).

32. *Id.*

always reach agreement, because they do not have adequate information, i.e., too many uncertainties involved[33] or because they cannot transact easily, as where a corporate defendant adopts a never-settle policy. The latter occurs relatively infrequently but may in fact explain the handful of cases that proceed to the second phase in bifurcated trials.[34] Eliminating uncertainty or obtaining adequate information may therefore best explain why so many parties settle after the first phase.[35]

The parties enter a trial with different private information: The plaintiff-victim has better information about the value of the injuries, and the defendant has superior information about the degree of caution or callousness that resulted in the tortious act. Reverse bifurcation forces disclosure of the plaintiff's best information first, without a reciprocal contemporaneous disclosure of the defendant's inside information; but the procedure also diminishes the *value* of the defendant's private information, because the unlikelihood of the second phase makes it less relevant. Modern pre-trial discovery rules, on the other hand, may result in more disclosure of the defendant's private information because so much of the negligence or breach of duty will turn on objective considerations, such as the costs of preventing the harm. The value of the victim's injury, on the other hand, includes a subjective element that is unknowable until the victim or the victim's family appears in court; to this extent, reverse bifurcation levels a subtle inequality in the pre-trial discovery rules.

Part II of this Article discusses the advantages of bifurcation generally. All of the academic literature to date has focused on regular

33. Information problems and the resulting uncertainty seem to form a bigger obstacle to settlement, and such information problems overlap with the issues of jury prejudice or confusion noted in the preceding paragraphs—various encumbrances with sorting and analyzing the information received skew verdicts away from what they would be in a perfectly-informed, procedure-does-not-matter world.

34. For example, a Philadelphia court ordered sanctions (amounting to $9,000) to defendant corporation for refusing to settle. Since defendant is the world's largest designer, manufacturer, and supplier of engineered sealing systems, the corporation is often a defendant in asbestos litigation. The company has a national policy "never settle to any cases, but appeal everything to the highest court possible." In the first phase of a reverse bifurcated trial, the jury awarded damages. Out of these damages, the defendant company would have been responsible for $50,170 and $90,000. The court recommended a $20,000 settlement for each case; plaintiffs agreed, but the defendant corporation refused. The judge was unhappy and said "there mere fact that a defendant might win a case does not mean that they can totally refuse to participate in settlement negotiations….when one defendant decides to fault the established system, it certainly is appropriate to sanction them for refusal to settle . . . ." Ruth Bryna Cohen, *'Never Settle' Policy Earns Sanctions,* THE LEGAL INTELLIGENCER, March 2, 2002.

35. The fact that litigants often stipulate on one or more of the issues in a case (liability, causation, some forms of damages) attests to the efficiency of severance or bifurcation. If many parties do this already, on their own initiative, then arguably more parties would achieve the same savings if court procedures encouraged the separation of issues. A mandated procedure would eliminate transaction costs that otherwise prevent non-agreeing parties from consenting to approach the issues separately.

bifurcation, so this brief survey will reflect that emphasis. Part II will also describe cases where courts have used reverse bifurcation. Part III uses game theory models to illustrate the incentive effects of reversing the order of trial proceedings, and attempts to demonstrate reverse bifurcation's superiority to both the traditional trial format and regular bifurcation. Part IV focuses on the kinds of cases that make reverse bifurcation more or less suitable from a public policy standpoint. Part V anticipates and answers some objections regarding due process concerns, and Part VI concludes.

II. BACKGROUND: ACADEMIC LITERATURE AND CASES

A. Academic Commentators on Bifurcation

Scholarly discussion of trial bifurcation began in earnest[36] in the late 1950s and early 1960s, with advocates presenting it as a technique for expediting trials and reducing court congestion. Much earlier in our legal history, prior to Blackstone's era, there were actions of "account-render" in the law courts (predating the formation of equity courts) that used severance or bifurcation, trying damages and liability separately.[37] Certain affirmative defenses in criminal cases (insanity, duress, consent, etc.) had been tried separately from the prosecutors' charges for generations. The mid-century scholarly interest in bifurcation coincided with its adoption or frequent use by courts in certain regions.

Professors Zeisel and Callahan published a seminal empirical study in 1973, focusing on federal district courts in Illinois. They concluded that regular bifurcation reduced trial time by almost 25%, reduced jury verdicts for the plaintiffs by 30% (from 42% to 12%), and lowered plaintiff-favoring settlements by 8% (from 32% to 24%). These results cemented the conventional wisdom in the legal profession that bifurcation favored defendants (because of the lower number of plaintiff

36. I refer here to regular bifurcation, not reverse bifurcation. The earliest academic article I have found on the subject is from 1938, and talks throughout about the need for bifurcation (calling it "severance" instead) as if it were completely unknown in that decade. *See* Lewis Mayers, *The Severance for Trial of Liability From Damage,* 86 U. PENN. L. REV. 389 (1938). The promulgation of the Federal Rules of Civil Procedure in 1938, which included the relevant provisions allowing for severance and bifurcation, seems to have triggered greater use of these devices. *See, e.g.,* James A. Henderson, Jr., Fred Bertram & Michael J. Toke, *Optimal Issue Separation in Modern Products Liability Litigation*, 73 Tex. L. Rev. 1653, 1676-78 (1995).

37. *Id.* at 391 ("Ordering separate trials of liability and damages, for example, was commonplace in the seventeenth century action of account-render."). *See also Severance of Issues at Trial Against Tobacco Companies May Be Appropriate for the Jury;* Simon v. Philip Morris, Inc., N.Y. L. J., Feb 16, 2001, at 31.

verdicts) but also fostered judicial economy significantly.[38] Use of the procedure grew slowly but steadily through the 1960s and 1970s.

A more dramatic change occurred during the 1980s and 1990s. The advent of class actions, mass torts (especially asbestos), and large punitive damages created an environment where each issue of the case (e.g., liability, causation, damages) could constitute a protracted, complex trial on its own;[39] some states, such as Pennsylvania, created specialized complex litigation courts to handle such cases.[40] Recent surveys of judges indicate overwhelming support for bifurcation as a means of preserving judicial economy,[41] but relatively few judges admit to actually using it in their courts more than five or ten times in a three-year period.[42] Most of the cases using bifurcation appear in the complex litigation courts.

Recently, commentators have taken a more nuanced look at bifurcation.[43] The earlier finding that bifurcation resulted in more defense verdicts has been tempered with the observation that verdicts for plaintiffs, while less frequent, are significantly larger. In other words, defendants have better odds of obtaining a verdict in their favor, but if they lose at the liability phase, the risk of high damage awards (both compensatory and punitive) is much greater.[44]

38. When the defendant prevails at the liability phase, judicial economy is substantially furthered. *See, e.g.,* de Villiers, *supra* note 9.

39. When applied to thousands of consolidated asbestos claims, bifurcation resolved the issues of liability and punitive damages in one large, unified trial. The process "eliminated the need for repetitious proof and saved time in processing large numbers of cases." Rice & Davis, *supra* note 6, at 136. When applied to individual cases (one on one) "bifurcation of the issues usually resulted in disadvantage and delay for plaintiffs" because it "fractionalized the issues." *Id*. "Bifurcation is seen as an extraordinary procedure that should not be used routinely." *Id.*

40. Blumenthal*, supra* note 22 (discussing Philadelphia's complex litigation center). Judge Ackerman, who runs the Complex Litigation Center, said that in the near future the court might decide to use reverse bifurcated method in all Fen-Phen cases, like it does in asbestos trials. Nann, *supra* note 22.

41. *See* de Villiers, *supra* note 9 at 196 ("A 1989 Harris Poll reports that 80 percent of federal judges and 77 percent of state judges surveyed believed that bifurcation had a positive influence on the fairness of the trial outcomes and expedited settlements.").

42. 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, tbls. 5.1-5.6 (1989).

43. *See* William Landes, *Sequential Versus Unitary Trials: An Economic Analysis,* 22 J. LEGAL STUD. 99 (1993); *see also* BAIRD ET AL., GAME THEORY AND THE LAW 251–59 (1994).

44. Four possible scenarios exist for a verdict in a civil trial. In the first scenario, the jurors are unanimous for imposing liability so bifurcated and unitary trials would have the same result, an average of each jurors ideal award. If there is a split jury and the minority favors imposing liability, bifurcation will result in zero damages while a unitary trial will result in an average of each juror's ideal damages. If the jury is split and the majority favor imposing liability, in a bifurcated trial the damages would be the full award while in a unitary trial it would result in an average of damages. If the jury is unanimous for acquittal, both bifurcated and unitary will result in zero damages. de Villiers, *supra* note 9.

Juror compromise appears to be one cause of this pattern. In a traditional, unified trial, a majority of jurors favoring the plaintiff can persuade the dissenters to agree to a lower damage award in order to give a unified verdict. Such compromises allow plaintiffs to win something, even a token amount, even if a trade-off in overall winnings results. Conversely, where the majority favors the defendant, compromise, though still possible, is less likely, generating "token" or nominal damages—again, incongruent with the harm in the case if the defendant is indeed the appropriate party to hold liable. In a sense, this trade-off means that the damage award reflects the collective doubt about liability, but whether such a result is desirable remains unclear.[45] The resulting "compromise" award could be disproportionately lower than the victim's losses (or the punitive damages could be too low to achieve an appropriate level of deterrence).[46]

Bifurcation of either variety usually eliminates this option for the jury. A well-informed jury may possibly reach compromise verdicts spanning multiple phases, but usually juries in bifurcated trials have too limited information to do this; and if a second jury is impaneled to decide the next phase, this obviously interrupts any plans that span different phases. Bifurcation removes leverage from holdouts on the jury, forcing them to choose between complete uncooperativeness and yielding. The rare cases that actually go to "phase two" in a regular bifurcated trial seem self-selected to be more pro-plaintiff; they represent a lack of compromise during settlement negotiations.

A few commentators contend that bifurcation undermines the real value of juries by eliminating such compromises and tradeoffs between liability and damages. Professors Boyers, Sandys, and Steiner, addressing the bifurcation of capital murder cases into separate phases for guilt and sentencing, argue that juries are supposed to synthesize into a single verdict their impressions of the seriousness of the wrongdoing and their sympathy for each party.[47] Partitioning the trial into different segments, each with its own verdict, supplants a more holistic result.[48] Interestingly, this objection evinces agreement about the true effects of bifurcation—that it forces jurors to decide each issue without influence from other features of the case. The difference, then, is a value

45. Jurors in unitary trials will compromise or average their verdicts resulting in low or nominal damages occasionally. *Id.*

46. *Id.*

47. William J. Bowers, Marla Sandys & Benjamin D. Steiner, *Foreclosed Impartiality In Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, And Premature Decision Making,* 83 CORNELL L. REV. 1476 (1998).

48. *Id.*

judgment about whether this result is good or bad, that is, whether we *want* juries to blend all the issues together subjectively or instead to meet some objective benchmark of reliability or truth. Because of their prior assumptions about the purposes of the trial, advocates on both sides of this issue would describe their approach as yielding more "accurate" results. The line between jury prejudice and comprehensiveness, then, is somewhat in the eye of the beholder.

Some evidence exists, however, that the way questions are divided into compound parts, and the order in which those discreet questions are considered, may strongly influence the outcome of the case. For example, David Lombardero has offered a sophisticated model to explain the subtle effects of using "special verdicts" or jury interrogatories, demonstrating that they disproportionately favor plaintiffs unless the defendant can isolate a dispositive element to be determined in her favor up front.[49] Instead of assessing the probability of a combined set of elements, which would normally be less than .5, jurors tend to look at the overall plausibility of the parties' competing "stories" (so that even where three essential elements were proven to a .7 certainty, yielding a combined probability of .7x.7.x.7= .343, the jury still finds against the defendant, as if it were subtracting the combined probability from 1). This effect is heightened the more juries decide each issue separately, especially where the questions are considered in a series, building on one another. An element that had only .51 certainty for a jury will now be assumed "proved," or certain, when the jury moves on to the next question.

The order in which the jury considers the questions affects the outcome, Lombardero argues, because probability gaps are left behind along the way. He notes in passing that this effect is even more pronounced in regular order bifurcated trials, where the findings of one phase are taken as binding for the next one. Interestingly, he notes that this effect might be more pronounced where separate juries are used for the different halves of a bifurcated trial because the jurors in a subsequent phase are unaware of the amount of doubt in other essential findings. On the other hand, bifurcated trials have an advantage for the defendant because, unlike special verdicts, they limit the evidence put before the jury in each phase and eliminate unfair bias, and they enable the defendant to completely avoid subsequent findings, including those that might be more damning, by winning on a dispositive issue early on. Bifurcation offers an additional benefit to defendants not available through special verdicts: Lombardero hypothesizes that juries have an

49. David A. Lombardero, *Do Special Verdicts Improve the Structure of Jury Decision-Making?* 36 JURIMETRICS J. 275, 275–300 (1996).

incentive to decide close cases in favor of defendants in order to shorten the proceedings.

Professor Landes argued in 1993 that regular bifurcation, which he calls "sequential trials," actually hinders judicial economy, by encouraging more cases to be filed and allowing fewer settlements.[50] Using game theoretical modeling, Landes posits that the expected litigation costs will decrease for the parties because of the chances that the later phases will not occur, inducing more parties with specious claims to bring actions.[51] Landes summarizes his arguments as follows:

> The simple insight of this article is that, in a variety of instances, a sequential trial lowers the expected cost of litigation compared to a unitary trial for both the plaintiff and the defendant because it holds out the prospect of avoiding litigation on subsequent issues if the defendant wins the current issue or the parties settle the remaining issues after the current one is decided. Consequently, a sequential trial (a) increases plaintiff's incentive to sue, (b) increases the number of lawsuits, and (c) reduces the likelihood that the parties will settle out of court by narrowing the range of mutually acceptable settlements. Hence, sequential decision making may increase the aggregate cost of litigation even though it lowers the expected cost of litigating (as opposed to settling) a particular dispute.[52]

This argument is similar to the idea that lower costs in a marketplace will increase demand. Similarly, the lower projected litigation costs create more disparity in the parties' expected outcome of the case, given that they no longer share a high but equal offset to their potential winnings. This divergence in expected outcomes should make it harder for parties to settle.[53] In addition, Landes modeled the incentives of the parties to increasingly hide their private information because of the sequential rounds of trials and negotiations. As writers following Landes summarized: "The persistent difference between a unitary and a sequential regime lies in the way the prospect of subsequent rounds of bargaining induces parties to conceal private information."[54] These observations lead to the well-stated conclusion: "If we believe that one of the goals of a civil procedure regime is to promote the transmittal of information and enhance settlement at values related to the strength of the case, there appears to be an argument for combining rather than

50. *See* Landes, *supra* note 43; *see also* BAIRD ET AL., *supra* note 43, at 251–59.

51. *See* Landes, *supra* note 43, at 100.

52. *Id.* at 100–01 (emphasis in original omitted).

53. It seems that reverse bifurcation would make this second concern much less pronounced, because the first item the parties determine in litigation is the value of the case.

54. BAIRD ET AL., *supra* note 43, at 259.

splitting trials."[55]

Landes's article has faced challenges, however, on its underlying assumptions.[56] Contrary to Landes's model, the parties are not always privy to the same information; given our pre-trial discovery procedures, one litigant may have more success than the other in discovering the opponent's private information.[57] Landes also neglects the role of increasing information—that the information disclosed in one phase of the trial (like the scope of damages) can give the parties hints, or enhance their ability to guess about the remaining information the other party holds.[58] In addition, Landes's conclusions about litigation costs and the resulting incentives arguably assume that different phases of trials have equal costs, or that the parties' costs in each phase are equal.[59] If the costs of the phases are vastly different, however, or if the parties' costs are vastly different from one another in different phases, this difference significantly changes the results from a game-theoretical perspective.[60] Finally, Landes's assertion that bifurcation reduces settlements contradicts the empirical survey evidence among trial judges, who see the trials first-hand.[61]

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55. *Id.*

56. *See, e.g.,* Kong-Pin Chen, Hung-Ken Chien, & C.Y. Cyrus Chu, *Sequential Versus Unitary Trials With Assymmetric Information*, 26 J. LEGAL STUD. 239 (1997); Joseph A. Grundfest & Peter H. Huang, "*The Unexpected Value of Litigation: A Real Options Perspective,"* 58 STAN. L. REV. 1267 (2006); Lucian Arye Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. OF ECON. 404 (1984)

57. Chen et al., *supra* note 56, at 247–49.

58. *Id.* at 249.

59. Another problem for Landes's model, along these lines, is the issue of economic "rents" paid to the attorneys on both sides due to the information that remains hidden. Bifurcation reduces attorney rents in litigation, because the current compensation system for attorneys anticipates more information analysis and refutation than actually occurs. *See, e.g.,* Klaas J. Beniers, Robert Dur, & Otto H. Swank, *Sequential Advocacy* (Tinbergen Inst. Disc. Paper No. 2002-016/1, 2002), *available at* http://ssrn.com/abstract=300582. "When time is limited, a sequential advocacy system eliminates rents, but comes at the cost of less information collection." *Id.* at 5. To the extent that the current trial structure causes unnecessary or surplus discovery before and during the trial, the useless compensation paid to the attorneys should constitute economic rents.

60. *See* Chen, *supra* note 56, at 251–53. These commentators conclude, "the greater the defendant's costs in litigating the first phase, the more the plaintiff benefits from a unified trial." In addition, in a bifurcated trial where the plaintiff can choose the order, the plaintiff would prefer to litigate first the phase that costs the defendant the least, because this enhances the plaintiff's bargaining power in the second phase, relative to the information disclosed through the first phase. In fairness, throughout Landes's article he qualifies his assertions by noting that they are limited by his assumptions.

61. *See* Landes*, supra* note 43; *see also* Angelo v. Armstrong World Indus., Inc., 11 F.3d 957, 964 (10th Cir. 1993) ("Reverse bifurcation obviously saves time and money by eliminating some cases after the first phase, thus avoiding trial of the defendants' liability.").

Landes and subsequent adherents to his views also ignore the empirical evidence about reciprocity and cooperation between parties; his model requires that parties always act out of pure self-interest. In many situations, however, individuals (sometimes most individuals, depending on the circumstances)

Landes did, however, note that reverse bifurcation is more cost efficient than regular bifurcation.[62] He offers the following comparison of the two ways of ordering a sequential (severed) trial:

> Let me turn briefly to a comparison of ordinary bifurcation (where liability rather than damages is litigated first) and reverse bifurcation. Assume that *A* would sue under either form of bifurcation. Since reverse bifurcation holds out the prospect of saving the cost of litigating liability while bifurcation holds out the prospect of saving the cost of litigating damages, the cost advantage of one over the other depends on (i) the relative cost of litigating damages relative to liability and (ii) the likelihood of achieving these cost savings. In the case of reverse bifurcation, ii depends on the sum of (*a*) the probability that a trial on damage will yield damages below the minimum amount A requires to maintain his suit and (*b*) the probability that damages will be below the threshold that induces the parties to litigate rather than settle (assuming mutual optimism on liability). In the case of ordinary bifurcation, ii depends positively on (*a*) the probability that the plaintiff loses liability and (*b*) the lower the degree of mutual optimism with respect to damages (given that the plaintiff wins liability).[63]

Baird, Gertner, and Picker summarize two primary models used the literature on litigation and game theory: the private information model and the optimism model.[64] The former focuses on two elements of litigation: (1) the need for parties to guess about some of the critical information in the opponent's possession which eluded discovery, and (2) the parties' efforts to signal each other strategically, or to trick each other, to induce a more favorable settlement.[65] The optimism model, by contrast, emphasizes the parties' expected costs and returns in the ensuing litigation.[66] Focusing on the costs and returns of litigation

reject purely self-interested outcomes due to reciprocity, because there is long-term value in building trust—especially between litigators in a specialized field. *See, e.g.,* Ananish Chaudhuri et al., *Trust and Trustworthiness in a Sequential Bargaining Game* (Wellesley Coll. Working Paper No. 2002-10, 2002), *available at* http://ssrn.com/abstract=370061.

The repeated rounds inherent in a bifurcated trial make the parties repeat players and introduce more reciprocity influences. Bolstering this effect is the fact that mass torts, being a specialized area of litigation, and the most common arena for reverse bifurcation, put the same lawyers face to face in case after case. The lawyers' reputations with each other take on greater significance than they would otherwise; they will signal to each other which cases are stronger or weaker on the liability question, or they may already know this information from previous cases involving the same conduct by the same defendant.

62. Landes, *supra* note 43, at 121. He also notes in the same paragraph that litigating damages will often be dispositive for the parties, inducing immediate settlement.

63. *Id.* at 124.

64. BAIRD ET AL., *supra* note 43 at 245, 252.

65. *Id.* at 245–54.

66. *Id.*

means that the plaintiff may be more likely to bring a lawsuit under a bifurcation regime. The opportunity to cease litigating the case after the first phase somewhat lowers the projected costs. Even so, an analysis of the costs and benefits after the first phase seemingly would induce both parties to settle because their gains from going forward, especially where the value is already set in a reverse bifurcation scenario, are significantly lower than the costs of proceeding with the second phase (if we include both the legal fees and the risks of jeopardizing an otherwise acceptable agreement).[67]

Using the private information model, Baird et al. give a detailed description of the incentives each party has to deceive the other in each successive interval between trial phases (the negotiation rounds), and conclude that the parties' signals become increasingly untrustworthy.[68] Their assumptions, however, do not account for each party's tends superior information about a different phase of the trial, and that after the first phase, the plaintiffs have already disclosed most of their best private information. The defendant's guesswork after the first phase of the reverse-bifurcated trial is less than that which these commentators assume.[69]

B. Reverse Bifurcation in the Courts

Reverse bifurcation has thus far been concentrated in Philadelphia, where Pennsylvania consolidated its mass tort cases in the Complex Litigation Center (CLC) in the early 1980s.[70] The judges at the CLC

67. *See* discussion *infra* Part III.A.

68. BAIRD ET AL., *supra* note 43, at 257–61.

69. *See* Muhamet Mildiz, *Waiting To Persuade* (MIT Dept. of Econ. Working Paper No. 02-38, 2002), *available at* http://ssrn.com/abstract=348181. Mildiz also notes the consensus in the academic literature that the failure of some cases to settle can be due to information asymmetries or excessive optimism by the parties. *See id.* at 2–5. Normally the parties initially wait for the other side to see the strength of their position, but "the players' learning will slow down, and it will no longer be worth waiting for them to change their minds. This is when they reach an agreement." *Id.* at 3. If parties could continue negotiations indefinitely, their views would eventually converge as their information reached the same level; Mildiz demonstrates that parties settle before this point, once they realize their "learning" from the other has slowed down.

Mildiz' work leads to the important conclusion that information in a trial usually has decreasing marginal value (with rare exceptions for surprise witnesses, etc.). When assessing the effects of bifurcation, or any other procedural mechanism, we must look not only at which phase is more expensive or risky to litigate, but also the rate at which the marginal value of information decreases in that particular type of case.

70. Blumenthal, *supra* note 22. See also Rice & Davis, *supra* note 6, at 145–46 (saying that "courts must address the reality that individual one-on-one evaluation of personal injury cases is an unfair and impracticable approach to mass tort litigation and in practice is not available in the tort system…due process must be balanced against the victim's right to fair and expeditious adjudication and compensation…At this time, the tools are not available to deal effectively with these problems. The

began using reverse bifurcation early on[71] to clear the enormous backlog of asbestos cases from the docket.[72] This strategy worked,[73] with most cases settling before going to the second phase of liability.[74] Reverse bifurcation became routine for asbestos litigation, where the defendants could hardly deny having manufactured the product and the injuries spanned a continuum (from death to mere apprehension of future sickness). Causation, especially in the sense of contribution, was hotly contested in the case of lifelong smokers, and apportionment between multiple defendants was complex. The latter issues fell within the rubric of "damages" and were often tried first at the CLC. Some reports indicate that reverse bifurcation was used in tobacco litigation,[75] and

only resolution in sight is through effective class action settlements within the procedural strictures laid out by the courts.").

For example, a Brooklyn federal jury awarded $91.2 million to 45 asbestos plaintiffs who worked in NY electrical power plants. There were approximately 700 similar claims. These cases were referred to as the "power-house cases." The federal judge ordered reverse bifurcation. The jury had not yet decided the liability apportionment. *Today's News Update*, N.Y. L. J., Aug. 16, 1991.

71. For example, a trial court denied the argument that reverse bifurcation was impermissible because the original reason for enacting this method (to help reduce mass-torts dockets overwhelmed by asbestos cases in 1980s) no longer exists. Trial judge denied defendant's argument, calling it "accurate but inapposite." Rabold v. Ericsson, Inc., No. 3141, 2004 WL 3261010, at *493 (Nov. 24, 2004). In defending the method, the Trial Judge stated that the method might not be necessary, but it does not mean that a method which has been used (in accord with the county practice) for 20 years is an 'abuse of discretion.' *Id*.

Responding to a special request of the then President Judge Toll in 1991, Judge Surrick made efforts to try to move some of the backlog of cases that had been languish in the courts for years. Surrick said he was thinking about judicial economy when began to consolidate cases and use the reverse bifurcation method. Surrick says, "What worked really well was when the jury came back with an affirmation of the injury. . . . Then the parties would start to talk about the value of the case, and sometimes they settled without going any further." (1). Judge Surrick, a long time judge in the Delaware County Common Pleas Court, was confirmed into US District Court for the E. District of Pennsylvania. He hopes to use some of his case-management strategies in the federal court, including reverse bifurcation which he often used in large asbestos cases. Donna Dudick, *Off to the Federal Bench*, THE LEGAL INTELLIGENCER SUBURBAN EDITION, June 21, 2000.

72. In recent years, Texas has also seen an increasing amount of asbestos litigation and has become a chosen forum encouraging the use of bifurcation to decide the cases. One judge said "if the court could somehow close thirty (asbestos) cases a month, it would take six and one-half years to try these cases and there would be pending over 5,000 untouched cases at the present rate of filing. Transaction costs would be astronomical." Cimino, et al.. v. Raymark Indus., Inc., 751 F.Supp. 649, 652 (E.D. Tex 1990).

73. Common Pleas Judge Manfredi says that purpose of reverse bifurcation (to expedite cases and encourage settlement) has worked. The number of pending asbestos cases is a fraction of what it once was—as least in part of the two-phase trials Manfredi says. Melissa Nann, *More Companies Pursuing Both Parts of Asbestos Trials*, THE LEGAL INTELLIGENCER, Oct. 30, 2003.

74. Four plaintiffs sued for exposure to asbestos, during the damages phase the jury awarded one plaintiff $3.5 million, and the defendant settled with the other three plaintiffs before the jury verdict on liability. Melissa Nann Burke, *Civil Practice Backward Bifurcation and Joint Trials Helped End Backlog; Continued Use of Such Proceedings Doesn't Deny Due Process*, 27 PA. L. WKLY, Dec. 27, 2004, at 6.

75. Judge Weinstein, *Severance of Issues at Trial Against Tobacco Companies May Be*

more recently the procedure has been proposed as a solution for the trial-within-a-trial conundrum of legal malpractice cases.[76]

A new wave of mass tort cases, at least in the Philadelphia CLC, is the avalanche of Fen-phen litigation.[77] Over 50,000 cases remain on the docket, even after a large class settlement.[78] Wyeth Pharmaceutical Corp, one of the primary defendants in the Fen-phen cases, prefers the reversed procedure and has settled all but two cases so far before proceeding to the second phase.[79] The settlement amounts are often near

Appropriate for the Jury; Simon v. Philip Morris, Inc*.,* N.Y. L. J., Feb 16, 2001, at 31.

A reverse bifurcated format was ordered in a class action suit involving millions of plaintiffs against the tobacco industry. The format will consist of three phases: phase one will consist of a class-wide determination of whether the companies employed fraud and conspiracy to keep people smoking and the amount of compensatory damages, phase two will determine if punitive damages are warranted, and phase three will determine the type of harm that occurred within the class. *In re* Simon II Litig., 2002 U.S. Dist. Lexis 25632 (E.D.N.Y. Oct. 22, 2002).

76. Christopher J. Sochacki, *Coping With 'Case-Within-A-Case' Conundrum*, CONN. L. TRIB., Aug. 25, 2003, at 4.

77. *See, e.g.,* William Jordan, Rives v. Wyeth Pharm., Inc., VERDICTS, SETTLEMENTS & TACTICS, May 2005, at 47 (Philadelphia diet drug products liability case awards $2.5 million to 3 plaintiffs in phase one, Defendant Wyeth was found liable in phase two); Gaskins, et al. v. Wyeth Pham., Inc., 16 ST. LOUIS VERDICT REP. No. 33, (2005) (Fen-Phen case where defendant sought reverse bifurcation and settled for a confidential amount).

78. Nann, *supra* note 22. The remaining cases appear to be class opt-outs. The first of the plaintiffs to opt out of class actions went to trial. The judge ordered the trial to be reverse bifurcated and the jury determined damages of $48,000, prompting the company to settle before proceeding to liability. *Id*.

79. The two cases involved particularly large verdicts and perhaps special liability issues, and the defendant lost both. In one case, four plaintiffs were awarded $2.135 million. In the second case, three plaintiffs were awarded $2.5 million. Wyeth was ultimately liable in the second phase of both trials. Asher Hawkins, *Tough Week in Philly for Fen-Phen Plaintiffs,* THE LEGAL INTELLIGENCER, Feb. 25, 2005, at 1.

There is a new trend where defendant companies wish to defend their product before a jury. Court administrators have noticed that more and more cases are going to the second phase to determine liability. Manfredi says this is because there is less "case inventory", which means more time and resources. Defense Attorney Eisler says that more uncontested mesothelioma cases (where the defendant does not contest that the plaintiff developed cancer due to asbestos exposure) are going to trial because Defendant companies have been "wiped out by previous lawsuits." Eisler goes on to say that "the companies and products that are truly responsible are in bankruptcy." Eisler continues by saying that "peripheral defendants" have become "target defendants" who have a better defense, and are willing to proceed to phase 2 because they have a better defense. Philadelphia court awarded plaintiffs $15.6 million against group of asbestos-product manufacturers. Before the liability phase, at least 10 defendants in the three cases settled—the amounts confidential. Two defendant companies did not settle. Each company will pay 10% of the $3.5 million verdict. Nann, *supra* note 22.

Manville was the nation's largest manufacturer and distributor of asbestos related products. When the masses of lawsuits began, Manville filed bankruptcy and a trust was set up as the only compensation. After about two years, the trust was insolvent. The present system is the "Trust Distribution Process" (TDP). According to the petition, "…[t]he purpose of the TDP is to extricate the trust from the tort system in order to equitably distribute limited trust assets to its beneficiaries, both plaintiffs and defendants." Six cases against the non-settling defendants were tried using reverse bifurcation. Verdicts favored the plaintiffs. All the plaintiffs had worked at Budd Company plants and suffered form symptomatic pleural thickening or asbestosis from during the 1960s to the 1980s. Gross verdicts ranged

or equal to the jury's award in the first phase;[80] scores of cases have settled so far.[81] The judges in the CLC have announced that reverse bifurcation may be used in all the Fen-Phen cases.[82] "The goal is to save time and encourage settlements by having the jury put a price tag on the case before delving into liability issues."[83] Fans and critics alike are among the litigation bar involved in these cases. Some plaintiffs' attorneys resent the restrictions on which evidence can come before the jury in which phase, and some defendants point to the significantly higher settlement amounts than those in regular-ordered cases.[84]

from $700,000 to $1.25 million. Many defendants settled before trial. During the liability phase, the jury apportioned liability among Owens Cornings and the other defendants that Owens had cross-claimed. On appeal, The Superior Court reversed three of the cases, stating that the plaintiffs had actually settled their claims against Manville Trust under the TDP. The other three cases were affirmed, and the judgments were not reduced. Owens Cornings' argument was that "under the terms of the TDP, there is no distinction between plaintiffs who have settled their claims against the trust and those who have not yet done so. There is simply the provision requiring the trust to be treated like a settling defendant . . . ." Michael E. Sacks, *Supreme Court to Decide Manville Set-off Procedure,* PENN. L. WKLY., March 29, 1999, at 1.

80. An eight member jury awarded 40 year old Plaintiff $48,000 in the first phase of reverse bifurcated trial. Before the second phase began, Defendant Wyeth Pharmaceuticals settled for the amount of the verdict. Nann, *supra* note 22.

81. Plaintiff Attorney DiDonato says that when the jury awards such a large amount of money, it is rare they would find no liability in the second phase. The jury deliberated 3 hours during the damages phase and deliberated 5 minutes during the liability phase. Nann, *supra* note 73.

82. Judge Ackerman, who runs the Complex Litigation Center, said that in the near future the court might decide to use reverse bifurcated method in all Fen-Phen cases, like it does in asbestos trials. Nann, *supra* note 22.

This case involved the largest Fen-Phen verdict to date. After a reverse bifurcated trial, which lasted 5 days, six jurors deliberated for 10 minutes before delivering the $2.5 million verdict. One juror was excused for medical reasons; another juror was excused for talking about the case outside the jury room. As of January 7, 2005, Wyeth has only gone through the second phase of a reverse bifurcated trial in other one case. That case resulted in a $2.135 million verdict to 4 plaintiffs. Ten Fen-Phen trials have gone to verdict since the trials began in July, according to the CLC. Many others were settled before or during trial—often after the jury awarded damages in the first phase. Melissa Nann Burke, *Wyeth Ruled Liable for $2.5 Mil. in Fen-Phen Trial,* THE LEGAL INTELLIGENCER, Jan. 7, 2005.

83. Blumenthal, *supra* note 22.

84. *See* Wise, *supra* note 15, at 1. Six months before the trial began, the defendants were in favor of reverse bifurcation, while the plaintiffs resisted the idea. When trial began, the parties "reversed themselves"—defense was opposing reverse bifurcation, while the plaintiffs were at least willing to try. The defense was so upset that they unsuccessfully appealed saying that Judge Freedman's use of reverse bifurcation had "caught them unaware that they would have to prepare certain medical testimony so quickly." "The parties' flip-flop over reverse bifurcation reflects the volatility of a litigation that has taken many unexpected turns…" *Id*.

There are a variety of opinions on reverse bifurcation: some asbestos litigation veterans say that it promotes judicial economy without sacrificing fairness; plaintiff's lawyer Perry Weitz says that there is economy because the same medical witnesses offer testimony on both issues, damages and causation; still others say that the fist phase is prolonged and there is a fairness issue—trying causation at the beginning of the trial adds complex and time consuming questions. Some opponents of reverse bifurcation state there is a fairness issue—it is unfair to confront defendants with damage figures without showing the injury is linked to asbestos. Defense attorneys state that reverse bifurcation

Appellate courts, however, have so far upheld reverse bifurcation when it was challenged on appeal;[85] the decision to sever claims or rearrange the order is within the discretion of the trial judge.[86]

prejudices them since they can only address part of the causation at the initial stage because whether the defendant's specific product caused the plaintiff's injury must be litigated in the second phase. "Since the question of exposure to asbestos will have been resolved in the initial phase, said one lawyer, the question of product identification is hardly likely to grab the jury's attention because they have already decided that someone's product has caused the injury." *Id.* at 5.

85. *See* Adams, *supra* note 22, at 1 (On appeal, defendants failed to block the reverse bifurcation). Defendant manufacturer argued that reverse bifurcation should not be allowed because the original grounds for the method (reducing mass-tort docket in the 1980s) no longer exists. Judge Ackerman denied defendant's request for anything but the reverse bifurcated procedure. Judge Bernstein states, "[a]t the time coordination of trials and reverse bifurcation were initiated, it was needed to handle an overburdened docket . . . [t]he transformation of the Philadelphia courts and the elimination of all backlog of civil cases may make coordination of cases and reverse bifurcation unnecessary but this fact cannot make Judge Ackerman's ruling, which is in accord with 20 years of Philadelphia County practice, an 'abuse of discretion'". Melissa Nann Burke, *Going Forward in Reverse,* THE LEGAL INTELLIGENCER, Dec. 20, 2004. *See also 3rd Circuit: Diet Drug Judge May Require Stipulation To Trial By Reverse Bifurcation*, MEALEY'S LITIG. REP.: FEN-PHEN/REDUX, Feb. 2005; *See also Parties Argue Over Reverse Bifurcation Before 3rd Circuit*, MEALEY'S LITIG. REP. FEN-PHEN/REDUX, Dec. 2004; *3rd Circuit To Decide If Diet Drug Reverse Bifurcation Is Just,* MEALEY'S MASS TORT PLEADINGS, Nov. 24, 2004*; Anonymous, Plaintiffs Appeal Order Of Reverse Bifurcation, Seek Writ of Mandamus*, MEALEY'S LITIG. REP.: FEN-PHEN/REDUX, Oct. 2004.

86. Judges are given broad discretion to severance issues. Examples of such severance are: summary judgment in favor of plaintiff separates trial of damages, successful plea of collateral estoppel bars further litigation of one issue, trifurcation, and reverse bifurcation to encourage settlement and shortening of the trial. *Severance of Issues at Trial Against Tobacco Companies May Be Appropriate for the Jury;* Simon v. Philip Morris, Inc.*,* N.Y. L. J., Feb 16, 2001.

Federal Rules of Civil Procedure grant judicial discretion in severing issues. Rule 42 encourages severing issues for trial, and guarantees trial judges flexibility to provide fair and efficient remedy. Three allowable grounds provide for bifurcation—furthering convenience, avoiding prejudice, and furthering expedition and economy—any one of these alone is sufficient. Additionally, Rule 16 (c)(13) makes scheduling and case management an express goal of pretrial procedure. *Severance of Issues at Trial Against Tobacco Companies May Be Appropriate for the Jury;* Simon v. Philip Morris, Inc.*,* N.Y. L. J., Feb 16, 2001. The 7th Amendment gives judges some discretion. "The Framer's main objective in drafting the Seventh Amendment was to limit the ability of an appellate court, specifically the Supreme Court, to review de novo and overturn a civil judge's findings of fact. Nowhere is there an indication that the Framers intended to constrain the trial judge's substantial discretion to employ appropriate mechanisms of jury control." *Id.* at 9. A public policy reason to allow judges to sever issues is to promote a "speedy and inexpensive determination of every action." *Id*. Mass production and mass marketing makes trial judge's discretion to sever issues the most necessary and natural tool in order to efficiently adjudicate the cases. *Id.* (explaining how judicial discretion was abused, stating "[a]lthough the trial court has discretion as to such a decision, they violated that discretion by deciding on reverse bifurcation of these issues. The reason is that the bifurcation resulted in prejudice to the [plaintiffs]. There was prejudice because the determinations of damages and of liability were not separable. Consequently, the jury was confused and the [plaintiffs] were prejudiced. This undermined the fairness of the trial and, therefore, is not allowable."). *Id.*. On appeal to the Supreme Court, the use of reverse bifurcation was found to prejudice the plaintiffs because the damages issues were inseparable from liability issues. *Utah Supreme Court Allows Stigma Damages for Temporary Injury,* MEALEY'S EMERGING TOXIC TORTS, Jan. 8, 1999. Defendant Okonite appealed on the basis of trial court's use of reverse bifurcation (and defendant challenges admission of expert medical testimony). Trial court awarded $115,978.84 in damages. The appellate panel concluded that the use of reverse bifurcation did

To summarize, trial bifurcation is a relatively new development, appearing in its current form in the last half-century, although there were similar devices used in earlier eras of the common law. This development coincided with the advent of class actions, product liability, and the extensive use of scientific experts in mass tort cases. The main impetus for bifurcating trials is the desire to avoid undue jury confusion or bias, and to preserve judicial economy, mostly through the increase in settlements, but also by other time-saving effects. Critics of the procedure express concern that it undermines the jury's ability to decide between the parties' overall "stories" as they can in a general verdict. Even so, distinguishing this syncretistic approach to factfinding from jury bias or confusion is difficult.

III. BIFURCATION: SOME OBSERVATIONS FROM GAME THEORY

Despite the arguments by Landes and commentators who followed his article,[87] subsequent commentators have effectively challenged his

not prejudice Okonite's right to a fair trial nor deprived it of due process. In *Pittsburgh Corning Corp. v. Bradley,* 453 A.2d 314, 317 (Pa. 1982), reverse bifurcation was upheld as "an effective procedure to facilitate the prompt disposition of the growing backlog of asbestos cases . . . [and] clearly related to the paramount concern of achieving timely justice." *Pennsylvania Superior Court Affirms $115,000 Award to Railway Laborer in Suit Against Okonite,* MEALEY'S LITIG. REP.: ASBESTOS, Feb 15, 2002. The Court of Appeals affirmed the lower court's jury verdict in favor of the widow of a mesothelioma victim. Plaintiff's deceased husband worked for nearly thirty years at a power/light company where he contracted mesothelioma and later died. There was sufficient evidence at trial that the product lacked a warning label. The results of an experiment produced asbestos dust exceeded OSHA standards by 300%! The defendant argued that reverse bifurcation would prevent the company from receiving a fair trial. The court stated that "[t]he inherent complexities involved in asbestos litigation coupled with the trial court's desire to expedite the trial more than justified its decision to implement a reverse bifurcation format." *Id*. Appellate court also rejected defendant's request for remittitur and denied that the trial court abused its discretion. *Appeals Court Affirms Jury Verdict for Widow of Mesothelioma Victim*, MEALEY'S LITIG. REP.: ASBESTOS, Jan. 7, 2004

Reverse bifurcation was an abuse of judicial discretion in power plant cases. *Consolidated 'Powerhouse' Trial Was Improper, Second Circuit Says,* MEALEY'S LIT. REP.: ASBESTOS, June 4, 1993 (distinguished from the Brooklyn Navy Yard case which was consolidated based on the plaintiffs having the same primary worksite).

87. Landes, s*upra* note 43; BAIRD ET AL., *supra* note 43 (Landes does acknowledge that reverse bifurcation can save more than ordinary bifurcation.). Landes, *supra,* at 121. Baird et al., introduce the approach to regular bifurcation succinctly:

> Victim thinks that the chances are 9 in 10 that a jury will find Injurer liable and that, if the jury does find Injurer liable, the damage award will be $110,000. Injurer thinks that there is only an 80 percent chance of being found liable and that, if found liable, the damages will be only $100,000. In a sequential trial regime, the parties can settle entirely, stipulate damages and litigate liability, stipulate liability and litigate damages, litigate both, settle damages after litigating liability, or settle liability after litigating damages. In a unitary trial regime, the last two options are not available. We assume that the costs of each stage of a sequential trial are $5,000 for each side, and the costs of a unitary trial are $10,000 for each side.

underlying model and assumptions.[88] Even without formal modeling, game theory suggests several intuitions that I explore in this Section.

A. Any type of bifurcation can create much higher incentive to settle after the first phase.

After the first phase of a bifurcated trial, the parties necessarily have more information about the merits of the case, the effectiveness of opposing counsel, the credibility of witnesses, etc. Both attorneys have an opportunity in the first phase to observe each juror's expressions and apparent reactions to various arguments and witnesses.[89] The judge's individual approach to ruling on objections, timing the recesses, and entertaining motions is clearer after a round of hearings. Such information helps both parties to be more realistic in their expectations of the outcome or rewards of the case and therefore makes their expectations and perspectives less divergent. The parties are less susceptible to either excessive optimism or information asymmetries

> In a legal regime in which there are unitary trials, the parties are willing to settle the entire lawsuit. Victim's expected recovery of $89,000 is less than the Injurer's expected costs of $90,000. The settlement range in this example, however, disappears in a legal regime in which liability is tried first and then damages. If we assume that the costs of litigation are the same in a case that is fully tried, the expected costs of litigation for both litigants is lower in a regime with sequential trials . . . [t]he less that parties can expect to save on litigation, the more their expectations about the outcome of any litigation must differ in order for settlement to occur. In our case, for example, Victim's expected recovery net of cost ($94,500) is higher and Injurer's expected cost ($84,000) is lower in a sequential rather than a unitary trial regime. Because of their different beliefs about Victim's chances, they both prefer to litigate rather than to settle.
>
> Sequential trials also produce another effect. Because the expected expenses of litigation are lower, some suits that might not be worth bringing under a unitary trial regime would be worth bringing under a regime in which liability and damages were tried separately.
>
> . . . Costs increase for two reasons. First, there is an increase in the number of cases that are filed in a regime of sequential trials. Second, there is a reduction in the number of cases settled, the exact number turning on how often a settlement range would exist under a unitary trial regime, but not under one with sequential trials.

Id. at 251–52.

88. Bebchuk, *supra* note 56 ;. Grundfest & Huang, *supra* note 56.

89. *See generally* Grundfest & Huang, *supra* note 56. Of course, some commentators question whether settlement is in itself a good thing. *See, e.g.,* Owen Fiss, Comment, *Against Settlement,* 93 YALE L. J. 1073 (1984). This article proceeds with the assumption that settlement is generally a good thing, not only for the sake of judicial economy, but also because lower prospective litigation costs make it easier for plaintiffs with low-value cases to bring their actions and have their day in court; reverse bifurcation in particular permits plaintiffs to air their injuries and afflictions in the first phase, even if the second phase is obviated by a settlement. Also, we should remember that reverse bifurcation became widely used in the context of an overwhelming number of mass tort actions. When dockets become sufficiently backlogged, the choice is not between settlement and a real trial, but rather between settlement and a trial decades in the future.

about the potential award from the case.[90] The array of new information garnered from even one phase of the trial causes the views of the parties to converge, which facilitates their agreement on a settlement.[91]

The parties also have more realistic, and therefore more uniform, expectations about the costs of litigation for the rest of the case after phase one is complete. Based on the costs of phase one, each side can project whether cash outlays, billable hours, unpleasantness from opposing counsel, and other litigation factors make proceeding worthwhile. Both parties can also eliminate some of the previously uncertain costs that might have impeded settlement before the trial began, such as the hours or days certain expert witnesses would consume with their testimony and cross examination. Finally, that the second phase involves fewer days in the courtroom makes it much easier for each side to estimate the costs of going forward, compared to their guesses about the length of the trial before it began. Two or three more days are easier to estimate accurately than six to nine days. The parties are less susceptible to either excessive optimism or information asymmetries about the remaining costs, either of which could explain their failure to settle previously.

Information disclosed through litigation has a diminishing marginal value, with occasional exceptions for surprises in the witnesses' testimony, or other unexpected events.[92] Each new fact or piece of evidence generally has less weight in forcing a conclusion on its own as the total body of information grows. From the standpoint of information disclosure (whether for the parties or for the finder of fact), the second phase would have continually decreasing value, and less value at the outset compared to the first phase. The decreasing marginal value of information applies regardless of which issue the parties litigate first. With any type of bifurcation, the parties get less value for the information obtained in the second phase, assuming the litigation costs are constant. In theory, if the second phase were much cheaper, this difference could offset the decreasing value of the information garnered from the new phase. Even if the litigation costs are not constant, however, the value of information for each dollar spent on litigation

90. *See* Mildiz, *supra* note 69. Mildiz also notes the consensus in the academic literature that the failure of some cases to settle can be due to information asymmetries or excessive optimism by the parties.

91. Grundfest & Huang, *supra* note 56, at 1–2.

92. *See* Mildiz, *supra* note 69. Mildiz notes that, "the . . . learning will slow down, and it will no longer be worth waiting for them to change their minds. This is when they reach an agreement." *Id.* at 3. If parties could continue negotiations indefinitely, their views would eventually converge as their information reached the same level; Mildiz offers economic models to show that parties settle before this point, once they realize their "learning" from the other has slowed down.

decreases as the trial progresses.

New opportunity costs for the parties can arise during the first phase of trial, making the overall expected costs higher, and the net payoffs lower, than either party expected when they failed to settle before the trial began. Conversely, existing opportunity costs are unlikely to decrease during the first phase because many have become sunk costs once the parties opt to proceed to trial.

For example, suppose the plaintiff's attorney[93] had to forego another case in order to take the present case; that was an opportunity cost at the beginning. Or suppose the defendant had to forego a lucrative purchase or merger due to the pending litigation; this could be another opportunity cost that the plaintiff and his attorney know at the outset.[94] When they know these possible costs before the trial begins, the parties can incorporate the loss into their calculation about whether to proceed to trial.[95] When the same types of opportunities arise after the trial begins, however, the parties must reassess their costs and benefits of going forward with the litigation. Opportunities foregone by choice beforehand are already sunk costs; the new opportunities being missed are unanticipated costs.[96] From the standpoint of opportunity costs, therefore, the parties are more likely to have higher opportunity costs by the time they finish the first phase, giving them a new incentive to settle during the new round of negotiations that bifurcation provides.

B. Reverse bifurcation has special effects on settlement because it is inherently harder for either side to predict the outcome of the damages phase than the liability phase.

In a projected outcome where the plaintiff wins, the amount of the prospective damages always spans a range—from the plaintiff's cost of

93. *See, e.g.,* Alon Harel & Alex Stein, Auctioning *for Loyalty: Selection and Monitoring of Class Counsel*, 22 YALE L. & POL'Y REV. 69, 82 (2004) (illustrating how attorney opportunity costs in class action litigation affects settlement).

94. *See, e.g.,* Peter H. Huang, *Lawsuit Abandonment Options In Possibly Frivolous Litigation Games*, 23 REV. LITIG. 47, 76 (2004) ("[i]n reality, it is not just legal costs, but also the opportunity costs, such as the prospective harm to a defendant's reputation, that might lead a defendant to settle a lawsuit by effectively purchasing the plaintiff's litigation continuation options.").

95. *See* Leah C. Fletcher*, Equal Treatment Under Patent Law: A Proposed Exception to the On-Sale Bar*, 13 TEX. INTELL. PROP. L.J. 209, 230 n.139 (2005) (noting that the costs of diverting resources and the opportunity costs can exceed the direct costs of litigation.); *see also* Kathryn E. Spier, *"Tied To The Mast": Most-Favored-Nation Clauses in Settlement Contracts,* 32 J. LEGAL STUD. 91, 96 (2003).

96. *See* Jeffrey O'Connell, Jeremy Kidd, & Evan Stephenson, *An Economic Model Costing "Early Offers" Medical Malpractice Reform: Trading Noneconomic Damages for Prompt Payment of Economic Damages,* 35 N.M. L. REV. 259, 291 (2005) (addressing the dissipation of original opportunity costs as the litigation proceeds).

litigating phase one, including pre-trial discovery, up to some maximum, which is often unknown, and possibly very high. This range is especially true where punitive damages are available.[97] We can assume the minimum is the plaintiff's cost of litigating phase one because the plaintiff would not have proceeded to trial if she did not expect the returns on the case to cover at least the cost of litigating the first phase. She might have brought the case, however, thinking that it would probably settle before the second phase, making her expected litigation costs lower. The prospective value of the case, then, follows this formula:

$$L_{p1} \leq V \leq V_{max}\,(Unknown)$$

In the formula, *L* is the cost of litigating, *p* refers to the plaintiff's costs, and *p1* refers to the plaintiff's costs in phase one alone. "*V*" is the expected value of the damages. "V_{max}" refers to the unknown, and often unknowable, maximum damages. Alternatively, assuming that the defendant would have settled for any amount lower than the cost of litigating phase one, then defendant's costs, represented by *d1*, would replace *p1*.

By contrast, the liability phase will normally be an "either-or" question: the defendant is liable or not. A comparative negligence regime naturally complicates this question, but evidence of comparative negligence usually comes in the damages part of the trial. Either-or questions are a matter of odds and are therefore much easier for the parties to estimate in most cases. For example, a party may estimate its chances of prevailing versus losing on the liability issue at 60–40 or 50–50. The damages estimate, on the other hand, is an odds number times every point on a continuum between L_{p1} and $V_{max.}$ In other words, the possible damages are inherently indeterminate compared with liability questions, which are simply the odds of a "yes" or a "no."

For example, assume that in a Fen-phen tort action, the cost of litigating through the end of phase one in a reverse-bifurcated trial is $10,000. The parties are weighing whether to settle the case, or for how much. For simplicity, assume that both parties think is the plaintiff has a 50% chance of ultimately prevailing, given the evidence in the case and the legal precedent in that jurisdiction. The plaintiff hopes to settle after phase one at the latest, so she will accept a settlement offer that is equal to or greater than $10,000. The plaintiff's settlement demands will

97. Counterclaims can encumber estimates about the liability questions, but they also introduce a second layer of potential damage calculations into the decisions about whether to settle. The added layer of damages introduces additional uncertainty and unreliability into the estimates.

reflect the 50% probability of the award range, which must be greater than $10,000—or else she has no reason to proceed—but could "max out" in the tens of millions.[98] The parties know the final verdict could be any amount into the tens of millions. Even if they pick round numbers, such as $1 million, $5 million, or $10 million, along the way as milestones, each amount must also have a probability, the odds that the verdict will reach that high. These probabilities change all along the continuum: the parties, presumably, will find it more likely that the plaintiff will win $10 million than $110 million for the case; the former might be a 20% chance and the latter a 1% chance, in either party's estimation.

The point is that damages are inherently more difficult to estimate beforehand in most cases.[99] The damages involve more complicated estimates of a series of odds; and they also involve true Knightian uncertainty, because the maximum potential value is almost impossible to limit ahead of time.[100]

Reverse bifurcation determines the damages in phase one, so the parties have in hand the most elusive information before the second round of negotiations leading into phase two. Phase two, the liability question, is much simpler for the parties to guess or bet on, because it is a simple either-or question. This latter question is, therefore, less of a barrier to settlement than the murkier question resolved in phase one. The parties are more likely to settle once the uncertain matter of damages becomes clear. This aversion to uncertainty suggests that the parties are more likely to settle mid-trial with reverse bifurcation than with traditional unitary trials; they are also more likely to settle mid-trial than they would with a regular bifurcated trial (liability first, damages second).

98. Grundfest and Huang use similar analogies through their insightful article to explain why each phase of a trial offers complex new incentives to settle, but they do not address the problem of damages being indeterminate compared to liability odds. *See generally* Grundfest & Huang, *supra* note 56.

99. Contract cases, however, offer a notable exception, as damages are usually stipulated beforehand, or are statutory.

100. *See generally* FRANK H. KNIGHT, RISK, UNCERTAINTY, AND PROFIT 197–263 (1921). Knight was the first economist to distinguish "risk" from "uncertainty." For Knight, "risk" refers to a possible event with known (or at least knowable) odds of occurring. Rolling dice, for example, involves statistically predictable outcomes—each die has a one-in-six chance of landing on a given number on each roll. In terms of managing investment risks, actuaries who have a large enough sample group can make reasonable predictions about the likelihood of losses due to fire, flooding, and even certain types of litigation.

"Uncertainty" refers to those cases where either the range of possible outcomes is truly unknown, or where the relative odds of different outcomes are unknowable. Knight's thesis throughout his book is that all true "profits" in business (as distinguished from net revenue, which mostly goes to compensate the owner for opportunity costs) are due to uncertainty instead of risk. Subsequent theoreticians, like Daniel Ellsberg, observed that people are more averse to uncertainty than to risk.

Not only do damages span a continuum, but they involve more subjective and aesthetic elements than do the liability questions. The victim's pain and suffering, and the attractiveness or likeability of the plaintiff can affect the jury in unpredictable ways, basically depending on an ephemeral mixture of empathy and sympathy. The political ideology of the jury regarding redistribution of wealth and the legitimacy of big business also seem to affect the size of jury verdicts.[101] Salience heuristics also affect the jury's empathy and felt need for deterrence—a particularly vivid portrayal of the wrongful act and the injury can make the jury overestimate its likelihood to recur (or happen to them). The likelihood and quantitative scope of this psychological effect is hard to predict.

Liability rules, in contrast, are more objective, involve more per se rules, triggering a guaranteed outcome, and broad, clearly-delineated categories into which the case must fit. For example, the liability question for Fen-phen requires consideration of, among other matters, industry standards for pharmaceutical companies and whether the defendant actually manufactured the product. Per se rules could generate either strict liability for certain acts, or could implicate an automatic bar or shield to liability in other cases, as with the production and marketing of vaccines.[102] Even where per se legal rules do not apply, the different types of negligence have well-established elements into which the case must fit. Each of these factors makes liability a more objective question than damages and therefore easier to predict ahead of time.

The only way to predict something as random as damages is to use an actuarial approach as a proxy: in the last thousand cases involving severed limbs, for example, the average verdict "X" dollars. The reliability of such projections depends largely on the sample size and the similarity of the members included in the sample. Given the variables of the victims' age, gender, race, income, attractiveness, carefulness—all of which can affect the size of the verdict, it seems—actuarial predictions for the upcoming case become shaky. By comparison, reliably predicting the liability question can be as easy as finding one Supreme Court case that is on-point. A single case can make the liability question very predictable and certain; a host of factors conspires

101. *See* American Tort Reform Association, *Judicial Hellholes* (2005), *available at* http://www.atra.org/reports/hellholes (study of locales with disproportionately high jury verdicts in personal injury and other cases).

102. *See* National Children's Vaccine Injury Act, 42 U.S.C. §§ 300-aa-1–300-aa-34 (2006) (discussed in Katherine Bulfer, *Childhood Vaccinations and Autism*: *Does the National Childhood Vaccine Injury Act Leave Parents of Children with Autism Out in the Cold with Nowhere to Go?,* 27 CAMPELL L. REV. 91 (2004)).

to make the predictions of damages uncertain and confusing.

Ellsberg's paradox becomes relevant at this point.[103] People (and parties) are risk-averse in general, but they are even more averse to uncertainty than they are to risk. Ellsberg conducted famous experiments in which subject faced two urns, M and N, which each contained one hundred red or black balls. Subjects were informed that Urn M contained exactly half red and half black balls; the other contained an unknown proportion of each. Bets were placed on the subject's ability to draw a black ball from either urn; subject showed a strong preference for Urn M, for which they knew the likelihood of winning (fifty percent); this presented a contradiction to the classic rational-actor model of economic thought, because the subjects had no rational basis for such a consistent preference. Uncertainty was just as likely to favor them, especially when compared to a fifty-fifty chance, as it was to disfavor them. This pattern of human decision-making has been verified in innumerable subsequent experiments and came to be known as Ellsberg's Paradox.[104] Uncertainty can take the form of straightforward ambiguity: the individual knows the set of possible outcomes, but cannot ascertain the relative likelihood of one as opposed to another. Alternatively, uncertainty can take the form of the individual's recognition that there are unknown or hitherto unimagined possible outcomes of a situation, an awareness of one's own ignorance. This latter type of uncertainty would not apply to Ellsberg's experiment, of course, because the subjects knew that they would either draw a black ball or a red one; there was no chance of drawing yellow or blue.[105]

Litigants will pay more to avoid uncertainty than to avoid risk, either in the form of paying a higher settlement (for the defendant) or accepting a lower one (for the plaintiff).[106] Uncertainty is a cost, and

103. *See generally* Daniel Ellsberg, *Risk, Ambiguity, and the Savage Axioms*, 75 Q. J. ECON. 643 (1961).

104. *See, e.g.*, Isaac Levi, *Introduction* to DANIEL ELLSBERG, RISK, AMBIGUITY AND DECISION ix–xi (2001).

105. *Id.* Applying uncertainty principles to legal settings can implicate either type. Individuals will sometimes face discrete possible outcomes, such as winning or losing a case, but may have unquantifiable odds for either outcome (as when the case is based on a novel but compelling argument, or where both parties have very poor evidence for their side). Jurisdiction and venue questions, such as whether one's criminal case will be prosecuted in state court or federal court, also provide finite sets of options but (sometimes) uncertain probabilities of one outcome actually occurring. Other situations confront us with unknown possible outcomes—the amount of punitive damages in a newer type of mass tort claim, for example, or the types of torts for which we may become victims.

106. As another illustration of the distinction between risk and uncertainty (in terms of people's aversion to each), suppose a law professor proposes to a law school class that the final examination consist entirely of 200 multiple-choice questions. Questions 101–200 are verbatim repeats of the first 100, with the same answer options. Students then have the option to split their answers for questions where they truly could not decide between two plausible multiple-choice answers. Of course, this is

more costly than simple risk. Liability questions are more akin to simple risk; damages are more like costs. Reverse bifurcation eliminates the issue with the most uncertainty first; with the attendant trepidation removed, the parties can more easily reach an agreement and settle.

C. The fact that plaintiffs "move first" in each phase of litigation games, combined with the information asymmetries between the parties in each phase, allows reverse bifurcation to foster more settlements.

The parties do not have the same decision-making power regarding litigation. The plaintiff is always in the first-move position in litigation games, because the plaintiff alone decides whether to file the case at the beginning, and decides whether to proceed with it or abandon it at each interval. At the least, the plaintiff has superior options for deciding whether to proceed to phase two in a bifurcated trial.

Each party has some private information that the other party does not learn until it comes out during the trial. The parties' private information tends to be about different issues, however, because the plaintiff-victim knows more about her own injuries and suffering, and the defendant know more about how careful or negligent she truly was.[107]

Because the plaintiff is in the first-move position in litigation games and has superior options for deciding whether to proceed to phase two, the plaintiff's private information dominates the direction of the trial more than defendant's private information. This effect of private information reinforces reverse bifurcation's strong effects on parties' incentives toward settlement.

For example, assume in a toxic torts case that the plaintiff suffered debilitating side-effects from the defendant's pharmaceuticals.[108] Under the modern procedural rules encouraging pre-trial discovery, both sides

perfectly irrational from an economic or risk-management standpoint; a 50% chance of getting both questions 39 and 139 correct is worth the same as getting one right and one wrong. A surprising number of students presented with this scenario, however, insist that they would split their answers if given the chance (anecdotally, this has always been the majority position in the class). They understand that they have guaranteed a forfeit of one question, but this was an acceptable price for having near certainty of getting the other question correct. Students who would opt for splitting their answers on unsolvable dilemmas (questions easily narrowed to two choices, but with seemingly equal plausibility for either being correct) demonstrate the premium they would pay to eliminate uncertainty. Some students refer to this as "purchasing partial credit" on the multiple-choice examination, but the real benefit the students want is elimination of the chance that they got both questions wrong.

107. BAIRD ET AL., *supra* note 43, at 251–56.

108. *See, e.g.,* William Jordan, $*2.25 Million Verdict in Suit Against Diet Drug Manufacturer*, VERDICTS, SETTLEMENTS & TACTICS, May 2005, at 47 (Philadelphia diet drug products liability case awards $2.5 million to 3 plaintiffs in phase one, Defendant Wyeth was found liable in phase two); Gaskins, et al. v. Wyeth Pham., Inc., 16 ST. LOUIS VERDICT REP. No. 33 (2005) (Fen-phen case where defendant sought reverse bifurcation and settled for a confidential amount).

must disclose relevant witnesses and documents to the other; but each has an incentive to obfuscate, or find loopholes in the discovery requests to justify nondisclosure of strategic information. Even apart from discovery-dodging, however, the parties have some subjective, private information that is undiscoverable. The plaintiff knows the true extent of her pain or suffering, lost bodily functions, chilled relationships, loss of self-esteem or self-confidence, etc. The defendant knows whether she foresaw the injury, whether she could have easily prevented it, and so on. Put another way, the plaintiff's information about the defendant's level of care is a subset of what the defendant knows, and the defendant's information about the plaintiff's injury is a subset of what the plaintiff knows. The plaintiff's information about the defendant's level of care will come either from her eyewitness experience of what the defendant did, which the defendant already knows, or from information the defendant turned over during pre-trial discovery. The same applies for the defendant's knowledge of the plaintiff's injuries—the information comes either from the defendant's witnessing the harm first-hand, which the plaintiff already knows, or from information the plaintiff turned over voluntarily.

Generally, the plaintiff's private information affects settlement negotiations in two unique ways: the plaintiff makes the major decision about whether to proceed to each subsequent phase of the trial, and the plaintiff's private information has the most bearing on the range of possible outcomes for the verdict. In both unitary trials and regular bifurcation, the plaintiff's possession of private information creates a prisoner's dilemma situation, because the plaintiff has an incentive to send signals exaggerating her privately-known injuries, and the defendant, knowing the plaintiff's incentives, will discount any moves by the plaintiff by the likelihood that the plaintiff is bluffing.[109] This prisoner's dilemma interferes with the parties' reaching agreements that would benefit them both.[110]

Reverse bifurcation, however, completes the disclosure of the plaintiff's relevant private information during the first phase, somewhat leveling the playing field between the parties, and ending the prisoner's dilemma described above. This arrangement may disfavor some plaintiffs, such as those with low damages who try to bluff in order to get higher settlements than they deserve. At the same time, reverse bifurcation helps plaintiffs overall by making their signals more credible to defendants in subsequent rounds of negotiations. Defendants no

109. *See* Mildiz, *supra* note 69, BAIRD ET AL., *supra* note 43, at 251–59; *see generally* Grundfest & Huang, *supra* note 56.

110. BAIRD ET AL., *supra* note 43, at 251–59.

longer need to discount the plaintiffs' signals to account for the fakers, as previously.[111]

Disclosing the plaintiff's private information first, as occurs in reverse bifurcation, can level the playing field from a different angle as well: The pre-trial discovery procedures tend to favor plaintiffs over defendants in terms of access to private information.[112] Given that the elements for negligence or recklessness are relatively objective, culling the defendant's relevant private information before trial is easier than culling the plaintiff's more subjective information. This potential imbalance in the information disclosure that inheres in the discovery rules is remedied when the plaintiff's information comes out first at trial.

In mass tort litigation, which to date is the most common arena for reverse bifurcation, the defendant is often a repeat-player, while the plaintiffs file cases individually. This mixture of unique plaintiffs facing the same defendant over the same tortious act, i.e., manufacturing asbestos, marketing Fen-phen, means that the defendant's relevant private information may have been previously disclosed in earlier rounds of litigation with other parties. Thus, mass tort litigation can have an inherent information asymmetry between the parties. Reverse bifurcation is ideal in these circumstances, because the second phase, liability, which focuses on the defendant's conduct, is largely unnecessary, and disclosure of the plaintiff's information on injuries at the beginning helps level the playing field for negotiations and settlement after the first round.[113]

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111. One could say this eliminates the "lemon" effect for plaintiffs. *See, e.g.,* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970). *See also* Bruce Hay, *Sting Operations, Undercover Agents, and Entrapment,* 70 MO. L. REV. 387, 412–13 (2005) (applying the "lemons" concept to undercover sting operations by police):

> When deterrence is the objective, the government creates something akin to the well-known market for lemons. The government introduces lemons—phony criminal opportunities—that resemble the genuine article. To the would-be offender, the risk of being caught in a trap makes it costlier to seize apparent opportunities for crime. He may therefore turn away genuine opportunities that would otherwise attract him. Just as the presence of lemons in the auto market discourages the sale of even good cars, the presence of lemons in the market for crime discourages genuine criminal transactions. If the sting totally succeeds, the market for real criminal opportunities "unravels," driving criminals into other activities. For example, if there were enough phony buyers of narcotics on the street, the price of drugs would rise so high that genuine buyers would disappear.

Id.

112. Pre-trial discovery may be more costly for plaintiffs in other ways, however, especially if the defendants is a corporation often engaged in litigation—and therefore prepared with stock answers to most interrogatory questions, etc.—and the plaintiffs are first-time litigants, who are ill-prepared for production requests and extensive interrogatories.

113. At the same time, the repeat-player phenomenon in mass torts is more symmetrical from the

Another implication of the information-analysis under a reverse bifurcation regime is the effect it can have on pre-trial discovery, and then on pre-trial negotiations. Pre-trial discovery currently overlaps with preparation for trial, and the traditional trial order tackles the liability question first. This dovetailing of discovery with trial preparation would encourage the discovery focus on the first issue of the trial, the defendant's liability. Reverse bifurcation, however, forces the parties to investigate and develop their evidence about the plaintiff's injuries as they prepare for the first phase of the trial, pushing more information about the plaintiff's private information into the pre-trial discovery period. This incentive to produce more relevant information about the plaintiff's injuries before trial fosters more settlements before the first phase even begins, as the parties have more realistic, and more convergent, views of the value of the case.

D. Information about damages offers a greater number of positive externalities after the trial than the liability information.

Settling cases after phase 1 under a reverse bifurcation regime has more social benefits than settling after phase 1 of a regular-order bifurcated trial.[114] The information generated and disseminated through the litigation process can have a significant social value because it alerts everyone to the size of the harm associated with certain risks.[115] The plaintiff's information—pertaining to the injuries—is particularly useful, because the defendant's conduct is rarely associated with harm by pure surprise. When useful information remains private and undisclosed, as occurs with settlements under a traditional trial sequence, "the plaintiff's

standpoint of the attorneys involved; many plaintiff's lawyers specialize in particular mass torts, so the litigators on each side (representing the litigants) will face each other repeatedly. Given that the defendant's information is already known by counsel for both sides after the first several cases, reverse bifurcation allows the plaintiff to avoid having to send false signals about the scope of the injuries in each case, which enhances the credibility of each lawyer's signals in negotiations and further fosters settlement. *See, e.g.,* Ananish Chaudhuri et al., *Trust and Trustworthiness in a Sequential Bargaining Game* (Wellesley Coll. Working Paper No. 2002-10, 2002), *available at* http://ssrn.com/abstract=370061. The repeated rounds inherent in a bifurcated trial make the parties repeat players and introduce more reciprocity influences. The attorneys' incentives to build trust with each other can overshadow their client's incentives to send misleading signals to the other side during negotiations. *See* BAIRD ET AL., *supra* note 43.

114. *See, e.g.,* Hua & Spier, *supra* note 30. Hua and Spier argue that litigation produces and disseminates information that is useful to society overall, especially regarding the scope of the harm or damages, and that settlements (especially confidential settlements) can therefore be undesirable. The authors cite the *Exxon Valdez* litigation as an example of litigation providing useful information about the scope of harms from oil-barge catastrophes.

115. *Id.* at 2.

decision [to settle] is endogenous and hinges on the liability rule."[116] Reverse bifurcation allows an optimal equilibrium where many cases can avoid the litigation costs of a full trial by settling after phase one, while the useful information still comes to light because the determination of damages occurs first in the sequence. "The accurate determination of damages—even those that may become known years later—provides those engaging in similar risky activities with valuable information for future decision making."[117] The information is useful for both potential tortfeasors and potential victims; both can adjust their behavior to avoid the harm in light of the information about the scope of the possible injuries. Traditional trial order shortchanges this benefit, whereas reverse bifurcation fosters it.

E. Apart from the possibility of liability evidence embarrassing the defendant, the plaintiff's costs are higher than the defendant's in the second round of a reverse bifurcated trial.

The plaintiff's differing costs in each phase of litigation must factor into an analysis of the parties' incentives to settle at different points in the process.[118] The plaintiff's costs are not constant throughout the rounds of sequential litigation; they are lower for the damages phase because the plaintiff is intimately acquainted with her own injuries and losses. When we reverse the order of the trial, the plaintiff has superior information in the first round, and therefore must do less investigation, analysis, and sorting of data to prepare for phase one of the trial. By contrast, the plaintiff has both higher discovery and preparation costs for the second phase but also much greater risks than the defendant. The plaintiff faces a possible outcome of zero if she proceeds to the second phase in reverse bifurcation; the entire award could be jeopardized, so the stakes are quite high for the plaintiff.

The defendant, on the other hand, is hoping for a no-liability decision in the second phase (that is, a zero verdict), so he mostly stands to gain from the risks in the second round of the trial. Both parties face additional cash outlays, as mentioned above, for information with a decreasing marginal value, but the risk factor is asymmetrical for the parties in phase two. This means that the plaintiff has particular incentive to settle once the value of the case is clear. It also means that a threat by the plaintiff to proceed to phase two during settlement

116. *Id.* at 3.

117. *Id.*

118. Landes seems to ignore this fact in drawing his conclusions that bifurcation discourages settlements; he assumes litigation costs are equal for each phase. *See* Landes, *supra* note 43.

negotiations is more credible because doing so is so costly for the plaintiff. The defendant will assume the plaintiff must have extremely incriminating evidence about liability if the plaintiff is willing to proceed to the second phase.

One implication of this asymmetry in risk is that plaintiffs who are more risk-averse (or who have less money to litigate in phase 2), are more likely to settle between the phases of a reverse-bifurcated trial. Similarly, if both parties are more averse to uncertainty than to risk,[119] the defendant's costs in phase two are lower than in the first phase. The plaintiff has less uncertainty in the first phase than the defendant, but faces far greater risk in the second phase.

F. Reverse bifurcation simplifies jury instructions more than unitary trials or regular-bifurcated trials.

Reverse bifurcation allows the court to break jury instructions into smaller, more discreet parts. These instructions or severed determinations should be more manageable for juries, although some academic commentators debate this point.[120] Reverse bifurcation does more, however, than break jury instructions into more manageable pieces; to the extent that the second phase never materializes, which seems to be most of the time when courts use reverse bifurcation, the jury decides only half of what it would in a unitary trial. The jury in most cases will decide only damages. Reverse bifurcation does not just simplify jury instructions; it reduces them significantly.

This reduction in jury instructions has several implications that affect the strategic decisions of the parties. The instructions reverse bifurcation tends to eliminates are instructions about liability and legal rules.[121] These instructions in particular are harder for jury layperson to comprehend, and the most likely result in appellate reversal.[122] Anticipating the greater appellate scrutiny of these instructions, trial judges have an incentive to make them longer and longer, more detailed, and consequently more tedious.

From the standpoint of the parties in the litigation, jury instructions that are simplified and more manageable mean less uncertainty, that is,

119. *See* discussion *supra* Part III.B.

120. Most of the debate over jury instructions focuses on the use of special verdicts and other commonly used techniques to sever elements of decision-making. *See generally* Thornburg, *supra* note 18; Ratliff, *supra* note 18, at 89; Bowers, et al., *supra* note 47; Lombardero, *supra* note 49, at 275–300.

121. Reverse bifurcation puts the legal question—liability—in the second phase, which the jury never reaches if the parties reach a settlement after the first phase, which is the main purpose of reverse-bifurcating in the first place.

122. *See supra* text accompanying note 20.

hopefully producing more reasonable verdicts. Reduced uncertainty helps both parties reach more realistic and convergent predictions about the verdict beforehand, making an agreement easier to reach in settlement negotiations. Anything that reduces jury confusion should enhance the mutual settlement power of the parties before the case ever reaches a jury.

The elimination of liability instructions in many reverse-bifurcated cases, however, also means that there should be fewer reversals by appellate courts. Fewer reversals, in turn, means lower incentives for the losing party to appeal, and the unlikelihood of potential appeals lowers the *ex ante* costs of litigation, which further enhances the present value of settlement offers from either party.

Two tangential benefits of reverse bifurcation pertain to jury instructions. Simplified jury instructions means the parties spend less time during the trial preparing their proposed instructions, or haggling over which party's instructions the court should adopt. Simplified jury instructions also enhance judicial economy to avert the time spent preparing and arguing over the jury instructions. In addition, shorter litigation time could mean fewer people seeking to be excused from jury duty. If courtroom time decreased, presumably jury duty would be less burdensome for potential jurors with regular employment. Reverse bifurcation, like any measure that reduces trial time, can eventually broaden the actual jury pool (that is, those who will actually serve on juries, as opposed to those who can receive summons) and affect its composition.

G. Reverse bifurcation prevents an overinvestment by the parties in liability determinations, which in unitary trials can skew the value of the case upward.

The traditional trial sequence typically begins with evidence about liability. The defendant in this phase has an incentive to deny any wrongdoing or liability as stridently as possible because a negative answer on liability means a zero verdict for the plaintiff. This approach is a gamble, however, because if the jury finds liability anyway, the strident denials will appear as a lack of remorse on the defendant's part. An apparent lack of remorse makes the defendant seem even more blameworthy and the conduct all the more reprehensible, which is likely to drive the verdict upward. Whether the jury seeks retribution against the seemingly callous wrongdoer, or sees a need for greater deterrence to compensate for other defendants' inability to see the wrongfulness of their action, the punitive damages will increase, and the compensatory

damages are likely to be more generous.[123]

Suppose the parties or their lawyers can sense that the jury is feeling annoyed by the defendant's denials, and they realize the denial is increasing the stakes of the trial.[124] The plaintiff now has a double incentive to respond by investing more effort in this phase. The defendant's steadfast denial of liability means the plaintiff risks getting nothing at all if the denials persuade the jury; but the same denials have increased the size of the verdict should the plaintiff prevail. The plaintiff now has a higher potential prize but a greater chance of losing everything. The natural response is to invest more and more in this phase, to use increasingly desperate measure to prejudice the jury in her favor.

The defendant must respond to the plaintiff's increased investment (or methods that are more questionable) with her own increased resistance. The defendant is now even more desperate to deny, and may even take more risks to offset the plaintiff's reinforced efforts, which raises the stakes still more. The trial thus escalates, and the stakes shift to a choice between a disproportionately high verdict, or nothing at all. The gamble becomes greater for both parties as they proceed in the liability phase of a traditional trial. The increased stakes do not simply make settlement more attractive; instead, they make the value of the case greater, depending on each side's confidence in their ability to carry the jury on the preliminary question of liability. The possible outcomes of the case polarize to two extremes because there is a higher chance of a zero verdict and the same time the alternative outcome becomes an ever-higher verdict.[125] As a result, the parties have incentives to invest disproportionately in an effort that continues the escalation.

Reverse bifurcation eliminates this escalation effect and keeps the value of the case closer to the actual harm involved. If punitive damages are part of the pre-liability phase of determinations, such damages are more likely to reflect a calculation of the needed deterrence value, rather than a retributivist impulse for revenge by the jury—based partly on the

123. *See, e.g.,* Jost, *supra* note 12. Jost explains, "Before the second agent [read "attorney"] acts, he observes the effort decision of the first [attorney]. Thereafter, the agents' output are [sic] produced and the one with the highest output receives the winner prize whereas the other agent gets the loser prize." *Id.* at 2.

124. *See* Lisa Blue & Robert Hirschhorn, *Make The Most Of Your Jury Questionnaire*, 40 TRIAL 78, 82 May 2004 ("Jurors often tell us, for example, that they were annoyed by lawyers who repeated themselves."); *see also* Robert A. Klinck, *The Punitive Damage Debate,* 38 HARV. J. ON LEGIS. 469, 483 (2001) (use of sterile cost-benefit analysis as a justification by the defense annoys jurors).

125. *See, e.g.*, Jim M. Perdue, Sr. & Jim M. Perdue, Jr., *Putting the Pieces Together*, 39 TRIAL 39, 45 (May 2003) ("[s]ubstantial plaintiff verdicts are rarely, if ever, motivated primarily by sympathy. Jurors award substantial damages when they are offended and angered by the defense or inspired by what the plaintiff and the plaintiff's witnesses represent.").

unfortunate defendant's need to deny liability as much as possible.

IV. WHEN REVERSE BIFURCATION IS MOST APPROPRIATE

A. Reducing Uncertainty

No procedural device is universally beneficial or suited for every case. Reverse bifurcation could bring benefits in more cases than just the current ones where courts use it. At the same time, in some settings, the procedure could cause problems or at least fail to offer any advantages.

Some cases present great uncertainty for the parties on questions of liability. One of the main advantages of reverse bifurcation is that it can usually eliminate uncertainty for the parties by resolving the biggest "unknown" most parties face as they approach litigation: the scope of damages. Uncertainty[126] about the potential size of a verdict interferes with settlements because the parties lack mutual information that would foster an agreement,[127] at least in Coasian terms.[128] When the greatest

126. "Uncertainty" here refers to Knightian uncertainty rather than Bayesian uncertainty. *See* FRANK KNIGHT, RISK, UNCERTAINTY, AND PROFIT 197–263 (1921).

127. *See* Emily M. DeFalla, Comment, *Voir Dire for California's Civil Trials: Applying the* Williams *Standard*, 39 HASTINGS L. J. 517, n.6 (1988) (noting that typical cases settle because the attorneys can predict the basic outcome of the case); *see also* Robert L. Haig & Steven P. Caley, *Shedding the Defense Mindset: Representing Corporate Plaintiffs in Complex Litigation*, 20 AM. J. TRIAL ADVOC. 69, 77 (1996) ("[S]ettlement always has certain benefits over seemingly interminable litigation. These benefits may be significant depending upon the particular circumstances of the case."); Amelia Porges, *Settling WTO Disputes: What Do Litigation Models Tell Us?* 19 OHIO ST. J. DISP. RESOL. 141, 172 (2003) ("Failure to settle occurs because one side has less knowledge than the other about the facts and law determining liability and damages, and therefore is unable to make an offer that the other side should accept."). Uncertainty can result in regrettable settlements, which parties take pains to avoid beforehand: "Before losing in court, even a nuisance plaintiff has some possibility of obtaining a settlement if a risk-averse defendant does not know how good the case really is, and would rather not go to court to find out." *Id.* at 174.

This is not to say that uncertainty is the only consideration influencing parties in settlement negotiations. Cases may settle due to the lawyer's and parties' desire to prevent negative publicity. *See* James A. Bresto, Comment, *Taking the Punitive Damage Windfall Away from the Plaintiff: An Analysis*, 86 NW. U. L. REV. 1130, 1153 (1992) (noting that defendants may settle to avoid publicity); S. Kristina Starke, *Exceptional Circumstances Justifying Vacator When Lower Court Decision Mooted by Settlement: Repeat Litigants Slide into Home with Second Circuit Decision*, 1999 J. DISP. RESOL. 97, 100 (1999) ("some parties may prefer settlement to avoid publicity."). In a study identifying factors statistically correlated with settlement decision, research indicated that "men settle less often than women, that married people settle more often than those who are not married, and that people who report high or low incomes are less likely to settle than disputants with medium income." James Todd Kennard, *Lawyers, Sex, and Marriage: Factors Empirically Correlated with the Decision to Settle*, 2 HARV. NEGOT. L. REV. 149, 161–62 (1997).

To this array of competing interests, Chris Gurthrie adds, "Litigants who settle never learn what they would have recovered at trial, but litigants who reject settlement offers in favor of trial learn the

uncertainty lies in the area of liability, however, the situation is different. As an illustration, in many contract claims, the damages are certain from the outset so that the parties can simply stipulate on the issue and proceed to litigate only the disputed questions of duty and conduct.[129]

This effect of uncertainty would explain why reverse bifurcation arose in the context of mass tort litigation, such as asbestos cases, and now Fen-phen cases. Little doubt existed about which companies manufactured these products, or could share in the liability. The truly difficult questions were apportionment of damages between multiple defendants (individual injuries in such cases are rarely traceable to a single manufacturer), and the degree to which the injuries should be offset by the victims' own contributions to their failing health (smoking, alcohol abuse, etc.). Reverse bifurcation presumably allowed the parties to resolve up front the most contentious issues in the case—where the most uncertainty lay—so that settlements could flow freely from the first-phase verdicts, at least in theory.

In cases where the liability questions present the most room for speculation, however, reverse bifurcation could simply delay consideration of the questions that keep the parties apart (that is, the real obstacles to quick settlement). Under such circumstances, the parties

outcomes of both options. Settlement, thus, offers litigants an opportunity to avoid, or at least minimize, regret, while trial increase the likelihood litigants will experience regret . . . the Regret Aversion Theory posits that litigants will choose settlement over trial to avoid feelings of regret associated with learning after trial that they should have settled." Chris Gurthrie, *Understanding Settlement in Damages (and Beyond),* 2004 J. DISP. RESOL. 89, 96–97 (2004).

128. *See* Coase, *supra* note 31. Coase famously describes how transaction costs can prevent parties from reaching mutually beneficial agreements (agreements that could otherwise render the legal system's assignment of rights somewhat irrelevant).

129. *See, e.g.,* 22 Am.Jur.2d *Damages* § 532 (2006) ("[t]he effect of a clause for stipulated damages in a contract is to substitute the agreed amount for the actual damages resulting from breach of the contract, thus preventing a controversy between the parties as to the amount of damages."). *See also* 22 Am.Jur.2d *Damages* § 533 (2006) ("If a provision is construed to be one for liquidated damages, the sum stipulated forms, in general, the measure of damages in case of a breach, and the recovery must be for that amount. No larger or smaller sum can be awarded even though the actual loss may be greater or less."); *see also* Coca-Cola Bottling Works (Thomas), Inc. v. Hazard Coca-Cola, 450 S.W.2d 515, 519 (Ky.1970) (citing above text); Island Creek Corp. v. Anker Energy Corp., 968 F.2d 1215, 1992 WL 159789 (6th Cir. July 10, 1992) (same); Uncle Henry's, Inc. v. Plaut Consulting Co., Inc., 399 F.3d 33 (1st Cir. 2005) (customer waived claim to any amount in excess of amount of previously stipulated damages); *In re* Udell, 18 F.3d 403 (7th Cir. 1994) (stipulated damages of $25,000 in contract claim). Courts honor stipulated damages readily. *See, e.g.,* Maryland Cas. Co. v. Ballard County, 289 S.W. 316, 320 (Ky. 1926):

> Courts are favorably inclined toward the adjustment of damages by the parties, and, when they enter into a solemn written obligation, by which they agree that the failure of a party to the contract to perform his undertaking shall be adjusted by the payment of certain stipulated damages which are not unreasonable, the courts will enforce the same.

Id.

gain little useful information—in terms of producing agreements—from determining the scope of damages first.

For example, when a case focuses on rights—such as due process concerns, which implicates the tensions between one person's freedom and another's property claims—determining damages first may be less useful. In general, any time rights or principles are more at stake than money damages, reverse bifurcation would bring less benefits and more unnecessary delays. Such cases primarily seek injunctive relief, however, and are readily identifiable. Employment reinstatements, cessation from harassment, or membership in a private (previously discriminatory) club, fall under the rubric of injunctive relief. On the other hand, cases pursuing injunctive relief often require pre-trial proceedings for temporary restraining orders, which in a sense are a form of reverse bifurcation—litigating about the remedy (injunction) before reaching the merits of the case itself.

Reverse bifurcation would also be less beneficial in "test cases" involving novel questions of law (like gun manufacturer liability or "fast food-fat" lawsuits), or when the precedent that could be created has disproportionate significance. These are cases where the plaintiff's injury or loss is dwarfed by the potential loss of liability for subsequent parties (whether plaintiffs or defendants). Of course, there is a continuum of relative tradeoffs between the present parties' interests and the precedent for future litigants. The following equation illustrates the formula for identifying the most relevant class of cases, where reverse bifurcation is less appropriate:

$$L_1 < L_2 p$$

L_1 is the injury or loss to the present plaintiff; L_2 is the resulting loss caused by the precedent for a future plaintiff or defendant, and p is the probability or estimated number of such parties over a reasonable time. Of course, the second L must be calculated twice, once for each possible outcome on the question of legal cognoscibility. If we assume a plaintiff's verdict in a case, the cost is not the same as the harm for future victims, because presumably liability will be spread across a large pool through insurance programs. A more sophisticated model would account for the reduction in p that insurers would foster through premium incentives. In case of a defense verdict, the second *L should* include the additional costs of loss-prevention that potential victims would internalize. A court could ask the parties to brief these questions to inform its assessment of whether bifurcation is warranted. One problem with this approach is that determining L_1—that is, finding a

consensus view on the current plaintiff's loss or inquiry—is essentially reverse bifurcation already.

Novel claims require some policy analysis from the court. The scope of the plaintiff's injuries can inform the cost-benefit analysis that influences the consideration about whether the novel claim should have redress in court. The information could also be useful for the parties in determining whether the claim truly merits litigation—not only in the present case, but in general. Even so, the usefulness of knowing the value of a novel case would not usually depend on the timing of this determination—it could come before or at the end of a trial. The greater uncertainty lies in the question of whether the claim is cognizable, so it is probably more efficient to adjudicate that question first.

Reverse bifurcation also can undermine the beneficial effects of the contingency-fee system, so cases where these effects are most desirable may be bad candidates for this procedural mechanism. When reverse bifurcation applies, the value of the case is set before adjudicating liability. The plaintiff's lawyer knows the fee of the case from that point, and cannot hope to increase it through extra effort, brilliant courtroom performance, or more probing discovery. Therefore, cases where the reliability of the results depends on ongoing discovery throughout the litigation—a situation the current discovery rules try to avoid—would be poor candidates for reverse bifurcation. Similarly, in cases with particularly unsophisticated or unsympathetic plaintiffs, who depend more on their lawyer's talent and judgment (both in strategy decisions and in offsetting their deficiencies as litigants), reverse bifurcation could deprive these plaintiffs from intangible benefits they would gain otherwise.

The beneficial "screening effects" that the contingency fee system offers are also undermined to some extent by reverse bifurcation. The plaintiff's lawyer can count on investing less time, given that the cases are more likely to settle immediately after the first phase, which addresses damages. To the extent that plaintiff attorneys weigh the potential worth of a case against their foreseeable costs for discovery and litigation (a process that may be intuitive for simpler cases but methodical for more complex ones), reverse bifurcation will decrease the projected costs for the attorney and make cases with lower forecast payoffs more worthwhile. This is undesirable in cases where the lower potential worth was due to less merit in the claim or less evidence to support it, because these cases produce less trustworthy verdicts. The contingency fee system eliminates some of these cases; as Professor Herbert Kritzer explains, "contingency fee lawyers do operate as gatekeepers: they turn away substantial numbers of potential clients,

most often because those potential claimants imply do not have a basis for pursuing the case."[130]

Similarly, the existence of true contingency fees provides a signaling function for the potential plaintiff about the feasibility of seeking judicial redress for her claim. One article suggests, "[a] plaintiff who cannot convince a lawyer to take his case on contingency receives a strong signal that his case is of low legal quality and will likely be deterred from filing."[131] A corollary of this notion is that contingency fees allow plaintiffs to send a signal to defendants that their claim has merit; some commentators have argued that the system therefore fosters higher settlements.[132]

On the other hand, the contingency fee system also tends to screen out some cases that are completely meritorious (and readily proved), but that yield an expected return lower than the current costs of litigation in a

130. *See* Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System*, 81 JUDICATURE 22, 29 (1997). In his often-cited statistical study, Kritzer discovered that, because of contingency fees, only one-fourth to one-third of phone calls received in a law office lead to representation. He concludes that "lack of liability & inadequate damages (singly or together) are the dominant reasons for declining cases." *Id*. at 27. The most common argument for the benefits of contingency fees seems to be the prevention of meritless claims. *See also* Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L..Q. 739, 754 (2002) (providing statistical data on how much screening actually occurs); George B. Murr, *Analysis of the Valuation of Attorney Work Product According to the Market for Claims: Reformulating the Lodestar Method,* 31 LOY. U. CHI. L.J. 599, 630 (2000) (stating that the contingent fee award regulates the number of meritless claims that are brought); Herbert M. Kritzer, *Holding Back the Floodtides: The Role of Contingent Fee Lawyers*, WIS. LAW., March 1997 at 10 (arguing that the screening process helps hold back the flood tide of unmeritorious cases).

131. *See* Eric Helland & Alexander Tabarrok, *Contingency Fees, Settlement Delay, and Low-Quality Litigation: Empirical Evidence from Two Datasets,* 19 J.L. ECON. & ORG. 517, 519 (2003). Qualifying this point, Thomas Miceli observes, "While it is true that a plaintiff's failure to secure counsel under a contingent fee is a signal that a case has no merit, it is not true that an attorney's acceptance of a case is a signal that a case *has* merit." Thomas J. Miceli, *Do Contingent Fees Promote Excessive Litigation?*, 23 J. LEGAL STUD. 211, 212 (1994).

132. *See, e.g.,* Neil Rickman, *Contingent Fees and Litigation Settlement*, 19 INT'L REV. L. & ECON. 295, (1999) (demonstrating that contingency fees "enable her to signal her confidence to her opponent. As a result, contingent fees may improve lawyers' incentives to bargain hard, thereby raising settlement offers and, if high offers are forthcoming, speeding settlement."). *See also* Angela Wennihan, *Let's Put the Contingency Back in the Contingency Fee,* 49 SMU L. REV. 1639, 1659 (1996) (suggesting that a positive aspect of contingency fee screening includes encouraging settlement of disputes).

One interesting study revealed that "[d]isputants who retain lawyers paid by contingency fee are more likely to reach settlement than those who retain lawyers paid a flat or hourly rate. Having the same lawyer from the beginning of the case is also associated with increased settlement rates." James Todd Kennard, Comment *Lawyers, Sex, and Marriage: Factors Empirically Correlated with the Decision to Settle*, 2 HARV. NEGOT. L. REV. 149, 161–62 (1997). Kennard reports, "[A] disputant who pays his lawyer on a contingency fee basis is more than twice (112%) as likely to settle as one who does not . . . a disputant who keeps the same lawyer throughout a legal dispute is 133% more likely to settle than otherwise." *Id* at 149.

full trial.[133] More of these meritorious claims could have their day in court if reverse bifurcation reduces the litigation costs. Screening out this second type of cases is undesirable, but under normal trial procedure is a necessary tradeoff for the benefit of eliminating many unmeritorious claims.[134] Reverse bifurcation could give rise to more of both types of cases; if another device is available for self-screening of unmeritorious or improvable claims, this could be a net benefit.

B. Jury Instructions

Jury instructions can be confusing, and are a common basis for reversal. Jurors without formal legal training must decipher the terms of art that delimit liability or guilt. In the traditional, non-bifurcated civil trial, we ask jurors to decide about a tangled web of issues all at once: credibility of the witnesses, reliability/relevance of the evidence, causation, the defendant's legal responsibility, and the amount of damages (compensatory and punitive). It is a matter of speculation whether and when juries allow one of these decisions to dominate others (and which ones tend to succumb to the preceding commitments) instead of considering each individually.

Bifurcation of any type breaks the case into parts that are more manageable. There is some concern about the decisional effects of having a series of discreet determinations instead of one "all-things-considered" verdict.[135] Such concerns focus mostly on the jury's deliberation process; there is little doubt that narrower jury instructions would be easier to for judges to formulate, easier for juries to comprehend, and easier for higher courts to sustain on appeal, at least generally. It is difficult to imagine arguments against having instructions that are more facile.

133. For more discussion of this problem, see Herbert M. Kritzer, *Holding Back the Floodtide: The Role of Contingent Fee Lawyers,* WISC. LAW., March 1997, at 10. "Lawyers inevitably will make some mistakes in their screening decisions, either turning away good winnable cases or accepting unwinnable cases." *Id.* "Lawyers also may turn away potential clients who have valid cases but that do not meet the lawyers' criteria of fee potential." *Id*. *See also* Manuel A. Gomez, *Like Migratory Birds: Latin American Claimants in U.S. Courts and the Ford-Firestone Rollover Litigation*, 11 SW. J. L. & TRADE AM. 281, 298 (2005) (noting that contingency fee screening may causes cases to be rejected because the potential award for them was not worth the effort and cost).

134. *See* Hua & Spier, *supra* note 30, explaining that some litigation is very beneficial to society because it reveals important information about the size of the harms that certain activities cause. Yet the screening effects discussed here can bar many of these useful cases from the judicial system, as the plaintiff's personal incentives (their potential benefits after netting out the costs of litigation) are too low compared to the societal benefit of the information. "The plaintiff's decision is endogenous and hinges on the liability rule." *Id.* at 3.

135. *See* Thornburg, *supra* note 18; Ratliff, *supra* note 18.

Jury instructions for the first phase in a reverse bifurcation case would need to explain to the jury that liability is not under consideration yet—either because they should assume it for the moment or because they will decide it later—and that the sole determination is the amount that the plaintiff should receive, if she wins. Compensatory damages, pain and suffering, and punitive damages could be the subject of the court's orders to the jury. Evidence about the defendant's actual wrongdoing, or the defendant's callous indifference to potential victims, is inadmissible at this phase.

The inadmissibility of such evidence presents a complication for punitive damages, which often flow from the jury's willingness to punish particularly loathsome tortfeasors. Of course, the main justification for punitive damages is not their punitive function, but their deterrent value for future wrongdoers. To the extent that the court wants the punitive damages to reflect retribution, reverse bifurcation is problematic because either evidence about the tort itself must come in the first phase (essentially negating the bifurcation), or must be decided later, after a subsequent phase that usually does not occur. Depending on how one views punitive damages, this is either a boon or blight. It could hinder punitive damages in mass tort cases as much as tort reform legislation attempts to do. On the other hand, mass torts are cases where deterrence for other future wrongdoers is perhaps most desirable and efficient, and to this extent, reverse bifurcation presents a social cost.[136]

If, however, the court views punitive damages as primarily a deterrent, then reverse bifurcation may not be so difficult. Such decisions are divorceable from the individual defendant's culpability. Along with a determination of the scope of harm or size of the compensatory award, the jury can receive information about the number of similar potential defendants, the frequency of this type of tort, the relative unlikelihood of facing litigation for wrongdoing, etc. The variables that could factor into a future tortfeasor's calculus can come before the jury as part of the first phase, without including evidence about the defendant in that particular case. Pure, general deterrence focuses on everyone *but* the present defendant. Reverse bifurcation, then, is very compatible with pure deterrence-based punitive damages

136. See *Angelo v. Armstrong World Indus., Inc.,* 11 F.3d 957, 965 (10th Cir. 1993), where the Tenth Circuit explicitly says that punitive damages should be reserved for the *second phase*, as they relate to the defendant's wrongdoing and not to the harm inflicted on the present (and potential future) victims: "Punitive damages are also decided in the second phase, because they also focus on the defendants' conduct." *Id*. The Supreme Court seems to have leaned toward the idea that punitive damages are retributive, rather than merely a deterrent, in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422, (2003). At the same time, the Court in *State Farm* noted that the lines are not at all clear: "Compensatory damages, however, already contain this punitive element." *Id*. at 426.

but not retributive damages. In a sense, reverse bifurcation forces a choice between the two competing aims of punitive awards.

If certain issues are more confusing for juries,[137] these issues would seemingly have a link to the relative uncertainty surrounding their results. The size of the verdict inherently contains more uncertainty, because it spans a large continuum of possibilities, and incorporates several factors (especially in mass tort cases, which usually involve apportionment of damages as well). The either-or decision of liability itself is inherently more inviting for estimates of the odds. Damages are especially complex in mass torts like asbestos and Fen-phen cases.[138] The decision involves apportionment (an arcane type of "causation," in a sense), the victim's contribution or failure to mitigate the harm (a different type of causation), medical costs (relatively straightforward), pain and suffering (very subjective), and punitive damages (based on a mathematical formula of future wrongdoers costs and benefits). It is unsurprising that reverse bifurcation came into use primarily in such cases. The most uncertain part of the verdict could be available early on, making it easier for parties to settle; but also the jury's most cumbersome task would come first, before they were weary with arguments and evidence about liability itself.

If reverse bifurcation were to spread outside the arena of mass tort litigation, cases involving more complex issues of damages—and thus more tedious jury instructions on damages—would be especially good candidates. Bifurcation in either order provides a clear benefit in cases requiring especially difficult jury instructions.

Along these same lines, another benefit of bifurcation is the possibility of allowing the judge to decide questions that involve technical legal concepts or that come packaged in lawyerly jargon—and these questions are more likely to pertain to liability determinations than the size of the award. The elements of crimes, the notion of duty in torts, foreseeability, proximate causation (as opposed to the "causation" involved in apportionment or contributory negligence), compliance with professional or industry-wide standards, are all questions more familiar to a judge than untrained jurors. Reverse bifurcation allows the court to dismiss the jury after its initial determination (damages), and the judge to consider—if necessary—these issues, which vex even attorneys.

137. *See, e.g.,* Steele & Thornburg, *supra* note 21 (discussing several studies about juror confusion over jury instructions); Tiersma, *supra* note 20 (noting the tension between legal accuracy and intelligibility).

138. *See generally* text accompanying note 2.

V. DUE PROCESS CHALLENGES TO REVERSE BIFURCATION

Due process challenges to reverse bifurcation have failed so far.[139] Parties sometimes feel that the judge's decision to use reverse bifurcation will be excessively prejudicial to their case, and argue that this deprives them of their right to a fair trial.[140] I cannot find any successful appeals of pre-trial decisions to employ reverse bifurcation (challenging the constitutionality of the decision on due process grounds).

Defendants seemed more likely to raise such concerns originally, fearing that a parade of victims' injuries and suffering at the beginning would fix the juries sentiments at the outset. More recently, however, complaints have shifted to the plaintiffs' side of the courtroom, perhaps because they lose their opportunity to use unsympathetic corporate defendants or a "smoking gun" memo to rouse the jury. When plaintiffs argue that reverse bifurcation is prejudicial, they imply that juror anger is a more significant variable than juror sympathy in contributing to the size of the award (and source of uncertainty for forecasts).

Ultimately, the parties challenging the decision to bifurcate a trial may do better to appeal to the judge's sense of fair play than to raise constitutional arguments, because these have been uniformly unsuccessful. Courts disfavor due process challenges in civil cases generally, viewing this as more of a concern for criminal cases.

The Supreme Court has held, however, that procedural due process can be a concern (and grounds for reversal) in certain non-penal settings, as in *Mathews v. Eldridge*[141] or *Cleveland Board of Education. v. Loudermill*.[142] The *Mathews* balancing test requires weighing the private interest effect, the risk of erroneous deprivation of the interest and probable value of additional procedures, and the government's interest in the regulation, including the burdens imposed by additional procedures.[143] These cases, however, involve the government as one of the parties (in *Mathews,* the Social Security Administration). Courts have not yet applied these constitutional procedural requirements to civil cases between private litigants. At the same time, some reverse

139. *See, e.g., Angelo*, 11 F.3d at 965; O'Dell v. Hercules, Inc., 904 F.2d 1194, 1201–02 (8th Cir. 1990); Morley v. Super. Ct. Ariz., 638 P.2d 1331 (Ariz. 1981); Transit Homes, Inc. v. Bellamy, 671 S.W.2d 153, 156 (Ark. 1984).

140. *See, e.g., Angelo*, 11 F.3d at 965 (where both the prejudice and fairness arguments were raised on appeal, discussed at length by the Tenth Circuit, and rejected).

141. 424 U.S. 319, 334 (1976) (termination of Social Security benefits can require a hearing).

142. 470 U.S. 532 (1985) (using a balancing test to evaluate a tenured public employee's due process rights during termination proceedings).

143. *Mathews,* 424 U.S. at 335.

bifurcation cases involve a government entity,[144] and the *Mathews* test could therefore apply.

Another possible challenge to reverse bifurcation on due process grounds would be to characterize it as a "strong-arm" tactic by the trial court to force a settlement. One of the main purposes of reverse bifurcation is to expedite settlement between the parties, at least before the second phase of the trial; some parties will inevitably feel that this puts them is a less advantageous position even before the first phase.

Analogous examples are present where courts have used other methods to pressure the litigants, giving rise to due process challenges (albeit usually unsuccessful).[145] For instance, in an older case, *In re LeMarre,* the Sixth Circuit held that "no judge can compel a settlement

144. *More Than 200 Asbestos Cases Are Settled*, N.Y. TIMES Sept. 13, 1990, at D; Joseph F. Rice & Nancy Worth Davis, *Judicial Innovation in Asbestos Mass Tort Litigation*, 33 Tort & Ins. L.J. 127 (1997); Wise, *supra* note 14; Daniel Wise, *Verdicts of $31 Million in Asbestos Lawsuits; Weinstein Terms Process of Handling Claims 'A National Scandel;' 64 Cases Completed,* N.Y.L.J., Jan. 25, 1991. The cases were divided into state level which applied reverse bifurcation and federal level. The state level verdicts averaged $2 million per case while verdicts at the federal level averaged at $590,000. Wise, *supra* note 15.

145. *See, e.g.,* Reust v. Alaska Petroleum Contractors, Inc., 127 P.3d 807 (Alaska 2005) (holding that a winning plaintiff's due process rights are not violated by a statute which caps the amount of punitive damages awarded and requires the plaintiff to give 50% to the state because these statutory requirements are rationally related to the goals of reducing the pursuit of punitive damages and encouraging settlement). *See also In re* Diet Drugs (Phentermine/Fenfluramine/Dexenfenfluramine) Prod. Liab. Litig., 431 F.3d 141, 146 (3rd Cir. 2005) (holding that inadequate representation by the class representative does not violate due process when a class member, who possesses an ailment that the class representative does not possess, obtained a full and fair hearing and generally had his or her procedural rights protected); Clayton v. T. H. Branson, 613 S.E.2d 259, 270 (N.C. Ct. App. 2005) ("[t]he city's discretion to choose whether to settle with a claimant is not a constitutional violation of procedural due process; instead, it is some evidence that a tort claimant may not have a constitutionally protected right to a settlement offer from a municipality in North Carolina").

A similar example is *Bergren v. Staples*, 57 N.W. 2d 714, 716 (Wis. 1953). Under Wisconsin Statute § 102.29, a trial court possesses the authority to require the plaintiff-employer to join in a settlement offer. This court order fails to violate the employer's due process right to a jury trial because the statute which provides his only cause of action authorizes the court with the ability to pass on the dispute without a jury trial. *See also* Stephens v. Albemarle, No. Civ.A. 3:04CV00081, 2005 WL 3533428, at *8 (W.D. Vir. Dec. 22, 2005) ("A claimant may state a claim on which relief may be granted by alleging that she was a potential recipient of speech from a willing speaker silenced as the result of an unconstitutional condition in a settlement agreement" between the government and citizen plaintiffs). *See also* Mulligan v. Piczzon, 739 A.2d 605, 609 (Pa. Commw. Ct. 1999) (holding that a trial court may require any person over whom it has personal jurisdiction to attend a pretrial settlement conference); G. Heilman Brewing Co., Inc. v. Joseph Oats Corp., 871 F.2d 648, 653 (7th Cir. 1989) (holding that a district court cannot require parties to participate in settlement negotiations, but it may require parties to attend settlement conferences); Strandell v. Jackson County, Ill., 838 F.2d 884, 887 (7th Cir. 1988) (holding that Rule 16(c) of the Federal Rules of Civil Procedure does not authorize judges to mandate the parties' participation in a summary jury trial); Fed. Reserve Bank of Minneapolis v. Carey-Canada, Inc., 123 F.R.D. 603, 607 (D. Minn. 1988) (holding that based on the legislative history and intent of Rule 16(c) of the Federal Rules of Civil Procedure, this rule, along with Local Rule 3, authorizes the court to require both attendance and participation in a summary jury trial).

prior to trial on terms which one or both parties find completely unacceptable."[146] The attorneys in this case had reached a settlement before trial; the defendant himself, however, refused to accept the agreement, despite his counsel's advice.[147] The defendant also refused to attend subsequent settlement conferences (defying a court summons to do so), prompting the court to charge LaMarre with contempt.[148] On appeal, the Sixth Circuit explained:

> Mr. LaMarre's expressed determination not to accept the recommendation of his own counsel and settle the underlying case could have been reiterated in the conference. It is, of course, clear that on due process grounds, no judge can compel a settlement prior to trial on terms which one or both parties find completely unacceptable. But LaMarre could not, in our judgment, refuse a lawful order to attend such a conference to discuss the matter.[149]

While holding that due process *could* be an issue under similar circumstances, the Court nevertheless upheld the sanctions imposed on the defendant due to his refusal to attend conferences.[150]

Other courts express displeasure with such tactics without explicitly characterizing the problem as constitutional in nature. For example, the New York Court of Appeals has held the court should never work to coerce or compel a litigant to make a settlement.[151] Even so, the court failed to explain whether the harm that would result might be a due process issue, or something else.

Some commentators have echoed these concerns about due process implications for "strong arm" settlement maneuvers court sometimes use: "Indeed, to require settlement would likely violate the jury trial and due process rights of litigants."[152] Nevertheless, reverse bifurcation seems even further removed from a constitutional trespass than

146. *In re* LaMarre, 494 F.2d 753, 756 (6th Cir. 1974)

147. *Id.* at 755.

148. *Id.*

149. *Id* at 756.

150. *Id*.

151. *See* Wolff v. Laverne, Inc., 17 A.D.2d 213, 233 N.Y.S.2d 555 (N.Y., 1962).

152. *See Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes,* 103 HARV. L. REV. 1086, n.87 (1990). The note author bases this assertion, however, on *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir.1985), in which the Court opined that "pressure tactics to coerce settlement simply are not permissible." The *Kothe* Court itself, however, never actually states that such tactics violate due process; instead, the opinion simply states, "[w]e view with disfavor all pressure tactics whether directly or obliquely, to coerce settlement by litigants and their counsel. Failure to concur in what the Justice presiding may consider an adequate settlement should not result in an imposition upon a litigant or his counsel, who reject it, of any retributive sanctions not specifically authorized by law." *Id.* at 669 (quoting Wolff v. Laverne, Inc., 17 A.D.2d 213, 215 N.Y.S.2d 555 (1962)).

summary "mock" trials or mandatory pre-trial conferences, because the case is actually going to trial, the jury's verdict is indeed binding, and the parties are free to proceed to the second phase if they wish—but this is unlikely to occur.

One other angle for a possible due process challenge would be the inherent conflicts of interest that reverse bifurcation could create between lawyers and their clients. After the first phase, when the jury has set a value for the case, the plaintiff's lawyer has a disincentive to proceed any further. The contingency fee for the case is essentially fixed, whether the case goes forward or not, so there is no additional compensation for further work or resources the plaintiff's attorney would have to devote to the liability phase. In the liability phase, one might say that the plaintiff's attorney is working without pay—something most lawyers would avoid. In addition, going forward after the jury's award verdict involves a gamble with incredibly high stakes—there is the risk of losing on the liability question, in which case the award (and attorney compensation) is zero. Admittedly, the client (the plaintiff) also risks losing everything if the trial goes to the second phase, but in a contingency-fee case the client, unlike her lawyer, faces no obvious additional cost for the extra litigation. Thus, from the moment that the parties know the jury's determination about the value of the case, the financial interests of the lawyer and client begin to diverge; the attorney is more desperate to settle, and will try to compel the client to agree.[153]

The problem is less applicable on the other side of the courtroom; defense counsel usually bills by the hour, so there is no new conflict of interest besides that which is always present (the attorney's interest in prolonging the matter and the client's interest in shortening it). Reverse bifurcation creates a growing rift between the plaintiff and her counsel, at least after the first phase, but this is not as true for the defendant.

Perhaps plaintiff's counsel should recuse herself from the case once the jury goes into its first deliberations, and before inter-trial settlement talks commence. Such a solution presents two immediate problems: the plaintiff has the disadvantage of having new counsel, who is unfamiliar with the case, and fact that the new counsel would seem to have the same conflict of interest as the outgoing attorney—the contingency fee will not increase despite any efforts the new lawyer invests.[154] If, on the other hand, the incoming plaintiff's lawyer agrees to bill by the hour

153. On the other hand, if the client is simply more risk-averse than the lawyer, this would offset the potential conflict and bring the interests more into alignment.

154. We can assume, for purposes of this hypothetical, that the first and second attorneys would split the contingency fee on some sort of pro-rata basis.

instead, then the conflict is even greater—the plaintiff risks losing the award already in hand, while the new lawyer would only have an incentive to prolong the matter and move forward, with no personal interests in jeopardy.

The usual remedy for a conflict of interest, assuming it harms the plaintiff, is a subsequent malpractice action against the first lawyer, not a due process claim. Apart from the doctrinal problems involved with the latter, the plaintiff will have trouble finding a new lawyer who wants to bring a due process challenge after the fact—such a challenge is more likely to yield injunctive relief (a retrial) than money damages, whereas the malpractice claim is the direct route to winning a nice fee. Instead, any due process challenge to the trial's bifurcation would have to come before the trial itself, as soon as the judge informs the parties of the schedule of events. The plaintiff's lawyer may be upset about the reversed order for other reasons (like missing the chance to introduce damning evidence about fault), but the eventual divergence of interests between the attorney and client will probably seem remote and theoretical during the pre-trial stage, when an interlocutory appeal would be appropriate.

Even if the lawyer had the foresight to raise the issue before trial, the doctrinal resistance to such a challenge is likely to be insurmountable. No courts to date have found a genuine due process issue beneath a conflict of interest in a civil case, although this would be an issue in a criminal case.

In the criminal context, the Supreme Court has held that with a conflict of interest present, "the potential for injustice . . . is sufficiently serious to require us to consider whether petitioners have been deprived of federal rights under the Due Process Clause."[155] While the trial judge apparently had not been aware that the defense lawyer had a conflict, the Court found that the possibility of conflict was sufficiently apparent and imposes a duty to inquire further.[156] Moreover, the Supreme Court has held previously that "lawyers in criminal courts are necessities, not luxuries."[157] The emphatic qualification of "criminal cases" could imply

155. Woods v. Georgia, 450 U.S. 261, 271 (1981). In *Woods*, three petitioners had been convicted of distributing obscene materials. *Id.* at 262. Sentenced merely to probation, they had to make regular installment payments towards their fines. *Id.* When they failed to make these payments, the court revoked their probation. *Id*. It appears that the defense attorney, however, was hired by the defendants' employer, the attorney's regular client. *Id.* at 263. On this basis, the Court found that "since [the petitioner's] counsel has acted as the agent of the employer and has been paid by the employer, the risk of conflict of interest in this situation is evident." *Id*. at 267. The court remanded the case based on a possible due process violation. *Id*. at 263.

156. *See id.*

157. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

that civil lawyers are indeed a luxury. Plaintiffs choose to bring suit, and hire a lawyer to assist in the process.

When conflicts become apparent in the context of civil trials, judges are likely to invoke other remedies and skirt the potential due process problem. For example, a judge can disqualify the attorney with the conflict, as in *Sorci v. Iowa District Court for Polk County*.[158] In addition, as mentioned above, "[a] party with privately retained counsel . . . has as its remedy a suit against the attorney for malpractice."[159]

Despite the dearth of judicial support for due process analysis in this situation, some commentators have argued that there should be consideration of due process in the civil context, particularly where the procedural mechanisms themselves create an inherent conflict of interest between the attorney and the client.[160] The literature on the subject does not point to any precedent to support the idea. Similarly, there does not seem to be any judicial support for the idea that an attorney's conflict of interest infringes on the Sixth Amendment right to counsel.[161]

158. 671 N.W.2d 482 (Iowa 2003).

159. Watson v. Moss, 619 F.2d 775, 776 (8th Cir. 1980).

160. *See, e.g.,* Ryan Kathleen Roth, *Mass Tort Malignancy: In the Search for A Cure, Courts Should Continue to Certify Mandatory Settlement Only Class Actions*, 79 B. U. L. REV. 577, 602 (1993). Roth posits that three distinct types of conflicts of interest infringe on due process in mass tort litigation: (1) intra-class conflict in which the class representative accepts inequitable settlements; (2) counsel's conflict with the clients, given their incentive to ignore the interests of individual class members to pursue a windfall contingency fee based on the collective award; and (3) judicial conflicts of interest. Judges may have an undue incentive to overlook procedural or evidentiary problems that they normally would address, simply to keep the cumbersome cases moving. Regarding conflicts of interest for the class counsel, Roth proposes two possible procedural remedies: requiring greater candor about the potential conflicts of interest, and engaging third parties to oversee negotiations as facilitators, evaluators, and monitors. *Id*. at 610.

Writing about the conflicts of interest that arise in class action suits, Karen Geduldig has argued, "[M]ass tort actions raise due process questions as to whether an individual's interests are being adequately represented as part of a large class of claimants. Inevitable conflicts of interest exist between an attorney who represents a large class of clients and the individual clients who make up that class." Karen A. Geduldig, *Casey at the Bat: Judicial Treatment of Mass Tort Litigation*, 29 HOFSTRA L. REV. 309, 322–23 (2000). Neither author cites cases to support this idea.

161. *See, e.g.,* Lewis v. Lane, 816 F.2d 1165, 1169 (7th Cir. 1987) (holding that a party in a civil case does not have a constitutional or statutory right to effective assistance of counsel); U.S. v. Rogers, 534 F.2d 1134 (5th Cir. 1976) (stating that the 6th amendment doesn't apply in civil cases).

Mekdeci v. Merrell Nat'l Labs., 711 F.2d 1510, 1512 (11th Cir. 1983), is particularly illustrative. The plaintiffs in a products liability case appealed an unfavorable verdict at trial, arguing in part that their attorneys had an improper financial stake in the outcome of the second trial, claiming that they were "denied a fair trial, in violation of their right to due process, because of the alleged inadequacy of the representation." *Id*. at 1522. The Court rejected this argument as based on the erroneous assumption that "they have a protected right to competent representation in their lawsuit. Simply stated, however, 'there is no constitutional or statutory right to effective assistance of counsel on a civil case.'" *Id*. Because petitioners do not have a right to effective assistance, they "must seek relief by means of the remedies specifically designed to compensate the type of injury they allege [i.e., malpractice claims]."

As troublesome as the inherent conflicts may be, the settlements produced via reverse bifurcation are still essentially voluntarily, regardless of how certain it is that the parties will settle. The combination of the civil trial setting with the voluntary settlements makes the procedure difficult to challenge on due process grounds.

Objections to reverse bifurcation that are based on the Seventh Amendment are more likely to prevail than those based on due process concerns. The issue so far has arisen in class action suits where judges tried to bifurcate certain issues for class certification (that is, have one jury decide these issues for all the cases) while leaving other issues for resolution in individual cases.[162] The discussion in these cases, however, could apply to simpler bifurcated proceedings:

> Bifurcation and even finer divisions of lawsuits into separate trials are authorized in federal district courts. And a decision to employ the procedure is reviewed deferentially. However, as we have been at pains to stress recently, the district judge must carve at the joint. Of particular relevance here, the judge must not divide issues between separate trials in such a way that the same issue is reexamined by different juries. The

Id. at 1523.

Watson v. Moss, presents the same notion in a § 1983 action against police. 619 F.2d at 775. After losing at trial, Watson appealed, alleging that his court-appointed counsel failed to provide him effective assistance of counsel; he demanded another trial. The Eighth Circuit reiterated that the Sixth Amendment right to counsel is inapplicable to civil cases:

> Watson's argument is basically as follows. In criminal cases involving appointed counsel, the Sixth Amendment requires a defendant to have effective assistance of counsel, which is defined as "that degree of performance which conforms to the care and skill of a reasonably competent lawyer rendering similar services under the existing circumstances." Watson contends this should be extended to civil cases instituted under 42 U.S.C. 1983 alleging violations of Fourteenth Amendment rights. Watson contends that if inadequacy of counsel is then demonstrated, plaintiff should be entitled to a new trial. We disagree.
>
> Initially, there is a substantial difference between the constitutional rights of an accused in a criminal proceeding, and those of a plaintiff in a civil action. The stringent standards of appointment and effective assistance of counsel mandated by the Sixth Amendment . . . do not apply to civil proceedings. There is no constitutional or statutory right for an indigent to have counsel appointed in a civil case. It of course follows there is no constitutional or statutory right to effective assistance of counsel in a civil case.

Id. at 776 (internal citations omitted). *See also* Taylor v. Dickel, 293 F.3d 427, 431 (8th Cir. 2002) (affirming that a petitioner in a 1983 action has no constitutional or statutory right to effective assistance of counsel, because it is a civil case, and that the proper remedy in such cases is an action for malpractice).

162. *See* Hydrite Chem. Co. v. Calumet Lubricants, 47 F.3d 887, 891 (7th Cir. 1995); *In re* Rhone Poulenc Rorer, Inc., 51 F.3d 1293, 1302 (7th Cir. 1995); *see also* Elizabeth J. Carbraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1502 (2005) ("the courts commonly use Rule 23(c)(4) to certify some elements of liability for class determination, while leaving other elements to individual adjudication—or, perhaps more realistically, settlement.") (quoting *In re* Chiang, 385 F.3d 256, 267 (3d Cir. 2004)).

> problem is not inherent in bifurcation. It does not arise when the same jury is to try the successive phases of the litigation. But most of the separate "cases" that compose this class action will be tried, after the initial trial in the Northern District of Illinois, in different courts, scattered throughout the country. The right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have juriable issues determined by the first jury impaneled to hear them (provided there are no errors warranting a new trial), and not reexamined by another finder of fact. . . . The plan of the district judge in this case is inconsistent with the principle that the findings of one jury are not to be reexamined by a second, or third, or *n*th jury. The first jury will not determine liability. It will determine merely whether one or more of the defendants was negligent under one of the two theories. The first jury may go on to decide the additional issues with regard to the named plaintiffs. But it will not decide them with regard to the other class members. Unless the defendants settle, a second (and third, and fourth, and hundredth, and conceivably thousandth) jury will have to decide, in individual follow-on litigation by class members not named as plaintiffs in [the present case] . . . . Both issues overlap the issue of the defendants' negligence.[163]

163. *In re* Rhone Poulenc Rorer, Inc., 51 F.3d at 1302–03 (internal citations omitted). The Court did acknowledge that this approach has been approved for asbestos litigation. *Id.* at 1304 (citing Jenkins v. Raymark Indus., Inc., 782 F.2d 468 (5th Cir. 1986); *In re* School Asbestos Litig., 789 F.2d 996 (3d Cir. 1986)). The majority of federal courts, however, do not permit the use of the class-action device in mass-tort cases, even asbestos cases. *See* THOMAS E. WILLGING, TRENDS IN ASBESTOS LITIGATION 93–98 (1987); Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts,* 44 STAN.L.REV. 815 (1992). For a case discussing separability of claims in reverse bifurcation in particular, see *Angelo v. Armstrong World Industries, Inc.,* 11 F.3d 957, 964–65 (10th Cir. 1993) (concluding that the claims were clearly separable). Interestingly, different juries were impaneled for each phase of this trial, although the second phase (as is almost always the case) never occurred; the Tenth Circuit asserted that this enhances, rather than diminishes, fairness in the proceedings. *Id.* at 965 n.6.

This holding by the Tenth Circuit has generated considerable academic commentary. *See, e.g.,* Lesley Frieder Wolf, *Evading Friendly Fire, Achieving Class Certification After the Civil Rights Act of 1991,* 100 COLUM. L. REV. 1847, 1857 (2000) ("[a]ccording to this formulation, courts may bifurcate trials so long as they carve out distinct issues, and therefore avoid reexamination."); Richard L. Marcus, *Confronting the Consolidation Conundrum*, 1995 BYU L. REV. 879, 894–95 (1995) (referencing Posner's requirement that a district court judge who orders bifurcation must carve at the joint and noting that "[w]hen separate cases are consolidated but still involve unique issues, the urge to consolidate and to extract the common issues for trial, deferring the others for later action, follows rather naturally. That practice may be troublesome . . . .").

For a contrary view, however, as Wright and Miller put it, the question may be posed as:

> [W]hether the admittedly preferred procedure is required constitutionally. It has been held, on sound ground, that the Seventh Amendment is not violated by the separate submission of the issues to a single jury. Is there a violation of the constitutional provision if issues are separately submitted to separate juries? The answer rather clearly must be in the negative.

WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE SEC. 2391 at p. 513 (citations omitted).

One commentator quotes Judge Posner's thoughts on bifurcating at the "joint" and adds that "[i]n 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."[164]

Reverse bifurcation cases have not yet faced reversals on Seventh Amendment grounds, perhaps because so many of the cases settle before the second phase (making the two-jury concern somewhat moot). Challenging a pre-trial decision to implement reverse bifurcation through a writ of mandamus is theoretically possible, however, if the court intends to impanel a new jury for the second phase. If the same jury will decide both phases, however, there is not likely to be a constitutional problem. One might argue that the Framers conceived of the right to a jury trial as the right to a *traditional* jury trial—if one could demonstrate the order of events controls the outcomes—but so far, no court appears to have considered this objection. Judge Posner seems to suggest in one place that reverse bifurcation in torts cases can be inherently problematic:

> It is true that the fact of injury and the amount of injury (damages) are analytically distinct. Tort liability requires proof of the first, that is, proof that there was injury, regardless of how much, so that if the trial is divided, as is commonly done, between liability and damages, the fact of injury belongs in the first trial and the quantification of the injury by means of an assessment of damages in the second.[165]

The statement above was made in a contracts case, so it is merely *dicta*. Why tort liability requires proof of liability first is unclear, especially given that the determination of liability should be informed by the scope of the harm and its likelihood.

VI. CONCLUSION

We should indeed carve a case "at the joint," as Judge Posner says,[166] and the most obvious node in litigation is between liability and damages. The different phases of the trial do not have equal significance for the efficient resolution of the case. Perhaps it was important in the formative years of the common law to determine which party was right or wrong before deciding how much money was at stake; but for parties

164. Steven S. Gensler, *Bifurcation Unbound*, 75 WASH. L. REV. 705, 780 (2000).

165. Hydrite Chem. Co. 47 F.3d at 890–91 (internal citations omitted).

166. *Id.* at 890.

facing costly litigation today, the stakes of the case can be more relevant than any other issue. Even so, just as people carve turkeys starting with the best pieces first, leaving the remainder for later, we do not simply want to carve cases at the joint: We should carve it to get the most important pieces first.

Modern trials involve skyscraper-sized verdicts; the parties joust for winnings that can reach hundreds of millions of dollars. The traditional, unitary trial sequence has turned modern litigation into an elaborate poker game, where the stakes grow larger as the parties try to guess the strength of their rival's hand. Each side has an incentive to bluff, to send mixed signals, and to stay in the game too long; all of which drive the stakes of the higher and higher. The random outcomes of high-stakes poker are part of the game's appeal, but also can turn it into a source of social blight if too many people become trapped in a game with devastating outcomes for the losers. The same is true for litigation; as the stakes can escalate throughout the process, the outcome drifts further from the merits of the claims, and the results of trials become a cause of widespread social concern, instead of a source of resolution and closure.

Reverse bifurcation rectifies this problem. Allowing the parties to determine the stakes of the case first gives them an incentive to settle, and better information with which to negotiate a reasonable settlement amount. It eliminates the twisted incentives that generate much of the misinformation that parties foist on each other in the regular trail sequence. The larger social benefits of each case—deterring future harm and spotlighting dangerous activities—are greater if the scope of the harm come first in the trial.

Civil procedure in general has two underlying purposes: to reduce unnecessary costs in litigation, and to reduce erroneous results. Reverse bifurcation often achieves both of these goals better than the traditional trial sequence. Trial time decreases significantly, as the parties are more likely to settle before reaching the second half. The results correspond more closely to the victim's losses, because the jury decides the damages first. Carving at the joint is not enough; it also matters where we start cutting. Reverse bifurcation prioritizes the issues in the case more appropriately for the needs of the parties.