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Restatement (Second) of Judgments: A Modest Dissent

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THE *RESTATEMENT (SECOND) OF JUDGMENTS*: A MODEST DISSENT

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INTRODUCTION

The *Restatement (Second) of Judgments* is a substantial contribution to the law. The product of an excellent group of reporters and advisers, the final draft reflects the years of hard work and thoughtful consideration that went into it. The new work represents progress for a number of reasons. First, its use of the terms "claim preclusion" and "issue preclusion" will help to clarify thinking about the impact of decisions.[1] Second, the work reflects current judicial developments; it is consistent with the Supreme Court's landmark decisions in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*,[2] *Montana v. United States*,[3] and *Parklane Hosiery Co. v. Shore*.[4] The *Restatement Second* wisely rejects the mutuality requirement for issue preclusion,[5] and also addresses the subject of the law of preclusion generally where federal courts are involved,[6] a topic not considered in the first *Restatement of Judgments*.[7] The *Restatement Second* has broadened and carefully delineated the concept of claim preclusion.[8] These provisions reflect an overall willingness to apply preclusive concepts for the benefit of the courts, the litigants, and society generally. Finally, with the approval of the *Restatement Second*, the first *Restatement of Judgments*—a voice from the distant past—is no longer significant.

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[1] RESTATEMENT (SECOND) OF JUDGMENTS, Introduction ch. 1, at 1 (Tent. Draft No. 7, 1980).

[2] 402 U.S. 313 (1971).

[3] 440 U.S. 147 (1979).

[4] 439 U.S. 322 (1979).

[5] RESTATEMENT (SECOND) OF JUDGMENTS § 88 (Tent. Draft No. 2, 1975) [§ 29]. [Throughout this Article, the corresponding section numbers that will appear in the final *Restatement Second* are given after citation to the tentative drafts. The final draft was not available to the author.]

[6] RESTATEMENT (SECOND) OF JUDGMENTS §§ 134, 135 (Tent. Draft No. 7, 1980) [§§ 86, 87].

[7] *See* RESTATEMENT OF JUDGMENTS (1942).

[8] RESTATEMENT (SECOND) OF JUDGMENTS §§ 61, 61.1 (Tent. Draft No. 5, 1978) [§§ 24, 25].

Because the law of judgments is dynamic and growing, it is fair to guess that a *Restatement (Third) of Judgments* will be as different from and represent as much of an improvement on the *Restatement Second* as does the second *Restatement* in comparison to the first. The first *Restatement* has had a negative influence on the development of the law, and the *Restatement Second*'s effect on its future development will probably also be adverse in the years ahead. This is the nature of the beast; Restatements are only static statements of a dynamic matter. Law is not rigid; it is changing. We cannot expect too much from a Restatement. Unfortunately, there are no editorial boards for the various Restatements as there are for the Uniform Commercial Code[9] and the Uniform Probate Code.[10] If there were, perhaps the Restatements could be kept current and so become voices of progress, rather than echoes from the past.

Although the *Restatement Second* is in most respects a fine synthesis, certain of its positions seem questionable. Most important, the *Restatement Second*'s articulation of issue preclusion is defective in several respects. First, it does not include as a principle factor the "incentive and opportunity" to litigate. Second, it requires "actual litigation" as a prerequisite to issue preclusion. Third, it divides the general statement of issue preclusion into two rules, sections 68[11] and 88,[12] rather than presenting the matter in a single coherent statement. It would have been preferable to provide specifically for the requirement that the party to be precluded must have had the incentive and opportunity to litigate the matter, and to delete any reference to actual litigation from the rule on issue preclusion. Moreover, treatment of issue preclusion should be found in a single place.

The *Restatement Second* suffers another deficiency in the rigidity of the provisions dealing with nonparties being bound by a judgment.[13] The *Restatement Second* does not take note of the developing nature of the law in this regard. It attempts to place the

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[9] This editorial board is composed of representatives of the American Law Institute and the National Conference of Commissioners on Uniform State Laws. *See* UNIFORM COMMERCIAL CODE (U.L.A.), Foreward at *ix-xiii* (1976).

[10] This editorial board is composed of representatives of the American Bar Association and the National Conference of Commissioners on Uniform State Laws. *See* UNIFORM PROBATE CODE (U.L.A.), Foreward at *iii-vi* (1972).

[11] RESTATEMENT (SECOND) OF JUDGMENTS § 68 (Tent. Draft No. 4, 1977) [§ 27].

[12] *Id.* § 88 (Tent. Draft No. 3, 1976) [§ 29].

[13] *See* notes 147-82 and accompanying text *infra*.

rules dealing with nonparties in precise categories, with no broad general provisions which might allow for growth. The *Restatement Second* is deficient in its coverage of claim preclusion against nonparties to the first action who hold interests either concurrently with or subsequent to the party in the first action and who may be bound by claim preclusion. This area of law is not clearly developed, yet the *Restatement Second* does not suggest the possibility of growth. The *Restatement Second* alludes to but does not sufficiently discuss the modern tendency to expand issue preclusion to persons adequately represented in the first action. Finally, issue preclusion in successive criminal prosecutions is not given any coverage at all.[14] Although this matter was raised during the drafting of the *Restatement Second,* the Reporter and the advisors wanted to terminate the project; consequently, preclusion in criminal cases was deferred to another day. These matters were finally deemed "beyond the scope of this Restatement."[15]

This Article considers these points and offers another perspective in the hope that the *Restatement Second* will serve not as a monolithic construct beyond challenge, but rather as a starting point for critical discussion and positive development in the law of judgments.

I

THE GENERAL RULE OF ISSUE PRECLUSION

Section 68 [section 27] of the *Restatement Second* contains the general rule of issue preclusion:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.[16]

Courts have developed a substantial body of issue preclusion case law. Examining these judicial developments provides a helpful context in which to examine the *Restatement Second* rule.

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[14] *See* notes 183-86 and accompanying text *infra.*

[15] RESTATEMENT (SECOND) OF JUDGMENTS § 133, Comment a (Tent. Draft No. 7, 1980) [§ 85].

[16] *Id.* § 68 (Tent. Draft No. 1, 1973) [§ 27].

A. *Incentive and Opportunity to Litigate*

A number of courts have articulated rules of issue preclusion that include such language as the "opportunity to litigate," the "full opportunity to litigate," or the "full and fair opportunity to litigate." In addition, some courts have held or stated that issue preclusion will exist only if the party to be bound had the incentive to litigate, or, in other words, only if a party had involvement sufficient to guarantee an adequate presentation of its arguments.[17]

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[17] *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (suggested in referring to the offensive use of issue preclusion that exceptions might exist and specifically mentioned situation where stakes were small and future litigation not foreseeable so that the defendant would have had little incentive for vigorous defense); Southern Pac. Transport. Co. v. Smith Material Corp., 616 F.2d 111, 115 (5th Cir. 1980) (in giving preclusive effect court noted, "Smith engaged in a week long trial in which several hundred thousand dollars were at stake; Smith had, therefore, every incentive to litigate Amtrak's negligence, and its own absence from negligence, to the fullest extent."); Miller Brewing Co. v. Jos. Schlitz Brewing Co., 605 F.2d 990, 992 (7th Cir. 1979) ("Whether a full and fair opportunity to litigate was afforded in the other action depends ... upon several factors, including ... incentive to litigate ... "; court held for issue preclusion); Starker v. United States, 602 F.2d 1341, 1349 (9th Cir. 1979) (in applying issue preclusion against the government, court noted, "The government had plenty of incentive to litigate *Starker I*, in which a $37,342 refund was at stake."); Cramer v. General Tel. & Elec. Corp., 582 F.2d 259, 268 (3d Cir. 1978) (in applying issue preclusion court stated, "The plaintiff in *Limmer* had a full and fair opportunity to litigate the § 14(a) claim in that forum. He had every incentive to prosecute vigorously the action against the individual defendants"); Winters v. Lavine, 574 F.2d 46, 58 n.14 (2d Cir. 1978) (extensive discussion of "incentive"); Sampson v. Ampex Corp., 478 F.2d 339, 341 (2d Cir. 1973) (estopped person had "every incentive to litigate the merits"); Safir v. Gibson, 432 F.2d 137, 143 (2d Cir.) (court found sufficient incentive in potential liability of $337,000 to apply issue preclusion), *cert. denied*, 400 U.S. 942 (1970); Maher v. Zapata Corp., 490 F. Supp. 348 (S.D. Tex. 1980) (court, rejecting claim of issue preclusion, stated, "It appears that the plaintiff in *Maldonado* had a full and fair opportunity to litigate the good faith and independence of the committee. They had every incentive to prosecute vigorously the issue of bona fides of the committee. Plaintiffs in this action, however, challenge that incentive through its claim of ineffective representation. Federal courts will not bind nonparty shareholders in a derivative suit unless their interests were adequately represented."); Teachers Credit Union v. Horner, 487 F. Supp. 246, 248 (W.D. Mo. 1980) (in upholding issue preclusion court noted that union "had both the opportunity and the incentive to fully litigate the issues involved"); Mooney v. Fibreboard Corp., 485 F. Supp. 242, 247 (E.D. Tex. 1980) (court considered possibility of unfairness and incentive to litigate and noted, "... this is not a case where the defendants were sued for small or nominal damages in the prior action"); Svoboda v. Trane Co., 495 F. Supp. 367, 369 (E.D. Mo. 1979) (plaintiff claimed that issue preclusion did not apply "because he did not have a full and fair opportunity to be heard on the merits of his claim ... [and] argued that he lacked the ability and incentive to conduct the litigation in the bankruptcy court"; court considered the argument at length and rejected it); *In re* Uranium Antitrust Litigation, 480 F. Supp. 1138, 1150 (N.D. Ill. 1979) (in holding no issue preclusion court noted that supposedly precluded party had "no meaningful incentive" on the issue in the first proceeding); Fairchild, Arabatzis & Smith, Inc. v. Prometco (Produce & Metals) Co., 470 F. Supp. 610, 617 n.8 (S.D.N.Y. 1979) (court held that issue preclusion can be based on a

The New York Court of Appeals, in *Schwartz v. Public Administrator*,[18] applied what it regarded as "a modern and stable statement of the law of *res judicata*. . . . [W]here it can be fairly said that a party has had a full opportunity to litigate a particular issue, he cannot reasonably demand a second one."[19] The court's rationale was that a litigant who has had his opportunity—his day in court—should not be allowed to litigate the same questions anew. The court's reference to "full" opportunity implies something more than just an opportunity; it seems to require both the chance and the motivation to challenge the issues, but not necessarily the actual litigation of the issue. The party risking subsequent preclusion has full control in choosing whether to litigate or concede any particular matter; but it is an informed choice and one where there is the incentive to litigate.[20]

In *Palma v. Powers*[21] the court stated:

> [C]onsiderations of public policy become involved where a party later seeks to litigate a point which he had full opportunity

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default judgment, noting that some commentators have criticized this result, generally confining such criticism to the situation where the defaulting party "had little incentive to defend the prior action or in which the potential for surprise is great. This is hardly such a case." The court mentioned the $190,000 recovery sought in the prior action); Rust v. First Nat'l Bank of Pinedale, 466 F. Supp. 135, 140 (D. Wyo. 1979) ("the proper resolution of the problem depends on whether the party against whom the doctrine of collateral estoppel is asserted has a full and fair opportunity and the incentive to vigorously litigate the identical issue in the earlier proceeding"); United States v. Abatti, 463 F. Supp. 596, 603 (S.D. Calif. 1978) ("At the time of the Tax Court trial, the government had every incentive to litigate its case fully, both because of the stakes involved there and because it knew that the criminal trial was 'waiting in the wings.' "); Hann v. Carson, 462 F. Supp. 854, 865 (M.D. Fla. 1978) ("... if the party to be precluded from relitigation in a later case did not have the initiative and burden of proof in an earlier case, then several other factors are important to consider. The need and motivation of the party to be precluded in a later case, to litigate the same questions vigorously in an earlier case, are important. If an earlier case was one involving de minimus [sic] interests, or having marginal consequences, the necessity and incentive for full-throttle litigation was probably missing." The court indicated these are factors to be considered in deciding whether preclusion would be unfair.).

[18] 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969).

[19] Id. at 69, 246 N.E.2d at 727-28, 298 N.Y.S.2d at 958.

[20] In Overseas Motors, Inc. v. Import Motors Ltd., 375 F. Supp. 499 (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975), the court held that issue preclusion could arise if "the issue has been effectively raised in the prior action" and the "losing party has had 'a fair opportunity procedurally, substantively, and evidentially' to contest the issue." *Id.* at 516 (quoting Eisel v. Columbia Packing Co., 181 F. Supp. 298, 301 (D. Mass. 1960) (footnotes omitted). The court rejected the *Restatement Second*'s position that issue preclusion cannot arise from a default judgment. The court stated, "The two-part test ... is far more functional. It ... protects against the abuses of unforeseeability, by including such factors as *incentive to litigate* and choice of forum in the calculus of full and fair opportunity...." *Id.* at 516-7. (emphasis added).

[21] 295 F. Supp. 924 (N.D. Ill. 1969).

> to litigate previously. . . . [A] litigant who has once foregone his opportunity to contest a matter which was necessarily decided in a previous proceeding should, at least, have the burden of explaining his failure to controvert the matter in the earlier suit or his desire to litigate the matter in a second action.[22]

Again, the key language is "full opportunity to litigate." It turns not on whether the party actually litigated the issue, but rather whether the party had the incentive and opportunity to do so.[23]

The United States Supreme Court noted the importance of the incentive to litigate in *Parklane Hosiery Co. v. Shore*.[24] In discussing the use of offensive collateral estoppel, the Court stated, "If a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously, particularly if future suits are not foreseeable. . . ."[25] The Court clearly recognized the importance of the incentive as well as the opportunity to litigate—notice and time within which to appear—as prerequisites to the invocation of the doctrine of issue preclusion.

In *Montana v. United States*,[26] the Court stated:

> Under collateral estoppel [issue preclusion], once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. . . . 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.[27]

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[22] *Id.* at 936 (footnote omitted).

[23] The incentive to litigate fully in the first action would seem apparent because the defendants were originally charged with a felony, and this was not reduced to a misdemeanor until the start of the trial. *Id.* at 930. In addition, the defendants, alleged bookmakers, had had telephone service to their premises discontinued by Illinois Bell Telephone Company after the raid by the police. The defendants' attorney, on January 20, 1966 (immediately before the trial), had indicated to the defendants a relationship between the trial and the right to phone service. *Id.* at 932.

[24] 439 U.S. 322 (1979).

[25] *Id.* at 330.

[26] 440 U.S. 147 (1979).

[27] *Id.* at 153-54.

The key language here is "full and fair opportunity to litigate." Under *Parklane Hosiery* and *Montana*, it is the opportunity to litigate an issue, and not its actual litigation, that is important.[28]

The *Restatement Second* includes an "incentive and opportunity" requirement in a negative cast. Section 68.1(e) [section 25] provides that relitigation is not precluded if

> [t]here is a clear and convincing need for a new determination of the issue . . . because the party sought to be concluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.[29]

Under this articulation, it would seem that a lack of incentive to litigate fully solely because of the small amount involved would not be covered. This provision seemingly becomes operative *only* if the conduct of the adverse party or some other special circumstances are somehow involved. However, it should be noted that in the Comment to clause (e) the unqualified statement is made, "Or the amount in controversy in the first action may have been so small in relation to the amount in controversy in the second that preclusion would be plainly unfair."[30] This statement drops from the rule any reference to "clear and convincing need for a new determination of the issue."[31] It seemingly is saying that the size of the amount in controversy may alone be enough to undercut the preclusive effect because of the impact on the incentive to litigate.

B. *Development of the "Actually Litigated" Requirement*

Almost from their first meeting, the members of the Advisory Committee to the *Restatement Second* disagreed about whether the *Restatement Second* should recognize that preclusion can exist

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[28] It is interesting that the *Restatement Second* itself notes that any party

> who has had a full and fair opportunity to litigate an issue has been accorded the elements of due process. In the absence of circumstances suggesting the appropriateness of allowing him to relitigate the issue, there is no good reason for refusing to treat the issue as settled so far as he is concerned other than that of making the burden of litigation risk and expense symmetrical between him and his adversaries.

RESTATEMENT (SECOND) OF JUDGMENTS § 88, Comment b (Tent. Draft No. 2, 1975) [§ 85].

[29] *Id.* § 68.1(e) (Tent. Draft No. 4, 1977) [§ 28].

[30] *Id.* § 68.1, Comment j (Tent. Draft No. 4, 1977) [§ 28].

[31] *Id.* § 68.1(e) (Tent. Draft No. 4, 1977) [§ 28].

on an issue even though it was not "actually litigated" in the first action. This matter was taken to the floor of the Institute, but received little consideration.[32] Although there might appear to be little disagreement on this matter, a body of well-considered authority rejects the position of the Institute on this point.[33]

Two examples illustrate the difference between the position adopted by the *Restatement Second* and that supported by this contrary body of authority. Suppose, in civil litigation, a plaintiff alleges facts A, B, C, and D to state a claim upon which relief can be granted. Suppose further that the litigation involves a substantial amount of money, thereby insuring that the litigants have incentive to litigate the matter fully. If the defendant's answer denies A and B, and admits C and D, the only fact issues actually litigated would be A and B. If the defendant loses at trial, in a second action a question might arise concerning the preclusive effect of the first judgment. Clearly, the judgment would preclude relitigation of A and B. But what of issues C and D, which were also necessary for the decision? The defendant chose not to litigate these facts; he conceded C and D when he had incentive to litigate fully, and when he in fact chose to litigate only A and B. I think that there should be a presumption of preclusion on C and D. The defendant's admission, in the first action, of C and D, when they were essential to the decision and when the defendant had incentive to litigate, sufficiently justifies such a presumption of preclusion.

For a second example, suppose the United States, after obtaining a guilty plea to a charge of income tax evasion, seeks a civil judgment against the convicted defendant for the unpaid tax plus penalties. Because the original criminal prosecution involved a felony, the defendant clearly had incentive to litigate. Should the defendant be allowed to litigate the fact issues necessarily determined in the criminal prosecution? Should not the second court hold that the judgment in the criminal prosecution presumptively established the necessary facts for the civil litigation? If the defendant had been convicted after a plea of not guilty, the *Restatement Second* would hold for preclusion, but would deny preclusion on the plea of guilty. Many jurisdictions would equate the plea of guilty and the finding of guilt after the plea of not guilty,[34] and hold relitigation precluded.

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[32] 54 ALI PROCEEDINGS 164-66 (1977).

[33] *See* text accompanying notes 50-139 *infra.*

[34] *See* notes 82-86 and accompanying text *infra.*

There is much to support the position that preclusion should follow from a conceded fact issue if it was necessary for the original decision. Of course, a number of exceptions would limit this general rule, but the burden should generally be on the apparently precluded party to show why preclusion should not arise. In contrast, the *Restatement Second* concludes, in section 68 [section 27], that preclusion would never arise from a fact issue not "actually litigated."

1. *Consideration of "Actually Litigated"*

The "actually litigated" requirement was discussed by the advisors and the Council prior to the 1973 meeting of the Institute. In a distribution to the advisors in November, 1974, the problem of the "actually litigated" requirement was covered in a memorandum with extensive correspondence. However, the Institute did not consider the requirement until the 1977 meeting. It was then raised on the floor of the Institute, but there was no apparent support for the speaker, and the Institute apparently approved the draft of section 68 [section 27] as submitted.

During the early stages of the consideration of the "actually litigated" requirement by the advisors, the preclusive effect of a criminal conviction based on a plea of guilty was raised. The Reporter indicated the advisors would consider this at a later time, and that the question of the "actually litigated" requirement would be addressed again.

At the final meeting of the Advisory Committee in Tucker's Town, Bermuda, in 1979, the advisors considered briefly the preclusive effect of criminal prosecutions. Because of the numerous times the problem had been addressed and the apparent firmness of the resolve of the Reporter on this point, it was not given much consideration. Apparently the Reporter did feel that the question of the preclusive effect of a conviction based on a plea of guilty needed to be faced, for the tentative draft presented to the Institute at the meeting in Washington, D.C., in 1980 included a new provision dealing with "actually litigated" which was added to the section dealing with criminal prosecutions.[35]

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[35] RESTATEMENT (SECOND) OF JUDGMENTS § 133, Comment b (Tent. Draft No. 7, 1980) [§ 85].

2. *Justifications for the "Actually Litigated" Requirement*

The *Restatement Second* offers several reasons to support its adoption of the "actually litigated" requirement. First, the Comment to section 68 [section 27] states that an action may involve "so small an amount that litigation of the issue may cost more than the value of the lawsuit."[36] This is a rather curious rationale. It does not support the "actually litigated" requirement; rather it supports a rejection of issue preclusion under any circumstances. If there is insufficient incentive to litigate a matter, then there should be no issue preclusion. Litigation in small claims courts or prosecutions for misdemeanors cannot give rise to issue preclusion because often those actions provide litigants with inadequate incentive to litigate. Although the line is not clearly defined, it seems reasonable to conclude that prosecutions for felonies and civil litigation involving substantial amounts will give rise to issue preclusion. The burden properly falls on the presumably precluded party to show why issue preclusion should not apply.[37]

Second, the Comment justifies the "actually litigated" requirement on the ground that "the forum may be an inconvenient one in which to produce the necessary evidence or in which to litigate at all."[38] If a valid judgment is going to be handed down, then this forum must have jurisdiction over the defendant and it is the forum of choice of the plaintiff. As the forum of choice of the plaintiff, it is proper to hold that the plaintiff should be bound by any adverse decision reached by the court. It is only in the case of the defendant that he might be able to assert that he should not be bound because it is inconvenient.[39]

In light of (a) the present constitutional limitations on the exercise of jurisdiction over defendants,[40] (b) the fact that the suit by definition involves a substantial interest,[41] and (c) the availability of procedures to get and present the relevant evidence,[42] this

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[36] RESTATEMENT (SECOND) OF JUDGMENTS § 68, Comment e (Tent. Draft No. 4, 1977) [§ 27].

[37] *See* note 17 and accompanying text *supra.*

[38] RESTATEMENT (SECOND) OF JUDGMENTS § 68, Comment e (Tent. Draft No. 4, 1977) [§ 27].

[39] Even this argument has questionable validity if the party does appear and litigates some of the issues but concedes some necessary for the decision.

[40] Savchuk v. Rush, 444 U.S. 320 (1980); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Shaffer v. Heitner, 433 U.S. 186 (1977).

[41] This is true because issue preclusion can arise only from actions involving substantial interests, monetary or otherwise. *See* note 17 *supra.*

[42] The federal courts and most state courts have rules that authorize the use of depositions, interrogatories, requests for admission, physical and mental examinations, produc-

justification is not very persuasive. Would it not be better to hold for issue preclusion, and then permit the apparently precluded party to explain why preclusion should not apply?

The Comment also gives as a reason for the "actually litigated" rule that a rule to the contrary "might serve to discourage compromise, to decrease the likelihood that the issues in an action would be narrowed by stipulation, and thus to intensify litigation."[43] This litigation, where there is the incentive to litigate, must involve substantial interests on the part of the parties. The issue preclusion that may flow from the judgment does not change the suit from unimportant to important. The suit is, by definition, important. If a compromise is going to be discouraged, it probably will be by the size of the present suit. If there is going to be a refusal to stipulate and thus narrow issues, in all probability it will be because of the importance of the instant suit and not because of the issue preclusion that may flow from the decision.

The Comment does give, albeit somewhat tangentially, five reasons for holding for preclusion even though not actually litigated. These are (1) conserving judicial resources, (2) maintaining consistency, (3) avoiding oppression or harassment, (4) avoiding the difficult decision whether an issue has been actually litigated, and finally (5) because "the party's reasons for not litigating in the prior action may be such that preclusion would be appropriate."[44] The *Restatement Second* concludes that the balance is clearly in favor of the "actually litigated" requirement.[45]

3. *Down the Slippery Slope*

The significance of the Reporter's decision to incorporate the "actually litigated" requirement into the issue preclusion rule is magnified by the inclusion of other provisions that were adopted in the interest of consistency. The provisions concerning the preclusive effect of convictions based on pleas of gnilty provide the most egregious example of the consequences spawned by the Reporter's desire for internal consistency. The Comment to section 133 [section 85] states:

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tion of documents, and subpoena duces tecum to obtain documents in the hands of nonparties to the action. These various devices can be used to develop all of the facts involved. Production of information is not limited to the jurisdiction in which the court is sitting.

[43] RESTATEMENT (SECOND) OF JUDGMENTS § 68, Comment e (Tent. Draft No. 4, 1977) [§ 27].

[44] *Id.*

[45] *Id.*

> *Actual adjudication.* The rule of this Section presupposes that the issue in question was actually litigated in the criminal prosecution. . . . Accordingly, the rule of this section does not apply where the criminal judgment was based on a plea of *nolo contendere* or a plea of guilty. A plea of *nolo contendere* by definition obviates actual adjudication and under prevailing interpretation is not an admission. A defendant who pleads guilty may be held to be estopped in subsequent civil litigation from contesting facts representing the elements of the offense. However, under the terms of this Restatement such an estoppel is not a matter of issue preclusion, because the issue has not actually been litigated, but is a matter of the law of evidence beyond the scope of this Restatement.[46]

To say that the effect of the first proceeding was a matter of the law of evidence is to totally disregard a developing body of law which holds for issue preclusion in cases where the criminal conviction is based on a plea of guilty.[47] This authority does not rely on an admission against interest—an evidentiary matter; rather it holds that a judgment is preclusive on the issues necessary for conviction.

The Reporter obviously felt troubled again by the actually litigated problem when, in section 15 [section 12], he wrote about subject matter jurisdiction not expressly determined. Comment d to that section suggests there are two possible approaches. Under one, a party may raise subject matter jurisdiction at any time. The other approach, according to the Reporter, is

> to say that the issue of subject matter jurisdiction, like questions of notice, territorial jurisdiction, and those concerning the merits, is implicitly resolved by the act of entering judgment. On this view, the entry of judgment should be taken as equivalent to actual litigation on the issue of subject matter jurisdiction and hence result in its becoming res judicata.
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> . . . .
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> The underlying consideration in resolving such situations is essentially the same as when the issue was actually litigated in the first action. Preclusion should therefore apply unless the losing party should be afforded opportunity to reopen the controversy, by reason of the circumstances referred to in Subsection (1)(a) and (b).[48]

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[46] *Id.* § 133, Comment b (Tent. Draft No. 7, 1980) [§ 85].

[47] *See* Vestal, *Issue Preclusion and Criminal Prosecutions*, 65 IOWA L. REV. 281, 294-96 (1980); notes 54-61 and accompanying text *infra*.

[48] RESTATEMENT (SECOND) OF JUDGMENTS § 15, Comment d (Tent. Draft No. 6, 1979) [§ 12].

This second approach relies on the notion of implicit litigation, so that the entry of judgment is construed as the equivalent of actual litigation of the issue. If we can use fictional actual litigation, such as this, then many difficulties of the "actually litigated" rule disappear.

The desire for consistency also led to a retreat from a position adopted by the first *Restatement.* The Reporter's Note to section 68 [section 27] of the *Restatement Second* states:

> One minor change from the first Restatement should be noted. It was there stated that if a fact put in issue in the pleadings is admitted by the adversary at trial, and in consequence no proof is offered, the question is "actually litigated" within the meaning of § 68 [§ 27]. The present Comment states that an issue is not "actually litigated" if an admission is made by the adversary before evidence is introduced.[49]

It may be questioned whether this is a minor change but it certainly reflects a significant difference in attitude.

These examples highlight the difficulty the Reporter experienced in attempting to adhere strictly to the "actually litigated" requirement.[50] They indicate that a general rule of issue preclusion omitting the "actually litigated" requirement may be more desirable.

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[49] *Id.* § 68, Reporter's Note (Tent. Draft No. 4, 1977) [§ 27].

[50] The attitude of the Reporter concerning the preclusive effect to be given to a consent judgment is apparently found in RESTATEMENT (SECOND) OF JUDGMENTS § 99, Comment f, Illustration 10 (Tent. Draft No. 4, 1977) [§ 51]. In this illustration a judgment was entered by agreement for $1,000 for the plaintiff. Payment of the amount was made by the defendant/driver. The illustration concluded that "[t]he judgment does not preclude [the plaintiff] from bringing an action against [the owner of the car involved in the accident] but any liability that may be established against [the owner] is discharged to the extent of $1,000." *Id.*

Implicit in this statement is the possibility of recovery of more than $1,000 by the plaintiff in the action against the owner. Section 99(2) provides, "A judgment in favor of the injured person is conclusive upon him as to the amount of his damages," with certain exceptions not applicable. RESTATEMENT (SECOND) OF JUDGMENTS § 99 (Tent. Draft No. 4, 1977) [§ 51]. Applying this rule to Illustration 10, one would be forced to conclude that the plaintiff, having received the $1,000, cannot recover against the owner. The $1,000 is the limit of recovery. If the draftsman is saying that there is no preclusive effect because the judgment is by consent, then something is being added to the wording of § 99(2) [§ 51]. Beyond this, it would seem reasonable to say that the plaintiff, having accepted the $1,000, should be precluded from seeking relief from any other source. It may be that the amount involved in the first suit was not sufficient to provide an incentive to litigate fully, and if this is true there may not be issue preclusion. However, there is no reason to believe that this was the point being made in this illustration. *See* note 17 *supra.*

4. *Existing Authority*

A litigant may concede an issue in a number of different ways. The litigant may admit in the pleadings, either affirmatively or by failure to deny. A defendant may plead guilty in a criminal prosecution. A court may enter a judgment by default against a litigant. Similarly, opposing litigants may settle their disputes by consent judgments or through judgments by confession. In each of these situations a judgment is based on at least some facts the parties have not actually litigated. It would seem desirable to examine what the cases are holding at the present time in each of these conceded issue situations, in considering what preclusive effect, if any, should obtain.

a. *Waiver; Admission or Failure to Deny in Pleading.* In the course of litigating a case a defendant may fail to deny, or may actually admit, certain essential allegations made by the plaintiff. For example, in the federal court, the defendant may not controvert the allegations of federal court jurisdiction properly contained in the initial paragraph of a complaint in the federal court.

Assume that in suit I between A and B, which turns on facts w, x, y, and z alleged by plaintiff A, defendant B denies only y and z, and a judgment is for the plaintiff. It seems logical to hold that the first suit determined all four facts, thereby precluding relitigation of those issues. All were necessary for the judgment; B had the incentive and opportunity to litigate all four issues and did, in fact, contest two of them. What then of w and x, issues uncontroverted in, but essential to, the original judgment, in subsequent litigation? Should the defendant's failure to controvert these issues preclude their relitigation? In *Scott Paper Co. v. Fort Howard Paper Co.*,[51] the court said that a party in such a situation should be barred from relitigation:

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[51] 343 F. Supp. 225 (E.D. Wis. 1972). *See also* Oldham v. Pritchett, 599 F.2d 274 (8th Cir. 1979), where the court held that the precluded party had a full and fair opportunity to litigate a particular issue but failed to do so. The *Oldham* court, in holding for preclusion, stated,

> Despite the motivation and opportunity to do so, the Oldhams failed to exercise their right to introduce evidence relating to Pritchett's alleged comparative or contributory negligence. This tactical decision by the Oldhams not to participate as "laboring oars" in the limitation action does not, under such circumstances, foreclose the application of collateral estoppel.

Id. at 280. The court, citing Montana v. United States, 440 U.S. 147, 153-54 (1979), held the party collaterally estopped and indicated that this conclusion is "consistent with and supportive of the policy underlying the doctrine of estoppel recently articulated by the Supreme Court." *Id.* at 280.

> [I]t has been held that where there is reason to believe that the failure of a party to litigate an issue is an admission of lack of validity of that party's claim, future litigation of that claim can be precluded. . . . [I]t is our opinion that the record in this case establishes that the defendant, in presenting its case, vigorously presented all matters which it thought might bring success. Matters not presented which could have been offered . . . were not offered, in our opinion, because the defendant admitted their lack of merit. Even under the doctrine of collateral estoppel, their presentation must be barred at this time.[52]

Indeed, logic suggests that a party should be precluded from relitigating all issues necessary for the initial judgment. It is difficult to posit a reason why a defendant who conceded issues in the first action would feel that he should be able to contest those same issues in a second suit.

The "actually litigated" requirement also presents problems when neither party contests the court's subject matter jurisdiction and the court renders judgment for the plaintiff.[53] If the plaintiff then takes the judgment to another state and sues on it there, may the defendant question the first court's subject matter jurisdiction? The defendant will argue that because the issue had not been litigated, it can be raised in the suit on the judgment. The argument should fail. It would seem logical to conclude that the defendant, in litigating fully the merits, implicitly conceded that the court had subject matter jurisdiction. Having had the incentive and opportunity to litigate, the defendant should be precluded.

b. *Guilty Pleas.* Courts frequently accord a guilty plea some weight in civil litigation. Many regard the plea of guilty as an admission—a judicial admission or an admission against interest—that is admissible in a civil suit as substantive evidence of the fact.[54] Increasingly, courts are not simply admitting a previous guilty plea as evidence but are speaking of the preclusive

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[52] *Id.* at 229.

[53] See notes 47-49 and accompanying text *supra.*

[54] *See generally* Annot., 18 A.L.R.2d 1287 (1951). The theory is that the plea is a judicial admission of the truth of the charges: "[T]he safeguards afforded the accused under criminal procedure are greater than those in a civil action, so that he has no cause for complaint that an adverse decision . . . should be used against him." *Id.* at 1289.

effect of such a judgment.[55] For example, in *United States v. Bower*,[56] the court was

> called upon to go one step further than admission of the criminal record in evidence; it [was] called upon to direct a verdict on the strength of that record, that is, to apply the rule of estoppel by judgment with the full force and significance of the record. The alternative is to require the Government to prove all over again that of which the defendant stands convicted out of his own mouth.[57]

The court found that the basic rationale supporting issue preclusion applies to guilty plea situations. "[T]here is reason for insisting that, if a point is settled, it should be settled for all related purposes and that it should operate as an estoppel as well as a defense."[58]

Numerous cases hold that issues necessarily established by a finding based on a guilty plea cannot be litigated in a subsequent action between the same parties.[59] For example, in *United States v. Ben Grunstein and Sons Co.*,[60] the defendant's guilty plea in the first action necessarily decided the issues of the existence of a conspiracy and the defendant's participation. The court held that those two issues were not open to relitigation in a second suit brought by the government to recover damages. The court emphasized that: (1) the parties were the same in both suits; (2) the issues were distinctly raised and directly determined by the first guilty plea; and (3) the precluded issues were identical in both suits. The court restated the policy behind collateral estoppel—an issue, once determined, cannot be relitigated—and stated that it was immaterial whether the judgment of conviction resulted from a trial or from a plea of guilty.[61]

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[55] Giving preclusive effect to a *conviction* is a different matter. More and more courts, however, are holding that a judgment of conviction can give rise to issue preclusion in a subsequent civil suit. *See, e.g.*, United States v. Ben Grunstein & Sons Co., 127 F. Supp. 907 (D.N.J. 1955); United States v. American Precision Prod. Corp., 115 F. Supp. 823 (D.N.J. 1953).

[56] 95 F. Supp. 19 (E.D. Tenn. 1951).

[57] *Id.* at 21.

[58] *Id.*

[59] *See, e.g.*, United States v. Eagle Beef Cloth Co., 235 F. Supp. 491 (E.D.N.Y. 1964); O'Neill v. United States, 198 F. Supp. 367 (E.D.N.Y. 1961); United States v. Schneider, 139 F. Supp. 826 (S.D.N.Y. 1956); United States v. Accardo, 113 F. Supp. 783 (D.N.J.), *aff'd per curiam* 208 F.2d 632 (3d Cir. 1953), *cert. denied*, 347 U.S. 952 (1954).

[60] 127 F. Supp. 907 (D.N.J. 1955).

[61] *Id.* at 909. In United States v. Guzzone, 273 F.2d 121 (2d Cir. 1959), the court emphasized that "It is well established that a prior criminal conviction may work an estop-

The court in *United States v. American Precision Products Corp.*,[62] used this same sort of analysis. The president of the corporation had previously pleaded guilty to conspiracy to defraud the government. In the subsequent civil action under the False Claims Act,[63] that court held the corporation president precluded from relitigating the issue of fraud. "Since this conspiracy is in substance the same as that to which he pleaded guilty on the above indictment, and the parties in this civil suit are the same as in those criminal proceedings, he is estopped by the record to deny civil liability as such conspirator here."[64] Similarly, in *Arctic Ice Cream Co. v. Commissioner*,[65] the tax court applied issue preclusion in a guilty plea situation:

> It is not material that Arctic's conviction was based upon a guilty plea, because for purposes of applying the doctrine of collateral estoppel, as well as for other purposes, there is no difference between a judgment of conviction based upon such a plea and a judgment of conviction rendered after a trial on the merits. . . . Arctic's plea of guilty to this indictment was therefore a conclusive judicial admission that its return for 1946 was false and fraudulent and that the deficiency in tax which was the necessary result of its being filed was due to fraud with intent to evade tax.[66]

In *United States v. Globe Remodeling Co.*,[67] the court said, "[E]ach criminal count to which [defendant] pleaded guilty distinctly put in issue and their plea of guilty directly determined that they made and used a document containing a statement known by them to be false for obtaining [Federal Housing Authority] insurance on a home improvement loan."[68] In this second suit, brought by the government for reimbursement, the court held

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pel in favor of the government in a subsequent civil proceeding, but such estoppel extends only to questions distinctly put in issue and directly determined in the criminal prosecution." *Id.* at 123. In this case the issue was superfluous to the initial conviction, so collateral estoppel was not applied. *Id.* This language of "directly determined" is less restrictive than "actually litigated" but still protects against inappropriate application. An issue can be directly determined without being actually litigated.

[62] 115 F. Supp. 823 (D.N.J. 1953).

[63] 31 U.S.C. §§ 231-234 (1976 & Supp. II 1978).

[64] 115 F. Supp. at 826.

[65] 43 T.C. 68 (1964).

[66] *Id.* at 75.

[67] 196 F. Supp. 652 (D. Vt. 1961).

[68] *Id.* at 656.

that the defendants were estopped from denying the falsity of their statements.[69]

Several decisions have even suggested that application of issue preclusion may be more appropriate when the first conviction was based on a guilty plea than a trial.[70] In *United States v. Schneider*,[71] the court observed:

> Relitigation in a civil action of an issue determined adversely to the defendant in a prior criminal proceeding is foreclosed, whether the prior determination was based on the verdict of a jury . . . or on a plea of guilty. . . . Indeed, where the prior conviction resulted from a plea of guilty there would appear to be greater warrant for application of the doctrine since the defendant has admitted the truth of the charges contained in the indictment.[72]

Similarly, in *Plunkett v. Commissioner*,[73] a court of appeals held that a guilty plea constituted an admission of all the elements of a formal criminal charge. The court looked to the particular circumstances behind the guilty plea to insure that it was not the result of either coercion or the defendant's desire for expediency. The existence of a plea bargain did not make this otherwise voluntary and knowing plea unfit for application of collateral estoppel, although the court allowed the defendant an opportunity to explain his plea to avoid its preclusive effect. In evaluating preclusive effect of the guilty plea, the court considered whether, under this set of facts, it could reasonably assume that the plea amounted to the defendant's admission of the issues necessary to the first judgment.[74] If so, then the party should be estopped from relitigating the same issue.

Most of these cases involve civil litigation between the government and the convicted individual. However, because application of issue preclusion no longer requires identity of parties in the two proceedings, convictions based on pleas of guilty will

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[69] *Id.* The test used in this case, whether the issue was distinctly put in issue and directly determined by the first suit, was first stated in Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 569-72 (1951). In United States v. Globe Remodeling, 196 F. Supp. 652 (D. Vt. 1961), an issue was distinctly put in issue and directly determined by a plea of guilty *without* actual litigation.

[70] *See* O'Neill v. United States, 198 F. Supp. 367 (E.D.N.Y. 1961); United States v. Ben Grunstein & Sons Co., 127 F. Supp. 907 (D.N.J. 1955).

[71] 139 F. Supp. 826 (S.D.N.Y. 1956).

[72] *Id.* at 829.

[73] 465 F.2d 299 (7th Cir. 1972).

[74] *Id.* at 305-06.

undoubtedly become more important in civil litigation between private parties as well. In *Metros v. United States District Court for District of Colorado*,[75] the defendant in the first action pleaded guilty to possession of heroin. In a subsequent civil action brought by the defendant against the police for money damages arising out of an allegedly illegal search, the court held the defendant estopped from contesting the issue of probable cause to arrest.[76] Because the defendant had had ample opportunity to raise the issue at his criminal trial, the court treated his failure to do so as a waiver of the right to raise it later. The court observed that the defendant must have recognized the importance of the legality of the search[77] and that the severe consequences of conviction provided sufficient incentive to litigate the issue at his criminal trial. In *Hooper v. Guthrie*,[78] a convicted criminal defendant sued the arresting officer for unlawful arrest and unlawful imprisonment. The defendant had pleaded guilty in the earlier prosecution. The court held that even though the defendant had not litigated the question at a criminal trial, "the generally accepted rule is that a judgment of conviction, based on a plea of guilty, is conclusive in a civil suit between the same parties of all the issues that would have been determined by a conviction after a contested trial."[79] The court held that the conviction based on a plea of guilty foreclosed litigation of an issue in a subsequent civil action.

As these cases demonstrate, when a defendant who has been convicted after a plea of guilty later tries, through a civil action, to

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[75] 441 F.2d 313 (10th Cir. 1971).

[76] *Id.* at 317. *Cf.* Williams v. Liberty, 461 F.2d 325 (7th Cir. 1972) (defendant found guilty of resisting arrest and battery in the first suit; in second suit by defendant against police for use of excessive force, court held that issue preclusion was not appropriate. The two claims—resisting arrest and excessive force—were not mutually exclusive. The court distinguished this situation from Palma v. Powers, 295 F. Supp. 924 (N.D. Ill. 1969)).

[77] The courts are careful to distinguish which issues should be precluded. In United States v. Rubin, 243 F.2d 900 (7th Cir. 1957), the court stated: "Consequently, though the plea was *res adjadicata* of all averments of the indictment, well pleaded, it was not decisive of the additional charge first made in the civil action. . . ." *Id.* at 902. There would be no preclusion on additional charges or elements necessary for the second judgment that were not essential to the first action.

In Diamond v. Holstein, 333 Mich. 74, 127 N.W.2d 896 (1964), the defendant's plea of guilty to an unsafe driving charge was not conclusive as to the entire civil action charging negligence. The plaintiff still needed to show that the defendant's driving proximately caused the accident.

[78] 390 F. Supp. 1327 (W.D. Pa. 1975).

[79] *Id.* at 1334 (quoting 1B MOORE'S FEDERAL PRACTICE ¶ 0.418[1] (2d ed. 1974)). *Accord,* Brazzel v. Adams, 493 F.2d 489, 490 (5th Cir. 1974); Metros v. United States Dist. Court, 441 F.2d 313, 317-19 (10th Cir. 1970); United States v. Accardo, 113 F. Supp. 783, 786 (D.N.J.), *aff'd,* 208 F.2d 632 (3d Cir. 1953), *cert. denied,* 347 U.S. 952 (1954).

profit from his criminal act, there is very strong support for the extension of issue preclusion as a way to protect parties who were not involved in the initial suit.[80] In addition to preclusive effect in a subsequent civil action, a judgment based on a guilty plea may also give rise to preclusion in a subsequent criminal proceeding.[81] A number of courts have concluded that issue preclusion should arise from a criminal conviction based on a guilty plea. These include several district courts,[82] and the courts of appeals for the Fifth,[83] the Seventh,[84] the Eighth,[85] and the Ninth Circuits.[86]

c. *Default Judgment.* It is reasonable, under certain circumstances, for issue preclusion to arise out of a default judgment against the defendant to a civil action. Where the defendant had contacts with the forum sufficient to justify exercise of that forum's jurisdiction over the defendant and where the defendant had both the incentive to litigate the matter fully (because he had a substantial amount at stake) and the opportunity to present his side of the controversy, then preclusion should arise on all issues necessary for the decision, unless a party presents some valid reason for non-preclusion. To further society's interests in maximizing judicial efficiency, issue preclusion, with safeguards such

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[80] *See, e.g.,* State Farm Mut. Auto. Ins. Co. v. Worthington, 405 F.2d 683 (8th Cir. 1968).

[81] Rosenberg v. Martin, 478 F.2d 520, 525 (2d Cir. 1973); Kauffman v. Moss, 420 F.2d 1270 (3d Cir. 1970); Simms v. Reiner, 419 F. Supp. 468, 475 (N.D. Ill. 1976); Lathon v. Parish of Jefferson, 358 F. Supp. 558, 560 (E.D. La. 1973); Martynn v. Darcy, 333 F. Supp. 1236, 1240 (E.D. La. 1971).

[82] *See* Pouncey v. Ryan, 396 F. Supp. 126 (D. Conn. 1975); Hooper v. Guthrie, 390 F. Supp. 1327 (W.D. Pa. 1975); United States v. Levinson, 369 F. Supp. 575 (E.D. Mich. 1973).

[83] Brazell v. Adams, 493 F.2d 489 (5th Cir. 1974).

[84] Nathan v. Tenna Corp., 560 F.2d 761 (7th Cir. 1977).

[85] Hernandez-Uribe v. United States, 515 F.2d 20 (8th Cir. 1975), *cert. denied,* 423 U.S. 1057 (1976).

[86] Ivers v. United States, 581 F.2d 1362 (9th Cir. 1978). *See also* Vestal, *Issue Preclusion and Criminal Prosecutions,* 65 IOWA L. REV. 281 (1980) and cases cited therein at notes 122-25.

as those found in sections 68.1[87] and 88[88] [sections 27 and 29], should prevent litigation of issues necessarily determined through a default judgment.

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[87] RESTATEMENT (SECOND) OF JUDGMENTS § 68.1 (Tent. Draft No. 4, 1977) [§ 28] provides:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> (a) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment by an appellate court in the initial action; or
>
> (b) The issue is one of law and (i) the two actions involve claims that are substantially unrelated, or (ii) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administrtion of the laws; or
>
> (c) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or
>
> (d) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or
>
> (e) There is a clear and convincing need for a new determination of the issue (i) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (ii) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (iii) because the party sought to be concluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

[88] RESTATEMENT (SECOND) OF JUDGMENTS § 88 (Tent. Draft No. 2, 1975) [§ 29] provides:

> A party precluded from relitigating an issue with an opposing party, in accordance with §§ 68 and 68.1, is also precluded from doing so with another person unless he lacked full and fair opportunity to litigate the issue in the first action or unless other circumstances justify affording him an opportunity to relitigate the issue. The circumstances to which consideration should be given include those enumerated in § 68.1 and also whether:
>
> (1) Treating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;
>
> (2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and that might likely result in the issue's being differently determined;
>
> (3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;
>
> (4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;

In *Peckham v. Family Loan Co.*,[89] the court applied issue preclusion to issues actually litigated or to issues necessarily involved in the conclusion reached. The majority of courts adhering to this theory state the rule in terms of issues necessarily determined by the first action.[90] In *Mitchell v. Jones*,[91] the court held: "It is our understanding . . . that a default judgment conclusively establishes, between the parties so far as subsequent proceedings on a different cause of action are concerned, the truth of all material allegations contained in the complaint in the first action, and every fact necessary to uphold the default judgment. . . ." [92]

In *United States v. Perry*,[93] another recent decision in which issue preclusion arose out of a prior default judgment, the government defaulted in the first action brought by Perry to quiet title. In the second suit, the government tried to set aside the property transfer as fraudulent. Although the causes of action were not identical, the two actions involved the same parties, and the quiet title action had necessarily determined the issue of fraudulent transfer. The court found issue preclusion even though the United States had defaulted and therefore had not "actually" litigated the issue.[94]

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(5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or was based on a compromise verdict or finding;

(6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;

(7) Other circumstances make it appropriate that the party be permitted to relitigate the issue.

[89] 196 F.2d 838 (5th Cir. 1952).

[90] Holdings are usually based on issues necessarily decided, but they also speak of issues properly pleaded and issues tbat might have been litigated. Typical judicial statements of the rule include Lawhorn v. Wellford, 179 Tenn. 625, 631, 168 S.W.2d 790, 792 (1943):

> A judgment taken by default is conclusive by way of estoppel in respect to all such matters and facts as are well pleaded and properly raised, and material to the case made by declaration or other pleadings, and such issues cannot be relitigated in any subsequent action between the parties or their privies.

Id. at 631, 168 S.W.2d at 792 (quoting Taylor v. Sledge, 110 Tenn. 263, 268-269, 75 S.W. 1074, 1075 (1903)). In David v. Nemerofsky, 41 A.2d 838, 839 (Mun. Ct. App. D.C. 1945), the court stated, "It [the binding effect] includes all facts alleged and necessary to support the judgment, and a judgment by default or confession is equally binding on the party against whom estoppel is claimed." *Id.* at 839.

[91] 172 Cal. App. 2d 580, 342 P.2d 503 (1959).

[92] *Id.* at 586-87, 342 P.2d at 507.

[93] 473 F.2d 643 (5th Cir. 1973).

[94] *Id.* at 648-49.

The *Perry* court applied the analysis discussed in *Palma v. Powers*.[95] Preclusion existed because the government: (1) understood the importance of the litigation; (2) could have easily contested the claim; (3) had had an opportunity for a full and fair litigation of the issue of fraudulent transfer; and (4) should have foreseen the preclusive effects of its default in the event of a second suit. The court examined the reason for the government's default and found a gross administrative oversight on the part of the Commissioner of Internal Revenue. The purpose of the quiet title action—a final settlement for the property owners—outweighed the administrative inconvenience to the government in litigating the issue in the first suit. Therefore, the court considered it unfair to force Perry to relitigate this issue, yet not unduly harsh to preclude the government just as it would have precluded any other private party under these circumstances.[96]

Several courts have regarded a default judgment as a waiver of the right to contest the issue in a subsequent action. Under this rationale, the record must show that the party intended the waiver. The test these courts apply is whether, in view of the surrounding facts, the parties intended the default to be an admission of the other party's claim.[97] In *Harvey v. Griffiths*,[98] the court stated:

> It is immaterial that the judgment which is assailed was procured by default. The defendants in that action had an opportunity to appear and protect their interest. They deliberately waived the right to their day in court by failing to appear and answer the complaint. A default judgment is an estoppel as to all issues necessarily litigated therein and determined thereby exactly like any other judgment provided the court acquired jurisdiction of the parties and subject matter involved in the suit.[99]

The defaulting party can avoid preclusion by giving an explanation of his failure to litigate.[100] The court can then decide

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[95] 295 F. Supp. 924 (N.D. Ill. 1969) (discussed at notes 21-23 and accompanying text *supra*; notes 141-43 and accompanying text *infra*.

[96] 473 F.2d at 648-49.

[97] *See, e.g.*, Guynn v. Wilhelm, 226 Or. 606, 360 P.2d 312 (1961).

[98] 133 Cal. App. 17, 23 P.2d 532 (3d Dist. 1933).

[99] *Id.* at 22-23, 23 P.2d at 534.

[100] *See* United States v. Perry, 473 F.2d 643 (5th Cir. 1973); Lynch v. Lynch, 250 Iowa 407, 94 N.W.2d 105 (1959); Guynn v. Wilhelm, 226 Or. 606, 360 P.2d 312 (1961).

whether the particular facts support a presumption that the default judgment constitutes an admission. Parties may thus avoid preclusion in cases of extreme hardship. A supposedly precluded party may be able to establish that his default was not an admission of liability but rather a deliberate choice to avoid litigating in a particular forum. A defendant, for example, might have believed that the forum did not have jurisdiction over him and so he may have elected to contest the matter of personal jurisdiction when suit was brought on the default judgment in another forum.

The controlling question courts should ask before applying issue preclusion to a default judgment is not whether the parties actually litigated the issue, but whether the party to be precluded had an opportunity for a full and fair day in court.[101] New York has developed such a "full and fair opportunity test." In *Schwartz v. Public Administrator*,[102] the court stated:

> New York law has now reached the point where there are but two necessary requirements for the invocation of the doctrine of collateral estoppel. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling.[103]

A United States district court in Michigan, in a thoughtful opinion, considered what preclusive effect it should give to a default judgment.[104] The court paid lip service to the rule that issue preclusion applied only to those issues which had been "actually" or "fully litigated" in the prior action,[105] but effectively undercut the rule:

> However, this rule does not refer to the quality or quantity of argument or evidence addressed to an issue. It requires only two things: first, that the issue has been effectively raised in the prior action, either in the pleadings or through development of

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[101] Phillips v. Cooper, 253 Iowa 359, 360, 112 N.W.2d 317, 318 (1961).

[102] 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969). *See also* Ritchie v. Landau, 475 F.2d 151 (2d Cir. 1973); Fairchild, Arabatzis & Smith, Inc. v. Prometo Co., 470 F. Supp. 610 (S.D.N.Y. 1979).

[103] 24 N.Y.2d at 71, 246 N.E.2d at 729, 298 N.Y.S.2d at 960.

[104] Overseas Motors, Inc. v. Import Motors Ltd., 375 F. Supp. 499 (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975).

[105] *Id.* at 516.

> the evidence and argument at trial or on motion; and second, that the losing party has had "a fair opportunity procedurally, substantively, and evidentially" to contest the issue. The general rule therefore is that subject to these restrictions default judgments do constitute res judicata for purposes of both claim preclusion and issue preclusion (collateral estoppel).[106]

The court rejected the *Restatement Second* rule in favor of a possibility of issue preclusion, and placed the burden on the supposedly precluded party to explain why preclusion should not apply: "a blanket refusal to recognize collateral estoppel in default cases is far too heavy-handed and indiscriminate a remedy. The two-part test referred to above is far more functional." [107]

The Court of Appeals for the Eighth Circuit,[108] the Court of Customs and Patent Appeals,[109] and state courts in Pennsylvania,[110] Colorado,[111] New Mexico,[112] and Maryland [113] have held that issue preclusion may arise from default judgments.

When a court enters a default judgment against a defendant who had full incentive and opportunity to litigate, later courts should recognize a presumption in favor of issue preclusion but provide the defendant an opportunity to show why preclusion is inappropriate. For example, where a defendant defaults because he prefers to litigate the question of jurisdiction in his own state, it certainly seems inappropriate to hold for issue preclusion on that question. On the other hand, issue preclusion should arise from a default judgment that reflects an admission on the part of the losing party that the facts asserted are true. If the default implies that the defendant acknowledges the correctness of the allegations against him, then a court should bar relitigation of the issue.

d. *Consent Judgments.* Because a consent judgment is both an agreement between the parties to the litigation and a judgment by a court, it poses a unique problem in applying issue preclusion, a problem differing somewhat from those presented by a judgment based on either an admission in a pleading or a guilty plea.

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[106] *Id.*

[107] *Id.* at 517.

[108] *See* Brown v. Kenron Alum. & Glass Corp., 477 F.2d 526 (8th Cir. 1973).

[109] *See* Williams v. Five Platters, 510 F.2d 963 (C.C.P.A. 1975).

[110] *See* Zimmer v. Zimmer, 457 Pa. 488, 326 A.2d 318 (1974).

[111] *See* DeBoer v. District Court, 184 Colo. 112, 518 P.2d 942 (1974).

[112] *See* Gallegos v. Franklin, 89 N.M. 118, 547 P.2d 1160 (Ct. App. 1976).

[113] *See* J. C. Penney Co. v. Harker, 23 Md. App. 121, 326 A.2d 228 (1974).

A number of courts have held that a consent judgment does not give rise to issue preclusion. The Supreme Court, denying issue preclusive effect to a consent judgment, stated:

> [U]nless we can say that [the consent judgments] were an adjudication of the merits, the doctrine of estoppel by judgment would serve an unjust cause: it would become a device by which a decision not shown to be on the merits would forever foreclose inquiry into the merits. Estoppel by judgment includes matters in a second proceeding which were actually presented and determined in an earlier suit. . . . A judgment entered with the consent of the parties may involve a determination of questions of fact and law by the court. But unless a showing is made that that was the case, the judgment has no greater dignity, so far as collateral estoppel is concerned, than any judgment entered only as a compromise of the parties.[114]

Courts should not, however, treat all consent judgments alike. The Supreme Court's language suggests that issue preclusion might be appropriate if the court entering a consent judgment makes specific findings of fact. Indeed, courts have been willing to bar litigation of an issue after a consent judgment where: (1) the parties expressly stipulate that the judgment shall have collateral effect;[115] (2) the parties have partially litigated the case before the court enters the consent judgment;[116] and (3) the parties' actions or statements indicate that they intended the judgment to have preclusive effect.[117] An examination of these categories of cases shows that consent judgments have had, as they should have, preclusive effect.

Because a consent judgment involves a contractual element, if the parties expressly agree that courts shall give the judgment preclusive effect, there is no reason to treat the judgment otherwise. One commentator observes:

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[114] United States v. International Bldg. Co., 345 U.S. 502, 506 (1952) (citations omitted).

[115] Nashville, C. & St. L. Ry. v. United States, 113 U.S. 261 (1885); Harrison v. Bloomfield Bldg. Indus., Inc., (6th Cir. 1970); Beucher v. Union Trust Co., 211 N.C. 377, 190 S.E. 226 (1937); Shell Petroleum Corp. v. Hess, 190 Okla. 669, 126 P.2d 534 (1942).

[116] Siegel v. National Periodical Publ., Inc., 364 F. Supp. 1032 (S.D.N.Y. 1973), *aff'd*, 508 F.2d 909 (2d Cir. 1974); Backus v. United States, 59 F.2d 242 (Ct. Cl. 1932), *cert. denied*, 288 U.S. 610 (1933); Macheras v. Syrmopoulos, 319 Mass. 485, 66 N.E.2d 351 (1946).

[117] Schlegel Mfg. Co. v. USM Corp., 525 F.2d 775 (6th Cir. 1975), *cert. denied*, 425 U.S. 912 (1976); World's Finest Chocolate, Inc. v. World Candies, Inc., 409 F. Supp. 840 (N.D. Ill. 1976), *aff'd*, 559 F.2d 1226 (7th Cir. 1977).

> Parties may consent to a judgment for reasons . . . unrelated to the merits of the underlying claim. However, because of such a judgment's consensual nature, there seems to be no reason why, if the parties expressly so stipulate, collateral-estoppel effect should not be accorded, provided it is limited to those claims which might reasonably have been foreseen at the time of the agreement.[118]

Where parties agree that a consent judgment will bind them in any future litigation, courts have held them to that bargain. These courts consider extrinsic evidence, surrounding circumstances, and the terms of the initial agreement to determine the litigants' intentions. In *Harrison v. Bloomfield Building Industries*,[119] the Sixth Circuit held that a stipulated judgment and release manifested "a clear intention of the parties with regard to the disposition of all claims of fraud."[120] The court found for issue preclusion arising from the earlier stipulated judgment and release.[121]

Courts have also held that a consent judgment may give rise to issue preclusion when the first court had partially tried the case before it entered the consent judgment. *Macheras v. Syrmopoulos*[122] is illustrative. In the first suit the plaintiff had recovered damages under a consent judgment from the defendant for damage done to plaintiff's auto. In the second suit, the court held the defendant estopped from litigating for personal injuries resulting from the same accident. In the first action, the court had actually determined liability, and only the damages were arrived by the parties' consent. Thus, in the second action, the court was not merely administering the contract between the two parties; another court had fully determined the negligence issue, thereby satisfying all the policies that underlie application of issue preclusion. The court said:

> The judgment in the earlier action was res judicata. There the parties and issues were the same as those here. It is not open to the plaintiff to try the issues anew; she has had her day in court. . . . That the judgment was entered by agreement of the

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[118] Note, *The Consent Judgment as an Instrument of Compromise and Settlement*, 72 HARV. L. REV. 1314, 1320-21 (1959) (footnotes omitted).

[119] 435 F.2d 1192 (6th Cir. 1970).

[120] *Id.* at 1195.

[121] *Id.*

[122] 319 Mass. 485, 66 N.E.2d 351 (1946).

> parties rather than by the court is of no materiality. . . . [I]f "by their agreement after litigation has been entered upon, [the parties] put the result in the form of a judgment in the proceeding, they thenceforth are as much bound by the legal effect of the judgment as if it were the outcome which a court would have reached had the issues disclosed by the pleadings been fully tried and decided." [123]

In *Backus v. United States*,[124] the Internal Revenue Service had made all the final determinations, and the proceedings had begun, when the parties reached the consent agreement. The court deemed issue preclusion appropriate, stating, "[A]ll matters affecting the tax liability of plaintiff . . . were finally and conclusively settled by the agreements and stipulations executed and filed with the Board of Tax Appeals and by the consent judgments entered by the board." [125] In *Siegel v. National Periodical Publications, Inc.*,[126] the court reached a similar result. In the first action, the parties reached a consent agreement after a referee had made findings of fact and the judge had formulated conclusions of law. The consent judgment incorporated these findings. The *Siegel* court held that the consent judgment precluded litigation of the issue in a subsequent action.[127] These decisions seem correct. When a consent judgment grows out of a judicial proceeding, it represents more than a mere memorial of a settlement between the parties; it is the final product of the litigation. As such, courts should afford the consent judgment preclusive effect.[128]

Courts have also given preclusive effect to consent judgments when parties' actions or statements indicate an intent to be bound. In *Schlegel Manufacturing Co. v. USM Corp.*,[129] plaintiff alleged a violation of a consent decree that had established the validity of

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[123] *Id.* at 486, 66 N.E.2d at 352 (quoting Ansara v. Regan, 276 Mass. 586, 589, 177 N.E. 671, 672 (1931) (citations omitted)).

[124] 59 F.2d 242 (Ct. Cl. 1932), *cert. denied*, 288 U.S. 610 (1933).

[125] *Id.* at 255.

[126] 364 F. Supp. 1032 (S.D.N.Y. 1973), *aff'd*, 508 F.2d 909 (2d Cir. 1974).

[127] *Id.* at 1037.

[128] *See* Kraly v. National Distillers Chem. Corp., 502 F.2d 1366 (7th Cir. 1974); Note, *"To Bind or Not to Bind": Bar and Merger Treatment of Consent Decrees in Patent Infringement Litigation*, 74 COLUM. L. REV. 1322 (1974). In *Kraly*, the court applied policies expressed by the Supreme Court in Lear, Inc. v. Adkins, 395 U.S. 653 (1969), to consent decree adjudications of validity, and concluded that "[T]he licensee [was] not estopped from challenging the validity of the patent, even though a prior consent decree incorporated an understanding not to challenge the validity of the patent." 502 F.2d at 1369.

[129] 525 F.2d 775 (6th Cir. 1975), *cert. denied*, 425 U.S. 912 (1976).

plaintiff's patent and enjoined further infringement by the defendant. The district court held that the consent decree barred the defendant from challenging the validity of the patent. The Sixth Circuit affirmed, stating: "Even though the degree of judicial involvement is different between a consent decree and a litigated result, we are not prepared to find that judicial involvement in a consent decree is so inconsequential as to justify different treatment." [130]

In *World's Finest Chocolate, Inc. v. World Candies, Inc.*,[131] another patent infringement action based on a prior consent decree, the court examined "what the consent judgment means by the plain intendment of the words used therein and whether the conduct of the defendant has violated its provisions." [132] The court concluded that the admission of infringement in the consent judgment operated as a waiver of the right to submit evidence on the issue of infringement in the subsequent proceeding for civil contempt.[133]

In addition to the categories mentioned, courts have found issue preclusion arising from consent judgments in other situations.[134] Together, these cases suggest that it is undesirable to have a rigid rule requiring "actual litigation" as a prerequisite to issue preclusion. Existing authority certainly suggests that a more flexible rule is desirable.

If it is true that some consent judgments should have preclusive effect, then the only question is how courts should draw the line between those that are preclusive and those that are not. The *Restatement Second* rule would bar preclusive effect for all consent judgments. The formulation urged in this Article would direct courts to hold for preclusion unless the party to be precluded can show that he should not be so bound. This rule would place a

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[130] *Id.* at 780. *See also* Broadview Chem. Corp. v. Loctite Corp., 474 F.2d 1391, 1395 (2d Cir. 1973); Hirs v. Detroit Filter Corp. 424 F.2d 1040, 1041 (6th Cir. 1970); United States *ex rel.* Shell Oil Co. v. Barco Corp., 430 F.2d 998, 1001-02 (8th Cir. 1970). *But see* Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 739-40 (9th Cir. 1971).

[131] 409 F. Supp. 840 (N.D. Ill. 1976), *aff'd*, 559 F.2d 1226 (7th Cir. 1977).

[132] *Id.* at 844.

[133] *Id.* at 845.

[134] *See* United States v. General Adjustment Bureau, Inc., 357 F. Supp. 426, 429 (S.D.N.Y. 1973) (antitrust action); Garrison v. Garrison, 138 Ga. App. 196, 197, 225 S.E.2d 773, 774 (1976) (consent decree concerning child support payments); Butler v. Butler, 253 Iowa 1084, 1110-11, 114 N.W.2d 595, 610-11 (1962) (establisbment of trust in deceased's estate); City of Chariton v. J. C. Blunk Constr. Co., 253 Iowa 805, 812-13, 112 N.W.2d 829, 832-33 (1962) (contract action to recover damages) (dicta); Missile v. Anne Arundel County, 271 Md. 70, 77-79, 314 A.2d 451, 456 (1974) (equity action for refund of deposit).

burden on the resisting party, but it is not an impossible burden. Under this Article's analysis, the incentive-and-opportunity-to-litigate test would apply to the consent judgment situation. If incentive and opportunity did not exist, then there should be no preclusion.[135]

e. *Judgment by Confessions.* Where a defendant, who has incentive and opportunity to litigate and who actually participated in the litigation, allows the entering of a judgment by confession, it is difficult to avoid the conclusion that issue preclusion should arise from the judgment. The defendant has elected not to contest the matter but rather to allow the court to enter a judgment by confession.[136]

f. *Judgment by Confession under Cognovit Provision.* When a party enters into an agreement containing a cognovit provision in a state that permits such a provision,[137] he runs the risk that a court will hand down a judgment against him without providing any notice of, or opportunity to participate in, the proceeding. Is this judgment preclusive of issues in subsequent litigation? It seems apparent that this sort of judgment falls under section 68.1 [section 28] of the *Restatement Second*[138] so that there would be no issue preclusion. Because the party did not have an adequate opportunity for a full and fair adjudication in the initial action, issue preclusion should not arise.[139]

5. *Towards an Acceptable Rule*

The "actually litigated" requirement undoubtedly endows the *Restatement Second* rule with virtues of simplicity and certainty. However, there are significant disadvantages. First, it allows litigation of issues that were necessary for the decision in the first action and that the losing party conceded while litigating other issues. This hardly engenders conservation of judicial resources. Second, because a losing party is not bound by all necessary find-

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[135] *See* notes 18-30 and accompanying text *supra*. Recall that §§ 68.1 and 88 of the RESTATEMENT (SECOND) OF JUDGMENTS [§§ 28, 29] specify several exceptions to the general concept of preclusion.

[136] *See e.g.*, IOWA CODE § 676 (1979).

[137] *See* D. H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972); Swarb v. Lennox, 405 U.S. 191 (1972).

[138] RESTATEMENT (SECOND) OF JUDGMENTS § 68.1 (Tent. Draft No. 4, 1977) [§ 28] (reprinted in full at note 87 *supra*).

[139] *Id.*, Comment j.

ings of the judgment, the rule creates uncertainty about legal relationships even after a court has rendered a final judgment. Third, the losing party, having had the incentive and opportunity to litigate an issue, gains a second chance to litigate without any concomitant social benefit. Fourth, courts may reach inconsistent results on the same issue, which confuses the litigants, the courts, and the public.

This Article advocates another position: that the question of actual litigation is a consideration irrelevant to the determination of issue preclusion. If the losing litigant had the incentive and opportunity to litigate, and the issue was necessary for the decision, then issue preclusion arises unless one of the exceptions, such as those found in sections 68.1 and 88 [sections 28 and 29], applies. If "actual litigation" is of questionable significance in some cases of asserted issue preclusion—and the authorities certainly support this position[140]—it seems desirable to adopt a rule that would allow issue preclusion without regard to "actual litigation" in some situations. The present *Restatement Second* does not so provide. It contains an absolute requirement of "actual litigation" before an issue can be precluded by a prior case. A much preferable position would allow issue preclusion absent "actual litigation" if other factors suggest that there should be preclusion. Courts would then possess needed flexibility that is absent under the rigid "actual litigation" requirement.

The court in *Palma v. Powers*[141] adopted a more flexible approach in a well-considered and well-stated opinion. The court stated:

> Although the requirement that the matter be actually controverted in a prior proceeding has been frequently reiterated, there are a number of well-considered cases which adopt the position that, in certain situations, preclusion can arise even though the issue was not contested in the first suit. For instance, it is widely accepted by the state courts that a default judgment is conclusive as to all issues necessarily litigated and determined therein and has exactly the same validity and force as any other judgment. Similarly, it is widely accepted that a consent decree, under proper circumstances, is entitled to res judicata effect and precludes litigation of the claims or issues determined in the decree in subsequent actions between the

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[140] See notes 50-139 and accompanying text *supra*.

[141] 295 F. Supp. 924 (N.D. Ill. 1969) (discussed at notes 21-23 and accompanying text *supra*).

> parties. A further example of this idea is found in the sphere of criminal law. It is generally established that "A plea of guilty is not a mere admission of guilt. It is in and of itself a conviction and as conclusive as the verdict of a jury." In the face of a voluntary plea of guilty, it has been consistently held that a criminal defendant cannot subsequently attack his conviction on the ground that it was secured in violation of his constitutional rights.[142]

The principle inquiry, then, when a party claims that preclusion extends to a previously uncontested issue, should be whether a court may reasonably assume that the allegedly precluded party's action in the first suit was an *admission* of the uncontested issue. This, of course, would depend upon the circumstances of the prior action and, ultimately, such objective factors as: (1) the importance of the matter to the party; (2) the cost of the litigation; and (3) the ease with which the party could have presented a defense to the uncontested point. A court should bar a litigant from actually litigating an issue only if the court can reasonably construe the litigant's action in the prior suit as a *waiver* of his right to contest that issue.

Where, however, a party with incentive and opportunity to litigate has *failed to defend* on an issue necessary for the judgment in a prior action, it is reasonable for courts to construe that failure as an admission of the truthfulness of the matter, particularly if the party has gone to the time and expense of defending on the other points in issue. The efficient operation of our legal system normally requires adjudication of fundamentally related issues in a single proceeding in one court to avoid piecemeal, diffuse, and unnecessarily prolonged litigation of controversies between parties. Consequently, a litigant who has once foregone his opportunity to contest a matter that was necessarily decided in a previous proceeding should, at least, bear the burden of explaining his failure to controvert the matter in the earlier suit to justify litigation of the matter in a second action.[143]

C. *A Proposed Form for the Rule on Issue Preclusion*

Unfortunately, the *Restatement Second*'s basic rule on issue preclusion is found not in a single provision but within three. Sec-

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[142] 295 F. Supp. at 935 (citations omitted).

[143] *See id.* at 936. The supposedly precluded party may be able to show that there was an explanation for the failure to litigate the issue in the first proceeding. *See, e.g.*, Worcester v. Commissioner, 370 F.2d 713, 717 (1st Cir. 1966). *See also* Plunkett v. Commissioner, 465 F.2d 299 (7th Cir. 1972) (discussed at note 73 *supra*).

tion 68 [section 27] presents the so-called "general rule" on issue preclusion, but it is not really the general rule; it deals only with subsequent actions between the same parties. Similarly, although section 68.1 [section 28] purports to present the exceptions to this rule, the exceptions deal only with subsequent litigation between the same parties. Section 88 [section 29] then extends the rule of sections 68 and 68.1 [sections 27 and 28] to litigation between the party to be bound and others not parties in the first action. Instead of including a section comparable to section 68.1 [section 28] for litigation involving strangers to the first suit, the *Restatement Second* includes the exceptions in section 88 [section 29]. So the present format is: (1) the rule of issue preclusion between the same parties, in section 68 [section 27]; (2) exceptions to this rule, in section 68.1 [section 28]; (3) the rule of issue preclusion between a losing litigant and strangers, in section 88 [section 29]; and (4) exceptions to this rule, also in section 88 [section 29].

This format of rules in the *Restatement Second* results from a decision to follow the numbering system of the first *Restatement.* Because the first *Restatement* required mutuality of estoppel, section 68 [section 27] applied only when two actions involved identical parties. The drafters adopted this format in the *Restatement Second* even though they had abandoned the mutuality requirement. It was suggested that the *Restatement Second* combine issue preclusion between the same parties and issue preclusion asserted by nonparties to the first action in one section, but the glacier was already in motion, and that logical combination never occurred. However, courts do combine all of the factors in a single rule.

An acceptable rule on issue preclusion should require: (1) that the party to be precluded have incentive and opportunity to litigate; (2) that the issue be necessary to the judgment; and (3) that the first court determined the issue against the party to be precluded. The following proposal includes such a general issue preclusion rule, which could be followed by exceptions such as those found currently in sections 68.1 and 88 [sections 28 and 29]:

> (a) When a party has had the incentive and opportunity to litigate, a judgment against the party is preclusive on any issue whose determination is necessary for the decision, except as provided in (b).
>
> (b) [Exceptions.]

Courts can obviously state a rule of this sort in a number of different ways. The New York Court of Appeals adopted the fol-

lowing formulation: "[W]here it can be fairly said that a party has had a full opportunity to litigate a particular issue, he cannot reasonably demand a second one."[144] The Seventh Circuit has set forth the rule as follows: "Invocation of the doctrine of . . . issue preclusion . . . is proper when the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding."[145] These latter two formulations suffer because they do not include all of the necessary facets. The rule must indicate that the determination of the issue was necessary to the prior judgment. In the interest of comprehensiveness, the rule should also indicate that the precluded party had the incentive to litigate.[146]

The precise wording is not, however, the crucial matter. The rule should specify the basis of preclusion (the incentive and opportunity to litigate), the precluded party (the losing party in the first proceeding), and the scope of the preclusion (issues necessary for the decision rendered). Any rule including all of these factors, regardless of form, will suffice.

II

Preclusion and Nonparties to First Action

Under some circumstances, a litigant may find that a judgment rendered in a prior action in which he was not a party may affect his claim or a claim that someone else asserts against him. Section 78 [section 34] of the *Restatement Second* states the general rule under the topic "Parties and Persons Represented by Parties":

> A person who is not a party to an action is not bound by or entitled to the benefits of the rules of res judicata, except as stated in §§ 73 and 74, §§ 79 to 88, and ___.[147]

The Reporter's Note states that "a non-party may be bound, for example, where he is represented by a party or where his in-

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[144] Schwartz v. Public Adm'r, 24 N.Y.2d 65, 69, 246 N.E.2d 725, 728, 298 N.Y.S.2d 955, 958 (1969).

[145] Speaker Sortation Sys., Div. of A-T-O, Inc. v. United States Postal Serv., 568 F.2d 46, 48 (7th Cir. 1978).

[146] For a discussion of the reasons for keying the general rule of issue preclusion to the existence of incentive and opportunity to litigate, see notes 17-30 and accompanying text *supra*.

[147] Restatement (Second) of Judgments § 78 (Tent. Draft No. 2, 1975) [§ 34] [citing final §§ 30, 31, 35-42, 52 & 29].

terests are derivative from those of a person who was a party." Supposedly, the precise rules are presented in the subsequent sections of this topic.[148]

These *Restatement Second* provisions specifically cover participating nonparties (section 83 [section 39]), persons agreeing to be bound either expressly or impliedly (section 84 [section 40]), persons represented by a party (sections 85 and 86 [sections 41 and 42]), bailor and bailee (section 87 [section 52]), successors to property (section 89 [section 43]), transfer of property while action was pending (section 90 [section 44]), survival action following personal injury action (section 92 [section 45]), wrongful death action following personal injury action (section 92.1 [section 46]), bringing both survival and wrongful death actions (section 92.2 [section 47]), derived actions (section 93 [section 48]), "Persons Having Relationships in Which One is Vicariously Responsible for the Conduct of the Other" (section 99 [section 51]), actions by joint obligee (section 102 [section 53]), assignor and assignee (section 104 [section 55]), parties to a contract and third-party beneficiary (section 105 [section 56]), and effect of judgment against indemnitee on the indemnitor (sections 107 and 107.1 [sections 57 and 58]).

In addition to these specific situations, section 88 [section 29] deals with the general problem of issue preclusion in subsequent litigation involving the losing—precluded—party from the first action. This section should really be a part of a general statement about issue preclusion generally arising from losing on an issue in a lawsuit.[149]

These provisions do not appear to be flexible. The *Restatement Second* includes no general language that courts can apply to expand the concept of preclusion. Many courts will seek a broadened application of preclusion to alleviate their overburdened dockets. Indeed, the judicial movement toward expansion has already begun. *Green v. American Broadcasting Co.*[150] is illustrative. In the initial action, plaintiff sued for damages sustained as the result of certain acts of defendant. After the court rendered judgment for defendant, a group of plaintiffs commenced a second action against defendant claiming that they had sustained

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[148] Sections 73 and 74 deal with jurisdiction to determine interest in things and jurisdiction over status. RESTATEMENT (SECOND) OF JUDGMENTS §§ 73, 74 (Tent. Draft No. 1, 1973) [§§ 30, 31].

[149] *See* notes 143-46 and accompanying text *supra*.

[150] 572 F.2d 628 (8th Cir. 1978).

damages by the same acts. The Court of Appeals held that the close relationship between the first plaintiff and the second group of plaintiffs barred relitigation of the claim:

> The basic principle in multiple party claim preclusion cases seems to be that certain individuals may be so closely related, their interests so interwoven, or their rights so similar that it is unfair to treat them separately.... This principle is applicable here. In a very real sense the investors here are [the second group of plaintiffs]. Without the investors' $900,000 investment the corporation would never have come into existence. The Iowa court and others have found privity in situations similar to here.[151]

Towle v. Boeing Airplane Co.[152] provides another example of judicial treatment of claim preclusion against nonparties to the first suit. The Court of Appeals observed,

> Simply put, the transactions between [the defendant corporation] and the plaintiffs may be viewed in two ways. The plaintiffs may be considered as the promoters of Atlas entering an agreement subsequently ratified by Atlas, or they may be treated as a group of individuals who purchased the helicopter (or invested in the corporation established for that purpose).
>
> The choice of theories determines the technically proper plaintiff, but the real parties in interest and the cause of action are identical under both theories. The two causes of action could only be pleaded in the alternative, as the amended complaint did.
>
> All matters now pressed were litigated in the earlier lawsuit and the plaintiffs are bound by that judgment as to the amount of recoverable damages. Further action is barred by the doctrine of res judicata, since the current plaintiffs were obviously privies to Atlas with respect to this cause of action. The defendant's motion for summary judgment must, therefore, be granted.[153]

In affirming the trial court's decision, the Court of Appeals pointed out further that

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[151] *Id.* at 631 (citations omitted).
[152] 364 F.2d 590 (8th Cir. 1966).
[153] *Id.* at 591-92 (citations omitted).

> The present appellants actively participated in the action resulting in the favorable judgment for the trustees and in so doing are in no position to challenge the status of the corporation as the real party in interest. The trial court found that appellants were privies to the Atlas trustees with respect to the former cause of action. . . . "Who are privies ordinarily presents a question of fact requiring examination of the circumstances of each case as it arises."
>
> Here appellants were closely connected with Atlas as controlling stockholders, directors and officers of Atlas. They have wholly failed to demonstrate that the court's finding of privity is clearly erroneous.[154]

The first *Restatement of Judgments* skirted this matter. Section 83 stated, "A person who is not a party but who is in privity with the parties in an action terminating in a valid judgment is, to the extent stated in [sections] 84-92, bound by and entitled to the benefits of the rules of res judicata."[155] This rule appeared to cover both claim and issue preclusion, and in fact an examination of sections 84 through 92 shows that both are included, except that section 90 deals only with issue preclusion (collateral estoppel). But none of the rules spoke directly to the question of claim preclusion arising against a nonparty to the first action in the situation considered here. None of the *Restatement Second* provisions mentioned above addresses this problem; nor do any of them have flexibility so that they could be viewed as applicable by implication to this situation.[156]

The *Restatement Second* does address the question of whether a judgment gives rise to issue preclusion against a nonparty to the first action. The *Restatement Second* indicates that courts may bind a nonparty to a decision of an issue in the first action if (1) the nonparty participated in the litigation; (2) the nonparty's interests were adequately represented in the first action and the nonparty has a specified relationship with a participant in the first action;

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[154] *Id.* at 593 (citations omitted).

[155] RESTATEMENT OF JUDGMENTS § 83 (1942).

[156] The Reporter has indicated that "The sections in Chapter 4 dealing with substantive connections are highly specific in the relationships to which they refer, although the underlying theme is that the interest being represented in the second action was in some sense represented in the original action." RESTATEMENT (SECOND) OF JUDGMENTS, Introduction at 16-17 (Tent. Draft No. 7, 1980). This seems to be the problem. The specific rules are so specific that there is no room for flexibility or a resort to their underlying theme. *See* Vestal, *Claim Preclusion and Parties in Privity: Sea-Land Services v. Gaudet in Perspective*, 60 IOWA L. REV. 973 (1975).

or (3) the nonparty has a certain legal relationship with the losing party in the first action, or the nonparty has consented to be bound.[157]

It is unfortunate that the *Restatement Second* does not have some general statement about binding nonparties, to permit development within its framework. The development will occur regardless. Expansion of the use of a judgment *against* a nonparty, rather than for the benefit of a nonparty, presents serious difficulties. However, some courts have concluded that it is desirable and possible to hold, in situations not covered by the *Restatement Second*, a nonparty bound by a prior adjudication.[158]

It is difficult to chart the probable future development of the concept, but it would seem reasonable to predict:

(1) a willingness to expand issue preclusion against a nonparty to the first suit;

(2) a greater willingness to use such a judgment defensively against a nonparty to the first suit than offensively; and

(3) expansion only within the constitutionally permissible area, which means only a modest use of this type of preclusion.

Courts are beginning to recognize that expansion of the application of issue preclusion to nonparties to the first suit, although unorthodox, reaches a result that is both desirable and constitutionally permissible. One court stated:

> [I]n view of the great increase in the number of civil actions commenced in the federal district courts in recent years, the Court believes that the federal trial courts should not hesitate to adopt new approaches designed to terminate needless and futile litigation where identical liability issues have been fairly and truly tried in a prior action.[159]

This court, in a multi-district litigation, held that the decision adverse to the claimants in the lead case was preclusive as far as the remaining plaintiffs were concerned. Other courts in the future may hold that logic, fair play, and judicial efficiency require such a result. The precedents exist;[160] the Constitution does not

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[157] RESTATEMENT (SECOND) OF JUDGMENTS §§ 83-85 (Tent. Draft No. 2, 1975) [§§ 39-41]; *Id.* §§ 89, 93 (Tent. Draft No. 3, 1976) [§§ 43, 48].

[158] *See* Vestal, *Res Judicata/Preclusion: Expansion*, 47 S. CAL. L. REV. 357, 362-373 (1974) and cases cited therein.

[159] *In re* Air Crash Disaster Near Dayton, Ohio, 350 F. Supp. 757, 768 (S.D. Ohio 1972), *rev'd sub. nom.* Humphreys v. Tann, 487 F.2d 666 (6th Cir. 1973).

[160] *See, e.g.*, Vestal, *supra* note 158; Note, *Collateral Estoppel of Nonparties*, 87 HARV. L. REV. 1485 (1974).

forbid such a result if there has been adequate representation of the interest of the person to be bound in the first action.[161] Only time will tell whether courts will adopt a broader application of issue preclusion.

Another cloud on the horizon is the possibility that courts will preclude a nonparty on an issue because the nonparty knew of the litigation and had the opportunity to intervene to present his point of view but elected not to. This is consistent with the idea that one should be bound if he had the full opportunity to litigate and chose not to. Courts have not fully developed this concept but have given it some serious consideration.[162] In *Provident Tradesmens Bank & Trust Co. v. Patterson*,[163] the Supreme Court touched upon this matter:

> [I]t might be argued that Dutcher should be bound by the previous decision because, although technically a nonparty, he had purposely bypassed an adequate opportunity to intervene. We do not now decide whether such an argument would be correct under the circumstances of this case. If, however, Dutcher is properly foreclosed by his failure to intervene in the present litigation, then the joinder issue . . . vanishes, for any rights of Dutcher's have been lost by his own inaction.[164]

This is not the only time the Supreme Court has suggested this possibility. Earlier that same year, the Court in the *Penn-Central Merger and N & W Inclusion Cases*[165] held that certain parties in

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[161] *See* U.S. CONST. amend. V; *id.* amend. XIV, § 1.

[162] On the question of the effect on possible preclusion of a right to intervene, the RESTATEMENT (SECOND) OF JUDGMENTS § 88(3) (Tent. Draft No. 2, 1975) [§ 29] might allow relitigation of an issue if "[t]he person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary." This is quite different from the effect being urged in the test, that is, that preclusion might arise because a nonparty had the opportunity to intervene. RESTATEMENT (SECOND) OF JUDGMENTS § 111 (Tent. Draft No. 4, 1977) [§ 62] bars a nonparty from asserting a claim arising out of the transaction "that was the subject of the action" if there might be inconsistent obligations imposed on a party to the first action and the claimant in the second action misled the party against whom the second action is brought so that he did not employ certain procedures "that could have determined the claimant's claim." This might be used against a nonparty who was invited to intervene, refused, and thus misled a party to the lawsuit as to the interest of the nonparty invitee.

[163] 390 U.S. 102 (1968).

[164] *Id.* at 114. The Court referred again to this idea by stating "when Dutcher raises this defense he may lose, either on the merits of the permission issue or on the ground that the issue is foreclosed by Dutcher's failure to intervene in the present case. . . ." *Id.* at 115.

[165] 389 U.S. 486 (1968).

other suits "might have joined in the New York proceedings," [166] and noted,

> The process of the New York court ran throughout the Nation.... In addition, the United States waived possible objections on venue grounds to appearances by any party in the New York litigation. In these circumstances, it would be senseless to permit parties seeking to challenge the merger and the inclusion orders to bring numerous suits in many different district courts.... [167]

In holding that the instant decision barred any further attacks on the approval of the merger and the inclusion of three protected lines, the Court specifically stated that the Borough of Moosic would be barred although it had not joined in the New York action. Apparently the Court took this action deliberately. As Justice Douglas noted in his partial dissent:

> The Court seemingly declares, however, a new rule of *res judicata* in its effort to prevent the parties in Pennsylvania from proceeding with their actions challenging the basic valdity of the Commission's ... order.... Because the Borough of Moosic, which had properly filed a suit in the Middle District of Pennsylvania but saw its action stayed, refused to accept the invitation of the New York District Court (a court in which Moosic was never a party, and which neither assumed jurisdiction over Moosic nor attempted to do so by making it an involuntary plaintiff) to come to New York and litigate, the Court holds that Moosic is bound by the decision of the New York court in the *Inclusion Case*. The New York court itself did not attempt to hold that its orders in the *Inclusion Case* would bind Moosic if it did not join in the New York proceedings. And I am at a loss to discover any such principle in the law of *res judicata*.
>
> A party is entitled to its day in court; and I cannot fathom how a party can be deprived of that right or waive it by refusing an invitation—not even an order—to litigate in another court located in another State. The Court could reach its conclusion under the doctrine of *res judicata* only if Moosic could be termed in "privity" with one of the parties litigating in the New York action.[168]

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[166] *Id.* at 505.
[167] *Id.* n.4.
[168] *Id.* at 541-42.

Justice Douglas concluded that the requisite privity did not exist.[169]

The *Penn-Central Merger* case illustrates the Court's willingness to expand the law of issue preclusion, and highlights the failure of the *Restatement Second* to include a provision that will accommodate such growth. Lower courts have begun to follow the Supreme Court's lead, and have held that litigants who had the right to intervene in the first action but failed to do so are precluded by the first court's judgment. In *Defenders of Wildlife v. Andrus,*[170] the court stated, "A party that fails to intervene when he is clearly able to do so may be bound by a judgment in a case he could have entered as a matter of right."[171] The District Court for the Southern District of Florida took that same position as one ground for its decision in *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel.*[172] That court stated, "Since the Division of Archives had the opportunity but failed to intervene, instead relying on the United States to further its interests, it should now be bound by the judgment rendered previously against the United States."[173] Despite contrary authority,[174] these cases open the door to the possibility that preclusion may arise from the unexercised right to intervene.[175]

Courts today have indicated a willingness to experiment with the concepts of preclusion. Just as Judge Traynor and the California court almost forty years ago took a giant step in *Bernhard v. Bank of America National Trust & Savings Association,*[176] courts today seem willing to challenge the extant outer limits of preclusion. For example, in In re *Air Crash Near Dayton, Ohio,*[177] the court held a nonparty plaintiff bound by a prior adjudication because of his close relationship with the defeated plaintiff in the first action. On appeal, however, the Sixth Circuit reversed.[178] A trial court in

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[169] *Id.* at 547-48.

[170] 77 F.R.D. 448 (D.D.C. 1978).

[171] *Id.* at 452.

[172] 459 F. Supp. 507 (S.D. Fla. 1978), *aff'd,* 621 F.2d 1340 (5th Cir. 1980).

[173] *Id.* at 516.

[174] *See, e.g.,* Show-World Center, Inc. v. Walsh, 438 F. Supp. 642 (S.D.N.Y. 1977) (citing cases from 1943 and 1918).

[175] Prate v. Freedman, 430 F. Supp. 1373 (W.D.N.Y. 1977), *aff'd,* 573 F.2d 1294 (2d Cir.), *cert. denied,* 436 U.S. 922 (1978).

[176] 19 Cal. 2d 807, 122 P.2d 892 (1942).

[177] 350 F. Supp. 757 (S.D. Ohio 1972), *rev'd sub. nom.* Humphreys v. Tann, 487 F.2d 666 (6th Cir. 1973).

[178] Humphreys v. Tann, 487 F.2d 666 (6th Cir. 1973).

Oregon[179] held a nonparty bound by a decision against the plaintiff in the first action. The court emphasized that the plaintiff in the second action had testified in the first; the same attorney had been involved in the two actions; and the two complaints contained identical allegations of wrongdoing. The intermediate appellate court, however, reversed the innovative court, stating "There is much respectable authority for defendants' contention. The law in this state, however, does not extend as far as defendants would wish it to, and it is not within our authority to expand upon it."[180]

Turner v. American Bar Association[181] represents an expansion of claim preclusion that has gained the approval of at least two courts of appeals. In *Turner,* the court rejected the claim of a right to lay representation in that litigation and held that, in the future, the matter need not be decided by any federal court—even if the litigants were not those involved in the instant cases and even though the judge was named as a defendant. This case is an extension of issue preclusion. The District of Columbia Court of Appeals has acknowledged the existence of "isolated decisions of lower federal courts advancing bold new rules for preclusion of nonparties, which have been hailed by commentators as a sign of things to come."[182] Regrettably, the *Restatement Second* will not easily accommodate such advances. Restatements should be flexible enough to allow changes in the future; they should not be dead hands from the past, hindering case-by-case development that is the hallmark of the common law.

III

Issue Preclusion in Criminal Cases

Section 133 [section 85] of the *Restatement Second* deals with the effect of a criminal judgment in a subsequent civil action involving either the government or a third person.[183] It is com-

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[179] Rynearson v. Firestone Tire & Rubber Co., 43 Or. App. 943, 607 P.2d 738 (1979).

[180] *Id.* at 947, 607 P.2d at 740.

[181] 407 F. Supp. 451 (N.D. Tex., W.D. Pa., N.D. Ind., D. Minn., S.D. Ala., W.D. Wis. 1975) (*mem.*), *aff'd,* 539 F.2d 715 (7th Cir., 1976), *aff'd,* 542 F.2d 56 (8th Cir. 1976).

[182] Consumers Union v. Consumer Prod. Safety Comm'n, 590 F.2d 1209, 1217 n.38 (D.C. Cir. 1978), *rev'd sub nom.* GTE Sylvania, Inc. v. Consumers Union, 100 S. Ct. 1194 (1980).

[183] Although the rules of the *Restatement Second* are generally straightforward, at least one blackletter provision is confusing. Section 133(3) states,

> A judgment against the prosecuting authority is preclusive against the government:

pletely reasonable for courts to hold for preclusion arising from criminal prosecutions, and they have indicated a willingness to do so. But the cases have not limited the preclusive effect of a criminal proceeding to subsequent civil litigation; courts are now holding for issue preclusion in a subsequent criminal prosecution.[184] The Comment to section 133 [section 85] notes,

> When the two proceedings in question are both criminal prosecutions, a judgment in the first prosecution may have preclusive effects as to issues determined and as to offenses adjudicated, such as lesser included offenses. It may also have preclusive effects through operation of the rule against placing an accused twice in jeopardy.[185]

Having whetted the reader's appetite, the Reporter continues that this matter is "beyond the scope of this Restatement." This is unfortunate.[186] The *Restatement Second* is the logical work in which to examine preclusion between criminal prosecutions. There is not another Restatement waiting in the wings to undertake this examination and we have a long wait for the *Restatement (Third) of Judgments.*

(a) In a subsequent civil action between the government and the defendant in the criminal prosecution, as stated in § 68 [§ 27] with the exceptions stated in § 68.1 [§ 28];

(b) In a subsequent civil action between the government and another person, as stated in § 88 [§ 29].

RESTATEMENT (SECOND) OF JUDGMENTS § 133(3) (Tent. Draft No. 7, 1980) [§ 85]. This deals with the situation where the defendant is found not guilty of tax evasion. The government may then elect to sue the defendant for taxes not paid. Superficially, this section would seem to be saying that the acquittal on the income tax evasion charge would be preclusive in the civil action. Of course, this is not true because of the difference in the standard of proof required. The acquittal simply meant that the state was not able to prove the defendant's evasion beyond a reasonable doubt. In the civil action, the proof standard is the preponderance of evidence standard. In fact, that is the thrust of the rule in § 133 [§ 85] because of the incorproation of § 68.1 [§ 28], more specifically § 68.1(d) [§ 28]. The same thing is true concerning § 133(3)(b) [§ 85] beause of the incorporation of § 88 [§ 29] which includes § 68.1 [§ 28].

[184] *See* Vestal, *Issue Preclusion and Criminal Prosecutions*, 65 IOWA L. REV. 281 (1980); Vestal, *Criminal Proseecutions: Issue Preclusion and Full Faith and Credit*, 28 KAN. L. REV. I (1979).

[185] RESTATEMENT (SECOND) OF JUDGMENTS § 133, Comment a (Tent. Draft No. 7, 1980) [§ 85].

[186] Whether there is, or is developing, in the criminal law a concept similar to claim preclusion is not clear. However, there are indications of a trend toward restricting multiple prosecutions for the same event. For example, many states have restrictions on a state prosecution for an act after a federal prosecution for that act has taken place. *See, e.g.*, 18 PA. CONS. STAT. ANN. § 111 (Purdon 1973 & Supp. 1980). This same conclusion has been

The Institute, in omitting discussion of criminal case issue preclusion, has missed a great opportunity to examine a developing area of the law and give the bench and bar the benefit of a careful analysis. The general topic of issue preclusion in criminal cases encompasses a number of interesting problems, and it is regrettable that we do not have the benefit of the thinking of the Reporter, the advisors, and the Institute on some of these problems.

Standefer v. United States,[187] a recent Supreme Court case, illustrates the complex nature of issue preclusion in criminal prosecutions. In *Standefer,* the government charged a party with aiding and abetting a government agent in accepting unlawful compensation. The agent had been tried and acquitted of the charges of which the present defendant was charged with aiding and abetting. The instant defendant urged issue preclusion against the government flowing from the first prosecution. Chief Justice Burger, writing for a unanimous Court, rejected the claim of issue preclusion. He distinguished the criminal case from civil cases for the purpose of issue preclusion, and indicated that the government might not have had a full and fair opportunity to litigate the matter. He examined procedural differences and the possible differences in the use of evidence. He recognized that courts might be able to resolve these problems on a case by case examination of the applicable factual situations, but he rejected this approach as too time consuming. He also found a fundamental difference between the actions, reasoning that criminal proceedings involve "competing policy considerations," and concluded that the enforcement of criminal laws outweighs the "economy concerns that undergird the estoppel doctrine."[188] He quoted with approval the court of appeals, stating:

> The public interest in the accuracy and justice of criminal results is greater than the concern for judicial economy professed

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reached at the state level by construction of state constitutional language. *See* People v. Cooper, 247 N.W.2d 866 (Mich. 1976). The federal government, in the *Petite* policy, has announced that it normally will not prosecute an individual for an act after a state prosecution for the act. Rinaldi v. United States, 434 U.S. 22 (1977). At the state level, there is authority for the proposition that multiple prosecutions for a single event will not be permitted even though several victims were involved. State v. Gregory, 66 N.J. 510, 333 A.2d 257 (1975). Although the picture is not clear, these pieces suggest that a broad mosaic may be forming which will have great significance in criminal prosecutions in the future. It is noteworthy that this is occurring because of judicial decisions, legislative acts, and executive policies and not necessarily because of the requirements of the United States Constitution.

[187] 100 S. Ct. 1999 (1980).

[188] *Id.* at 2008.

> in civil cases and we are thus inclined to reject, at least as a general matter, a rule that would spread the effect of an erroneous acquittal to all those who participated in a particular criminal transaction.[189]

This decision leaves some room for movement for any court facing a related problem in the future. Moreover, the Supreme Court is not the final word with respect to state court proceedings. A state court might decide to apply issue preclusion in a case similar to *Standefer*. Should it do so, the prosecuting authority could not obtain effective Supreme Court review of the acquittal in the state court.[190]

CONCLUSION

The *Restatement Second* is an excellent product overall, but—perhaps inevitably—is subject to criticism. An examination of its positions, the relevant cases, and the principles underlying issue preclusion suggests future cases, and not the *Restatement*, will decide what course the law takes.

Restating the law in a particular field can be very beneficial. It reveals a cross-section of the law at a particular time; it reports the state of the law in a particular time frame. Unfortunately, it does not allow for a disclosure of the trends in the law. A Restatement lacks a time dimension, a dimension which is extremely important precisely because the law is a growing, dynamic force. The *Restatement (Second) of Judgments* suffers to a very marked degree from this deficiency because the law of judgments is developing rapidly; courts are quickly accepting new concepts and discarding old limitations.

This Article has identified three areas in which the *Restatement Second* suffers some deficiencies. The articulation of issue preclusion is a troublesome matter upon which the *Restatement Second* will not have the last word. The scope of application of both claim and issue preclusion to nonparties to the initial action is expanding so rapidly that the *Restatement Second* could not deal adequately with the topic. It is unfortunate that the Institute did not recognize the difficult job it was undertaking and provide in the *Restatement Second* some room for growth. Finally, it is regrettable—but perhaps understandable—that the Reporter and

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[189] *Id.*

[190] The Court in the *Standefer* case noted that the prosecution "can not secure appellate review where a defendant has been acquitted." *Id.* at 2007.

the advisors did not complete the job by examining and synthesizing the law of preclusion in succeeding criminal prosecutions. The Institute could have helped immensely in this area.