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## Another Jackpot (In)Justice: Verdict Variability and Issue Preclusion in Mass Torts

Byron G. Stier



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# Another Jackpot (In)Justice: Verdict Variability and Issue Preclusion in Mass Torts

Byron G. Stier\*

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## I. INTRODUCTION

What if, in a case involving a single plaintiff, a corporate defendant in a mass tort litigation faces a single jury of six people that finds, in a special interrogatory, that the corporation's product is defective? That single finding by six people on one jury could well result in a finding of defectiveness for the defendant's product in perhaps thousands of other suits. Indeed, that finding may bind future juries, even if most subsequent juries may have found no product defect. That is because issue preclusion, or collateral estoppel, as it was previously known,<sup>1</sup> would in the discretion of the trial court permit a plaintiff to use a single jury's verdict against a

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1. This article will employ the more recent term, issue preclusion, rather than collateral estoppel. See RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1980) (referring to collateral estoppel as "issue preclusion").

defendant in a prior case to foreclose further litigation on the issue litigated. Indeed, the use of issue preclusion may gain renewed attention for mass tort management since the Florida Supreme Court's 2006 decision in *Engle v. Liggett Group, Inc.*, where a statewide tobacco class action jury found that, *inter alia*, defect and negligence would preclude further litigation on those issues in follow-up trials of former class members.<sup>2</sup>

Under the United States Supreme Court's seminal opinion in *Parklane Hosiery Co., Inc. v. Shore*, issue preclusion may be applied if three conditions are met. First, the issue was necessary to the prior jury's decision; second, the current plaintiff could not have easily joined the prior action; and third, application of issue preclusion would not otherwise be "unfair."<sup>3</sup> Fairness considerations set forth in *Parklane* include whether the defendant had the incentive to litigate vigorously in light of the amount of damages alleged in the earlier suit and foreseeable future suits;<sup>4</sup> whether the judgment sought to be used for issue preclusion "is itself inconsistent with one or more previous judgments" for the defendant;<sup>5</sup> and whether the second suit provides the defendant procedural differences that could change the result.<sup>6</sup>

In an often-cited footnote, the *Parklane* Court expanded on the question of prior inconsistent verdicts and discussed an article by Professor Brainerd Currie in which he detailed the issue preclusion problem facing a railroad after a railroad crash.<sup>7</sup> As Professor Currie explained, various plaintiffs might lose the first twenty-five suits against the railroad, but then a plaintiff might win the twenty-sixth suit.<sup>8</sup> Issue preclusion might conceivably allow plaintiffs to benefit from the single adverse verdict against the defendant on issues such as negligence, when other plaintiffs lost suits one to twenty-five

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2. *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). Recently, a federal district court rejected the issue preclusive effect of *Engle*'s findings because they were not sufficiently specific to comport with the requirements of common law issue preclusion or due process. *Brown v. R.J. Reynolds Tobacco Co.*, 576 F. Supp. 2d 1328, 1347-48 (M.D. Fla. 2008). Because *Engle* occurred in a class setting, *Engle* is properly regarded as an "issue class action," which involves additional problems not present in individual case issue preclusion. See Laura J. Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L.J. 567 (2004) [hereinafter Hines, *Dangerous Allure*]; Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709 (2003) [hereinafter Hines, *Challenging the Issue*]; cf. *Spitzfaden v. Dow Corning Corp.*, 833 So. 2d 512 (La. Ct. App. 2002) (reversing decision that Phase I class verdict benefitted absent class members after class was decertified). Full exploration of issue class actions is beyond the scope of this article.

3. See *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 329-31 (1979).

4. *Id.* at 330.

5. *Id.*

6. *Id.* at 331 (stating that such "procedural opportunities" could "readily cause a different result").

7. *Id.* at 330 n.14 (citing Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957)).

8. *Id.*

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on that issue.<sup>9</sup> Those losses could not be applied via issue preclusion against subsequent plaintiffs because, unlike the defendant, the later plaintiffs were not parties to the prior suit and had a due process right to present their own arguments on the issue.<sup>10</sup> The Supreme Court agreed with Professor Currie that such a result would be unfair, and that issue preclusion should not be used where there have been prior inconsistent verdicts.<sup>11</sup>

But what if the first jury, which happened to find defectiveness in a mass tort case, would have in fact conflicted with most of the subsequent juries? Under the Supreme Court's approach, there would be no prior inconsistent verdicts, and future inconsistent verdicts would never appear because future plaintiffs would seek to have the issue bindingly resolved in all subsequent litigation. Is that fair? As a result of the decision of a single jury, composed of perhaps six to twelve people, a company, or even an industry, could be bankrupted as thousands of plaintiffs in the jurisdiction seek to take advantage of the single jury's finding.<sup>12</sup> If the jury's finding is an outlier among those which most juries would find, proper implementation of the tort goals of deterrence and corrective justice in the mass tort litigation are also undercut.

Defense counsel might avoid this problem by seeking a general verdict from which it is impossible to derive a jury's finding applicable to other cases, such as whether the product is defective. But a judge seeking the

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9. *Id.*

10. As the Supreme Court of the United States had previously noted in *Blonder-Tongue*:

Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

*Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971) (citing *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)).

11. *Parklane*, 439 U.S. at 330; see also Lawrence C. George, *Sweet Uses of Adversity: Parklane Hosiery and the Collateral Class Action*, 32 STAN. L. REV. 655, 675 (1980) (describing result of all subsequent plaintiffs benefiting from a plaintiff win after several plaintiff losses as “capricious—certainly unfair to defendant, but also to those early plaintiffs, if any, unable to reap the benefits of a later triumph”).

12. If the governing law is the same, a verdict could conceivably be given issue preclusive effect even outside the particular state's jurisdiction. See *Rogers v. Ford Motor Co.*, 925 F. Supp. 1413, 1418–20 (N.D. Ind. 1996) (plaintiff sought preclusive effect for prior California verdict, but court rejected on other grounds); *Kortenhaus v. Eli Lilly & Co.*, 549 A.2d 437 (N.J. Super. Ct. App. Div. 1988) (reversing partial summary judgment based on issue preclusion from prior New York judgment); *Goodson v. McDonough Power Equip., Inc.*, No. 80-CA-34, 1981 WL 2886 (Ohio Ct. App. Aug. 18, 1981) (applying Florida judgment in Ohio court on negligence for manufacturer of mower), *rev'd*, 443 N.E.2d 978 (Ohio 1983).

judicial efficiency that supposedly underlies issue preclusion<sup>13</sup> might well use special jury interrogatories that offer generalizable findings on particular issues, and indeed may also notify the parties at the start of the case of his or her intention to use issue preclusion in subsequent cases if the verdict is against the defendant.

Indeed, the Supreme Court's fairness factors do not remedy this problem, even though its consideration of inconsistent verdicts demonstrates the Court's concern about verdict variability. In effect, the Court's approach makes fairness turn on the luck of which verdict comes first in time. A defense verdict that arises first should stop subsequent issue preclusion on an issue, because a prior pro-defense verdict would be inconsistent with the subsequent plaintiff verdict. But if the pro-plaintiff verdict occurs first, the pro-defense verdict may never be heard because issue preclusion would prevent subsequent juries from deciding the issue. Thus, even though the United States Supreme Court has sought to avoid the "aura of the gaming table,"<sup>14</sup> the Court's approach simply turns on which verdict is dealt first.

All of these concerns are exacerbated in light of the recent and growing empirical evidence of verdict variability. Notwithstanding judicial mechanisms to control the jury verdict, such as awarding judgment notwithstanding the verdict,<sup>15</sup> substantial verdict variability remains. As a result, while one jury may find for plaintiffs on an issue such as defect, other juries may indeed reach the opposite conclusion. This burgeoning evidence of verdict variability confirms lawyers' long-held beliefs about the unpredictability of any one jury's verdict, and especially calls into question the use of issue preclusion in mass torts, where a single, outlier, pro-plaintiff verdict on issues such as design defect, warning, or negligence could bankrupt a company or industry, even though most juries would have found otherwise.

To avoid these problems, this article argues that in mass tort litigation, courts should exercise their "broad discretion" to deny as "unfair" the application of offensive, non-mutual issue preclusion.<sup>16</sup> Instead, rather than

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13. See *Parklane*, 439 U.S. at 326 (noting that "[c]ollateral estoppel . . . has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation" (emphasis added)).

14. *Blonder-Tongue*, 402 U.S. at 329 (stating in the context of defensive non-mutual issue preclusion that "[p]ermitt[ing] repeated litigation of the same issue as long as the supply of unrelated defendants holds out" may reflect "the aura of the gaming table"); see also *id.* at 322–23 ("Bentham had attacked the doctrine 'as destitute of any semblance of reason, and as 'a maxim which one would suppose to have found its way from the gaming-table to the bench.'") (quoting *Zdanok v. Glidden Co.*, 327 F.2d 944, 954 (2d Cir. 1964)).

15. See FED. R. CIV. P. 50(a)(1) (setting forth Judgment as a Matter of Law and stating that "[i]f a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may . . . resolve the issue against the party").

16. As the United States Supreme Court stated in *Parklane*:

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affix resolution of crucial issues in a mass tort on a single pro-plaintiff verdict, courts should allow multiple jury verdicts to unfold and convey a more accurate and representative community assessment of difficult issues such as defect, warning, and negligence. Such an approach would still serve judicial efficiency because these multiple verdicts frequently form the basis for broad settlements that dispose of thousands of claims without trial. Moreover, while this approach may permit seemingly inconsistent verdicts, raising concern for the public perceptions of the judicial system, it reflects, in its proper assessment of the use and limits of juries, an honesty that should enhance respect for the judiciary. In exploring the implications of recent evidence of verdict variability for issue preclusion and situating issue preclusion within the emerging consensus of mass tort management, this article furthers the analysis of my prior work examining verdict variability and mass tort class actions<sup>17</sup> and deepens the scholarly criticism of the use of issue preclusion in mass tort litigation.<sup>18</sup>

Part II of this article discusses the growing empirical evidence of verdict variability on general issues of liability and explains that variability is expectable given the jury's necessarily limited representation of the community. Part III then examines and critiques the doctrine of offensive non-mutual issue preclusion in mass tort litigation, particularly in light of the concerns created by verdict variability. Next, Part IV discusses, as an alternative mass tort management approach to issue preclusion, the use of multiple verdicts in individual trials that frequently lead to broad, well-informed mass tort settlements that serve judicial efficiency and effectuate well the tort goals of corrective justice, deterrence, and compensation. Finally, Part V concludes that offensive non-mutual issue preclusion is

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[T]he preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts *broad discretion* to determine when it should be applied. The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be *unfair* to a defendant, a trial judge should not allow the use of offensive collateral estoppel.

*Parklane*, 439 U.S. at 331 (emphasis added) (footnote omitted).

17. See Byron G. Stier, *Jackpot Justice: Verdict Variability and the Mass Tort Class Action*, 80 TEMP. L. REV. 1013 (2007).

18. Professor Michael Green, for example, wrote intelligently and thoroughly in criticizing the use of issue preclusion for products liability cases in 1984, only a few years subsequent to *Parklane*. See Michael D. Green, *The Inability of Offensive Collateral Estoppel to Fulfill Its Promise: An Examination of Estoppel in Asbestos Litigation*, 70 IOWA L. REV. 141 (1984). Much has occurred in the intervening twenty-five years, both with regard to research on juries and their record in mass tort litigation, and evolving approaches to mass tort case management. See *infra* Parts II, IV.

problematic, that courts should use their discretion to reject issue preclusion in mass tort litigation, and that courts should join in moving the entire mass tort to maturity and likely settlement through multiple verdicts that provide a more balanced assessment of the issues involved.

## II. VERDICT VARIABILITY IN MASS TORT TRIALS

Evidence of verdict variability conforms to lawyers' long-held beliefs about the unpredictability of trial.<sup>19</sup> Juries may well deliver verdicts that substantially differ, though based on identical facts.<sup>20</sup> Indeed, any one jury's verdict may be an outlier among numerous jury responses applying the law to the facts before it.<sup>21</sup> If one tried the same case before different juries multiple times, one would expect to be able to chart the variety of verdict responses.<sup>22</sup> Numerous trials would need to occur to sketch the likelihood of liability.<sup>23</sup> As a result, the decision of any one jury may not be indicative of whether a plaintiff would prevail with another jury.<sup>24</sup> Indeed, because of problems of uniformity and predictability, courts in England have ruled that

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19. See Laura G. Dooley, *National Juries for National Cases: Preserving Citizen Participation in Large-Scale Litigation*, 83 N.Y.U. L. REV. 411, 412 (2008) [hereinafter Dooley, *National Juries*] (“[M]edia portrayals of jury verdicts in tort cases as disproportionate and inconsistent have revealed a crisis of legitimacy.”); see also Stier, *supra* note 17 (discussing evidence of verdict variability).

20. As Professor Trangsrud has noted:

If the cases in a mass tort are tried separately, some similarly situated plaintiffs may recover and others may not. . . . We should not pretend that there is only one proper result in a hotly disputed tort case. Reasonable persons and reasonable juries may disagree on the significance of the same or similar evidence.

Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 77 (1989).

21. See, e.g., 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, 833 (1992) (“Every verdict is itself merely a sample from the large population of potential verdicts.”); *id.* at 834 (“The fact that we normally obtain only one award from one trial of each case obscures the population of possible awards from which that one was drawn.”); *id.* at 839 (“We already have noted one flaw in the imagery of the archetypal civil trial: The verdict appears precise and individualized, but in reality it is only a sample of one from a wider population of possible outcomes.”).

22. See *id.* at 833 (“That ‘population of verdicts’ consists of all the awards that would result from trying the same case repeatedly for an infinite number of times.”); *id.* at 834 (“Imagine a case were tried 100 times. Then the verdicts are arrayed on a frequency distribution. . . . It should be apparent that any single verdict is just one from among those.” (footnote omitted)).

23. As Professor Moran has noted:

[T]o determine the plaintiff’s probability of success at trial, the research firm would need to stage hundreds or thousands of mock trials in which all of the evidence is presented and argued to hundreds or thousands of mock juries, each of which is then asked to assess the probability that defendant was negligent and the probability that the defendant caused plaintiff’s injuries.

David A. Moran, *Jury Uncertainty, Elemental Independence and the Conjunction Paradox: A Response to Allen and Jehl*, 2003 MICH. ST. L. REV. 945, 948 (2003).

24. See *id.* (“If the research firm conducted a single mock trial and the jury responded that the probability of negligence was .7 and causation was .6, that result would tell the researchers almost nothing about plaintiff’s chances of success at the real trial.”).

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a judge, rather than a jury, should try personal injury cases—although that approach also raises the question of variability among judges.<sup>25</sup>

*A. Verdict Variability in Litigated Mass Torts*

Various mass torts have displayed verdict variability on the same issues. For example, verdicts in individual-plaintiff tobacco trials in Florida markedly conflict with the findings of the *Engle* statewide class action jury, whose pro-plaintiff findings were intended to be applied to preclude common issues in litigation filed by some of the approximately 700,000 smoker class members.<sup>26</sup> In *Engle*, the Florida Supreme Court held that the certain common liability findings by the jury in phase I of the class action could stand, but that remaining issues were individualized and required decertification of the class.<sup>27</sup> Accordingly, jury findings against the tobacco defendants on general causation, the addictive nature of cigarettes, strict liability, fraud by concealment, civil conspiracy concealment, breach of implied warranty, breach of express warranty, and negligence were res judicata as to all 700,000 class members.<sup>28</sup>

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25. See 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, 91 n.22 (2006) (citing *Ward v. James*, 1 Q.B. 273 (1966)); see also Justice Scott Brister, *The Decline in Jury Trials: What Would Wal-Mart Do?*, 47 S. TEX. L. REV. 191, 201–02 (2005) (“The unpredictability of jury verdicts has been a primary reason cited for limiting or abolishing jury trials, both here and abroad.”).

26. See *infra* note 30.

27. *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1254 (Fla. 2006).

28. *Id.* at 1255, 1276–77; see also Stier, *supra* note 17. The court, however, also found that jury findings against defendants on fraud and misrepresentation, and on intentional infliction of emotional distress were “inadequate to allow a subsequent jury to consider individual questions of reliance and legal cause,” and therefore could not be applied to the rest of the class. *Engle*, 945 So. 2d at 1255. In addition, the court did not uphold the finding of civil conspiracy for misrepresentation because it relied upon the underlying misrepresentation finding. *Id.* Notably, the federal court for the Middle District of Florida has recently rejected issue preclusion even for *Engle* jury findings sought to be retained by the Florida Supreme Court:

At most, these findings establish that at some time the Defendants sold a defective product, concealed their tortious behavior, acted negligently, breached an express or implied warranty, and engaged in a conspiracy to misrepresent information relating to the health effects of smoking. While these findings demonstrate that the Defendants engaged in tortious behavior at some point in the past, such findings are insufficient to establish any element of the *Engle* plaintiffs’ claims. Rather, the Phase I findings merely establish conduct as abroad [sic] abstraction, and conduct in the abstract fails to meet the identity requirement to apply such findings in the specific cases before this Court.

*Brown v. R.J. Reynolds Tobacco Co.*, 576 F. Supp. 2d 1328, 1342 (M.D. Fla. 2008).

Prior to *Engle*, however, out of thirteen cases involving smokers against the tobacco industry whose verdicts were not overturned on appeal,<sup>29</sup> the defendants prevailed in eight of them.<sup>30</sup> In the defense verdicts, juries answered “no” to special interrogatories concerning negligence,<sup>31</sup> design defect,<sup>32</sup> defect based on failure to warn,<sup>33</sup> fraud,<sup>34</sup> and civil conspiracy.<sup>35</sup> Each special interrogatory included the additional statement that the alleged misconduct was a “legal cause” of plaintiffs’ harm, rendering seemingly unclear the inconsistency with the common issue findings of *Engle*.<sup>36</sup> But

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29. In *Jones v. R.J. Reynolds Tobacco Co.*, the jury returned a verdict for the plaintiff for \$200,028.57. 830 So. 2d 854, 855 (Fla. Dist. Ct. App. 2002). The trial court, however, granted a new trial to the defendant on the grounds of erroneous admission of evidence, and the appellate court affirmed. *Id.* Similarly, in *Widdick v. Brown & Williamson Tobacco Corp.*, the jury returned a plaintiff verdict for \$52,249 for medical expenses, \$500,000 for the spouse’s loss of husband’s companionship and pain and suffering, and \$450,000 in punitive damages. No. 97-3522-CA (Fla. Duval County Ct. June 10, 1998). The First District Court of Appeal, however, reversed the judgment below, finding that the trial court impermissibly denied defendants’ motion to transfer venue. *Brown & Williamson Tobacco Corp. v. Widdick*, 717 So. 2d 572, 572–74 (Fla. Dist. Ct. App. 1998).

30. The eight verdicts for defendants are: *Schwartz v. Liggett Group, Inc.*, No. CA 03-2078 AA (Fla. Beach County Ct. Mar. 2, 2006); *Beckum v. Philip Morris USA, Inc.*, No. 02-01836 (Fla. Hillsborough County Ct. Apr. 29, 2005); *Martinez v. Liggett Group, Inc.*, No. 02-20943-CA-15 (Fla. Miami-Dade County Ct. Feb. 11, 2005); *Hall v. R.J. Reynolds Tobacco Co.*, No. 00-1061 (Fla. Hillsborough County Ct. Dec. 10, 2003); *Allen v. R.J. Reynolds Tobacco Co.*, No. 01-4319-CIV-KING/O’SULLIVAN (S.D. Fla. Feb. 28, 2003); *Tune v. Philip Morris, Inc.*, No. 97-4678-CI-11 (Fla. Pinellas County Ct. May 24, 2002); *Karbiwnyk v. R.J. Reynolds Tobacco Co.*, No. 95-04697-CA (Fla. Duval County Ct. Oct. 31, 1997); *Raulerson v. R.J. Reynolds Tobacco Co.*, No. 95-01820-CA (Fla. Duval County Ct. May 5, 1997); *Stier*, *supra* note 17. The five verdicts for the plaintiff are: *Arnitz v. Philip Morris USA, Inc.*, No. 00-4208-Div. H (Fla. Hillsborough County Ct. Oct. 21, 2004) (attributing 40% fault to defendant and 60% fault to plaintiff); *Davis v. Liggett Group, Inc.*, No. 02-18944 05 (Fla. Broward County Ct. Apr. 28, 2004); *Eastman v. Brown & Williamson Tobacco Corp.*, No. 97-5968-CI-11 (Fla. Pinellas County Ct. Apr. 3, 2003) (attributing 40% fault to defendant Philip Morris USA, Inc., 10% fault to defendant Brown & Williamson Tobacco Corp., and 50% fault to plaintiff); *Kenyon v. R.J. Reynolds Tobacco Co.*, No. 00-5401 (Fla. Hillsborough County Ct. Dec. 12, 2001); *Carter v. Brown & Williamson Tobacco Corp.*, No. 95-00934 CA (Fla. Duval County Ct. Aug. 9, 1996); *see also Stier*, *supra* note 17.

31. *Schwartz*, No. CA 03-2078 AA, at \*1; *Martinez*, No. 02-20943-CA-15, at \*1–2; *Hall*, No. 00-1061, at \*2; *Allen*, No. 01-4319-CIV-KING/O’SULLIVAN, at 1; *Tune*, No. 97-4678-CI-11, at \*1; *Karbiwnyk*, No. 95-04697-CA, at 1; *Raulerson*, No. 95-01820-CA, at \*1.

32. *Schwartz*, No. CA 03-2078 AA, at \*1 (“Defendant did not place . . . cigarettes on the market with a defect . . .”) (editor’s note); *Martinez*, No. 02-20943-CA-15, at \*1; *Hall*, No. 00-1061, at \*2; *Tune*, No. 97-4678-CI-11, at \*1; *Karbiwnyk*, No. 95-04697-CA, at 1 (jury finding with regard to “unreasonably dangerous and defective”); *Allen*, No. 01-4319-CIV-KING/O’SULLIVAN, at 1; *Raulerson*, No. 95-01820, at \*1.

33. *Hall*, No. 00-1061, at \*2; *Allen*, No. 01-4319-CIV-KING/O’SULLIVAN, at 2; *Tune*, No. 97-4678-CI-11, at \*1; *Karbiwnyk*, No. 95-04697, at 1 (jury finding with regard to “unreasonably dangerous and defective”).

34. *Martinez*, No. 02-20943-CA-15, at \*2; *Allen*, No. 01-4319-CIV-KING/O’SULLIVAN at 2; *Tune*, No. 97-4678-CI-11, at \*2 (conspiracy-based fraudulent misrepresentation or concealment).

35. *Martinez*, No. 02-20943 CA 15, at \*3; *Tune*, No. 97-4678-CI-11, at \*2.

36. *See, e.g., Martinez*, No. 02-20943-CA-15, at \*1 (finding no “negligence on the part of Defendant in designing its products, resulting in a defect that was a legal cause of damage to

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the jury findings in two Florida tobacco cases are necessarily inconsistent with the jury findings to be extrapolated in *Engle*. In *Eastman v. Brown & Williamson Tobacco Corp.*, the jury found neither negligence in failing to warn nor negligence in design defect to be a legal cause of plaintiff's injuries.<sup>37</sup> However, the jury still determined that Philip Morris and Brown & Williamson had manufactured products that were defective in design and for failing to warn, and found that the defects were a legal cause of plaintiff's injuries.<sup>38</sup> In addition, in *Kenyon v. R.J. Reynolds Tobacco Co.*, the jury found no negligence in failure to warn or design, and found no defect for failure to warn.<sup>39</sup> But the jury found for the plaintiff based on defective design.<sup>40</sup> Thus, in both *Eastman* and *Kenyon*, the jury found for the plaintiffs on causation, but neither jury determined that the defendants were negligent, and one found no strict liability for failure to warn—both of the latter findings are inconsistent with the *Engle* class jury. Moreover, the defendants in the Florida tobacco cases vigorously contested these common issues, arguing that their cigarettes were not defective<sup>41</sup> by emphasizing,

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Plaintiff”).

37. *Eastman v. Brown & Williamson Tobacco Corp.*, No. 97-5968-CI-11, at 1 (Fla. Pinellas County Ct. Apr. 3, 2003) (verdict); Stier, *supra* note 17.

38. *Eastman*, No. 97-5968-CI-11, at 2; *see also* Stier, *supra* note 17.

39. *Kenyon v. R.J. Reynolds Tobacco Co.*, No. 00-5401, 2001 WL 34315009, at \*2-3 (Fla. Hillsborough County Ct. Dec. 12, 2001); Stier, *supra* note 17; David Karp, *Man Gets \$165,000 in Tobacco Lawsuit*, ST. PETERSBURG TIMES, Dec. 13, 2001 (noting defense lawyer Stephanie Parker's comment: "We were very pleased that the jury found that our actions were reasonable.").

40. *Kenyon*, No. 00-5401, at \*2-3; Stier, *supra* note 17.

41. *See* Stier, *supra* note 17; *Florida Jury Awards Smoker \$600,000 in Damages, Finds Smoker 40 Percent Liable*, 18-8 MEALEY'S LITIG. REP. TOBACCO 4 (Oct. 25, 2004) (noting that in *Arnitz v. Philip Morris Inc.*, No. 00-4208-Div. H (Fla. Hillsborough County Ct. Oct. 21, 2004), "Philip Morris argued that the dangers were common knowledge. The company also argued that the cigarettes were not defective."); *Florida Jury Rejects Smoker's Design Defect Claims*, 20-2 MEALEY'S LITIG. REP. TOBACCO 11 (Apr. 2006) (stating that in *Beckum*, "Defense: Relative safety of cigarette does not constitute defect"). For example, in *Beckum*, the defense offered numerous arguments challenging the defectiveness of the cigarettes at issue:

[J]ust because a cigarette is not safe, does not make it defective. Philip Morris defended against Plaintiffs' defect claims by demonstrating that additives are common in many products and that none of the additives in cigarettes make them any more dangerous than they otherwise would be. It is the burning of tobacco, not the additives, that makes smoking dangerous. In addition, people expect cigarettes to have the very properties that Plaintiffs claim make them defective—they expect cigarettes to taste good, to contain nicotine, to contain additives and to be inhalable. Moreover, neither the government, the public-health community nor any company in the competitive tobacco industry has endorsed or accepted Plaintiffs' defect allegations.

William Jordan, *Defense Verdict in Suit Against Cigarette Manufacturer*, 26 No. 3 VERDICTS, SETTLEMENTS & TACTICS art. 42 (Mar. 2006) (discussing *Beckum v. Philip Morris USA, Inc.*, No. 02-01836). Defendants also contested product defect in cases they lost. *See, e.g., Carter Awarded*

*inter alia*, knowledge of smoking risks pertinent to a consumer-expectations approach to design defect.<sup>42</sup> And plaintiffs presented detailed and controversial theories of product defect.<sup>43</sup> In sum, the common issues identified in *Engle* were litigated in these trials by individual plaintiffs, and these common issues, rather than legal causation, may well have been the basis for defense verdicts.<sup>44</sup>

Similarly, juries' verdicts varied in the Vioxx litigation against Merck. The first three jury verdicts in the Vioxx litigation, for example, resulted in inconsistent findings for the defendant and the plaintiff, though they applied the law of three different states.<sup>45</sup> The first jury, in Texas, awarded \$253.5 million in compensatory and punitive damages to the plaintiff, but the trial court subsequently reduced the punitive damage under Texas's cap on

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*\$750,000 in Tobacco Case Against Brown & Williamson Corp.*, 10-8 MEALEY'S LITIG. REP. TOBACCO 4 (1996) ("The company had a duty to warn only when the hazards of using the product were not reasonably obvious, [the defense attorney] said, or if the manufacturers knew more than the consumers about the product's risks.").

42. See *Davis v. Liggett Group, Inc.*, No. 02-18944 05, 04 FLA. JURY VERDICT REPORTER 8-8, at \*2 (Fla. Broward County Ct. Apr. 28, 2004), available at 2004 WL 3235406 ("Defendants alleged that the dangers of smoking were well known as far back as 1936.") (verdict for plaintiff); see also *Stier*, *supra* note 17.

43. For example, in *Beckum*:

Plaintiffs identified four alleged defects in Marlboro cigarettes: (1) that the tobacco was cured in a way that made it more carcinogenic than other means of curing; (2) that Philip Morris manipulated nicotine levels and additives to increase the likelihood of addiction; (3) that additives were used to make smoke more deeply inhalable (unlike pipe and cigar smoke), which increased the risk of lung cancer; and (4) that consumers did not expect cigarettes designed with filters to be as dangerous as they really were. Plaintiffs essentially maintained that a product is defective if it is not the safest product that can be made with the technology available at a given time. Accordingly, they argued that only the lowest-tar cigarette ever made was not defective. All other commercially available cigarettes are (and have always been) defective and unreasonably dangerous.

*Jordan*, *supra* note 42, at 1; see also *Stier*, *supra* note 17.

44. See *Jordan*, *supra* note 41, at 1 ("The jurors' questions provided insight into their thinking and suggested that they were skeptical of Plaintiffs' case early on."); see also *Stier*, *supra* note 17. But see *Martinez v. Liggett Group, Inc.*, No. 02-20943-CA-15, 05 FLA. JURY VERDICT REPORTER 7-39 (Fla. Miami-Dade County Ct. Feb. 11, 2005), available at 2005 WL 2217993 ("Defendant alleged that Plaintiff did not smoke its cigarettes."); *Schwartz v. Liggett Group, Inc.*, No. 03-02078-AA, 2006 WL 986357 (Fla. Palm Beach County Ct. Mar. 13, 2006) ("Defense counsel argued that Schwartz didn't die from lung cancer and therefore Liggett . . . wasn't responsible."); *Tune v. Philip Morris, Inc.*, No. 97-4678-CI-11, 03 FLA. JURY VERDICT REPORTER 3-59, at \*1 (Fla. Cir. Ct. May 24, 2002), available at 2002 WL 32128381:

Defendant alleged that, other than cigarettes, Plaintiff was exposed to a variety of substances which might have caused his cancer, including: (1) regular alcohol use; (2) previous exposure to harmful chemicals including DDT through various occupations; and (3) residency in a heavy industrial state (New Jersey) where the population is at a higher risk for cancer.

*Id.*; *Wilner Begins Third Assault on Tobacco*, 11-11 MEALEY'S LITIG. REP. TOBACCO 9 (Oct. 9, 1997) ("R.J. Reynolds contends that Karbiwnyk did not develop lung cancer from using its products and has a type of tumor statistically associated with smoking.").

45. See *Dooley, National Juries*, *supra* note 19, at 413.

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punitive damages.<sup>46</sup> Then, in New Jersey, a second jury found in favor of Merck.<sup>47</sup> The third jury, in Louisiana, resulted in a mistrial, after jurors could not reach a unanimous verdict and remained deadlocked at eight-to-one in favor of Merck.<sup>48</sup>

Moreover, in the asbestos litigation, one asbestos case tried to multiple juries resulted in varying findings in an experiment by Judge Richard Parker in the Eastern District of Texas.<sup>49</sup> Five juries heard the same evidence in a consolidated proceeding in which all juries were present in the courtroom.<sup>50</sup> Despite receiving jury instructions together and nearly uniform special interrogatories on common issues to the asbestos cases, the juries returned varying verdicts: the earliest dates of knowledge of asbestos danger were found to be 1935, 1946, and 1965 by one jury each, and 1946 by two juries; on design defect, one jury found all products defective and two found none defective; and juries also varied as to what warnings were adequate.<sup>51</sup> Indeed, the Fifth Circuit was right to note in rejecting issue preclusion for asbestos litigation that “different juries [may] reach equally valid verdicts,” and that “[o]ne jury’s determination should not . . . bind another jury’s determination of an issue over which there are equally reasonable resolutions of doubt.”<sup>52</sup> Quoting the Restatement of Judgments, the Fifth Circuit also stated that “taking the prior determination at face value for

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46. See *Merck & Co. v. Ernst*, No. 14-06-00835-CV, 2008 WL 2201769, slip op. at \*3 (Tex. App. May 29, 2008); Dooley, *National Juries*, *supra* note 19, at 413 n.6. The appellate court, however, reversed the judgment, finding insufficient evidence of a thrombotic cardiovascular event. *Ernst*, 2008 WL 2201769, at \*7.

47. See *Humeston v. Merck & Co.*, No. ATL-L-2272-03-M, 2005 WL 3440614 (N.J. Super. Ct. Law. Div. Nov. 3, 2005); Dooley, *National Juries*, *supra* note 19, at 413 n.6. The trial court, however, granted a new trial based on “new evidence.” *Humeston*, No. ATL-L-2272-03-MT (Aug. 17, 2006); Dooley, *National Juries*, *supra* note 19, at 413 n.6. The re-empanelled jury found for the plaintiff for \$20 million in compensatory damages and \$27.5 million in punitive damages. See Dooley, *supra* note 19, at 413 n.6.

48. See Dooley, *National Juries*, *supra* note 19, at 413 n.6. On retrial, Merck won, but the court ordered yet another retrial. See *Plunkett v. Merck & Co. (In re Vioxx Prods. Liab. Litig.)*, 489 F. Supp. 2d 587, 588 (E.D. La. 2007).

49. See Green, *supra* note 18, at 221–24 app.; Jack Ratliff, *Offensive Collateral Estoppel and the Option Effect*, 67 TEX. L. REV. 63, 91 n.173 (1988); Michael J. Waggoner, *Fifty Years of Bernhard v. Bank of America Is Enough: Collateral Estoppel Should Require Mutuality But Res Judicata Should Not*, 12 REV. LITIG. 391, 415 (1993) (“The indeterminacy of litigation was graphically demonstrated when one case was simultaneously tried to five juries and produced quite divergent answers to special interrogatories.”).

50. See Green, *supra* note 18, at 222.

51. See *id.* at 222–23 app.; see also Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 662 (1989) (discussing Judge Parker’s approach in asbestos cases and noting, “The lack of consistency in outcomes doomed this method.”).

52. *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 346 (5th Cir. 1982).

purposes of the second action would extend the effects of imperfections in the adjudicative process beyond the limits of the first adjudication, within which they are accepted only because of the practical necessity of achieving finality.”<sup>53</sup>

Furthermore, as Judge Jack Weinstein has noted, “[t]he Bendectin litigations have also produced inconsistent results.”<sup>54</sup> The first jury verdict for plaintiffs relied heavily on a single juror’s “stubbornness” in forcing a compromise verdict for plaintiff, but subsequent judgments differed on Bendectin.<sup>55</sup> Because the first Bendectin verdict was set aside on appeal, issue preclusion was never subsequently raised.<sup>56</sup> In addition, in the multidistrict litigation court, Judge Rubin conducted a common-issue trial on generic causation by Bendectin of birth defects, whose verdict would apply to all plaintiffs from the Southern District of Ohio and other plaintiffs who opted in.<sup>57</sup> The jury in the MDL trial found no generic causation, eliminating the claims of all the plaintiffs.<sup>58</sup>

Evidence of verdict variability can therefore be gleaned from multiple mass tort contexts. Indeed, such variability has also occurred in jury verdicts for silicone breast implants.<sup>59</sup> Moreover, outside the mass tort context, even *Blonder-Tongue* employed issue preclusion to overturn a

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53. *Id.* at 343–44 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 29 cmt. g (1982)).

54. Jack B. Weinstein, *Procedural and Substantive Problems in Complex Litigation Arising from Disasters*, 5 *TOURO L. REV.* 1, 7 n.27 (1988); see also *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823, 826–27, 832–33 (D.C. Cir. 1988) (affirming trial court judgment notwithstanding the verdict for defendant, and overturning jury verdict of causation of plaintiff’s birth defects); *In re Richardson-Merrell, Inc.*, 624 F. Supp. 1212 (S.D. Ohio 1985), *aff’d in part, vacated in part, and remanded with directions sub nom. In re Bendectin Litig.*, 857 F.2d 290 (6th Cir. 1988) (upholding jury verdict of no causation of birth defects); *Oxendine v. Merrell Dow Pharms., Inc.*, No. 82-1245, 1996 WL 680992 (D.C. Super. Ct. Oct. 24, 1996) (overturning jury verdict finding causation of birth defects).

55. See MICHAEL D. GREEN, *BENDECTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION* 144 (1996) (“Grover Ashcroft’s presence on the first Mekdeci jury, and his stubbornness in forcing a compromise verdict, provided a modicum of encouragement not only for the lawyers in Mekdeci, but for others as well.”); Richard L. Marcus, *Reexamining the Bendectin Litigation Story*, 83 *IOWA L. REV.* 231, 250 (1997) (concluding based on Bendectin that “[t]he courts have properly been very hesitant to apply collateral estoppel in products liability cases”); Peter H. Schuck, *Judicial Avoidance of Juries in Mass Tort Litigation*, 48 *DEPAUL L. REV.* 479, 484 (1998) (noting that “[i]n the Bendectin litigation, . . . a series of directed verdicts for defendants based on lack of general causation was both bracketed and interrupted by several large plaintiffs’ verdicts”).

56. Marcus, *supra* note 55, at 250.

57. See GREEN, *supra* note 55, at 227.

58. *Id.*

59. See Schuck, *supra* note 55, at 484–85 (stating that “in the silicone gel breast implant litigation, where the evidence on general causation of immunological disorders was always weak and became progressively weaker over time, most of the juries rendered defendants’ verdicts, but some of them awarded large damages to plaintiffs, even after a string of defendant victories”); *id.* at 492 (noting “the great variability in jury verdicts in mass tort cases”).

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subsequent judge's finding that the patent there was valid, in conflict with a prior court's decision.<sup>60</sup>

*B. Verdict Variability: Empirical Research and Explanations*

Experimental research on the behavior of juries has also shown variation, even when juries hear the same evidence.<sup>61</sup> In one study, jurors watched precisely the same products liability trial on videotape, and then delivered their verdicts.<sup>62</sup> Fifty-one percent of jurors gave verdicts for the plaintiff.<sup>63</sup> Reviewing the varying verdicts of subsequently pooled juries, the study authors stated that “[t]he combined perspective of the particular set of jurors who happen to be selected for a case will determine the outcome and that outcome might have been different if a different sample of six had been selected.”<sup>64</sup> When the jurors deliberated as members of juries, 30% of

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60. *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 350 (1971); *see also* Waggoner, *supra* note 49, at 414.

61. As Professors Kenneth Bordens and Irwin Horowitz have noted: “[R]esearch has shown that . . . different juries hearing precisely the same evidence may arrive at widely differing verdicts. . . . We certainly cannot predict what any hypothetical jury would do based on the verdicts of one or two juries in allegedly ‘similar’ cases.” Kenneth S. Bordens & Irwin A. Horowitz, *The Limits of Sampling and Consolidation in Mass Tort Trials: Justice Improved or Justice Altered?*, 22 LAW & PSYCHOL. REV. 43, 65 (1998) [hereinafter Bordens & Horowitz, *Limits*]; *see also* Kenneth S. Bordens & Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 JUDICATURE 22, 24 (1989) (“[T]here was a rather significant amount of inter-jury disagreement. Juries exposed to precisely the same evidence and experimental manipulations rendered highly divergent decisions.”) [hereinafter Bordens & Horowitz, *Mass Torts*]; Stier, *supra* note 17. Reviewing various empirical studies on jury verdicts, Professor Michael Saks similarly concluded that some variation existed:

In general, studies show persistent correlations between evidence and outcomes in many contexts. But while there is substantial predictability, there also is considerable variation within conditions, that is, unpredictability and error. The two are by no means incompatible. While most juries respond to pro-plaintiff evidence with verdicts for the plaintiff, and to pro-defendant evidence with verdicts for the defendant, not all do. The closer the evidence is to equipoise, the greater will be the rate of disagreement among juries. The more extreme the evidence, the greater the proportion of juries that will reach the same verdict.

Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1238 (1992); *see id.* at 1234 (discussing study by Kalven and Zeisel in light of settlement likelihood for clear cases and stating that “[t]he more perfectly the litigation system performs, the more random trial outcomes will be”); *id.* at 1234–35.

62. *See* Shari Seidman Diamond et al., *Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DEPAUL L. REV. 301, 303–05 (1998); *see also* Stephan Landsman et al., *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 WIS. L. REV. 297, 315–16 (1998).

63. *See* Diamond et al., *supra* note 62, at 305.

64. *See id.* at 317.

juries that saw the moderate case found for the plaintiff, whereas 12% of juries that saw the weak case found for the plaintiff.<sup>65</sup> The study found that nine variables in attitudes among jurors could lead to a 67% prediction rate of a juror's decisions on liability.<sup>66</sup>

In another study, in which the same toxic tort trial was presented to jurors and the effect of separated trial structures was examined, 72% of juries in a bifurcated or trifurcated trial found for the plaintiff.<sup>67</sup> When liability was determined *before* causation, 83% of juries found for the plaintiff, and when liability was judged *after* causation, 97% of juries found for the plaintiff.<sup>68</sup> With regard to general causation verdicts, 85.7% of juries found for plaintiffs after hearing a unitary trial, and 56.5% of juries found for plaintiffs when presented with a separated trial.<sup>69</sup>

Interestingly, Professor Shari Seidman Diamond gathered information on agreement rates of people in a variety of complex settings.<sup>70</sup> Across multiple areas, Professor Diamond found a disagreement rate of 25–30%, including 25% for scientists doing peer review, 30% for psychiatrists diagnosing mental illness, 23–34% for physicians diagnosing physical illness, and 30% or more for judges on sentencing councils deciding on prison for a convict.<sup>71</sup> Reviewing these studies, Professor Philip Peters recently concluded that “[i]t is now well established that a modest, but significant, level of disagreement is inherent in the nature of performance assessment,”<sup>72</sup> which would seemingly underlie any claim for negligence, including those in mass tort cases. Such findings are also roughly consonant with the classic Kaven and Zeisel research involving 600 judges and 8,000 trials, which found a judge–jury liability disagreement rate of 22% for personal injury cases.<sup>73</sup>

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65. See Landsman et al., *supra* note 62, at 322.

66. See Diamond et al., *supra* note 62, at 313.

67. Bordens & Horowitz, *Mass Torts*, *supra* note 61, at 26.

68. *Id.*

69. *Id.*

70. See Philip G. Peters Jr., *Doctors & Juries*, 105 MICH. L. REV. 1453, 1477 (2007) (discussing Shari Seidman Diamond, *Order in the Court: Consistency in Criminal-Court Decisions*, in 2 THE MASTER LECTURE SERIES: PSYCHOLOGY AND THE LAW 119, 125 (1982)).

71. *Id.* at 1477–78; see also Shari Seidman Diamond & Hans Zeisel, *Sentencing Councils: A Study of Sentence Disparity and its Reduction*, 43 U. CHI. L. REV. 109, 119–20 (1975).

72. Peters, *supra* note 70, at 1478.

73. See HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 64 n.12 (1966); Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1063–68 (1964); see also Saks, *supra* note 61, at 1232–34; David M. Studdert & Michelle M. Mello, *When Tort Resolutions Are “Wrong”: Predictors of Discordant Outcomes in Medical Malpractice Litigation*, 36 J. LEGAL STUD. S47, 73 (2007) (“This study found that discordant outcomes in malpractice litigation occur in approximately a quarter of cases. Although lower than most previous estimates of system inaccuracy, this level of discordance is still cause for concern.”).

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Numerous sources contribute to this verdict variability. Of course, sources of variability include the varying performances and arguments of lawyers and witnesses, differing rulings and comments by the same or different judges, and the varying circumstances and injuries of different plaintiffs.<sup>74</sup> Minimal explanation and training to juries about their task may also contribute to differing verdicts.<sup>75</sup> Moreover, juries often have difficulty remembering the instructions given to them.<sup>76</sup> Indeed, in a recent study, individual jury members only scored an average of 5% correct on a test of memory and understanding of jury instructions,<sup>77</sup> and what memory jurors do have may be inaccurate.<sup>78</sup> In addition, the complexity of a mass tort trial may also account for a jury's difficulty in comprehending, and additional variability.<sup>79</sup>

At base, though, the existence of verdict variability should not surprise, given the make-up of the jury. The jury represents a serious attempt at bringing unbiased community sentiment on such issues as risk and defect to bear.<sup>80</sup> But a single jury of six<sup>81</sup> to twelve persons cannot be deemed a

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74. See Saks & Blanck, *supra* note 21, at 834:

[T]he case could have been tried using different permutations of the same facts or different facts and arguments that could have been assembled out of the same basic case. Clearly, any given trial of a case is but a single instance from among thousands of possible trials of that same basic case.

75. See Shari Seidman Diamond, *Beyond Fantasy and Nightmare: A Portrait of the Jury*, 54 BUFF. L. REV. 717, 750 (2006) (“[T]here is . . . evidence that legal instructions as they are typically given often fail to provide jurors with helpful legal guidance.”).

76. See CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE 21 (2002) (“[W]e were surprised by how rarely jurors mentioned judicial instructions when thinking about their individual decisions and even when deliberating as juries.”).

77. *Id.* at 23 tbl. 1.1.

78. *Id.* at 21 (“[J]urors did not have accurate memories of the instructions, even when tested a few minutes after making their decisions.”).

79. See Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 755–60 (1991); Reid Hastie & W. Kip Viscusi, *What Juries Can't Do Well: The Jury's Performance as a Risk Manager*, 40 ARIZ. L. REV. 901, 909–10 (1998); Peters, *supra* note 70, at 1480–81 (“The most clearly established [jury] weakness lies in the comprehension and application of probabilistic evidence. . . . [P]eople tend to overestimate the significance of some low probability risks.”); Joseph Sanders, *Scientifically Complex Cases, Trial by Jury, and the Erosion of Adversarial Processes*, 48 DEPAUL L. REV. 355, 365 (1998).

80. See Meiring de Villiers, *Technological Risk and Issue Preclusion: A Legal and Policy Critique*, 9 CORNELL J.L. & PUB POL'Y 523, 528 (2000) (“The civil jury assesses liability for product defectiveness by evaluating the ‘reasonableness’ of the risk at issue. This assessment depends on the risk attitudes of the jurors, which in turn depend on the jury selection process and properties of the constitutionally ideal civil jury.”).

81. *In re Rhone-Poulenc*, 51 F.3d 1293, 1300 (noting that typical federal jury contains six jurors and two alternate jurors); Michael J. Saks, *Litigating Medical Malpractice Claims*, SG095 ALI-ABA 275, 279 (2002) (“The trend toward smaller juries (down to 6 or 8 from the traditional 12) has

statistically significant sample of the community. To compile a federal jury, the court creates a “master file” of at least one-half of one percent of the total names of possible jurors in a district.<sup>82</sup> The court then randomly draws a smaller group from the master file, and sends these persons questionnaires to determine their eligibility for, or exemption from, jury service.<sup>83</sup> Eligible persons comprise the “jury wheel,” from which a random list of prospective jurors is made to summon to the courthouse as a “jury venire” or “jury panel.”<sup>84</sup> Initially, the court may eliminate members of the jury panel for hardship.<sup>85</sup> Those remaining undergo “voir dire,” in which attorneys for each side may eliminate additional jurors for cause (based on bias) or with a peremptory challenge.<sup>86</sup> Those jurors that are not eliminated in voir dire comprise the “petit jury,” which sits in the jury box for the duration of the trial.<sup>87</sup>

Though most of the Supreme Court’s jurisprudence on juries concerns criminal, rather than civil proceedings,<sup>88</sup> the Court requires that juries be “drawn from a cross-section of the community,”<sup>89</sup> and be free of bias.<sup>90</sup> The Supreme Court, however, has recognized that the petit jury, or a jury panel, is not constitutionally guaranteed to represent perfectly every aspect of the

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contributed to greater unpredictability in verdicts.”).

82. See Villiers, *supra* note 80, at 529.

83. See *id.*

84. See *id.*

85. See *id.*

86. See *id.* Statute usually limits the number of permissible peremptory challenges, under which an explanation need not be given for the juror’s elimination. See *id.* But see *Batson v. Kentucky*, 476 U.S. 79 (1986) (stating that peremptory challenges may not be based on racial grounds).

87. See Villiers, *supra* note 80, at 529.

88. Professor Dooley has noted:

There is some question about whether the fair cross-section requirement, which emanates from the Sixth Amendment’s guarantee of an impartial jury, applies in civil cases as a constitutional matter. In civil cases pending in federal court, however, the Supreme Court has in its supervisory capacity imposed a fair cross-section requirement. Most of the Court’s analysis has developed on the criminal side of the docket.

Dooley, *National Juries*, *supra* note 19, at 439 (footnotes omitted). Compare U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .” (emphasis added)), with U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . .”).

89. *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946) (“The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community.”); see also *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Peters v. Kiff*, 407 U.S. 493 (1972); Villiers, *supra* note 80, at 530.

90. *Dennis v. United States*, 339 U.S. 162 (1950); *Frazier v. United States*, 335 U.S. 497 (1948); Villiers, *supra* note 80, at 530, 531–32 (noting that the Court has defined lack of bias as a jury where “each juror is, a priori, indifferent to the outcome of the case and ‘conscientiously appl[ies] the law and find[s] the facts’” (footnote omitted) (brackets in original)).

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community,<sup>91</sup> and indeed, any jury of even twelve members will not be completely representative.<sup>92</sup> The United States Supreme Court only requires that no “cognizable group”<sup>93</sup> be excluded, but of course members within that group may differ markedly.

With regard to bias, two types may be distinguished. First, specific bias concerns any predisposition by a juror toward the right outcome in the case before the court.<sup>94</sup> Methods of controlling such bias include voir dire, peremptory and for cause challenges.<sup>95</sup> In contrast, general biases involve general views on issues such as risk and the value of life or health.<sup>96</sup> Variation among jurors in general bias is not considered problematic so long as the overall mix of views is broadly reflective of the community.<sup>97</sup> Racism among jurors, though not countenanced, may still surface and affect verdicts.<sup>98</sup> A jury with a mix of views, but without any specific biases, achieves what has been termed, “diffused impartiality.”<sup>99</sup>

These differences in views among the jury affect jurors’ assessment of risk that underlies notions of negligence and product defect.<sup>100</sup> Assessment

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91. See *Holland v. Illinois*, 493 U.S. 474, 480 (1990); *Taylor*, 419 U.S. at 538 (petit jury need not “mirror the community”); *Thiel*, 328 U.S. at 220 (Sixth Amendment does not mandate that petit jury “contain representatives of all the economic, social, religious, racial, political and geographic groups of the community”); Dooley, *National Juries*, *supra* note 19, at 439–40 (“The Supreme Court has consistently held that the fair cross-section requirement applies only to the jury venire, not to the panel chosen to sit in a particular case.”); Villiers, *supra* note 80, at 531.

92. See Villiers, *supra* note 80, at 531 (“The cross-section requirement is a theoretical ideal that an individual twelve member jury cannot achieve.”).

93. See *Taylor*, 419 U.S. at 538 (no guarantee that petit jury will “reflect the various distinctive groups in the population.”); *Apodaca v. Oregon*, 406 U.S. 404, 413 (1972) (no systematic rejection by jury panels of “identifiable segments of the community”); Dooley, *National Juries*, *supra* note 19, at 439; Villiers, *supra* note 80, at 531 (noting that “[c]ourts have defined a cognizable group as one with (i) a common defining and limiting attribute, (ii) a distinctive attitude or experience, and (iii) a ‘community of interest,’ the exclusion of which would render the jury pool unrepresentative of the community”).

94. See Villiers, *supra* note 80, at 532.

95. *Id.* (also noting use of sequestration and change of venue); see also *Holland v. Illinois*, 493 U.S. 474, 484 (1990) (“Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of ‘eliminat[ing] extremes of partiality on both sides,’ thereby ‘assuring the selection of a qualified *and unbiased* jury.’” (citations omitted)).

96. See Villiers, *supra* note 80, at 532.

97. *Id.* (“[T]his type of bias does not violate the Seventh Amendment, but is essential to satisfy the fair cross-section requirement.”); see also *People v. Wheeler*, 583 P.2d 748, 761 (Cal. 1978) (noting desire to “achieve an overall impartiality by allowing the interaction of the diverse beliefs and values the jurors bring from their group experiences”).

98. See Saks & Blanck, *supra* note 21, at 836 n.145 (noting biases including racism).

99. See Villiers, *supra* note 80, at 533.

100. *Id.* (“Liability depends on a judgment of the reasonableness of a risk, which in turn depends

of risk varies with risk tolerance, wealth, and age.<sup>101</sup> In particular, empirical studies have shown that less-risk-averse individuals put a lower value on a statistical life than more-risk-averse individuals.<sup>102</sup> Wealthier individuals also place a higher value on a statistical life.<sup>103</sup> In addition, jurors with higher education may prefer more detailed product warnings, whereas those with lesser education may want simpler product warnings.<sup>104</sup> As a result of a particular mix of individuals on a jury, with attitudes on risk that may vary markedly from the community, the resulting verdict variability, shown in previous mass torts and replicated in empirical studies, should be no surprise.

A court's ability to take a case from a jury does not remedy the problem of jury verdict variability.<sup>105</sup> On issues of liability, the jury's decision is only partly hemmed by summary judgment, directed verdict, or judgment notwithstanding the verdict (J.N.O.V.). Summary judgment is only granted when there is "no genuine issue as to any material fact," because a reasonable jury could not, based on the evidence in the record, find for the party opposing summary judgment—an approach leaving considerable leeway for variation among "reasonable" juries.<sup>106</sup> Under motions for a J.N.O.V., a jury verdict is reversed if no reasonable fact finder, based on the evidence presented, could find as the jury had.<sup>107</sup> But of course where

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on the risk attitudes of the person making the judgment.").

101. *Id.*; see also W. KIP VISCUSI, *FATAL TRADEOFFS: PUBLIC AND PRIVATE RESPONSIBILITIES FOR RISK* 7 (1992) ("Risk-dollar tradeoffs reflect individual preferences that will differ across individuals, just as do tastes and preferences for other economic goods. . . . [W]e should be concerned with ascertaining the distribution of values that are pertinent to the preferences of the individuals whose lives are at risk."). *But see* Diamond, *supra* note 75, at 737 ("Demographic characteristics like gender, race, and age generally account for very little of the variation in response.").

102. See Villiers, *supra* note 80, at 533; see also VISCUSI, *supra* note 101, at 47 (noting that workers in the lowest quartile of risk appreciation valued a statistical life between \$5 and \$8 million, while the highest-risk quartile valued a life between \$2.8 and \$3 million).

103. See Villiers, *supra* note 80, at 534.

104. See *id.*

105. See Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908, 915 (1989) ("Judicial oversight only marginally curbs jury discretion."); Stephan Landsman, *Appellate Courts and Civil Juries,* 70 U. CIN. L. REV. 873, 893 (2002) ("[T]here are simply too many reasons justifying new trials to attempt an enumeration, but at the heart of the rule is a concern for the avoidance of serious injustice and a desire to insure that verdicts bear some reasonable relation to the weight of the evidence.").

106. See FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

107. See FED. R. CIV. P. 50(b); see also FED. R. CIV. P. 50(a)(1):

If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have had a legally sufficient evidentiary basis to find for that party on that issue, the court may: (A) resolve the issue against the party; and (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that

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reasonable fact finders could find either way on issues of liability, those verdicts would stand. Similarly, judges may have differing notions of what a reasonable fact finder might be able to find, resulting in further variability.<sup>108</sup>

### III. ISSUE PRECLUSION IN MASS TORT LITIGATION: A CRITIQUE

Issue preclusion permits one jury's finding on a particular legal issue to foreclose a subsequent jury from deciding that issue.<sup>109</sup> For issue preclusion to apply, resolution of the legal issue must have been necessary to the prior jury's judgment,<sup>110</sup> and the issue must be identical to the issue that arises

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issue.

108. One study in Texas found a statewide jury verdict reversal rate of 25% of cases. Lynne Liberato & Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 44 S. TEX. L. REV. 431, 440 (2003). Interestingly, however, appellate courts reversed 30% of jury verdict judgments in tort and Deceptive Trade Practices Act cases, with a 49% rate for defendants appealing a plaintiff jury verdict, and a 10% rate for plaintiffs appealing a defense jury verdict. *Id.* at 455–56. In personal injury cases only, defendants prevailed in appealing 38% of plaintiff jury verdicts, whereas plaintiffs only succeeded in appealing 6% of defense jury verdicts. *Id.* at 456. Sixty percent of the statewide reversals derived from legal insufficiency of evidence pertaining to causation, damages, or another element (sometimes due to expert testimony that should have been excluded). *Id.* at 440–41. Only 4% of the reversals were based on challenges that the jury verdict was contrary to the great weight or preponderance of the evidence. *Id.* at 442. In addition, appellate courts increased jury involvement by reversing 24% of directed verdicts and 58% of grants of J.N.O.V. *Id.* at 443. Appellate courts also reversed 33% of awards of summary judgment, of which 58% of the reversals were based on the existence of fact issues for the jury. *Id.* at 446–47. One study examining medical malpractice cases found that after 210 jury verdicts for plaintiffs in Florida, there was only one J.N.O.V.; out of 112 jury verdicts for plaintiffs in New York, there were only four instances of J.N.O.V.; and out of 179 jury verdicts for plaintiffs in California, there was only one J.N.O.V. Neil Vidmar et al., *Jury Awards for Medical Malpractice and Post-Verdict Adjustments of Those Awards*, 48 DEPAUL L. REV. 265, 285, 292, 294 (1998).

109. See RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) (“When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the [same] parties . . .”).

110. See *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (“Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.”); *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1198 (10th Cir. 2000); *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984) (requiring that facts were “fully and fairly litigated in the prior action”; that facts were “essential” to the first action’s judgment; and the litigants were “cast as adversaries in the first action”). If the judgment indicates that there were potentially multiple independent grounds for the decision, then in some jurisdictions that decision may not be accorded preclusive effect. See Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 969 (1998); Monica Renee Brownnewell, Note, *Rethinking the Restatement View (Again!): Multiple Independent Holdings and the Doctrine of Issue Preclusion*, 37 VAL. U. L. REV. 879, 880 (2003); see also RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. i. Some courts treat each of the multiple independent grounds

before a subsequent jury.<sup>111</sup> As a result, the governing legal standard for the issue being decided must be the same in both courts.<sup>112</sup> Earlier versions of issue preclusion required mutuality of parties—that the parties in the first lawsuit and the second suit were the same.<sup>113</sup> But federal<sup>114</sup> and most state

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for a decision as deserving of issue preclusive effect. *See, e.g.,* Westgate-California Corp. v. Smith, 642 F.2d 1174 (9th Cir. 1981); Yamaha Corp. of Am. v. United States, 961 F.2d 245 (D.C. Cir. 1992). Other courts, however, will not apply issue preclusion when multiple independent holdings support the decision. *See, e.g.,* Halpern v. Schwartz, 426 F.2d 102, 106 (2d Cir. 1970).

111. *See* Bernhard v. Bank of Am. Nat'l Trust & Savings Ass'n, 122 P.2d 892, 895 (Cal. 1942); Kurt Erlenbach, *Offensive Collateral Estoppel and Products Liability: Reasoning with the Unreasonable*, 14 ST. MARY'S L.J. 19, 26 (1982) (noting the “first and most troublesome” collateral-estoppel issue is “whether the issue decided in the first suit is identical to the issue in the second suit for which collateral estoppel is being invoked”); Villiers, *supra* note 80, at 542; Susan R. Johnson, Note, *Civil Procedure: The Use of Collateral Estoppel and the Implications on the Multiple Trials Flowing from a Denial of Class Certification*—Dodge v. Cotter Corporation, 32 N.M. L. REV. 409, 416 (2002).

112. *See* Erlenbach, *supra* note 111, at 28 (“[U]sing collateral estoppel in products liability suits poses the problem of reconciling varying standards of defectiveness used in different jurisdictions.”); Green, *supra* note 18, at 189–90:

[T]he laws that govern the determination of liability differ . . . . [A] finding of liability in a failure to warn case in New Jersey, where knowledge of the danger is imputed to the defendant, has no preclusion utility in Illinois, where a plaintiff must prove that the defendant had or should have had knowledge of the risks involved in the product at the time of manufacture.

(footnote omitted); Villiers, *supra* note 80, at 542:

Application of collateral estoppel requires not only identity between the issue to be precluded and that decided in the prior action (e.g., product defectiveness), but also requires that the definition of defectiveness applied in the prior case be consistent with the standard followed in the jurisdiction where application of estoppel is sought.

113. *See, e.g.,* Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 117–18 (1912); *Bonniwell*, 663 S.W.2d at 818; Erlenbach, *supra* note 111, at 29; Villiers, *supra* note 80, at 543; Note, *Offensive Use of Collateral Estoppel and the Right to Jury Trial*, 93 HARV. L. REV. 219, 222 (1979) [hereinafter *Offensive Use of Collateral Estoppel*].

114. *See* *Allen*, 449 U.S. at 94–95; *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326–28, 330 (1979) (allowing offensive collateral estoppel in subsequent suit, by non-party to prior litigation against party to the prior litigation); *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313 (1971); Villiers, *supra* note 80, at 544. In diversity cases, federal courts may generally apply the law of the state in which they sit for matters of issue preclusion, though decisions have varied. *See* *Blonder-Tongue*, 402 U.S. at 325 (“Many federal courts, exercising both federal question and diversity jurisdiction, are in accord unless in a diversity case bound to apply a conflicting state rule requiring mutuality.”); *see also id.* at 324 n.12 (“In federal-question cases, the law applied is federal law . . . . ‘It has been held in non-diversity cases since *Erie* . . . that the federal courts will apply their own rule of res judicata.”); *Lynch v. Merrell Nat'l Labs.*, 830 F.2d 1190, 1192 (1st Cir. 1987). *But see* *Freeman v. Lester Coggins Trucking, Inc.*, 771 F.2d 860, 862 (5th Cir. 1985) (“Federal law determines the res judicata and collateral effect given a prior decision of a federal tribunal, regardless of the bases of the federal court’s jurisdiction.”); *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334 (5th Cir. 1982) (stating that “federal res [j]udicata principles apply in federal tort claims actions in order to preserve the integrity of federal court judgment and that this rationale applies even equally to diversity cases.”); *Harrison v. Celotex Corp.*, 583 F. Supp. 1497, 1502 (E.D. Tenn. 1984) (federal law governs issue preclusive effect of prior diversity jurisdiction federal decision); *Flatt v. Johns Manville Sales Corp.*, 488 F. Supp. 836, 839 (E.D. Tex. 1980) (same); RESTATEMENT (SECOND) OF JUDGMENTS § 87 (1982) (requiring that “[f]ederal law determines the effects under the res judicata of a judgment of a federal court”). *See generally* Erichson, *supra* note

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courts<sup>115</sup> have since jettisoned mutuality in favor of a due process analysis, which merely requires the party against whom a prior jury resolution is to be applied, to either have been a party in the prior suit, or in privity with that party.<sup>116</sup> The prior party must also have had a full and fair opportunity to litigate the first lawsuit.<sup>117</sup> And even then, the Supreme Court allows courts applying offensive issue preclusion broad discretion as to whether to apply issue preclusion. The Court articulated various fairness factors that must also be met before a court can apply issue preclusion, such as whether

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110, at 949 (“The preclusive effect of a judgment, with rare exceptions, should be governed by the preclusion law of the rendering jurisdiction.”).

115. See, e.g., *Silva v. State*, 745 P.2d 380, 384 (N.M. 1987); *Eagle Props., Ltd. v. Sharbauer*, 807 S.W.2d 714, 721 (Tex. 1990) (stating that “it is only necessary that the party against whom the plea of collateral estoppel is being asserted be a party or in privity with a party in the prior litigation.”); *Bonniwell*, 663 S.W.2d at 818–19; *Bernhard v. Bank of Am. Nat’l Trust & Savings Ass’n*, 122 P.2d 892, 894–95 (Cal. 1942); *B.R. DeWitt, Inc., v. Hall*, 225 N.E.2d 195, 198–99 (N.Y. 1967) (mutuality is “dead letter”); *Bahler v. Fletcher*, 474 P.2d 329, 338 (Or. 1970) (“[M]utuality is not a relevant basis on which to determine the finality of litigation.”); *Erichson*, *supra* note 110, at 965–69; *Erlenbach*, *supra* note 111, at 31 n.67; *Villiers*, *supra* note 80, at 544; *Johnson*, *supra* note 111, at 413; *Deric Zacca*, *Florida’s Position on Nonmutual Collateral Estoppel After Stogniew*, 52 U. MIAMI L. REV. 889, 898 (1998) (stating that although Florida retains the mutuality requirement for offensive collateral estoppel, “[m]ost state courts have . . . embraced nonmutual collateral estoppel”); see generally *Stogniew v. McQueen*, 656 So. 2d 917, 920 n.2 (Fla. 1995) (retaining mutuality requirement for issue preclusion and listing other states’ positions on the issue).

116. See *Taylor v. Sturgell*, 128 S. Ct. 2161, 2171 (2008):

A person who was not a party to a suit generally has not had a “full and fair opportunity to litigate” the claims and issues settled in that suit. The application of claim and issue preclusion to nonparties thus runs up against the “deep-rooted historic tradition that everyone should have his own day in court.”

*Id.* (citation omitted); see also *Blonder-Tongue*, 402 U.S. at 322; *Dooley*, *National Juries*, *supra* note 19, at 431 n.101 (“Most courts, including the federal courts, have abolished the mutuality doctrine that restricted issue preclusion to parties actually joined in the earlier case.”); *Erlenbach*, *supra* note 111, at 29 (“Before a plaintiff can be bound by a judgment in favor of a particular defendant, the plaintiff must either have been the plaintiff or be in privity with the plaintiff in the original case.”); *George*, *supra* note 11, at 661 (“[T]o assure the precluded party of this due process requirement, the Court deems it essential to be able to tell the precluded loser in [the second suit]: ‘You (or your privy) have had your day in court in [the earlier suit].’”); *Villiers*, *supra* note 80, at 543 (“Due process concerns require that only a party to an action or their privies can later be bound by the judgment in the action.”). The United States Supreme Court recently made clear that a party may not be virtually represented based simply on common interests. *Taylor*, 128 S. Ct. at 2161; *cf.* *Montana v. United States*, 440 U.S. 147, 154 (1979) (allowing preclusion against “nonparties [who] assume control over litigation in which they have a direct financial or proprietary interest”). See generally Robert G. Bone, *Rethinking the “Day In Court” Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193 (1992) (discussing nonparty preclusion).

117. See *Allen*, 449 U.S. at 95 (“[O]ne general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a ‘full and fair opportunity’ to litigate that issue in the earlier case.”); *Parklane*, 439 U.S. at 326–29.

procedural advantages in the second litigation “could readily cause a different result,” whether the party had an adequate incentive to fully litigate the prior case, and whether the plaintiff held off easily joining the prior case to wait to see if a favorable verdict would result.<sup>118</sup> Moreover, if there are prior inconsistent verdicts, courts may not apply offensive issue preclusion.<sup>119</sup> In addition, development of new evidence on an issue such as causation may result in not applying issue preclusion.<sup>120</sup> Similarly, if the

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118. *Parklane*, 439 U.S. at 330–32; *see also Blonder-Tongue*, 402 U.S. at 333–34 (“[N]o one set of facts, no one collection of words or phrases, will provide an automatic formula for proper rulings on estoppel pleas. . . . [D]ecision will necessarily rest on the trial courts’ sense of justice and equity.”); *Hardy*, 681 F.2d at 346 (“[A]pplication of collateral estoppel would still be unfair . . . because it is very doubtful that these defendants could have foreseen that their \$68,000 liability to plaintiff . . . would foreshadow multimillion dollar asbestos liability.”); *Scurlock Oil v. Smithwick*, 724 S.W.2d 1, 6 (Tex. 1986); *Villiers*, *supra* note 80, at 542 (“To discourage a wait-and-see attitude among potential plaintiffs, courts are reluctant to apply offensive collateral estoppel in cases where [the] plaintiff could easily have joined in the first action, or where such application would be unfair to a defendant.”).

119. *See Parklane*, 439 U.S. at 330 (suggesting no issue preclusion if based on a judgment that “is itself inconsistent with one or more previous judgments in favor of the defendant”); *Setter v. A.H. Robins Co.*, 748 F.2d 1328, 1330 (8th Cir. 1984) (affirming no issue preclusion in *Dalkon Shield* case because of prior inconsistent verdicts); *Harrison*, 583 F. Supp. at 1503 (“It seems most inappropriate for this Court to pick out one case upon which the jury reached a verdict for the plaintiff, and accord it preclusive effect, and at the same time to ignore all the others in which equally competent juries have reached the opposite conclusion.”); *Tretter v. Johns-Manville Corp.*, 88 F.R.D. 329, 333 (E.D. Mo. 1980) (rejecting issue preclusion because “[t]hough plaintiff points to several cases in which a finding that asbestos was unreasonably dangerous was necessarily included within a jury verdict, defendants likewise can point to cases in which the jury found in favor of the defendant.”); *Kortenhaus v. Eli Lilly & Co.*, 549 A.2d 437, 440 (N.J. App. Div. 1988) (“[A]pplication of offensive collateral estoppel in the face of inconsistent verdicts is antithetical to the very basis of the rule. . . .”); *Sandoval v. Super. Ct.*, 140 Cal. App. 3d 932, 944 (Cal. Ct. App. 1983) (rejecting issue preclusion because of inconsistent verdicts on design defect); *Dooley*, *National Juries*, *supra* note 19, at 413 n.5 (“Many courts refuse to allow offensive issue preclusion against a defendant who has won the issue in at least one previous case, even if another plaintiff has later won the issue.”); Alison Kenamer, *Issues Raised by the Potential Application of Non-Mutual Offensive Collateral Estoppel in Texas Products Liability Cases*, 30 TEX. TECH. L. REV. 1127, 1152–53 (1999) (discussing *Setter*); *see generally Kortenhaus*, 549 A.2d at 439 (“Fundamental to the theory of collateral estoppel is the notion that the earlier decision is reliable, an underlying confidence the result was substantially correct. The premise is that properly retried, the outcome should be the same.” (citation omitted)). Interestingly, if a prior verdict for a defendant is in the form of a general verdict, it is possible that in a mass tort, for example, the verdict was based on lack of causation and thus, not technically inconsistent with a following plaintiff verdict necessarily based on defect. *See, e.g., Mooney v. Fibreboard Corp.*, 485 F. Supp. 242, 246–48 (E.D. Tex. 1980) (applying issue preclusion in favor of asbestos plaintiff despite prior general verdicts for defendant); Richard Hynes, Comment, *Inconsistent Verdicts, Issue Preclusion, and Settlement in the Presence of Judicial Bias*, 2 U. CHI. L. SCH. ROUNDTABLE 663, 667, 668 n.25 (1995). *But see Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 346 (5th Cir. 1982) (“A court able to say that the approximately 35 suits decided in favor of asbestos manufacturers were all decided on the basis of insufficient exposure on the part of the plaintiff or failure to demonstrate an asbestos-related disease would be clairvoyant.”); *Vogt v. Emerson Elec. Co.*, 805 F. Supp. 506, 510 (M.D. Tenn. 1992); *Hoppe v. G.D. Searle & Co.*, 779 F. Supp. 1425, 1427 (S.D.N.Y. 1991); *Lavetter v. Int’l Playtex*, 706 F. Supp. 722, 723 (D. Ariz. 1988); *Harrison v. Celotex Corp.*, 583 F. Supp. 1497 (E.D. Tenn. 1984).

120. *See Rogers v. Ford Motor Co.*, 925 F. Supp. 1413, 1419 (N.D. Ind. 1996) (“[C]onfidence in

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prior court issued evidentiary rulings that the subsequent court found prejudicial, then issue preclusion may not be applied.<sup>121</sup> Assuming these requirements are met, the court may then, under the doctrine of offensive non-mutual issue preclusion, allow a plaintiff to use a prior adverse judgment against the defendant to foreclose the defendant from relitigating the issue in the subsequent litigation.<sup>122</sup>

The purpose of issue preclusion is to promote judicial efficiency<sup>123</sup> and decisional consistency.<sup>124</sup> When applied, issue preclusion saves the judicial

the . . . verdict is undermined by the existence of additional evidence . . . that was unavailable during the . . . trial—which conceivably could lead to a different result.”); *Zweig v. E.R. Squibb & Sons, Inc.*, 536 A.2d 1280 (N.J. App. Div. 1988) (noting that new evidence “cast doubt” on medical causation of injuries from anti-miscarriage drug); *see also Oxendine v. Merrell Dow Pharms.*, No. 82-1245, 1996 WL 680992, at \*34 (D.C. Super. Ct. Oct. 24, 1996) (“The science that existed in 1983 has changed and it would, in these circumstances, be inappropriate to allow the 1983 judgment to stand or to do anything other than enter a judgment mandated by the state of scientific knowledge.”); M. Stuart Madden, *Issue Preclusion in Products Liability*, 11 PACE L. REV. 87, 102 (1990); Jonathan David Pauerstein, Comment, *The Future of Offensive Collateral Estoppel in Texas*, 35 BAYLOR L. REV. 291, 319 (1983) (“[W]hen new scientific evidence is discovered relating to whether a certain drug can cause a given harmful result, a plaintiff’s plea of estoppel is properly denied.”).

121. *See Zweig*, 536 A.2d at 1283; Madden, *supra* note 120, at 118.

122. *See Dooley, National Juries*, *supra* note 19, at 431 n.101 (“[U]nrelated plaintiffs may use a previous plaintiff’s win on a key issue against a common defendant.”).

123. *See Parklane*, 439 U.S. at 326 (“Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.” (footnote omitted)); *see also Allen v. McCurry*, 449 U.S. 90, 94–96 (1980); George, *supra* note 11, at 663 (noting “waste and vexation to the common opponent” when no collateral estoppel because of lack of privity); Villiers, *supra* note 80, at 547; Note, *The Due Process Roots of Criminal Collateral Estoppel*, 109 HARV. L. REV. 1729, 1730 (1996) (“The general doctrine of collateral estoppel has its roots in the notions that like cases should be treated alike, that judicial efficiency demands a degree of finality in judgments, and that multiple, conflicting judgments undermine confidence in the judicial process.”); *Offensive Use of Collateral Estoppel*, *supra* note 113, at 225 (stating that *Parklane* “resolves th[e] balance in favor of the needs of judicial economy”). *But see Hardy*, 681 F.2d at 348 (rejecting collateral estoppel and refusing “to elevate judicial expedience over considerations of justice and fair play”). But of course, saving of expense alone is not sufficient to abridge the Seventh Amendment right to trial in federal court. *See Villiers*, *supra* note 80, at 550–51; *see also Hobson v. Brennan*, 637 F. Supp. 173 (D.D.C. 1986) (rejecting denial of civil jury trial because of impending budgetary difficulties); *Armster v. U.S. Dist. Ct.*, 792 F.2d 1423 (9th Cir. 1986) (same).

124. *See Taylor v. Sturgell*, 128 S. Ct. 2161, 2171 (2008) (“[T]hese two doctrines protect against ‘the expense and vexation attending multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions.’” (quoting *Montana v. United States*, 440 U.S. 147, 153–54 (1979))); George, *supra* note 11, at 663 (noting “[i]nconsistency and thus embarrassment to the judicial system” resulting from using lack of privity to block collateral estoppel); Villiers, *supra* note 80, at 547; Hynes, *supra* note 119, at 663 (noting that issue preclusion “reduces the possibility of inconsistent verdicts, which create considerable embarrassment for the legal system” (footnote omitted)); Note, *The Due Process Roots of Criminal*

resources and litigation expenses of subsequent parties relitigating the prior issue.<sup>125</sup> This preservation of decisional consistency may raise the public's regard for the justice system.<sup>126</sup> In addition, the Supreme Court of the United States has criticized the notion that a party has a right to more than one litigation of an issue. In *Blonder-Tongue*, the Court stated that such an approach has the "aura of the gaming table."<sup>127</sup>

In most litigations, in which there are few repeat litigations, application of issue preclusion may not appear onerous. For example, a single, small accident may seem appropriate for issue preclusion. In *Skrzat v. Ford Motor Co.*,<sup>128</sup> one person was killed and one injured as a result of an accident in which the gas tank exploded in a Ford Maverick. In the first suit on behalf of the person killed, the court found the gas tank to be defectively designed, and held the manufacturer was liable.<sup>129</sup> Then, in the second suit on behalf of the injured person, the court granted summary judgment on liability based upon the earlier judgment.<sup>130</sup>

But in litigations with many subsequent related actions, the inherent problems of issue preclusion become more apparent. In mass tort litigation, for example, the first case may involve allegations of product defectiveness that may affect the claims of hundreds of thousands of individuals, as in actions involving pharmaceuticals such as Vioxx or consumer products such as tobacco. If the first jury in a jury interrogatory finds that the product is defective,<sup>131</sup> all subsequent juries may be bound by that finding.<sup>132</sup> Notably,

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*Collateral Estoppel*, 109 HARV. L. REV. 1729, 1730 (1996). Professor George broadens his concern for inconsistent verdicts into a general value of "solidarity—a legally ordained systematic preference for equality of treatment among all persons similarly situated." George, *supra* note 11, at 676; *see also* Johnson, *supra* note 111, at 412.

125. *See* Dooley, *National Juries*, *supra* note 19, at 432 ("Collateral estoppel . . . evolved from an ideal of efficiency: using court resources to relitigate issues already decided seems wasteful and unnecessary."); Villiers, *supra* note 80, at 549.

126. *See* Lucido v. Super. Ct., 795 P.2d 1223, 1229 (Cal. 1990) (noting that "[p]ublic confidence in the integrity of the judicial system is threatened whenever two tribunals render inconsistent verdicts," but rejecting issue preclusion in the criminal case before the court); Laura Gaston Dooley, *The Cult of Finality: Rethinking Collateral Estoppel in the Postmodern Age*, 31 VAL. U. L. REV. 43, 51 (1996) [hereinafter Dooley, *Cult of Finality*].

[W]e justify . . . collateral estoppel because of our fear that different decisionmakers in the context of different cases might make inconsistent findings—this is thought to be somehow unseemly and subversive of the authority of the court system. So in order to mask the uncertainty that inevitably flows from an imperfect system of truthfinding, we extol the virtues of finality.

*See also* George, *supra* note 11, at 662 (noting the "risk of embarrassment to the system that essentially like cases will be decided in different ways").

127. *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971).

128. 389 F. Supp. 753, 754 (D.R.I. 1975).

129. *Id.*; *see also* Villiers, *supra* note 80, at 543; *cf.* Ezagui v. Dow Chem. Corp., 598 F.2d 727 (2d Cir. 1979) (applying collateral estoppel for claim of product defect from inadequate warning).

130. *Skrzat*, 389 F. Supp. at 753, 759.

131. *See, e.g.*, Hines, *Dangerous Allure*, *supra* note 2, at 574 ("While special interrogatory

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these subsequent juries may be bound on the issue, even though they may well have varied and found no defect.<sup>133</sup>

However, those subsequent juries' verdicts will never be delivered because issue preclusion will silence them. Preserving the appearance of consistency,<sup>134</sup> issue preclusion fastens on the first verdict, even when it may not in fact be representative of what most juries would do.<sup>135</sup> For example,

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verdicts might be used that make more clear the exact grounds on which a jury bases its verdict, the problem of isolating the same issue in complex factual and legal circumstances remains a serious impediment to the use of collateral estoppel in mass tort cases.”); *see also* Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 344 (5th Cir. 1982) (rejecting issue preclusion and noting that “it is impossible to determine what the [prior] jury decided about when a duty to warn attached”).

132. *See* Dooley, *National Juries*, *supra* note 19, at 413 (“[B]ecause of preclusion principles, a favorable plaintiff’s verdict on a key issue—such as whether a product is unreasonably dangerous—may relieve future plaintiffs of having to prove the point.”); Erlenbach, *supra* note 111, at 20 (“Once a product is found defective, if certain criteria are met, plaintiffs in subsequent suits can obtain a summary judgment on the issue of defect by establishing that the defendant is collaterally estopped to deny the defectiveness of the product.”).

133. *See* Richard A. Epstein, *The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal*, 10 J.L. & COM. 1, 59 (1990) (noting “the possibility that an erroneous decision in a hotly contested case will receive dispositive weight in all future cases”); Erlenbach, *supra* note 111, at 20 (noting that “[t]he potential for injustice . . . is great; finders of fact are not infallible”); Green, *supra* note 18, at 223 (“From the perspective of an asbestos defendant, . . . there is substantial unfairness in universalizing a single adverse jury decision, which experience has demonstrated is not reliable.”); Edwin H. Greenbaum, *In Defense of the Doctrine of Mutuality of Estoppel*, 45 IND. L.J. 1, 2 (1969) (“The fallibility of the litigation process is the most fundamental basis for the mutuality requirement. . . ; no one should ever undertake to guarantee the accuracy of the results of litigation.”); Kennamer, *supra* note 119, at 1137 (“Another danger inherent in the application of non-mutual offensive collateral estoppel is the possibility that a plaintiff might unfairly try to use an inconsistent or aberrant result to support his or her claim of collateral estoppel” (emphasis added)); Ratliff, *supra* note 49, at 82 (“[T]here is no requirement that the first and controlling case be fairly representative of the issue to be decided.”); Schuck, *supra* note 55, at 480 (“[T]he variability in trial outcomes—even assuming that the underlying facts are identical—may be significant.”); Waggoner, *supra* note 49, at 410 (“[T]here can be little doubt that many cases are decided incorrectly.”); *id.* at 416 (“That nonmutual collateral estoppel is unfair emerges from the fact that litigation involves a substantial element of chance, that the results of litigation run a substantial risk of being inaccurate.”); *id.* at 416–17 (“Once the likelihood of inaccurate litigation results is recognized, once litigation is seen as to a great extent a matter of chance, then the unfairness of nonmutual collateral estoppel is manifest.”); *id.* at 423 (noting that “[a] major assumption of courts approving nonmutual collateral estoppel . . . is that a fairly tried case necessarily produces the right answer,” and stating that it is an “obviously erroneous assumption” (footnote omitted)).

134. *See* Dooley, *Cult of Finality*, *supra* note 126, at 64 (noting that “Collateral estoppel artificially fixes as true a finding that simply represents the ideologically-determined interpretation of an initial factfinder”).

135. *See* Spettigue v. Mahoney, 445 P.2d 557, 562 (Ariz. Ct. App. 1968) (rejecting offensive collateral estoppel and noting that “[w]hile this court believes that our system of justice has no peer in this fallible world, nevertheless, it is unable to consider that our trial processes unerringly discover Truth”); JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE § 14.9, at 660 (1993) (“Collateral estoppel operates without regard to whether the first determination of a particular issue was correct. The court does not concern itself with the rightness of the findings.”);

even if the trial court views the verdict as “probably wrong,” the trial court may not award a J.N.O.V. if a reasonable jury could so find.<sup>136</sup> Moreover, the first plaintiff may have been selected to be the most sympathetic by plaintiffs’ counsel, increasing the chance of an aberrational verdict in favor of the plaintiffs in the first suit.<sup>137</sup> The plaintiff may have particularly egregious damages, making the jury more likely to find liability, which could be exported to other cases via issue preclusion.<sup>138</sup> Additionally, the first jury verdict may have been a compromise verdict of liability in favor of reduced damages.<sup>139</sup>

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Hiroshi Motomura, *Using Judgments as Evidence*, 70 MINN. L. REV. 979, 1009 (1986) (“Litigation is not an infallible determiner of historical truth, but rather an imperfect exercise that may produce a different result each time, influenced heavily but unpredictably by the identity of the parties, the advocates, and the decisionmakers . . . . The very basis of collateral estoppel is that the prior judgment is binding even if it is wrong.”); Victor E. Schwartz & Liberty Mahshagian, *Offensive Collateral Estoppel: It Will Not Work in Product Liability*, 31 N.Y. L. SCH. REV. 583, 586–87 (1986) (“[T]here is always the possibility that the prior verdict relied upon by the subsequent plaintiff may have been erroneously decided. The court may have erred in admitting or excluding evidence or in instructing the jury.”); Steven C. Malin, Comment, *Collateral Estoppel: The Fairness Exception*, 53 J. AIR L. & COM. 959, 986–87 (1988) (stating that “if a defendant won ninety-five out of one hundred suits arising from a common set of facts (such as an air crash),” and “if one of the five aberrational judgments had occurred in the first action and the remaining courts barred the defendant from relitigating his liability, then all subsequent cases would be controlled by, perhaps, an idiosyncratic judge or jury”).

136. See FED. R. CIV. P. 50; Waggoner, *supra* note 49, at 412 (noting that “[a] jury will be allowed to return a verdict, rather than have judgment entered as a matter of law, so long as the evidence is such that a reasonable person could arrive at the jury’s verdict, even if that verdict is probably wrong”); *id.* (“A judge’s findings of fact must be accepted even though they are probably wrong, so long as they are not clearly erroneous.”).

137. See Lundeen v. Hackbarth, 171 N.W.2d 87 (1969); Malin, *supra* note 135, at 987 (“[S]uch an idiosyncratic decision for the plaintiff is most likely to occur in the first action since, knowing of potential estoppel effect, the most sympathetic plaintiff is often put forth first.”); Ratliff, *supra* note 49, at 90 (suggesting disparity if first plaintiff were a “nun-neurosurgeon” as opposed to an “escaped convict”); Schwartz & Mahshagian, *supra* note 135, at 587 (“[T]he prior plaintiff may have aroused extreme sympathy from the court or jury.”).

138. See Ratliff, *supra* note 49, at 89 (“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.”).

139. See Katz v. Eli Lilly & Co., 84 F.R.D. 378, 382 (E.D.N.Y. 1979) (“[W]here the original judgment is questioned on the ground that it was based on a compromise verdict, a court must in fairness provide a litigant every opportunity to explore the basis for a defense to offensive use of the judgment as collateral estoppel against it.”); Kaufman v. Eli Lilly & Co., Inc., 482 N.E.2d 63, 69 (N.Y. 1985) (noting in a DES case, that “[a]lthough indications of jury compromise is one factor properly to be considered in determining whether a party against whom collateral estoppel is sought had a full and fair opportunity to litigate the issues in the prior determination, the evidence offered to defeat application of the doctrine in this case is insufficient” (citations omitted)); Green, *supra* note 18, at 202 (“Confidence in the first judgment may also be impaired if it was the result of jury compromise.”); Hynes, *supra* note 119, at 663 (“One possible casualty is accuracy. Issue preclusion may enhance the risk associated with a lawsuit by possibly preserving an anomalous judgment or by making a compromise verdict the basis of extensive liability in subsequent cases.” (footnote omitted)); Saks, *supra* note 81, at 283 (“Where ‘fusion’ [of liability and damages] is found, it usually takes the form of a reduced damage awards [sic] when the defendant’s liability is less than clear.”). *But see* Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 333–34 n.26 (1971)

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In *Parklane*, the Supreme Court's concern with prior inconsistent judgments<sup>140</sup> ignored the possibility that the first verdict would be inconsistent with subsequent verdicts, and indeed, may have been an outlier in favor of the plaintiffs when most other juries would have found for the defendant. The Court discussed Professor Currie's example of a railroad crash with multiple suits to underscore the problem of inconsistent prior verdicts.<sup>141</sup> But, in the same article cited by the Court, Professor Currie underscored that the concern of an aberrational verdict also applies to the first verdict:

If we are unwilling to treat the judgment against the railroad as res judicata when it is the last of a series, all of which except the last were favorable to the railroad, it must follow that we should also be unwilling to treat an adverse judgment as res judicata even though it was rendered in the first action brought, and is the only one of record. Our aversion to the twenty-sixth judgment as a conclusive adjudication stems largely from the feeling that such a judgment in such a series must be an aberration, but we have no warrant for assuming that the aberrational judgment will not come as the first in the series.<sup>142</sup>

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(noting compromise-verdict concern, but noting, "nor would it appear to be a significant consideration in deciding when to sustain a plea of estoppel in patent litigation, since most patent cases are tried to the court").

140. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 330 (1979).

141. *Id.* at 330 n.14.

142. Currie, *supra* note 7, at 289. As Professor Richard Marcus has noted, "[a]lthough the Supreme Court acknowledged that inconsistent verdicts provide a reason for denying estoppel on grounds of fairness, it did not seem to appreciate Currie's basic point"—which is that we cannot be assured the first verdict is not aberrational. Marcus, *supra* note 55, at 249. Professor Jack Ratliff expanded on Currie's persisting problem, post-*Parklane*:

[I]f a court applied collateral estoppel in the situation in which Case 26 was tried first, the anomaly would never come to light. The repeated use of a single initial finding would conceal the problem. This situation presents only the theoretical *potential* for other, conflicting fact-findings. Even though the result is no less anomalous, we would never have the anomaly demonstrated. The system would maintain an appearance—though a false one—of regularity. Curiously enough, this idea of cosmetic regularity has been one of the mainstays of the argument favoring the application of collateral estoppel. The argument is that different fact finders will inevitably reach conflicting results on the same questions. Therefore, consistency will never be possible, and so we might as well settle for the appearance of it.

Ratliff, *supra* note 49, at 74 n.77. Professor Currie later retreated somewhat from his position, noting that "so long as we retain sufficient faith in the institution of trial by jury to retain it for civil cases at all, what warrant is there for mistrusting the verdict for purposes of collateral estoppel when there is no suggestion that there has been compromise or other impropriety?" See Brainerd Currie,

The tremendous sums turning on the question of product defectiveness, or negligence, warrant allowing multiple juries to bring a more collective wisdom on the issue, rather than cutting short jury input via issue preclusion.<sup>143</sup> As Judge Posner opined in class actions, an area with similar problems,<sup>144</sup> “[o]ne jury, consisting of six persons . . . will hold the fate of an industry in the palm of its hand.”<sup>145</sup> Imposing such a potentially outlier verdict on all subsequent cases is not fair.<sup>146</sup> Therefore, judges should reject such verdicts in the mass tort context under their discretion with regard to offensive non-mutual issue preclusion.<sup>147</sup> Any one individual trial

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*Civil Procedure: The Tempest Brews*, 53 CAL. L. REV. 25, 36 (1965); see also *Sandoval v. Super. Ct.*, 140 Cal. App. 3d 932, 943 n.7 (Cal. Ct. App. 1983) (stating that “Currie himself retreated from his original position”).

143. See *Erlenbach*, *supra* note 111, at 22 (“[I]t is . . . unjust to prove the plaintiff’s case for him by taking from the factfinder the opportunity to pass on the defectiveness of the product when that question is still a matter of reasonable dispute.”); *id.* at 53 (“A lone jury’s decision that a defendant’s conduct was unreasonable should not resolve the issue in all subsequent cases; something more is needed.”); *Waggoner*, *supra* note 49, at 408 (“The risk of inaccuracy in litigation is too high to let us justify estoppel by confidence that the first result is likely to have been correct.”); *Malin*, *supra* note 135, at 987 (“[T]rying multiple cases consumes valuable judicial resources; but, one must consider whether (as in the present system) the possibility of ninety-five unfair, unjust judgments is an acceptable cost therefor [sic].”).

144. See *Stier*, *supra* note 17.

145. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995); *Dooley*, *National Juries*, *supra* note 19, at 432–33 (discussing the “unease” of, *inter alia*, the Supreme Court and Congress, and noting that “[t]hese critics question whether the initial decisionmaker, the local jury, should wield such power”).

146. See *Hines*, *Dangerous Allure*, *supra* note 2, at 575 (“[I]t would be unfair to permit preclusion based on a single verdict in mass tort cases where the evidence would have supported a judgment for either party.”); *Alexandra D. Lahav*, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 594 (2008) (noting “greater possibility for systemic bias” in situation where “only one jury . . . makes decisions that are to be extrapolated to a larger population, [because] one set of jurors, rather than many sets over many years, will decide the fate of thousands of cases”); *Roger H. Trangsrud*, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 813 (1985) (“In such circumstances, there is no certainty that the initial verdict was correct and imposing the facts found in the first action on all later cases is unfair.”).

147. See *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 305 n.11 (6th Cir. 1984) (citing *Parklane*’s discussion of *Currie*’s hypothetical and stating that “[i]n *Parklane Hosiery*, the Supreme Court explicitly stated that offensive collateral estoppel could not be used in mass tort litigation”); *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 346 n.13 (5th Cir. 1982) (“The injustice of applying collateral estoppel in cases involving mass torts is especially obvious.”); *Amy Gibson*, Note, *Cimino v. Raymark Industries: Propriety of Using Inferential Statistics and Consolidated Trials to Establish Compensatory Damages for Mass Torts*, 46 BAYLOR L. REV. 463, 464 (1994) (“Often, however, these ‘missed opportunities’ reflect a recognition that procedural changes designed to decrease the federal caseload impermissibly alter substantive rights. For example, allowing offensive collateral estoppel in the context of mass torts violates the principles announced in *Parklane Hosiery Co. v. Shore*.”); *Kennamer*, *supra* note 119, at 1145 (“The problems inherent in attempting to apply non-mutual offensive collateral estoppel to products liability litigation further demonstrate that Texas courts should, like those other courts whose decisions were well-reasoned, find the application of non-mutual offensive collateral estoppel in products liability cases largely unfair.”); *Schwartz & Mahshigian*, *supra* note 135, at 590 (“The Supreme Court has warned trial courts not to apply offensive collateral estoppel if it would be unfair to a defendant . . . [I]t is not

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represents a just attempt at resolving the dispute between the parties,<sup>148</sup> but applying that one jury's finding to perhaps thousands of other cases overstates the accuracy of any one jury.<sup>149</sup>

In addition to the concern of verdict variability on issues of such high stakes, non-mutual issue preclusion is unfair because it only imposes the downside of the first verdict on defendants, not plaintiffs, in a mass tort litigation.<sup>150</sup> In a mass tort, each individual suit may pit a single plaintiff against a defendant alleged to have caused the mass tort. A loss on an issue such as product defect by any one plaintiff will not result in issue preclusive effects upon other plaintiffs, because those subsequent plaintiffs will not have been parties to the prior action; due process prohibits the application of issue preclusion.<sup>151</sup> Yet if the first plaintiff wins on defectiveness against

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justified in product liability lawsuits." (footnote omitted)); *see also* Nations v. Sun Oil Co., 705 F.2d 742, 744 (5th Cir. 1983) ("[Collateral estoppel] is a doctrine of equitable discretion to be applied only when the alignment of the parties and the legal and factual issues raised warrant it."). Another intriguing suggestion is the possibility that courts should grant issue preclusion only based on a summary judgment finding that no rational jury could find other than against the defendant on defect. Attorney Erlenbach, for example, argued that "a products liability defendant should not be estopped to deny the alleged defect in his product *unless the judge is convinced that there is no reasonable dispute on the matter*," a standard that is tantamount to a summary judgment or directed verdict. *See* Erlenbach, *supra* note 111, at 54. Even here, however, there are concerns regarding circumventing juries and imposing the will of a single individual—the judge—in deciding the entire mass tort. Again, the risk of an outlier judgment instead counsels a more decentralized approach of multiple juries not constrained by issue preclusion.

148. *See* Waggoner, *supra* note 49, at 415 ("If decisions are too often inaccurate to be accepted for nonmutual collateral estoppel, why should their results be accepted even in the first case . . . ? [T]he court systems do make a major effort to produce accurate results, and this effort deserves respect even though accuracy may often not be achieved.").

149. *See* Schwartz & Mahshagian, *supra* note 135, at 590 ("[C]hoosing any single verdict to establish the issue in a subsequent case is inherently arbitrary."); Waggoner, *supra* note 49, at 415 ("We should not put the results of litigation to uses that could be justified only if the results could confidently be expected to be accurate.").

150. *See* Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 338 (1979) (Rehnquist, J., dissenting) (noting a "nagging sense of unfairness as to the way petitioners have been treated, engendered by the *imprimatur* placed by the Court of Appeals on respondent's 'heads I win, tails you lose' theory of this litigation"); Richard O. Faulk et al., *Building a Better Mousetrap? A New Approach to Trying Mass Tort Cases*, 29 TEX. TECH. L. REV. 779, 805–06 (1998) ("[Defendants'] concern is exacerbated by the fact that, even if the first bellwether trial results in a defense verdict, that verdict would have no effect on the remaining claims because their claims were not actually litigated in the prior trial. Accordingly, defendants face the potential of being collaterally estopped by a loss, while a loss by a plaintiffs' bellwether group has absolutely no legal impact on the thousands of remaining claims." (footnote omitted)); Gibson, *supra* note 147, at 464 n.9 ("The unfairness of a contrary result is apparent. A defendant in a products liability action could win an issue in the first 500 cases, lose the issue in the 501st case, and face the prospect of losing the issue in the next 1,000 cases due to plaintiffs' use of offensive collateral estoppel.").

151. *See* Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 329 (1971) ("Some litigants—those who never appeared in a prior action—may not be collaterally estopped without

the common defendant, then subsequent plaintiffs may gain issue preclusion and prevail on defect because the common defendant was in the prior case.<sup>152</sup> This inequity may result in free riding by plaintiffs who might seek not to be the first plaintiff.<sup>153</sup> The subsequent plaintiff would then gain summary judgment on the issue of defectiveness, and further evidence would be introduced on issues of causation and damages.<sup>154</sup> Moreover, it is not fair to allow subsequent plaintiffs to gain the benefit selectively of a pro-plaintiff first verdict because those subsequent plaintiffs have not been

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litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.”). Professor Jack Ratliff referred to this problem as the “option effect”:

The option effect works this way. If a plaintiff establishes in Case 1 that the roll bar on a four-wheel drive Blaster is defective, subsequent plaintiffs who were not parties to Case 1 can hold Blaster Company to that finding. But subsequent plaintiffs are not bound to a finding *against* the first plaintiff. Each subsequent plaintiff has a due process right to a day in court on that question. Therefore, each has an option. He can adopt the Case 1 finding if it goes against Blaster Company or ignore it if it does not. Each subsequent plaintiff has a “heads-I-win, tails-you-lose” advantage.

Ratliff, *supra* note 49, at 65 (footnotes omitted); *see also* Erlenbach, *supra* note 111, at 29. Professor Villiers similarly described the problem:

This privity requirement prevents a defendant who prevailed in an action to collaterally estop a non-party plaintiff. Suppose, for instance, a victim of an automobile accident sues the manufacturer of an automobile alleging a defectively designed gasoline tank. The manufacturer then prevails on the defectiveness issue. This judgment does not preclude a different plaintiff from relitigating the identical issue in a different cause of action.

Villiers, *supra* note 80, at 543; *see also In re TMI Litig.*, 193 F.3d 613, 724 (3d. Cir. 1999); Johnson, *supra* note 111, at 417.

152. Villiers, *supra* note 80, at 543 (“Collateral estoppel may be used offensively . . . by a non-privity plaintiff in a subsequent suit. If, in the automobile example, the decision had gone against the defendant, a subsequent non-privity plaintiff could have used collateral estoppel offensively to estop defendant from denying defectiveness.”); Green, *supra* note 18, at 151 (“[P]otential plaintiffs can await the outcome of another suit against a common defendant, potentially benefit from it, and at no risk.”); Hynes, *supra* note 119, at 667 (noting the “asymmetry of offensive, non-mutual issue preclusion”); Waggoner, *supra* note 49, at 408 (“Under nonmutual collateral estoppel, the common party’s loss of the first case may be available to all the other claimants as an estoppel of the common party on issues which may be dispositive, yet a victory by the common party cannot be used against the other claimants because of the limitations of the Due Process Clause. Thus the common party in litigating the first case can win no more than that case, but the common party may lose all the cases.” (footnote omitted)); Weinstein, *supra* note 54, at 14 & n.54 (“Up to now these doctrines [of res judicata and collateral estoppel] have been of greater help to plaintiffs than defendants.”).

153. *See* George, *supra* note 11, at 665 (noting that those who may seek issue preclusion based on “*Parklane* and *Blonder-Tongue* are basically defined by free riding—they are ‘bound’ only by the victories of earlier parties”).

154. *See* Villiers, *supra* note 80, at 544 (“If the issue of liability were precluded by application of offensive collateral estoppel, the jury will be instructed to assess damages on the presumption that the defendant is liable. In cases where evidence of liability is separate from damages testimony, either party can, through a motion *in limine*, move to exclude evidence on liability as irrelevant or prejudicial.”) (footnote omitted).

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subjected to the risk of a loss in the first case.<sup>155</sup> Indeed, the result resembles the one-way intervention of the spurious class action that was rejected by the Rule 23 amendments in 1966.<sup>156</sup> Although *Parklane* advises courts to be mindful of whether plaintiffs “could easily have joined in the earlier action,”<sup>157</sup> this concern alone may not be enough to prevent issue

155. As Professor Waggoner has noted:

The risk in litigation is much like the risk in a coin flip, even though the court system by a variety of mechanisms tries to resolve disputes accurately, and even though each side tries by retention of skilled counsel and by diligent preparation to make the odds as much as possible favor it. In such a coin flip you put up your money and you abide by the result, win or lose. That seems fair. Now suppose a bystander who has watched the coin flip but who has not risked his cash were to approach the loser and say, “Pay me, too.” Such a demand would be laughed away, it is so obviously unfair. Yet such demands are now commonly enforced under the doctrine of nonmutual collateral estoppel.

Waggoner, *supra* note 49, at 417; *see also* Epstein, *supra* note 133, at 58–59 (noting the “potential abuses associated with the offensive use of collateral estoppel,” and stating that “[w]here individual plaintiffs are free to ‘hang back’ from consolidated litigation, they can place themselves in a ‘heads-I-win-tails-I-relitigate’ position”); Ratliff, *supra* note 49, at 77, 79 (“[G]ood procedural rules should allocate the risk of chance [of] miscarriages fairly, which in civil cases generally means evenly. . . . [I]t is clear that the option effect forces the first-case defendant to play for low stakes if he wins, but for high stakes if he loses.”); Waggoner, *supra* note 49, at 418 (“The other claimants able to invoke nonmutual collateral estoppel are able to win without having risked anything. While such a result might seem appropriate if we were confident the first result was correct, such confidence cannot be justified. There is no fair claim to such a windfall.”); *id.* at 425 (“Courts are used not because they are accurate (on the contrary they appear often to be inaccurate), but because they attempt to be fair and accurate and they are a reasonable risk allocation mechanism. A process justified by fair risk allocation cannot fairly be extended to others who risked nothing.”); Malin, *supra* note 135, at 988 (“A fundamental flaw in the offensive collateral estoppel doctrine is the glaring fact that the defendant has everything at risk in the first action while nonparty plaintiffs risk nothing.”). To remedy this “basic asymmetry of risk,” some have proposed that issue preclusion only be applied if both parties agreed to be bound by the first verdict. *See* Epstein, *supra* note 133, at 59 (“[T]he problem of outsider abuse can be ameliorated by a simple procedural measure . . . : require the outsider to *elect* at the outset whether or not it chooses to be both benefited and burdened by any judgment or settlement in the class litigation.”); Malin, *supra* note 135, at 991; *see also* Taylor v. Sturgell, 128 S. Ct. 2161, 2172 (2008) (“[A] person who agrees to be bound by the determination of issues in an action between others is bound in accordance with the terms of his agreement.” (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 40 (1980))); *In re Air Crash Disaster at Stapleton Int’l Airport*, 720 F. Supp. 1505 (D. Colo. 1989) (applying results of first test trial on common issues to those plaintiffs who agreed to be bound by result but denying issue preclusion benefit to “wait and see” plaintiffs), *rev’d on other grounds sub nom.* Johnson v. Cont’l Airlines Corp., 964 F.2d 1059 (10th Cir. 1992). Although litigants should be free to resolve their lawsuit as they wish (as in settlement), this approach does not remedy the underlying problem of verdict variability and resulting unreliability in the first verdict.

156. *See* Ratliff, *supra* note 49, at 79–80 (“One-way intervention made its appearance in the early days of class actions and was widely condemned as unfair. . . . Some thirteen years after the 1966 rule change shut down the . . . option effect, *Parklane* opened it up again.”); Waggoner, *supra* note 49, at 419 (“To tolerate nonmutual collateral estoppel is to resurrect the unfairness the 1966 revision of the federal rules sought to inter.”).

157. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 322–23 (1979).

preclusion in mass torts, where joinder of perhaps thousands of plaintiffs is not practicable, and where identifying putative plaintiffs may be difficult.<sup>158</sup>

As a result of this pro-plaintiff bias, defendants are incentivized to settle with plaintiffs for more than they would without issue preclusion,<sup>159</sup> increasing their total litigation exposure.<sup>160</sup> Moreover, a relatively more-attractive plaintiff would likely command a settlement premium because of the greater fear of an initial pro-plaintiff finding on general issues such as defect.<sup>161</sup> Indeed, because of the risk for a mass tort defendant of issue preclusion on a single jury, the defendant may feel compelled to settle stronger cases.<sup>162</sup> But a relatively unattractive plaintiff may, at the beginning of a litigation, push the defendant toward trial because of the greater chance that a pro-defense verdict could stop future issue preclusion through the prior pro-defense verdict.<sup>163</sup> For their part, plaintiffs' counsel may try to avoid bringing claims for less-attractive plaintiffs first.<sup>164</sup> And defendants are incentivized to undertake tremendous expenditures defending the first trial, to avoid collateral estoppel.<sup>165</sup> Moreover, litigation surrounding whether the elements of issue preclusion are met consumes

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158. See Ratliff, *supra* note 49, at 82 (“[C]ourts cannot effectively identify and disarm most wait-and-see plaintiffs.”).

159. See Hynes, *supra* note 119, at 674 (“[T]he defendant is willing to offer a greater settlement than he would be if there were no offensive, non-mutual issue preclusion.”); see also Madden, *supra* note 120, at 135 (“[I]t would be rare for the defense counsel of a national manufacturer or marketer to fail to review every litigation decision with an eye towards the effect upon later and similar lawsuits that may be anticipated from any systemic product problem.”).

160. See Hynes, *supra* note 119, at 674 (calling the extra amount the “issue preclusion bonus” and noting that “even if courts interpret ‘inconsistent’ verdicts broadly, the defendant’s expected total liability will still be greater than if the courts maintained the mutuality requirement”).

161. See Erichson, *supra* note 110, at 957 (“[D]efendant may be willing to sweeten the settlement in order to avoid the risk of an adverse judgment.”); Hynes, *supra* note 119, at 683.

162. See George, *supra* note 11, at 668 (“The threat of later preclusion, like the threat of class certification, may deny economically rational actors the opportunity to exercise their constitutionally protected procedural rights to fully litigate each case, because the stakes are simply apt to be too high. Many litigants would settle simple, private controversies before the day of judgment. . . .” (footnote omitted)); Marcus, *supra* note 55, at 251.

163. See George, *supra* note 11, at 668; Marcus, *supra* note 55, at 251.

164. This motivation may have been behind the dispute between the lawyers and their plaintiff, Betty Mekdeci, who had strategic difficulties with her Bendectin claim, leading her lawyers to want to drop her case. See Marcus, *supra* note 55, at 250–51.

165. See Erichson, *supra* note 110, at 951 (“[A] defendant must place enormous emphasis on prevailing in the first case that goes to trial.”); Marcus, *supra* note 55, at 251; Schwartz & Mahshagian, *supra* note 135, at 589 (“The possibility of a court applying collateral estoppel thus forces defendants to litigate all cases on the assumption that the disposition of any issue might prove critical in subsequent cases.”); Stephen J. Spurr, *An Economic Analysis of Collateral Estoppel*, 11 INT’L REV. OF LAW & ECON. 47, 47 (1991) (collateral estoppel “might give [defendant manufacturer] an incentive to invest a disproportionate amount in defending itself against [plaintiff’s] suit”); see also GREEN, *supra* note 55, at 158 (stating that in the first Bendectin trial, “Betty Mekdeci . . . faced a defense that was of an effort and size that reflected much more than the single claim being asserted”).

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additional resources.<sup>166</sup> In any event, the putative efficiency benefits of issue preclusion may be lost if, as has happened, plaintiffs and defendants agree to a settlement premium for a settlement including vacatur of the underlying judgment, which in some jurisdictions the trial court may do to effectuate settlement.<sup>167</sup> The vacated judgment would therefore not be able

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166. See *Goodson v. McDonough Power Equip., Inc.*, 443 N.E.2d 978, 983–84 (Ohio 1983) (“[T]ime-consuming and costly investigations may well be necessitated into collateral issues that may be essentially irrelevant to the actual issues between the parties . . . and may indeed increase the total amount of litigation, negating one of the prime supportive arguments, *i.e.*, the economy of the judicial process.”); Green, *supra* note 18, at 186 (noting “a significant proportion of party and judicial resources may be consumed by the efforts invested in determining whether collateral estoppel is appropriate in a particular case”); Schwartz & Mahshigian, *supra* note 135, at 589 (“The resources devoted to litigating these [collateral estoppel] issues may offset any savings derived from the use of collateral estoppel and actually increase the total burden on the judicial system.”); Thomas E. Willging, *Mass Tort Problems and Proposals: A Report to the Mass Torts Working Group*, 187 F.R.D. 328, 428 (1999) (“Even if some attempts to relitigate are unsuccessful, the attempts themselves consume judicial and party resources.”).

167. See *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 536 F.2d 730, 733 (7th Cir. 1976) (recounting plaintiff attorneys’ request to settle with vacatur, so as to avoid collateral estoppel); Elizabeth R.P. Bowen, *Routine Vacatur: The Supreme Court Strikes the Balance in Favor of Finality*, 3 FED. CIR. B.J. 259, 264 (1993) (“The inconsistent treatment within the court system has subjected parties seeking to invoke the collateral effects of a prior judgment—or to avoid such effects—to uncertain and arbitrary application of the vacatur doctrine.”); Erlenbach, *supra* note 111, at 20 n.5 (discussing *Outboard Marine*); Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589, 596 (1991) (“Vacatur enables an unsuccessful litigant to obtain the collateral benefits of reversal, such as . . . destruction of any collateral estoppel . . . in exchange for the settlement price.”); Brandon T. Allen, Note, *A New Rationale for an Old Practice: Vacatur and the Rules of Professional Responsibility*, 76 TEX. L. REV. 661, 663 (1998) (“[V]acatur creates problems for future plaintiffs who would like to use the trial court’s judgment when attempting to invoke the doctrine of offensive collateral estoppel.”); Steven R. Harmon, Comment, *Unsettling Settlements: Should Stipulated Reversals Be Allowed to Trump Judgments’ Collateral Estoppel Effects Under Neary?*, 85 CAL. L. REV. 479 (1997); cf. Cheylynn Hayman, Note, *Collateral Estoppel Not Allowed if Settlement Agreement Precedes Final Judgment for Both Liability and Damages*, 2001 UTAH L. REV. 1090 (2001). But see *U.S. Bancorp Mortgage Co. v. Bonner Mall P’ship*, 513 U.S. 18, 29 (1994) (“[M]ootness by reason of settlement does not justify vacatur of a judgment under review.”). A judgment on appeal may not be sufficiently final to warrant issue preclusive effect. See *Kramer v. Showa Denko K.K.*, 929 F. Supp. 733, 750 (S.D.N.Y. 1996) (rejecting preclusive effect of California judgment still on appeal); *Sandoval v. Super. Ct.*, 140 Cal. App. 3d 932, 936–37 (Cal. Ct. App. 1983) (“Although California law is settled that *pending* appeal a trial court judgment is not final and will not be given *res judicata* effect, once the appeal is settled favorably to the plaintiff and thereafter dismissed, the Restatement analysis and reason itself dictate that the trial court judgment reemerges with sufficient finality to permit the application of collateral estoppel.” (citations omitted)); cf. *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 395 (5th Cir. 1998) (“[T]he availability of review is of paramount importance to the issue of preclusion.”); *Merced-Torres v. Merck & Co.*, 393 F. Supp. 2d 1299, 1303 (M.D. Fla. 2005) (“Offensive collateral estoppel is not appropriate in cases where an issue is not reviewable on appeal.”); *Sandoval*, 140 Cal. App. 3d at 937 n.2 (“Under the federal rule and in a majority of state courts, the second plaintiff can use a judgment as *res judicata* in a later trial at any time before the first judgment has been reversed, vacated or modified.”);

to be used for issue preclusion.<sup>168</sup> In sum, the gamesmanship engendered in ordering plaintiffs, and the sizable additional litigation and settlement costs, call into question the fairness of issue preclusion, as well as its efficiency goals.<sup>169</sup>

Furthermore, the jury pool for the single plaintiff is a fair cross-section of members of the community around the court in which the plaintiff brought suit. But applying that verdict statewide via preclusion undercuts the ability of other juries, representative of other communities within the state, to opine as to issues such as product defect.<sup>170</sup> These jury concerns are exacerbated in the context of mass tort claims based on negligence and product defect that are so fluid as to be especially unpredictable as to how any one jury would find, and therefore, particularly require broader community input via multiple juries. For example, mass tort claims involve emotional settings that may be particularly susceptible to verdict variability. As Professor Lawrence George emphasized:

The *Parklane* Court's refusal to extend preclusion to the plaintiff estoppel class in the Currie mass-tort situation was sound, because the standards for liability in a personal injury litigation are so uncertain that their application even to victims of the same accident is intended to be inseparable from such factors as the appeal of the plaintiff to the jury's sympathy. It is this intensely populist, antirational emphasis upon the emotive or aleatory aspects of tort law application . . . which accounts for the strong intuitive appeal of

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Erichson, *supra* note 110, at 972 (noting that the Second Restatement and federal approach is "that judgments are entitled to . . . issue-preclusive effect upon entry of the judgment, regardless of whether the time to appeal has run, and even if an appeal is pending," but that "[s]everal states . . . disagree").

168. Harmon, *supra* note 166, at 479 (noting that "if the initial action is reversed by stipulation, the first judgment has no preclusive effect in later actions").

169. See Motomura, *supra* note 135, at 1004 ("[I]n many cases collateral estoppel is also very inefficient. It may simply substitute one area of contention for another. Instead of arguing the merits of the case, the parties argue about what the prior litigation decided."); Schwartz & Mahshigian, *supra* note 135, at 584–85 ("[T]he determination of whether to apply [collateral estoppel], in light of the particular facts of a case, actually increases the burden on the judiciary by exhausting the same judicial resources that would have been spent on litigating the issue to be estopped."); Spurr, *supra* note 165, at 47 (stating that the "fact that the stakes have increased for [defendant manufacturer] in the first case raises the question whether more resources will be consumed in litigation, even though relitigation of the issues is avoided"); Malin, *supra* note 135, at 983–84 (noting loss of efficiency in plaintiffs' not joining in the first action, additional defense costs in the first suit, and subsequent litigation over whether issue preclusion applies).

170. Cf. Dooley, *National Juries*, *supra* note 19, at 417 (arguing that "[a] national case demands a national jury drawn from a national pool"); see also *id.* ("The waning legitimacy of the civil jury in large-scale litigation reflects the disparity between the scope of the local jury pool and the scope of the cases.").

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the mass-tort anomaly . . . . Thus, on issues such as negligence, the principle of solidarity is illusory.<sup>171</sup>

Moreover, the claims of products liability litigation themselves are particularly open in their interpretations, leading to more variation among juries. As Professor Michael Green has stated:

Difficult evaluative questions and well-nigh impossible factual issues must be answered in order to resolve many asbestos products liability cases. The evaluative aspects may require the fact finder to assess what risks the user “would reasonably not expect to find,” to determine what degree of danger is “beyond that which would be contemplated by the ordinary consumer,” or to balance lungs, lives, and limbs against the utility of asbestos products. These indeterminate and value-laden questions, direct descendants of the “reasonable person” of negligence law, are simply not susceptible to reliable resolution, at least in close cases. But it is precisely these issues in close cases that are candidates for collateral estoppel.<sup>172</sup>

Furthermore, as the Supreme Court of Ohio has noted, the complexity of products liability claims—both with regard to the need for expert testimony and evaluating the manufacturer’s conduct within knowledge prevalent at the time of manufacture—renders more difficult and unpredictable the jury’s verdict.<sup>173</sup>

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171. George, *supra* note 11, at 678–79 (footnote omitted).

172. Green, *supra* note 18, at 216–17 (footnotes omitted).

173. As the Supreme Court of Ohio stated:

The danger is multiplied in cases such as this one where the issue determined in the first litigation relates to a product’s design. This is due to the nature of the questions and the potentially broad impact of their resolution. These questions are very technical, requiring expert testimony to bring out the specifics. Also, a jury’s ultimate determination requires delicate balancing between the design decisions actually made by the manufacturer and those which are postulated as feasible within the industry at any given point in time. Thus, the determination made by a jury in any particular case will oftentimes not be free from doubt.

Just as the risk of an erroneous determination is increased by the complex nature of design issues, the potential impact of such a decision would be unfairly broadened by the offensive application of nonmutual collateral estoppel.

*Goodson v. McDonough Power Equip., Inc.*, 443 N.E.2d 978, 987 (Ohio 1983); *see also* Ratliff, *supra* note 49, at 77 (“[N]o procedural rules can eliminate entirely the risk of error or the role of chance, especially when fact finders must often make close calls on conflicting evidence.”); Schwartz & Mahshagian, *supra* note 135, at 587 (“[J]uries are composed of laymen, and the prior jury may not have understood the complex technical issues regarding the design or manufacture of a

In addition, various courts have limited the supposed usefulness of issue preclusion by strictly adhering to the requirement that the current issue be identical to that in the prior litigation. This practice sometimes leads to a denial of issue preclusion where the issues are not identical.<sup>174</sup> Courts have permitted, for example, issue preclusion on identical issues arising from airplane crash cases.<sup>175</sup> In contrast, the Fifth Circuit in an asbestos case carefully examined the issue decided below, and found that asbestos products in the case could not be viewed as defective based on a prior jury's finding only with regard to certain types of asbestos products.<sup>176</sup> Moreover,

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particular product or the mechanical workings of an unfamiliar piece of equipment.”); *cf. In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1086 (7th Cir. 1980) (holding that antitrust case too complex for jury to hear, so no jury trial right under Seventh Amendment).

174. See *Kramer v. Showa Denko K.K.*, 929 F. Supp. 733, 750 (S.D.N.Y. 1996) (“Case law is clear that collateral estoppel is inapplicable in cases where there is any ambiguity regarding which issues actually were decided in the prior proceeding.”); *Kessinger v. Grefco, Inc.*, 672 N.E.2d 1149, 1158 (Ill. 1996) (“Application of the doctrine of collateral estoppel must be narrowly tailored to fit the precise facts and issues that were clearly determined in the prior judgment.”); *Vincent v. Thompson*, 50 A.D.2d 211, 219 (N.Y. App. Div. 1975) (rejecting issue preclusion and noting that “[o]ne [issue] turns upon the establishment of a defect in the pertussis vaccine component of QuadriGen and the other turns upon the establishment of a defect in the Salk polio vaccine component thereof”); *Owens-Corning Fiberglas Corp. v. Sitz*, 970 S.W.2d 103, 106 (Tex. App. 1998) (“Like *stare decisis*, collateral estoppel applies only to issues of fact or law necessarily decided by a prior court.”).

175. *In re Air Crash at Detroit Metro. Airport*, 791 F. Supp. 1204, 1214–16 (E.D. Mich. 1992), *aff’d sub nom. In re Air Crash Disaster*, 86 F.3d 498 (6th Cir. 1996); *Georgakis v. E. Air Lines, Inc.*, 512 F. Supp. 330, 334 (E.D.N.Y. 1981) (issue preclusion against defendant’s contention that crash covered by Warsaw Convention); *Stoddard v. Ling-Temco-Vought, Inc.*, 513 F. Supp. 335, 337–38 (C.D. Cal. 1981) (issue preclusion against defendant for liability). *But see Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 852–53 (D.C. Cir. 1981) (reversing issue preclusion on capacity of crash to injure infant because of lack of identical issues). See generally *Malin*, *supra* note 135, at 979–80 (discussing *Georgakis*, *Stoddard*, and *Schneider*). Issue preclusion has also been applied in DES cases. See, e.g., *Schaeffer v. Eli Lilly & Co.*, 113 A.D.2d 827 (N.Y. App. Div. 1985) (mem.).

176. *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 345 (5th Cir. 1982); see also *Arnold v. Garlock, Inc.*, 278 F.3d 426, 443 (5th Cir. 2001) (“[N]o matter how creative the procedural avenue, and in spite of the fact that this litigation would benefit from a uniform approach, at almost every turn this circuit has rejected attempts at aggregation and issue preclusion in asbestos cases. Our adversity toward group resolution sounds in our concern that no one be deprived the right to a full and fair opportunity to litigate their claims.”); *id.* (“The passage of time has not weakened the teachings of *Hardy*.”); *Setter v. A.H. Robins Co.*, 748 F.2d 1328, 1330–31 (8th Cir. 1984) (not clear which type of negligence proven in prior Dalkon Shield trial); *Kramer*, 929 F. Supp. at 750 (no identical issues of manufacturing defect for L-tryptofan because of different manufactured lots); *Rogers v. Ford Motor Co.*, 925 F. Supp. 1413, 1418–20 (N.D. Ind. 1996) (rejecting issue preclusion and noting that “the two buckles [in the two cases] were manufactured and assembled largely from different components with distinct part numbers and dissimilar weights”); *In re Asbestos Litig.*, Nos. 86C-08-70, 87C-01-84, 1993 WL 81288, at \*2 (Del. Super. Ct. Feb. 18, 1993); *Corey v. Int’l Playtex*, No. 92 C 5778, 1993 U.S. Dist. LEXIS 527, at \*5 (N.D. Ill. Jan. 21, 1993) (“[N]one of the questions the [prior] jury answered addressed the issue of whether the tampons were defective or unreasonably dangerous.”); *Dooley*, *National Juries*, *supra* note 19, at 432; *Kenamer*, *supra* note 119, at 1146–47 (“In asbestos cases . . . courts refuse to apply non-mutual offensive collateral estoppel either because they find that differences in the underlying facts render the issues not identical for purposes of collateral estoppel analysis, or that such differences would make application of the doctrine fundamentally unfair.”). *But see Batson v. Lederle Labs.*, 674 A.2d 1013, 1016 (N.J.

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even design defects may turn on the facts of the individual case. Sometimes, in products liability, the particular factual setting makes different the determination of putatively common issues such as defect.<sup>177</sup> For example, in rejecting issue preclusion for a seat belt system found defective in a prior case from a car accident in a separate car, the Northern District of Indiana stated:

The conclusion in a prior proceeding that a product failed due to defective design necessarily rests upon a determination that the design was inadequate to withstand the specific, foreseeable circumstances of the underlying incident. It does not automatically follow that the product would fail due to defective design in a different type of incident, where the forces acting upon the product may have been distinct from those in the earlier litigated incident (and possibly unforeseeable).<sup>178</sup>

Furthermore, the use of collateral estoppel on issues such as negligence and product defect may not be workable, in light of the need to address comparative fault in subsequent follow-up trials.<sup>179</sup> The juries in subsequent

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Super. Ct. App. Div. 1996) (approving issue preclusion for issue of date of manufacturer's knowledge of tooth-staining properties of tetracycline), *aff'd in part as modified*, 702 A.2d 471 (N.J. 1997); *Ezagui v. Dow Chem. Corp.*, 598 F.2d 727, 733 (2d Cir. 1979) (allowing issue preclusion for inadequacy of warnings for vaccine Quadrigen); *Kenamer*, *supra* note 119, at 1147–51 (discussing *Batson* and criticizing *Ezagui*). Early cases permitted issue preclusion in asbestos cases. *See, e.g.*, *Flatt v. Johns Manville Sales Corp.*, 488 F. Supp. 836, 840 (E.D. Tex. 1980); *Mooney v. Fibreboard Corp.*, 485 F. Supp. 242, 248 (E.D. Tex. 1980).

177. *Kramer*, 929 F. Supp. at 750–51:

[A] single products liability case typically involves individualized circumstances peculiar to that case alone, such as the age and health of the plaintiff, the conditions under which the product was used, or the precise circumstances surrounding the plaintiff's injury. Such factual idiosyncracies necessarily prevent a single finding from one such case to be applied to all other cases in a cookie-cutter fashion. To find otherwise could distort a jury's decision on the remaining, open questions, prejudice a defendant's ability to litigate case-specific issues, and insulate a plaintiff from the burden of having to prove his case.

*See also Goodson*, 443 N.E.2d at 987 (“It would not be prudent to raise a decision made by one jury in the context of one set of facts to the standard under which all subsequent cases involving separate underlying factual circumstances are judged.”); *Schwartz & Mahshigian*, *supra* note 135, at 588 (“For instance, in situations involving alleged side effects from a pharmaceutical or an illness alleged to have arisen from exposure to a chemical, the facts and issues of a product liability case are too individualized to permit a finding in one case to control in another case.”).

178. *Rogers*, 925 F. Supp. at 1419.

179. *See Green*, *supra* note 18, at 210 (“Preclusion is further complicated when conduct of the plaintiff or the plaintiff's decedent is asserted as a defense in an asbestos case.”); *see also id.* at 211

cases would not be able to compare fault between the plaintiff and defendant without reexamining the evidence of the defendant's fault considered by the first jury because this would call into question the efficiency of issue preclusion and could conceivably be seen to violate the Reexamination Clause of the Seventh Amendment to the Constitution.<sup>180</sup> A similar problem arises in cases seeking punitive damages, for evidence with regard to liability would also be required as a basis on which to award punitive damages.<sup>181</sup>

#### IV. COLLECTIVE WISDOM: OF MULTIPLE TRIALS, MATURITY, AND MASS TORT SETTLEMENT

Rather than employ issue preclusion, if courts permit multiple mass tort verdicts in multiple cases, even though that may lead to inconsistent verdicts,<sup>182</sup> these verdicts can foster well-informed and broad-reaching settlements.<sup>183</sup> The multiple verdicts on contested issues such as defect will over time provide more reliable inferences of claim valuation, contributing to what Professor Francis McGovern has termed the "maturity" of the mass tort.<sup>184</sup> When the parties' claim valuations are sufficiently settled, the press

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("Whatever the difficulties of assessing comparative percentages of responsibility, they are significantly enhanced when preclusion is employed and no evidence of defectiveness is introduced, leaving the jury with an empty, if condemned, vessel to compare with the plaintiff's conduct."); Kennamer, *supra* note 119, at 1138 ("[N]on-mutual offensive collateral estoppel deprives a Texas tort defendant of its right, similar to the right to try liability and damages together, to have its percentage of liability assessed after the jury hears all the facts and circumstances of the case at hand.").

180. *See* U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."); *cf. Rhone-Poulenc*, 51 F.3d at 1303 ("The right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have jurable 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.").

181. *See* *Setter v. A.H. Robins Co.*, 748 F.2d 1328, 1331 (8th Cir. 1984) ("Even if collateral estoppel were invoked here, little court time would be saved, because most plaintiffs, including [the plaintiff before the court], claim punitive damages in Dalkon Shield cases, and the same facts, or most of them, that would have been relevant on the issue of liability would still have to come in and be considered by the court or jury on the issue of exemplary damages.").

182. *See* Dooley, *supra* note 19, at 442 ("Multiple trials avoid the [Seventh Amendment] reexamination problem but create problems ranging from inconsistent verdicts . . .").

183. *Cf. United States v. Mendoza*, 464 U.S. 154, 160 (1984):

A rule allowing nonmutual collateral estoppel against the Government in such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari.

184. Professor McGovern noted:

[In] "mature mass torts" or mass tort litigation . . . there has been full and complete

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of attorneys' fees and other transaction costs will push them toward settlement,<sup>185</sup> which achieves much of the efficiency sought to be achieved by issue preclusion. In addition, settlements that follow multiple verdicts are likely to be more accurate than settlements predicated upon mere attorney speculation before any verdicts, or based on merely the single potentially outlier jury that delivered the verdict subsequently used for issue preclusion.

And of course the accuracy of the amounts paid is essential to effectuate tort goals of corrective justice, deterrence, and compensation.<sup>186</sup> Indeed, with regard to efficiency-based deterrence, the overall efficiency of the legal system may well be served by spending additional transaction costs on individual trials, if those trials engender the more efficient allocation of amounts involved in safety of mass products.<sup>187</sup> Mass tort litigation involves vast resources, sometimes with settlements in the billions of dollars, and affects thousands of workers in the industry, as well as consumers.<sup>188</sup> Spending more on procedure via multiple juries that supply more accurate information and incentives to manufacturers may be a sound social investment.<sup>189</sup>

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discovery, multiple jury verdicts, and a persistent vitality in the plaintiffs' contentions. Typically at the mature stage, little or no new evidence will be developed, significant appellate review of any novel legal issues has been concluded, and at least one full cycle of trial strategies has been exhausted.

Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 659 (1989).

185. See Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 85 (1989).

186. See Stier, *supra* note 17 (discussing effectuation of tort goals by mass tort settlement based on individual trials).

187. Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1498 n.45 (1999) ("Some cases are so huge that a single jury, even of 12, is too small to assure accuracy commensurate with the stakes. This is a problem in mass tort class action, when claims with aggregate stakes of literally billions of dollars may be combined for trial before a single jury. The solution is to have a sample of the cases tried before separate juries.").

188. See Erlenbach, *supra* note 111, at 22 ("Products liability suits, unlike most tort actions, affect interests far beyond those of the litigants; the defendant's stockholders, employees, creditors, insurers, customers, and occasionally the entire industry, can be seriously shaken by a finding of defect, and the liberal application of collateral estoppel on the issue of defect greatly magnifies the effect."); *id.* at 55 (noting the needed concern that "manufacturers of mass-produced products . . . not be destroyed by a lone judgment").

189. Arguing for multiple individual trials of common issues as more "robust" than single class determination, Judge Posner stated, "[T]he pattern that results will reflect a consensus, or at least a pooling of judgment, of many different tribunals. For this consensus or maturing of judgment the district judge proposes to substitute a single trial before a single jury . . ." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299-1300 (7th Cir. 1995); see also Hines, *Dangerous Allure*, *supra* note 2, at 601 (noting "skepticism [with regard to] the one-time, one-jury, one-roll-of-the-dice adjudication of an issue that might reasonably be found for or against the class").

Judges Richard Posner and Frank Easterbrook of the Seventh Circuit, in both scholarship and judicial opinions, have described the collective wisdom that results from multiple juries, sometimes connecting this approach to the decentralized methods of free-market economics. For example, in rejecting class certification in *Bridgestone/Firestone*, Judge Easterbrook noted that “[o]ne suit is an all-or-none affair, with high risk even if the parties supply all the information at their disposal.”<sup>190</sup> Instead, Judge Easterbrook has urged that “[w]hen courts think of efficiency, they should think of market models,” observing that “[m]arkets . . . use diversified decisionmaking to supply and evaluate information.”<sup>191</sup> Similarly, Judge Posner, in rejecting the single-adjudication class approach in *Rhone-Poulenc*, noted his

concern with forcing these defendants to stake their companies on the outcome of a single jury trial . . . when it is entirely feasible to allow a . . . determination of their liability . . . to emerge from a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions.<sup>192</sup>

According to Judge Posner, such an approach would “reflect a consensus, or at least a pooling of judgment, of many different tribunals.”<sup>193</sup>

In contrast to issue preclusion, which fosters settlements based merely on the early speculations of counsel or the result of a single jury verdict on common issues, multiple verdicts encourage the parties to craft a settlement based on a more full community judgment on the legal claims alleged.<sup>194</sup> For example, out of the many varying individual verdicts in the Vioxx litigation, came a broad settlement.<sup>195</sup> The parties used the total compiled individual verdicts to gauge the value of pending claims.<sup>196</sup> The parties then put together a far-reaching settlement of \$4.85 billion.<sup>197</sup> Although the costs

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190. *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002).

191. *Id.* (“Thousands of traders affect prices by their purchases and sales over the course of a crop year. This method looks ‘inefficient’ from the planner’s perspective, but it produces more information, more accurate prices, and a vibrant, growing economy.”).

192. *Rhone-Poulenc*, 51 F.3d at 1299; *see also id.* at 1300 (stating that “the alternative [to a class action] exists of submitting an issue to multiple juries constituting in the aggregate a much larger and more diverse sample of decision-makers.”).

193. *Id.* at 1300.

194. *See Bridgestone/Firestone*, 288 F.3d at 1020 (“[O]nly ‘a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions,’ will yield the information needed for accurate evaluation of mass tort claims.” (quoting *Rhone-Poulenc*, 51 F.3d at 1299)); *see also Rhone-Poulenc*, 51 F.3d at 1300 (urging use of “multiple juries constituting in the aggregate a much larger and more diverse sample of decision-makers”).

195. *See supra* Part II.A.

196. *See Dooley, National Juries*, *supra* note 19, at 413–14 (“These [first three trials] and other early cases indicated to the parties the relative strength of their positions . . .”).

197. *See id.* at 414 (“The [Vioxx] parties then crafted a proposed global settlement of the

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of those individual trials—likely in the millions—may seem substantial in themselves, they do not seem unduly high in relation to the mammoth \$4.85 billion settlement negotiated based on those trial verdicts.

Such an approach draws support from the democratic approach of empowering broad community sentiment to opine as to the legal claims of the mass tort. Unlike current doctrine on issue preclusion, this multiple-verdict approach credits the role of multiple juries in individual cases, allowing variation in verdict.<sup>198</sup> It also does not export a local jury, drawn from a specific local community, to have preclusive effects across a broader geographic area, such as an entire state.<sup>199</sup> Moreover, allowing multiple juries might allow a greater possibility of clustering of minority members of the community, whose views might otherwise be discounted in a jury comprised mainly without them.<sup>200</sup> Allowing multiple juries to weigh in on the meaning and application of terms such as “unreasonably dangerous,” which undergirds product liability claims for defect, allows for a more complete conveying of the community sensibility that forms the background of contracts and business practices.<sup>201</sup>

With regard to inconsistency, courts should not hide the limits of the adjudicative process.<sup>202</sup> By eliminating inconsistent verdicts, issue

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litigation.”); Alex Berenson, *Analysts See Merck Victory in Vioxx Deal*, N.Y. TIMES, Nov. 10, 2007, at A1.

198. See Dooley, *National Juries*, *supra* note 19, at 433 (“The subtext is that we can tolerate the imprecise calculations made by a jury in an individual case, but we hesitate to export such an imperfect product to other cases, especially outside that locality.”).

199. *Id.*; Dooley, *Cult of Finality*, *supra* note 126, at 46 (“If you believe, as I do, that the jury is in most situations the superior decisionmaker (being more diverse demographically and more diffuse functionally), then we must examine whether the doctrine of collateral estoppel should be used to circumvent the power of the community to speak in given contexts, despite the inefficiencies that ‘relitigation’ may entail.” (footnotes omitted)); *id.* at 58–59 (noting that applying a first jury’s finding via issue preclusion “still poses dangers to local community interpretation” and that “since both judges and juries are drawn typically from the immediate vicinity of courts, the earlier finding may have been made in a different local context”).

200. See *id.* at 50 (“[R]esearch shows that often the dynamics of the jury room operate to silence the voices of women and minorities . . . . [T]he initial factfinding supposedly captured by the articulation later proposed for collateral estoppel effect may be tainted by the suppression of some voices.”).

201. See *id.* at 52–53 (discussing varying possible jury and community interpretations of “unreasonably dangerous”); *id.* at 62 (“[T]he finding that the chainsaw is or is not unreasonably dangerous is inherently unstable, that it is a social construction produced by the interpretive communities represented by the prior decisionmaker . . . .”).

202. See Waggoner, *supra* note 49, at 423 (“[O]ne must ask whether it is good for the courts to pretend to have greater accuracy than they possess.” (footnote omitted)). As Professor Green has noted:

One wonders . . . whether there isn’t value in honestly confronting the inability of the

preclusion has not avoided the underlying reality of jury verdict variability that may lead to the first verdict being an outlier.<sup>203</sup> Indeed, issue preclusion may only magnify the unrepresentative verdict's effects by extrapolating its findings to numerous other cases and placing the downside risk on only one party: the defendant who was present in the prior case.<sup>204</sup> It is difficult to see how such a process, fully understood, encourages respect for the judiciary, as issue preclusion promises. Rather, courts should be forthright and open about the capabilities and limitations of the jury system by allowing a more full array of verdicts to provide a balanced societal assessment of issues such as defect and negligence. Such an approach may well enhance public respect for the judiciary. In addition, revealing those limits may assist in designing better approaches for future adjudication.<sup>205</sup>

## V. CONCLUSION

In mass tort litigation, offensive non-mutual issue preclusion promises vast efficiency and protection against inconsistent judgments, propping up public confidence in the courts. Upon scrutiny, however, issue preclusion may lock in place the possibly outlier first verdict only in situations where it benefits the plaintiffs, not the defendants—thus suffering from being both unreliable and one-sided. Recent and growing empirical evidence of jury verdict variability calls into question the fairness of such a method. In contrast, an approach that relies upon multiple verdicts to provide a more complete view of core contested issues such as negligence or defect offers litigants valuable and more accurate information that can be used to fashion informed settlements. Indeed, these far-reaching settlements may better achieve efficiency than issue preclusion. Courts should therefore use their discretion to decline to apply issue preclusion in the mass tort context.

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judicial process to find truth in a system utilizing indeterminate and value-laden standards and relying on the jury to apply those standards. Perhaps we should confront the dissonance head on, rather than surreptitiously burying it beneath a collateral estoppel shroud.

Green, *supra* note 18, at 214–15 (footnotes omitted).

203. *See supra* note 135 and accompanying text.

204. *See supra* note 150 and accompanying text.

205. *See Waggoner, supra* note 49, at 423 (“In the long run, institutions are likely to operate better with their flaws revealed and subject to pressure for reform, than if they hide their flaws and leave dissatisfaction to fester until the institution is thoroughly deficient or its support gone.”).