

HOW RELEVANT IS JURY RATIONALITY?

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Review of *Punitive Damages: How Juries Decide* by Cass R. Sunstein, Reid Hastie, John W. Payne, David A. Schkade, and W. Kip Viscusi, with an introduction by George L. Priest, University of Chicago Press (2002).

In the last ten years, law professors have spent ever increasing amounts of time worrying if ordinary people have their heads “screwed on right.”¹ Some scholars, relying on a new set of data loosely labeled

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1. Richard Posner, *Social Norms, Social Meaning, and the Economic Analysis of Law: A Comment*, 27 J. LEGAL STUD. 553, 563 (1998). Posner argues that the implicit message of so-called behavioralist scholars like Cass Sunstein is that people are irrational. For a thoughtful description of how Posner’s conceptions of what is “rational” relate to traditional economic theories, and new cognitive research, see Jeanne L. Schroeder, *Rationality in Law and Economics Scholarship*, 79 OR. L. REV. 147 (2000). The assumption that individuals always act to maximize their expected utility (the narrowest definition of rationality) had been under attack in the field of economics even before law and economics gained its current status. See Paul Slovic et al., *Decision Processes, Rationality and Adjustment to Natural Hazards*, in THE PERCEPTION OF RISK 1, 3–6 (Paul Slovic ed., 2000) (describing criticism of theory of expected utility dating from the 1950s); Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317, 317–24 (1977) (criticizing the rationality assumption of mainstream economics).

In this essay, when I speak of the “rationality debate,” or the debate about whether individuals have their “heads on straight,” I refer to the recent legal scholarship that refers to how people make choices (whether in the real world or in the laboratory). This recent scholarship is a reaction, in part, to friendly critics of law and economics who argued that it was important to enrich the “rational actor” model with data about how real people make choices. See Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23 (1989) (critiquing traditional law and economists for assuming that individuals would be rational actors). Bringing human frailty to rational actors was a difficult process. See Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy*, 6 PSYCHOL. PUB. POL’Y & L. 788, 789 (2000) (describing early difficulty in persuading legal academics to take juror research seriously). Moreover, scholars are still engaged in a vigorous debate about the meaning of recent experimental studies. See Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499, 1501–03 (1998) (describing “far from resolved” debate about rationality).

“behavioralism,” argue² that people do a bad job at making decisions based on “good reasons and with as much information as possible.”³ Others argue this new behavioralism research is misguided: its empirical studies are flawed,⁴ and the project lacks a theoretical core.⁵

This debate between practitioners of behavioralism and their critics has waged hotly but would be of little interest outside the academy if some behavioralists had not begun to employ their empirical research in recommending surprisingly paternalistic social policies. While the original behavioralists simply called for enriching the theoretical model of the rational actor in law and economics, their latter day incarnations have tied behavioral research to the conclusion that people are irrational. Liberal scholars like Cass Sunstein⁶ use behavioralism to argue that poli-

Many use this “rationality debate” as a starting off point for discussion of law and economic themes. See, e.g., Jennifer Arlen et al., *Endowment Effects Within Corporate Agency Relationships*, 31 J. LEGAL STUD. 1, 2 (2002) (“[B]ehavioral law and economics has fostered renewed academic skepticism about central tenets of law and economics that depend on strong rationality assumptions.”); Daniel A. Farber, *Toward a New Legal Realism*, 68 U. CHI. L. REV. 279 (2001) (describing rationality debate); David A. Hoffman & Michael P. O’Shea, *Can Law and Economics Be Both Practical and Principled?*, 53 ALA. L. REV. 335, 356–59 (2002) (discussing how legal economists made practical decisions before behavioralism changed their assumptions). Of the many articles describing the rationality debate, none does so more elegantly than Mark Kelman, *Behavioral Economics as Part of a Rhetorical Duet: A Response to Jolls, Sunstein, and Thaler*, 50 STAN. L. REV. 1577 (1998).

2. The principal trilogy of behavioralism articles is by Jon Hanson and Douglas Kysar. See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630 (1999) [hereinafter Hanson & Kysar, *The Problem of Market Manipulation*]; Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: A Response to Market Manipulation*, 6 ROGER WILLIAMS U. L. REV. 259 (2000) [hereinafter Hanson & Kysar, *A Response to Market Manipulation*]; Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420 (1999). Hanson and Kysar’s focus is on the experimental data and its implications for policy. Others have focused on how the experimental data affects the “rational choice” model in law and economics. See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998) (arguing that “bounded rationality,” “bounded willpower,” and “bounded self-interest” provide models for consistent departure from a pure expected utility model of human behavior); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000) (arguing that existing versions of rationality theory offer predictions about behavior that are often false). For a more general review of behavioralism literature, see Langevoort, *supra* note 1; Jeffrey J. Rachlinski, *The “New” Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739 (2000); Jennifer Arlen, Comment, *The Future Behavioral Economic Analysis of Law*, 51 VAND. L. REV. 1765, 1777–81 (1998).

3. MARK BLAUG, *THE METHODOLOGY OF ECONOMICS OR HOW ECONOMISTS EXPLAIN* 229 (2d ed. 1992), quoted in Schroeder, *supra* note 1, at 152. The quote refers to economists’ traditional definition of rationality.

4. See, e.g., Richard Lempert, *Juries, Hindsight, and Punitive Damage Awards: Failures of a Social Science Case for Change*, 48 DEPAUL L. REV. 867 (1999); Gregory Mitchell, *Taking Behavioralism Too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of Law*, 43 WM. & MARY L. REV. 1907 (2002); see also GERD GIGERENZER ET AL., *SIMPLE HEURISTICS THAT MAKE US SMART* (Stephen Stich ed., 1999) (arguing that use of simple and accurate heuristics is rational).

5. See, e.g., Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551 (1998) (arguing that behavioralists lack a theoretical model). But see Rachlinski, *supra* note 2, at 748–53 (arguing behavioralist observations, though marked by a “laundry-list” syndrome, have theoretical coherence).

6. See Nancy Benac, *Analysis: War Raises Constitutional Questions*, COLUMBIAN, June 23, 2002, at A8 (“Cass Sunstein, a liberal University of Chicago law professor . . .”); Robert G. Kaiser & Thomas B. Edsall, *The Two Theodore Olsons; Although Conservatives Love Him, Some Doubt Solicitor*

cies of paternalism—or taking power away from irrational citizens and giving it to bureaucrats—are now worth renewed consideration.⁷ Against this emerging paternalist tide, a few stalwart defenders of democratic choice, like Judge Richard Posner, raise cries of “totalitarian[ism].”⁸ The relationship between behavioralism, irrationality, and paternalism has just begun to receive scholarly attention.⁹

The debate about behavioralism’s foundations and empirical content—which purportedly grapples with deep questions about how people make decisions, and the different kinds of ways people can be rational—is a red herring.¹⁰ The new paternalist proposals, although they often mention behavioralist data, are not logically related to the cognitive biases, heuristics, and tics that together define the new consensus about human irrationality. Instead, the new paternalism is motivated by a series of experiments establishing that individuals reject making legal deci-

General Nominee’s Candor, WASH. POST, May 17, 2001, at A1 (“Cass Sunstein, a liberal law professor at the University of Chicago . . .”); Walter Shapiro, *Hype and Glory*, USA TODAY, Dec. 5, 2001, at A4 (“Cass Sunstein, a leading liberal legal theorist at the University of Chicago . . .”).

7. See Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175, 1178 (1997) [hereinafter Sunstein, *Behavioral Analysis*] (“Recent revisions in understanding human behavior greatly unsettle certain arguments against paternalism in law. . . . [T]hey support a form of anti-antipaternalism.”); Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119 (2002) [hereinafter Sunstein, *The Laws of Fear*] (reviewing THE PERCEPTION OF RISK, *supra* note 1, and arguing that populist arguments fail in the face of data about human irrationality); cf. Arlen et al., *supra* note 1; Samuel Issacharoff, *Can There Be a Behavioral Law and Economics?*, 51 VAND. L. REV. 1729, 1743–44 (1998) (arguing that even though academics have proposed interventionism, it would be unwise); Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229 (1998) (employing behavioralism data to conclude that paternalism creates efficiency). Some of Sunstein’s proposals, like eliminating the jury system in favor of a workers-compensation-like regime, are not novel. See Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555 (1985) (arguing that costs of tort law exceed its benefits and the system should be replaced by regulatory and insurance regimes). This earlier work was not based on data about irrationality, although jury irrationality was mentioned in passing as an anecdotal reason to distrust the tort system. *Id.* at 612. In this essay, when I refer to the “paternalists” or the “new paternalists,” I mean those scholars who, relying on new empirical and laboratory results about human behavior, argue for removing power from ordinary people and vesting it in bureaucrats. I have excluded from my discussion the work of scholars who, concluding that individuals suffer from cognitive biases rendering them susceptible to manipulation, call for expansion of the liability of corporations. See, e.g., Hanson & Kysar, *A Response to Market Manipulation*, *supra* note 2 (arguing that behavioralism research supports enterprise liability).

8. Posner, *supra* note 5, at 1575.

9. See Stephen M. Bainbridge, *Mandatory Disclosure: A Behavioral Analysis*, 68 U. CIN. L. REV. 1023, 1027 (2000) (explaining that behavioral economics is likely to increase paternalistic proposals because it offers a new kind of argument technique); Issacharoff, *supra* note 7, at 1744–45 (discussing the likelihood that behavioralism will lead to paternalistic policy proposals and arguing that this would be unjustified); Mitchell, *supra* note 4, at 1929 (“Reconceiving people as cognitive misers rather than economic misers leads to a very different conception of how people should be treated under the law, with cognitive misers generally due less responsibility and autonomy and in need of greater oversight, control, and assistance.”). For an earlier, nonlegal, view of the relationship between behavioral economics and democratic decision making, see Paul Slovic, *Perceived Risk, Trust and Democracy*, in THE PERCEPTION OF RISK, *supra* note 1, at 316, 324–26 (arguing that the “French model” of paternalism is likely to be unacceptable in the United States).

10. In an earlier article, a coauthor and I noted the connection between behavioralism research and paternalism. See Hoffman & O’Shea, *supra* note 1, at 337–39. That article’s critique of paternalism was internal to existing law and economic theoretical models. In this essay, by contrast, I offer an external critique of paternalism.

sions through explicit weighing of monetary costs against benefits. Although these preferences may be entirely rational and consistent, they fly in the face of the utilitarian morality which is at the heart of the new paternalists' conception of our legal system.

By failing to make an explicit connection between their policies and the public's dislike of cost-benefit decision making, the new paternalists have scored impressive rhetorical victories over their adversaries. One such rhetorical victory has been their fight against the American jury system,¹¹ waged in symposiums, books, and articles over the last few years.¹² Defenders of the jury have unwisely allowed themselves to join the hyper-complex, hyper-technical debate about juror rationality.¹³ In this debate, the jury's defenders have been overwhelmed by a rush of studies demonstrating that jurors, like the rest of society, are imprecise decision makers.¹⁴

In *Punitive Damages: How Juries Decide*,¹⁵ the paternalists present their strongest case for terminating the civil jury system, and demonstrate the rhetorical attack I have just described. The book collects research about decision making by jurors and individuals,¹⁶ and after evaluating

11. Cf. Robert A. Klinck, *The Punitive Damages Debate*, 38 HARV. J. ON LEGIS. 469, 472 (2001) (describing the view that reform of juries is necessary as "more prominent"); Lisa Litwiller, *Has the Supreme Court Sounded the Death Knell for Jury Assessed Punitive Damages? A Critical Re-Examination of the American Jury*, 36 U.S.F. L. REV. 411, 468 (2002) (arguing that a recent Supreme Court case changing review of damage awards rested, in part, on arguments of jury irrationality).

12. For a thorough literature review, see Ellsworth & Reifman, *supra* note 1, at 788-90; see also Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53 (2001) (arguing that modern trends make civil jury increasingly obsolete); Daniel W. Shuman & Anthony Champagne, *Removing the People from the Legal Process*, 3 PSYCHOL. PUB. POL'Y & L. 242, 251-56 (1997) (defending juries from psychologically based attacks).

13. See, e.g., Theodore Eisenberg et al., *Juries, Judges and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743 (2002) (defending juries with empirical studies); Lempert, *supra* note 4 (attacking jury critics' methodology); Richard Lempert, *Why Do Juries Get a Bum Rap? Reflections on the Work of Valerie Hans*, 48 DEPAUL L. REV. 453, 454-55 (1998) (arguing the same); Robert C. MacCoun, *The Costs and Benefits of Letting Juries Punish Corporations: Comment on Viscusi*, 52 STAN. L. REV. 1821 (2000) (arguing the same).

14. See *infra* note 16 and accompanying text.

15. CASS R. SUNSTEIN, REID HASTIE, JOHN W. PAYNE, DAVID A. SCHKADE & W. KIP VISCUSI, *PUNITIVE DAMAGES: HOW JURIES DECIDE* (2002) [hereinafter SUNSTEIN ET AL.]. Daniel Kahneman, although a coauthor of some of the original articles which form the book, did not participate in its construction and is not a listed author. *Id.* at ix. The authors note that their research has "different emphasis and different concerns," but their differences are "dwarfed by the commonalities." *Id.* Therefore, I refer to them throughout as "the authors" or "they," although I recognize that some authors may not subscribe to some of the language expressed by others.

16. The authors rely on several previously published articles. Reid Hastie, David A. Schkade & John W. Payne, *A Study of Juror and Jury Judgments in Civil Cases: Deciding Liability for Punitive Damages*, 22 LAW & HUM. BEHAV. 287 (1998); Reid Hastie, David A. Schkade & John W. Payne, *Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards*, 23 LAW & HUM. BEHAV. 445 (1999); Reid Hastie, David A. Schkade & John W. Payne, *Juror Judgments in Civil Cases: Hindsight Effects on Judgments of Liability for Punitive Damages*, 23 LAW & HUM. BEHAV. 597 (1999); Reid Hastie & W. Kip Viscusi, *What Juries Can't Do Well: The Jury's Performance as a Risk Manager*, 40 ARIZ. L. REV. 901 (1998); Daniel Kahneman, David A. Schkade & Cass R. Sunstein, *Shared Outrage and Erratic Awards: The Psychology of Punitive Damages*, 16 J. RISK & UNCERTAINTY 49 (1998); David A. Schkade, Cass R. Sunstein & Daniel Kahneman, *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139 (2000) [hereinafter Schkade et al., *Delib-*

this data—which “no one could have predicted”¹⁷—concludes with a sweeping indictment of jury rationality. Because jurors’ tasks “exceed[ed] their individual and social capacities,”¹⁸ their good intentions failed to prevent them from producing “unreliable, erratic, and unpredictable” results.¹⁹ In short: the jury system is irrational.

The authors recommend that we dispense with the jury system in civil cases²⁰ and replace it with a “schedule of fines and penalties, overseen by administrative officials.”²¹ This system, although vulnerable to populist attacks,²² would perform better than a system founded on erratic citizen participation.²³ The authors leave the practical question of designing such an “ideal system” of bureaucracy to further scholarship,²⁴ but suggest that it could look like an expanded version of worker’s compensation.²⁵

Through a close reading of *Punitive Damages*, I hope to refute its authors’ claim that jury irrationality or unpredictability requires their proposal to substitute a new bureaucracy for the 225-year-old American civil jury system. Part I demonstrates that: (1) the authors’ data is vulnerable to powerful internal critiques; and (2) the data, because it concludes nothing about individuals that has not been known anecdotally for hundreds of years, does not support the reforms the authors propose. Because the authors’ claims are representative of those of the larger group of paternalists whose arguments have recently been so prominent, it is disturbing that, to date, few of the jury’s defenders have addressed the disjunct between the paternalists’ data and their reforms.

In part II, I argue that citizens’ rejection of cost-benefit-based decision making in court cases is related, both logically and politically, to the new paternalists’ proposals. This evidence—forming about half of *Punitive Damages* substantive chapters—gives rise to a tension between what legal economists want the legal system to create (efficiency and deter-

erating About Dollars]; Cass R. Sunstein, Daniel Kahneman & David A. Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071 (1998) [hereinafter Sunstein et al., *Assessing Punitive Damages*]; Cass R. Sunstein, David A. Schkade & Daniel Kahneman, *Do People Want Optimal Deterrence*, 29 J. LEGAL STUD. 237 (2000) [hereinafter Sunstein et al., *Deterrence*]; W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547 (2000); W. Kip Viscusi, *How Do Judges Think About Risk*, 1 AM. L. & ECON. REV. 26 (1999); W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. LEGAL STUD. 107 (2001); W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics*, 30 J. LEGAL STUD. 313 (2001) [hereinafter Viscusi, *Punitive Damages Mathematics*].

17. SUNSTEIN ET AL., *supra* note 15, at 236.

18. *Id.* at 241.

19. *Id.*

20. Nowhere in the book do the authors limit their claims to tort cases. In theory, their results apply equally to actions sounding in contract, property, and constitutional law. I have chosen not to address the constitutional issues raised by these proposals. Cf. U.S. CONST. amend. VII.

21. SUNSTEIN ET AL., *supra* note 15, at 252.

22. *See id.* at 255.

23. *See id.* at 257.

24. *Id.* at 258.

25. *See id.* at 253–55.

rence) and what individual citizens want (fairness and justice). Although this tension is not new, it has only recently been quantified and given statistical heft. These new experiments provide intriguing evidence that minorities and women reject utilitarian cost-benefit balancing at higher rates than white men.

Part III discusses how conflating data about individual irrationality and individual rejection of cost-benefit decision making allows the new paternalists, including the authors, to avoid answering hard questions about the latter evidence. I argue that if defenders of the jury system could move beyond rationality, the frame through which we debate jury capability would change. Rather than asking if juries are irrational, we would be asking more important questions: (1) what moral goals are served by cost-benefit decision making?;²⁶ (2) why is cost-benefit decision making rejected by women and minorities at higher rates?;²⁷ and (3) is it appropriate to disempower citizens because they reject cost-benefit analysis?²⁸

I. DO ORDINARY PEOPLE HAVE THEIR HEADS SCREWED ON STRAIGHT?

Cass Sunstein's 1997 article, *Behavioral Analysis of Law*, provided one of the first explicit links between behavioral research and paternalism.²⁹ Sunstein wrote, "there is reason to question whether respect for [irrational decisions] is a good way to promote utility or welfare."³⁰ In other words, if citizens cannot make rational choices, perhaps it is a bad idea to give them what they want. Sunstein then defended "anti-antipaternalism:"³¹ paternalism makes sense if people cannot be educated or instructed to do the right thing.³² Sunstein urged scholars to "go to work" on these questions.³³

Some scholars have since argued that behavioralism research suggests that people are *irrational*,³⁴ while others disagree.³⁵ A frustrated

26. See, e.g., Steven Garber, Comment, *Punitive Damages and Deterrence of Efficiency-Promoting Analysis: A Problem Without a Solution*, 52 STAN. L. REV. 1809, 1810 (2000) (discussing the failure of economists to make explicit assumption that efficiency should guide jury decision making); see also Hoffman & O'Shea, *supra* note 1, at 341-45, 354-56 (discussing the failure of economists to provide explicit moral and practical justifications for their policy proposals).

27. See generally Laura Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 353-56 (1995) (arguing against attempts to impose rationality, traditionally defined by white men, on juries).

28. See Hoffman & O'Shea, *supra* note 1, at 414-15 (suggesting that paternalistic proposals will be impractical, even if they are otherwise moral).

29. Sunstein, *Behavioral Analysis*, *supra* note 7, at 1178.

30. *Id.*

31. *Id.*

32. See *id.* at 1193-94.

33. See *id.* at 1195.

34. See, e.g., Robert A. Hillman, *The Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages*, 85 CORNELL L. REV. 717, 735 (2000) (stating that people are subject to "general irrationality in processing information"); W. Bradley Wendel, *Mixed Signals: Rational-*

few throw up their hands, arguing that there is no way to distinguish rational from irrational behavior—both words essentially state conclusions based on the speaker’s perspective of how people should act.³⁶ Without becoming overly technical, one can fairly state that “rationality” once had a perfectly clear meaning, and now does not. A simple illustration may be helpful.

A person—I will call her Dori—used to be called rational if she (1) knew what she wanted; and (2) was capable of choosing, and did choose, the best way of getting it.³⁷ Behavioralism research purports to establish several “cognitive biases” or “cognitive errors” preventing Dori from giving herself what she wants.³⁸ From the perspective of the original definition of rational, such cognitive errors render Dori’s behavior irrational. But, some behavioralists have argued that we ought to stretch the original definition of rationality so that Dori, no matter how odd her behavior may look, may still be called rational.³⁹

Choice Theories of Social Norms and the Pragmatics of Explanation, 77 IND. L.J. 1, 13 (2002) (describing how social norms may lead people to fail to maximize their expected utility in irrational ways); cf. Owen D. Jones, *Time-Shifted Rationality and the Law of Law’s Leverage: Behavioral Economics Meets Behavioral Biology*, 95 NW. U. L. REV. 1141, 1148–51 (2001) (describing how behavioralism research has challenged law and economists to refine idea of rationality so that behavior which looks “irrational” may be considered rational). Notably, Cass Sunstein sometimes disavows arguments that behavioralism research means that people are irrational, but sometimes treats behavioralism research as evidence of irrationality. Compare Sunstein, *Behavioral Analysis*, *supra* note 7, at 1175 (“[I]t does not follow that people’s behavior is unpredictable, systematically irrational, random, rule-free, or elusive to social scientists.”), with Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 756 (1999) (“Counteracting the irrational attitudes and counterproductive policy demands caused by cognitive biases and distortions of public discourse, a [Risk Information Site] would help individuals form their risk preferences and judgments more rationally than is currently possible.”); compare *id.* at 689 (“There is nothing irrational about participating in an informational cascade.”), with Sunstein, *The Laws of Fear*, *supra* note 7, at 1131 (“Because dramatic events are an important determinant of individual risk judgments, a highly publicized incident might exacerbate unwarranted or irrational fears.”); compare Cass R. Sunstein, *Foreword: On Academic Fads and Fashions*, 99 MICH. L. REV. 1251, 1256 (2001) (“Nor do I mean to suggest that those who are vulnerable to informational pressures are weak or irrational.”), with Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1059, 1086 (2000) (“Here the question is whether government can legitimately spend extra resources to avert the harms associated with irrational public attitudes.”). Sunstein is aware of the imprecision of the word “irrationality.” See Christine Jolls, Cass R. Sunstein & Richard Thaler, *Theories and Tropes: A Reply to Posner and Kelman*, 50 STAN. L. REV. 1593, 1594 (1998) (Posner and others “write as if ‘irrationality’ and ‘irrational behavior’ are at the heart of behavioral economics and behavioral law and economics. But our article intentionally avoided that word, on the ground that it is not useful and is likely to mislead. We do far better to specify how human beings actually behave (and depart from the conventional theory) than to argue whether they are ‘irrational.’”).

35. See, e.g., Posner, *supra* note 5.

36. See Jacob Jacoby, *Is It Rational to Assume Consumer Rationality? Some Consumer Psychological Perspectives on Rational Choice Theory*, 6 ROGER WILLIAMS U. L. REV. 81, 100–01 (2000).

37. Posner, *supra* note 5, at 1551. Posner states:

For example, a rational person who wants to keep warm will compare the alternative means known to him of keeping warm in terms of cost, comfort, and other dimensions of utility and disutility, and will choose from this array the means that achieves warmth with the greatest margin of benefit over cost, broadly defined. Rational choice need not be conscious choice. Rats are at least as rational as human beings when rationality is defined as achieving one’s ends (survival and reproduction, in the case of rats) at least cost.

38. See, e.g., Korobkin & Ulen, *supra* note 2.

39. See Jolls et al., *supra* note 2.

These terms are confusing, and the authors do not define them.⁴⁰ However, the authors do charge individuals with deviations from the “Dori wants-Dori gets” definition of rationality I have given above.⁴¹ They argue that jurors do a bad job of making predictable decisions.⁴² I summarize these experimental results in subpart A, below. I then continue, in subpart B, to offer an “internal critique” of this behavioralism evidence; in accord with several recent authors, I argue that the authors rely on flawed methodology. In subpart C, I offer a more “external” critique. I discuss the kind of legal system the authors envision, and how their paternalist proposals relate to that system. I conclude that whatever one’s perspective on the meaning of the word rational and whatever one’s belief about the methodological and empirical bases of behavioralism, those issues are almost irrelevant to the paternalistic solutions the authors propose.

A. Punitive Damages: *Experimental Results*

In *Punitive Damages*, the authors present ten chapters of experimental data about individuals’ decision making as legal actors. In seven of these chapters, the authors present evidence that individuals act irrationally as prospective or mock jurors.⁴³ The authors conclude that “systematic, shared biases”⁴⁴ render juror judgments that are “not rational or fair.”⁴⁵ Jurors pick punitive damage awards through “erratic and unpredictable cognitive processes.”⁴⁶

In evaluating the authors’ experimental results, I derive the following rules describing how the authors believe the system should work: (1) similar cases should have similar awards; (2) damages should be awarded based on what the parties knew at the time of the wrongdoing; and (3) the amount of punitive damages should be proportional to the amount of compensatory damages.⁴⁷

40. The authors at one point argue that cognitive biases are not necessarily evidence of “irrationality.” SUNSTEIN ET AL., *supra* note 15, at 242 (arguing that jurors’ problems do not arise because they are “irrational, inattentive, or stupid”).

41. *See, e.g., id.* at 239.

42. *See id.* at 241.

43. Three additional chapters, which I discuss later, relate to people’s reactions to cost-benefit analysis.

44. *See* SUNSTEIN ET AL., *supra* note 15, at 239.

45. *Id.*

46. *Id.* at 240.

47. *See id.* at 25–26 (summarizing the experimental results).

1. *Unpredictability of Awards*

The authors tested unpredictability by reporting how subjects reacted to mock tort cases. Before examining the data, it may be useful to give a sense of the kinds of stories mock juries heard.⁴⁸

In one story, Joan Glover, a five-year-old child, ingested non-prescription medicine because she had been able to open a supposedly childproof cap.⁴⁹ The company willfully ignored federal regulations that might have prevented the accident.⁵⁰ The government warned the company of its failure, but an internal memo stated, “this stupid, unnecessary federal regulation is a waste of our money.”⁵¹ Noting the mildness of the government’s civil fine system, the company affirmatively decided to flout the law.

The trial jury awarded compensatory damages of \$200,000, and the remaining question was whether, and how much, to award in punitive damages.⁵² The child’s attorney, arguing for punitive damages, suggested that the company’s disregard for the child’s safety was “abhorrent and represented exactly the kind of reckless corporate greed deserving of a high award of punitive damages.”⁵³ The company’s attorney argued that it was “not at all clear that the cap was actually in violation of the regulation at all,” because the government’s warning about the cap was not in writing.⁵⁴

The authors concluded that citizens uniformly agree that this company deserves some punishment—we agree with each other around 90% of the time about the nature of the harm that has occurred.⁵⁵ But, either as individuals or as collections of citizens discussing this issue, we are unable to award consistent verdicts in the same cases.⁵⁶ Individuals’ inability to find agreement on the amount of punishment resulted in “severe unpredictability and highly erratic outcomes.”⁵⁷ Deliberation increased unpredictability: after talking, awards became either much higher or much lower.⁵⁸ The authors conclude from this data set that “[i]t is obvious that the judgment any particular dollar jury is likely to be a poor estimate of overall community sentiment.”⁵⁹

48. This original data was not available in the book itself, but can be found in one of the articles forming its constituent parts. See Schkade et al., *Deliberating About Dollars*, *supra* note 16, at 1174.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 1150.

56. See SUNSTEIN ET AL., *supra* note 15, at 36–37.

57. *Id.* at 37.

58. *Id.* at 43; Schkade et al., *Deliberating About Dollars*, *supra* note 16, at 1172.

59. SUNSTEIN ET AL., *supra* note 15, at 40–41.

2. *Hindsight Bias*

Just as the amount of a punitive damage award was hard to predict, the authors concluded that the decision to award punitive damages was riddled with cognitive errors.⁶⁰ One problem resulted from individuals' irrational "heuristics" or shortcut ways of thinking about problems.⁶¹ A classic heuristic is "hindsight bias": jurors are unable to judge conduct in light of what the tortfeasor knew at the time that she made the relevant decision because jurors are affected by what they knew of what eventually occurred.⁶²

In the book, for example, some jurors were presented with a story about a potential railroad accident, and asked if, as a group of mock jurors or as citizens evaluating a Regulatory Order, a company should take an action that would prevent future accidents.⁶³ Others were presented with the same situation after the accident happened, and asked questions about the necessity of punitive damages.⁶⁴ The experimenters reported that while only thirty-three percent of "foresight" condition respondents would force the repair, in hindsight, sixty-seven percent judged the railroad's actions as reckless enough to engender a punitive award.⁶⁵

The authors doubt that deliberation would eliminate this hindsight bias because the problem is an "almost inevitable" result of allowing citizens to make decisions.⁶⁶ They believe that jurors are simply unable to rid themselves of the feeling of "I knew it all along."⁶⁷ Given two possible events, one occurring and one not, it is all too natural to assume that the thing that did happen was always more probable.⁶⁸

3. *Proportionality*

Finally, the authors demonstrate how individuals fail to make punitive damages proportional to compensatory damages. Damages are distorted from this ideal by party citizenship (local plaintiffs are preferred);⁶⁹ party wealth (rich defendants are punished);⁷⁰ party dollar demand (plaintiffs' monetary demand of jury affected the verdict);⁷¹ and

60. *Id.* at 77.

61. Hoffman & O'Shea, *supra* note 1, at 360-61.

62. See SUNSTEIN ET AL., *supra* note 15, at 96-97.

63. *Id.* at 100-01.

64. *Id.*

65. *Id.* at 103.

66. *Id.* at 108.

67. *Id.* at 107.

68. See, e.g., Philip G. Peters, Jr., *Hindsight Bias and Tort Liability: Avoiding Premature Conclusions*, 31 ARIZ. ST. L.J. 1277, 1280-85 (1999) (describing evidence of bias).

69. SUNSTEIN ET AL., *supra* note 15, at 62-76.

70. See *id.* at 40.

71. See *id.* at 62-76.

party's use of economic rationales to make a decision (use of cost-benefit analysis hurts defendants).⁷²

Overall, many scholars appear to agree with the authors that these cognitive biases render the task of being a juror overly complex.⁷³ Juries have "good intentions and high levels of motivation," but nevertheless are liable to give punitive awards that are "unreliable, erratic and unpredictable."⁷⁴ They face "extremely serious problems in producing sensible and coherent outcomes."⁷⁵

B. *Internal Critique of Irrationality Data*

The data about rationality comes almost exclusively from a series of laboratory experiments testing people's reactions to stimuli. Critics of behavioralism's empirical findings argue that isolating decision making in this way is an especially poor way to test human rationality. In laboratories, subjects lack context from which to make decisions—they are given no feedback or opportunity to learn from their mistakes.⁷⁶ Critics also charge behavioralists with bias: experiments, rather than being neutral about their results, seem designed to elicit nonrational responses.⁷⁷ Third, scholars argue that behavioralists have put cues into their experiments that lead subjects astray.⁷⁸ Fourth, there is little confirmation that laboratory conclusions about irrationality are reflected in real-world juror verdicts.⁷⁹ Fifth, scholars, by focusing on narrow decision tasks, may discount longer range evolutionary advantages to supposedly irrational decisions.⁸⁰ Finally, critics of the behavioralism studies argue that whatever the evidence of irrationality, the proposed reforms will do little to ameliorate the problem.⁸¹

Punitive Damages, like much of the new behavioralist data, suffers from these methodological and structural problems. Because these issues have been extensively discussed elsewhere, I will not detail them here. But, one example may be helpful: the Glover case provides an ex-

72. See *id.* at 112–31.

73. See *id.* at 242.

74. *Id.* at 241.

75. *Id.* at 243.

76. See Mitchell, *supra* note 4, at 1977–79; see also Roselle L. Wissler et al., *Instructing Jurors on General Damages in Personal Injury Cases: Problems and Possibilities*, 6 PSYCHOL. PUB. POL'Y & L. 712, 718 (2000) ("Unlike judges, jurors are systematically denied any information about decisions by other juries in prior cases, depriving them of information that could help them treat like cases alike.").

77. See Mitchell, *supra* note 4, at 1972–77.

78. Lempert, *supra* note 4, at 880–81; Mitchell, *supra* note 4, at 1979–84.

79. See, e.g., Eisenberg et al., *supra* note 13, at 744–46 (arguing that juries typically relate punitive damages awards to compensatory damages).

80. See, e.g., Jones, *supra* note 34 (articulating the long-term rationality theory); Kelman, *supra* note 1, at 1580–86 (describing debate between the rationalists and the irrationalists); Posner, *supra* note 5, at 1561–64 (describing evolutionary theory and its relationship to rationality assumptions).

81. See, e.g., Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 159–90 (2002).

cellent case study in the authors' methodological errors.⁸² There, subjects were told that compensatory damages had already been awarded. Legally, the only possible way this could have been so was that a previous fact finder had found that the defendant failed to use reasonable care under the circumstances. Yet, in the closing, the defendant's attorney is made to say, "it was not at all clear that the cap was actually in violation of the regulation at all."⁸³ A reasonable juror, hearing both the instruction (negligence established) and the corporate defendant's intransigent response, might believe that a message beyond deterrence was necessary.⁸⁴ Is it surprising that ninety percent of respondents voted to award punitive damages?⁸⁵

These criticisms of behavioralism research in general, and the authors' own previously published studies in particular, are powerful. It is surprising, as *Punitive Damages* postdates this criticism, that the authors do not directly confront these issues. The general interest reader will find only one hint that the data is controversial.⁸⁶

C. *An External Critique of the Connection Between Irrationality and Paternalism*

I predict that behavioralism will soon undergo a crisis of confidence brought on by attacks on its methodological foundations. But, however valuable these criticisms may be, they distract attention away from what is really at issue. In this subpart, I examine the logic of the connection between behavioralism (with its conclusion that people behave erratically in setting damage awards) and the paternalistic solutions the authors

82. See *supra* notes 49-54 and accompanying text.

83. Schkade et al., *Deliberating About Dollars*, *supra* note 16, at 1174.

84. Other possible methodological problems existed. The authors gave individuals a list of diseases and asked how likely they were to be affected by them. Not surprisingly, individuals overestimated the effect of unlikely, but widely reported, illnesses like Botulism and underestimated the effects of common killers like strokes. The authors did not explore a crucial question: does it make sense for individuals to know about the different risks they have of death from various, apparently randomly selected, causes of death? For the nonmorbid, or the nonactuarial, it does not. The only possible result of the experiment is a mixture of informed and outright guesses. Diseases that have lower incidences are more likely to be overidentified, as a matter of simple statistics. SUNSTEIN ET AL., *supra* note 15, at 181-84.

Additionally, while the authors report that judges perform significantly better than juries and (presumably) award punitive damages less frequently, real world tests of verdicts confirm that laboratory results are not easily transferable to the real world. For example, the recently published study by Eisenberg et al., studied forty-five large trial courts conducting 9,000 trials. This review "yield[ed] no evidence that judges and juries differ significantly in their rates of awarding punitive damages, or in the relation between the size of punitive and compensatory damages." Eisenberg et al., *supra* note 13, at 746. The authors, who at one point assert "there is not a single instance in which our results disagree with findings from other experiments," SUNSTEIN ET AL., *supra* note 15, at 20, later acknowledge this study but dismiss it, arguing that "[e]ven if judges and juries do produce similar decisions, our basic claims here would not be much affected" because their proposed ideal solution would transfer power from judges as well. *Id.* at 252.

85. Schkade et al., *Deliberating About Dollars*, *supra* note 16, at 1150.

86. See SUNSTEIN ET AL., *supra* note 15, at 249-52 (discussing Eisenberg study); *infra* note 108.

propose. I argue that even if behavioralism research were methodologically unassailable, it could not support the authors' proposed solution: removing all power from civil juries and transferring it to bureaucrats applying a worker's compensation-like grid.⁸⁷

The first page of *Punitive Damages* states, without citation, that we have "experienced a dramatic increase in the incidence and magnitude of punitive damages" awards.⁸⁸ While this increase alone may not be a problem (the authors acknowledge that punitive damage awards remain rare), the decision to award damages, and the magnitude of awards, are inconsistent. This "substantial variability in punitive damages verdicts"⁸⁹ is inconsistent with our commitment to the "[R]ule of [L]aw."⁹⁰ If individuals cannot award damages with "reason and consistency," then the system itself is flawed.⁹¹

The authors—establishing that their test subjects did not always award punitive verdicts consistently or based on legally acceptable factors—conclude the Rule of Law is being undermined from within. A principal value of the system is that awards should be predictable.⁹² When awards are unpredictable, punitive damages do not serve the systemic goal of the jury system that juries reflect community sentiment.⁹³ Judges, who are less prone to the jury's problems, or bureaucrats, who might be even better at achieving consistency, should be given power.⁹⁴

In thinking about what the authors must mean by the phrase "Rule of Law," I identify two themes: (1) the Rule of Law requires similar facts to receive similar treatment by courts;⁹⁵ and (2) the Rule of Law requires that parties be able to determine, at the time when they are acting, the ultimate legal cost of that action with some certainty.⁹⁶

The authors' concern about disparate treatment of similar tortfeasors is addressed most fully by their "moderate" proposal to require judges to compare punitive damage awards to similar ones in that district when evaluating their appropriateness.⁹⁷ However, as the authors note, the Supreme Court has rejected this proposal as a constitutional requirement.⁹⁸ Without defending its merits as a "matter of constitutional law,"⁹⁹ the authors move on to more radical suggestions, and seemingly abandon this "moderate" idea.

87. SUNSTEIN ET AL., *supra* note 15, at 252.

88. *Id.* at 1.

89. *Id.* at 4.

90. *Id.* at 2.

91. *Id.* at 3.

92. *See id.* at 251.

93. *See id.* at 249.

94. *See id.* at 248–49.

95. *See id.* at 3–5.

96. *See id.* at 246.

97. *See id.* at 251.

98. *TXO Prod. Corp. v. Alliance Res.*, 509 U.S. 443, 457 (1993).

99. SUNSTEIN ET AL., *supra* note 15, at 251.

And what of the need for perfect foresight? The authors do not provide any support for their idea that the Rule of Law requires that legal actors know with precision the legal consequences of their actions. Of course, some knowledge about legal consequences is necessary.¹⁰⁰ However, in the context of civil cases, the standard for actors is often not self-knowledge, but objective knowledge: what will a jury believe was a reasonable action in light of a legal duty. The authors imagine that we could somehow create a table, with every possible bad act placed in context, paired with every possible resultant injury, every risk of detection, and come out with every possible damage award, all before the actions analyzed have occurred.

To see how this system might work, imagine a scenario based on the famous torts case of *Vosberg v. Putney*.¹⁰¹ Were you hit in the kneecap by a child in the schoolroom? Damages are \$500.00, unless the teacher watches her charges one-sixth of the time, in which case punitive damages are $(\text{harm} = \$500) * 1/(\text{probability of detection} = 1/6) = \$3,000.00$. But it is difficult to imagine room on this table for the egg-shell plaintiff rule, which in *Vosberg*, allowed recovery for harm the defendant could not have predicted.¹⁰² Providing recovery for the egg-shell plaintiff creates unpredictability.

In this pursuit of clear outcomes, and of tables, the authors pay homage to Justice Scalia's "The Rule of Law as a Law of Rules,"¹⁰³ with a twist: the authors' Rule of Law is a Law Without Litigants. For if the liability charts the authors propose were to exist, who would ever commit a tort?¹⁰⁴

I want to take a step back from the authors' arguments about the Rule of Law for a moment to regain a sense of perspective. Lest we worry that our system has always been secretly unstable, we should ask how often the authors' proposed unpredictability is likely to affect civil verdicts. One recent study found that during fiscal year 1991–1992, in state courts of general jurisdiction in forty-five of the seventy-five most populous counties in the nation, punitive damages were awarded in roughly 6% of tort cases in which the plaintiff won (177 out of 2,849 cases).¹⁰⁵ According to the authors, this study provides misleading con-

100. Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 7–8 (1997) ("Second, the Rule of Law should allow people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of various actions." (emphasis added)).

101. 50 N.W. 403 (Wis. 1891).

102. *Id.* at 404.

103. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–80 (1989).

104. If litigants knew all costs and benefits, they would only act when benefits exceeded costs. By definition, according to the authors, those cost-justified actions would be nonnegligent. Is it fair to conclude that perfect foreknowledge of costs would preclude their imposition?

105. Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 631–34 (1997).

clusions about the unpredictability of jury awards,¹⁰⁶ but the authors do not contest the rarity of punitive damages. Does our system really subvert the Rule of Law when it denies 94% of prevailing plaintiffs punitive damages, and provides only a tiny fraction the billion dollar verdicts that the authors point to, and of that tiny fraction, reverses or reduces most on appeal?

The authors' claims are a variant of Chicken Little's.¹⁰⁷ Without much real world evidence of how our legal system fails to provide citizens guidance when making decisions about the probable legal costs of their actions, the authors recommend a drastic paternalistic solution. But, our economy remains, recent experiences to the contrary, highly successful; our public institutions relatively free of graft; our infant mortality levels low. By any fair standard, there is little evidence that jury irrationality is destroying the fabric of the polity. The authors critique is entirely constructed through laboratory results about hypothetical behavior. Given the radical nature of their proposals, they have failed to meet their burden of showing a connection between erratic or irrational awards and the emergent necessity of paternalism.

A central problem is that there is no rigorous way to distinguish the jurors of today with those sitting in cases from the very beginning of the Republic. Juror irrationality is not news. Anecdotal historical evidence shows that people have always known that jurors are inconsistently precise decision makers. A belief that juries were irrational may have had its roots in the mid-nineteenth century, a product of expanding the formerly all-male, all-white venire.¹⁰⁸ In 1905 William Howard Taft decried

106. The authors' argument against Eisenberg's study has several parts. First, they argue that Eisenberg's cases are not representative of the "volatile areas" of products liability, medical malpractice and toxic substance liability, which are the subject of the book. SUNSTEIN ET AL., *supra* note 15, at 246. This objection is hard to square with the authors' proposals: the book's paternalistic conclusions do not limit their applicability to "volatile" subject matters. Even if they did, there will be statistical extremes in any data set: existing tools of appellate review are well designed to reduce excessive verdicts. Second, the authors argue that the decision whether or not to award punitive damages is part of the unpredictability they have observed. However, their own research describes a wide agreement among experimental subjects about the need for punitive awards. Third, the authors note Eisenberg et al.'s conclusion that punitive damages are tied to compensatory damages, but argue that because defendants do not know compensatory verdicts up front, they have little guidance on punitive awards. They believe "undoubtedly" that any estimate of compensatory verdicts would lead to substantial error. Even if one could "know" the compensatory award, the Eisenberg study explained that punitive damages were only partly related to compensatory levels. The authors conclude that the legal system is not "complying with the aspirations of the rule of law." *Id.* at 247. That is, the authors argue that the Rule of Law requires perfect foreknowledge of the legal costs of action. This idealistic vision of the Rule of Law bears no real recognition to what most people think it stands for. See Fallon, *supra* note 100, at 8-9 (describing different "elements" making up the "Rule of Law").

107. See generally SALLY HOBSON, CHICKEN LITTLE (1994).

108. Dooley, *supra* note 27, at 353-56 (collecting literature and arguing that criticisms of juries arose contemporaneously with the end of the all-white, all-male jury); Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 445 (1996) (describing erosion of support for jurors as rational fact finder beginning in the nineteenth century). Dooley quotes the fictional bar tender Mr. Dooley (who, she assures, is no relation of hers), saying of a jury in 1898: "Whin th' case is all over, the jury'll pitch th' testimony out iv th' window, an' consider three questions: 'Did Lootgert look as though he'd kill his wife? Did his wife look as though she ought to be

the contemporary tendency “to exalt the jury’s power beyond anything which is wise or prudent”;¹⁰⁹ Judge Frank, shortly thereafter, said “[a] better instrument could scarcely be imagined for achieving uncertainty, capriciousness, lack of uniformity, disregard of former decisions—utter unpredictability.”¹¹⁰

This anecdotal history makes it difficult to understand what effect the new debate about rationality has on our understanding of the jury’s role as a guide of community sentiment. To be sure, *Punitive Damages* attempts to quantify this irrationality. But the laboratory results, even if “real,” tell us what we already know: jury’s verdicts about punitive damages are not perfectly predictable. They are affected by nonlegal factors, and they are manipulable by smart lawyers.

The authors’ justification for paternalism reduces to the following argument: (1) unpredictability, a product of irrationality, mars jury decision making about punitive damages; (2) unpredictability undermines the Rule of Law. However, as I have shown, jury unpredictability has limited impact on the overwhelming majority of civil tort trials. Of those limited trials where punitive damages are applied, the resulting unpredictability is no different—or at least no different on any measure the authors provide—from that present since the beginning of the Republic. The Rule of Law can only be impacted by this deeply rooted, though relatively insignificant, unpredictability, if one defines the Rule of Law to mean that legal costs should be perfectly foreseeable for any given action.

When the authors argue that jury inconsistency undermines the Rule of Law,¹¹¹ they are implicitly describing their own political vision of what the legal system *should* look like, not what it is.¹¹² The Rule of Law is traditionally identified as a positive account of the legal system, not a normative proposal for what the system should be.¹¹³ When the authors propose that we change our system to one of perfect foreseeability and award-tables, they are not articulating a defense of the Rule of Law; they are proposing a radical departure from the adversary, adjudicatory, dispute resolution system that exists. Where the Rule of Law implies that

kilt? Isn’t it time we wint to supper?” *Id.* at 330 n.21 (quoting FINLEY P. DUNNE, MR. DOOLEY IN PEACE AND WAR 141–45 (Boston, Small, Maynard & Co. 1898), *quoted in* JAMES P. LEVINE, JURIES AND POLITICS ix (1992)).

109. William H. Taft, *The Administration of Criminal Law*, 15 YALE L.J. 1, 14 (1905).

110. JEROME FRANK, LAW AND THE MODERN MIND 172 (6th prt. 1949); *see also* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 8–9 (1966) (“[C]ritics complain that the jury will not follow the law, either because it does not understand it or because it does not like it, and that thus only a very uneven and unequal administration of justice can result from reliance on the jury . . .”).

111. *See* SUNSTEIN ET AL., *supra* note 15, at 247.

112. *Cf.* Judith N. Shklar, *Political Theory and the Rule of Law*, in THE RULE OF LAW: IDEAL OR IDEOLOGY 1, 1 (Allan C. Hutchinson & Patrick Monahan eds., 1987) (“[T]he phrase ‘the Rule of Law’ . . . may well have become just another of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians.”), *quoted in* Fallon, *supra* note 100, at 2 n.8.

113. *See* Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1159 (1997).

individuals will be governed by a system of laws, the authors propose that we be defined by a technocratic grid. Looking only to evidence of human irrationality, *Punitive Damages* fails to articulate why this radical model of the Rule of Law is moral, or even necessary.

II. CITIZENS' REACTIONS TO BALANCING COSTS AND BENEFITS

While jury research on irrationality affects the foresight model on the margin, research on jury reaction to cost-benefit analysis directly undercuts the model's core. If, as I will show, legal actors performing cost-benefit analyses are penalized by juries, then the authors' vision of the Rule of Law is endangered. It is this research, and its probable relation to the new paternalist proposals, that I turn to next.

The case of the exploding Ford Pinto, *Grimshaw v. Ford Motor Co.*,¹¹⁴ marks the first well-known instance of the law confronting the hard issue of citizen reaction to cost-benefit balancing.¹¹⁵ In that case, Ford chose to release a vehicle it knew had a design flaw because the cost of replacing the vehicle exceeded the benefits due to society, assuming that the benefit of a human life was \$200,000.¹¹⁶ The jury punished Ford with a \$125 million punitive award (later reduced on appeal to \$3.5 million).¹¹⁷ In the years since the Pinto case, several different scholars have attempted to decipher why Ford's cost-benefit analysis was so unpleasant for juries.¹¹⁸

Until very recently, however, the idea that jurors (and individuals in society more generally) found cost-benefit analysis distasteful was anecdotal, and limited to cases like the Pinto.¹¹⁹ There was little explicit data supporting the idea that a defendant's use of cost-benefit analysis was a guaranteed ticket to a windfall verdict. Indeed, Professor Gary Schwartz,

114. 174 Cal. Rptr. 348 (1981).

115. See MacCoun, *supra* note 13, at 1831 n.2 (stating that the Ford Pinto case is an especially useful illustrative tool); Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1035–39 (1991) (discussing public outrage about Ford's cost-benefit tradeoff); W. Bradley Wendel, *Value Pluralism in Legal Ethics*, 78 WASH. U. L.Q. 113, 149 (2000) (discussing the Ford Pinto case as archetype of juries rejecting cost-benefit analysis).

116. But see Schwartz, *supra* note 115, for another rendition of the story of how Ford lost its case. Schwartz argued, in part, that the jury was never really confronted with the cost-benefit test, as the trial judge rejected Ford's proposed risk-benefit balancing jury instruction. *Id.* at 1039–40.

117. See *Grimshaw*, 174 Cal. Rptr. at 390–91 (stating that a jury verdict of \$125 million in punitive damages against an automobile manufacturer was reduced on appeal to \$3.5 million).

118. See Dale Hattis & Sue Swedis, *Uses of Biomarkers for Genetic Susceptibility and Exposure in the Regulatory Context*, 41 JURIMETRICS J. 177, 193–94 (2001) (arguing that cost-benefit analysis “appear[s] to reduce important policy decisions to purely technical analyses”); Hoffman & O’Shea, *supra* note 1, at 394–403 (discussing data about antiutilitarianism preferences, and suggesting that people have a positive taste for fairness and deontological, as opposed to utilitarian, legal analysis); Richard H. Pildes & Elizabeth S. Anderson, *Slipping Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2150–51 (1990) (arguing that the Pinto jury’s punitive award “reflect[s] a more subtle set of judgments, not about whether trade-offs between safety and expense should ever be made, but about what it meant to make that particular trade-off in the particular context in which it had been made”); Schwartz, *supra* note 115, at 1038–47.

119. See Lempert, *supra* note 4, at 892.

who first devoted scholarly attention to the Pinto case, thought lawyers could convince jurors to accept efficiency-based analyses.¹²⁰

This anecdotal account began to change in the late 1990s, when the authors published empirical studies establishing that: (1) individuals do not want economics applied to at least some legal choices; (2) in those circumstances, individuals will not apply cost-benefit thinking, no matter how strongly urged to do so; and (3) individuals will consider illegitimate courses of conduct that are arrived at through such economic decision making. These studies, now collected in *Punitive Damages*,¹²¹ have had an enormous impact on how other scholars now view the institution of the American jury,¹²² as well as how corporations conduct their businesses.¹²³

Let me take a moment to briefly summarize the results of the studies the authors present in *Punitive Damages*.¹²⁴ Subjects were asked about their reactions to an automobile design defect tort case. In one scenario, where a corporation had not employed a cost-benefit analysis, individuals imposed an average of \$2.91 million in punitive damages. But when companies employed cost-benefit decision making, they were penalized \$4.59 million.¹²⁵

In another study, “ordinary people” as well as seemingly sympathetic law students at the University of Chicago Law School were shown to reject attempts to apply economic models to punitive awards.¹²⁶ They refused to award punitive damages according to the best known law and economics based instruction—awarding damages by multiplying the inverse of the probability of detection of the tortfeasor’s actions by the

120. See Schwartz, *supra* note 115, at 1037–38.

121. SUNSTEIN ET AL., *supra* note 15.

122. See, e.g., Mark Geistfeld, *Reconciling Cost-Benefit Analysis with the Principle That Safety Matters More Than Money*, 76 N.Y.U. L. REV. 114, 167–68 (2001) (using new studies to construct a theory about how juries evaluate risk); Phillip G. Peters, Jr., *The Role of the Jury in Modern Malpractice Law*, 87 IOWA L. REV. 909, 935 (2002) (suggesting that juror unwillingness to compute costs makes the jury inappropriate adjudicator of medical decisions); John M. Thomas, *Design Litigation and Strict Liability III: The Problem of Jury Instructions Which Do Not Instruct*, 10 KAN. J.L. & PUB. POL’Y 132, 136 (2000) (“[I]n the context of specific cases involving specific injuries, not only are juries inclined to reject intuitively risk utility balancing, they are likely to punish manufacturers for engaging precisely in the risk utility analysis required by the law.”); W. Kip Viscusi, *Punitive Damages: How Jurors Fail to Promote Efficiency*, 39 HARV. J. ON LEGIS. 139 (2002). Some scholars have reacted to the recent data by assuming that eventually juries can be made to accept cost-benefit balancing. Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813, 860 (2001) (arguing that juries will cease to “bridle” at cost-benefit analysis over time if this comes to be part of what “everybody knows” about negligence).

123. For an anecdotal discussion of how companies react to cost-benefit analyses, see Steven Garber, *Product Liability, Punitive Damages, Business Decisions and Economic Outcomes*, 1998 WIS. L. REV. 237, 257 n.41. For a discussion of how corporate criminal law ought to react to these new studies, see V.S. Khanna, *Corporate Liability Standards: When Should Corporations Be Held Criminally Liable?*, 37 AM. CRIM. L. REV. 1239, 1273 n.218 (2000).

124. The following descriptions were adapted, in part, from Hoffman & O’Shea, *supra* note 1, at 395–404.

125. SUNSTEIN ET AL., *supra* note 15, at 124.

126. *Id.* at 141.

amount of the compensatory award that would remedy the victim's actual loss.¹²⁷ Even varying the probability of detection by twenty-fold had no significant effect on the amount of the punitive award the subjects offered.¹²⁸ In a third experiment,¹²⁹ individuals were to perform three calculations before selecting a punitive damage award. First, they were instructed to set the award that would be appropriate from a pure deterrence perspective. That number, they were told, should equal the level of damages (the compensatory judgment) divided by the probability of detection. Second, they were told to think about what level of damages was necessary to punish corporate wrongdoing, but were instructed that such punishment may occur through the compensatory (and not the punitive) damage scheme. Third, they were told to compute a weighted average of the first two numbers to find the optimal punitive award.¹³⁰

Only fifteen percent of respondents correctly applied the calculus.¹³¹ Individuals were "simply reluctant or unable to carry out even the most basic mathematic calculations."¹³² The amount of money that individuals believed necessary to punish corporations proved far more significant to determining the amount of their final damage award than did their view of the deterrence test.

- Demographic differences proved to be significant determinants of how likely individuals were to accept cost-benefit-based instructions.¹³³
- Being a woman makes you 5% less likely to apply the deterrence-based mathematical calculus;
- Being Latino makes you 8% less likely to apply the calculus;
- Being African American makes you 11% less likely to apply the calculus;
- Being college educated and having a graduate degree makes you 22 and 32% more likely, respectively, to apply cost-benefit type decision making;
- "Given . . . that these formulas required only simple multiplication, it would be difficult to make the case that these individuals were unable to carry out the basic arithmetic. A more compelling explanation is that many respondents were simply unwilling to carry out these instructions."¹³⁴ The results may indicate a simple

127. *Id.* at 240–41.

128. *Id.* at 137, 139 tbl.8.2.

129. *See id.* at 142–70.

130. *Id.* at 144–45, 164–66.

131. *Id.* at 151 tbl.9.2, 152.

132. *Id.* at 164.

133. I found the detailed data discussed in the text, not in the book, but in one of the source papers. *See Viscusi, Punitive Damages Mathematics*, *supra* note 16, at 339–40.

134. *Id.* at 338.

reluctance by women, for example, “to surrender their punitive damages judgment to a mathematical formula.”¹³⁵

I believe that this data is what has motivated the paternalism that increasingly marks the work of the authors, and other like-minded scholars. Unlike the data about erratic awards, arising from behavioralism research about irrationality, the data about juror reactions to cost-benefit balancing is an explicit rejection of the paternalists’ idealized system. That system, as I have described it, is governed by the Rule of Law, where the Rule of Law means that actions have perfectly predictable legal results, defined through explicit weighing of social costs and benefits. If people reject the concept of weighing costs and benefits, then they really are rejecting the Rule of Law, at least as defined by the authors. When individual jurors refuse to accept the central value of our legal system, as currently understood by these law and economic scholars, paternalistic reforms become necessary.

III. HOW CONFLATING IRRATIONALITY AND DISLIKE OF COST-BENEFIT ANALYSIS HELPS SCHOLARS ATTACK JURIES (AND CITIZEN DECISION MAKING)

This part explores how conflating data about jury irrationality with data about jurors’ reactions to cost-benefit decision making offers paternalists—whether they are conscious of it or not—important rhetorical advantages in their fight to change the way legal decisions are made in the United States.¹³⁶ Unlike the previous two parts, I now aim my critique not at the authors but at their critics; I argue that the current focus of the antipaternalists is flawed.

Early behavioralists believed that undermining the assumption that humans are rational actors would fundamentally change (and possibly undermine) law and economics.¹³⁷ If law and economists were unable to predict how people react to law, the thinking went, normative work would be hard to defend.¹³⁸ Many liberal and left-leaning scholars were in the forefront of the early rationality debate.¹³⁹

But, in recent years, the nature of the debate has changed. Defenders of individual choices—on the right and left—have attacked the experimental data and its theoretical grounding, on a variety of fronts. As I

135. SUNSTEIN ET AL., *supra* note 15, at 161.

136. Cass Sunstein has suggested that “availability entrepreneurs acting on behalf of corporations” may deliberately focus on individual cases of aberrant punitive damage awards as a means of encouraging public support for tort reform. See Kuran & Sunstein, *supra* note 34, at 687. However, even if *Punitive Damages* is an example of availability entrepreneurship, it is not clear that the authors would distinguish evidence of juror “irrationality” from evidence about their reaction to cost-benefit analysis. Some might argue that rejection of efficiency-based legal regimes is itself irrational.

137. See Hanson & Kysar, *The Problem of Market Manipulation*, *supra* note 2, at 634–35.

138. See Arlen, *supra* note 2, at 1767.

139. See, e.g., Hanson & Kysar, *The Problem of Market Manipulation*, *supra* note 2.

have demonstrated above, this debate wages fiercely across legal academia, with no end in sight.¹⁴⁰

Simply by engaging in the debate about the meaning and empirical content of rationality and behavioralism, defenders of traditional common-law institutions like the jury find themselves on foreign ground. How are they to respond to laboratory studies about individuals' cognitive biases? Most such scholars are ill equipped to start their own research centers, and are not supported by the corporations that fund several of the authors of *Punitive Damages*.¹⁴¹ The experiments detailed in *Punitive Damages* examine hundreds of test subjects: does the average academic have access to such resources? What corporation would sponsor laboratory studies defending the jury's role in civil actions?¹⁴² By debating citizen rationality viewed through the laboratory's lens, defenders of democratic decision making immediately put themselves at a financial disadvantage.

As significantly, it is unclear that defending juror "rationality" will be conclusive. People do respond "irrationally" to some choices. Moreover, competing studies are likely to confuse the issue, as scholars who wish to prove that individuals are rational, or irrational, have not reached a consensus about definitions.¹⁴³

Assume, however, that the behavioralism project were demonstrated to lack a rigorous empirical core. What then? As part I shows, the debate about jury unpredictability is not logically related to the new paternalistic proposals which have so infected legal discourse. Even if the jury's defenders (or more broadly democratic decision making in general) were to establish that individuals could be trusted to run their own affairs, paternalists would not abandon their project. They would be left with a definition of the Rule of Law—perfectly foreseeable legal costs based on explicit balancing of risks and harms—that alienates the great majority of the population, and a set of mechanisms with which to implement their ideal legal system that is equally distasteful.

Because jury rationality is, in a way, irrelevant to the new paternalists, it is fair to ask why they have not been called to task about this issue.

140. See *supra* note 1.

141. See Lempert, *supra* note 4, at 868–70 (discussing Exxon funding of Viscusi and Hastie's scholarship).

142. See Theodore Eisenberg, *Damage Awards in Perspective: Behind the Headline-Grabbing Awards in Exxon Valdez and Engle*, 36 WAKE FOREST L. REV. 1129, 1147–49 (2002) (discussing Exxon funding of scholars and the business's use of the experimental research in its attacks on punitive damage awards).

143. Korobkin & Ulen, *supra* note 2, at 1071–72; Posner, *supra* note 5, at 1558. Hanson and Kysar, recognizing this issue early on, applied the old phrase that "it takes a theory to beat a theory." See Hanson & Kysar, *The Problem of Market Manipulation*, *supra* note 2, at 667. But the atheoretical objection to evidence of actual human behavior has had a long history. See Donald C. Langevoort, *Theories, Assumptions, and Securities Regulation: Market Efficiency Revisited*, 140 U. PA. L. REV. 851, 913 n.214 (1992) (quoting economic scholarship from the 1980s that rejected behavioral data for lack of theoretical coherence).

Sunstein and others agree that behavioralism weakens the case for deference to individual choices, because behavioralism establishes that people do a bad job of evaluating risks, making decisions that are wise, and implementing the decisions they have made to give themselves what they want.¹⁴⁴ These conclusions are persuasive not through moral argument but by reference to empirical data. Readers of the data are caught up in its assumptions, its precision, the graphs, the scientific rhetoric. Professor McCloskey's formulation of how data seduces legal scholars says it all: "Look, I have a coefficient here statistically significantly different from zero: promote me."¹⁴⁵

Unfortunately, debating whether people are or are not irrational, do or do not provide perfectly predictable punitive verdicts, respect or disrespect jury instructions, in the context of deciding how much power they ought to retain over legal institutions, is likely to prove an ineffective rejoinder to the new paternalism.

If the jury's defenders can move beyond rationality, they can focus on the experiments about how juries, and members of the public, react to cost-benefit analysis. They could examine why African Americans, Latinos, women, the less-educated, and the poor all reject utilitarian models at higher rates than white men. This astonishing fact has received almost no scrutiny,¹⁴⁶ even though it confirms what many had long suspected about law and economics' privilege of logic over real-world issues of gender and race. A crucial component of the defense of juries should be that their critics must rely on a conception of the Rule of Law which has been statistically proven to be more appealing to white men than to minorities and women.

Similarly lost in the data has been any concern about the moral goals of the civil law. The authors mention this concern in passing. They say that the idea of deterrence providing the only justification for punitive damages is "controversial, and we do not, as a group, intend to take a position on [it] here. . . . We suggest only that many policy analysts believe that the task of the legal system is to [deter bad conduct]"¹⁴⁷

144. See Sunstein, *Behavioral Analysis*, *supra* note 7, at 1178.

145. Donald N. McCloskey, Essay, *The Rhetoric of Law and Economics*, 86 MICH. L. REV. 752, 765 (1988)

146. Cf. Hoffman & O'Shea, *supra* note 1, at 402-03. On the other hand, evidence that different kinds of people have different responses to risk itself has received scrutiny, both by psychologists and, increasingly, by legal academics. See Paul Slovic, *Trust, Emotion, Sex, Politics and Science: Surveying the Risk-Assessment Battlefield*, in *THE PERCEPTION OF RISK*, *supra* note 1, at 390-412 (discussing the "inherently subjective" nature of risk assessment and demographic differences in risk perception); see also Staci Jeanne Krupp, *Environmental Hazards: Assessing the Risk to Women*, 12 FORDHAM ENVTL. L.J. 111, 125 (2000) ("[A]rguably, risk assessors, politicians, and bureaucrats may be acting on values and judgments about risk that women do not share, or may be neglecting concerns that are particular to women."); Sunstein et al., *Assessing Punitive Damages*, *supra* note 16, at 2100 (discussing gender differences in jury behavior); cf. Jan L. Hitchcock, *Gender Differences in Risk Perception: Broadening the Contexts*, 12 RISK 179 (2001) (arguing that risk assessments have drawn conclusions that overgeneralize from data about women's responses to risk).

147. SUNSTEIN ET AL., *supra* note 15, at 109.

Elsewhere they acknowledge that people “disagree about the purpose of punitive damage awards,” and, they concede, “many people, including many lawyers and judges, are unsure about economic analysis of the deterrence issue.”¹⁴⁸ The authors provide no discussion of the intense moral and practical debates about applying efficiency to legal decisions.¹⁴⁹ There is no discussion of the effect a “retribution”-based theory of punitive damages would have on the authors’ judgment that all power should be transferred to the bureaucratic state. Rather, the authors acknowledge the controversy, and then move on as if it did not exist.

Absent the distracting rationality debate, this disregard of moral issues would have been impossible. The authors would have been forced to confront the hard moral problems often hidden in law and economic analyses: what goal is the system supposed to serve; and how should it best serve that goal? Nowhere in the book do we learn that there is no agreement among scholars, and precious little explicit discussion, about these goals.¹⁵⁰ The authors do not discuss the idea of wealth maximization, a controversial concept at the heart of a deterrence-based theory of tort law. Nowhere in the book do the authors give any real consideration of the possibility of educating the citizens to better comprehend the value of cost-benefit tradeoffs.¹⁵¹ Instead, the authors recommend that we all simply consider the practical (not the moral) implications of moving immense amounts of power to a bureaucratic state. Paternalists argue that if bureaucratic control is practical, “whatever ordinary people think, the relevant administrators will seek to promote optimal deterrence.”¹⁵² Is this silence about moral issues defensible in light of the irrelevance of the data about unpredictability?

Conflating data about irrationality with information about how much citizens dislike cost-benefit analysis thus provides paternalists with two main advantages: (1) it engages opponents in a data heavy debate where defenders of the common-law jury are at a natural disadvantage; and (2) it covers up several very unattractive features of the second kind of research. Because of these characteristics, we will likely see more

148. *Id.* at 109–10.

149. For an in-depth discussion, see Hoffman & O’Shea, *supra* note 1, at 340–72.

150. *Id.* at 347–56.

151. *Cf.* Letter from Thomas Jefferson to William Charles Davis (Sept. 28, 1820), *quoted in* JOHN BARTLETT, *FAMILIAR QUOTATIONS* 344–45 (Justin Kaplan ed., 16th ed. 1992) (“I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion.”). In my earlier article with Michael O’Shea, we discussed the work of Jonathan Baron, a psychology professor at the University of Pennsylvania. See Hoffman & O’Shea, *supra* note 1, at 404–07, 415–18. Baron argues that “[u]tilitarianism often conflicts with our intuitive beliefs about what is morally right.” Jonathan Baron, *Heuristics and Biases in Equity Judgments*, in *PSYCHOLOGICAL PERSPECTIVES ON JUSTICE* 109, 111 (Mellers & Baron eds., 1993). However, Baron believes that people are capable of being educated to accept utilitarian arguments. See JONATHAN BARON, *JUDGMENT MISGUIDED: INTUITION AND ERROR IN PUBLIC DECISION MAKING* 196 (1998).

152. Sunstein et al., *Deterrence*, *supra* note 16, at 250.

books like *Punitive Damages*: full of data about individual behavior that mix evidence of irrationality and evidence of tastes against utilitarianism. And, because of the seductive nature of the rationality debate, we will likely see critiques of this data that focus on methodology and rationality, instead of morality and legal theory.

While the evidence of irrationality I describe in part I is likely to be important ammunition in political and legal battles, data like that I describe in part II is unlikely to be seen often outside the pages of academic law reviews.¹⁵³ This absence will deprive defenders of democratic decision making of an important weapon in their fight to preserve ancient, and constitutionally mandated, institutions like the civil jury.

153. Cf. Adam Liptak, *Debate Grows on Jury's Role in Injury Cases*, N.Y. TIMES, Aug. 26, 2002, at A1 (relying on the book and on Professors Sunstein and Viscusi for support of view that jury decisions are not sensible or reliable, without mention of jury's explicit reactions to efficiency); *Readings*, WASH. POST, May 5, 2002, at H3 (summarizing the book by stating it is not fair or cost-effective to rely on jurors because they are easily swayed and mete out inconsistent verdicts). *But cf.* Bruce Fein, *All Rise, the Jury Is Deciding*, WASH. TIMES, July 23, 2002, at A21. Fein describes the *Punitive Damages*' conclusion as follows:

Their findings generally confirm . . . that jury awards are erratic, hitting like lightening bolts; that juries favor local plaintiffs over carpetbaggers; that jurors routinely ignore the legal standards for punitive damages; that when injuries appear, no matter how serendipitous, jurors are inclined to find predictability by the defendant to alleviate plaintiff losses. And, defendants whose cases pivot on a cold cost/benefit appraisal of the worth of a human life are more harshly punished than the non-calculating businessman.