

# REVISITING THE SECOND *RESTATEMENT* OF *JUDGMENTS*: ISSUE PRECLUSION AND RELATED PROBLEMS

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The event of this symposium on the *Restatement (Second) of Judgments* is welcome to the Reporter. It signifies that the work is done and the indenture fulfilled. Only those who have been involved in one of these long term enterprises can appreciate how much that means. Beyond that, it is deeply gratifying to have a signal that the project seems successful. During such a venture, the participants never know for sure that success will be achieved, for they are bent in a curious mixture of relentless self-criticism and continual self-congratulation, the latter reflecting partly genuine mutual esteem and partly a conscious effort to sustain purpose and morale. I take from what is said here, and what is not said, that the enterprise came out pretty well. If working conventional law is worth doing, and if a Restatement is a worthwhile way of working the law, then the verdict is that the *Restatement (Second) of Judgments* has been worthwhile.<sup>1</sup> There are not many things of which that can be said with real conviction.

On the whole I found the task very rewarding. A Restatement provides lawyers, judges, and law professors a chance to write the law, instead of merely talking about writing the law. Lawyers and law professors are, of course, frustrated judges. So are judges, because to a serious jurist, the judicial decision conference must be the ultimate frustration. By contrast, in the Restatement process nothing much depends on the outcome, except the legal merit of the product.

Writing a Restatement can occasion the best of all legal seminars. The rules of the forum are academic in the best sense. A premium is placed on neutrality in outlook, universality in responsibility, and providing opportunity to think. At the same time, the participants in the Restatement are lawyers in the best

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<sup>1</sup> Some will say that the American Law Institute would have been better employed at other things, such as trying to devise a means for implementing *Brown v. Board of Educ.*, 347 U.S. 483 (1954), or the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361 (1976). There is reason to doubt, however, that anyone would have employed the American Law Institute for such purposes.

sense—smart, tough veterans of all forms of legal intercourse. *Paper Chase*<sup>2</sup> with everyone a Kingsfield.

A Restatement is also the ultimately demanding challenge in legal craftsmanship. The law requires that cases be decided justly if possible. It also requires that, if possible, the decisions be reconciled on premises that are general and hence even-handed. Law requires both good judging and good legislating. A Restatement requires both at the same time, because it seeks to formulate general propositions that are compatible with prevailing sentiment as to how concrete cases ought to come out.

The reviewers say, however, that there were things we left undone. Professor Clermont points to the problem of interstate jurisdiction, and Professor Vestal to the problem of res judicata in criminal cases. The reviewers also say that some things we simply got wrong. Professor Vestal argues that we took too narrow a view of the principle of issue preclusion, Professor Martin says we kept some obsolete terminological baggage, and Professor Moore says that we kept some obsolete conceptual baggage. Finally, Professor Casad points to some discontinuities that will have to be ironed out in the future.

The reviewers have cited but a sample of instances of deficiency. I could give them many more. A project of this sort is always an accommodation between what the collective mind believes ought to be done and what the collective body can actually accomplish. Moreover, when the *Restatement Second* gets into the courts, more deficiencies will be revealed, because there are limits to what the collective mind can see at any given time.

What more can a player say about the reviews, if only to demonstrate that there is no end to discussion of what the law is or ought to be?

## I

### INTERSTATE JURISDICTION

The place of trial among the state courts for civil litigation involving multistate elements is determined by interpretation of the due process and full faith and credit clauses in a long line of ambiguous cases of which *Penmoyer v. Neff*<sup>3</sup> and *International Shoe*

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<sup>2</sup> J. OSBORN, *THE PAPER CHASE* (1972).

<sup>3</sup> 94 U.S. 714 (1877).

*v. Washington*<sup>4</sup> are the most central. The place of trial among federal courts is generally determined by a federal statute that was not well thought out when enacted in 1887 and was not well reconsidered when amended in 1948.<sup>5</sup> Moreover, as to most actions, federal courts incorporate state law on service of process, thereby incorporating the ambiguities of the *Pennoyer-International Shoe* line of decisions. Professor Clermont complains that the *Restatement (Second) of Judgments* merely refers to the *Restatement (Second) of Conflict of Laws* on the question of state court jurisdiction and does nothing about federal venue.<sup>6</sup> He wonders why we did not work out a single framework of national venue, and offers a method of analysis by which we could have moved toward doing so.<sup>7</sup>

This is a perfectly cogent criticism and deserves a response. In framing the project for the *Restatement (Second) of Judgments*, the American Law Institute decided not to rework the law of interstate place of trial in any fundamental way. The Institute had already considered the topic extensively in the *Restatement (Second) of Conflict of Laws*<sup>8</sup> and in the *Study of the Division of Jurisdiction Between State and Federal Courts*.<sup>9</sup> Both were major projects involving large intellectual efforts and substantial commitment of very limited financial resources. Other topics compete for the attention of the Institute and its intellectual and financial donors, such as tax law, securities regulation, corporate governance, torts, contracts, and property.

Professor Clermont might argue that the *Conflicts* and *Federal Jurisdiction* projects, considered separately or together, did not engage adequately the problem of multistate litigation. More specifically, he might say that the *Conflicts* project considered state court jurisdiction merely as an incident of the problem of choice of law and not as a question of fairness and convenience of trial in a

<sup>4</sup> 326 U.S. 310 (1945).

<sup>5</sup> 28 U.S.C. § 1391 (1976).

<sup>6</sup> Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411 (1981). RESTATEMENT (SECOND) OF JUDGMENTS § 7, Comment a (Tent. Draft No. 5, 1978) [§ 4] refers to RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 24, 56 (1971) on the issue of state court territorial jurisdiction. [Throughout this Article, the corresponding section numbers that will appear in the final *Restatement Second* are given in brackets after citation to the tentative drafts.]

<sup>7</sup> Clermont, *supra* note 6, at 450, 462.

<sup>8</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 24, 56 (1971).

<sup>9</sup> See ALLI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS §§ 2371-2376 (1969); *id.* at 375-410.

federal legal system.<sup>10</sup> By the same token, the *Federal Jurisdiction* project considered convenience of trial only in federal courts and treated the problem of state court territorial jurisdiction as outside its scope.<sup>11</sup> This argument has force, but force that carries forward to an encounter with a further difficulty. If the problem of multistate venue should be considered comprehensively, as Professor Clermont urges, it would require either a project about forum that ignored choice of law—state-to-state and federal-to-state—or a project that encompassed both forum and choice of law in both state and federal courts. Trying to deal with forum choice without considering choice of law is possible but very unsatisfactory.<sup>12</sup> Trying to deal with forum choice and choice of law for the American legal system as a whole, state and federal, is a sizeable task that Professor Clermont may relish, and someday may be drawn into, but one that I would like to leave for him or someone else.

At another level, the trouble with trying to deal in one package with interstate venue and venue of the federal district courts is that these subjects historically have been the provinces of different law-givers. Interstate venue has been the province of the judiciary—the state supreme courts and the United States Supreme Court interacting with each other.<sup>13</sup> The dynamic in this body of law has been litigation, through participation of the random litigants who happen to get involved in cases involving these problems. In contrast, venue of the federal courts has been primarily the province of Congress, where the dynamic is the legislative process and the participation is by those who have a voice on matters of federal jurisdiction and the federal courts.<sup>14</sup> There may be some way of coordinating these processes, but I do not know what it is.

Still another response is that we should not try to integrate federal venue and interstate venue until both of them separately are fairly straight in our minds. I agree with Professor Clermont that federal venue rules are evolving in the direction of rationality.<sup>15</sup> I agree that interstate venue of state courts can be

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<sup>10</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 24, 56 (1971).

<sup>11</sup> See ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 375-80 (1969).

<sup>12</sup> See, e.g., Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872 (1980).

<sup>13</sup> Cf. *International Shoe v. Washington*, 326 U.S. 310 (1945) (affirming state supreme court decision upholding trial court jurisdiction over foreign corporation).

<sup>14</sup> See 28 U.S.C. § 1391 (1976).

<sup>15</sup> See Clermont, *supra* note 6, at 431.

moved in the same direction. However, I am not sure that his analysis will move us further forward, or that his interpretation of recent Supreme Court cases is a sound one.

Professor Clermont says that, in broad terms, the doctrine regarding state court jurisdiction has gone from "power" under *Pennoyer*, to "reasonableness" under *International Shoe*, to a combination of "power" and "reasonableness" in the recent cases of *Shaffer v. Heitner*,<sup>16</sup> *Kulko v. Superior Court*,<sup>17</sup> *Rush v. Savchuk*,<sup>18</sup> and *World-Wide Volkswagen Corp. v. Woodson*.<sup>19</sup> I think Professor Clermont is right in suggesting that both "power" and "reasonableness" are elements of state court jurisdiction, but I do not think the character of the elements, and their relationship to each other, is as he suggests.

To me the term "power" means the capability of exercising or threatening physical force to get someone to do something. Surely this is the definition Justice Holmes had in mind in his famous statement that the foundation of jurisdiction is physical power.<sup>20</sup> This appears to be the definition that classical jurists and international lawyers have in mind when they talk of the power of a sovereign nation-state. "Power," in this ordinary sense of the term, is a necessary condition for the exercise of legal authority—as we are reminded by the fourteen-month internment of the American hostages in Iran. But questions of power in this sense are remote to the point of irrelevance in analysis of the problem of interstate jurisdiction.

It is true that the states may be analogized to independent sovereignties, an analogy the Supreme Court often makes in talking about interstate jurisdictional problems. But the analogy is imperfect and almost always misleading. The states of the American union do not have "power" in interstate matters. Connecticut cannot take New Yorkers as hostages to compel New York to stop sending it candidates for Senator or otherwise influencing its government; New York cannot impound Connecticut assets deposited in New York banks to enforce its claims that Connecticut citizens should pay more taxes for upkeep of the Big Apple. One can only imagine Larchmont Harbor becoming the subject of an armed struggle like that over Shatt al-Arab. Occasionally, to be

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<sup>16</sup> 433 U.S. 186 (1977).

<sup>17</sup> 436 U.S. 84 (1978).

<sup>18</sup> 444 U.S. 320 (1980).

<sup>19</sup> 444 U.S. 286 (1980); see Clermont, *supra* note 6, at 414-29.

<sup>20</sup> *McDonald v. Mabee*, 243 U.S. 90, 91 (1917).

sure, we encounter an opinion that brings to our minds a vision of such nonsense. The one I like best is *Grace v. McArthur*,<sup>21</sup> where a district court judge had to decide whether service of process effectuated in a commercial airliner while over Arkansas was effectuated “in” Arkansas. In the course of his opinion the judge made elaborate reference to the scope of Arkansas’s control over its airspace. In reading that case, I have always had the image of a company of Arkansas sheriff’s deputies deployed in hunting blinds along the west bank of the Mississippi, waiting with poised shotguns for the first sight of aircraft from Memphis. But that picture fades out when I remember that in matters having to do with distribution of sovereign authority among governments of the United States, the federal government has a monopoly of power. That was settled by compact in the Constitution and ratified by force of arms in the Civil War.

So the question involved when states exercise interstate jurisdiction is not one of power but of authority. They have whatever authority they are bold enough to claim, subject to the limits that the Supreme Court feels obligated to impose. The attitude of states in this matter has varied over time and varies from state to state, sometimes being expansive and sometimes being self-restrictive. In formulating the authority of the states, there are two basic questions: what should be the relevant indicia or determinants of authority by which to test whether a state may exercise judicial jurisdiction in regard to a multistate transaction; and to what degree or extent must those determinants exist in order for jurisdiction to be sustained?

The basic determinants have been “presence” of a person or thing in a state, and connection of a “transaction” to a state. The required degree is relatively more or relatively less. Under classic doctrine as expounded in *Pennoyer*, which analogized the states to sovereign polities, the critical determinant of judicial authority was local presence of the person—in personam jurisdiction—or presence of the thing—in rem jurisdiction.<sup>22</sup> Under *International Shoe* and *Shaffer v. Heitner*, the critical determinant has been the connection of the transaction to the state.<sup>23</sup> Presence of a person or thing and connection of the transaction are both in some sense related to the idea of power. A state should have authority over

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<sup>21</sup> 170 F. Supp. 442 (E.D. Ark. 1959).

<sup>22</sup> 95 U.S. at 733-34.

<sup>23</sup> 433 U.S. at 204.

persons and things that are locally situated, because geographical proximity is related to effectiveness of legal control. Similarly, a state should have authority over persons and things that are involved in local transactions because otherwise the state cannot subject the transaction to effective legal control.

Both pathways of analysis are reasonable—that is, cogent. Hence, both approaches are manifestations of a concept of “reasonableness.” Furthermore, the concepts of “presence” and “connection of transaction” merge once we get beyond very simple transactions. In *International Shoe*, the Supreme Court held that the existence of local corporate transactions could be deemed the equivalent of local corporate presence, on the basis of which in personam jurisdiction could be exercised.<sup>24</sup> In *Mullane v. Central Hanover Bank and Trust Co.*,<sup>25</sup> a precedent that Professor Clermont seems to think is in jeopardy,<sup>26</sup> the Court held that the existence of local transactions could be deemed the equivalent of presence of property, on the basis of which in rem jurisdiction could be exercised.<sup>27</sup>

Thus, all interstate jurisdictional problems have a component of “power” as the basis upon which authority is allocated among the states. In allocating such authority the touchstone may be either “presence” or “transaction,” or both. “Presence” and “transaction” both require some fictions to work across the board. Also, both require some common sense to keep them in bounds, that is, an element of reasonableness.

The limits of the “presence” theory are reached when there is local physical presence of a person or thing that has no transactional nexus to the forum, as, for example, where an airline passenger is served with process while the plane is over a state with which the transaction in suit has no connection whatever.<sup>28</sup> The *Pennoyer* doctrine, however, ignored the matter of transactional nexus. It was the inattention to that nexus which so deeply concerned the late Albert Ehrenzweig and impelled his relentless attack on “transient” jurisdiction.<sup>29</sup> The same point would arise if

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<sup>24</sup> 326 U.S. at 316-17.

<sup>25</sup> 339 U.S. 306 (1950).

<sup>26</sup> See Clermont, *supra* note 6, at 429 n.90.

<sup>27</sup> 339 U.S. at 313.

<sup>28</sup> The transaction in *Grace v. McArthur*, 170 F. Supp. 442 (E.D. Ark. 1959), had a strong connection to Arkansas.

<sup>29</sup> See, e.g., Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The “Power” Myth and Forum Conveniens*, 65 *YALE L.J.* 289 (1956).

we considered attachment of the cargo of an airplane where there was no connection between the transaction in suit and the state seeking to establish attachment jurisdiction. The decision in *Shaffer v. Heitner*<sup>30</sup> seems to provide adequate basis for supposing that attachment jurisdiction is ordinarily improper without a transactional nexus and that in personam jurisdiction is subject to the same limitation.<sup>31</sup> Thus, ordinarily, "presence" is no longer enough.

The "transaction" approach also has its limits. These limits are reached when the definition of transaction is unreasonably attenuated to include even remote connections. For example, it is foreseeable that a child of mine may wind up penniless in Tobago, but it is stretching things to say that such an eventuality should result in my being subject to jurisdiction for a support action in Tobago. Yet that is about what the California Supreme Court held in *Kulko*.<sup>32</sup> It is foreseeable that a victim of a Connecticut tort might suffer agony that persists in Tobago, but it is stretching things to say that such a consequence results in jurisdiction in Tobago for an action against the Connecticut tortfeasor. Nevertheless, that is about what the Minnesota Supreme Court held in *Rush v. Savchuck*.<sup>33</sup> And why should a New York auto dealer be answerable in Oklahoma simply because the car broke down there, the situation involved in *World-Wide Volkswagen*?<sup>34</sup>

The decisions of the Supreme Court in these cases are concretions that give meaning to the terms "reasonable" or "reasonably foreseeable." Concretions such as these are necessary epistemologically, for they convey a sense of proportion and dimension in the use of a concept that otherwise has no limits short of those of imagination. They are necessary as a practical matter to correct imperialist tendencies in lower echelons of our federal legal system. There should be nothing surprising or mysterious in the pronouncement of "arbitrary" corollaries to a general principle of "reasonableness."<sup>35</sup> Such corollaries are found, for example, in the statutes of limitation that give specific meaning to the concept of unreasonable delay,<sup>36</sup> the definite

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<sup>30</sup> 433 U.S. 186 (1977).

<sup>31</sup> *But see* Donald Manter Co. v. Davis, 543 F.2d 419 (1st Cir. 1976) (action against Vermont partnership upholding in personam jurisdiction in New Hampshire over Vermont partner based on in-hand service of partner in New Hampshire).

<sup>32</sup> 436 U.S. at 89.

<sup>33</sup> 311 Minn. 480, 245 N.W. 2d 624 (1976); *see* 444 U.S. at 324.

<sup>34</sup> 444 U.S. at 289-91.

<sup>35</sup> *See* Hazard, *A General Theory of Jurisdiction*, 1965 SUP. CT. REV. 241, 283.

<sup>36</sup> *See, e.g.,* Guaranty Trust Co. v. York, 326 U.S. 99 (1945).



speed limits that give specific meaning to the concept of unreasonable speed, and the use of the concept of "proximate" to modify "cause" as the basis of tort liability.

I therefore interpret the recent Supreme Court cases dealing with territorial jurisdiction in a much less complicated way than does Professor Clermont.<sup>37</sup> The present doctrine seems to me something like this: the authority of the states to exercise judicial jurisdiction in litigation having multistate elements depends on the existence of a reasonable relationship between the state and the person, thing, or transaction involved in the litigation. Presence of the defendant is usually such a relationship and so is the occurrence of a transaction having significant connection with the state. However, "presence" without any local transactional connection ordinarily is an insufficient basis for exercising jurisdiction, and so is exercise of jurisdiction based on a hyperattenuated transactional connection. Where the state courts cannot discipline themselves to observe these limits, the Supreme Court will lay down some mechanical formulae to take care of salient cases and to provide general guidance. This is a less elegant approach than Professor Clermont's, but probably yields about the same results.

One other thing about the treatment of state court jurisdiction in the *Restatement (Second) of Judgments* is that we adopted the term "territorial jurisdiction" to refer to the *Pennoyer-International Shoe* problem. This allowed us to clarify the different consequences that ensue when the question involved concerns territorial jurisdiction as distinct from subject matter jurisdiction.<sup>38</sup> That usage is also a step in the direction of treating interstate jurisdiction as a question of venue, as Professor Clermont rightly urges us to do.<sup>39</sup>

## II

### CRIMINAL RES JUDICATA

The other error of omission laid against the *Restatement (Second) of Judgments*, in this instance by Professor Vestal, concerns res judicata in criminal cases.<sup>40</sup> I think the decision not to under-

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<sup>37</sup> See Clermont, *supra* note 6, at 414-29.

<sup>38</sup> See notes 86-99 and accompanying text *infra*.

<sup>39</sup> See Clermont, *supra* note 6, at 462.

<sup>40</sup> Vestal, *The Restatement (Second) of Judgments: A Modest Dissent*, 66 CORNELL L. REV. 464 (1981).

take this topic was clearly correct for practical and theoretical reasons. As a practical matter, taking on this subject would have required restructuring the project. As Reporter, I would have found myself in a field in which I am not expert, and the opportunity costs of my becoming such would have been high for me and for the Institute. Bringing aboard a co-Reporter would have entailed similar difficulties. The Advisory Committee would also have had to be reconstructed.

There were, however, more fundamental difficulties. The contemporary law of criminal *res judicata* is largely the creation of a single court, the Supreme Court of the United States. Moreover, the law on the subject is confused down to its roots. When both of these conditions exist, it is not easy to make a contribution through a Restatement, even if the law desperately needs clarification.

It is inappropriate for a Restatement to deal with a subject that is essentially the product of a single tribunal. Can one imagine a useful *Restatement of United States Constitutional Law*, or a *Restatement of New York Contract Law*? Most people who have considered that question reach a negative conclusion, but perhaps without having worked out exactly why they do. I share the conclusion and think that the reason is approximately as follows: A Restatement is a quasi-official exposition of the law. Although it is like a treatise in comprehensiveness and endeavors to be disinterested, it is the product of an organization constituted not simply on the basis of scholarly competence but also on the basis of standing in the legal profession. A Restatement therefore represents not only academic authority but a combination of academic and professional authority. The Institute is something like a sister-jurisdiction to every other common law jurisdiction. It can be regarded as an extra-territorial common law jurisdiction—to borrow from Holmes, a quasi-sovereign with an articulate voice giving forth a brooding omnipresence in the sky.<sup>41</sup> As such, the Institute's expositions of "the law" provide a useful resource to courts encountering problems that have not recently been resolved in a specific jurisdiction. It would be fatuous, however, for the Institute to enter competition with the courts of a specific jurisdiction to restate its law.

A Restatement of *res judicata* in criminal cases would in any case be extremely difficult because of the fundamental confusion

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<sup>41</sup> *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

of doctrine in the field.<sup>42</sup> The law on the subject is mostly United States Supreme Court decisions interpreting the double jeopardy and due process clauses.<sup>43</sup> These clauses provide only the vaguest premises for the detail required in the problems of criminal res judicata. Moreover, the law of res judicata is a mirror image of the law of procedure. The law of criminal res judicata as nurtured by the Supreme Court is essentially a set of federal specifications prescribing the consequences of decisional processes regulated primarily by state law. State criminal procedure varies widely with regard to the rules of pleading, joinder, discovery, nonsuit, and judge-jury functions.<sup>44</sup> As a consequence, the federal law of res judicata does not mesh well with the state law of criminal procedure. The Supreme Court deals with the discrepancies as best it can in the certiorari process, serially and more or less randomly. In a Restatement, the Institute would have to resolve these discrepancies at once in a coherent text that is consistent with the Supreme Court's decisions. As I read a recent hornbook on the subject, it cannot be done.<sup>45</sup>

### III

#### ISSUE PRECLUSION

As for the things that were done wrong in the *Restatement Second*, there are many more than the reviewers mention. Some of the sentences, even full paragraphs, and a few blackletter provisions are really very good in my opinion. The rest is only the best we could do. Even so, we probably made some significant mistakes. Our treatment of issue preclusion with respect to an issue not actually litigated, however, is not one of them.

The position of the *Restatement Second* is that the principle of issue preclusion does not preclude a party from subsequently dis-

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<sup>42</sup> See, *United States v. DeFrancesco*, 101 S. Ct. 426, 432 (1980); Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81; Note, *The Double Jeopardy Clause as a Bar to Reintroducing Evidence*, 89 YALE L.J. 962 (1980); 65 CORNELL L. REV. 715 (1980).

<sup>43</sup> U.S. CONST. amend. V.

<sup>44</sup> As we discovered in doing the civil *Restatement Second*, these elements of procedure often portend important differences in res judicata. A civil Restatement undertaking to express generally prevailing law is possible because the states have substantially identical civil procedural systems—systems based on the Federal Rules of Civil Procedure or closely similar systems, particularly those in California, Illinois, and New York. See RESTATEMENT (SECOND) OF JUDGMENTS, INTRODUCTION at 6-15 (Tent. Draft No. 7, 1980).

<sup>45</sup> See C. WHITEBREAD, CRIMINAL PROCEDURE ch. 24 (1980).

puting, in litigation involving another claim or cause of action, a material proposition that he admitted or failed to deny in an earlier litigation.<sup>46</sup> In this symposium Professor Vestal argues,<sup>47</sup> as he has argued elsewhere,<sup>48</sup> that the principle of *res judicata* should extend to such a situation.

Some care is required in stating precisely the point of difference between the two positions. The question is not whether in various circumstances a party may be estopped from contesting a proposition previously admitted. Nor is it whether a party may be conditionally estopped in that he might be required to show good reason why he should be allowed to controvert a previously admitted proposition. The question is whether a party should be categorically denied his day in court on an issue because he had the "opportunity to litigate" the issue in a prior action. It is agreed that there may be such an estoppel in many circumstances. It is also agreed that the estoppel should often have only limited effect in the subsequent litigation—the truth of the matter should be treated as presumptive rather than conclusive.

It is also agreed that there is some authority for Professor Vestal's position, although some cases he cites in this regard cannot fairly be construed as providing such support. For example, Professor Vestal attaches much significance to statements in *Schwartz v. Public Administrator*<sup>49</sup> and *Montana v. United States*<sup>50</sup> referring to the "opportunity to litigate."<sup>51</sup> He asserts these references support the view that a party who has an opportunity to litigate an issue, but does not do so, is nevertheless bound as to the issue.<sup>52</sup> However, *Schwartz* and *Montana* and many other decisions invoked by Professor Vestal involve a party who in fact actually litigated the issue in the prior action. The reference to "opportunity" in these decisions is to test whether, as to an issue the party did litigate, the opportunity was sufficient that he should not be allowed to litigate the issue again. To cite such language for the proposition that opportunity alone carries preclusive effects is to distort the syntax of these decisions.

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<sup>46</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 68, Comment a (Tent. Draft No. 4, 1977) [§ 27].

<sup>47</sup> See Vestal, *supra* note 40, at 472.

<sup>48</sup> See A. VESTAL, RES JUDICATA/PRECLUSION 199-203 (1969).

<sup>49</sup> 24 N.Y.2d 65, 69, 246 N.E.2d 725, 728, 298 N.Y.S.2d 955, 958 (1969).

<sup>50</sup> 440 U.S. 147, 153-54 (1979).

<sup>51</sup> See Vestal, *supra* note 40, at 468-70.

<sup>52</sup> See *id.*

There are, to be sure, cases saying that the principle of issue preclusion applies to propositions put in issue as well as propositions actually litigated. In many of the cases cited by Professor Vestal for this thesis, however, the statement is plainly *obiter dictum* because the issue in question actually had been litigated in the prior action. This is true, for example, of *Scott Paper Co. v. Fort Howard Paper Co.*<sup>53</sup> and *Oldham v. Prichett.*<sup>54</sup> Furthermore, many of the default judgment cases cited by Professor Vestal involved a judgment *loser* trying to abrogate the judgment through new litigation attacking a proposition upon which prior judgment depended. They do not involve a judgment *winner* trying to extend the effect of the prior judgment by using it to preclude litigation of an issue in a subsequent action involving a different claim.<sup>55</sup> These cases involve attempts to avoid the *claim* preclusive effect of a prior default judgment, not attempts to attach *issue* preclusive effect to such a judgment. To say a default judgment loser may not overcome the judgment, because he had opportunity to litigate the issues therein, is not to say that he is also bound as to these issues in another action involving a different cause of action.<sup>56</sup> It is not unfair to say that inattention to niceties such as these in the handling of authority diminished Professor Vestal's persuasiveness with the Institute.

Professor Vestal would have to concede that there are situations where a party plainly has had opportunity to litigate, did not do so, and is not held to an estoppel. The clearest situation is where a defendant in a criminal case enters a plea of *nolo contendere* and an issue involved in the criminal charge thereafter arises in a civil action. I am not entirely sure of Professor Vestal's position on this problem, but I gather he would say that a *nolo contendere* plea should not give rise to issue preclusion. But on his premise that opportunity to litigate is the equivalent of an admission, why not? The explanation presumably is that imposing collateral preclusive consequences would undesirably create extrinsic incentives to litigate in a criminal proceeding. But if this explanation applies to a criminal *nolo* plea, why doesn't it apply to failure

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<sup>53</sup> 343 F. Supp. 225, 228 (E.D. Wis. 1972).

<sup>54</sup> 599 F.2d 274, 281 (8th Cir. 1979).

<sup>55</sup> See, e.g., *Harvey v. Griffiths*, 133 Cal. App. 17, 21-22, 23 P.2d 532, 534 (Dist. Ct. App. 1933) (refusal to set aside default judgment on grounds of intrinsic fraud).

<sup>56</sup> Compare RESTATEMENT (SECOND) OF JUDGMENTS § 56.1, Illustrations 9, 10 [§ 22], with *id.* § 68, Comment e (Tent. Draft No. 1, 1973) [§ 27].

to dispute allegations in a civil proceeding? Because symmetry of outcomes is more important in civil cases than criminal? Because the incentives to litigate are less (or more) in civil cases? One draws a blank.

Analysis of the *nolo contendere* plea in a criminal case thus indicates that mere opportunity to litigate an issue on one occasion is not a sufficient reason for estopping a person from litigating that issue on some subsequent occasion. Otherwise, the plea of *nolo contendere* would be the equivalent of an express admission—a guilty plea. Moreover, when an issue has been posed in a proceeding, the rendition of a judgment in the proceeding is not necessary in order to estop a party from disputing the issue in subsequent litigation. Imagine this situation: a defendant is charged with arson of his warehouse; he pleads guilty; he dies before judgment is entered; his estate then sues the insurer of the warehouse to recover the fire insurance. Surely the estate should be estopped to deny that the decedent burned down the warehouse. Given the plea of guilty—a solemn admission of the matter in question—the ensuing judgment is superfluous so far as estoppel is concerned. A judgment, as such, is not necessary to give rise to an estoppel if the party's admission or failure to deny is so plainly deliberate and unequivocal as to suggest that the subsequent disputation is simply frivolous. The same analysis holds in civil controversies. Hence, a judgment is neither sufficient nor necessary to generate an estoppel with regard to a matter that was in issue but not actually litigated.

A good case can be made for saying that if a matter is distinctly put in issue and formally admitted, the party making the admission should be bound by it in subsequent litigation. This was the old formulation of the rule of "judicial estoppel," as it was then called: "The former verdict is conclusive only as to facts directly and distinctly put in issue. . . ."<sup>57</sup> But how can a matter be "directly and distinctly put in issue"? Obviously, by actual litigation. Another way is through pleadings. In a pleading system where matters are "distinctly put in issue," it makes sense to say that if a proposition is clearly asserted, and if a party is called upon solemnly to admit or deny the proposition, and if the stakes are high enough to assure that the party is serious in dealing with the issue, and if the party then admits or fails to deny the proposition, then he ought to be estopped from controverting it on

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<sup>57</sup> A. FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS § 257, at 273 (2d ed. 1874).

some other occasion, particularly if that other occasion involves essentially the same transaction. The clearest case for such an estoppel is where a defendant pleads guilty to a substantial criminal charge and then seeks in civil litigation concerning the same transaction to assert that he did not commit the criminal act. Particularly galling is the situation where a criminal convicted on his own guilty plea seeks as plaintiff in a subsequent civil action to claim redress based on a repudiation of the confession. The effrontery or, as some might say it, *chutzpah*, is too much to take. There certainly should be an estoppel in such a case.<sup>58</sup>

The same principle could apply when an issue is put forward and admitted "distinctly"—that is, clearly and solemnly—in a civil case. It is therefore appropriate to impose an estoppel based on a formal admission in a civil case, and the law of evidence does so. A judicial admission is considered in subsequent litigations as prima facie evidence that the admitted matter is true.<sup>59</sup>

The relation between judicial admissions and subsequent estoppel merits closer examination. In a procedural system that aims to put things "distinctly in issue" in the pre-trial stage, judicial admissions are elicited as a matter of course. This was the effect of the system of common law pleading, the Hillary Rules, and the classical form of code pleading. Admissions were an important by-product of a system of pleading designed to put things "distinctly in issue" as a preface to conducting a trial. The process of obtaining admissions in this way was so familiar that they were called "judicial admissions," treated as part of the law of judgments, and mentioned in books dealing with judgments. In a procedural system that focuses on pre-trial formulation of issues, it is appropriate to give estoppel effect to judicial admissions. If a party is confronted by a distinct allegation, is required by the procedural rules to admit or deny such assertions, has adequate incentive to litigate, and does not deny it, he should be estopped from later controverting the allegation. That apparently was the rule under the regime of code pleading.<sup>60</sup>

But today we work under the Federal Rules of Civil Procedure and analogous systems. The federal rules reject issue formulation as the basis of adjudicative procedure. Pleadings under

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<sup>58</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 133, Reporter's Note at 69 (Tent. Draft No. 7, 1980) [§ 85].

<sup>59</sup> See MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 265, at 235-36 (2d ed. E. Cleary 1972).

<sup>60</sup> See A. FREEMAN, *supra* note 57, at 274.

the federal rules merely give notice in broad terms that some sort of legal controversy is afoot.<sup>61</sup> The federal rules' mechanism for identifying issues is not pleading, but interrogation and proof through discovery and summary judgment or trial. The technique for specifying the issues is direct immersion in evidence—actual litigation—and not issue formulation. Professor Vestal, for all his aspiration to modernity, is thus writing for the wrong century. What he sees as an imminent form of preclusion in modern procedure is a fading vestige of code pleading.

This is another instance where change in procedural rules requires modification of *res judicata* doctrine.<sup>62</sup> Under modern civil procedure, a party is not required to put matters "distinctly in issue" before proof is formally marshalled and weighed. Moreover, in modern civil procedure a party has practically unlimited freedom, or "opportunity," to assert claims and issues. Even in a simple civil action, a plaintiff can open up any legal controversy between the parties within the subject matter jurisdiction of the court<sup>63</sup>—law or equity, tort or contract, common law or statute, state or federal. In a strict sense, a plaintiff has an "opportunity" to raise every issue that could possibly be tendered in any claim the pleading and jurisdiction rules allow him to raise, regardless of the logical or evidentiary connections among them. A defendant has comparable latitude. A defendant has "opportunity" to raise every issue that would be involved in any defense, avoidance, or counterclaim that the procedural rules allow him to assert. Modern pleading allows a defendant to assert as a defense anything relevant to plaintiff's claim, and to assert as a counterclaim everything he may have against plaintiff, regardless of relevancy to plaintiff's claim.

This is the measure of "opportunity to litigate" under modern civil procedure. Does issue preclusion sweep this broad, so that "opportunity to litigate" an issue becomes the equivalent of necessity to litigate? No, of course it does not. Then how can boundaries be constructed on the scope of issue preclusion?

The *Restatement Second* specifies two different modes of issue preclusion. The first is the rule of issue preclusion or collateral estoppel: issues actually litigated may not be relitigated except under unusual circumstances.<sup>64</sup> Everyone agrees to this basic

<sup>61</sup> See FED. R. CIV. P. 8.

<sup>62</sup> See RESTATEMENT (SECOND) OF JUDGMENTS, Introduction at 6-15 (Tent. Draft No. 7, 1980).

<sup>63</sup> See FED. R. CIV. P. 18(a).

<sup>64</sup> See RESTATEMENT (SECOND) OF JUDGMENTS §§ 68, 68.1 (Tent. Draft No. 5, 1977) [§§ 27, 28]; *id.* § 88 (Tent. Draft No. 3, 1976) [§ 29].



idea, except the declining band who hold to the "mutuality" rule.<sup>65</sup> The second mode of issue preclusion is the rule of claim preclusion encompassing "merger" and "bar." The merger rule is that a winning plaintiff may not, with respect to a claim previously litigated, assert new issues in hope of expanding the size or scope of his recovery. The critical variable in this formulation is the term "claim."<sup>66</sup> In effect, under the rule of claim preclusion there is preclusion as to every issue that is within the plaintiff's original "claim," unless that issue is also within a separate and distinct claim. In the latter event, plaintiff may litigate the issue in his second action if he did not actually litigate it in the original action.

The rule of bar imposes similar preclusion on the defendant. A losing defendant may not, with respect to a claim previously litigated, assert new issues in hope of overcoming or reducing the recovery awarded in the prior judgment. There are two critical variables in this formulation. One is the "claim" of the plaintiff. The scope of the plaintiff's "claim" obviously defines the scope of the defendant's potential defenses; otherwise, any "claim" by a plaintiff would require a defendant to assert defenses to every conceivable claim the plaintiff could have. The other critical variable in defining the scope of claim preclusion imposed on a defendant is the boundary between "defense" and "counterclaim." The boundary here is, or at least should be, complementary to the definition of plaintiff's "claim." Every issue that would defeat the "claim" is a "defense" within the rule of bar.<sup>67</sup> Such an issue therefore may not be subsequently asserted by the defendant un-

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<sup>65</sup> The "mutuality of estoppel" doctrine prevents a nonparty to a prior action from invoking issue preclusion against an opponent who previously litigated an issue against another party and lost. Because the party who previously litigated the issue would not be allowed to use issue preclusion against an opponent who was not a party to the first action, there is no "mutuality of estoppel" and neither should be allowed to invoke preclusion. See F. JAMES & G. HAZARD, CIVIL PROCEDURE § 11.24 at 577 (2d ed. 1977).

<sup>66</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 61 (Tent. Draft No. 1, 1973) [§ 24].

<sup>67</sup> Analytically, the boundary between claim-and-defense, on one hand, and counterclaim, on the other, is clean. Operationally, however, the boundary is quite messy, because of the protean possibilities of "claim." But the *Restatement Second* takes account of the ambiguities and says that, at the margin, the party should be deemed to have litigated only those issues he should have litigated in the prior action, considering the course of that action. See RESTATEMENT (SECOND) OF JUDGMENTS § 56.1, Illustration 6 (Tent. Draft No. 1, 1973) [§ 22]. In any case, the compulsory counterclaim rule that prevails in most jurisdictions, see, e.g., FED. R. CIV. P. 13(a), ordinarily makes this problem moot. See RESTATEMENT (SECOND) OF JUDGMENTS § 56.1, Illustration 9 (Tent. Draft No. 1, 1973) [§ 22].

less that issue also is within a separate and distinct counterclaim "claim." In the latter event, a defendant may litigate the issue in his second action if he did not actually litigate it in the original action. This is the point of Comment b to section 56.1 [section 22] of the *Restatement Second*, which states:

In the absence of a statute or rule of court otherwise providing, the defendant's failure to allege certain facts either as a defense or as a counterclaim does not normally preclude him from relying on those facts in an action subsequently brought by him against the plaintiff. . . . The failure to interpose a defense to the plaintiff's claim precludes the defendant from thereafter asserting the defense as a basis for attacking the judgment (see § 47 [§ 18]). But the defendant's claim against the plaintiff is not normally merged in the judgment given in that action, and issue preclusion does not apply to issues not actually litigated (see § 68 [§ 27]). The defendant, in short, is entitled to his day in court on his own claim.<sup>68</sup>

On the subject of issue preclusion, I believe Professor Vestal would reach most of the same outcomes as the *Restatement Second* when it gets down to cases. But when it comes to doctrine, he insists on his formulation, apparently untroubled by its literal meaning. Formulations make a difference. It may be true that general propositions do not decide concrete cases in the sense that major premises are not sufficient to generate outcomes. But a major premise sets in motion the train of analysis; if misdirected, it may foreclose an appropriate outcome. I submit that Professor Vestal's formulation—that opportunity to litigate an issue ordinarily results in preclusion as to the issue—is unsound. As a general proposition, it would be wrong to convert option to litigate into compulsion to litigate, and serious mischief results from such an approach. This is well illustrated in *Palma v. Powers*,<sup>69</sup> a decision upon which Professor Vestal places much reliance, where an intelligent judge adopted Professor Vestal's analysis in deciding the very problem under consideration.

The facts of the case were as follows: Plaintiffs in the present action were Fred Palma and Frank and Ralph Mamolella. The Mamolella brothers were partners in, and Palma was an employee of, an establishment that the police thought was a bookie joint.

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<sup>68</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 56.1, Comment b (Tent. Draft No. 1, 1973) [§ 22].

<sup>69</sup> 295 F. Supp. 924 (N.D. Ill. 1969).

The police obtained a search warrant and conducted a raid on the establishment, in the course of which they seized and removed the telephones. Palma and Frank Mamolella were charged with felony gambling. In due course the charges were reduced to the misdemeanor of wagering. Frank Mamolella was convicted and fined \$50. Palma was acquitted. Meanwhile, on the afternoon of the raid the police called Illinois Telephone Company, described the warrant, raid, and seizure of the telephones, and asked that telephone service at the establishment be discontinued. The Company complied, relying on a company regulation filed with the Illinois Commerce Commission which provided:

The service is furnished subject to the condition that it shall not be used for the purpose of making or accepting bets. . . . Upon complaint to the Commission by any . . . subscriber who is affected by the . . . discontinuance of service in accordance with this rule, such service shall be . . . restored if the Commission shall determine that the service has not been used . . . in violation of this rule.<sup>70</sup>

The Mamolella brothers demanded restoration of service. However, they did not press their demand until after the criminal prosecution had terminated and did not file a complaint before the Commission. Instead, Palma and the Mamolellas sued the arresting officer and the telephone company under section 1983 of the Civil Rights Act.<sup>71</sup> The essence of the section 1983 claim was that the police and the telephone company had conspired to deprive plaintiffs of their rights under the Constitution, because disconnecting the telephone was an invasion of personal or property rights and the raid constituted an illegal search and seizure. Defendants countered, among other things, that the establishment had in fact been a bookie joint, so that the termination of service was justified and the raid was legal. To prove the fact that wagering was conducted at the place, defendants quite appropriately invoked the prior conviction, which actually and necessarily had adjudicated that issue.<sup>72</sup> As to the legality of the search, defen-

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<sup>70</sup> *Id.* at 931.

<sup>71</sup> 42 U.S.C. § 1983 (1976).

<sup>72</sup> The court properly held that Frank Mamolella was bound by the finding in the criminal adjudication that wagering had occurred at the establishment, 295 F. Supp. at 934. However, it is impossible to see why Palma should have been similarly precluded, because he had been acquitted in the criminal case. Perhaps the court thought that a servant is bound by an adjudication against his master, a proposition that ceased to be

dants argued that this issue could have been raised by a motion to suppress in the criminal proceeding and hence that plaintiffs were foreclosed from litigating the issue in a subsequent civil action.

Judge Will accepted the defendant's invocation of issue preclusion, citing Professor Vestal and saying:

[T]here 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 . . . . If any principle may be gleaned . . . it is that preclusion is appropriate in those situations where there is reason to believe that the failure to litigate the matter in fact was a recognition of the validity of the opposing claim.<sup>73</sup>

On this premise, the court proceeded to hold that:

(1) Frank Mamolella, who was convicted in the state criminal prosecution, was precluded from asserting that the police search was illegal because he could have raised that issue in the state court by a motion to suppress; and

(2) Palma, who was acquitted in the state criminal prosecution, was precluded from asserting the illegality of the search because he too could have raised that issue in the state court.<sup>74</sup>

We should dispel any impulse to embrace these results based on the assumption that Palma and Mamolella were members of organized crime. This variable can be factored out by supposing, for example, that an apartment was raided, that the arrest was for possession of marijuana, and that Palma and Mamolella were just ordinary citizens. The question then is: should a person having a tort claim against the police for unlawful behavior in an arrest be precluded from showing the behavior was unlawful because he could have advanced that contention as a basis for suppression of evidence following the arrest? And if there is to be issue preclusion, why so?

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tenable when servants were recognized as having legal identities separate from their masters. The court also applied issue preclusion against Ralph Mamolella. Justification for this result requires an analysis that is intricate but tenable, although the court did not provide it. While Ralph was not a party to the criminal prosecution, he was in partnership with Frank, who was convicted on a finding that the partnership enterprise involved illegal wagering. Because Frank is bound by that finding in his subsequent civil action and because the original criminal prosecution involved the partnership enterprise, it would be proper to hold Ralph precluded as to the issue by virtue of his partnership relationship with Frank. See RESTATEMENT (SECOND) OF JUDGMENTS § 109 (Tent. Draft No. 4, 1977) [§ 60]; *id.* § 133(1)(b) (Tent. Draft No. 7, 1980) [§ 85].

<sup>73</sup> Palma v. Powers, 295 F. Supp. at 935-36.

<sup>74</sup> *Id.* at 940-42.

Professor Vestal says there should be an estoppel because, where there is an incentive to deny, failure to deny constitutes an admission.<sup>75</sup> This turns the notion of incentive to litigate on its head. The "incentive to litigate" formula, as used in most of the cases and in the *Restatement Second*, allows a party who *did* litigate an issue to relitigate it if the party can show that the original litigation was a side show rather than a struggle to the finish.<sup>76</sup> The *Restatement Second* allows a party to rebut the inference naturally drawn from the fact that the issue was actually litigated—the inference that the party had treated the issue with entire seriousness in the first litigation. In Professor Vestal's system, however, "incentive to litigate" allows a court to conjecture that the party probably had reason to litigate the issue in the first action, and to conjecture further that the failure to litigate is an admission of a proposition not litigated. Professor Vestal's "opportunity" theory allows the court to infer that the issue was important to a party whose behavior indicates he thought the issue was unimportant, and, having done that, to convict the party by his silence.<sup>77</sup> Does that make sense? In *Palma v. Powers*, after all, Mamolella was only fined \$50. And Palma was acquitted. Why should a forfeiture of claim result from omitting to make a protest that events have proved to be superfluous?<sup>78</sup>

I hope this analysis makes clear why the *Restatement Second* did not deal with issue preclusion in the way that Professor Vestal has urged. It also makes a point about the matter raised by Professor Martin. Professor Martin says that, in regard to claim preclusion, we should have distinguished between matters a party should have litigated and matters that he actually litigated.<sup>79</sup>

<sup>75</sup> See Vestal, *supra* note 40, at 468-69.

<sup>76</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 68.1(e), Comment j (Tent. Draft No. 4, 1977) [§ 28].

<sup>77</sup> See Vestal, *supra* note 40, at 468-69.

<sup>78</sup> If Professor Vestal is correct, the result will, among other things, mean the death of suits against public officials under 42 U.S.C. § 1983 (1976) if the official gets to the state courthouse first. I do not know the correct resolution of the problem of § 1983 litigation, and neither does the American Law Institute. See RESTATEMENT (SECOND) OF JUDGMENTS § 134 (Tent. Draft No. 7, 1980) [§ 86]. However, I am sure that Professor Vestal's result cannot be right. If opportunity to litigate is the *prima facie* equivalent of actual litigation, it means that anyone who upon legal provocation fails to run for the courthouse may be in jeopardy of having to explain himself or be denied his day in court. Kafka's *The Trial* comes to mind.

<sup>79</sup> Martin, *The Restatement (Second) of Judgments: An Overview*, 66 CORNELL L. REV. 404, 407 (1981). Professor Martin argues that the Institute should have replaced the terms "merger" and "bar" with functional concepts. Instead of the *Restatement Second's* emphasis

However, the difficult problems in the law of *res judicata* do not involve the distinction between "should have" and "actually" litigated, but rather the connection between these concepts. The problem is that of working out the relationship between what was actually done in a litigation, what might have been done, and what a court will deem to have been done. This problem is very clear in the matter of claim preclusion. The law says that the litigation of a claim normally carries with it the opportunity to argue everything that could be urged for and against the claim. Therefore, a lawsuit ordinarily will be deemed to have considered all such things in relation to that claim. The critical variable is thus the scope of the term "claim."

The same problem presents itself in the matter of issue preclusion, although the relationship between "should have" and "actually" is not quite so obvious. The basic idea is that a party should not be able to relitigate an issue that he actually litigated. The critical variable is the scope of the term "issue." "Issue" might mean only a proposition necessarily implied from evidence actually offered. If this were the meaning assigned to "issue actually litigated," the scope of issue preclusion in subsequent litigation relating to the same general subject matter would be very narrow.<sup>80</sup> It is clear that "issue" means something more than this. As stated in Comment c to section 68 [section 27] of the *Restatement Second*:

When there is a lack of total identity between the particular matter presented in the second action and that presented in the first, there are several factors that should be considered in deciding whether for purposes of the rule of [issue preclusion] the "issue" in the two proceedings is the same, for example: Is

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on claims merged in a plaintiff's victory and defenses barred by a defendant's loss, Professor Martin would equate merger with efficiency and bar with consistency: "merger occurs when a party should have presented a matter at the first trial, and bar occurs when allowing a party to relitigate a matter might produce a result inconsistent with the outcome of the earlier litigation." *Id.* at 407. Thus, his efficiency concept deals with what should have been done in the prior action, and the consistency concept preserves results regarding matters actually litigated.

<sup>80</sup> Indeed, logically no single proposition is necessarily implied from an item of evidence or chain of evidence. An item or chain of evidence could be a link to a nearly infinite array of propositions. Therefore, when we say that an issue has been "actually litigated," we do so by drawing an inference not from the evidence alone but from the conclusion we suppose that the tribunal was asked to draw from the evidence. However, the conclusions that a tribunal properly may draw depend on what is in issue. Thus, examination of the evidence alone takes us on a circle. In the absence of pleadings, a pretrial order, or other specifications, the circle can be broken only by looking at the proceeding as a whole, particularly the parties' opening and closing arguments.

there a substantial overlap between the evidence or argument . . . ? Does the new [action] involve application of the same rule of law. . . ? Could pretrial preparation and discovery relating to . . . the first action reasonably be expected to have embraced the matter sought to be presented in the second?<sup>81</sup>

Thus, the law of preclusion, whether issue preclusion or claim preclusion, combines an assessment of what was actually done with an assessment of what reasonably should have been done. For this reason, I believe Professor Martin offers incorrect reasons for dropping the terms "merger" and "bar."<sup>82</sup> However, I agree that the terms should have been dropped. They serve merely as vehicles for inquiring how far a winner or loser should be bound, and do not do much to carry that inquiry forward.

#### IV

#### SUBJECT MATTER JURISDICTION

Professor Moore's thesis, as I understand it, is that the issue of subject matter jurisdiction should be deemed resolved by a judgment, under the principle of *res judicata*, except in certain limited circumstances.<sup>83</sup> I agree with that proposition and so does the *Restatement (Second) of Judgments*. What, then, is its difference with Professor Moore?

One difference is in strategy and rhetoric in reforming the law. In substance all law reform is both radical and conservative. It is radical because it seeks purposively to change social institutions. It is conservative in that it uses the means of law and legal process to do so. In style and strategy, law reform enterprises can be conservative or radical. A conservative strategy seeks to accomplish as much in the way of needed change as the forces favoring the status quo will permit, while providing as much assurance about continuity as plausibility requires. A radical reform strategy seeks to advance the strongest case for change that plausibly can be maintained, while settling for as much actual change as the forces favoring the status quo will permit. A conservative strategy

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<sup>81</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 68, Comment c (Tent. Draft No. 1, 1973) [§ 27].

<sup>82</sup> See Martin, *supra* note 79, at 407.

<sup>83</sup> See Moore, *Collateral Attack on Subject Matter Jurisdiction: A Critique of the Restatement (Second) of Judgments*, 66 CORNELL L. REV. 534, 535 (1981).

understates objectives, sometimes underachieves compared to what objectively is possible, and leaves the radicals muttering about sellout and lost opportunity. A radical strategy overstates objectives, sometimes overachieves compared to what objectively is possible, and leaves the conservatives muttering about shortfall and needless turmoil.

A Restatement should be strongly reformist,<sup>84</sup> for otherwise it is difficult to see why such an endeavor would be worth the trouble. With regard to reform in the law of judgments concerning the problem of subject matter jurisdiction, the aim should be, as Professor Moore says, a rule that the issue of subject matter jurisdiction is ordinarily deemed resolved by a judgment. The questions, then, are whether this substantive objective was realized in the *Restatement Second*, particularly with regard to the scope of the exceptions subsumed under the term "ordinarily," and whether appropriate rhetoric was employed in doing so.

One way to formulate the basic rule that subject matter jurisdiction questions ordinarily are precluded is to say, "Subject matter jurisdiction questions are precluded by a judgment, except as follows . . ." and then construct the array of exceptions. Another is to say, "Subject matter jurisdiction questions remain open despite a judgment in the following circumstances. . ." and then construct the array of circumstances. Logically and positively the two approaches are equivalent, their content depending on the exceptions or qualifying circumstances, as the case may be. However, the first approach entails a sharp rhetorical departure from older law, while the second does not.

In the *Restatement Second* we took the second approach. To implement it, we adopted two distinctions that I think are critical, but one of which Professor Moore seems to think is unimportant.<sup>85</sup> One is between default judgments and judgments in contested actions.<sup>86</sup> The other is between that component of jurisdiction having to do with territorial jurisdiction among political sovereignties and that component having to do with the allocation of authority to the rendering court by the political

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<sup>84</sup> See Wechsler, *Restatements and Legal Change: Problems of Policy in the Restatement Work of the American Law Institute*, 13 ST. LOUIS L. REV. 185, 189 (1968).

<sup>85</sup> See Moore, *supra* note 83, at 561. Professor Moore's article deals only with "subject matter jurisdiction" and does not discuss "territorial jurisdiction."

<sup>86</sup> See RESTATEMENT (SECOND) OF JUDGMENTS, Introductory Note to ch. 2 at 2-4 (Tent. Draft No. 5, 1978). Compare *id.* §§ 113-116 (Tent. Draft No. 6, 1979) [§ 65-68], with *id.* §§ 117-120 (Tent. Draft No. 6, 1979) [§§ 69-72]. See also Moore, *supra* note 83, at 561.



sovereignty that created it. The first component we called "territorial jurisdiction," the second we called "subject matter jurisdiction."<sup>87</sup> Using these two distinctions, four different situations are involved:

	Contested Action	Default Judgment
Territorial Jurisdiction	A	B
Subject matter Jurisdiction	C	D

Situation A is where a party appears at the proceeding, either to assert only that the court lacks territorial jurisdiction, or to defend on other grounds as well. In this situation, under the *Restatement (Second) of Judgments*, the judgment is always preclusive.<sup>88</sup> The law is quite clear on this point and Professor Moore does not disagree.

Situation B is where a party does not appear at the proceeding even though the issue of territorial jurisdiction is arguable. When this happens, default judgment may be entered. If nothing happens thereafter, the question of jurisdiction is moot; plaintiff has a judgment but defendant is not practically affected by it. However, if plaintiff seeks to enforce the judgment in the forum state or in another state, defendant may seek to resist the enforcement on the ground that the judgment was "void." This resistance may take the form of a motion in the original action to reopen the judgment, or a motion to quash the enforcement proceeding.<sup>89</sup> In either case, relief may be denied if the applicant unduly delayed in seeking relief,<sup>90</sup> if other equitable considera-

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<sup>87</sup> See RESTATEMENT (SECOND) OF JUDGMENTS, Introductory Note to ch. I at 8-13 (Tent. Draft No. 5, 1978).

<sup>88</sup> See *id.* § 13 (Tent. Draft No. 5, 1978) [§ 10]. This rule is subject to exceptions regarding fraud, duress, or the like. See *id.* §§ 118-120 (Tent. Draft No. 6, 1979) [§§ 70-72].

<sup>89</sup> The prevailing view, adopted in the *Restatement Second*, is that ordinarily the appropriate mode of relief for a local judgment is by motion in the original action. See *id.* § 126 (Tent. Draft No. 6, 1979) [§ 78].

<sup>90</sup> See *id.* § 126, Comment c (Tent. Draft No. 6, 1979) [§ 78]; *id.* § 127, Comment c (Tent. Draft No. 6, 1979) [§ 79].

tions warrant denial of relief,<sup>91</sup> or if substantial interests of reliance would be impaired by granting relief.<sup>92</sup> On the other hand, if relief is timely sought and no interests of reliance have intervened, the defaulting party may be granted relief.

When a court grants relief in the instance last mentioned, in effect it allows the defaulting defendant an extension of time—from the date of the judgment to the date of the enforcement action—in which to object to territorial jurisdiction. The cases plainly hold that such an extension should be granted unless there are intervening equities.

The judges know that most of these default cases result from ignorance on the part of the defaulting party, or blundering or dilatoriness on the part of counsel. If the question of territorial jurisdiction is reasonably arguable, an adequately represented party will never allow judgment to be entered by default.<sup>93</sup> On the other hand, if the question of territorial jurisdiction is open and shut in favor of the defaulting party, why shouldn't the judgment be regarded as void?

Consider a case to test the latter: Defendant lives in Alaska, and has done so all her life. She is involved in an automobile accident in Alaska with a car driven by a citizen of Florida. The Florida citizen returns home and commences an action for his injuries in a Florida court. Is the Alaska resident required to appear in Florida to object to jurisdiction, or can she wait until the person from Florida tries to enforce the judgment in Alaska? If the answer is that the Alaskan must appear in Florida, then a defendant must appear in an unreasonable forum to argue that the forum is unreasonable. This would undercut the purpose of having territorial limits on state court jurisdiction in the first place. In any event, under the law as it now stands, and as it has stood for

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<sup>91</sup> See *id.* § 122 (Tent. Draft No. 6, 1979) [§ 74].

<sup>92</sup> See *id.* § 114 (Tent. Draft No. 6, 1979) [§ 66].

<sup>93</sup> Given the choice between defaulting and making a special appearance to contest territorial jurisdiction, would any sane lawyer choose the former if the jurisdictional question was reasonably arguable? If the party defaults and tries to resist enforcement of the judgment by contesting territorial jurisdiction, he foregoes opportunity to contest the merits. There are some situations, particularly in international litigation, where it may be prudent to employ the strategy of suffering a default and then resisting enforcement of the judgment. This strategy may make sense when the defendant believes the original forum will be hostile in its approach to the merits or to the jurisdictional question. A defendant might also default when the judgment will have to be enforced in a jurisdiction that defendant believes will have a sympathetic attitude toward his position on the jurisdictional question. Relative cost of litigation in the two forums may also be a consideration. See, e.g., *Conn v. Whitmore*, 9 Utah 2d 250, 342 P.2d 871 (1959).

two hundred years, a defendant is not required to appear in order to avail himself of the jurisdictional defense. He can default, await the day when enforcement of the judgment is attempted, and then make a "collateral attack." Hence, in situation B the question of territorial jurisdiction is not necessarily foreclosed by the judgment, nor can I think of a reason why it should be.

We now come to situation C. Here, the action has been contested and the issue is subject matter jurisdiction, in the sense of allocation of authority among various tribunals in a state. As Professor Moore observes, it is now fairly well established that if the question of subject matter jurisdiction is actually litigated, the question is foreclosed in all circumstances except those falling into standard exceptions to the rules of preclusion.<sup>94</sup> The cases that have caused difficulty are those in which the proceeding was contested but the matter of jurisdiction was not raised, *i.e.*, the parties assumed the court had authority to adjudicate the matter. The *Restatement Second* says that the judgment in this situation is beyond attack unless there are no justifiable interests of reliance that must be protected,<sup>95</sup> and:

(1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or

(2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or

(3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction.<sup>96</sup>

As I read Professor Moore's formulation, it is in substance identical to this as applied to an action that was contested on the merits.<sup>97</sup>

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<sup>94</sup> See Moore, *supra* note 83, at 548; see, *e.g.*, *Durfee v. Duke*, 375 U.S. 106 (1963); RESTATEMENT (SECOND) OF JUDGMENTS § 15, Comment c (Tent. Draft No. 6, 1979) [§ 12].

<sup>95</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 117 (Tent. Draft No. 6, 1979) [§ 69].

<sup>96</sup> *Id.* § 15 (Tent. Draft No. 6, 1979) [§ 12].

<sup>97</sup> Professor Moore's formulation precludes collateral attack on subject matter jurisdiction where an appearance was made but the issue of jurisdiction was not raised, unless strong extrinsic factors implicating jurisdiction, such as substantial interference with the effective exercise of powers which have been lodged exclusively in another tribunal or agency, are present." Moore, *supra* note 83, at 561.

This brings us, finally, to Situation D, where the judgment was by default and the court lacked subject matter jurisdiction. Under the *Restatement Second* formulation, lack of subject matter jurisdiction means lack of authority to decide the "type of controversy involved in the action."<sup>98</sup> Operationally, this is equivalent to sections 15(1) and 15(2) of the *Restatement Second*, quoted above. There are not many cases where the judgment was by default and subject matter jurisdiction was clearly lacking.<sup>99</sup> The proverbial case involves a justice of the peace who has undertaken to grant a divorce. Professor Moore would require the respondent in such a case to appear before the justice under penalty that otherwise the divorce would be legally valid. I cannot believe any court would hold that.

## V

### NEXT ON THE AGENDA

The task for lawyers interested in the law of judgments is now to make the best use possible of the new *Restatement Second*. Part of that task is to integrate it with other areas of the law, procedural and substantive. Professor Casad has made a nice beginning with his article dealing with the problem of the issue and claim preclusive effects of a judgment outside the state of rendition.<sup>100</sup>

### CONCLUSION

One of the main purposes of the Restatement process is to generate critical thought in important areas of the law. Much of this thought was actually brought to bear in the Institute during the drafting process, and contributed greatly to the quality of the finished product. However, the process does not stop when a final draft is approved by the Institute. On the contrary, it is hoped that approval of the *Restatement (Second) of Judgments* will encourage further scholarly and professional discourse on the law of judgments.

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<sup>98</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 14 (Tent. Draft. No. 5, 1978) [§ 11].

<sup>99</sup> See *id.*, Reporter's Note to § 15 at 163 (Tent. Draft No. 5, 1979) [§ 12].

<sup>100</sup> See Casad, *Intersystem Issue Preclusion and the Restatement (Second) of Judgments*, 66 CORNELL L. REV. 510 (1981).

This *Symposium* is a welcome beginning to that discourse. It will be an important part of the materials at hand when a new Advisory Committee convenes to begin drafting the *Restatement (Third) of Judgments*.