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Offensive Non-Mutual Issue Preclusion Revisited

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INTRODUCTION

Some forty years ago, in *Parklane Hosiery Co. v. Shore*,[1] the United States Supreme Court held that the rule of mutuality of estoppel was no longer an absolute bar to the invocation of issue preclusion for the benefit of a plaintiff who had been a stranger to the prior (F-1) litigation against a defendant who had been party to both the F-1 and present (F-2) cases.[2] In so ruling, the Supreme Court gave its imprimatur to Judge Traynor's dramatic takedown of the mutuality rule in *Bernhard v. Bank of America National Trust and Savings Association*[3] nearly four decades earlier. The outcome in *Parklane* was also foreshadowed by the Court's earlier ruling in *Blonder-Tongue Laboratories v. University of Illinois Foundation.*[4] There, the Court rejected mutuality where the stranger to F-1 invoked the F-1 decision holding a patent invalid as a defense to an infringement suit in F-2 involving the same patent.[5] *Blonder Tongue* was consistent with the trend in many state and lower federal court decisions that had abrogated mutuality where preclusion was interposed defensively.[6] *Parklane*, of course, involved offensive non-mutual issue preclusion,[7] and at the time of the *Blonder Tongue* decision, many courts drew a line distinguishing defensive and offensive non-mutual preclusion, allowing the former but not the latter.[8] *Parklane* acknowledged this bright-line distinction but rejected an outright ban on offensive non-mutual issue preclusion, leaving it to the trial courts to determine on a case-by-case basis when it should be applied.[9] The Court in *Parklane* thus stopped short of a blanket approval of offensive non-mutual issue preclusion, and qualified its holding in three important respects: (1) a defendant must have had a full and fair opportunity to litigate the case in F-1; (2)

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1. 439 U.S. 322 (1979); For a detailed discussion of *Parklane*, see Lewis A. Grossman, *The Story of Parklane: The "Litigation Crisis" and the Efficiency Imperative*, in CIVIL PROCEDURE STORIES 405 (Kevin M. Clermont ed., 2008).
2. 439 U.S. at 327–33.
3. 122 P.2d 892, 895 (Cal. 1942).
4. 402 U.S. 313 (1971).
5. *Id.* at 328–29.
6. *Id.* at 324–25.
7. *Parklane*, 439 U.S. at 326.
8. *Blonder-Tongue*, 402 U.S. at 324 n. 11; *Parklane*, 439 U.S. at 329 n.11.
9. *Parklane*, 439 U.S. at 331; *see infra* notes 136-40 and accompanying text.

invocation of non-mutual issue preclusion must not produce an unfair result; and (3) the decision of whether or not to allow offensive non-mutual issue preclusion is left to the sound discretion of the trial court and thus is not a matter of right.[10]

Following *Parklane*, many,[11] but not all,[12] states have abrogated the rule of mutuality and now allowed offensive non-mutual

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10. *Parklane*, 439 U.S. at 329–333.

11. *See, e.g.*, Watkins v. Southern Farm Bureau Cas. Ins. Co., 370 S.W.3d 848, 855–856 (Ark. Ct. App. 2009); Central Bank Denver v. Mehaffy, Rider, Windholz & Wilson, 940 P.2d 1097, 1103 (Colo. App. 1997); Aetna Cas. & Sur. Co. v. Jones, 596 A.2d 414, 422–423 (Conn. 1991); Reinhard & Kreinberg v. Dow Chemical Co., No. 3003-CC, 2008 WL 868108, at *4 (Del. Ch. Mar. 28, 2008); Mastrangelo v. Sandstrom, Inc., 55 P.3d 298, 303 (Idaho 2002); Hossler v. Barry, 403 A.2d 762, 768 (Me. 1979); Oates v. Safeco Ins. Co. of America, 583 S.W.2d 713, 719 (Mo. 1979) (en banc); Peterson v. Nebraska Natural Gas Co., 281 N.W.2d 525, 527 (Neb. 1979); Cutter v. Town of Durham, 411 A.2d 1120, 1121 (N.H. 1980); O'Connor v. G & R Packing Co., 426 N.Y.S.2d 557, 567 (App. Div. 1980); B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 147 (1967) ("[T]he 'doctrine of mutuality' is a dead letter."); Shannon v. Moffett, 604 P.2d 407, 409 (Or. 1979); Steven P. Nonkes, Note, *Reducing the Unfair Effects of Nonmutual Issue Preclusion Through Damage Limits*, 94 CORNELL L. REV. 1459, 1467 and cases cited at n. 59 (2009); *see generally* RESTATEMENT (SECOND) OF JUDGMENTS § 29 Reporter's Note (AM. LAW INST. 1982) (stating that abrogation of mutuality has acquired "general acceptance").

12. *See, e.g.*, Minnifield v. Wells Fargo Bank, 771 S.E.2d 188, 192 (Ga. Ct. App. 2015) ("In Georgia, mutual identity of parties is required for collateral estoppel . . . ."); Mosley v. Trans Rent-A-Car, Inc., 650 P.2d 1256, 1258 (Ariz. Ct. App. 1982); Bailey v. Harris Brake Fire Protection Dist., 697 S.W.2d 916, 917–18 (Ark. 1985); Newport Div., Tenneco Chemicals, Inc. v. Thompson, 330 So. 2d 826, 827–28 (Fla. Dist. Ct. App. 1976); State Farm Mut. Auto. Ins v. Glasgow, 478 N.E.2d 918, 922 (Ind. Ct. App. 1985); Atencio v. Vigil, 521 P.2d 646, 648–49 (N.M. 1974); Tar Landing Villas Owners Ass'n v. Town of Atlantic Beach, 307 S.E.2d 181, 184 (N.C. Ct. App. 1983); Wolverton v. Holcomb, 329 S.E.2d 885, 888–89 (W. Va. 1985); Redmond v. Bankester, 757 So. 2d 1145, 1150 n.2 (Ala. 1999) (requiring mutuality of collateral estoppel); Cook Inlet Keeper v. State, 46 P.3d 957, 966 (Alaska 2002) (same); Regency Park, LP v. City of Topeka, 981 P.2d 256, 265 (Kan. 1999) (same); Hofsommer v. Hofsommer Excavating, Inc., 488 N.W.2d 380, 384 (N.D. 1992) ("For purposes of both res judicata and collateral estoppel in this state, only parties or their privies may take advantage of or be bound by the former judgment."); Scales v. Lewis, 541 S.E.2d 899, 901 (Va. 2001) ("[T]here also must be 'mutuality' *i.e.,* a litigant cannot invoke collateral estoppel unless he would have been bound had the litigation of the issue in the prior action reached the opposite result."(quoting Angstadt v. Atl. Mut. Ins. Co. 457 S.E.2d 86, 87 (Va. 1995))); *see, e.g.*, Kiara Lake Estates, LLC v. Bd. of Park Comm'rs O.O. McIntyre Park Dist., No. 2:13-cv-522, 2014 WL 773437, at *5 (S.D. Ohio Feb. 24, 2014) ("[C]ollateral estoppel may generally be applied only when the party seeking to use the prior judgment and the party against whom the judgment is being asserted were parties . . . ."); Burruss v. Bd. of Cty. Comm'rs, 46 A.3d 1182, 1194 (Md. 2012) (noting that Maryland law permits only defensive non-mutual issue preclusion); *see generally*,

issue preclusion. In effect, *Parklane* and *Blonder-Tongue* have shifted presumptions 180 degrees. Instead of a rule of mutuality subject to specific exceptions, we now have a rule of non-mutuality subject to exceptions where that approach would generate unfair results.[13]

Some influential scholars have argued that *Parklane* definitively settled the matter of offensive non-mutual issue preclusion, and that little is served today in debating the pros and cons of mutuality.[14] Other scholars argue that *Parklane* went too far and that a rule of mutuality with a few defined exceptions is preferable to a rule of non-mutuality with a lot of fuzzy exceptions.[15] Little has been written about *Parklane* in recent years. Meanwhile, litigation in federal courts has grown increasingly complex in the years since *Parklane* was decided. Accordingly, this is an ideal time to reassess whether, and the extent to which, mutuality should play a role in issue preclusion analysis. Historically, the law of res judicata in the United States has evolved at a glacial pace. One commentator has suggested that the reasons for the slow development of res judicata law were that the "subject was not yet satisfactorily systematized," and that "[o]ften res judicata came up only when a litigant had taken a misstep that mired the court in repetitive litigation, and therefore res judicata tended to be envisaged as an arcane jumble of technical and arbitrary provisions to

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RESTATEMENT (SECOND) OF JUDGMENTS § 29 Reporter's Note (AM. LAW INST. 1982).

13. *But see* ROBERT C. CASAD & KEVIN M. CLERMONT, RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE 185 (2001) ("A basic choice exists between the rule of mutuality, with a few defined extensions, and the rule of nonmutuality, with lots of fuzzy exceptions. These two are not alternative formulations that end up at the same place in the middle. On the one hand, the extensions to mutuality were rare and limited, playing it safe and simple in extending res judicata to situations of real need such as secondary liability. The extensions certainly did not aim at reaching every case in which, on balance, preclusion would be desirable. On the other hand, the exceptions to nonmutuality are many, but they surely do not reach all situations beyond the coverage of mutuality's extensions. The prevailing exceptions do not even recognize all the reasons that preclusion might be undesirable.").

14. *See, e.g.*, CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, 18A FEDERAL PRACTICE AND PROCEDURE § 4464, at 695 (3d ed. 2017) ("With nonmutual issue preclusion thus firmly entrenched, little would be gained by an exhaustive study of the arguments for and against abandoning the mutuality rule.").

15. *See* CASAD & CLERMONT, *supra* note 13, at 185; *see also* Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 777 (1986) ("Following a vigorous and highly successful attack on mutuality, there now seems to be doubt about the wisdom of the revolution.").

handle this peculiar problem."[16] Two events spurred the rapid development of res judicata law in the twentieth century: (1) the promulgation of the Federal Rules of Civil Procedure in 1938; and (2) the publication of the *Restatement (Second) of Judgments* in 1982.

The Federal Rules of Civil Procedure featured simplified pleading rules that eliminated the common law forms of action,[17] and liberal joinder rules that made it easier to bring all claims and all litigants within a single cause of action.[18] The Federal Rules thus invited a broader application of res judicata principles. The *Restatement (Second) of Judgments*, following the path charted by the first *Restatement of Judgments*, provided a framework through which courts could analyze and apply the res judicata doctrine more broadly.[19] Relying on the *Restatement (Second) of Judgments*, the Supreme Court "has embraced res judicata with an especially fervent ardor."[20]

The modern approach to res judicata has indeed led to a broader application of preclusion principles designed to enable courts to resolve all disputes between litigants in one action.[21] However, in the past thirty years, the complexion of litigation in the federal courts has changed dramatically and has brought about a corresponding change in attitudes among judges on how to manage litigation. The multiparty, multijurisdictional, multidistrict litigation that populates today's federal dockets has grown increasingly complex.[22] In managing complex cases, judges no longer seek to try all cases in a single,

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16. Kevin M. Clermont, *Res Judicata as a Requisite for Justice*, 68 RUTGERS U. L. REV. 1067, 1073 (2016).

17. *See* FED. R. CIV. P. 8(a)(2), 8(d)(i).

18. *See* FED. R. CIV. P. 18–21.

19. Clermont, *supra* note 16, at 1075.

20. *Id.*

21. *See* CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 100A, at 651 (8th ed. 2017) ("Modern scholarship had looked hard at the rules of res judicata and found that they had failed to keep pace with the rules of procedure that they complement."); Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found., 402 U.S. 313, 328 (1971) ("[I]t is clear that more than crowded dockets is involved.").

22. *See* Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 945–46 (1998) ("With great frequency, multiple lawsuits arise out of single or related transactions or events. Mass tort litigation and complex commercial litigation provide the most emphatic examples, but the phenomenon of multiple related lawsuits extends to every corner of litigation, including intellectual property, matrimonial, criminal, antitrust, personal injury, securities, commercial, products liability, environmental, and civil rights.") (footnotes omitted).

consolidated action.[23] Rather, judges may seek to break down the litigation into smaller pieces, looking for "fast track" or "bellwether" cases that, once resolved, will lead to settlement of the remaining cases. In these circumstances, questions of issue preclusion abound.

The question explored herein is whether the rule of *Parklane* and its progeny remains a viable standard under the new litigation paradigm. This article (1) traces the evolution of the doctrine of issue preclusion; (2) analyzes the rise and fall of the principle of mutuality; (3) concludes that the concept of mutuality is ill-conceived and serves to undermine principles of substantive law, as well as the basic goals of preclusion—efficiency, finality, and consistency; and (4) further concludes that the standards developed in *Parklane* regarding offensive non-mutual issue preclusion and its progeny strike the proper balance between the goals of preclusion, on the one hand, and basic principles of fairness, on the other hand. In sum, the current standards regarding issue preclusion are working, and any proposal to return to a mutuality regime would be an unfortunate step backward.

I. BACKGROUND

As one scholar has aptly noted, "every system of justice around the world, from near its beginnings, has generated a common core of res judicata law to make adjudications binding."[24] In *Riordan v. Ferguson*,[25] Judge Charles Clark, the principal drafter of the Federal Rules of Civil Procedure and one of the most thoughtful jurists of the twentieth century, observed wryly that "[t]he defense of res judicata is universally respected, but actually not very well liked."[26] The distaste for res judicata no doubt stems from the fact that it is widely viewed as "an arcane jumble of technical and arbitrary rules blocking access to courts"[27] that forces litigants and courts to continually weigh the needs for repose and cost containment against the need for the courts to get

23. *Id.* at 946–47 ("Proposed aggregation mechanisms that would allow the consolidation of dispersed litigation appear destined for failure, at least in the near term.").

24. Clermont, *supra* note 16, at 1079.

25. 147 F.2d 983 (2d Cir. 1945).

26. *Id.* at 988 (Clark, J., dissenting).

27. *See* CASAD & CLERMONT, *supra* note 13, at 3.

accurate results, perhaps through relitigation of cases.[28] Notwithstanding this distaste, res judicata is universally respected out of practical necessity: "One who has had his day in court should not be permitted to litigate the question anew."[29] That is, a litigant is entitled to

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28. DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS 16–17 (1st ed. 2001). Shapiro argues that the justifications for preclusion are pragmatic in nature:

> First, and perhaps foremost, the concept of repose. The finality of a judgment in its fullest sense, allows the loser as well as the winner, to get on with his life; to put a controversy over a claim, or even part of a claim or an issue embedded in the claim, behind him and to move on to other things . . . . A related justification lies in the often invoked argument that any system of justice must strive not only for truth and accuracy but also for the avoidance of excessive costs. For a winning party to have to relitigate a claim already decided in his favor imposes costs not only on him—both financial and psychological—but also on the public in the form of judicial expenses not paid for by the parties themselves . . . . And another, less tangible cost to the system is the loss of 'prestige' (for want of a better word) that attends the existence of inconsistent and even conflicting results ... [T]he lack of assurance that a second adjudication will yield a 'better' or more 'accurate' result militates against a general authorization of relitigation solely on the assumption that a second consideration is more likely than the first to get things right.

Id; see also Clermont, *supra* note 16, at 1089 ("Between minimal and maximal limits, the extent of res judicata is a matter of cost-benefit policy.").

29. Good Health Dairy Prods. Corp. v. Emery, 275 N.Y. 14, 18 (N.Y. 1937). The Court stated:

> Behind the phrase *res judicata* lies a rule of reason and practical necessity. One who has had his day in court should not be permitted to litigate the question anew. Although normally it is necessary that mutuality of estoppel exist, an exception is at times made where the party *against* whom the plea is raised was a party to the prior action and 'had full opportunity to litigate the issue of its responsibility.' (See *Liberty Mutual Ins. Co. v. George Colon & Co.*, 260 N.Y. 305, 312.) Under such circumstances the judgment is held to be conclusive upon those who were parties to the action in which the judgment was rendered. Where a full opportunity has been afforded to a party to the prior action and he has failed to prove his freedom from liability or to establish liability or culpability on the part of another, there is no reason for permitting him to retry these issues. Where the issue in the second action differs in any way from that in the earlier action, the plea, of course is not available.

one bite—and only one bite—of the apple.[30] Indeed, "the doctrine of res judicata is a principle of universal jurisprudence forming part of the legal system of all civilized nations."[31]

The phrase res judicata is sometimes used to describe all ways in which a prior judgment can have preclusive effect in subsequent litigation.[32] Thus broadly defined, the phrase res judicata comprises two separate, but interrelated doctrines: res judicata properly defined, also known as claim preclusion; and collateral estoppel, also known as issue preclusion.[33] The terminology claim preclusion and issue preclusion has been adopted by the *Restatement (Second) of Judgments* and will be used throughout this article.[34]

Id.

30. Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found., 402 U.S. 313, 324 (1971) ("[A] party who has had one fair and full opportunity to prove a claim and has failed in that effort, should not be permitted to go to trial on the merits of that claim a second time.") (citation omitted).

31. 2 A.C. FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS § 627, at 1321 (5th ed. 1925).

32. *See, e.g.*, Weaver Corp. v. Kidde, Inc., 701 F. Supp. 61, 63 (S.D.N.Y. 1988) ("One difficulty is that courts use 'res judicata' for two different concepts. Some use it to mean claim preclusion. Others employ res judicata in a general sense, to encompass both claim and issue preclusion.").

33. For an excellent explanation of modern preclusion terminology, see Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc., 575 F.2d 530, 535–36 (5th Cir. 1978) ("The rules of res judicata, as the term is sometimes sweepingly used, actually comprise two doctrines concerning the preclusive effect of a prior adjudication. The first such doctrine is 'claim preclusion,' or true res judicata. It treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same 'claim' or 'cause of action.' When the plaintiff obtains a judgment in his favor, his claim 'merges' in the judgment; he may seek no further relief on that claim in a separate action. Conversely, when a judgment is rendered for a defendant, the plaintiff's claim is extinguished; the judgment then acts as a 'bar.' Under these rules of claim preclusion, the effect of a judgment extends to the litigation of all issues relevant to the same claim between the same parties, whether or not raised at trial. The aim of claim preclusion is thus to avoid multiple suits on identical entitlements or obligations between the same parties, accompanied, as they would be, by the redetermination of identical issues of duty and breach. The second doctrine, collateral estoppel or 'issue preclusion,' recognizes that suits addressed to particular claims may present issues relevant to suits on other claims. In order to effectuate the public policy in favor of minimizing redundant litigation, issue preclusion bars the relitigation of issues actually adjudicated, and essential to the judgment, in a prior litigation between the same parties. It is insufficient for the invocation of issue preclusion that some question of fact or law in a later suit was relevant to a prior adjudication between the parties; the contested issue must have been litigated and necessary to the judgment earlier rendered") (citations omitted).

34. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 23–29 (AM. LAW INST. 1982); *see generally* CASAD & CLERMONT, *supra* note 13, at 9.

A. Claim Preclusion

1. Derivation

Claim preclusion is derived from the common law doctrines of bar and merger and defense preclusion.[35] The doctrine of bar and merger addresses limitations on plaintiffs.[36] The concept of merger is somewhat metaphysical. At common law, if a plaintiff sued on a cause of action and won, it would be awarded a judgment. Once the judgment was entered, the cause of action would merge into that judgment and thus would no longer exist.[37] Therefore, it could not be sued upon a second time. For example, suppose drivers A and B get into an automobile accident. A suffers a broken leg and facial lacerations and sues B for negligence. A wins. Thereafter, A suffers debilitating headaches and is diagnosed with a serious brain injury stemming from the accident. In F-2, A sues B again to recover for the brain injury caused by the accident. A would be barred under the doctrine of merger. A's cause of action for personal injury was merged with the F-1 judgment and no longer exists.

Similarly, under the doctrine of bar, if A sues B and loses, A cannot re-sue B on the same cause of action.[38] For example, suppose A sued B in state court and lost. Suppose further that the claim could have been brought in federal court under diversity jurisdiction. A may not go forward in federal court after having lost in state court. If the state court case was wrongly decided, then A's remedy would be to appeal the decision in the state appellate courts, not to re-sue in federal court.

The defense preclusion rule mirrors the doctrine of bar and merger. If A sues B and wins and thereafter seeks to enforce the judgment, then under the defense preclusion doctrine, B cannot raise defenses that have been or could have been raised in the original action. Nor may B, following the entry of judgment for A, bring an action that would effectively unravel the initial judgment for A. This "common law compulsory counterclaim" rule prevents a losing defendant from relitigating A's claim by using defenses as a basis for recovery.[39]

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35. *See* Clermont, *supra* note 16, at 1082–84.
36. *Id.*
37. *Id.* at 1084.
38. *Id.* at 1082–83.
39. *Id.* at 1083; *see* RESTATEMENT (SECOND) OF JUDGMENTS § 22(2)(a)–(b) (AM. LAW INST. 1982).

2. Requirements of Claim Preclusion

The defense of claim preclusion has three elements: (a) identical parties; (b) identical cause of action; and (c) the F-1 judgment was on the merits.[40]

i. Identical Parties

Ordinarily, the question of whether the parties to the F-1 and F-2 judgments are the same is easy to determine. Simply look to see if the same persons are parties to both cases. One who is not a party to the F-1 judgment cannot be bound by that judgment.[41] However, courts have recognized that in certain circumstances, a non-party stands in the shoes of the party in F-1 and therefore is legally bound by any determination made with respect to the party; e.g., if a non-party A agrees to be bound by a judgment with respect to a party B, then A and B are considered identical parties for claim preclusion purposes.[42]

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40. *See* Taylor v. Sturgell, 553 U.S. 880, 884 (2008); United States v. Ryan, 810 F.2d 650, 654 (7th Cir. 1987); Keith v. Aldridge, 900 F.2d 736, 739 (4th Cir. 1990); *cf.* RESTATEMENT (SECOND) OF JUDGMENTS §19 cmt.a (dropping the on the merits requirements).

> "Because even though the "prototype case continues to be one in which the merits of the claim are in fact adjudicated against the plaintiff after trial . . . judgments not passing directly on the substance of a claim have come to operate as a bar."

Id.

41. *Taylor*, 553 U.S. at 893–95.

42. *Id.* The Court in *Taylor* identified six situations where a non-party may be bound by an F-1 determination:

> 1. A nonparty to F-1 may be bound by that judgment where it agrees to be bound.
> 2. A nonparty may be bound by F-1 based on certain "pre-existing 'substantive legal relationship[s]'" between it and a party to judgment. These relationships include, but are not limited to, successorship, bailor-bailee and assignor-assignee.
> 3. Where a nonparty was adequately represented in F-1 by a party with the same interests, it may be bound by F-1. The principal example of this situation is the class action, but it also applies to suits brought by trustees, guardians, and other fiduciaries on behalf of their beneficiaries.
> 4. A nonparty who had "assumed control" of F-1 litigation is bound by the judgment rendered by the F-1 court. Such a party,

ii. Identical Causes of Action

Historically, the question of whether two causes of action were identical for claim preclusion purposes turned on the theory of recovery.[43] Each theory of recovery would give rise to a separate cause of action, even if the factual bases of these claims were identical.[44] The common law definition of cause of action seems at odds with the basic goals of preclusion because it would enable a crafty advocate through clever pleading to assert multiple causes of action based on the same facts simply by articulating different theories of recovery.

The modern approach to defining cause of action for preclusion purposes turns on transactional analysis.[45] Thus, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy."[46] This broader definition of cause of action has allowed a more far-reaching application of claim preclusion.

The movement away from a theory-based definition of cause of action and toward a more practical, transactional-based approach came about largely through the adoption of the Federal Rules of Civil

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> having been given the opportunity to present evidence, has had its day in court.
> 5. A nonparty suing an action as a proxy for one already bound by an earlier litigation is likewise bound by that litigation.
> 6. Various statutory schemes may expressly foreclose successive litigation by nonlitigants, provided those schemes are consistent with due process. Examples of these schemes include bankruptcy and probate, as well as quo warranto and other similar suits that may be brought on behalf of the public.

Id. at 893–95.

43. *See* WRIGHT, MILLER & COOPER, *supra* note 14, § 4407, at 178–79; CASAD & CLERMONT, *supra* note 13, at 62–66.

44. CASAD & CLERMONT, *supra* note 13, at 63 ("For the most part, if the facts relating to an event could fit into a different form of action that involved a different legal theory, then, in spite of the so-called general rule that res judicata could not be avoided by changing the form of action, a judgment against the plaintiff in the first action usually did not have claim-preclusive effect in a different form of action, even when the same basic event was involved.").

45. *See* RESTATEMENT (SECOND) OF JUDGMENTS, §§ 24, 25(1)–(2) (AM. LAW INST. 1982); CASAD & CLERMONT, *supra* note 13, at 66–69; O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357 (1981).

46. *O'Brien*, 54 N.Y.2d at 357.

Procedure.[47] First, the Federal Rules introduced a simplified pleading regimen, often described as notice pleading,[48] and specifically rejected the technical forms of pleading required at common law.[49] Recovery turned on proof at trial, not the theories of recovery in the complaint.[50]

Second, the Federal Rules permitted liberal joinder of claims and parties in a single action.[51] Now, all claims arising from a common nucleus of fact could be resolved in one action, instead of multiple actions. Failure to assert all claims arising from a given transaction or series of transactions would mean that these unasserted claims would be barred.[52] Put another way, if claims could have been raised, then they should have been raised. Third, the Federal Rules permit liberal amendment of the pleadings, further discouraging the proliferation of separate lawsuits.

iii. "On the Merits"

A final judgment has no claim preclusive effects unless it is "on the merits"; i.e. unless the judgment goes to the substance of the claim.[53] Accordingly, dismissals on "procedural" grounds, including lack of personal jurisdiction, lack of subject matter jurisdiction, or failure to join a necessary party, do not go to the substance of a claim and hence are not on the merits.[54] On the other hand, judgments rendered for the plaintiffs are invariably on the merits.

Nevertheless, the line dividing decisions that are on the merits and those that are not cannot always be neatly drawn.[55] Attempts to

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47. CASAD & CLERMONT, *supra* note 13, at 66–67; *see, e.g.*, FED. R. CIV. P. 18 (addressing joinder of claims); FED. R. CIV. P. 42 (permitting the court to consolidate claims or to order separate trials).

48. *See* FED. R. CIV. P. 8(a)(2).

49. *See* FED. R. CIV. P. 8(d)(1) ("No technical form is required.").

50. *See* FED. R. CIV. P. 8(e) ("Pleadings must be construed so as to do justice."); FED. R. CIV. P. 15(b)(2) ("When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings.").

51. *See* FED. R. CIV. P. 18–21.

52. *See* RESTATEMENT (SECOND) OF JUDGMENTS, §§ 24, 25 (AM. LAW INST. 1982).

53. *See* Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 501–02 (2001) ("The original connotation of an 'on the merits' adjudication is one that actually 'pass[es] directly on the substance of [a particular] claim' before the court." (citing RESTATEMENT (SECOND) OF JUDGMENTS § 19 cmt. a, at 161)).

54. *See* WRIGHT, MILLER, & COOPER, *supra* note 14, § 4436, at 143.

55. *Compare* FED. R. CIV. P. 41(b) ("[A] dismissal . . . –except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as

draw such a line have proven vexing for the courts.[56] One example of this difficulty is a decision dismissing a case for failure to state a claim upon which relief can be granted.[57] In dismissing a case on these grounds, is a court saying merely that the complaint is technically defective? Or is the court saying that the complaint is inherently defective so that, no matter how the complaint is presented, the plaintiff has no claim for relief? In the former case, dismissal would not be on the merits; but in the latter case, it would be.

One way to address this dilemma is for a court to simply say "with prejudice" if its decision goes to the merits, or "without prejudice" if the ruling is not on the merits. In many cases, though, the courts would say nothing beyond "dismissed" and the problem would persist. Modern procedural rules have addressed this problem by setting forth default presumptions that would govern unless the court rules otherwise.[58] Thus, under the Federal Rules of Civil Procedure, a motion to dismiss is on the merits unless the court rules that the dismissal is without prejudice.[59] Given this fix, the *Restatement (Second) of Judgments* no longer includes "on the merits" as an element of claim preclusion.[60]

A second area that has posed problems for the courts has been dismissal on statute of limitation grounds. Historically, such dismissals were viewed as not on the merits, since the imposition of a statute of repose barred only the remedy, not the right. Nevertheless, courts today do sometimes give claim preclusive effect to dismissals on limitation grounds.[61]

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an adjudication on the merits."), *with* WRIGHT, MILLER & COOPER, *supra* note 15, § 4435, at 145 (discussing the issue of a dismissal for failure to state a claim as one that requires "clear independent thought" and noting that Rule 41(b) "cannot automatically provide sound answers").

56. *See, e.g.*, Baris v. Sulpicio Lines, Inc., 74 F.3d 567, 573 n.7 (5th Cir. 1996) (noting confusion surrounding the phrase "with prejudice"); *see* WRIGHT, MILLER & COOPER, *supra* note 15, § 4435, at 127 ("Thus it is clear that an entire claim may be precluded by a judgment that does not rest on any examination whatever of the substantive rights asserted.").

57. *See* FED. R. CIV. P. 12(b)(6).

58. FED. R. CIV. P. 41(b).

59. *Id.*

60. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 19 cmt. a. (AM. LAW INST. 1982).

61. *See* Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 502 (2001).

B. *Issue Preclusion*

Issue preclusion bars relitigation of issues that were litigated and determined in the F-1 forum, and that were necessary to the judgment rendered therein.[62] Its scope by definition is narrower than that of claim preclusion. Whereas claim preclusion addresses relitigation of prior claims, issue preclusion bars only relitigation of issues that had been litigated and determined in F-1.[63] A key difference between claim preclusion and issue preclusion is that claim preclusion bars claims that were actually litigated in F-1, as well as claims that might have been brought in F-1 but were not.[64] Issue preclusion, on the other hand, bars relitigation of only those issues that were actually raised, litigated, and adjudicated in F-1.[65] Although narrower in scope than claim preclusion, issue preclusion can still have outcome-determinative effects. For example, suppose P is a passenger in a car driven by D-1. D-1 gets into an accident with D-2, the driver of another car. In F-1, P sues D-1 for personal injuries and loses because the court finds that its alleged injuries were not caused by the accident. In F-2, P sues D-2 for personal injuries. D-2 will interpose the F-1 findings on the issue of causation, which, in turn, will strike the death knell to P's claim in F-2.

As discussed below,[66] many applications of issue preclusion are simple,[67] while other applications have proven thornier for the courts.[68] Especially challenging has been the application of offensive

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62. RESTATEMENT (SECOND) OF JUDGMENTS § 27.

63. *See* Kremer v. Chem. Constr. Corp, 456 U.S. 461, 466 n.6 (1982) ("Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue on a different cause of action between the same parties.") (citations omitted).

64. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 24–25.

65. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27.

66. *See infra* notes 73-82 and accompanying text.

67. WRIGHT, MILLER & COOPER, *supra* note 14, § 4416, at 425.

68. *See* Quinn v. Monroe Cty., 330 F.3d 1320, 1328 (11th Cir. 2003) ("We now tread into the bramble bush of collateral estoppel.").

non-mutual issue preclusion.[69] Indeed, most of the modern developments in preclusion law have occurred in the area of issue preclusion.[70]

II. ISSUE PRECLUSION IN ACTION

A. The Rise of Mutuality

Application of issue preclusion principles is a straightforward exercise where the parties to F-1 and F-2 are identical.[71] As long as the party against whom issue preclusion is being invoked has had a full and fair opportunity to litigate the issue in question, the doctrine of issue preclusion applies.[72] The situation is more complicated where

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69. *See* Jack Faucett Assocs. v. AT&T Co., 744 F.2d 118, 124 (D.C. Cir. 1984) ("The doctrine [of offensive non-mutual issue preclusion] is detailed, difficult, and potentially dangerous."); *accord* In re Microsoft Corp. Antitrust Litigation, 355 F.3d 322, 327 (4th Cir. 2004) (finding that criteria for application of offensive non-mutual issue preclusion should "be applied strictly"); Shaffer v. R.J. Reynolds Tobacco Co., 860 F. Supp. 2d 991, 996 (D. Ariz. 2012) (noting that following a government victory in the *Tobacco Cases*, trial courts uniformly refused to apply offensive non-mutual issue preclusion in private follow-on actions).

70. *See* WRIGHT, MILLER & COOPER, *supra* note 14, § 4416, at 425 ("Almost all of the modern expansions of res judicata, indeed, involve issue preclusion.").

71. Few courts have attempted to define "issue" in the abstract for preclusion purposes. At the same time most courts have had little difficulty in deciding whether issues are in fact identical. *See* WRIGHT, MILLER & COOPER, *supra* note 14, § 4417, at 450–54; RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. c (AM. LAW INST. 1982) (suggesting that the following factors be taken into account in determining whether issues are identical: (1) whether there is substantial overlap in evidence or argument in the two cases; (2) whether new evidence or argument would involve the same issues of law; (3) whether discovery in F-1 embraced matters sought to be presented in F-2; and (4) whether the claims in F-1 and F-2 are closely related).

72. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 28; Montana v. United States, 440 U.S. 147, 153–54 (1979) ("To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions."); *see* S. Pac. R.R. Co. v. United States, 168 U.S. 1, 48–49 (1897) ("The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and

the parties to F-1 and F-2 are not the same. Due process dictates that a person who is not a party to the F-1 judgment cannot be bound by that judgment.[73] This rule makes sense; a party that has not had its day in court should not be barred from litigating an issue.[74] For example, assume a car and a bus collide at an intersection. D, the driver of the car, sues B, the bus company, for negligence. In F-1, the court finds that B was 100% negligent and that D was free of any negligence, and D thus wins F-1. Subsequently, P, a passenger on the bus sues both D and B for negligence. D may not invoke issue preclusion on the issue of negligence against P, notwithstanding the F-1 ruling in its favor, because P was not a party to F-1.[75]

The situation is much different, however, where a stranger to F-1 seeks to invoke the benefits of the F-1 judgment in F-2 against the F-1 loser. For example, in the car-bus crash hypothetical above, suppose P, a passenger on the bus, in F-2 seeks to preclude the bus company, which had been already found 100% liable for the accident in F-1, from defending on the issue of negligence in F-2. Unlike the previous situation, B was a party to F-1, did defend on the merits, and lost. B thus had its one bite of the apple in F-1.

Should P, a stranger to F-1, be able to benefit from the F-1 judgment in F-2? Initially, the courts answered no, citing the rule of mutuality, which provides that one who is not bound by a judgment cannot benefit from that judgment.[76] Hence, in the hypothetical

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repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue, and actually determined by them.").

73. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard.") (citations omitted); *see also* Taylor v. Sturgell, 553 U.S. 880, 892–93 (2008) ("A person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit. The application of claim and issue preclusion to nonparties thus runs up against the 'deep-rooted historic tradition that everyone should have his own day in court.'").

74. *Sturgell*, 553 U.S. at 892–93.(which source is this citing? Cannot have "*Id.*" when the preceding footnote that has two sources).

75. Neenan v. Woodside Astoria Transp. Co., 261 N.Y. 159, 161 (N.Y. 1933).

76. *See* WRIGHT, MILLER & COOPER, *supra* note 14, § 4436, at 666; *see also* Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 127 (1912) ("It is a principle of general elementary law that the estoppel of a judgment must be mutual.").

above, P could not assert issue preclusion against B in F-2 because had B been successful in F-1, B would not have been able to assert the F-1 judgment against P, who had not been a party thereto. Although "the rule of mutuality established a pleasing symmetry"[77]—if you are not bound by a judgment, you cannot benefit from that judgment—it was in reality, the product of "intuitional thinking"[78] and "a vague unanalyzed generalization, conceived, no doubt, in response to felt injustices or anomalies in certain situations, but conceived with a sprawling generality unjustified by those situations."[79]

Thus, as a rule of law, mutuality was suspect from the beginning. Worse, in certain situations, mutuality could produce unacceptably bad results.[80] The most prominent example of bad results arose in cases involving imputed liability giving rise to the right of indemnity.[81] Suppose driver D and driver E, an employee of O, get into an accident while E is driving O's car in the ordinary course of business. In F-1, D sues E and loses; E was found not to have been negligent. In F-2, D sues O on a theory of imputed liability. O could be liable only if E were found to have been negligent, but the F-1 court had exonerated E. O wants to assert the F-1 judgment as a bar to any attempt to prove its negligence in F-2. Under the mutuality principles, O cannot assert the F-1 judgment as a defense because had D been

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77. *See* WRIGHT, MILLER & COOPER, *supra* note 14, § 4463, at 666.

78. Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 305 (1957).

79. *Id.* at 322; *see* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 (1979) ("By failing to recognize the obvious difference in position between a party who has never litigated an issue and one who has fully litigated and lost, the mutuality requirement was criticized almost from its inception."); Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found., 402 U.S. 313, 327 (1971) ("In its pristine formulation, an increasing number of courts have rejected the principle as unsound.")

80. *See* WRIGHT, MILLER & COOPER, *supra* note 14, § 4463, at 671–74.

81. *Id.* § 4463 at 672–73 ("Early statements [of the rationale for an exception in indemnity situations] often were simply that it would be unjust to insist on mutuality. A more formal explanation was that the indemnitee should be subrogated to the third person's claim against the indemnitor, but the indemnitor's victory has destroyed that claim. The most direct statement, however, is that denial of preclusion would force an impossible choice between unacceptable alternatives. If a second action can be maintained against the indemnitee, either the indemnitee must be allowed to assert his right of indemnification or the right must be defeated by the judgment in favor of the indemnitor. To allow the right of indemnification would be to destroy the victory won by the indemnitor in the first action. To deny the right of indemnification would be to destroy the indemnitee's right by the result of an action in which he took no part. It is far better to preclude the third person, who has already had one opportunity to litigate, and who often could have joined both adversaries in the first action.").

successful in F-1, D would not have been able to utilize the F-1 judgment against O, who was not a party thereto. Now, assume further that F-2 then proceeds to trial and D wins. O has to pay D. Under basic tort rules, O, the passive tortfeasor, would ordinarily be entitled to indemnity from E, the active tortfeasor. However, were O to pursue indemnity against E, O would lose; E has already been exonerated from any claim of negligence. O would be left holding the bag because D got a second bite of the apple and in F-2 was able to convince a jury what it had failed to prove in F-1—that E had been negligent.[82] Thus, allowing principles of mutuality to effectively trump the right to indemnity would produce mischievous results.

To address this anomaly, the courts developed an exception to the rule of mutuality in cases involving imputed liability.[83] Accordingly, O would be able to use the F-1 judgment as a defense in F-2; specifically, O could bar D from introducing any evidence of E's negligence in F-2. This exception was limited to situations where the passive wrongdoer (such as O) was invoking F-1 as a defense.[84]

In theory, O should also be able to invoke F-1 offensively as a basis of recovery. Suppose in the foregoing example that in F-1, D sues E and loses because D was 100% negligent. Suppose further that in F-2, O now wants to sue D for damage for its car. Now, O is invoking non-mutual issue preclusion as a sword and not a shield—as a basis of recovery, rather than as a defense. Courts initially were unwilling to go that far.[85] They drew a line in the sand, distinguishing defensive non-mutual issue preclusion (permissible) from offensive non-mutual issue preclusion (impermissible).[86]

The rationale for this offensive/defensive distinction was that defensive non-mutual issue preclusion promoted the underlying goals of issue preclusion—peace, efficiency, and consistency—but that

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82. *Id.* § 4463, at 671.

83. *Id.* § 4463, at 673.

84. *Id.* § 4463, at 671; *see* Bernhard v. Bank of America Nat. Trust & Savings Ass'n, 122 P.2d 892, 812 (Cal. 1942) ("The courts of most jurisdictions . . . recogniz[e] a broad exception to the requirements of mutuality and privity, namely, that they are not necessary where the liability of the defendant asserting the plea of res judicata is dependent upon or derived from the liability of one who was exonerated in an earlier suit brought by the same plaintiff upon the same facts.").

85. WRIGHT & KANE, *supra* note 21, § 100A, at 659 (noting the hesitancy of courts to allow offensive non-mutual issue preclusion); *see* Nevarov v. Caldwell, 327 P.2d 111, 122 (Cal. 1958) (rejecting offensive non-mutual issue preclusion in automobile accident case); *see* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329 n.11 (1979) (citing academic criticism of offensive non-mutual issue preclusion).

86. WRIGHT & KANE, *supra* note 21, § 100A, at 659.

offensive non-mutual issue preclusion not only was at odds with some goals of issue preclusion but also was likely to produce unfair results.[87] The distinction is not illogical. In the case of defensive non-mutual issue preclusion, suppose there is one plaintiff who has three potential defendants. Would the plaintiff sue the defendants together in one suit or seriatim? The answer is that the plaintiff would have a strong incentive to sue the defendants together. If it sued only D-1 and won, it would get no benefit against D-2 and D-3 because they were not parties to F-1, and thus not bound thereby.[88]

If the plaintiff sued only D-1 and lost, it would then face the defense of issue preclusion in F-2 and F-3 from D-2 and D-3. Accordingly, the smart move would be to sue all the defendants in one suit. Permitting defensive non-mutual issue preclusion thus discourages multiple suits, encourages efficiency, and assures consistency of outcome, and is therefore consistent with the underlying goals of issue preclusion.[89]

Notably, the Supreme Court in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*[90] held that mutuality does not bar defensive use of issue preclusion as long as the defendant against whom the estoppel is asserted had a full and fair opportunity to litigate the issue:[91]

> In any lawsuit where a defendant, because of the mutuality principle, is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources. To the extent the defendant in the second suit may not win by asserting, without contradiction, that the plaintiff had fully and fairly, but unsuccessfully, litigated the same claim in the prior suit, the defendant's time and money are diverted from alternative uses – productive or otherwise – to relitigation of a decided issue. And, still assuming that the issue was resolved correctly in the first suit,

87. *See Parklane*, 439 U.S. at 329–31 (outlining objections to offensive non-mutual issue preclusion).

88. Neenan v. Woodside Astoria Transp. Co., 261 N.Y. 159, 161 (N.Y. 1933).

89. *Parklane*, 439 U.S. at 329–30 ("Thus defensive collateral estoppel gives a plaintiff a strong incentive to join all potential defendants in the first action if possible.").

90. 402 U.S. 313 (1971).

91. *Id.* at 329.

> there is reason to be concerned about the plaintiff's allocation of resources. Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or 'a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure'. *Kerotest Mfg. Co. v. C-O-Two Co.*, 342 U. S. 180, 185 (1952). Although neither judges, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard.[92]

Now, suppose multiple plaintiffs are contemplating a suit against one defendant. Here, the incentives are very different from those in the foregoing scenario. If plaintiff P-1 sues individually and loses in F-1, the other plaintiffs are not bound and can sue D subsequently. If P-1 sues and wins, and the other plaintiffs could benefit from P-1's win by precluding D's defense in later cases, then the other plaintiffs would have strong incentives to sue separately and not jointly.[93] Those other plaintiffs would wait and see, suing only after F-1 had been decided. In that case, plaintiffs have the best of both worlds; they are not bound by P-1's loss and can benefit from P-1's victory. A rule that would permit offensive use of issue preclusion by a stranger to F-1 would thus encourage multiple suits, thereby undermining the goals of peace and efficiency.[94] Moreover, further mischief may ensue. Suppose P-1 through P-4, suing separately from each other, each loses in F-1 through F-4. P-5, not bound by the earlier suits, sues and wins in F-5. P-6 and all subsequent plaintiffs then seek to invoke the benefits of F-5, ignoring the results in F-1 through F-4. To allow such results would not only undermine basic principles of preclusion by locking in inconsistent judgments, but also would be very unfair to D by ignoring D's victories in F-1 through F-4.[95]

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92. *Id.*

93. *Parklane*, 439 U.S. at 330.

94. *Id.*

95. *Id.* at 330–31 and n.14; *see* Pooshs v. Philip Morris USA, Inc., 904 F. Supp. 2d 1009, 1034 (N.D. Cal. 2012) ("[T]he court is not persuaded that it would be fair to give preclusive effect to the findings of the court in the [F-1] case, given the numerous other inconsistent judgments, with some favoring tobacco defendants and some favoring plaintiffs—or to apply a preclusive effect based on a single adverse

The differing incentives in the foregoing factual scenarios led the courts to draw a bright line permitting defensive non-mutual issue preclusion but barring offensive non-mutual issue preclusion. Thus, non-mutual preclusion could be used as a shield but not as a sword.

B. The Decline of Mutuality

As discussed,[96] though the mutuality approach had some visceral appeal, beyond vague arguments of fairness, the doctrine was difficult to justify. In *Bernhard*, Justice Traynor observed that "[j]ust why a party who was not bound by a previous action should be precluded from asserting it as res judicata against a party who was bound by it is difficult to comprehend."[97] Criticism of mutuality, dating back to the nineteenth century,[98] abounded by the mid-twentieth century, and Justice Traynor's full-fledged frontal assault in *Bernhard*[99] led courts and scholars alike to rethink the utility of the mutuality doctrine.

Bernhard involved the settlement of the estate of Clara Sather. Prior to her death, the elderly and ailing Mrs. Sather lived under the care of Mr. and Mrs. Cook, and she authorized Cook to make withdrawals from her bank account. Cook did so from time to time to meet Mrs. Sather's expenses. Cook also withdrew funds from Mrs. Sather's account and transferred them to his own account for his benefit.[100] Following Mrs. Sather's death, Cook qualified as executor of her estate.[101] He then administered the estate and subsequently filed an accounting with the probate court, accompanied by his resignation.[102] The accounting made no mention of the funds transferred from Mrs. Sather's bank account to Cook, and Mrs. Sather's heirs objected, claiming that Cook had embezzled Mrs. Sather's funds.[103] The

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judgment."); Harrison v. Celotex Corp., 583 F. Supp. 1497, 1503 (E.D. Tenn. 1984) (holding that plaintiff's motion for preclusion denied where there had been thirty-five previous asbestos judgments for defendants).

96. *See supra* notes 76-82 and accompanying text.

97. Bernhard v. Bank of America Nat. Trust & Savings Ass'n, 122 P.2d 892, 894–95 (Cal. 1942).

98. *See* JEREMY BENTHAM, 7 THE WORKS OF JEREMY BENTHAM 171 (John Bowring ed., 1843).

99. *Bernhard*, 122 P.2d at 894–95.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

probate court disagreed and ruled that Mrs. Sather had made a gift of the funds in question to Cook.[104]

Following Cook's resignation, Mrs. Sather's daughter, Helen Bernhard, was appointed the administrator of the estate and brought an action against Mrs. Sather's bank for wrongfully transferring the funds in question to Cook.[105] The bank pleaded the prior judgment, arguing that since the F-1 court found that Mrs. Sather had made a gift to Cook, the bank's transfer to Cook as a matter of law could not have been wrongful.[106] Bernhard argued that mutuality was lacking, and since the bank was not bound by the F-1 judgment, it could not benefit from that judgment.[107]

Justice Traynor, writing for a unanimous court, disagreed with Bernhard and ruled that the absence of mutuality did not bar the bank from asserting the F-1 judgment as a defense.[108] Justice Traynor might have viewed this case narrowly as within the well-recognized exception to mutuality involving imputed liability and ruled that the bank, as a passive wrongdoer, could not be held liable if the conduct of Cook, the active wrongdoer, were held lawful. But, Traynor opted not to take the narrow view. He "chose instead to extirpate the mutuality requirement and put it to the torch":[109]

> The criteria for determining who may assert a plea of res judicata differ fundamentally from the criteria for determining against whom a plea of res judicata may be asserted. The requirements of due process of law forbid the assertion of a plea of res judicata against a party unless he was bound by the earlier litigation in which the matter was decided . . . He is bound by that litigation only if he has been a party thereto or in privity with a party thereto. There is no compelling reason, however, for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation.
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104. *Bernhard*, 122 P.2d at 894–95.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. Brainerd Currie, *Civil Procedure: The Tempest Brews*, 53 CAL. L. REV. 25, 26 (1965).

> In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?[110]

Read broadly, the *Bernhard* opinion thus abolishes the requirement of mutuality altogether.[111] Commenting on *Bernhard*, Professor Currie stated that "the glib and superficial requirement of mutuality of estoppel had been permanently laid to rest by a triumph of judicial statesmanship,"[112] and further that "[t]he demise of the requirement of mutuality was a welcome event."[113] Many,[114] but not all,[115] states followed suit and abolished mutuality.

Bernhard's "transformation of estoppel law was neither instantaneous nor universal."[116] Although cautious, the federal courts eventually followed *Bernhard* and abolished mutuality in two stages. First, in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*,[117] the Supreme Court upheld defensive non-mutual issue preclusion.[118] In *Blonder Tongue*, the patentee brought an infringement action against A in F-1 and lost because the court held the patent invalid.[119] Subsequently, in F-2, the patentee sued B, alleging the

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110. *Bernhard*, 122 P.2d at 894–95.

111. *See* WRIGHT, MILLER & COOPER, *supra* note 14, § 4464, at 330.

112. *See* Currie, *supra* note 78, at 285.

113. *Id.* at 284.

114. *See* WRIGHT, MILLER & COOPER, *supra* note 14, § 4464, at 682 n.1 ("Most courts have abandoned the mutuality requirement."); *see, e.g.*, B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 147 (1967) ("[T]he 'doctrine of mutuality' is a dead letter."). *See generally* Bahler v. Fletcher, 474 P.2d 329 (Or. 1970) (en banc); Richards v. Hodson, 485 P.2d 1044 (Utah 1971); Lucas v. Velikanje, 471 P.2d 103 (Wash. Ct. App. 1970).

115. *See generally* Daigneau v. Nat'l Cash Reg. Co. 247 So. 2d 465 (Fla. Dist. Ct. App. 1971); Lukacs v. Kluessner, 290 N.E.2d 125 (Ind. Ct. App. 1972); Keith v. Schiefen-Stockham Ins. Agency, Inc. 498 P.2d 265 (Kan. 1972); Howell v. Vito's Trucking & Excavating Co., 191 N.W.2d 313 (Mich. 1971); Armstrong v. Miller, 200 N.W.2d 282 (N.D. 1972).

116. Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 326 (1971); *see* Note, *A Probabilistic Analysis of the Doctrine of Mutuality of Collateral Estoppel*, 76 MICH. L. REV. 612, 618 (1978) ([T]he *Bernhard* doctrine, in the interest of judicial economy, clearly retreats from a commitment to substantive justice.")

117. *Blonder-Tongue*, 402 U.S. at 349–50.

118. *Id.* at 314–15.

119. *Id.* at 315–16.

same patent had been infringed.[120] The trial court, on the authority of *Triplett v. Lowell*,[121] permitted the F-2 case to go forward. The Seventh Circuit affirmed that ruling.[122] Before the Supreme Court, the United States, as amicus curiae, argued that the rule of mutuality of estoppel should be abandoned in patent cases.[123] Reversing, the Supreme Court upheld the defense of non-mutual issue preclusion, noting that repeated litigation by the putative patentee in an effort to have its patent upheld would lead to a serious misallocation of resources, and further, "[p]ermitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or 'a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure.'"[124] The Court concluded that defensive non-mutual issue preclusion is not unfair, and the "requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard."[125]

The second stage of the federal abolition of mutuality came eight years later in *Parklane Hosiery Co. v. Shore*.[126] In *Parklane*, a shareholder filed a class action against the company under the federal securities laws, alleging false statements in a proxy statement issued in connection with a merger. Thereafter, the Securities and Exchange Commissions ("SEC") brought an enforcement action against *Parklane*, seeking to enjoin the false statements. The SEC case was tried first, and the court, sitting without a jury, ruled that the proxy statement was materially false and misleading and issued a declaratory judgment to that effect.[127]

Thereafter, plaintiffs in the shareholders' action moved for partial summary judgment barring the company in F-2 from defending against the fraud allegations.[128] Faced squarely with the question of whether to permit offensive non-mutual issue preclusion, the Court noted the erosion of the mutuality principle in the wake of *Bernhard*[129] but also recognized powerful arguments that had been advanced

120. *Id.*
121. 297 U.S. 638 (1936).
122. *Blonder-Tongue*, 402 U.S. at 317.
123. *Id.* at 319.
124. *Id.* at 329 (citation omitted).
125. *Id.*
126. 439 U.S. 322 (1979).
127. *Id.* at 324–25.
128. *Id.* at 325.
129. *Id.* at 326–28.

against offensive non-mutual issue preclusion.[130] First, whereas defensive non-mutual issue preclusion creates incentives to join all defendants is one action, offensive non-mutual issue preclusion may encourage a "wait and see" attitude by plaintiffs and proliferation of litigation.[131] Second, offensive non-mutual issue preclusion may prove unfair to defendants.[132] For example, if the F-1 litigation is nominal in nature, the defendant may not have a strong incentive to defend the case aggressively and may be lulled into a false sense of security.[133] If the defendant then loses F-1 and the F-2 plaintiff sues for significantly higher damages, the defendant is put at an unfair disadvantage in F-2 if the F-2 plaintiff seeks to invoke the benefits of the F-1 judgment in the higher stakes F-2 litigation.

Third, if the judgment relied on to estop the defendant from defending is "inconsistent with one or more previous judgments in favor of the defendant," then preclusion should be denied.[134] Otherwise, prior judgments favoring the defendant would be totally devalued. Fourth, it may be unfair to invoke offensive non-mutual issue preclusion where F-2 affords the defendant procedural opportunities, such as broader discovery, not available in F-1.[135]

The Court ruled that "the preferable approach . . . is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied."[136] It further ruled that, generally speaking, offensive non-mutual issue preclusion should not be allowed when the plaintiff could easily have joined the earlier action, or where the application of non-mutual issue preclusion would be unfair to the defendant for the reasons discussed above or "for other reasons."[137] Accordingly, the exceptions recognized and discussed by the Court are not meant to be exclusive.[138] The Court found that on the record before it, "none of the circumstances that might justify a reluctance to allow the offensive use of collateral

130. *Parklane*, 439 U.S. at 329–31.
131. *Id.* at 329–30.
132. *Id.* at 330–31.
133. *Id.* at 330.
134. *Id.*
135. *Parklane*, 439 U.S. at 330–31.
136. *Id.* at 331.
137. *Id.*
138. *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 29 (AM. LAW INST. 1982) (setting forth circumstances in which offensive nonmutual issue preclusion may be inappropriate); *see aslo* In re Air Crash at Detroit Metro. Airport, 776 F. Supp. 316, 324 (E.D. Mich. 1991); Exotics Hawaii–Kona, Inc. v. E I. Dupont De Nemours & Co., 90 P.3d 250, 265 (Haw. 2004).

estoppel is present,"[139] and upheld the grant of partial summary judgment barring Parklane from defending on the issue of fraud.[140]

In addition, the Court rejected defendant's claim that allowing offensive non-mutual preclusion would violate its Seventh Amendment right to a jury trial.[141] Defendant argued that to give preclusive effect to a factual finding by the court in the equitable F-1 proceeding would effectively foreclose the jury in the F-2 legal action from leaving and determining that issue.[142] The Court rejected the "rigid" construction of the Seventh Amendment advocated by the defendant[143] and held that a factual finding by the court in an equitable action can have preclusive effect in a subsequent legal action where a jury trial has been demanded.[144] Nor should any construction of the Seventh Amendment turn on whether mutuality of the parties exists:[145]

> A litigant who has lost because of adverse factual findings in an equity action is equally deprived of a jury trial whether he is estopped from relitigating the factual issues against the same party or a new party. In either case, the party against whom estoppel is asserted has litigated questions of fact, and has had the facts determined against him in an earlier proceeding. In either case there is no further factfinding function for the jury to perform, since the common factual issues have been resolved in the previous action.

Professor Clopton suggests that the Court's ruling on whether F-1 involved a non-jury trial did not affect the application of offensive non-mutual issue preclusion may have involved some sleight of hand since mutual issue preclusion was allowed at the time the Seventh Amendment took effect, but non-mutual issue preclusion was not.[146]

The *Parklane* approach was subsequently embraced by the *Restatement (Second) of Judgments*, promulgated in 1982. Section 29 of the *Restatement (Second) of Judgments* provides a list of factors similar to, but more detailed than, the factors enumerated in *Parklane*.[147] The guiding principle under section 29 is "that a party should not be

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139. *Parklane*, 439 U.S. at 331.
140. *Id.* at 332–33.
141. *Id.* at 336.
142. *Id.* at 335.
143. *Id.* at 336.
144. *Parklane*, 439 U.S. at at 335.
145. *Id.* at 335–36.
146. *See* Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. (forthcoming 2019) (article at 17 n.113) (https://ssrn.com/abstract=3290345).
147. RESTATEMENT (SECOND) OF JUDGMENTS § 29 (AM. LAW INST. 1982).

precluded unless his previous opportunity was at least the equivalent of that otherwise awaiting him in the present litigation."[148]

III. PARKLANE IN ACTION

The *Parklane* holding was transformative; instead of a rule of mutuality subject to limited and clearly defined exceptions, we now have a rule for non-mutuality subject to an exception where non-mutual preclusion would produce unfair results.[149] The federal courts and most state courts have adopted the *Parklane* reasoning. *Parklane* now represents the majority view.[150]

That said, not all state courts have adopted the *Parklane* approach.[151] Moreover, some influential academic writers have questioned the utility and fairness of a broad reading of *Parklane*.[152] Critics would prefer the approach of the initial *Restatement of Judgments*, which advocated a general rule of mutuality subject to limited and clearly defined exceptions.[153] Critics also question whether reasoning underlying non-mutual preclusion—that the defendant is entitled to only one bite of the apple, regardless of whether the adversaries in F-1 and F-2 are the same—may well elevate "simplistic notions of efficiency over real concerns of fairness and substantive policy."[154] First, non-mutuality creates inefficiencies of its own in that it (1) may

148. *Id.* § 29 cmt. b.

149. *See* CASAD & CLERMONT, *supra* note 13 and accompanying text; Clermont, *supra* note 16, at 1121 ("[T]he law faced a basic choice between the rule of mutuality, with a few defined extensions for derivative liability, and the rule of non-mutuality, with lots of mainly fuzzy exceptions."); *see* CASAD & CLERMONT, *supra* note 13, at 185 ("These two are not alternative formulations that end up at the same place in the middle. On the one hand, the extensions to mutuality were rare and limited playing it safe and simple in extending res judicata to situations of real need such as secondary liability. The extensions certainly did not aim at reaching every case in which, on balance, preclusion would be desirable. On the other hand, the exceptions to nonmutuality are many, but they surely do not reach all situations beyond the coverage of mutuality's extensions. The prevailing exceptions do not even recognize all the reasons that preclusion might be undesirable.").

150. *Parklane*, 439 U.S. at 329–33 (finding that the decision of whether to allow offensive nonmutual issue preclusion is within the discretion of the trial courts).

151. *See supra* text accompanying note 11 (see comment above).

152. *See* CASAD & CLERMONT, *supra* note 13, at 176–79; *see* Clopton, *supra* note 146, at 22–23 ("Nonmutuality is an outrage to justice.") (quoting Professor Clermont).

153. CASAD & CLERMONT, *supra* note 13, at 185–86.

154. Clermont, *supra* note 16, at 1122.

encourage a "wait and see" attitude on the part of prospective plaintiffs; (2) stimulates over-litigation of the F-1 action in anticipation of possible preclusive effect on subsequent litigation; and (3) imposes additional litigation costs on the parties and the courts regarding the application of preclusion principles in subsequent litigation.[155]

Second, offensive non-mutual issue preclusion is unfair in that it (1) transforms a decision in an action between a plaintiff and a defendant in which P wins into a much broader determination of the rights of all plaintiffs against D on the same issue; and (2) notably, in mass tort cases, undermines procedural fairness by tilting the playing field decidedly in favor of the stranger to F-1 seeking to invoke issue preclusion against the F-1 loser.[156] The fact that the plaintiff in F-1 risks losing only its case in that court, while the defendant risks losing not only F-1 but all other cases brought by subsequent plaintiffs claiming to be victims of the mass tort, provides the F-1 plaintiff with significant settlement leverage.[157]

Other commentators have questioned the fairness of offensive non-mutual issue preclusion from another perspective. For example, one commentator argues, also in the mass tort context, that there is no prior basis for assuming that a judgment in F-1 in favor of P-1 is correct.[158] Indeed, the F-1 judgment for the plaintiff may be an aberration. To permit offensive non-mutual issue preclusion and to allow strangers to F-1 to invoke its benefit without sharing the litigation risks of the defendant provides a windfall to those not participating in F-1.[159]

The section below discusses criticisms of offensive non-mutual issue preclusion in two parts. The first question is whether the lower courts have heeded the warnings of the Supreme Court to deny offensive non-mutual issue preclusion in cases where its application would produce unfair results. The second question is whether, in the post-*Parklane* era of complex, multiparty, multidistrict litigation, offensive non-mutual issue preclusion should be abandoned. The short answer to these questions is that implementation of offensive non-mutual issue preclusion by the lower courts has by and large not produced unfair results, and that the growing complexity of modern federal

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155. *Id.*

156. *Id.*

157. *Id.*

158. Byron G. Stier, *Another Jackpot (In)Justice: Verdict Variability and Issue Preclusion in Mass Torts*, 36 PEPP. L. REV. 715, 742 (2009).

159. *Id.* at 744–45 and n.15.

litigation does not warrant abandonment of offensive non-mutual issue preclusion.

A. The Parklane Factors

1. Proliferation of Litigation through "Wait and See"

Parklane makes clear that offensive non-mutual issue preclusion should be denied where the F-2 plaintiff could "easily have joined" the F-1 action.[160] However, whether one should be denied preclusion because it could have easily joined another litigation is a tricky question. The mere fact that a plaintiff chose to sue separately rather than to join an existing action is not disqualifying.[161] Courts respect the right of a party to pursue its own litigation strategy.[162] As long as the thrust of the litigation strategy is not a "wait and see" approach, offensive non-mutual issue preclusion is permissible.[163]

As discussed below,[164] one area where courts have balked at allowing offensive non-mutual issue preclusion is where the F-2 plaintiff had opted out of a class action, the class ultimately prevailed, and now the F-2 plaintiff seeks to invoke preclusion on issues resolved in the F-1 judgment favoring the class.[165] This is a classic example of

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160. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979).

161. *See* McLendon v. Cont'l Grp., Inc. 660 F. Supp. 1553, 1563 (D.N.J. 1987).

162. *Id.* at 1564; *see* RESTATEMENT (SECOND) OF JUDGMENTS § 29 cmt. e (AM. LAW INST. 1982) ("Due recognition should be given . . . to the normally available option of a plaintiff to prosecute his claim without the encumbrance of joining with others whose situation does not substantially coincide with his own.").

163. *McLendon*, 660 F. Supp. at 1564 (noting that a litigation strategy, if not motivated by a "wait and see" approach does not preclude offensive non-mutual issue preclusion); *see* WRIGHT, MILLER & COOPER, *supra* note 14, § 4465.1, at 724–26 ("Preclusion may come to be denied only if it appears that the later plaintiff stayed out of the first action solely in hopes of a one-way option at preclusion.").

164. *See* CASAD & CLERMONT, *supra* note 13, at 187; Clermont, *supra* note 16, at 1122.

165. *See* Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, 814 F.2d 358, 364 (7th Cir. 1987); Polk v. Montgomery Cty., 782 F.2d 1196, 1202 (4th Cir. 1986); Sarasota Oil Co. v. Greyhound Leasing & Fin. Corp., 483 F.2d 450, 452 (10th Cir. 1973); Tardiff v. Knox Cty., 567 F. Supp. 2d 201, 213 (D. Me. 2008); *see* RESTATEMENT (SECOND) OF JUDGMENTS § 42 cmt. d (AM. LAW INST. 1982) (illustrating that when X opts out of a class action against defendant C, X is not precluded by a judgment in favor of C, and similarly if the judgment is against C, X may not invoke the benefit of preclusion regarding issues determined in that action).

the kind of one-way intervention that the 1966 Amendments to the class action rules sought to eliminate.[166]

2. Locking in Inconsistent Judgments

Professor Brainerd Currie, an early critic of offensive non-mutual issue preclusion, developed the mass train wreck hypothetical as definitive proof of the inherent unfairness of offensive preclusion.[167] Suppose, Currie argued, that there were a mass train accident followed by a series of individual personal injury suits.[168] Suppose further that F-1 through F-25 were decided for the railroad, and then the F-26 plaintiff wins.[169] Currie urged that it would be unfair for subsequent plaintiffs to invoke preclusion against the railroad based on the F-26 result. He was right, and *Parklane* agreed with that assessment.[170] Post-*Parklane*, the overwhelming majority of courts have held that imposition of issue preclusion in the face of prior inconsistent judgments would be inappropriate.[171]

However, the Currie hypothetical involves more than merely using non-mutual preclusion to lock-in inconsistent judgments. The more fundamental question is whether one can trust the correctness of the F-1 judgment.[172] As Wright & Miller have observed, there is "[n]o clear answer" to this question.[173] Courts in the antitrust realm have

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166. WRIGHT & KANE, *supra* note 21, § 72, at 471 ("To permit [a party to opt out of a class action and then reap the benefits of any class judgment] would make a mockery of the [Rule] 23(b)(3) procedure, and would restore in a different form the 'one-way' intervention that the amended rule expressly was intended to preclude.").

167. *See* Currie, *supra* note 78, at 281.

168. *Id.*

169. *Id.* at 285–86

170. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330 (1979).

171. *See generally* Shaffer v. R.J. Reynolds Tobacco Co., 860 F. Supp. 2d 991, 996 (D. Ariz. 2012); Aspinall v. Philip Morris Cos., No. 98-6002-H, 2012 WL 1063342 (Mass. Super. Ct. Mar. 13, 2012); City of St. Louis v. Am. Tobacco Co., No. 22982-09652-01, 2010 WL 2917188 (Mo. Cir. Ct. June 2, 2010); In re Light Cigarettes Mktg. Practices Sales Litig., 691 F. Supp. 2d 239 (D. Me. 2010); Curtis v. Altria Grp., No. 27-CV-01-18042, 2009 WL 5820516 (D. Minn. Oct. 14, 2009), *aff'd*, 792 N.W.2d 836 (Minn. Ct. App. 2010); Grisham v. Philip Morris, Inc., 670 F. Supp. 2d 1014 (C.D. Cal. 2009); Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992 (E.D.N.Y. 2006), *rev'd on other grounds*, 522 F.3d 215 (2nd Cir. 2008); *see* WRIGHT, MILLER & COOPER, *supra* note 14, § 4465.3, at 761 ("When nonmutual preclusion is confronted only after a string of inconsistent verdicts, it may seem particularly easy to deny preclusion.").

172. WRIGHT, MILLER & COOPER, *supra* note 14, § 4465.3, at 757.

173. *Id.*

been especially concerned about erroneous outcomes and the resulting false positives.[174] In *Trinko*, the Supreme Court underscored the high cost of error in antitrust cases, observing that "[m]istaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'"[175] Similarly, in *Twombly*, the Court once again warned of the high cost of false positives,[176] and counseled trial courts to refrain from overly broad inferences from complaints and to dismiss at the outset "largely groundless claim[s]".[177] Clearly, where the trial court gets it wrong in the first instance, the application of issue preclusion only compounds the error. Nevertheless, cases involving "dispersed mass torts," such as the *Asbestos* and *Tobacco Cases*, do shed some light on this issue.[178] In the mass tort context, courts have been reluctant to preclude the losing party based on the findings in the initial case out of concern that (1) the facts may not have been fully developed; (2) the court may not have been equally convenient for both parties; and (3) the F-1 case is just a piece of a much longer dispute involving many more parties.[179] However, as the case matures through successive trials, with improved understanding through more detailed discovery and better scientific knowledge, a pattern emerges and results become reliable.[180] In these circumstances, earlier inconsistent judgments "should not stand in the way of preclusion."[181]

3. Differing Stakes in F-1 and F-2

Parklane also cautions that offensive non-mutual issue preclusion should not be invoked so as to take unfair advantage of a defendant by attempting to invoke preclusion as an action for substantial damages based on an F-1 judgment for nominal damages.[182] Suppose two automobile drivers get into a motor vehicle accident. In F-1, D-1 sues D-2 for minor damages to its vehicle and wins a nominal judgment of $350. In F-2, P, a passenger in D-1's car, then sues D-2 for $3.5 million, alleging that it suffered a brain injury in the accident, and

174. *See generally* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).
175. *Trinko*, 540 U.S. at 414.
176. *Twombly*, 550 U.S. at 551.
177. *Id.* at 557–58.
178. WRIGHT, MILLER & COOPER, *supra* note 14, § 4465.3, at 763.
179. *Id.*
180. *Id.*
181. *Id.* at 764.
182. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330 (1979).

seeks to preclude D-2 from defending on the negligence issue. Courts will not allow a defendant to be whipsawed by a nominal F-1 judgment.[183] Note that this situation is a far cry from the facts of *Parklane*. There, defendants knew of potentially massive liability lurking in shareholder suits.[184] Indeed, the shareholder suits had actually been filed *prior* to the SEC enforcement action.[185] Parklane could not credibly maintain that the stakes were not high in F-1, even though only equitable relief had been sought by the government.[186]

4. Difference in Procedural Remedies

Parklane further held that offensive non-mutual issue preclusion would be inappropriate where F-2 offered procedural advantages not available to the defendant in F-1.[187] Again, the lower courts have heeded this admonition. For example, preclusion may be denied where: (1) F-1 is a court of limited subject matter jurisdiction;[188] (2) F-2 has procedural remedies not available in F-1;[189] and (3) witnesses not available in F-1 are available in F-2.[190] In addition, courts have also ruled, despite the view in *Parklane* that unavailability of a jury in F-1 is a neutral factor, that the lack of a jury in F-1 can be taken into account as a "non-dispositive factor when balancing the equities of issue preclusion."[191] Thus, where F-1 was a non-jury trial and F-2 involves punitive damages before a jury, the absence of the jury in F-1 may be considered when deciding the preclusion issue.[192] Finally, preclusion will be denied where the burden of proof in F-1 is less stringent than the F-2 burden of proof.[193]

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183. *Id.*; *see* RESTATEMENT (SECOND) OF JUDGMENTS § 29 (AM. LAW INST. 1982); *see* Univac Dental Co. v. Dentsply Int'l, Inc., 702 F. Supp. 2d 465, 493 (M.D. Pa. 2010) (holding that preclusion was denied and defendant had no incentive to litigate vigorously F-1 issues of causation and damage).

184. *Parklane*, 439 U.S. at 324; *see also* In re DirecTV Early Cancellation Litig., 738 F. Supp. 2d 1062, 1079 (C.D. Cal. 2010) (noting that defendant was a party to other class action cases and knew the stakes).

185. *Parklane*, 439 U.S. at 324.

186. *Id.*

187. *Id.* at 324–25.

188. Pennington v. Snow, 471 P.2d 370 (Alaska 1970).

189. Golino v. City of New Haven, 950 F.2d 864, 869–70 (2d Cir. 1991).

190. WRIGHT, MILLER & COOPER, *supra* note 14, § 4465.2, at 738.

191. *See* Grisham v. Philip Morris Co., 670 F. Supp. 2d 1014, 1036 (C.D. Cal. 2009).

192. *Id.* at 1036–37.

193. Littlejohn v. United States, 321 F.3d 915, 924 (9th Cir. 2003).

5. "Full and Fair Opportunity to Litigate"

The *Parklane* factors are not exhaustive.[194] *Parklane* also made clear that offensive non-mutual issue preclusion should not be allowed where the party against whom preclusion is invoked did not have a full and fair opportunity to litigate the issue in question.[195] *Parklane* thus grants "trial courts broad discretion to determine when [non-mutual preclusion] should be applied."[196] Also, the *Restatement (Second) of Judgments* sets forth a detailed listing of circumstances where offensive non-mutual issue preclusion should not be permitted.[197] The thrust of the *Restatement (Second)* approach is that a party should not be precluded "unless his previous opportunity was at least the equivalent of that otherwise awaiting him in the present litigation."[198] Yet, as Wright & Miller observe, "[l]ower-court decisions have not even approached the possible limits that could be found in the invocation of justice, equity, and discretion."[199] Nor have the courts developed a litmus paper test for fairness;[200] rather, the lower courts have tackled the issue on a case-by-case basis. [201]

Thus, preclusion has been denied where: (1) there is reason to question the viability of the F-1 judgment;[202] (2) F-1 findings are used to preclude some, but not all, of the defendants;[203] (3) no efficiencies would be achieved by preclusion;[204] (4) allowing preclusion might confuse jurors;[205] (5) the burden of proof with respect to the issue upon

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194. *In re* Air Crash at Detroit Metro. Airport, 776 F. Supp. 316, 324 (E.D. Mich. 1991); Exotics Hawai'i-Kona, Inc. v. E.I. Dupont De Nemours & Co., 90 P.3d 250, 265 (Haw. 2004).

195. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 332–33 (1979).

196. *Id.* at 331.

197. RESTATEMENT (SECOND) OF JUDGMENTS § 29 (AM. LAW INST. 1982)

198. *Id.* § 29 cmt. b.

199. *See* WRIGHT, MILLER & COOPER, *supra* note 14, § 4465, at 714.

200. *Blonder-Tongue*, 402 U.S. at 333–34.

201. *See* WRIGHT, MILLER & COOPER, *supra* note 14, § 4465, at 716.

202. *See* Schwartz v. Pub. Admin. of Bronx, 24 N.Y.2d 65, 72 (N.Y. 1969).

203. *See* AIG Ret. Servs., Inc. v. Altus Fin. S.A., No. CV 05-1035-JFW (CWx), 2011 WL 13213602, at *6 (C.D. Cal. 2011).

204. Acevedo-Garcia v. Monroig, 351 F.3d 547, 577 (1st Cir. 2003) ("The need to relitigate individual issues that overlap the common issues may provide a special reason to deny preclusion—little if any trial time will be spared . . .") (quoting 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER § 4465.3); In re Light Cigarettes Mktg. Practices Sales Litig., 691 F. Supp. 2d 239, 251 (D. Me. 2010); Grisham v. Philip Morris Inc., 670 F. Supp. 2d 1014, 1036 (C.D. Cal. 2009); Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992, 1052 (E.D.N.Y. 2006).

205. *Light Cigarettes*, 691 F. Supp. 2d at 251; *Schwab*, 449 F. Supp. 2d at 1079.

which preclusion is sought is more demanding in F-2 than in F-1;[206] (6) there is a difference in governing law between F-1 and F-2;[207] and (7) there are inconsistent judgments on the issues.[208] In short, the courts have the tools to rein-in rogue uses of non-mutual preclusion and have utilized these tools to avoid unfair applications of that doctrine. The parade of horribles predicted by the critics of offensive non-mutual issue preclusion has simply not come about.

B. Modern Criticism

The traditional arguments against offensive non-mutual issue preclusion are not without substance, but they are not sufficiently compelling in light of *Parklane* to justify the abandonment of offensive non-mutual issue preclusion.[209] They certainly do not warrant a return of mutuality principles espoused in the first *Restatement of Judgments*. Nevertheless, doubts about the wisdom of allowing offensive non-mutual issue preclusion persist.[210] The twenty-first-century arguments against offensive non-mutual preclusion are more nuanced than those made pre-*Parklane*. These arguments focus on (1) asymmetry of risk between the F-1 defendants and the stranger to F-1 seeking to invoke its benefits; (2) the probability of error in F-1 that could result in locking in wrong outcomes in all subsequent litigation; (3) the administrative costs of implementing offensive non-mutual issue preclusion.[211]

1. Asymmetry of Risks

A fundamental objection to sanctioning offensive non-mutual issue preclusion is that litigation risks are not shared equally by plaintiffs and defendants.[212] The F-1 plaintiff is litigating only its case, while the F-1 defendant is litigating not only the F-1 case but also all cases that might be brought against it by all other similarly situated plaintiffs. For example, in the train wreck scenario, the single-plaintiff

206. *See* Littlejohn v. United States, 321 F.3d 915, 924 (9th Cir. 2003).

207. Schor v. Abott Labs., 457 F.3d 608, 615 (7th Cir. 2006).

208. Syverson v. IBM Corp., 472 F.3d 1072, 1080 (9th Cir. 2007) ("[A]llowing plaintiffs to cherry-pick favorable prior decisions to preclude issues in an ongoing or subsequent litigation raises serious fairness concerns.").

209. *See* WRIGHT, MILLER & COOPER, *supra* note 14, § 4464, at 695.

210. *See* CASAD & CLERMONT, *supra* note 13, at 185–86.

211. *Id.* at 176-77.

212. *Id.* at 177.

passenger in F-1 is concerned only about its claim; but in defending F-1, the railroad must take into account the risks posed by the F-1 claim, as well as the risks posed by all future claimants who are not parties to F-1.[213] The differences in financial risks between individual plaintiffs and the defendant may be enormous. This asymmetry in risk, in turn, gives plaintiffs significant settlement leverage.[214] As a result, plaintiffs may be able to extract higher settlements than would be the case if offensive non-mutual issue preclusion were not permitted.

The asymmetry of risks, in turn, encourages other passengers on the train to sit on the sideline and await the outcome of F-1. Those other passengers have little incentive to join F-1; they are not bound by any adverse judgment and may invoke the benefits of a favorable judgment.[215] Because other plaintiffs have the incentive to adopt a wait-and-see posture and not join the F-1 case, allowing offensive non-mutual issue preclusion would encourage the proliferation of litigation, thereby undermining the basic goals of issue preclusion—peace, consistency, and efficiency.[216]

The simple answer to these objections is that the risks of litigation are almost always asymmetric. The plaintiff chooses the time, place, forum, and grounds for the lawsuit and therefore always has a leg up on the defendant. Moreover, in cases involving enforcement action by the federal government, such as the securities fraud case in *Parklane* or an antitrust criminal prosecution by the Antitrust Division, defendants almost always have more at stake than the government enforcers because of the likelihood of private damages actions down the road. Furthermore, where F-1 is an enforcement action, defendants cannot argue that private plaintiffs' failure to join F-2 bars their assertion of offensive issue preclusion because private plaintiffs cannot be parties to F-1 and have no choice but to "wait and see." Thus, free riding by prospective plaintiffs may be unavoidable in certain circumstances. In those situations, defendants are well aware that the F-1 outcome has significant implications beyond the facts of that particular litigation. Equally important, as discussed below,[217] even if issue preclusion does not apply, defendants still would have a strong incentive to litigate F-1 aggressively in order to avoid adverse stare decisis effects. The asymmetry of risk arises from the factual context

213. *Id.*
214. *Id.*; *see* CLERMONT, *supra* note 16, at 1122.
215. CASAD & CLERMONT, *supra* note 13, at 176.
216. *Id.*
217. *See infra*, n. 246 and accompanying text.

in which the case arises, not from permitting offensive non-mutual issue preclusion.

That is not to say that free riding should be encouraged. *Parklane* makes abundantly clear that where a stranger to F-1 seeking to invoke its benefits "could easily have joined" that litigation, issue preclusion should be denied.[218] Courts have heeded this directive. A case in point involves class actions pursuant to Rule 26(b)(3) of the Federal Rules of Civil Procedure, where a class member chooses to opt out of the class.[219] Then, after the class has been successful in its suit, the now-individual plaintiff, having previously opted out, seeks to invoke the benefits of the class judgment.[220] The vast majority of courts who have faced this issue have denied offensive non-mutual issue preclusion, noting that this is precisely the kind of "one-way intervention" that amended Rule 26(b)(3) sought to eliminate.[221]

Similarly, courts need to be particularly vigilant in mass tort cases, such as those involving asbestos, tobacco, and prescription drugs, where, in effect, a whole industry may be tried in the F-1 litigation, and the outcome of the F-1 litigation could determine the fate of that entire industry.[222] In these cases, the asymmetry of risk between the F-1 plaintiff and F-1 defendant may well justify denial of offensive non-mutual issue preclusion, at least where the F-1 action is the only decision to have been rendered by any court. Judge Posner's rationale for denying class certification in *Rhone-Poulenc*[223] applies equally to the question of offensive non-mutual issue preclusion:

> For this consensus or maturing of judgment the district judge proposes to substitute a single trial before a single jury. . . . One jury . . . will hold the fate of an industry in the palm of its hand. . . . That kind of thing can happen in our system of civil justice. . . . But it need not be tolerated when the alternative exists of submitting an issue to multiple juries constituting in the aggregate a much larger and more diverse sample of

218. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979).

219. *See, e.g.*, Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, 814 F.2d 358, 365 (7th Cir. 1996).

220. *Id.*

221. *Id.* at 362–65; In re TFT-LCD (Flat Panel) Antitrust Litigation, MDL No. 1827, 2012 WL 4858836 (N.D. Cal. Oct. 12, 2012) at *4.

222. *Cf.* Castano v. American Tobacco Co., 84 F.3d 734, 748 (5th Cir. 1996) (recognizing the perils of placing the fate of an entire industry in the hands of a single jury).

223. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1295 (7th Cir. 1995).

> decision-makers. That would not be a feasible option if the stakes to each class member were too slight to repay the cost of suit. . . . But this is not the case. . . . Each plaintiff if successful is apt to receive a judgment in the millions. With the aggregate stakes in the tens or hundreds of millions of dollars, or even in the billions, it is not a waste of judicial resources to conduct more than one trial, before more than six jurors, to determine whether a major segment of the international pharmaceutical industry is to follow the asbestos manufacturers into Chapter 11.[224]

Mass torts should be distinguished from single-event mass accident cases, such as those involving airplane crashes,[225] where claims are based on one incident, as opposed to a series of incidents. In mass tort cases, liability issues may be highly individualized. For example, in asbestos cases, outcomes for individual plaintiffs may differ depending upon: (1) the nature and duration of their exposure to asbestos; (2) whether they were smokers; and (3) whether they lived in a region where air quality was poor. Simply put, it is difficult to lump these various individual plaintiffs into one category. On the other hand, in air crashes involving mass fatalities, the liability issues are the same with respect to all plaintiffs across the board. In such cases, courts can generally feel confident in applying offensive non-mutual issue preclusion.[226]

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224. *Id.* at 1300.

225. *See* WRIGHT, MILLER & COOPER, *supra* note 14 § 4465.3, at 757–58. One distinction that may help sort through the multiple claimant problem is drawn between "single-event" wrong that injure many people all at once and "dispersed" mass event that injure many people at different times and places. Single events are commonly identified with torts involving such matters as the crash of a common-carrier vehicle, a hotel fire, or collapse of a building. Dispersed events are commonly identified with environmental contamination or products associated with widespread injury. The problem of nonmutual preclusion is likely to arise when the widespread injuries are sufficiently serious to support multiple individual actions; widespread but trivial injury, commonly identified with petty consumer fraud, is more likely to be addressed by a class action or a small number of aggregated actions.
Id.

226. *See, e.g.*, In re Air Crash at Detroit Metro. Airport at Detroit, Mich. on Aug. 16, 1987, 776 F. Supp. 316, 323–26 (E.D. Mich. 1991) (explaining that it is not unfair to permit individual plaintiffs to invoke offensive non-mutual issue preclusion in light of the thoroughness of the pretrial and trial proceedings, defendant's claims of unfairness ring hallow); *see generally* WRIGHT, MILLER & COOPER, *supra*

This is not to suggest that offensive non-mutual issue preclusion is *never* appropriate in mass tort cases. As discussed above,[227] as mass tort litigation matures through successive trials, consistent findings emerge and results become sufficiently reliable to warrant the application of offensive non-mutual issue preclusion.

2. Probability of Error

Broadly speaking, the preclusion doctrine presents a policy choice between getting litigation done and getting it right; that is, efficiency vs. fairness.[228] Critics of non-mutual issue preclusion question whether it is fair to assume that a first-in-time judgment is, in fact, correct, and therefore dictates the outcome of all related litigation.[229] Obviously, if the F-1 judgment were wrong, the invocation of offensive non-mutual issue preclusion multiplies the magnitude of the court's error and the concomitant unfairness to defendants. However, courts are not powerless to deal with these situations. If a judgment is plainly wrong, if—for example, circumstances suggest a compromise verdict or a verdict based on defendants' deep pockets—then "taking the prior determination at face value for purposes of the second action would extend the effects of imperfections in the adjudicative process beyond the limits of the first adjudication, within which they are

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note 14 § 4465.3, at 758; *but see* Acevedo-Garcia v. Monroig, 351 F.3d 547, 572–77 (1st Cir. 2003) (explaining that in single-event cases, non-mutual preclusion may be denied where there is significant overlap between the issues to be tried and the issues to be precluded because invoking preclusion in these circumstances is not likely to achieve significant net gains in efficiency).

227. *See supra* nn. 180–81 and accompanying text.

228. *See* CLERMONT, *supra* note 16, at 1081 ("There is an obvious tradeoff between getting things right and getting them finished.").

229. As Professor Currie has observed:

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

Currie, *supra* note 78, at 289.

accepted only because of the practical necessity of achieving finality."[230] Here, preclusion should be denied. Similarly, if new evidence not available in the initial litigation were discovered in subsequent cases, the court may choose not to allow the invocation of issue preclusion.[231]

Finally, the appellate process assures the integrity of the F-1 findings. If the F-1 judgment is subsequently affirmed in the appellate arena, we can feel confident that the outcome is correct, and to impose issue preclusion based on that outcome would not propagate error.[232]

3. Efficiencies Generated by Preclusion are Illusory

A third argument against offensive non-mutual issue preclusion is that efficiencies generated by its application are illusory.[233] First, the applicability vel non of issue preclusion introduces new issues in the case that must be briefed, argued, and resolved. This process takes time and costs money. For issue preclusion to apply, the court must determine that (a) the issues in F-1 and F-2 are identical; (b) the issue was litigated and determined in F-1; (c) the issue was necessary to the F-1 judgment; and (d) invocation of issue preclusion would not be unfair to the defendant.[234] That is no small task.[235]

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230. RESTATEMENT (SECOND) OF JUDGMENTS § 29, cmt. g (AM. LAW INST. 1982).

231. RESTATEMENT (SECOND) OF JUDGMENTS § 29, cmt. j (AM. LAW INST. 1982).

232. By the same token, non-mutual preclusion may be denied where there was no opportunity to appeal. *See, e.g.*, Winters v. Diamond Shamrock Chemical Co., 149 F.3d 387, 392-96 (5th Cir. 1998).

233. *See* CASAD & CLERMONT, *supra* note 13, at 176 (explaining that in mass tort cases, abandonment of mutuality may very well have increased—not reduced—the amount of judicial effort to resolve common disputes); *see* CLERMONT, *supra* note 16, at 1091–92 ("Efficiency policies can cut the other way too. Litigating about res judicata can be seriously inefficient. In addition to these 'direct costs,' the fear of future preclusion might stimulate over litigation in the initial action. Also, there are the inefficient 'error costs' of deciding to live with an incorrect judgment. Moreover, these economic arguments play out against a complicated background. For example, the parties' settlement in light of prior outcomes would often avoid relitigation without any preclusion rule.").

234. *See* RESTATEMENT (SECOND) OF JUDGMENTS, §§ 28-29 (AM. LAW INST. 1982).

235. *See* Michael D. Green, *The Inability of Offensive Collateral Estoppel to Fulfill Its Promise: An Examination of Estoppel in the Asbestos Litigation,* 70 IOWA L. REV. 141, 186 (1984) ("One lesson vividly demonstrated by the experience in asbestos litigation is that a significant proportion of party and judicial resources may

Among other things, the court must determine whether (1) issues in F-1 and F-2 are identical; (2) certain issues in F-1 were litigated and decided; (3) the losing party in F-1 had a full and fair opportunity to litigate; and (4) prior inconsistent judgments exist.[236] Very little case law exists on whether and when issues are identical for preclusion purposes.[237] In addition, a detailed examination of the trial transcript may be necessary in order to ascertain whether a particular issue was actually litigated and determined in the action.[238] Whether a finding is necessary to judgment is in some cases obvious, but in other cases may require a detailed analysis of the court record.[239] A finding is necessary to the judgment "only when the final outcome hinges on it."[240] Issues decided "only collaterally or incidentally" are not given preclusive effect.[241] As a general matter, outcome turns on findings that are favorable to the F-1 winner; and therefore only issues decided in favor of the F-1 winnter are "ajudicated" for issue preclusion purposes.[242]

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be consumed by the efforts invested in determining whether collateral estoppel is appropriate in a particular case.")

236. *Id.*; *see In re TFT-LCD (Flat Panel) Antitrust Litigation*, MDL No. 1827, 2012 WL 4858836 at *4 (N.D. Cal. Oct. 12, 2012) ("The Court concludes that Dell has not met its burden to show that it can assert offensive nonmutual issue preclusion. Dell opted out of the direct purchaser class action, and the jury was explicitly instructed by the Court that Dell and other opt outs were not part of the litigation, that Dell had brought its own lawsuit, as had others, and that 'the existence of these lawsuits should also not influence your consideration of this case.' As Dell's claims were not before the jury, the jury could not have concluded that 'Toshiba knowingly participated in a conspiracy to fix, raise, maintain or stabilize the prices of TFT-LCD panels sold to Dell.' In addition, in the DPP trial the jury was not instructed to and did not make any findings regarding the identity of Toshiba's alleged co-conspirators or the duration of the conspiracy. The fact that there is substantial overlap between the pleadings and evidence in the DPP case and Dell's case in insufficient to meet Dell's burden of demonstrating that the issues for which it seeks preclusive effect are identical to those that were actually litigated and decided in the DPP trial.") (citations omitted).

237. *See* WRIGHT, MILLER & COOPER, *supra* note 14 § 4417, at 450–52 ("A few decisions have even attempted to define the abstract dimensions of an issue for preclusion purposes."); see RESTATEMENT (SECOND) OF JUDGMENTS §27 reporter's note, cmt. c (AM. LAW INST. 1982) (noting that ascertaining the dimensions of an issue is "most difficult" and proposing a list of relevant factors in defining "issue"); *see also supra* note 71 and accompanying text.

238. *See* CLERMONT, *supra* note 16, at 1117 (discussing the difficulty of establishing issue preclusion).

239. *See* WRIGHT, MILLER & COOPER, *supra* note 14 §4421, at 588–91.

240. Bobby v. Bies, 556 U.S. 825, 835 (2009).

241. Norton v. Larney, 266 U.S. 511, 517 (1925).

242. *See* Cambria v. Jeffrey, 29 N.E. 2d 555, 555–56 (Mass. 1940).

Finally, with respect to whether a party has had a full and fair opportunity to litigate in F-1, the Supreme Court has stated very broadly that "[r]edetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation."[243] Although the cost of ascertaining the applicability of issue preclusion may be significant, so, too, is the cost of additional trials; and it is not at all clear that subsequent trials provide a cheaper alternative.

Second, critics of offensive non-mutual issue preclusion argue that the prospect of preclusion down the line fosters inefficiency by forcing defendants to commit excessive resources to F-1; i.e., to "over-litigate" F-1 to secure a victory and thereby abnegate any preclusion argument in subsequent cases.[244] This argument has some visceral appeal; after all, it makes sense to say that overall litigation expenses, like discovery expenses, should be proportional to the needs of the case.[245] However, on reflection, this argument cannot withstand scrutiny. In the first place, there is no established standard for defining where litigation expenses are proportional to the needs of the case. Indeed, the resources needed to litigate a matter vary from case to case. Secondly, it is not clear what critics mean when they argue that offensive non-mutual issue preclusion creates incentives to "over-litigate." The fact is that even if offensive non-mutual issue preclusion were not permitted, a defendant would still have to litigate the F-1 case in the shadow of other prospective or actual claims in order to avoid adverse effects under the doctrine of stare decisis.[246] Accordingly, the F-1 defendants will always have strong incentives to seek a victory in F-1, even if that means incurring expenses disproportional to the needs of the case, wholly apart from the applicability of the preclusion doctrine. Third, critics of offensive non-mutual issue preclusion further argue that its invocation creates upward pressure on the amounts that

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243. Montana v. United States, 440 U.S. 147, 164 n.11 (1979).

244. *See* Erichson, *supra* note 22, at 950–51 ("[W]herever a litigant can foresee related litigation with nonparties, nonmutual issue preclusion produces incentives to invest greater resources into winning in order to prevent adverse determinations that may carry a damaging issue-preclusive effect in subsequent suits.").

245. *Cf.* Fed. R. Civ. P. 26(b)(1); *see* Erichson, *supra* note 22, at 950 ("The rational litigant will expend resources on the lawsuit in proportion to the stakes of the suit.").

246. ROBERT G. BONE, THE ECONOMICS OF CIVIL PROCEDURE 252 (1st ed. 2003) ("Even with a mutuality rule, [defendant] must worry about stare decisis effects in future suits.")

defendants would have to pay to settle disputes.[247] Where a defendant faces multiple suits by plaintiffs, loss of the F-1 suit could result in liability to many future plaintiffs.[248] The increase in the defendant's costs would exceed an individual plaintiff's expected gain for victory.[249] Inevitably, defendants would have to pay more in order to buy peace. Skeptics, however, question the impact of offensive non-mutual issue preclusion on settlements.[250] Whether non-mutual preclusion actually adds to litigation costs is uncertain. Perhaps the most that can be said is that "[i]t is hard to be confident that on balance, modern rules of issue preclusion actually reduce the total burdens of litigation on either parties or the courts."[251]

C. *The Mendoza Rule: Restricting Offensive Non-mutual Issue Preclusion*

The trend line, however, has not moved uniformly in the direction of the broader application of offensive non-mutual issue preclusion. One situation where the federal courts have countered the trend toward the broader application of preclusion rules involves cases where the United States is the defendant. In *United States v. Mendoza*,[252] the Supreme Court ruled that offensive non-mutual issue preclusion may not be invoked against the United States.[253] The facts of *Mendoza* are somewhat unique. Shortly after attacking Pearl Harbor, Japanese military forces invaded the Philippines Islands, then a territory of the United States. During World War II, Congress passed a statute that would expedite applications for United States citizenship for Filipinos who fought on behalf of the United States.[254] However, at the urging of the Filipino government, which was concerned about

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247. *See* Note, *Reducing the Unfair Effects of Nonmutual Issue Preclusion through Damage Limits*, 94 CORNELL L. REV. 1459, 1471–72 (2019).

248. *Id.*

249. *Id.* at 1472 ("Because a rational defendant will tend to settle a suit if the expected costs of litigation plus the expected outcome exceeds the cost of settlement, nonmutual collateral estoppel increases the amount at which a defendant would rationally be willing to settle.").

250. *See* Michael D. Green, *The Inability of Offensive Collateral Estoppel to Fulfill a Promise: An Examiniation of Estoppel in Asbestos Litigation*, 70 IOWA L. REV. 141, 183–84 (1984) (suggesting that the impact of issue preclusion in bringing about settlements is "apparently inflated").

251. *See* WRIGHT, MILLER & COOPER, *supra* note 14 § 4416, at 437.

252. 464 U.S. 154 (1984).

253. *Id.* at 162.

254. *Id.* at 156.

a possible mass post-war emigration of Filipinos to the United States after impending independence, the program was discontinued.[255]

Decades later, a Filipino veteran sued the United States, alleging that discontinuation of the program to expedite American citizenship applications of Filipino veterans violated due process of law.[256] The lower courts ruled for the Filipino veteran.[257] Thereafter, Mendoza brought a similar action and moved to invoke offensive non-mutual issue preclusion against the government.[258] Rejecting Mendoza's arguments, the Supreme Court held that "nonmutual offensive collateral estoppel simply does not apply against the government in such a way as to preclude relitigation of issues such as those involved in this case."[259]

The Court reasoned that the federal government is not in a position identical to private litigants.[260] First, the government is involved in far more cases than individual private litigants.[261] To force the government to pursue appeals in each case that it lost would be unduly burdensome.[262] Second, the government is involved in cases of particular public importance.[263] Many cases involved Constitutional issues, many of which arise only in litigation to which the government is a party.[264] Accordingly, the government may frequently be a party to lawsuits against different parties that may involve identical legal issues.[265]

Third, a rule permitting offensive non-mutual issue preclusion against the government "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue."[266] Fourth, unlike private litigants, the government must consider factors such as limited government resources and crowded dockets before authorizing appeals.[267] Fifth, successive administrations should remain free to adopt policies

255. *Id.*
256. *Id.* at 156–57.
257. *Mendoza*, 464 U.S. at 157.
258. *Id.* at 156–57.
259. *Id.* at 162.
260. *Id.* at. 159.
261. *Id.* at 159–60.
262. *Mendoza*, 464 U.S. at 161.
263. *Id.* at 160.
264. *Id.*
265. *Id.*
266. *Mendoza*, 464 U.S. at 160.
267. *Id.* at 161.

differing from their predecessors and ought not to be bound by preclusion consequences of judgments accepted by prior administrations.[268]

The Court did not expressly hold that offensive non-mutual issue preclusion could never be invoked against the United States; rather, preclusion limitations apply to "relitigation of issues such as those involved in this case."[269] Nevertheless, the fact that *Mendoza* involved relatively few Filipino veterans and accordingly would have little impact on the public at large suggests that its ban on offensive non-mutual issue preclusion against the government is fairly broad. Courts post-*Mendoza* have generally denied preclusion against the government.[270] Still, some lower courts have permitted preclusion against the government.[271] Professor Wright has suggested that preclusion may be appropriate "when the government brings an action to vindicate essentially private interests."[272] The scope of *Mendoza* remains unclear, but the holding on its own terms would seem to allow for narrow exceptions that would permit offensive non-mutual issue preclusion to be used against the government.[273] Nor did the Court explain why offensive non-mutual issue preclusion should not apply to the government.

Professor Clopton has convincingly argued that the foregoing policy-based explanations do not hold water.[274] First, concerns about encouraging over-litigation, preventing percolation of cases in the lower courts, and creating uncertainty are arguments that apply to the implementation of non-mutual issue preclusion generally and not solely to actions brought against the federal government and do not justify withholding preclusion where the federal government is a defendant.[275]

Second, the contention that the federal government is involved in cases raising issues of importance supports special treatment for the federal government is dubious. Many cases involving private parties raise issues of public importance.[276] Indeed, important public issues litigated by the federal government are not infrequently also litigated

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268. *Id.* at 161–62.

269. *Id.* at 162.

270. *See, e.g.*, Harrell v. U.S. Postal Serv., 445 F.3d 913, 921–22 (9th Cir. 1997).

271. *See, e.g.*, DiSimone v. Browner, 121 F.3d 1262, 1267–68 (9th Cir. 1997).

272. *See* WRIGHT, MILLER & COOPER, *supra* note 14 § 4465.4, at 779.

273. *See Mendoza*, 464 U.S. at 162 (suggesting that its holding is limited to issues such as those involved in this case).

274. *See* Clopton, *supra* note 146 at 20–22.

275. *Id.*

276. *Id.*

by private parties wherein those private parties—unlike the federal government—are subject to offensive non-mutual issue preclusion.[277] On the other hand, the federal government is *not* limited in its ability to utilize offensive non-mutual issue preclusion against private parties.[278] The preclusion door should swing both ways.

More importantly, not every case involving the federal government is necessarily important. A review of the federal docket reveals that the majority of cases involving the United States concern mundane litigation involving prisoner rights and social security appeals.[279]

Third, concerns that allowing offensive non-mutual issue preclusion against the federal government would lock future administrations into policies that such administrations might consider unwise is also not a compelling rationale for the *Mendoza*[280] rule. As Professor Clopton points out, "there is no inviolable principle against locking in the federal government."[281] Indeed, the government may be locked into a particular position in a variety of ways, including through contract, plea bargains, or non-prosecution agreements.[282] They can also be locked in by mutual issue preclusion.[283] Thus, concerns of inter-administration lock-in are "overblown."[284]

The rationale for *Mendoza's* broad prohibition on the use of offensive non-mutual issue preclusion against the government is shaky at best. Accordingly, the preferable approach would be to eliminate *Mendoza's* blanket prohibition but permit the courts to deny offensive non-mutual issue preclusion in cases that truly involve issues of public importance. *Parklane* and the *Restatement (Second) of Judgments* provide ample authority for this approach.

IV. LITIGATION IN THE TWENTY-FIRST CENTURY AND PRECLUSION

The litigation landscape has changed markedly since the rules of preclusion were first systematized in the *Restatement of Judgments* in 1942, and ever since the promulgation of the *Restatement (Second)*

277. *Id.*
278. *Id.*
279. *See* Clopton, *supra* note 146 at 20–22.
280. *Id.* at 25.
281. *Id.*
282. *Id.* at 25–26.
283. *Id.* at 26–27.
284. *See* Clopton, *supra* note 146 at 25.

of Judgments in 1982. We live in an era of the vanishing civil trial.[285] Many cases that enter into the federal civil justice system are now diverted to arbitration or another form of alternative dispute resolution.[286] The cases that do enter the court system are typically decided on pretrial motions, including motions to dismiss and motions for summary judgment, or they are settled.[287] Only a tiny percentage of cases actually go to trial.[288] Given the fact that trials are quite rare, the question is whether issue preclusion is becoming irrelevant. The answer to that question is decidedly no, although the role of preclusion is somewhat different in today's era of complex litigation than it was in an earlier era when cases were simple.

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285. *See, e.g.*, Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, L J. EMPIRICAL LEGAL STUD. 459, 460 (2004); *see* Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 747 (2010) ("[T]rials are an increasingly small part of the daily routine of the federal trial courts. Most district courts now try very few civil or criminal cases . . . ."); *see also* Hon. Mark W. Bennett, *Judges' Views on Vanishing Civil Trials*, 88 Judicature 306, 308 (2005).

286. *See*, Edward D. Cavanagh, *Federal Civil Litigation of the Crossroads: Reshaping the Rule of the Federal Courts in Twenty- First Century Dispute Resolution*, 93 OR. L. REV. 631, 633 (2015) ("Many putative litigants have chosen to opt out of the courts in favor of some form of alternative dispute resolution (ADR), which they perceive as cheaper, faster, more private, and less risky than the court system.").

287. *See* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. Rev. 286, 358-59 (2013) ("We are moving toward a civil justice system in which an increasing number of actions may be stillborn. Not only is case disposition occurring earlier, it is being based on less and less information regarding the facts and merits of a dispute. A trial provides live evidence based on complete discovery, examination, cross-examination, and often the deliberation of a jury. Summary judgment (and class certification), although primarily based on lawyer's papers, often is delayed until after merit (or class action) discovery has been completed and all the relevant informational cards theoretically are face-up. But even that is not always true. The motion to dismiss, however, is based only on the complaint. Not discovery. Not evidence. Not witness testimony. Not cross-examination. Not the voice of the community . . . . Adjudication based on a single paper—the complaint—as evaluated by subjective factors such as judicial experience and common sense and an abstract comparison to a hypothesized innocent explanation of the defendant's conduct is a process that is alien to me. Personal jurisdiction challenges, of course, have nothing to do with the central justice question—who should win and who should lose.").

288. *Id.*

A. The Settlement Dynamic

In theory, as discussed above,[289] in jurisdictions that permit offensive non-mutual issue preclusion, the F-1 plaintiff in a mass tort case has significant leverage in any settlement negotiation, because whereas the F-1 plaintiff risks losing only its case, the F-1 defendant effectively risks losing all cases.[290] The reality is much different and not so simple. In mass tort cases, the goal of the federal civil justice system is not to try every case, whether all at once or seriatim; rather, the goal is to settle the matters without trial.[291] The pretrial process is not to prepare the case for trial, but rather to get this case in a posture whereby it can be settled. Settlement can be achieved by direct negotiations between the parties, or through the use of intermediaries, such as a settlement master, a magistrate judge, or the assigned judge.

Another approach, one sanctioned by the Manual for Complex Litigation, is for the court to designate a representative case—called a bellwether case—try that matter, and use the results of the bellwether trial as a roadmap for a universal settlement.[292] Critics of bellwether trials point out the practical difficulties of identifying a truly representative case: the plaintiffs have an incentive to promote their strongest case, while defendants may propose the weakest case.[293] In those circumstances, the underlying goals of the bellwether trial would be thwarted, and the process would fail. If the parties fail to agree on a

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289. *See, supra*, n. 214 and accompanying text.

290. *See* Clermont, *supra* note 16, at 1122.

291. *See* RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT ix (2007) ("As in traditional tort litigation, the end game for a mass tort dispute is not trial but settlement.").

292. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.315 (2004) ("Test cases should produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis' and what range of values the cases may have if resolution is attempted on a group basis. The more representative the test cases, the more reliable the information about similar cases will be.").

293. *See, e.g., In re* Chevron U.S.A, Inc., 109 F.3d 1016, 1019 (5th Cir 1997) (where plaintiff and defendants separately choose the test cases, the trial of each "is not a bellwether trial. It is simply a trial of fifteen (15) of the 'best' and fifteen (15) of the 'worst' contained in the universe of claims involved in the litigation."); *cf.* Stier, *supra* note 159, at 740 ("[M]oreover, the first plaintiff may have been selected to be the most sympathetic by plaintiffs' counsel, increasing the chance of an aberrational verdict in favor of the plaintiffs in the first suit.").

truly representative case, the judge, in order to avoid any partisan gamesmanship, might select the bellwether case at random.[294]

It may be that even after the bellwether trial, the parties cannot reach a universal settlement. In such instances, the outcome of the bellwether trial will potentially have issue preclusive effect if the plaintiff is successful, and stare decisis effect in any event.[295] As a practical matter, however, the potential preclusive effect will have minimal impact. Real world courts will continue to push the parties hard to settle and are not likely to offer trial dates in the near future.

A related situation where settlement and issue preclusion intersect is where a matter is tried to judgment for the plaintiff but settled while an appeal is pending. Defendants may request, as a condition of settlement, that the trial court vacates its judgment for the plaintiff.[296] This is a blatant effort to avoid the preclusive effect of the F-1 judgment, and the Supreme Court has rejected this attempted end run around preclusion law.[297]

B. Class Actions and Mandatory Joinder

Concerns about the potential unfairness of offensive non-mutual issue preclusion could be obviated if all claimants could be made part of the F-1 action, either through the existing class action mechanism or through some form of mandatory joinder. As discussed below, neither is likely to provide a viable solution.

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294. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.315 ("To obtain the most representative cases from the available pool, a judge should direct the parties to select test cases randomly or limit the selection to cases that the parties agree are typical of the mix of cases.").

295. Katz v. Carte Blanche Corp., 496 F.2d 747, 759 (3d Cir. 1974); *In re* Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., No. 1:00-1898, 2007 WL 1791258 at *4 (S.D.N.Y. June 15, 2007) ("Because all issues will be tried as to the representative wells, issue preclusion will attach only as to those defendants against whom there is an adverse verdict and who will then have the opportunity for appellate review.").

296. *See* Nestle Co. v. Chester's Mkt, Inc., 756 F.2d 280, 282–83 (2d Cir. 1985).

297. U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 27 (1994) ("To allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would—quite apart from any consideration of fairness to the parties—disturb the orderly operation of the federal judicial system.").

1. Class Actions

At first blush, the class action would seem to be the ideal vehicle to put the issues surrounding offensive non-mutual issue preclusion to rest.[298] Where there are multiple claimants in mass tort cases, the claimants would file as a class action suit.[299] All member of the plaintiffs' class, as well as the defendants, would be bound by the outcome. Claimants who did not want to be part of the class could opt-out, and would not be bound by the outcome of the class action. However, they also could not benefit from any class judgment favoring the plaintiff class.[300]

The problem with this approach is that in the past three decades, the federal courts have become increasingly hostile to class actions.[301] Recent Supreme Court decisions, notably *Wal-Mart Inc. v. Dukes*,[302] have raised the bar for class certification, making it much more difficult for cases to go forward as class actions.[303] The results are either that the cases go away because the plaintiff cannot efficiently try the cases individually, or the "litigants often must endure multiple, closely related lawsuits"[304] that will inevitably generate issue preclusion questions. Given this hostile climate, class actions are not a practical solution to the potential unfairness created by offensive non-mutual issue preclusion.

2. Mandatory Joinder

An alternative to the class action as a vehicle for addressing issues arising from multiparty, multidistrict litigation is to create an

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298. Fed. R. Civ. P. 23.

299. Fed. R. Civ. P 23(c)(2)(B)(v).

300. Premier Elec. Constr. Co. v. Nat'l Elect. Contractors Assn, 814 F.2d 358, 365 (7th Cir 1996); *In re TFT-LCD (Flat Panel) Antitrust Lit.*, at *4.

301. *See, e.g.*, In re Hydrogen Peroxide Antitrust Lit., 552 F.3d 305, 310 (1st Cir. 2008).

302. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 359 (2011) ("To meet the commonality requirement of Fed. R. Civ. P 23(a)(2), the common contention "must be of such a nature that it is capable of class wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.").

303. *Id.*; Comcast Corp. v. Behrend, 569 U.S. 27, 34 (2013) (denying class certification, concluding that common question did not predominate where the Court found the regression module of plaintiffs' expert could not be accepted as evidence that damages could be measured for the entire class); Amchem Products Inc. v. Windsor, 521 U.S. 591, 597 (1997) (denying certification of a settlement class).

304. *See* Erichson, *supra* note 22, at 946.

"aggregation mechanisms for consolidating widespread litigation."[305] That approach, however, has proven to be a non-starter.[306] A threshold problem is that implementation of this approach would require legislative or rule-making action.[307] Joinder provisions under the Federal Rules as currently drafted are largely permissive.[308] Moreover, even if mandatory joinder or other forms of aggregation could be achieved, courts would still face the major logistical hurdle of how to try all claims in one action. Issues involving due process and possible juror confusion would almost certainly abound.[309] Courts then might opt for the bellwether trial, discussed above.[310] In that case, mandatory joinder would seem redundant. In short, although mandatory joinder might have some visceral appeal, it is not a practical solution to the problem of potential unfairness arising from the use of offensive non-mutual issue preclusion. Nor would consolidation effectively address fairness concerns, especially in light of the Supreme Court's recent *BMS*[311] decision, which limits the reach of a forum's long-arm statute in consolidated cases.[312]

C. The Way Forward

The task of formulating and implementing issue preclusion principles has historically fallen to the courts. Unquestionably, the courts have proven equal to that task. As the foregoing analysis demonstrates, the hope of *Parklane* critics for legislative or rule-making actions to modify or overrule *Parklane* is a pipe dream. The standards enunciated in *Parklane* and the *Restatement (Second) of Judgments* have been workable. The doomsday predictions by *Parklane*

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305. *Id.*

306. *See* Clermont, *supra* note 16, at 1123 ("Nevertheless, society has chosen, after balancing benefits and costs, to follow this mandatory joinder route no farther than provisions such as Federal Rule of Civil Procedure 19 on compulsory joinder go."); *see also* Erichson, *supra* note 22, at 946-47 n.14.

307. *See* CASAD & CLERMONT, *supra* note 13, at 185-87.

308. *See* Fed. R. Civ. P. 18-20.

309. Corley v. Google, Inc., 316 F.R.D. 277, 289 (N.D. Cal. 2016).

310. *See supra* nn. 292-95 and accompanying text.

311. Bristol-Myers Squibb Co. v. Superior Ct. of Cal., San Francisco Cty., 137 S. Ct. 1773 (2017).

312. In *BMS*, over 600 plaintiffs filed eight suits in California State count alleging injury from use of Plavix, a blood thinner manufactured by *BMS*. *Id.* at 1777. Only 86 of the plaintiffs were from California; 592 were from 33 other states. *Id.* at 1778. The Court ruled that due process bars the exercise of personal jurisdiction over BMS on claims unconnected to its activities in the former state. *Id.* at 1781. Accordingly, the claims of the non-resident plaintiffs were dismissed. *Id.* at 1783.

critics based on theoretical objections to offensive non-mutual issue preclusion simply have not come about. Far from the knee-jerk implementation of non-mutual preclusion, the courts have been both cautious and circumspect.[313] The train is on the right track and should not be derailed.

CONCLUSION

The changing nature of litigation in the federal system has not lessened the need for development and implementation of a coherent set of principles governing preclusion. In most areas of preclusion, a broad consensus in fact exists. Whether courts should allow offensive non-mutual issue preclusion is the only real area of debate in the preclusion field. The case-by-case approach articulated by the Supreme Court in *Parklane* strikes the proper balance between fairness and efficiency. Bright line rules might be more predictable, but the ultimate goal is to get just outcomes, not simply predictable outcomes. The answer to Professor Clermont's question is, therefore, that we are better off with a rule of non-mutuality with a lot of fuzzy exceptions, instead of a rule of mutuality subject to a few very well-defined exceptions. The case for change has not been made, and it would be a serious mistake to turn back the clock and re-embrace a rule of mutuality.

313. *See* Clopton, *supra* note 146, at 12-13 ("In a sample of 49 federal district court cases from 2000 to2017, judges exercised their discretion to decline nonmutual preclusion in 43% of cases.") (citations omitted).