TECHNOLOGICAL RISK AND ISSUE PRECLUSION: A LEGAL AND POLICY CRITIQUE

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This article presents a legal and policy analysis of issue preclusion in product liability litigation. The analysis shows that application of offensive collateral estoppel to preclude liability constitutes an abridgement of a fundamental right, and should therefore be subject to strict scrutiny. The major public policy interests of collateral estoppel to be weighed in a strict scrutiny calculus are decisional consistency and judicial economy. In fact, offensive collateral estoppel has an ambiguous causal connection with decisional consistency and may actually undermine it. Furthermore, analysis of constitutional jurisprudence shows that the fundamental right at issue may not be rationed or compromised to promote a purely economic interest. Based on these considerations, the offensive use of collateral estoppel to preclude liability does not pass the strict scrutiny test of constitutionality. Policy implications of this analysis include limitations on full faith and credit recognition and enforcement of product liability judgments across state lines.

INTRODUCTION

Any technology is inherently risky. A software package may contain a virus that causes a nuclear plant to malfunction; an automobile gas tank may explode upon impact; and a drug may have adverse side effects even while it provides the only technologically feasible cure for a dreaded disease. The law of product liability does not require perfect product safety, but recognizes that society's best interests are served when an "optimal" level of safety is achieved.[1] Liability for product

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[1] *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (Proposed Final Draft 1997) ("Society does not benefit from products that are excessively safe . . . any more than it benefits from products that are too risky. Society benefits most when the right, or optimal, amount of product safety is achieved.").

defectiveness is imposed when the riskiness of a product exceeds a legal standard of safety and causes personal injury or damage to property.[2]

Proof of defectiveness is essential to establishing liability and recovering damages in a product liability suit. Proving defectiveness is often time-consuming, expensive and frequently requires expert testimony.[3] The doctrine of offensive collateral estoppel allows a plaintiff to avoid relitigating the issue of defectiveness if the product at issue has been found defective in a prior action.[4] The rationale is that when a defendant had a full and fair opportunity to litigate the issue of defectiveness, it would be a waste of time and money to relitigate the identical issue.[5]

Advocates of collateral estoppel argue that it promotes judicial economy and decisional consistency. Liberal application of collateral estoppel in product liability, however, has been criticized for putting the survival of entire industries at risk based on a single, possibly erroneous, judgment.[6] In this article I argue that, regardless of its net economic benefit, offensive application of collateral estoppel to preclude the issue of defectiveness in a product liability action constitutes an abridgement of a fundamental right, namely the Seventh Amendment right to a jury trial. As such it should be subject to strict scrutiny.

A constitutionally ideal civil jury may disagree on a defendant's liability, even though all jurors hear the same evidence. The root cause of divergent opinions among jurors is the constitutional requirement of juror impartiality. An impartial jury is (i) unbiased, and (ii) representative of a cross-section of the community where the action is brought.[7] In their refinement of the definition of "bias," the courts have distinguished between general and specific biases.[8] General biases, such as a low risk tolerance, are constitutional if they reflect the values of the community. Specific biases, such as a preconceived opinion of defendant's liability, are unconstitutional. A representative jury will therefore contain jurors with, for instance, a diversity of risk attitudes, but no biases specific to the case.

The diversity of risk attitudes may lead to disagreement on liability. Relatively risk-tolerant jurors may consider a risk under litigation to be

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2 *See id.*

3 *See* Tinnerholm v. Parke, Davis & Co., 411 F.2d 48, 51-53 (2d Cir. 1969) (providing a classic example of a case dominated by expensive and time-consuming expert testimony on both sides); *see also* Kurt Erlenbach, *Offensive Collateral Estoppel and Products Liability: Reasoning with the Unreasonable*, 14 ST. MARY'S L. J. 19, n.3 (1982).

4 *See* Erlenbach, *supra* note 3, at 20.

5 *See id.*

6 *See id.*

7 *See* discussion *infra* Part II.B.

8 *See* discussion *infra* Part II.C-D.

"reasonable," and find the defendant not liable. Conversely, relatively risk averse jurors may find that the same evidence supports a verdict of liability.

The damages verdict rendered by a constitutionally impartial jury in a case where evidence of liability is separate from damages testimony, can be written as $\alpha \bullet D$. The factor α, which varies between zero and one, represents the jury's degree of disagreement. $\alpha = 1$ if all jurors agree to hold defendant liable, while a value of zero corresponds to a unanimous acquittal. The factor, α, is therefore also indirectly a measure of (i) the defendant's degree of culpability, (ii) the strength of evidence of liability and (iii) society's aggregate judgment of the reasonableness of the risk at issue. The symbol D represents the dollar value of plaintiff's loss, and is a function only of damages testimony.

If plaintiff successfully invoked offensive collateral estoppel to preclude liability, evidence of liability may be excluded as irrelevant, and the jury may be instructed to presume liability and render a damages verdict based only on damages testimony. The jury is now "unanimous" on liability (by design), and the resulting damages award will be D, instead of a fraction of D.

Bearing in mind that α would be less than one if evidence of liability were unconvincing to at least one juror, we argue that offensive application of collateral estoppel (forcing α to be equal to one) is an unconstitutional invasion of a defendant's Seventh Amendment right to a trial by jury. Offensive collateral estoppel distorts that component of the jury's damages verdict that reflects society's aggregate judgment of defendant's culpability. Forcing $\alpha = 1$ results in a damages verdict that reflects a higher degree of culpability than a constitutionally impartial jury's "true" judgment, based on (i) the evidence presented at trial, and (ii) society's standards of risk and safety.

A law or measure that burdens a fundamental right, such as the right to a jury trial, is subject to strict scrutiny.[9] Strict scrutiny analysis weighs the public policy interests of the challenged measure against the

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[9] *See* Regents of the Univ. of Cal. V. Bakke, 438 U.S. 265, 290-91 (1978) (applying strict scrutiny to race-based classification scheme used in college admissions decisions); Roe v. Wade, 410 U.S. 113, 155, 163-64 (1973) (applying strict scrutiny to law that burdened right to privacy); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1964) (stating that "where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined"); Reynolds v. Sims, 377 U.S. 533, 561-62 (1964) (stating that "the right to suffrage is a fundamental matter" and as such "must be carefully and meticulously scrutinized"); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1454 (2d ed. 1988) ("Legislative and administrative classifications are to be strictly scrutinized and thus held unconstitutional absent a compelling governmental justification if they distribute benefits and burdens in a manner inconsistent with fundamental rights."); Daniel J. Solove, *Note: Faith Profaned: The Religious Freedom Restoration Act and Religion in the Prisons*, 106 YALE L. J. 459, 461 (1996) ("Strict (or 'height-

fundamental right that it threatens. The public policy interests in collateral estoppel are decisional consistency and judicial economy. I argue that the causal connection between offensive collateral estoppel and decisional consistency is ambiguous, and that estoppel actually undermines consistency in precisely those cases where it is most likely to generate a constitutional conflict. Furthermore, although the Supreme Court has balanced constitutional rights against each other and against other public policy interests, analysis of constitutional jurisprudence shows that the Seventh Amendment right to a civil jury trial may not be rationed or compromised for pure economic gain.[10] Offensive use of collateral estoppel to preclude defectiveness does therefore not pass the strict scrutiny test of constitutionality.

This analysis has several public policy implications. A constitutional limitation on issue preclusion is likely to affect the economics of product liability litigation and impede full faith and credit recognition and enforcement of product liability verdicts across state lines. The theory relied on in the analysis also sheds new light on the judicial interpretation of compromise verdicts.

Part I of this article reviews the standards of liability for product defectiveness. Part II analyzes the properties of a constitutionally ideal civil jury in product liability litigation. Part III discusses the process by which the jury negotiates a liability verdict and damages figure. Part IV discusses the principles of issue preclusion and analyzes the effect of collateral estoppel on adjudication of liability and damages. Part V presents a constitutional analysis of issue preclusion in product liability litigation. Part VI discusses policy implications of the theory presented in this article.

I. STANDARD OF LIABILITY

The law of product liability recognizes three categories of product defectiveness. A product may be defective due to a manufacturing defect, design defect, or because of inadequate instructions or warnings about risks inherent in the product.[11] The focus of this article is on the latter two categories, which involve judgments of the reasonableness of risks.

The so-called risk-utility test is emerging as the leading test for design defectiveness. This test considers whether the riskiness of a product could have been reduced without an unreasonable increase in cost and

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ened') scrutiny is the most rigorous form of judicial review . . . . The court has applied strict scrutiny to cases involving . . . laws that burden fundamental rights.").

10 *See* discussion *infra* Part III.

11 *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (Proposed Final Draft 1997). *See generally* RICHARD A. EPSTEIN, MODERN PRODUCTS LIABILITY LAW (1980) (setting forth a comprehensive reexamination of the law of products liability).

sacrifice of utility. Formally stated, a product is defective in design "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe."[12] The risk-utility test has been adopted as a standard, not only by the Restatement, but also by courts[13] and academic commentators.[14]

The most appropriate and logical interpretation of the risk-utility test is as a "micro-balance."[15] A micro-balance weighs the costs and benefits of only the proposed alternative design *feature*, not the entire product. If, for instance, the issue is whether an outboard motor should be equipped with a propeller guard, the appropriate micro risk-utility test would balance the costs and benefits resulting from adding such a guard, not the costs and benefits of outboard motors as a whole.[16]

The risk-utility test balances benefits and costs to society as a whole, including the manufacturer and all consumers foreseeably affected, not just the litigating parties.[17] Factors that should be balanced include effects of the alternative (safer) design on production costs, product longevity, maintenance, repair and aesthetics.[18]

As an illustration of the risk-utility test, consider the case of an automobile with a fuel tank configuration designed in such a way that a rear-end collision might cause it to explode. Suppose the estate of a driver killed in such an accident brings suit, claiming a defective design. The burden is then on the plaintiff to propose an alternative design that

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12 RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (Proposed Final Draft 1997).

13 *See* Banks v. ICI Americas, Inc., 450 S.E.2d 671, 674 (Ga. 1994) (advocating the risk-utility test); Sperry-New Holland v. Prestage, 617 So.2d 248, 254-56 (Miss. 1993) (same).

14 *See* James A. Henderson & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 882-87 (1998); David G. Owen, *Toward a Proper Test for Design Defectiveness: "Micro-Balancing" Costs and Benefits*, 75 TEX. L. REV. 1661, 1661-65 (1997).

15 *See* Owen, *supra* note 14, at 1676-86; *see also* W. KIP VISCUSI, FATAL TRADEOFFS: PUBLIC AND PRIVATE RESPONSIBILITIES FOR RISK 17 (1992) ("In the usual risk policy decision – for example, determining what safety characteristics to provide in automobiles – the policy result to be assessed is an incremental risk reduction rather than a shift involving the certainty of life or death.") [hereinafter FATAL TRADEOFFS].

16 Fitzpatrick v. Madonna, 623 A.2d 322 (Pa. Super. Ct. 1993) (person killed after coming into contact with outboard motor with unguarded propeller blades). This example is from Owen, *supra* note 14, at 1664. A micro-balance version of the risk-utility test can be formalized as follows: "A product is defective in design if it was not designed with reasonable safety, such that the safety benefits from altering the design, as proposed by the plaintiff, were foreseeably greater than the resulting costs, including any diminished usefulness or diminished safety." *Id.* at 1691.

17 *See* Owen, *supra* note 14, at 1680 n.61.

18 *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. f (Proposed Final Draft 1997).

would have eliminated the accident.[19] Plaintiff might, for instance, allege that defendant manufacturer could have made the design safer by installing a metal shield to protect the tank against the impact of a collision. Liability would depend on whether the net increase in safety (net number of lives saved by switching designs) outweighed the increase in cost and loss of utility. The manufacturer may defend its design decision by showing that the net increase in safety would be outweighed by the increase in cost and/or loss of utility of the alternative design. The shield might, for instance, make the car heavier and more expensive and introduce other safety problems.[20]

The standard for adequacy of warnings and instructions, like the standard for defective design, is formulated in terms of a reasonableness test. Formally, a product is defective due to inadequate instructions or warnings "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings . . . and the omission of the instructions or warnings renders the product not reasonably safe."[21]

The common law has developed and expanded these principles, yet the reasonableness principle has persisted. In *First National Bank in Albequerque v. Nor-Am Agricultural Products, Inc.*,[22] for instance, the court fleshed out the meaning of "adequate warnings" stating that: (i) "the warning must adequately indicate the scope of the danger"; (ii) "the warning must reasonably communicate the extent or seriousness of harm that could result from the danger"; and (iii) "the physical aspects of the warning - conspicuousness, prominence, relative size of print, etc., - must be adequate to alert the reasonably prudent person."[23]

Part II analyzes the liability decision of the civil jury as the arbiter of the reasonable person standard.

II. THE CONSTITUTIONAL CIVIL JURY

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.

Criminal defendants are guaranteed the right to a trial by an *impartial* jury under the Sixth Amendment to the United States Constitution,[24]

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19 *See, e.g.*, M. Grady, *Untaken Precautions*, J. LEGAL STUD. 139-56 (1989).

20 *See* Owen, *supra* note 14, at 1677-78.

21 RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (c) (Proposed Final Draft 1997). *See, e.g.*, Anderson v. Owens-Corning Fiberglas Corp., 810 P.2d 549, 557 (Cal. 1991) (en banc); Fibreboard Corp. v. Fenton, 845 P.2d 1168, 1175 (Colo. 1993) (en banc).

22 537 P.2d 682 (N.M. Ct. App. 1975).

23 *Id.* at 691-92 (citations omitted).

24 U.S. CONST. amend. VI.

and the Seventh Amendment extends this right to civil litigants.[25] The rules of jury selection and the judicial interpretation of the meaning of "impartiality," as interpreted by the judiciary, govern the composition of the civil jury.[26]

A. JURY SELECTION

Federal jury selection proceeds as follows.[27] First, the court compiles a "source list" of potential jurors from the judicial district where the action is brought.[28] The court then selects a "master file," consisting of a random selection of at least one half of one percent of the source list.[29] The court selects a smaller random sample from the master file and mails to each person so selected a questionnaire to determine whether they qualify for jury service or must be exempted.[30] The list of qualified jurors is known as the "jury wheel."[31] From this list the court selects, again at random, a list of prospective jurors to summon to the courthouse, the so-called "jury venire" or "jury panel."[32] The court may eliminate potential jurors from the venire for reasons such as personal hardship. The remaining potential jurors then go through the process of "voir dire," where the attorneys for both sides can eliminate potential jurors for cause or peremptorily.[33] During voir dire each side questions jurors to identify and challenge jurors they would like to strike. Jurors may be challenged either for cause (if, for instance, a juror is believed to be partial) or by exercising a peremptory challenge. The number of peremptory challenges available to each side is usually limited by statute.[34] The purpose of voir dire is to eliminate case-specific biases.[35] The individuals who survive voir dire constitute the so-called "petit jury," i.e., the jury that enters the jury box to hear the case.[36]

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25 *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 . . . .").

26 The Jury Selection and Service Act ("JSSA") codifies the constitutional right of defendants to a jury selected at random from a fair cross-section of the community where the court convenes. 28 U.S.C. § 1861 (1994).

27 This description draws on HIROSHI FUKURAI ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE 42-78 (1993).

28 *See id.* at 44-47.

29 *See id.* at 47-51.

30 *See id.*

31 *See id.* at 51-56.

32 *See id.* at 56-58.

33 *See id.* at 68-71.

34 The fair cross-section requirement applies to the selection procedure up to and including the venire, but does not govern voir dire. *See* Duren v. Missouri, 439 U.S. 357, 363-64 (1979) (*citing* Taylor v. Louisiana, 419 U.S. 522, 538 (1975).

35 *See* FUKURAI ET AL., *supra* note 26, at 68-71.

36 *See id.* at 71-78.

B. IMPARTIALITY

The only property of the jury explicitly articulated in the Constitution is that of impartiality, stipulated in the Sixth Amendment. It is not explicitly mentioned in the Seventh Amendment, but the Supreme Court has held that the impartiality requirement applies to civil as well as criminal juries.[37]

The Supreme Court has interpreted an impartial jury as one that is (i) drawn from a representative cross-section of the community,[38] and (ii) unbiased.[39] This dual interpretation may seem inherently contradictory. If, for instance, most people in a society have a low risk tolerance, the cross-sectional requirement would mandate that they be proportionally represented on the jury. The inclusion of a majority of individuals with a low risk-tolerance may, however, be seen as creating a pro-plaintiff bias in a product liability action, apparently negating the impartiality requirement. The analysis presented in this section shows that the courts have resolved this potential conflict by refining the legal definition of "bias."

C. CROSS-SECTION REQUIREMENT

Product liability adjudication is based on a hybrid mixture of objective, case-specific facts, such as medical expenditures and proven economic damages, as well as subjective values, such as the value of a marginal increase in safety or the reasonableness of a risk. A core value of the constitutional guarantee of a trial by jury is that questions of fact should be adjudicated in accordance with the norms and values of the community where the court convenes.[40] The Supreme Court has formal-

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[37] Thiel v. Southern 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* McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 554 (1984); Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980); Withrow v. Larkin, 421 U.S. 35, 46 (1975).

[38] Taylor v. Louisiana, 419 U.S. 522 (1975); Peters v. Kiff, 407 U.S. 493 (1972).

[39] Dennis v. U.S., 339 U.S. 162 (1950); Frasier v. U.S., 335 U.S. 497 (1948).

[40] *See* Taylor v. Louisiana, 419 U.S. 522, 530 (1975) ("We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment . . . ."); *Thiel*, 328 U.S. at 220 (Inherent in the American tradition of trial by jury is "an impartial jury drawn from a cross-section of the community."); Ballard v. United States, 329 U.S. 187, 191 (1946); Glasser v. United States, 315 U.S. 60, 85-86 (1942); Smith v. Texas, 311 U.S. 128, 130 (1940) ("It is part of the established tradition . . . of public justice that the jury be a body truly representative of the community."); s*ee also* Duncan v. Louisiana, 391 U.S. 145 (1968). The jury is supposed to provide the common sense judgment of the community. The *Duncan* Court's reasoning suggests that when a jury's decision differs from that of the judge, it is usually because they are serving this very purpose. *See id.* at 156-57. *See, e.g.*, Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1140, 1187 (1991) (stating that juries do not make the law, but adapt it to the values of their community); James J. Gobert, *In Search of the Impartial Jury*, 79 J. CRIM. L. & CRIMINOLOGY 269, 279-80 (1988) ("[A] person's political, moral, social, and economic views . . . are viewed as indispensable qualities

ized this requirement by interpreting an impartial jury as one drawn from a representative cross-section of the community.[41]

The cross-section requirement is a theoretical ideal that an individual twelve member jury cannot achieve. Hence, the Supreme Court recognized that the Constitution does not guarantee a petit jury[42] or even a jury panel[43] that perfectly mirrors a community which theoretically permits infinitely many groups and classifications.[44] The Supreme court, as a practical matter, limited cross-section protection to so-called "cognizable groups,"[45] specifying the (petit) jury be selected from a venire from which no so-called "cognizable group" has been systematically excluded.[46]

Courts 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.[47] The courts generally agree, for instance, that women and African Americans constitute distinctive groups. Further, when jury officials intentionally discriminate against a group, that group effectively becomes a cognizable group.[48]

D. ABSENCE OF BIAS

An impartial jury must not only be diverse, but also unbiased. The Supreme Court has defined an unbiased jury as one where each juror is, a

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of the ideal juror" and jurors should be allowed to make value (as opposed to factual) judgments without restriction).

41 *See Taylor*, 419 U.S. at 528; Williams v. Florida, 399 U.S. 78, 100 (1970); Brown v. Allen, 344 U.S. 443, 474 (1953).

42 The "petit jury" is the actual jury for the civil trial. *See* BLACK'S LAW DICTIONARY (6th ed. 1990).

43 The Jury panel is the group of prospective jurors from which the petit jury is chosen. *See* BLACK'S LAW DICTIONARY (6th ed. 1990).

44 *See, e.g.*, Holland v. Illinois, 493 U.S. 474, 480 (1990); *Taylor*, 419 U.S. at 538.

45 U.S. v. Biaggi, 673 F. Supp. 96, 100 (E.D.N.Y. 1987) ("Because discrimination in the venire under the Sixth Amendment may be statistical, the definition of a single 'cognizable' group must be narrowly drawn lest any group imaginable by defense counsel be found numerically underrepresented."); *see also* Barber v. Ponte, 772 F.2d 982, 999 (1st Cir. 1995) (en banc), *cert. denied*, 475 U.S. 1050 (1986).

46 *See* Lockhart v. McCree, 476 U.S. 162 (1986); Duren v. Missouri, 439 U.S. 357, 364 (1979); Taylor v. Louisiana, 419 U.S. 522, 528-30 (1975) (impartiality requires the jury venire to be drawn from a representative cross-section of the community); Williams v. Florida, 399 U.S. 78, 100 (1970) (stating that the cross-section requirement guarantees "a fair possibility for obtaining a representative cross-section of the community").

47 *See, e.g.*,. U.S. v. Guzman, 337 F. Supp. 140, 143-44 (S.D.N.Y. 1972), *aff'd*, 468 F.2d 1245 (2d Cir. 1972), *cert. denied*, 410 U.S. 937 (1973).

48 *See* Barber v. Ponte, 772 F.2d 982, 1000 (1st Cir. 1985), *cert. denied*, 475 U.S. 1050 (1986).

priori, indifferent to the outcome of the case[49] and "conscientiously appl[ies] the law and find[s] the facts."[50]

The Supreme Court's constitutional interpretation of impartiality identifies two types of bias, namely specific and general bias. Specific bias is particular to the case at hand, such as that exhibited by a juror with a preconceived opinion of the outcome of the case, perhaps due to exposure to pre-trial publicity.[51] Procedural mechanisms to eliminate this kind of bias include the peremptory and for cause challenges, voir dire, sequestration of the jury, and change of venue.[52] The purpose of the challenges is to remove jurors who have a specific bias, but no other biases.[53]

General biases are community values, such as risk attitudes and the valuation of life and health. Jurors with a mix of general biases will be impartial if the mix reflects the distribution of general biases of the community.[54] Hence, this type of bias does not violate the Seventh Amendment, but is essential to satisfy the fair cross-section requirement. A juror with a low risk tolerance may be said to have a *general* bias in favor of a product liability plaintiff. Such a juror is nevertheless unbi-

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49 *See* Morgan v. Illinois, 504 U.S. 716 (1992); *see also* Smith v. Phillips, 455 U.S. 209, 225 n.1 (1982); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 551 (1976); Ristaino v. Ross 424 U.S. 589, 596 (1976); Ross v. Massachusetts, 414 U.S. 1080, 1081 (1973) (Marshall, J., dissenting)); Irvin v. Dowd, 366 U.S. 717, 722 (1961) (finding juror with preconceived opinion on outcome of trial cannot be impartial); United States v. Wood, 299 U.S. 123, 145-6 (1936); Reynolds v. United States, 98 U.S. 145, 154 (1878); COKE ON LITTLETON 155b (19th ed. 1832) (An impartial juror is one who is "indifferent as he stands unsworn," (*quoted in Irvin*, 366 U.S. at 722)).

50 Lockhart v. McCree, 476 U.S. 162, 179 (1986) (*quoting* Wainwright v. Witt, 469 U.S. 412, 423 (1985); *see also* Logan v. United States, 144 U.S. 263, 298 (1892) ("A juror who has conscientious scruples on any subject, which prevent him from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence, is not an impartial juror."); U.S. v. Burr, 25 F. Cas. 49, 50 (C.C.D. Va. 1807) (No. 14,692G) (An impartial jury is one that will "fairly hear the testimony which may be offered to them, and bring in their verdict according to that testimony, and according to the law arising on it."). Justice Marshall describes the required mental state for impartiality: "The jury should enter upon the trial with minds open to those impressions which the testimony and the law of the case ought to make, not with those preconceived opinions which will resist those impressions." *Id.*

51 *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333 (1966) (finding pre-trial publicity denied petitioner a fair trial); People v. Wheeler, 583 P.2d 748, 761 (Cal. 1978) (A specific bias is one "relating to the particular case on trial or the parties or witnesses thereto . . . .").

52 *See* Darryl K. Brown, *The Role of Race in Jury Impartiality and Venue Transfers*, 53 MD. L. REV. 107, 121 (1994).

53 *See, e.g.*, 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).

54 *See* People v. Wheeler, 583 P.2d 748, 761 (Cal. 1978) (The purpose of the cross-section doctrine is to "achieve an overall impartiality by allowing the interaction of the diverse beliefs and values the jurors bring from their group experiences.").

ased in the Constitutional sense if she is *ex ante* indifferent to the outcome of the case, and applies the law and finds the facts based on evidence presented at trial.

In summary, the constitutionally ideal impartial civil jury represents the distribution of values (general biases) of a cross-section of the community, including a diversity of risk attitudes, but is free of specific biases. This standard has been characterized as a "diffused impartiality."[55]

III. LIABILITY AND DAMAGES: THE MIRACLE OF 'VICARIOUS SETTLEMENT'

A jury with a representative diversity of risk attitudes, wealth, age and educational groups, may disagree on the reasonableness of a risk, instruction or warning. As a result, the jury may split on the issue of liability. Part III of this article analyzes the mechanism by which a non-unanimous jury reconciles its disagreement in order to reach a verdict.

A. CONSTITUTIONAL JURY AND LIABILITY

Liability depends on a judgment of the reasonableness of a risk, which in turn depends on the risk attitudes of the person making the judgment. Risk attitudes vary significantly across individuals due to individual differences in factors such as risk tolerance, wealth, and age.[56] Some individuals select riskier professions, choose to smoke, and do not use automobile seatbelts. These relatively risk tolerant individuals can be expected to value life and health less than risk averse individuals.[57] This is confirmed by empirical studies that are relevant to our interest in the effect of risk attitudes on liability assessment.[58] Empirical studies based on labor market data, for instance, measure the wage premium workers require to enter a risky profession.[59] The compensation premium per incremental statistical death, defined as the worker's value of life, reflects the worker's valuation of an incremental increase in probability of death or injury. This valuation is analogous to the valuation a civil juror makes in a product liability decision.[60]

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55 Commonwealth v. Soares, 387 N.E.2d 499 (Mass. 1979), *cert. denied*, 444 U.S. 881 (1979). Diversity of opinion among jurors is the court's idea of "diffused impartiality." *Id.* at 515; *see also* Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

56 *See* VISCUSI, FATAL TRADEOFFS, *supra* note 15, at 34-41. "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." *Id.* at 7.

57 *See id.* at 8.

58 *See id.* at 51-74.

59 *See id.* at 34-49.

60 *See id.* at 8. Liability for product defectiveness depends on whether the risks of a product could have been reduced without an unreasonable increase in cost and sacrifice of utility. This requires an implicit valuation of a statistical life or injury. *See id.* at 10.

Empirical evidence indicates that individuals in riskier professions, individuals who smoke and individuals who do not wear automobile seatbelts tend to place a lower dollar value on life and health in comparison to those in safer professions, non-smokers and seatbelt users.[61] Valuation of life and health also appears to increase with income and decrease with age.[62] Young people may demand a greater safety level as they have a greater expected span of life. Therefore, products that expose children to risk will be held to a higher standard than products used by the general public.[63]

Evaluation of the adequacy of a warning or instruction involves a value judgment that, as in the case of a design decision, depends on factors such as the risk tolerance, wealth, age, and education of the decisionmaker. Better educated people may demand and are able to efficiently process more detailed warnings and instructions. Less-educated people may prefer simple instructions and warnings. Products that are likely to be used by or near children may be required to display warnings that are particularly obvious and clear. Some situations require a great deal of detail and full disclosure, while in others too much detail may distract from the essence of the instructions or warnings, rendering them ineffective.

There is also an implicit risk-utility tradeoff, between the utility of a particular level of warning and direct and indirect costs. Direct costs include the cost of a warning label, while indirect costs include information overload – "too much" warning and instruction – and other sources of utility loss resulting from excessive warning and instruction.[64]

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61 *See id.* at 47, tbl. 3-6. Viscusi reports empirical evidence on the heterogeneity in value of life over risk level of occupations. For instance, workers in the lowest quartile of risk level implicitly value a statistical life at between $5 and 8 million (depending on the estimation method, compared to a valuation of between $ 2.8 and 3 million for the highest risk quartile). *See id.*; *see also* Joni Hersch & W. Kip Viscusi, *Cigarette Smoking, Seatbelt Use, and Differences in Wage-Risk Tradeoffs*, 25 J. HUM. RESOURCES 202 (1990). Hersch and Viscusi report a lower risk-dollar tradeoff (lower valuation of life and health) among smokers and non-seatbelt users. In their study, workers receive an average premium of $56,500 per statistical injury (1990 dollars), while the group of workers who are nonsmokers and seatbelt users require a premium of $95,220 per statistical injury. The group including only smokers require a premium of only $30,781. *See id.* at 202-227.

62 Luxury cars such as Mercedes Benz and Acura offer air bags and antilock braking systems, while lower-priced vehicles generally avoid these features. *See* VISCUSI, FATAL TRADEOFFS, *supra* note 15, at 28-29. "Because of the positive income elasticity of the demand for good health, the more affluent workers will have safer jobs." *Id.* at 55; *see also* W. Kip Viscusi, & William N. Evans, *Utility Functions that Depend on Health Status: Estimates and Economic Implications*, 80 AM. ECON. REV. 353-372 (1990) (reporting, for instance, that risk valuations have an income elasticity of approximately 1.0).

63 *See* VISCUSI, FATAL TRADEOFFS, *supra* note 15, at 30 (*citing* Richard J. Zeckhauser & Donald Shepard, *Where Now for Saving Lives?*, 40 LAW & CONTEMP. PROBS., Autumn 1976, at 5).

64 *See* DAVID G. OWEN ET AL., PRODUCTS LIABILITY AND SAFETY 329-30 (3d ed. 1996).

A constitutionally ideal jury represents a cross-section of the community where the action is brought, including a cross-section of risk attitudes, age groups and wealth and educational levels. Such a jury can therefore be expected to be non-unanimous on the issue of liability, especially where the evidence is ambiguous. Empirical research on jury decisionmaking and information from reported case decisions show that an initially non-unanimous jury often reaches consensus on liability through a mechanism known as "vicarious settlement."

B. VICARIOUS SETTLEMENT

It is the task of the jury to hear and weigh the evidence and decide the liability of the plaintiff by a preponderance of the evidence. If it finds the defendant liable, regardless of the margin of her fault, a plaintiff receives compensation for all proven damages. Conversely, if defendant is found not liable, no damages are awarded. The damage award should not vary with the degree of fault of the defendant.[65] A non-unanimous jury would therefore consist of jurors who want to hold defendant liable and award the full amount of proven damages, and those who want to acquit and award zero damages. The two groups face considerable pressure to either negotiate a compromise or otherwise face an unacceptable alternative, namely a hung jury.[66] Empirical research and reported case decisions suggest that they often reach agreement by effectively disregarding the legal principle that the damage award may not be improperly compromised.[67] The result is a negotiated compromise, namely an agreement to reduce the damages award in exchange for an agreement to impose liability. This negotiated compromise, aptly termed "vicarious settlement," reflects the aggregate judgment of the jury, instead of exclu-

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65 *See* 8 AM. JUR. *Pleading & Practice Forms* § 179 (1996) ("In arriving at your verdict you must not make a compromise between the question of liability and the amount of damages, if any."); *see also* Simmons v. Fish, 97 N.E. 102 (Mass. 1912) (ordering a new trial because verdict was held to be based on improper compromise between liability and damages); CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES (1935). In deliberations on the damages award, jurors should not compromise on "vital points" such as liability. Individual concessions on the damages award are acceptable and recognized in the common law, as long as it is not the result of abandonment by one juror subgroup of their conviction on liability in exchange for concessions on damages by another group. *Id.* at 62, 64. Degree of culpability does, of course, play a role in punitive damages and in cases where comparative and contributory negligence play a role, which we do not consider here. *See, e.g., Simmons*, 97 N.E. at 106.

66 *See* Harry Kalven, Jr., *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158, 177 (1958) ("This is the result of many pressures including a great reluctance to fail to do their job and have the jury hung.").

67 *See, e.g.*, MCMORMICK *supra* note 65, at 64-65 (In deliberations on the damages award, jurors should not compromise on "vital issues" such as liability. Individual concessions on the damages award are acceptable and recognized in the common law, as long as it is not the result of abandonment by one juror subgroup of their conviction on liability in exchange for concessions on damages by another group.).

sively one subgroup.[68] We now turn to a formal quantitative analysis of the process of vicarious settlement.

The non-unanimous jury is under pressure to negotiate a compromise or face the unacceptable alternative of a hung jury. As a practical matter, the negotiated compromise is the usual outcome: The jury reaches an agreement that reduces the damages award in exchange for agreement regarding liability. This negotiated compromise, aptly termed "vicarious settlement," reflects the aggregate judgment of the jury, rather than the exclusive judgment of one faction or the other.[69]

The following model illustrates the process of vicarious settlement. Evidence of liability is assumed to be separate from damages testimony, as is true in many tort cases.[70] Liability may, for instance, depend on technical aspects of a design decision, while damages may depend on the dollar value of lost earnings and medical expenses.

Each juror forms an estimate of the plaintiff's loss, based on damages testimony, and makes a decision on the defendant's liability, based on evidence relevant to liability. We denote the *i-th* juror's estimate of plaintiff's loss by D_i, and the outcome of the juror's liability decision by L_i. A value of $L_i = 0$ denotes a finding of no liability, and $L_i = 1$ a finding of liability. Since evidence on liability and damages are separate and D_i depends only on the latter, D_i is the same amount, whether the *i-th* juror hears evidence on liability or not. If a juror decides to hold defendant not liable, she will want to award zero damages, regardless of the value of D_i. The damages verdict with which each juror comes to the

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[68] *See* Kalven *supra* note 66, at 177-78 ("[T]he function of the jury in the end may be not to adjudicate the case, but . . . to settle it vicariously. . . . The damage verdict therefore is especially likely to reflect the composite view of the jury as a group and not to be the product of the single strong juror or the strong faction.").

In jurisdictions that require only a majority jury verdict, compromises such as these are likely only in close cases where equal numbers of jurors favor liability and acquittal. *See* E. Greene, *On Juries and Damage Awards: The Process of Decisionmaking*, 52 LAW AND CONTEMP. PROBS. 225, 240 (1989).

[69] *See* Edith Greene, *On Juries and Damage Awards: The Process of Decisionmaking*, 52 LAW & CONTEMP. PROBS., Autumn 1989, at 225. In jurisdictions that require only a majority jury verdict, compromises such these are likely only in close cases where equal numbers of jurors favor liability and acquittal. *Id.* at 240; *see also* Kalven *supra* note 66, at 177-78 ("[T]he function of the jury in the end may be not to adjudicate the case, but . . . to settle it vicariously . . . . The damage verdict therefore is especially likely to reflect the composite view of the jury as a group and not to be the product of the single strong juror or the strong faction.").

[70] *See* Roger H. Transgrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 829 n.279 (1985) (*citing* Hosie v. Chicago & N.W.R.R., 282 F.2d 639 (7th Cir. 1960)). *Hosie* provides an exception where the nature of a plaintiff's injuries had a bearing on liability. Liability depended on the cause of a flame that triggered an explosion. Damages testimony, which included evidence such as the location and nature of burns on plaintiff's body, was found relevant to a determination of the origin of the flame. *See id.* at 642-43.

table can therefore be written as $L_i \bullet D$, which equals zero or D_i, depending on the juror's liability finding.

The adjudication of a case may proceed according to one of two scenarios, depending on whether or not liability is precluded. In the first, the issue of liability is precluded and evidence of liability is therefore excluded as irrelevant. The jurors are instructed to assume that defendant is liable, and to render a damage verdict based on relevant testimony. Hence $L_i = 1$ for all jurors, and each comes to the table with a non-zero damages figure in mind, namely D_i, $i = 1, 2, \ldots, 12$. The jury negotiates and renders a damages verdict, denoted D.

In the second scenario, jurors hear evidence of both liability and damages. If the evidence is not entirely convincing to all jurors, they may disagree on liability. Now, for some jurors, $L_i = 0$, and their $L_i \bullet D$ figure becomes zero, while the remainder of the jurors come to the table with the same damages figure in mind as in the first scenario, namely D_i. It is reasonable to assume that the damages verdict the two factions negotiate in this scenario will be lower than in scenario one. In scenario one, all jurors come to the negotiating table with a non-zero damages figure, $D_i > 0$. In scenario two, this figure is the same for some jurors, but zero for those who hold $L_i = 0$.[71] We denote the reduced damages verdict by $\alpha \bullet D$, $\alpha < 1$.

Research on jury decisionmaking indeed suggests that jurors reconcile their conflicting opinions on liability by negotiating a compromise damages verdict. Jurors who want to hold the defendant liable ($L_i = 1$) accommodate those who do not ($L_i = 0$) by agreeing on a reduced damages verdict in exchange for a liability verdict. The reduced damages verdict can be written as $\alpha \bullet D$, $\alpha < 1$.

As a simple illustrative example of the effect of liability preclusion, consider a case where the plaintiff's loss is an uncontroversial and proven amount, equal to D. The jury is evenly split on liability, i.e., six members of a twelve person jury want to award zero damages, while six want to award the full amount of D. Suppose that, as is often the case empirically,[72] the jury compromises by averaging their individual awards to reach a damages verdict. The resulting damage award will be equal to

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[71] Suppose the jury's damages verdict could be written as a weighted average of the damages estimates of the individual jurors, with the weights denoted by a_i: $D = 3\ \alpha_i L_i \bullet D_i$. In scenario one, each $L_i = 1$, $D_i > 0$, and Damages = D. In scenario two, $L_i = 0$ for some i, and hence the summation will be less than D, written as $a \bullet D$, $a < 1$.

For a mathematical derivation of the jury's damage award as a weighted average of individual jurors' damage estimates, see M. de Villiers, *A Legal and Policy Analysis of Bifurcated Litigation*, 2000 COLUM. BUS. L. REV. 1 (2000).

[72] *See* JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 114 (1949) ("Again and again, it has been disclosed that . . . [e]ach juror . . . writes down the amount he wants to award, the total is added and the average is taken as the verdict."); *see also* JOHN GUINTHER, THE JURY IN AMERICA 97 (1988) (citing an empirical study reporting that in

0.5•D, i.e., $\alpha = 0.5$. If the jury were unanimous on liability, or if liability were precluded, there would be no compromise and the damage award would equal the full amount, *D*.

The discount factor, α reflects the jury's aggregate assessment of the strength of the evidence against the defendant. Since the jury represents a cross-section of their community, α also represents societal norms and values of risk and safety, such as risk-dollar tradeoff and valuation of life and health. Although the law does not recognize degrees of liability for product defectiveness, the constitutionally impartial jury effectively creates such a continuum to reconcile conflicting values in the community it represents.[73]

Empirical studies support the theory of vicarious settlement. Based on post-trial jury interviews, Guinther postulates that jury deliberations may proceed according to three possible scenarios.[74] In the first scenario, all jurors agree on the defendant's liability and proceed to negotiate a damage award based on the evidence presented at trial. They may disagree on the size of the damages award, but each juror goes into the deliberations with a (non-zero) figure in mind. In the second scenario, a majority of the jurors want to hold the defendant liable, while a minority want to acquit. In the third scenario, there is also disagreement on liability, but here a minority favors holding the defendant liable, while a majority wants to acquit. In the second and third scenarios, the damages award becomes the bargaining mechanism through which the disagreeing groups settle their differences. In both cases they may settle on a verdict for the plaintiff, but with a reduced damage award to placate the group that favored the defendant. The result is a discounted damage award, relative to the "full" award of the first scenario.[75]

40% of cases where jurors greatly disagreed on the damages award, they simply averaged individual suggestions to reach an agreement).

[73] *See* Kalven, *supra* note 66:

> If we imagine for a moment a series of cases in which the facts as to damages remain identical but the facts as to liability range over the full and rich possibilities of negligence, the legal view is that the award should be constant throughout the series. The jury's view is that these may be significantly different cases.

Id. at 165-66; *see also* Stephen R. Mysliwiec, Note, *Toward Principles of Jury Equity*, 83 YALE L.J. 1023, 1045 (1974) (stating that social psychological research indicates that a jury, if given the discretion, will return a harsher verdict against a defendant the more significant the evidence of wrongdoing).

[74] GUINTHER, *supra* note 72, at 96.

[75] *See id.* at 86. Guinther reports that in a majority of cases in his study where the verdict was for the plaintiff and where a unanimous verdict was required, there is evidence of a compromise on the damages award between the jury faction who favored liability and the faction who did not. In jurisdictions that did not require a unanimous verdict (e.g. jurisdictions that required that five out of six jurors must agree), such compromises occurred less frequently (in about one third of such cases). *See id.*

Professor Dale Broeder reports evidence from experimental juries showing that the damage award tends to vary proportionally to juror perceptions of liability, i.e., damage awards depend on the strength of the evidence against the defendant.[76] In Broeder's experiments, juries were presented with two different versions of the same case. In one version the defendant's liability was clear, while in the other it was doubtful. The average damages award for the case where liability was clear was $41,000. For the doubtful case the average award was $34,000. Broeder suggests that these results are consistent with long-held suspicion among trial lawyers that the weaker the proof of liability, the lower the damage award is likely to be.[77]

Professors Phares and Wilson[78] report similar results from a study where a simulated jury was presented with summaries of actual civil cases. Severity of outcomes, as well as strength of evidence of liability against the defendant varied. Within each category of severity of outcome, the damage award varied proportionally to the strength of evidence of liability. Landsman et al., similarly, found that compensatory damage awards varied according to strength of evidence of liability in unitary trials, but not in bifurcated trials.[79]

The observed link between strength of evidence and the size of the damage award is consistent with the theory of vicarious settlement. As the evidentiary strength of liability increases, the number of jurors who are swayed to impose liability on the defendant will also increase. As the number of jurors for whom $L_i = 1$ increases, the expression for the group damage award $3a_iL_i \bullet D_i$, increases, resulting in a higher compromise damage award. Hence, a positive correlation between evidentiary strength and the size of damage award, as observed by Broeder and Phares and Wilson.

These observations are formalized in a set of principles of jury equity compiled by Stephen R. Mysliwiec,[80] based on social psychological research. One principle states, for instance, that "[t]he greater the ambi-

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76 Dale W. Broeder, *The University of Chicago Jury Project*, 38 NEB L. REV. 744, 753-54 (1959).

77 *See id.; see also* Kalven *supra* note 66, at 165-66 ("It we imagine for a moment a series of cases in which the facts as to damages remain identical but the facts as to liability range over the full and rich possibilities of negligence the legal view is that the award should be constant throughout the series. The jury's view is that these may be significantly different cases."); Greene *supra* note 69, at 233 n.51.

78 Phares & Wilson *Responsibility Attribution: Role of Outcome Severity, Situational Ambiguity, and Internal-External Control,* 40 J. PERS. 392 (1972).

79 Stephan Landsman et al., *Be Careful What You Wish For: The Paradoxical Effect of Bifurcating Claims for Punitive Damages*, 1977 WIS. L. REV. 297 (1998).

80 *See* Mysliwiec *supra* note 73.

guity surrounding the defendant's civil liability or criminal guilt, the milder the damages or punishment will be."[81]

There is evidence of compromise damage awards in reported case decisions, and some courts have explicitly acknowledged the necessity of compromise in order to reach a verdict. The decision in Bickler v. Eli Lilly,[82] for instance, a product liability action involving the drug diethylstilbestrol (DES), was apparently based on a compromise verdict.[83] One of the jurors interviewed allegedly admitted that she did not want to hold defendant liable but agreed to a verdict of liability on condition that the damages award be reduced.[84]

In the United States' legal system, the jury generally has the right to determine liability and damages without having to reveal or explain the process by which it reached its decision. This effectively gives the jury the power to resolve a case equitably where strict application of the law would reach a result contrary to its notion of fairness. Supreme Court decisions have acknowledged that deviance from a general legal rule often reflects the demands of equity, rather than jury bias or incompetence.[85]

In summary, a negotiated compromise damage verdict is the direct result of the constitutional requirement that a verdict on an issue of fact

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[81] *Id.* at 1045.

[82] No. 15600/74 (N.Y. Sup. Ct., Bronx Co., July 1979, *discussed in* Katz v. Eli Lilly & Co., 84 F.R.D. 378, 379 (E.D.N.Y. 1979).

[83] *See* Katz v. Eli Lilly & Co., 84 F.R.D. 378, 379 (E.D.N.Y. 1979) (*discussing* Bichler v. Eli Lilly & Co., 436 N.E.2d 182 (N.Y. App. Div. 1982), and the commentary from that case regarding a compromise verdict).

[84] *See Katz*, 84 F.R.D. at 380; *see also* Taylor v. Hawkinson, 306 P.2d 797, 799 (Cal. 1957) (acknowledging the effectiveness of a compromise verdict in achieving finality in an action and citing generally Partridge v. Shepard, 71 Cal. 470, 475 (1886)); Moore v. Schneider, 196 Cal. 380, 389 (1925); Fitzgerald v. Terminal Dev. Co., 53 P.2d 177 (Cal. Dist. Ct. App. 1936)).

[85] *See* Williams v. Florida, 399 U.S. 78, 100 (1970) ("[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common-sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence."); Duncan v. Louisiana, 391 U.S. 145, 156-58 (1968); *see also* United States v. Dougherty, 473 F.2d 1113, 1138 (D.C. Cir. 1972) (confirming that the judicial role is limited to declaring the applicable law).

The courts acknowledge that the very purpose of the civil jury is to adjudicate matters on which reasonable people may disagree. If facts are so clear that only one conclusion is possible, there would be no need for a jury and the issue could be resolved by a judge. *See* Application of Eynde, 480 F.2d 1364, 1370 (C.C.P.A. 1973) ("[F]acts constituting the state of the art [in a patent case] are normally subject to the possibility of rational disagreement among reasonable men and are not amenable to the taking of such [judicial or administrative] notice."); Barr v. Curry, 71 S.E.2d 313, 317 (W. Va. 1952) (concluding that when evidence of negligence is such that reasonable people may draw different conclusions from it, the issue should be decided by a jury; when the facts point unambiguously to one conclusion, it becomes a question of law for the court).

reflect (i) the values of a cross-section of the community, and (ii) an unbiased decision, based on all relevant evidence presented at trial.

When a product has been determined to be defective, the issue may be precluded in a subsequent action through a procedural doctrine known as collateral estoppel. When estoppel has been successfully invoked, liability is not relitigated and evidence of liability may be excluded if it is independent of and separate from evidence of damages. There will consequently be no room for juror disagreement on liability. In the notation of the model of vicarious settlement, the jury will render a damage award equal to D, instead of the (possibly smaller) amount, $\alpha \bullet D$, that they would render based on all evidence.

Part IV reviews the principles of issue preclusion, and Part V analyzes the constitutionality of this distortion of the damages award through offensive application of collateral estoppel.

IV. ISSUE PRECLUSION

Liability and damages are the principal issues in a product liability suit. Liability depends on a finding of defectiveness and causation.[86] Once a product has been found defective, a party in a subsequent action involving the same product and defect may want to rely on this judgment without having to relitigate the issue. A plaintiff usually has a strong incentive to obtain summary judgment on a previously litigated issue, such as design defectiveness. Proving defectiveness is often expensive and time-consuming.[87] Well-developed judicial rules exist that allow issue preclusion.

A family of doctrines, known as res judicata, governs the binding effect of a judgment on subsequent proceedings. Three distinct members of the family are merger, bar and collateral estoppel. The doctrine of merger prevents relitigation of a claim decided in favor of a plaintiff in a prior action, by "merging" the original cause of action with the judgment.[88] The doctrine of bar prevents an unsuccessful plaintiff from relit-

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[86] In this article we assume that causation is incontrovertible, so that defectiveness and liability are synonymous.

[87] *See* Erlenbach, *supra* note 3.

[88] RESTATEMENT (SECOND) OF JUDGMENTS § 18 cmt. a (1982):

> When the plaintiff recovers a valid and final personal judgment, his original claim is extinguished and rights upon the judgment are substituted for it. The plaintiff's original claim is said to be "merged" in the judgment. It is immaterial whether the defendant had a defense to the original action if he did not rely on it, or if he did rely on it and judgment was nevertheless given against him. It is immaterial whether the judgment was rendered upon a verdict or upon a motion to dismiss or other objection to the pleadings or upon consent, confession, or default.

Id.

igating the same cause of action a second time.[89] Suppose, for example, a plaintiff sues unsuccessfully to recover for an injury to his arm in an accident. The adverse judgment *bars* this plaintiff from suing again on the same cause of action. He cannot, for instance, sue again to recover for head injuries allegedly sustained in the same accident. Now suppose the plaintiff prevailed in the first suit and recovered damages. The original judgment will nevertheless preclude any further suits. The successful plaintiff cannot, for instance, sue to recover for a different injury sustained in the same accident, because the second claim is considered *merged* into the first.[90] Merger and bar prevent relitigation of *claims*. The doctrine of collateral estoppel prevents the relitigation of an *issue* or *fact* that has been finally adjudicated on the merits by a court of competent jurisdiction. Collateral estoppel is therefore also known as "issue preclusion."[91]

Collateral estoppel, or issue preclusion, prevents the relitigation of an issue in a subsequent and different cause of action provided that (i) the issue was determined on its merits in a prior final adjudication before a court of competent jurisdiction, (ii) the parties against whom estoppel is applied had a full and fair opportunity to litigate the issue in the prior action, (iii) the identical issue was actually litigated and decided in the former action, and (iv) decision of the identical issue was necessary for the determination of that action.[92] 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.[93] To discourage a wait-and-see attitude among potential plaintiffs, courts are reluctant to apply offensive collateral estoppel in cases where plaintiff could easily have joined in the first action, or where such application would be unfair to a defendant.[94]

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89 *See id.* at § 19 ("[A] valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim.").

90 *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 607 (1985).

91 *See, e.g.*, Eason v. Weaver, 557 F.2d 1202, 1204-05 (5th Cir. 1977); Zdanok v. Glidden Co., 327 F.2d 944, 954-55 (2d Cir. 1964); Sherman v. Jacobson, 247 F. Supp. 261, 268-69 (S.D.N.Y. 1965); Washington v. United States, 366 A.2d 457, 460 (D.C. 1976).

92 *See e.g.*, FRIEDENTHAL ET AL. *supra* note 90, at § 14.11 (1985).

93 For a discussion of the identity of issue requirement in product liability, see Erlenbach, *supra* note 3, at 26-29.

94 *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330-31. "Unfair" application of offensive collateral estoppel includes situations where: (i) the defendant had no incentive to expend substantial resources in litigating the first action, either because he could not reasonably foresee the extent of future litigation on the same issue or because of the small stakes involved in the original action; (ii) prior actions on the same issue were decided inconsistently, especially if most were decided in favor of defendant; and (iii) a different result could reason-

Skrzat v. Ford Motor Co.[95] presents an example of the application of offensive collateral estoppel to preclude relitigation of design defectiveness. In an accident involving a Ford Maverick, a gas tank exploded, killing one passenger (Turcotte) and burning the other (Skrzat). In a suit on behalf of Turcotte's estate, it was determined that the gas tank was defectively designed and the manufacturer was held liable for Turcotte's death. Skrzat then sued independently and was granted summary judgment on the liability issue based on the Turcotte judgment.[96]

Collateral estoppel may also be used defensively. A party who won on an issue in an action may use collateral estoppel defensively in a second suit to preclude relitigation of the same issue by the same plaintiff.[97]

Due process concerns require that only a party to an action or their privies can later be bound by the judgment in the action.[98] 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 the 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. Collateral estoppel may be used offensively, however, by a non-privy plaintiff in a subsequent suit. If, in the automobile example, the decision had gone against the defendant, a subsequent non-privy plaintiff could have used collateral estoppel offensively to estop defendant from denying defectiveness.

Traditionally, courts adhered to the mutuality requirement in applying the rules of collateral estoppel. Mutuality of estoppel limits the use of issue preclusion to parties who were bound by the original judgment. Under mutuality a plaintiff cannot apply collateral estoppel offensively unless it could have been used defensively against her, had the original case been decided in favor of the defendant. While this doctrine was in force, it meant that only the original plaintiff or her privy could rely on a

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ably be expected in the second suit, e.g., due to procedural differences. *See id.*; *see also* Erlenbach, *supra* note 3, at 30-31.

95 389 F. Supp. 753 (D.R.I. 1975), *cited in* Erlenbach, *supra* note 3, at 36 n.102.

96 *See id.* For a case where offensive collateral estoppel was applied to defectiveness because of inadequate warnings, see *Ezagui v. Dow Chemical Corp.*, 598 F.2d 727 (2d Cir. 1979).

97 *Parklane*, 439 U.S. at 326 n.4; Blonder-Tongue Lab, Inc. v. Univ. of Ill. Found., 402 U.S. 313 (1971); *see also* FRIEDENTHAL *supra* note 90, at § 14.9; Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589, 614-17 (1991).

98 *See* Blonder-Tongue Labs., Inc. v. University of Illinois Found., 402 U.S. 313, 320-21 (1971) (*citing* Triplett v. Lowell, 297 U.S. 638, 644 (1936)).

prior judgment to preclude litigation of an issue.[99] The mutuality requirement was overruled by the Supreme Court in *Parklane Hosiery Co. v. Shore*.[100] Courts eventually abolished mutuality in most states,[101] which led to expanded application of collateral estoppel.

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*,[102] move to exclude evidence on liability as irrelevant or prejudicial. This removes all potential for disagreement on liability among jurors, so that, in the usual notation, the jury can be expected to render a damages award of D, instead of $\alpha \bullet D$, where, generally, $\alpha < 1$.

Part V analyzes the constitutionality of this invasion of the jury's adjudication of the size of the damage award.

V. CONSTITUTIONAL ANALYSIS

A "fundamental right" in constitutional jurisprudence is any right which, explicitly or implicitly, derives from the United States Constitution,[103] including the right to a jury trial.[104] A law that burdens a fundamental right violates equal protection or due process unless found to pass the "strict scrutiny" test.[105] Under a strict scrutiny standard, the burden shifts to the state to show that it has a compelling interest in the challenged measure and that the causal connection between the means and the end is extremely close.[106]

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99 *See, e.g.*, Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 117-18 (1912); Foltz v. Pullman, Inc., 319 A.2d 38, 41 (Del. Super. Ct. 1974), *cited in* Erlenbach, *supra* note 3, at 29 n.58; FRIEDENTHAL *supra* note 90, at § 14.14.

100 439 U.S. 322, 326-28 (1979).

101 The California Supreme Court discarded mutuality by a unanimous decision in *Bernhard v. Bank of America Nat'l Trust & Savings Ass'n*, 122 P.2d 892 (Cal. 1942).

102 A motion *in limine* is a pre-trial motion made by a party to exclude prejudicial evidence from trial. *See* BLACK'S LAW DICTIONARY (6th ed. 1990).

103 *See* BLACK'S LAW DICTIONARY 674 (6th ed. 1990).

104 The Supreme Court has held on several occasions that the Seventh Amendment right to a jury trial in civil cases is so important and fundamental that any seeming erosion of that right should be rigorously scrutinized. *See, e.g.*, Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501 (1959) (*quoting* Dimick v. Schiedt, 293 U.S. 474, 486 (1935)); Jacob v. New York City, 315 U.S. 752, 752-53 (1942) ("The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen . . . should be jealously guarded by the courts.").

105 *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 290-91 (1978) (subjecting race-based classification scheme in medical school admission process to strict scrutiny under Equal Protection clause); Roe v. Wade, 410 U.S. 113 (1973) (subjecting challenge to anti-abortion statute to strict scrutiny under Due Process Clause); *see also* Tribe *supra* note 9, at § 16-6.

106 *See Roe*, 410 U.S. at 155.

The Supreme Court has extended strict scrutiny to common law rules, such as rules of tort liability, which include the common law rules that govern collateral estoppel. In *New York Times Co. v. Sullivan*,[107] for instance, the Court subjected common law privacy rules to First Amendment scrutiny, stating that:

> [a]lthough this is a civil lawsuit between private parties . . . . [i]t matters not that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.[108]

Issue preclusion in cases where evidence of liability and damages are separate creates two classes of defendants. The first class consists of defendants against whom evidence of liability clearly exceeds the reasonableness threshold of the community. These defendants will elicit a unanimous verdict of liability. The second class consists of defendants who are likely to elicit a split liability verdict, or acquittal. In this case, relatively risk tolerant jurors may view the risk under litigation as reasonable and want to acquit the defendant, while more risk averse jurors may want to vote for liability, based on the same evidence. Although this is not a suspect classification,[109] the rule governing issue preclusion is subject to strict scrutiny under both due process and equal protection analyses, because it infringes upon a fundamental right.[110]

Application of offensive collateral estoppel would treat these classes of defendants differently. Estoppel would not affect the damage award rendered against the first class. The jury in this case will be unanimous on the defendant's liability, whether based on the evidence, or based on the preclusion of liability through estoppel. In the notation of Part III, the damages award would be equal to D in either case.

However, collateral estoppel would affect the second class. If the jury were to hear evidence relevant to both liability and damages, it would render a compromise verdict, denoted $\alpha \bullet D$, $\alpha < 1$. If liability were precluded, evidence on liability may be excluded and a "forced" unanimous jury would return a damage award equal to D.

Such interference with a damage verdict presents a Seventh Amendment constitutional issue. In actions where the right to a jury trial is guaranteed, the Seventh Amendment prohibits interference with the

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107 376 U.S. 254 (1964).

108 *Id.* at 265.

109 The Supreme Court has recognized classifications involving, for instance, race, Brown v. Board of Education, 347 U.S. 483 (1954), and national origin, Korematsu v. United States, 323 U.S. 214 (1944), as suspect classifications which are subject to strict scrutiny review.

110 Boyd v. Bulala, 647 F. Supp. 781, 787 (W.D. Va. 1986).

jury's ultimate determination of issues of fact, such as damages.[111] Historically, at the time the Seventh Amendment was ratified, the prevailing common law, as well as authorities such as Blackstone's *Commentaries*, upon which the framers relied, agreed that the question of damages should be decided by the jury alone.[112] The size of the damage award, as a question of fact, is within the decisional prerogative of the civil jury.[113] We argue, therefore, that the distortion of a damage award through offensive application of collateral estoppel burdens a core value of the Seventh Amendment.

The Seventh Amendment guarantees the right to a verdict by an impartial jury that reflects a representative cross-section of the community where the action is brought. Application of offensive collateral estoppel distorts the component of the damage verdict that reflects the community's standards of safety and risk-tolerance. By forcing $\alpha = 1$, liability preclusion results in a damage verdict that reflects a higher implicit degree of culpability than society's true aggregate assessment of defendant's culpability, based on the evidence and society's standards of risk and safety.

The constitutional issues generated by issue preclusion are analogous to those considered by the courts in cases adjudicating the constitutionality of tort damages caps imposed by a number of states.[114] In their analysis of the constitutionality of such statutes, courts have reasoned that the statutes created two classes of plaintiffs and distorted the damage award of one class relative to the amount a jury would render based on the evidence. The two classes of plaintiffs are those whose actual damages exceed the cap, and those whose damages fall below the cap, respectively. The capping statutes distort the damage award of the former, but not the latter. Although some courts have upheld the constitutionality of damage caps challenged under due process or equal protection,

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111 *See Ex Parte* Peterson, 253 U.S. 300 (1920); *see also* Boyd v. Bulala, 647 F. Supp. 781 (W.D. Va. 1986):

> Since the assessment of damages is a fact issue committed to the jury for resolution, a limitation on the performance of that function is a limitation on the role of the jury. Since the right to a jury as the fact-finder is guaranteed under the Seventh Amendment, it therefore follows that such a limitation is unconstitutional under the provisions of that amendment.

Id. at 789.

112 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 397 ("([T]he quantum of damages sustained by [plaintiff] . . . is a matter that cannot be [decided] without the intervention of a jury.").

113 *See, e.g.*, Dimick v. Schiedt, 293 U.S. 474, 486 (1935) ("[The] jury properly determine[s] the question of liability and the extent of the injury by an assessment of damages. Both are questions of fact.").

114 *See, e.g.*, MD. CTS. & JUD. PROC. CODE ANN. § 11-108 (1987); WASH REV. CODE. ANN. § 4.56.250 (1987).

several courts have held that they violate plaintiffs' Seventh Amendment right to a jury trial.

In *Boyd v. Bulala*,[115] for instance, the court considered a challenge to a state statute capping damages, brought under the theory that it denied plaintiffs the right to a trial by jury. Following a Supreme Court decision stating that "any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care,"[116] the *Boyd* court reasoned that a cap would interfere with a damage award rendered by the jury based on evidence presented at trial, and concluded that the statute violated the Seventh Amendment constitutional right to a jury trial.[117]

In summary, I argue that (i) the size of the damage award is subject to Seventh Amendment protection, and (ii) a rule of law, such as offensive collateral estoppel, that interferes with the size of the damage award in a way that violates a core value of the Seventh Amendment, burdens a fundamental right.

A strict scrutiny analysis of the constitutional conflict generated by issue preclusion requires an examination of the public policy benefits of collateral estoppel, as well as the causal connection between these benefits and collateral estoppel. The benefits of issue preclusion can be reduced to two main policy goals, namely (i) decisional consistency and (ii) economic efficiency, including conservation of judicial resources and minimization of litigation expenditure.[118] We now consider whether these are "compelling interests" that pass the strict scrutiny standard.

The right to a jury trial is not an absolute one. It may be waived, and a court may deny it where the issue under litigation is deemed too complex for a lay jury to understand.[119] Furthermore, the Supreme Court has often shown a willingness to balance constitutional rights against one another and against other public policy considerations on a cost-benefit basis. The language of the Fourth Amendment protection against unreasonable searches and seizures, for instance, has been interpreted as an implied choice between competing policy interests. In *United States v.*

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115 647 F. Supp. 781 (W.D. Va. 1986), *aff'd*, 672 F. Supp. 915 (W.D. Va. 1987).

116 *Boyd*, 647 F. Supp. at 788 (*quoting* Dimick v. Schiedt, 293 U.S. 474, 486 (1935)).

117 *See id.* at 789-90; *see also* Waggoner v. Gibson, 647 F. Supp., 1102, 1107 (D.N.D. Tex. 1986); Smith v. Dept. of Insurance, 507 So.2d 1080 (Fla. 1987); Carter v. Fibreboard, No. 87-2-03555-7, 24-25, (King County Wa. 1988) (Washington capping statute found to violate equal protection as well as the right to a jury trial.) In its analysis, the court stated that, constitutionally, the jury has the ultimate power to find facts based on evidence presented, and "the amount of damages . . . is an ultimate fact." *Id.* The court concluded that a state statute capping damages unconstitutionally interferes with the task of the jury to determine the size of the damages award based on evidence presented. *See id.*

118 Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979); *see also* James F. Flanagan, *Offensive Collateral Estoppel: Inefficiency and Foolish Consistency*, 1982 ARIZ. ST. L. J. 45, 49.

119 *See* In re Japanese Electronic Products Antitrust Litig., 631 F.2d 1069 (1980).

Leon,[120] the Supreme Court rejected an absolute ban on the use of unconstitutionally obtained evidence and stated that each case should be resolved on a cost-benefit basis. For instance, the social costs associated with letting guilty defendants go free should be weighed against the benefit of a search in "good faith" reliance on a warrant.[121] In *Kaiser Industries Corp. v. Jones & Laughlin Steel Corp.*,[122] the Court characterized collateral estoppel as a balance between due process interests of substantial justice and judicial economy.[123] Even rights that are stated in absolute language, such as the First Amendment, have been subjected to a balancing approach.[124]

A strict scrutiny analysis of collateral estoppel requires a balancing of the public policy benefits of the doctrine against the value of the Seventh Amendment right to a jury trial, an analysis to which we now turn.

A. DECISIONAL CONSISTENCY

Advocates of collateral estoppel claim that the doctrine promotes decisional consistency, namely identical adjudication of identical issues.[125] Detractors of the doctrine, on the other hand, have questioned this claim.[126] We argue in this section that application of offensive collateral estoppel against defendants is likely to *undermine* decisional consistency precisely in cases where it is also most likely to offend a constitutional principle.

As an illustration of the class of cases where issue preclusion undermines decisional consistency, consider a product liability action. The injured person sues and obtains a judgment that the product is defective. The evidence on liability is such that the jury is not unanimous, and renders a damage award which we write, in usual notation, as $\alpha \bullet D$, $\alpha < 1$. Subsequently, the identical product causes an identical harm in a different jurisdiction where the community has an identical distribution of risk attitudes. The ideal of decisional consistency would compel an identical

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120 468 U.S. 897 (1984).

121 *Id.* at 907-08.

122 515 F.2d 964, 976-77 (*discussing* Blonder-Tongue Labs. v. University of Illinois Found., 402 U.S. 313, 321 (1971)).

123 *See id.*

124 *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). "Content-neutral" limitations on speech, for instance, are constitutional if "designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Id.* at 48; *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 (1985) ("We have long recognized that not all speech is of equal First Amendment importance.") (citations omitted); Tennessee v. Garner, 471 U.S. 1 (1985) (balancing the state's right to use deadly force against a fleeing felon and an individual's interest in life); New York v. Ferber 458 U.S. 747 (1982) (holding that the evil of child pornography outweighed the First Amendment rights of a purveyor of such material).

125 *See* Allen v. McCurry, 449 U.S. 90, 94-96 (1980).

126 *See, e.g.*, Flanagan, *supra* note 110, at 52.

judgment, namely a verdict of liability and a damages award of $\alpha \cdot D$ in the second action. If, however, offensive collateral estoppel were applied against defendant on the issue of liability in the second suit, it would force $\alpha = 1$ and the expected damages award would be equal to D. If offensive collateral estoppel were not applied in the second action, an appropriately selected jury could be expected to render a "consistent" verdict, namely a verdict imposing liability and rendering a damage award of $\alpha \cdot D$.[127] The difference between D and $\alpha \cdot D$ measures not only the unconstitutional distortion of the damage award, but also demonstrates how severely decisional consistency has been undermined. This differential is a result of the use of offensive collateral estoppel to force jury unanimity where unanimity is not justified by the defendant's degree of culpability.

The anomalous result is that (i) issue preclusion is promoted as furthering the judicial ideal of decisional consistency, yet (ii) defendants who pay the constitutional price of issue preclusion are not only the relatively less culpable ones, but they do not even get the purported benefit: They constitute the class of defendants for whom consistency is undermined. Even if we accept that application of offensive collateral estoppel promotes consistency in some cases, it undermines it in others. Therefore, there is no clear causal connection between estoppel and consistency.

B. JUDICIAL ECONOMY

Judicial economy is the second major public policy benefit claimed by proponents of collateral estoppel. Collateral estoppel allows parties to avoid relitigating an issue that has already been decided. This reduces private litigation expenditure and promotes judicial economy and efficiency by alleviating the caseloads of the courts. Strict scrutiny analysis would balance this economic interest against litigating parties' Seventh Amendment right.

The Court often balances constitutional rights against one another and against a variety of public policy considerations; however, the judiciary has been more protective of constitutional rights when the opposing interest involved pure economic or efficiency considerations. For instance, the Supreme Court stated in *Stanley v. Illinois*,[128] that:

> the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say . . . the Bill of

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127 An individual jury will not reflect the full diversity of the community, but if it is selected appropriately, it will render an *expected* damage award that reflects this diversity of risk attitudes, namely an amount equal to $a \cdot D$.

128 405 U.S. 645, 656 (1972) (*discussed in* Laurence Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 596 n.26 (1985)).

> Rights . . . [was] designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.[129]

The Court has held in other cases that saving money is not a compelling state interest that justifies the government's abrogation of constitutional rights.[130] Even if a state had a compelling fiscal need, a remedy that would abrogate a constitutional right should be used only as a last resort.[131]

Commentators and the courts have been especially reluctant to apply cost-benefit balancing to the Sixth and Seventh Amendment rights to a jury trial. A recurring rationale is that the framers of the Constitution have balanced the costs and benefits of the right to a jury trial and resolved it in favor of said right, and it is therefore inappropriate to repeat such a balancing. For example, Judge Frank Easterbrook writes "[o]ther constitutional provisions also instruct the government to put costs and benefits aside. The seventh and eleventh amendments enshrine historical treatments of important problems, though these solutions may be quite inefficient."[132]

A series of cases have directly addressed the appropriate constitutional balance between the Seventh Amendment right to a civil jury trial and economic benefits. On June 12, 1986, the Administrative Office of the United States Courts temporarily suspended civil jury trials because of inadequate funding from Congress. The constitutionality of this proposed "jury rationing" was successfully challenged by civil litigants in two cases, *Armster v. United States District Court*[133] and *Hobson v. Brennan*.[134]

The *Hobson* court held that denial of a civil jury trial in anticipation of budgetary problems would violate the Seventh Amendment.[135] The *Armster* court directly addressed the constitutionality of the temporary

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129 *Id.* at 656 (footnote omitted).

130 *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (finding that state government's fiscal interest does not justify burden on the right to interstate travel).

131 *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 407 (1963) (stating that even a financial emergency barely justifies infringing First Amendment rights).

132 Frank H. Easterbrook, *Method, Result, and Authority: A Reply*, 98 HARV. L. REV. 622, 623 n.4; *see also* Earl C. Dudley, *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025, 1091-92 (1993) ("With respect to these rights, the Constitution has resolved the cost-benefit analysis in favor of jury trials in serious criminal (and most civil) cases . . . .").

133 792 F.2d 1423 (9th Cir. 1986).

134 637 F. Supp. 173 (D.D.C. 1986).

135 Subsequent to *Armster*, *Odden v. O'Keefe*, 450 N.W.2d 707 (N.D. 1990), considered the constitutionality of a moratorium on civil jury trials for a period of 18 months, imposed for

suspension and, likewise, held that the temporary suspension violated the Seventh Amendment right to a jury trial. The court held unambiguously that a constitutional right should not be compromised for economic gain, even when apparently compelled by cost-benefit considerations.[136] This applies especially to the Seventh Amendment right to a civil jury trial,[137] and applies even to a temporary deprivation of, or an attempt to limit, a party's Seventh Amendment right.[138]

In conclusion, the analysis in Part V shows that application of offensive collateral estoppel to preclude liability does not pass the strict scrutiny test of constitutionality. There is no clear causal connection between offensive collateral estoppel and decisional consistency. In fact, I have demonstrated that preclusion often undermines decisional consistency. Furthermore, the purported benefit of judicial economy does not justify an erosion of the Seventh Amendment. Part VI discusses public policy implications of this analysis.

VI. POLICY CONSIDERATIONS

This article has presented a theory that would impose constitutional limitations on the application of offensive collateral estoppel in product liability litigation. Such limitations may affect the economics of product liability litigation and impede Full Faith and Credit recognition and enforcement of product liability verdicts across state lines. Furthermore, the theory sheds light on the judicial interpretation of compromise verdicts.

A. ECONOMICS OF LITIGATION

A constitutional conflict originates from the fact that offensive application of collateral estoppel may force a jury to render a damage verdict without hearing evidence on liability. This constitutional risk is also

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budgetary reasons. *See id.* at 709. Relying heavily on *Armster*, the *O'Keefe* court held that the moratorium violated petitioner's state constitutional right to a civil jury trial. *See id.* at 710.

136 *See Armster*, 792 F.2d at 1429:

> [T]he availability of constitutional rights does not vary with the rise and fall of account balances in the Treasury. Our basic liberties cannot be offered and withdrawn as 'budget crunches' come and go .... In short, constitutional rights do not turn on the political mood of the moment, the outcome of cost/benefit analyses or the results of economic or fiscal calculations.

Id.

137 *See id.* ("There is no price tag on [the civil jury] system, or on any other constitutionally-provided right.").

138 *See id.* at 1430 ("A temporary deprivation of a right, *or a limitation on it*, may violate the Constitution as well.") (emphasis added); *see also* Connell v. Sears, Roebuck & Co., 722 F.2d 1542, 1547 (Fed. Cir. 1983) ("So long as the Seventh Amendment stands, the right to a jury trial *should not be rationed* . . . ") (emphasis added).

present in other litigation techniques that force separate determination of liability and damages, such as trial bifurcation.

Federal Rule of Civil Procedure 42(b) provides that a court may order separate trials on issues such as liability and damages to promote economy, convenience, and avoid prejudice.[139] The rule has most often been used to bifurcate liability and damages, and in some jurisdictions bifurcation is a matter of norm and routine.[140] Under a rule formulated in *Gasoline Products Co. v. Champlin Refining Co.*,[141] issues such as liability and damages may be tried separately if they are separable and sufficiently distinct so that separate trials will not lead to an injustice.[142]

Empirical evidence indicates that bifurcation does save time and money. In a statistical study of bifurcated trials, Zeisel and Callahan[143] found that, in their sample, bifurcated trials lasted an average of 4.0 days compared to 4.7 days for unitary trials. They controlled for a selection effect, i.e. the possibility that particular types of cases may be more likely to be selected for bifurcation. The authors estimate that a court could save 21 % of trial time by bifurcating all of its personal injury cases.[144] Bifurcation saves time when the defendant prevails at the liability phase and the trial ends. In addition, Zeisel and Callahan found that bifurcation encouraged settlement when the plaintiff prevailed during the liability phase of a bifurcated trial. Zeisel and Callahan report four additional positive consequences of bifurcation. According to their results, bifurcation reduced juror deliberation time, did not affect frequency of jury waivers, left the percentage of hung juries more or less constant, and did not diminish the pre-trial settlement rate.[145] Furthermore, a 1989 poll reports that 80% of federal judges and 77% of state judges surveyed believe that bifurcation had a positive influence on the fairness of the outcomes and expedited settlements.[146]

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139 FED. R. CIV. PRO. 42(b) ("The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial . . . of any separate issue . . . always preserving inviolate the right of trial by jury as declared by the Seventh Amendment . . . ."); *see also* R.S. HAYDOCK ET AL., FUNDAMENTALS OF PRETRIAL LITIGATION § 12.3.6 (3d ed. 1994).

140 *See* HAYDOCK ET AL. *supra* note 139, at § 12.3.6.

141 283 U.S. 494, 500 (1931); *see also* Franchi Constr. Co. v. Combined Ins. Co. of Am., 580 F.2d 1 (1st Cir. 1978). Separate trials of distinct issues before different juries would offend the Seventh Amendment only when the issues are so interwoven that separating them would deny defendant a fair trial. *See id.* at 7-8.

142 *See id.*

143 Hans Zeisel & Thomas Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606, 1612 (1963).

144 *See id.* at 1616.

145 *See id.* at 1621-23.

146 *See* Symposium, *Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half Their Time on General Civil Cases*, 69 B. U. L. REV. 731, 743, 745 tbl.5.6 (1989); *see also* Vogel, The Issues of Liability and Damages Should be Separated for the Purposes of Trial, ABA Ins. Neg. & Compensation Sec. 265 (1960).

In practice, the issues of liability and damages may be heard by separate juries in bifurcated cases,[147] and courts have held that this practice does not violate the Seventh Amendment.[148] In spite of the blessing of the courts and evidence of the positive economic impact of bifurcation, the analysis in this article would question the constitutionality of such a procedure. If bifurcation were held to be unconstitutional, as the analysis of this article suggests, the result will be an increase in the cost of litigation, both to private parties, as well as to the judiciary. According to empirical studies cited in this Part, possible consequences include increased juror deliberation time, reduced incentives to settle during trial, and greater litigation expenses, including increased demands on resources of the courts.

B. JUDGMENT RECOGNITION AND ENFORCEMENT

An extension of the analysis in this article would limit recognition and enforcement of product liability judgments across state lines. The principles of Full Faith and Credit govern the decision to recognize and enforce a judgment rendered in another jurisdiction.[149] Under these principles, a jurisdiction must give the judgment from another jurisdiction the same recognition and respect it would receive in the jurisdiction where the judgment was rendered.[150] A state can refuse to recognize the judgment of another state only when recognition may offend a constitutional principle. For instance, violation of due process by the first court due to a lack of personal jurisdiction may justify non-recognition of its judgment.[151] The analysis in this article provides a constitutional foundation for refusal to recognize the judgment of another state when the judgment has depended on the use of offensive collateral estoppel, bifurcation of liability and damages or any other procedure that allowed the determination of liability and damages by separate juries.

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147 *See, e.g.*, United Airlines, Inc. v. Wiener, 286 F.2d 302, 306 (9th Cir. 1961).

148 *See, e.g.*, Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 498 (1931) (concluding issue separation does not substantively affect the right to a jury trial); Moss v. Associated Transport, Inc., 344 F.2d 23, 27 (6th Cir. 1965), *cited in* HAYDOCK ET AL. *supra* note 139, at § 12.3.6.

149 States must recognize judgments from sister states to the same extent as the state where judgment was rendered. U.S. CONST. art. IV, § 1 (codified as 28 U.S.C.A. § 1738 (1994)).

150 Although the Constitutional provision is stated in terms of recognition of judgments among the states, the principles of full faith and credit are pervasive in the U.S. legal system and generally apply to recognition of judgments among state courts as well as federal and state courts. *See* FRIEDENTHAL ET AL. *supra* note 90, at 607, § 14.15.

151 *See id.* at 694.

C. COMPROMISE VERDICT

Courts have generally been hostile to compromise verdicts, such as a compromise damage verdict negotiated in return for a liability verdict. In *Simmons v. Fish*,[152] for instance, the court ordered a new trial after the jury returned what appeared to be just such a compromise verdict on damages.[153] In *Taylor v. Hawkinson*,[154] the court characterized a verdict that included a compromise damage amount as inconclusive of defendant's liability.[155] Moreover, the Restatement of Judgments refers to compromise judgments as imperfect judgments.[156] The courts do acknowledge, however, the effectiveness of a compromise verdict in achieving finality in an action[157] and will not set aside a prior verdict just because it was based on a compromise.[158]

A distinction should be made between verdicts where the compromise is motivated by sympathy, e.g. for an injured plaintiff or an uninsured co-defendant, and a verdict where the compromise is motivated by a reconciliation of rational disagreement among jurors with a diversity of general biases. The former type of compromise is the result of case-specific bias and violates the constitutional requirement of impartiality. The courts' concern with the validity of this type of liability verdict is entirely justified. The latter type of compromise verdict is, as argued in this article, the inevitable consequence of a constitutionally diverse jury. Such a compromise verdict is a legitimate verdict that reflects society's judgment of the strength of the evidence against a defendant. It is therefore inappropriate to characterize such a verdict as "imperfect" or "inconclusive."

Courts usually refuse to give preclusive effect to compromise verdicts because of judicial skepticism towards the validity of such verdicts.[159] While I agree with the courts' reluctance to allow preclusion, I

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152 97 N.E. 102 (Mass. 1912).

153 *See id.; see also* MCCORMICK, *supra* note 67, at § 19.

154 306 P.2d 797 (Cal. 1957).

155 The court characterized the verdict as a compromise based on evidence such as a damages award substantially less than special damages. *Id.* at 799.

156 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 29 (4), (5) (1982); *see also* J. Sanders, *From Science to Evidence: The Testimony on Causation in the* Bendectin *Cases*, 46 STAN. L. REV. 1, 75 (1993).

157 *See* Moore v. Schneider, 238 P. 81, 84 (Cal. 1925); Partridge v. Shepard, 12 P. 480, 484 (Cal. 1886); FitzGerald v. Terminal Dev. Co., 53 P.2d 177 (Cal. Ct. App. 1925), *cited in* Taylor v. Hawkinson, 306 P.2d 797, 799 (Cal. 1957).

158 *See* United States v. Dotterweich, 320 U.S. 277, 279 (1943); United States v. Gipson, 553 F.2d 453, 457 (5th Cir. 1977); H. S. Suskin, Collateral Estoppel and the Compromise Verdict, 18 International Society of Barristers Quarterly 354, 354 n.4 (1983).

159 *See* Colditz v. Eastern Airlines, Inc., 329 F. Supp. 691, 695 (S.D.N.Y. 1971); Taylor v. Hawkinson, 47 Cal. 2d 893, 306 P.2d 797, 799 (1957); *see also* Braselton v. Clearfield State Bank, 606 F.2d 285 (10th Cir. 1979); Berner v. British Commonwealth Pac. Airlines, 346 F.2d 532 (2d Cir. 1965); Katz v. Eli Lilly & Co., 84 F.R.D. 378 (E.D.N.Y. 1979); Lundeen v.

do not agree with their rationale. A compromise verdict may be valid and constitutional if it reflects the aggregate judgment of a cross-section of the community that the jury represents.

VII. CONCLUSION

This article presents a legal and policy analysis of issue preclusion in product liability litigation. Application of offensive collateral estoppel to preclude litigation of the issue of liability invades the constitutional authority of the civil jury to decide the size of a damages award based on evidence presented at trial. Strict scrutiny analysis of the public policy interests of issue preclusion indicates that preclusion of liability is an unconstitutional burden on a fundamental right, namely the Seventh Amendment right to a jury trial.

The analysis has significant public policy implications. A constitutional limitation on issue preclusion can be expected to affect the economics of product liability litigation, as well as the recognition and enforcement of product liability judgments. The analysis also sheds new light on the judicial interpretation of compromise verdicts.

Hackbarth, 171 N.W.2d 87 (Minn. 1969); *see also* H.S. Suskin, Collateral Estoppel and the Compromise Verdict, 18 International Society of Barristers Quarterly 354, 354 (1983).