Washington and Lee Law Review

Volume 48 | Issue 2 Article 9

Spring 3-1-1991

# Inconsistent Judgments

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# INCONSISTENT JUDGMENTS

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## I. INTRODUCTION

In instances in which multiple suits with common issues occur or the prospect of such suits arises there has been a good deal of talk about the supposed evil of judgments inconsistently resolving the same issue, whether the issue be one of fact or law.[1] The danger of inconsistency arises in a variety of contexts. Sometimes, but not always, something is done to prevent it. In those cases in which action is taken, its character varies. The preventive may be issue or claim preclusion applied so that no relitigation of the same matter in the second suit occurs, or it may be joinder of claims or parties so that what otherwise would have been dealt with in two suits is disposed of in one. The preventive may be no more than adopting a predisposition to judge consistently. The form of the remedy available, especially when joinder is used, takes different shapes and, accordingly, may be more or less efficacious. In other words, we are inconsistent in our reactions to the prospect of inconsistent judicial determinations. Whether this is the consequence of inadequate attention to the problem or reflects appreciated differences in context is the subject of this article. I hope to show that there are material differences in the situations in which inconsistency arises so that some differences in treatment make sense. At the same time I seek to demonstrate that in some measure like cases of inconsistency are treated differently and sometimes inadequately. The latter conclusion leads me to suggest some steps that might be taken to provide further prevention.

Where repetitive litigation does occur, it burdens scarce judicial resources, and this is a problem of increasing concern. In the view of some, indeed, it is perhaps a more pressing issue than that of inconsistency.[2] It would be possible, of course, to deal with the inconsistency problem by providing even more adjudication, for example, to "break the tie"[3] of

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1. *See, e.g.*, Rowe & Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7, 15 (1986) (listing inconsistency, "whipsawing," and scrambles for inadequate assets along with cost and delay as injustices arising from duplicative litigation). The concern is not new. A. VESTAL, RES JUDICATA/PRECLUSION v-9 to v-10 (1969), cited Lord Coke as complaining about inconsistent adjudications.

2. This concern seems to dominate the American Law Institute's Complex Litigation Project. *See* AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT 11-19 (Tent. Draft No. 1, 1989) (emphasizing the burden on state and federal court systems of mass filings of suits by individual plaintiffs).

3. In fact, the preferred response where a third action follows two inconsistent judgments is to give preclusive effect to the later of the prior judgments. RESTATEMENT (SECOND) OF JUDGMENTS § 15 (1982). Thus the inconsistency is perpetuated while further relitigation is prevented.

inconsistent determinations by still another proceeding. Ordinarily, however, the systemic response to possible inconsistency, whether achieved by preclusion, joinder, or predisposition to uniformity, seeks to limit litigation of the issue common to two suits to one adjudication. Consequently, any improvement in dealing with inconsistency lightens the burden on judicial resources of repetitive litigation as well. It must be recognized, however, that there are cases in which repetition does not produce inconsistency at all[4] or in which the inconsistency produced by repetition can be thought benign. In consequence, while eliminating repetition will always prevent inconsistency, what is necessary to deal with cases where inconsistency truly presents difficulty will not prevent all repetition. The two problems are not coextensive.

## II. Is Inconsistency Surely Bad?

At the outset, one ought to ask whether the existence of inconsistent determinations is always a bad thing. Obviously, if two decisions are inconsistent, one of them must be wrong.[5] Without more, however, the evil does not lie in the inconsistency; it lies in the erroneous decision. Inconsistency is merely a signal that error exists, a symptom of something bad, but not itself evil. Eliminating inconsistency will not surely cure the error. In fact, the error may be obscured by joinder or preclusion if the initial decision is the wrong one. To justify striking at inconsistency alone and not reaching the error that is the underlying cause, it must be shown that some harm is caused by the inconsistency itself.

It is sometimes argued that, when inconsistency reveals the occurrence of error, that manifestation of fallibility saps public confidence in the adjudicatory process and that inconsistency is thus harmful simply because of its signal.[6] I think this argument underestimates the ability of the public to accept the proposition that, as in the rest of life, honest mistakes and even worse failures sometimes occur in the course of adjudication. My hunch is that the public is fully aware of this reality and would prefer its acknowledgement and attempts at reform to cover-up.

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4. One would expect that the result of a second adjudication usually is the same as in the first even though one siding with the loser of the first suit would be expected to alter the presentation in the second in light of the earlier failure.

5. It is easy to see that opposing conclusions about an issue of past fact must mean that one of the conclusions is wrong. The same suggestion about predictions of future facts seems true as well. Whether it can be said of opposing determinations of an issue of law might be thought more debatable. Two judges may disagree about an issue of law because they bring a different calculus of values to the problem. At least if the judges come from different jurisdictions it can be argued that the decisions are not inconsistent because the fact of different values distinguishes the issues in the cases. On the other hand, it can be said in this case that one of the value sets must be inferior to the other and that the inferior value set is wrong. This point of contention is beyond the scope of this article.

6. *See* 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction § 4403 (1981); A. Vestal, *supra* note 1, at v-12; Schauer, *Precedent*, 39 Stan. L. Rev. 571, 600 (1987).

Beyond signalling error, inconsistent judgments can result in different treatment of people who are similarly situated. "Treating like cases alike" is probably the most commonly advanced justification for preventing inconsistency.[7] While this argument is seductive, I do not think it is ultimately persuasive in the great majority of cases. A neutral onlooker, finding disparate treatment of litigants because of inconsistent judgments discomfitting, is likely to regard the difference as injurious. Winners do not complain of it, however; losers do. But in most cases the loser's complaint, I believe, is not truly about the disparity, though it may be so cast. It is about losing. That is the injury from his perspective, and eliminating the disparity is not what he wants. The one case in which this is not so is where the loser and his winning counterpart are in direct competition. There, getting rid of the disparity in any fashion may be important to the loser in order that the continuing competition be fair. For example, different tax treatment of the expenses of competing businesses would be unfortunate for this reason. More often, however, difference in treatment is invoked by the loser, not for its own sake, but as evidence that *his* loss is erroneous, the possibility that the other outcome is the wrong one being swept under the rug. We should regard inconsistency as causing injury on an equality basis only in the case of competition noted above and not in all cases.

By creating uncertainty, inconsistency is also said to stand in the way of predictability and thus to hinder planning.[8] The injury of inconsistency under this argument falls on persons, not necessarily the parties to the judgments, who wish to regulate their affairs in light of the outcome of litigated cases. Once again, it is far from clear that this concern reaches all cases of inconsistency. In many instances there is simply no planning. Few accident victims, for example, will have made plans based on whether they would be compensated by the tort system if injured. And in a substantial number of cases it is possible to plan around uncertainty. Buying insurance or pricing a product are ways to do that. Doubtless there are some cases in which one would want consistency to facilitate planning, but this is not a problem that should lead us always to want to take whatever steps are necessary to eliminate inconsistency.

These three concerns about inconsistency can be usefully considered in the context of a strange case of "bankruptcy planning." In *In re Tveten*[9] and *In re Johnson*[10] two Minnesota doctors had invested in the same highly leveraged real estate development company and had given personal guarantees for the company's obligations. When the company defaulted, each doctor had about $19,000,000 of debt on the guarantees. The doctors consulted their lawyers who, relying on a case that had allowed a bankrupt

7. *See, e.g.*, AMERICAN LAW INSTITUTE, PRELIMINARY STUDY OF COMPLEX LITIGATION 5 (1987); Schauer, *supra* note 6, at 595-97.

8. Schauer, *supra* note 6, at 597-98. Professor Schauer asserts that this is the most important reason for objecting to inconsistency.

9. 70 Bankr. 529 (Bankr. D. Minn. 1987), *aff'd*, 848 F.2d 871 (8th Cir. 1988).

10. 80 Bankr. 953 (Bankr. D. Minn. 1987), *aff'd in part*, 880 F.2d 78 (8th Cir. 1989).

farmer to sell nonexempt cattle to buy exempt hogs,[11] advised both to convert significant amounts of nonexempt property to exempt assets. Following this advice, Dr. Tveten acquired $700,000 worth of fraternal benefit annuities, insurance, and Individual Retirement Accounts. Dr. Johnson prepaid $175,000 to release liens on his homestead and bought about $250,000 worth of life insurance, a grand piano, and an $8,000 harpsichord. Both then filed bankruptcy petitions.

The doctors' creditors opposed giving them discharges from their pre-bankruptcy obligations on the ground that these conversions of nonexempt assets to exempt ones were made with an intent to defraud creditors. One bankruptcy judge denied Dr. Tveten a discharge.[12] The judge's decision that the doctor had the requisite intent to defraud was affirmed by the district court[13] and the Eighth Circuit[14] as not clearly erroneous. A different bankruptcy judge, though aware of the first bankruptcy judge's ruling, granted a discharge[15] to Dr. Johnson and the discharge was affirmed by the district court.[16] The Eighth Circuit affirmed this decision as applied to removing the liens from the homestead, but remanded the case for further consideration of whether the other conversions were fraudulent.[17] Perhaps there were distinguishing features. The Minnesota Supreme Court, in an advisory opinion growing out of Dr. Tveten's case, had held that the unlimited fraternal benefit exemption violated the state constitution.[18] The Minnesota court's decision, however, came after the discharge was denied and was germane only as to whether he could keep the property. The homestead exemption, limited as to acreage but not amount, had been upheld by the state court against similar constitutional challenges.[19] At the surface, however, one may certainly view the courts' decisions as inconsistent. One conversion was all right; the other was not.

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11. *See* Forsberg v. Security State Bank, 15 F.2d 499, 502 (8th Cir. 1926) (decided under the 1898 Act). There was also legislative history under the 1978 Bankruptcy Code apparently authorizing conversion of nonexempt assets into exempt property interests. H.R. REP. No. 595, 95th Cong., 1st Sess. 360-361, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6316-17.

12. *In re Tveten*, 70 Bankr. 529, 531 (Bankr. D. Minn. 1987), *aff'd*, 848 F.2d 871 (8th Cir. 1988).

13. *In re* Tveten, 82 Bankr. 95 (D. Minn. 1987).

14. *In re* Tveten, 848 F.2d 871 (8th Cir. 1988).

15. *In re* Johnson, 80 Bankr. 953 (Bankr. D. Minn. 1987).

16. Panuska v. Johnson, 101 Bankr. 997 (D. Minn. 1988).

17. *In re* Johnson, 880 F.2d 78 (8th Cir. 1988). The Eighth Circuit attempted to harmonize the cases by saying that the form of the exemption and its amount were relevant factors in determining fraud. It is clear that the problem is at its worst where there is no ceiling on the amount of an exemption. This encourages a debtor to acquire such property for purposes of exemption rather than need.

18. *In re* Tveten, 402 N.W.2d 551, 560 (Minn. 1987) (on a question certified by the bankruptcy court because of creditors' objections to allowing exemptions).

19. The Eighth Circuit cited Title Ins. Co. v. Agora Leases Inc., 320 N.W.2d 884, 885 (Minn. 1982), for this proposition. *Johnson*, 880 F.2d 78, 82 (8th Cir. 1989).

Will courts lose credibility on this account? Was the doctor who was denied a discharge treated unfairly because the other was discharged? In light of these decisions how can debtors and their lawyers know whether it is safe to convert nonexempt into exempt property in future cases? Or does it make sense for courts to continue to examine this difficult bankruptcy problem case-by-case in an effort to find a wise resolution? Is a little uncertainty perhaps a healthy curb on greed in this situation? Reasonable people may well differ in their responses to these questions. If one concludes that inconsistency was inappropriate here, how should it have been avoided? Should the decision in the first case have been binding in the second? Should the cases have been consolidated? With all pending cases around the country raising the same question? Or are the costs of these preventives too high? Again, answers may differ. I recognize that it is risky to generalize from one instance of inconsistency, and I do not mean to be entirely dismissive of these common objections to its occurrence. At the same time, it seems to me that the example may serve to demonstrate that preventing inconsistency for these reasons may not be uniformly desirable.

A class of cases exists, however, in which inconsistency causes direct injury to a clearly identifiable victim and ought to be prevented on that ground. I believe that this vice of inconsistent judgments arises when a litigant is caught between *two* adverse judgments, one of which, because of the relationships involved, the litigant should have won.[20] There is no doubt about the existence of injury in these cases. Moreover, although an error in one of the judgments lies behind the inconsistency, for this person it does not matter which judgment is wrong. Regardless of the locus of the error, he is injured because he has lost in both cases. It seems to me that this is the kind of situation for which we should be especially on the alert. Here the costs of preventing inconsistency, to the litigants and to the judicial system, are always justified by the immediacy and certainty of the injury the inconsistency inflicts.

## III. The Remedies

Joinder of claims and parties on the one hand and issue and claim preclusion on the other are the principal vehicles for preventing inconsistency.[21] Both do so by unifying adjudication, though they achieve that

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20. *See infra* Parts V.A.1., B.1., and D.1. and 2.

21. Writing about multiparty disputes more than a decade ago, I was unable to identify any other mechanisms, although I then differentiated joinder and consolidation because parties effect the former and courts the latter. McCoid, *A Single Package for Multiparty Disputes*, 28 Stan. L. Rev. 707, 710-12 (1976). Professor Roger Groot has suggested to me that inconsistency is sometimes prevented by acquiescence of an institutional litigant, usually the government, in an adverse decision. He cites as an example the decision of the Federal Bureau of Prisons to give prisoners sentenced in the Ninth Circuit credit against their sentences for pretrial time spent in a halfway house as a condition of bond because of that circuit's decision in Brown v. Rison, 895 F.2d 533 (9th Cir. 1990). Federal Bureau of Prisons, Operations Memorandum No. 112-90 (5880) (Aug. 29, 1990).

unification in different ways. Joinder pulls all the parties or claims into a single action. Preclusion bars relitigation of things already decided. Both concepts are subject to limitations that get in the way of unification.

The obstacles to joinder are those of jurisdiction and venue. In the federal courts particularly, the jurisdictional difficulties are compound. Jurisdiction over subject matter, limited by Article III and further by Congress, can present problems. The usual requirement of a federal question or complete diversity between plaintiffs and defendants, the latter a restriction thought to be imposed by Congress,[22] is sometimes insurmountable. However, ancillary[23] and pendent[24] jurisdiction and partial diversity[25] provide opportunities for expansion of federal subject-matter jurisdiction which might be used to combat inconsistency. Jurisdiction over the person, limited by due process[26] and sometimes further by legislative action,[27] can also be troublesome, and that is true in both state and federal courts. Congress has made nationwide service available in the federal courts in some cases[28] and

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22. The source of the complete diversity requirement, which prohibits jurisdiction based on diversity when a plaintiff and a defendant share common citizenship, is Chief Justice Marshall's opinion in Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806). For discussion of this long-standing interpretation of the Judicial Code, see 13A C. WRIGHT, A. MILLER & E. COOPER, *supra* note 6, at § 3605 (suggesting that Marshall came to regret the position).

23. Ancillary jurisdiction allows a party other than the plaintiff to assert a claim in federal court which could not have been the subject of an independent suit there. It is the relationship of this claim to another claim which is properly before the federal court which legitimates its assertion. Examples are compulsory counterclaims, Moore v. New York Cotton Exchange, 270 U.S. 593, 607-10 (1926), and crossclaims that arise from the same transaction as the plaintiff's claim. *See* 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 6, at § 3523.

24. Pendent jurisdiction allows a plaintiff to join a claim that could not be the subject of an independent action in federal court with a factually related claim arising under federal law. It seems clear that, absent jurisdiction limitations, the two claims ordinarily would be regarded as one cause of action for claim preclusion purposes. The foundation case has become United Mine Workers of America v. Gibbs, 383 U.S. 715, 721-29 (1966) (joining a state law claim against a nondiverse defendant with a claim arising under the Labor and Management Relations Act). *See* 13B C. WRIGHT, A. MILLER & E. COOPER, *supra* note 6, at § 3567.

25. Statutory interpleader under 28 U.S.C. § 1335 (1988) requires only that there be diversity between two claimants. There need not be diversity between the plaintiff and the defendant claimants or between all claimants. The Supreme Court upheld this provision as within the diversity jurisdiction granted by Article III in State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530-31 (1967).

26. *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 115-16 (1987); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-94 (1980).

27. A state, or Congress for that matter, may choose not to exercise all the personal jurisdiction authority the due process clauses of the Constitution would allow.

28. Nationwide service in federal courts is now authorized, for example, in actions under the securities laws, 15 U.S.C. § 78aa (1988); statutory interpleader, 28 U.S.C. § 2361 (1988); and the antitrust laws, 15 U.S.C. § 5 (1988). For a complete catalogue of such provisions, see Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 Nw. U.L. REV. 1, 62-71 (1984) (suggesting that Congressional power is limited). It has been suggested that Congress could authorize state courts to exercise nationwide jurisdiction in complex cases, AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT 187-94 (Prelim. Draft No. 3, 1990); it is not clear, however, that Congress can extend state authority to match its own. *Id.* at 188.

might adopt nationwide service for other claims to prevent inconsistency. Some precedent exists in state courts for personal jurisdiction based on "necessity." This precedent might be similarly useful,[29] but how promising this concept is remains unclear. Venue limitations can also stand in the way of joinder. Because venue is largely a matter of statute[30] aimed at convenient location within a jurisdiction, relaxation of venue rules to deal with inconsistency is primarily a matter of persuading the legislature to put avoidance of that threat ahead of defendant convenience.

Preclusion, too, is constitutionally limited. Here the due process requirement of notice and opportunity to be heard provides the principal restriction.[31] However, preclusion may be further restricted, usually by judicial decision, on policy grounds.[32] The former obstacle may be overcome, in some cases at least, simply by provision of notice and opportunity to intervene.[33] At least, this would seem to be so as to an absentee subject to personal jurisdiction.[34] Problems in the latter category require balancing those policies against the evil of inconsistency.

Finally, the judgment in an earlier action may predispose a later court to reach the same decision on a common issue. For example, a prior judgment might be prima facie evidence in a subsequent suit between the loser and a third party on the same issue.[35] As to matters of law, stare decisis has even greater power to prevent inconsistency between separate cases.[36] The idea that a court should follow the rule established by an earlier decision of the same point is ancient. The idea probably is grounded in part in achieving judicial economy, but its more powerful justification is like treatment of people similarly circumstanced. The force of the doctrine is limited to a single jurisdiction and to the same or inferior courts therein. Even in that confine, the doctrine provides a good deal less than absolute protection. Ordinarily, stare decisis does not stand in the way of repetition of argument and decision as do joinder and preclusion, and repetition

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29. This suggestion is elaborated, but not very much, in Part V.A.1., *infra*.

30. Some authority suggests that due process may restrict venue as well as personal jurisdiction. *See, e.g.*, Aguchak v. Montgomery Ward Co., 520 P.2d 1352, 1356-58 (Alaska 1974).

31. *See* Hansberry v. Lee, 311 U.S. 32, 44 (1940) (nonparty not precluded where not adequately represented).

32. For example, the Supreme Court in Martin v. Wilks, 490 U.S. 755 (1989) (discussed in Part V.A.1., *infra*) thought it bad policy to impose on a nonparty the obligation to intervene or accept preclusion by the judgment of a pending case.

33. *See* AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT 97-129 (Tent. Draft No. 2, 1990).

34. *See id.* at 104 (stating the existence of such a limitation).

35. Section 5(a) of the Clayton Act makes a government judgment prima facie evidence in a later action by a private plaintiff against the same defendant. This statutory rule was subsumed by nonmutual offensive preclusion, and in 1980 Congress amended the statute to make it clear that operation of the broader preclusion rule was allowed but not required. P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 323.2a (1987 Supp.).

36. *See* Schauer, *supra* note 6, at 571, 605; Wise, *The Doctrine of Stare Decisis*, 21 WAYNE L. REV. 1043, 1056-60 (1975).

creates the opportunity for different outcomes. Departures from precedent are frequent enough to justify the conclusion that, while the potential of stare decisis to prevent inconsistency must be acknowledged, its utility on this score falls well short of what joinder and preclusion achieve.

## IV. The Two-Party Problem

The simplest case arises in the two-party context: when A sues B in suit #1 and suit #2 pits the same parties against each other once more. For example, suppose that in suit #1 A sues B for damages for personal injuries sustained in a collision which A alleges to be B's fault, and A wins. In suit #2 B sues A for B's injuries on the ground that the collision was A's fault. If the court allows relitigation and B wins suit #2, both victories are to some extent neutralized by the inconsistency. Or suppose that in suit #2 A sues B again, this time for property damage. If relitigation occurs and B wins, we have the anomaly of liability for personal injury but not for property damage.

The courts' usual response in this situation is foreclosure of relitigation by claim or issue preclusion, depending on the circumstances. When B brings the second suit, a compulsory counterclaim rule, a form of statutory claim preclusion, in the first forum will bar the second suit.[37] If no such rule obtains, issue preclusion will establish that the collision was B's fault and prevent recovery if contributory fault is an absolute defense.[38] If A brings the second suit, the court might bar the suit by claim preclusion if state law considers that personal injury and property damage comprise a single cause of action, as do most, but not all, states.[39] If the court recognizes personal injury and property damage as separate causes of action, A will not have to relitigate B's fault; issue preclusion will establish B's liability.[40] Seemingly, then, preclusion works very well to prevent inconsistent determinations in the two-party case.

A notorious Supreme Court decision, *Reed v. Allen*,[41] provides a double illustration of preclusion preventing the possibility of two-party inconsistency. The holder of rents from land interpleaded Reed (A) and Allen (B) who were adverse claimants under a will. Reed initially prevailed and then brought ejectment against Allen to recover possession of the land. In the second action Reed relied on the construction of the will in the interpleader decree to establish his claim, and the court rendered judgment in his favor on that account. The court imposed the result of the interpleader action on the ejectment action to prevent inconsistency (and to save litigation effort).

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37. *See* J. Friedenthal, M. Kane, & A. Miller, Civil Procedure 350, 353-54 (1985); Restatement (Second) of Judgments § 22(2) (1982).

38. *See* Restatement (Second) of Judgments § 27 (1982).

39. *Id.* at § 24, illustration 1; J. Friedenthal, M. Kane, & A. Miller, *supra* note 37, at 631-32.

40. *See* Restatement (Second) of Judgments § 27 (1982).

41. 286 U.S. 191 (1932).

The case's notoriety, of course, stems from additional facts. Allen had appealed the interpleader decree. That fact did not deter the court in the second action from relying on the decree. After the court in the second suit rendered judgment from which Allen took no appeal, the court reversed the decree in the first suit, and Allen prevailed in the trial court on remand. Allen then brought a third suit against Reed, also ejectment for the land. The Supreme Court ultimately sustained Reed's res judicata plea based on the judgment in the second action, with Cardozo, Brandeis, and Stone dissenting. Writing for the majority, Justice Sutherland believed that Allen's remedy was to have appealed the second judgment.[42] Having failed to do so, he was bound by that judgment. Preclusion thus prevented a result in the third action inconsistent with the result in the second, although an ultimate inconsistency remained: Allen had the rents; Reed had the land. Obviously, the difficulty in *Reed* arose from the court's giving preclusive effect in the second action to the first decree while an appeal of the first decree was pending.

Traditionally, preclusion prevents inconsistency only if the party who is advantaged by preclusion properly invokes the suit #1 judgment in suit #2. If the advantaged party does not affirmatively invoke the prior judgment, relitigation will occur, inconsistency may follow, and the inconsistency will go uncorrected, for courts do not often raise preclusion on their own motion. Leaving the matter to the parties makes sense if the adverse consequences of inconsistency affect only A and B. Arguably, inconsistency also has the adverse effect on society already noted because inconsistency reveals the fallibility of the process.

Would a better system allow the court to invoke preclusion on its own motion? One answer to this question might be that such a change would not accomplish much because the court in suit #2 has no sure way to know of the first judgment if the parties do not inform the court thereof. In a computerized world that answer probably has less force than it once did. Maybe a better answer is that the benefits to the party able to invoke preclusion are so great that the party will not often waive the point by nonassertion. Neither answer, however, shows that such a change would do any harm. The only argument in that direction that occurs to me, and it is not a strong one, is that it is important to preserve party control over the dimensions of the dispute in suit #2. The momentum, I believe, is in the other direction. It is likely that managerial judges will increasingly initiate preclusion when a party does not, not so much to prevent inconsistency as to avoid the burden of relitigation.[43]

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42. Contemporary analysis suggests different procedures for dealing with this problem. The loser of the first action might seek a stay of the second action while his appeal of the first decision is pending or he might make a post-judgment motion for a new trial in the second action after the first judgment is reversed on appeal. RESTATEMENT (SECOND) OF JUDGMENTS § 16 (1982). The dissenters in Reed had thought a third suit for restitution might be appropriate. Reed v. Allen, 286 U.S. 191, 203-09 (1932) (Cardozo, J., dissenting).

43. 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 6, at § 4405. If the issue can

It should be added that, quite apart from preclusion, the rules of permissive claim joinder leading to joinder in suit #1 are likely to diminish substantially the risk of inconsistency. Consider again the hypothetical. For reasons of economy, if not fear of preclusion, A is more likely than not to join his property damage claim with his personal injury claim.[44] B, too, is likely to counterclaim for his damages where counterclaims arising from the same transaction are allowed, as they almost universally are.[45] On the facts of *Reed v. Allen*, we would today expect a crossclaim between the interpleaded defendants to establish who had the right to the land itself.[46]

Insofar as inconsistency is concerned, the two-party case does not seem to pose any serious problem demanding reform. The preventives appear to be well conceived to prevent inconsistency. Ordinarily party action will avoid inconsistency either by initial joinder or timely assertion of preclusion. Where the parties do not act, it is probable that courts increasingly will pick up at least some of the slack by invoking preclusion. It is ironic that inconsistency is perhaps best forestalled where it is least harmful. Here inconsistency is victimless. The two-party case is one of those situations where inconsistency reveals the presence of a wrong determination but does not identify it. One of the inconsistent decisions is erroneous, but we do not know which one. There is a victim of that error; but, with the possible exception of *Reed v. Allen*, in which Allen seems to have been victimized by initial error in the interpleader action (if its reversal was sound), we cannot tell where the error occurred or who its victim is.[47] Joinder and preclusion serve other values here and are not necessary to prevent inconsistency.

## V. Three-Party (or More) Inconsistency

All the other cases of inconsistency involve an additional party or parties. Suit #1 is between A and B. Suit #2 is between one of them and C. As will become apparent, the joinder solution is much more apt to be the solution utilized in these cases. But the cases can take more than one form, and variation in form turns out to be important.

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only be raised by the parties, the public interest in preventing multiplicity or the appearance of fallibility is in jeopardy.

44. Legislation like Fed. R. Civ. P. 18, a typical contemporary joinder-of-claims provision, would clearly allow joinder if the claims were deemed separate. In federal courts aggregation of damages would be permitted even if the personal injury and property damage components were regarded as separate claims.

45. *See, e.g.*, Fed. R. Civ. P. 13(a), (b).

46. *See* Fed. R. Civ. P. 13(g). The transactional requirement is obviously satisfied.

47. Neither loser can show that he is harmed by the fact of inconsistency; he can only argue that *perhaps* he has lost a case he should have won and is injured by the loss. The decision in his counterpart's favor might be seen as evidence supporting his argument, but he presumably could make the argument that the adverse judgment was erroneous even if there were no inconsistent judgment.

### A. *Two Claimants against a Single Defender*

#### 1. Inconsistent Obligations of the Defender

If A sues B in suit #1 and wins, and C sues B in suit #2 and wins, the obligations that the two judgments impose on B may be incompatible. Commonly, this will mean double liability: the court directs B to pay A and to pay C when B should only have to pay one of them. This happened to the insurer in *New York Life Insurance Company v. Dunlevy*.[48] In the first action two competing claimants for the proceeds of a policy were interpleaded by the insurer (B). Dunlevy (C), who claimed as an assignee, made no appearance in that action, and the named insured, Gould, (A) recovered from the insurer (B). Dunlevy then prevailed in a second action brought against the insurer. The judgment in the first action was held not to bind Dunlevy because the first court lacked personal jurisdiction over her.[49]

On rare occasion the inconsistency can be even worse. The court directs B to behave (other than by paying money) in one fashion in suit #1 and to behave in an opposite fashion in suit #2. *Martin v. Wilks*[50] could turn out to be such a case. Black firefighters (A) obtained a consent decree against a city and a county agency (Bs) which directed a course of affirmative action in hiring and promotion because of past discrimination. Claiming that they were being denied promotions in favor of less qualified blacks, white firefighters (C) then sued the same defendants. The Supreme Court held that the white firefighters were not precluded by their failure to intervene in the first suit and remanded for a trial of their reverse discrimination claims, thus opening the possibility of inconsistent determinations of how the defendants must hire and promote firefighters. Should the possibility materialize, the defendants will not be able to comply with both judgments. Obviously, something would *have* to be done about an inconsistency should courts render conflicting judgments in that kind of case,[51]

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48. 241 U.S. 518 (1916).

49. The first suit had been instituted in the Pennsylvania state court by a creditor of Dunlevy seeking to garnish an obligation allegedly owed Dunlevy by the insurer. The insurer responded by interpleading the named insured and Dunlevy. On Dunlevy's failure to appear a default judgment was rendered for the named insured and the garnishing creditor took nothing. When Dunlevy later sued the insurer in California, the insurer's defense was that the Pennsylvania judgment barred her claim. Not having appeared in the Pennsylvania action, Dunlevy was free to collaterally attack jurisdiction. Because Pennsylvania lacked personal jurisdiction over Dunlevy that state's judgment was not entitled to full faith and credit, she was entitled to litigate the merits, and the insurer had to pay twice.

50. 490 U.S. 755 (1989).

51. The black firefighters, who had been victorious plaintiffs in the first suit, were allowed to intervene in the second action to defend the decrees rendered in the earlier suit. Consequently, it seems probable that they will be bound if the second action is decided in favor of the white firefighters and that such a decree would be controlling. In two relatively recent cases the Department of Labor has been the target of conflicting injunctions. In NAACP, Jefferson County Branch v. McLaughlin, 703 F. Supp. 1014 (D.D.C. 1989), the

and something *ought* to be done in the double liability situation as well.

Indeed, the Supreme Court has ruled at least once that subjecting a B to the lesser threat of double liability to an A and a C is a denial of due process. In *Western Union Telegraph Co. v. Pennsylvania*,[52] the telegraph company (B) was faced with competing state claims to escheat unclaimed money orders. The Court ordered dismissal of Pennsylvania's (A) separate suit against the company so that a single proceeding could resolve the conflicting claims of the states, especially New York (C), without imposing double liability on the company.

The usual response to the problem is joinder of C in suit #1 at the instance of the threatened party, B. This may take the form of mandatory joinder, on B's motion a refusal by the court to proceed with suit #1 in the absence of C.[53] Or the response can take the form of allowing B to proceed against A and C by interpleader, a permissive joinder device.[54] The distinction is an important one because of the jurisdiction and venue restrictions on joinder. If the response is mandatory joinder, jurisdiction or venue problems can prevent suit #1 from going forward. In *Western Union*, for example, New York could not be joined in a state court action in Pennsylvania,[55] but the Supreme Court had original jurisdiction over such a case.[56] The state court action was dismissed so that inconsistency could be prevented in another forum. If the response is use of a permissive joinder device, jurisdiction or venue limits may defeat protection. In *Dunlevy* lack of personal jurisdiction over one of the claimants left the insurer exposed to double liability. To some extent, however, these jurisdictional obstacles can be relaxed. Easing of jurisdictional limits can be found, for example, in federal statutory interpleader, which allows minimal diversity (it is sufficient if there is diversity between any two claimants), a reduced jurisdictional amount, nationwide service of process, and a capacious venue.[57] The

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court issuing the first injunction refused to hold the department in contempt for doing what the second injunction, issued by another court, had required on the ground that the department had acted in good faith, thus saving the department from a "Catch 22" plight. *Id.* at 1017-18. In Feller v. Brock, 802 F.2d 722 (4th Cir. 1986), the Fourth Circuit, entertaining an appeal from the second injunction, vacated it because it conflicted with the first which had been issued by a coordinate court. *Id.* at 727-28.

52. 368 U.S. 71 (1961). It is clear from Justice Black's opinion for the Court that the state action forbidden is rendition of the judgment and not institution of the suit.

53. *E.g.*, FED. R. CIV. P. 19.

54. *E.g.*, 28 U.S.C. 1335 (1988); FED. R. CIV. P. 22.

55. Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71, 75 (1961). It is not clear from the opinion why New York could not be joined in the Pennsylvania action. The Eleventh Amendment does not bar suits between states, and, at least after Nevada v. Hall, 440 U.S. 410 (1979), one state may be sued in the courts of another.

56. Article III, section 2, gives the Supreme Court original jurisdiction over suits "in which a State shall be a Party." U.S. CONST. art. III, § 2.

57. For a comparison of statutory interpleader and a proceeding under Federal Rule of Civil Procedure 22, see 7 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1703 (1986).

statute clearly covers the *Dunlevy* facts. Indeed, that case is said to be what prompted Congress to provide the federal remedy.[58]

The joinder response to the threat of inconsistency in this situation, then, is pretty vigorous. But it is not foolproof. Mandatory joinder is not an absolute. For example, if there is no forum where A can join B and C, the court may decide to proceed in C's absence.[59] Nor is interpleader, even with its relaxed standards, sure to be available. If C is from another country, for example, nationwide service will not reach him.[60] At least partial diversity is necessary under the federal statute as well, and state courts are limited in terms of personal jurisdiction; nationwide service is beyond their power.

Preclusion of C would be a surer means of protecting B, of course, but it cannot be invoked in most cases. Because C was not a party in suit #1, C is not bound by that adjudication. There are exceptional cases of preclusion, cases in which C is said to be "in privity" with one of the suit #1 parties.[61] There are several forms of privity, and I shall not undertake to describe them here. Suffice it to say that more often than not there will be no privity and, on that account, preclusion is not ordinarily useful as a means of protecting B from inconsistent obligations.

Is further protection needed here? To the extent that joinder and preclusion fall short one could argue that it is. Providing further protection is another matter, however. The parties may have exhausted joinder possibilities. There are conflicting constitutional claims. If the threat to B is intolerable as a matter of due process, perhaps further extensions of jurisdiction over the person of C are intolerable as well. It might be possible to argue for an expansion of personal jurisdiction. The underlying theory would be necessity, and *Mullane v. Central Hanover Bank*[62] could be cited in support of the argument. In *Mullane* the Supreme Court sustained the power of New York to bind nonresident beneficiaries of common trusts established under its laws, so long as adequate notice was provided, based on the state's interest in providing a binding adjudication. Essentially the argument for personal jurisdiction based on necessity involves a balancing

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58. *See id.* at § 1701.

59. *See id.* at § 1611.

60. In State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 537 n.18 (1967), the Supreme Court expressly declined to pass on whether Canadian bus passengers injured in a California accident were amenable in a statutory interpleader action brought in that state. 28 U.S.C. § 2361 (1988) provides only for service on claimants where they "reside or may be found." *Id.*

61. *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE § 11.22 (3d ed. 1985) (describing "privity" as based on representation or on substantive legal relationships); J. FRIEDENTHAL, M. KANE, & A. MILLER, *supra* note 37, at § 14.13 ("Persons in a privity relationship are deemed to have interests so closely intertwined that a decision involving one necessarily should control another.").

62. 339 U.S. 306 (1950). The case is perhaps better known for holding that service by publication was insufficient against known parties with a known place of abode when a means more likely to inform was available. *Id.* at 318-20.

of the competing interests and resolution in B's favor. The prospect of such an expansion, however, may not seem bright as recent Supreme Court decisions seem to take a restrictive, rather than expansive, view of the subject.[63] Article III constrains further relaxation of federal subject matter jurisdiction unless Congress transforms the matter into a federal question. This, perhaps, Congress could do under the umbrella of the commerce power.[64]

Preclusion is a more promising direction. One possibility is legislation authorizing giving notice to C of A's suit against B and the opportunity for C to intervene therein with issue preclusion whether C exercises the option or not.[65] The idea underlying this device is that it provides the requisite notice and opportunity to be heard. The *Martin* decision presumably would not stand in the way. In that case there was no legislation. The preclusion argument was simply that C, knowing of A's suit, should be bound by failure to intervene. The Court rejected a theory that put the burden on C to identify the need to act.[66] It is not clear, however, that C could be precluded by a court lacking personal jurisdiction over him.[67]

### 2. Inconsistent Determinations of Multiple Obligations

A second two-claimant model arises when A and C sue B separately with B winning one suit and losing the other in a situation in which B

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63. Notable recent decisions invalidating attempted exercises of jurisdiction against nonresidents served outside the state include Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Kulko v. Superior Court, 436 U.S. 84 (1978); Shaffer v. Heitner, 433 U.S. 186 (1977). The Court's most recent decision sustaining jurisdiction over a nonresident served while present in the state, Burnham v. Superior Court, 110 S. Ct. 2105 (1990), does not really address the problem involved here.

64. *Cf.* AMERICAN LAW INSTITUTE, PRELIMINARY STUDY OF COMPLEX LITIGATION 188, 191 (1987) (considering the problem in the context of multiforum-multiparty litigation).

65. AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT 97-129 (Tent. Draft No. 2, 1990) (proposing such preclusion in multiforum-multiparty cases); Note, *Preclusion of Absent Disputants to Compel Intervention*, 79 COLUM. L. REV. 1551, 1565-66 (1979); McCoid, *supra* note 21, at 714-28 (favoring formal joinder); Comment, *Nonparties and Preclusion by Judgment: The Privity Rule Reconsidered*, 56 CALIF. L. REV. 1098, 1122-25 (1968) [hereinafter *The Privity Rule*].

Section 6 of the proposed Civil Rights Bill, H.R. 1, 102d Cong., 1st Sess. (1991), is designed to overrule *Martin* more or less in this fashion. It provides that litigated and consent judgments or orders resolving claims of employment discrimination will bind those who had actual notice and a reasonable opportunity to present objections or were adequately represented by one challenging the proposed judgment or order. They would also be bound if reasonable efforts were made to notify interested persons. The last two justifications for preclusion, obviously, go beyond what was rejected in *Martin* as not authorized by statute and unwise.

66. Although the Court placed its decision on the ground that the structure of the Federal Rules was based on joinder rather than preclusion, it indicated as well that it thought that a preclusion model which required the absentee to identify the need to intervene was bad as a matter of policy. Martin v. Wilks, 490 U.S. 755 (1989).

67. AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT 104 (Tent. Draft No. 2, 1990).

ought to win both or lose both. Suppose the case in which A is driving an automobile in which C is a passenger and which is hit by another automobile driven by B. If the possibility of contributory fault barring recovery by A is put aside, B ought to be liable to both or neither. The mass tort context is perhaps a more glamorous example because the number of claimants balloons. The resulting burden on the court system is the aspect of those cases which rightly gives rise to most of the concern. The facts underlying *Parklane Hosiery Co. v. Shore*[68] provide another illustration. There the Securities and Exchange Commission (A) sued the company (B) for injunctive relief based on securities fraud and prevailed. Thereafter a private investor (C) brought a damage action based on the same behavior. Either the defendant was guilty of a securities law violation or not. Separate adjudication could have led to inconsistent determinations.

Here joinder is of only limited utility as a response to the possibility of inconsistency. There is no mandatory joinder at the instance of B on these facts, though some commentators have argued that there should be.[69] B has no way of effecting joinder, other than by seeking consolidation if both suits are pending in the same forum at the same time.[70] In federal court, transfer from one district to another may facilitate consolidation. Transfer for trial is limited, however, to a forum where the action might have been brought originally.[71] Permissive joinder rules would allow A and C to choose to sue together if they both wish to do so.[72] If A is unwilling to join with C and sues alone, C may be able to intervene, again permissively.[73] Jurisdiction over subject matter and venue restrictions, however, are not relaxed to facilitate either joinder of plaintiffs or intervention in such cases.

Again, preclusion prevents inconsistency in this situation, but only sometimes and, it seems, almost by chance. If A wins the first suit against B, C may be able to invoke the prior judgment offensively in the second suit. At least that is possible in those courts which allow nonmutual offensive preclusion.[74] *Parklane* authorized this for federal courts. Privity is not

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68. 439 U.S. 322 (1979).

69. *See* Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 842-43 (1989); McCoid, *supra* note 21, at 724-28.

70. *See, e.g.*, FED. R. CIV. P. 42(a).

71. 28 U.S.C. § 1404(a) (1988).

72. *E.g.*, FED. R. CIV. P. 20(a). All that is required is that the claims arise from the same transaction, occurrence, or series of transactions or occurrences and contain a common question of fact or law.

73. *E.g.*, FED. R. CIV. P. 24(b)(2). Only a common question of law or fact is required. Intervention was not an avenue for the investor in *Parklane*; private litigants may not intervene in S.E.C. proceedings.

74. Mutuality of estoppel (or preclusion) means that in a B-C controversy B cannot be bound by the result of an adverse judgement in an earlier A-B case unless C would have been bound, because of privity with A, had the judgment gone the other way in the A-B action. *See* F. JAMES & G. HAZARD, *supra* note 61, at § 11.24; J. FRIEDENTHAL, M. KANE, AND A. MILLER, *supra* note 37, at § 14.14.

necessary because B has had his day in court. Even nonmutual preclusion may be limited, however. In *Parklane* the Supreme Court indicated that preclusion would not be available in cases where C stayed out of the first suit with a view to getting two chances at recovery, by preclusion if A won suit #1 or directly in suit #2 if A had lost suit #1.[75] On the other hand, no preclusion of C results if B wins the first suit brought by A; C cannot be bound because he has not had a day in court.

Serious proposals for reform are under consideration in the mass tort context. The proposals utilize both joinder (consolidation) and preclusion (notice and opportunity to intervene) concepts. The former will take advantage of partial diversity, pendent party jurisdiction, nationwide service, and expanded removal in order to achieve maximum joinder in federal courts,[76] and plans exist as well to facilitate consolidation in state court actions.[77]

Is this a situation in which we need reform? Probably reform is desirable, at least in the mass tort context, because of the burdens on the system and on defenders arising from multiple suits. However, reform is not required on account of inconsistency except as one is disturbed by appearances or troubled by the prospect that two claimants may receive different treatment if there are separate proceedings. These consequences alone might not be thought to warrant imposition of either expanded joinder or preclusion. The situation is distinguishable from the inconsistent obligation problem and like the two-party cases. While we know from the existence of inconsistent judgments that there is an erroneous adjudication and two claimants were treated differently, we cannot be sure of the identity of the victim of error. Should B have won both cases, in which case he is the victim? Or should B have lost both cases, in which case the losing claimant is the victim? The absence of a clearly identified victim has much to do with the relatively weak responses to the possibility of inconsistency in this situation. It may be that there has been little complaint about the possibility by litigants who either do not see any clear threat from inconsistency or see what they perceive to be other, greater threats than the chance of error in a proceeding in which they have a day in court.[78]

A situation posing an analogous problem for B is one involving punitive damages. It may be that multiple awards of punitive damages amount, in effect, to double liability. If the trier in suit #1 calculates the award based on a penalty for the defender's overall conduct and takes no account of

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75. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331-32 (1979).

76. AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT Chapters 3 and 5 (Tent. Draft No. 2, 1990).

77. AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT Chapter 4 (Prelim. Draft No. 3, 1990).

78. In the absence of bankruptcy, the claimants are in a race to satisfaction if the defender's assets are insufficient to satisfy all claims. A, racing with C to get satisfaction from B, will prefer to litigate alone. In some instances some characteristic of C will lead A to regard him as an unattractive partner. What makes C unattractive may or may not be related to the issues in litigation.

the possibility of further such awards to other claimants in other cases and the triers in suit #2 and suit #3, and so on, do likewise, the total sanction imposed on B will be excessive.[79] Strictly speaking, this is not a case of inconsistency. The different triers may, in fact, be quite consistent in their assessments. The problem, rather, is one of redundancy, but the situation calls for protection of B analogous to that provided for double liability resulting from inconsistency.

### *B. A Defender Turned into a Claimant*

#### 1. Liability Over

Still another three-party situation occurs when A sues B who, if held liable, should be able to recover from C for indemnification or contribution. If A's suit against B and B's suit against C are conducted independently, B may suffer a loss he should not have to bear because the issue of his liability to A is determined differently in the two adjudications.[80] One example of this is a case in which C is B's liability insurer and A is the victim of B's alleged tort. Another is when C is obliged to make contribution because C, too, was responsible for A's injury. *Owen Equipment & Erection Co. v. Kroger*[81] was such a case. Mr. Kroger was electrocuted when a crane next to which he was walking came too close to a high-tension electric power line. His widow (A) brought a wrongful death action against the utility company (B) which owned the line. The defendant utility had a claim for contribution against the contractor (C) who operated the crane.

There is no mandatory joinder in this kind of case. The joinder solution for the problem is impleader, or third-party practice.[82] In *Owen* the utility impleaded the contractor. This device is permissive; B may implead C if B wishes but is not obliged to do so. There are some instances in which B is substantively prevented by contract from joinder of C in this fashion. The "no-action clause" in liability insurance policies, for example, is frequently held to bar impleading a liability insurer.[83] Even in the absence of substantive limitation procedural problems may arise. Interestingly, in the federal courts limitations on joinder are only partially relaxed to facilitate use of impleader. Courts generally hold subject matter jurisdiction over B's claim against C

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79. AMERICAN LAW INSTITUTE, PRELIMINARY STUDY OF COMPLEX LITIGATION 85-86 (1987).

80. C. WRIGHT, A. MILLER & E. COOPER, *supra* note 6, at § 4452 (arguing for a preclusion solution).

81. 437 U.S. 365 (1978). In Medlin Marine, Inc. v. Klapmeier, 540 F. Supp. 232 (E.D. Ark. 1982), a retailer and a part manufacturer held liable for wrongful death and personal injuries caused by a defective watercraft sought indemnity from the designer of a portion of the watercraft who had testified as an expert for the defendants, now plaintiffs, in the earlier tort action. To establish the designer's liability the plaintiffs relied on the earlier judgment. The action was dismissed with prejudice because the designer was not a party to the earlier action. 540 F. Supp. at 254.

82. *E.g.*, FED. R. CIV. P. 14.

83. *See* R. KEETON & A. WIDISS, INSURANCE LAW § 4.8(b) (1988).

to be ancillary to A's claim against B.[84] Accordingly, B may assert the third-party claim against C though they are citizens of the same state and B's claim against C presents no federal question so that B could not independently sue C in federal court. Thus the fact that the utility and the contractor were both Nebraska corporations did not prevent impleader in *Owen*.[85] Venue also is probably ancillary.[86] But personal jurisdiction over C is restricted in the usual fashion.[87] If C is not amenable at the forum, the court will not allow impleader.

In many cases in this category preclusion provides an additional form of protection for B. That is generally the case when C is B's indemnitor, as in the case of liability insurance. In such a case, when C defends B in A's suit, as is usually required by the policy, C will be bound by the outcome.[88] C's control of the defense constitutes a foundation for preclusion because C has in fact had his day in court, albeit not as a formal party. Preclusion also applies if C wrongly refuses to defend B in violation of a legal obligation to do so.[89] Here the theory underlying preclusion, in part, is that the insurer has notice and an opportunity to be heard.[90] This rationale is probably the forerunner of the proposal, described in Part III and V.A.1, to bind an absentee who has notice of the action and an opportunity to intervene. In this context, however, the further justification, that B who has an incentive to avoid liability to A represents C when B defends himself, absent evidence of collusion bolsters the rationale of preclusion.[91] Of course, a third basis for preclusion is that it is an appropriate sanction for C's breach of the obligation to defend. However, when B and C have a conflict of interest, such as when A charges B with both covered and uninsured

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84. C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1444 (1990). No Supreme Court case so holds, but there is a favorable dictum. *See* Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 375-76 (1978).

85. *Owen*, 437 U.S. at 367-68. It was the plaintiff 's attempt to assert a claim against the third-party defendant that caused difficulty in Owen. Initially it appeared that this presented no problem because the plaintiff was an Iowa citizen and the third-party defendant was incorporated in Nebraska. It turned out, however, that the principal place of business of the latter was in Iowa, a fact not immediately apparent because it was on the west side of the Missouri River after that stream changed its channel. *Id.* at 369.

86. C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1445 (1990).

87. *Id.*; *see, e.g.*, Block Industries v. DHJ Industries, Inc., 495 F.2d 256 (8th Cir. 1974) (contacts of third-party defendants with forum inadequate to support long-arm jurisdiction where record showed only that they manufactured and sold to defendant fabric of the sort causing plaintiff's injury).

88. R. KEETON & A. WIDISS, *supra* note 83, at § 7.6(e)(4), (5); RESTATEMENT (SECOND) OF JUDGMENTS §§ 57, 58, illustration 2 (1982); 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 6, at § 4451.

89. *See* R. KEETON & A. WIDISS, *supra* note 83, at § 7.6(e)(4), (5) (1988); RESTATEMENT (SECOND) OF JUDGMENTS §§ 57, 58, illustration 1 (1982); 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 6, at § 4452.

90. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 57 comment a (1982).

91. *Id.*, comment b; 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 6, at § 4452.

behavior, the notice-and-opportunity and breach justifications disappear, although B still has the same incentive to avoid liability. And in that case there is no preclusion as to the matter in conflict.[92]

What should be apparent is that the threat to B is as great in this kind of case as it is when two claimants separately assert inconsistent claims against B, the situation described in Part V.A.1. There is no economic difference between double liability where there should only be single liability and residual liability where there should be none. This is another instance in which B can be a victim of inconsistency per se. If it were clear that joinder and preclusion worked in complimentary fashion always to protect B when B acts to invoke one or the other of them, the threat of inconsistency would not give pause; B could defend himself against it. Unfortunately, as has been shown, such is not the case, and in those instances B is denied protection that ought to be available.

Several possible improvements can be suggested. In the joinder direction, personal jurisdiction over C in the state where A sues B based on a theory of necessity, if defensible,[93] would make impleader generally available in state courts. Short of that is expansion of the federal remedy. Just as the threat of double liability led to federal statutory interpleader, this problem may warrant provision for an action initiated by B against both C and A without waiting for A to sue. Essentially, B would seek relief in the alternative, a determination that B is not liable to A or that, if he is, C is liable to B. Whether as part of such scheme or simply within the present impleader framework, nationwide service should be as available as partial diversity (through ancillary jurisdiction) and relaxed venue already are. Alternatively, a straightforward preclusion solution probably could be based on notice to C of an opportunity to intervene. On the substantive side, there is much to be said as well for abolition of the no action clause in liability insurance contracts.

### 2. No Liability Over

There is another class of defender-turned-claimant case. A may sue B claiming that B caused A injury in suit #1 and B may sue C in suit #2 for a separate injury sustained by B in the same transaction. The absence of any legal connection between A's and B's claims distinguishes this case from the preceding one. Imagine, for example, that A is a passenger in a vehicle driven by B that collides with a vehicle operated by C. Inconsistent judgments may result if the court in suit #1 finds that responsibility is B's while in suit #2 the court lays the blame on C. Inconsistency results as well if in

92. *See* R. KEETON &.A. WIDISS, *supra* note 83, at § 7.6(e)(4), (5); RESTATEMENT (SECOND) OF JUDGMENTS §§ 57, 58, illustration 5 (1982). The latter authority asserts, based on the "independent duty to defend" of the insurer, that the insurer should defend under a reservation of rights and may be precluded if it simply refuses to defend. *Id.*

93. *See supra* text accompanying note 62.

suit #1 A is denied recovery on the theory that responsibility is C's, not B's, and in suit #2 B loses to C.

Joinder as a solution takes a different form and is somewhat limited. As a practical matter, the conflict between A and B will keep them from joining as plaintiffs. Impleader is not available here because C's liability to B is not derived from B's to A. However, if A sues both B and C, as A is likely to do in an automobile case, B can crossclaim against C.[94] In the federal court system it is generally held that the crossclaim is ancillary so there need be neither diversity between B and C nor proper venue over the B v. C component.[95] A's ability to join B and C, of course, indicates that there is no problem of personal jurisdiction. It should be apparent, however, that all this turns on A's joinder of B and C. Absent that, consolidation provides the only means of joinder. For consolidation to occur the B v. C component must independently satisfy jurisdiction and venue.

Preclusion similarly is not a sure solution. It is true that, if B loses in suit #1, C can invoke that judgment in suit #2 in a jurisdiction adopting nonmutual preclusion. Here C's invocation of the prior judgment is defensive and less controversial than offensive use as in *Parklane*.[96] It will be of no utility, however, if B wins suit #1. C, not a party to that suit, will not be bound by its result. It is not clear that preclusion based on notice and opportunity to intervene would be helpful here. C is a potential defendant, not a claimant.[97] Would C intervene by asserting a claim for declaratory relief? That surely would precipitate a counterclaim for affirmative relief by B. Whether C will be willing to trigger this likely consequence is open to question. Given C's dilemma, a legislature might be unwilling to impose preclusion here.

In any event, the inconsistency may not call for any remedy. This is yet another case in which inconsistency is only a signal of error in one suit or another and itself causes no certain harm to any one of the three parties. If a crossclaim or preclusion prevents inconsistency in those cases where B loses suit #1, the consequence may be only to magnify the effect of error if that result is erroneous.

### C. *Claimant-Turned-Defender*

Presumably there are also cases in which B sues A and then C sues B. If C is B's passenger and A is the operator of the other vehicle, this could

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94. *See, e.g.*, FED. R. CIV. P. 13(g), requiring only that the cross-claim arise from the same transaction or occurrence as the plaintiff's claim.

95. 6 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1433 (1990).

96. The incentive of a claimant to stand aside in suit #1 with the hope of invoking a judgment in his favor or relitigating if the judgment is adverse is absent where C, the nonparty in suit #1, is a defender in suit #2.

97. An early proposal to preclude on the basis of failure to intervene expressly included defenders. *See The Privity Rule, supra* note 65, at 1128. The A.L.I. proposal for multiparty, multiforum cases seems limited by its terms to claimants but does not discuss the issue. AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT § 5.05(a)(1) (Tent. Draft No. 2, 1990).

easily occur. Joinder is unlikely absent consolidation or intervention because of the conflict between the two claimants. Whether there is preclusion depends entirely on the outcome of the first suit. B will be precluded in suit #2 if he loses suit #1 in jurisdictions adopting nonmutual preclusion, subject to the significance attached to C's failure to intervene in suit #1.[98] If B wins suit #1, on the other hand, C will not be bound by that result absent privity with A. This case is indistinguishable from the one described in Part V.B.2. Whether B claims or defends first really does not matter, although the case for precluding B when he loses the first suit as a claimant is perhaps stronger than when B is precluded by a judgment in a suit in which he defended.[99] As a claimant, B controlled the time and locus of the first suit and has little basis, therefore, to complain about any inadequate opportunity to be heard. In any event, inconsistency, again, here is only a symptom of error, not a trap for B.

### *D. One Claimant and Two Defenders*

#### 1. Liability in the Alternative

Another kind of three-party case involves a single claimant, B, who should recover from either A or C. If B proceeds against A and C serially, it is possible that he will recover from neither. In B's suit against A the court may find that C is responsible and render judgment for A. When B then sues C, the second court may place responsibility on A and decide the case in C's favor. A simple example of this situation arises when a passenger injured in a collision proceeds separately against his driver and the operator of the other vehicle. The plaintiff's thwarted attempt to amend her complaint to assert a claim against the third-party defendant-contractor in *Owen Equipment & Erection Co v. Kroger*[100] suggests that it might have been a case in which the plaintiff feared such a result. The *Owen* plaintiff might have been unsure whether the death of her husband was the fault of the utility or of the contractor. *Finley v. United States*,[101] a case recently before the Supreme Court, seems to fall into the same category. The victim of a plane crash sued the Federal Aviation Administration in the federal court. The same plaintiff also sued the city and a local utility in a state court. The Supreme Court rejected the plaintiff's attempt to amend the federal suit to add the nondiverse, state-court defendants as pendent parties because the Court found no congressional authorization for such a departure from the usual requirement of diversity between the victim and the state-court

98. *See supra* text accompanying notes 74 and 75.
99. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 29 comment d (1982).
100. 437 U.S. 365 (1978); *see also supra* Part V.B.1 (discussing *Owen*).
101. 490 U.S. 545 (1989).

defendants in the absence of a claim against the defendants based on a federal question.[102]

The prospect of "falling between the stools," if foreseen, will usually prompt B to try to join A and C as defendants and claim that one or the other is liable to him. This he typically is permitted to do.[103] As *Owen* and *Finley* demonstrate, in federal courts such joinder is subject to the standard restrictions imposed by jurisdiction and venue rules.[104] Permissive joinder in state court is not a sure alternative. While it would not be true in the automobile collision illustration, in some cases of this type A and C might not be amenable to suit in the same forum. *Finley* presented a different, but nonetheless fatal, obstacle to a state-court action. The federal court had exclusive subject matter jurisdiction over the suit against the F.A.A. In the absence of pendent party jurisdiction in federal court, therefore, there was no forum where the plaintiff could join all defendants.[105]

Preclusion offers no help at all in these cases, not even fortuitously. In the absence of privity between A and C, which is unlikely to be present, if B loses to A in suit #1, that decision cannot bind C who has not had his day in court.

Yet the economic impact on B of no recovery from either A or C is exactly the same as the risk of double liability of a defender in the inconsistent-obligation context discussed in Part V.A.1. and the risk of residual liability in the liability-over context discussed in Part V.B.1. Just as in those cases, B is a clear victim of the inconsistency itself and ought to be protected. Jurisdiction and venue restrictions on joinder should be relaxed as much as possible to permit joinder in order to avoid this. At the least, Congress should authorize pendent party jurisdiction for both the *Owen* and *Finley* situations. Congress' response to these decisions, however, has been only partial. The *Finley* problem has been corrected; *Owen* remains the law.[106] Probably we should provide B with something like reverse

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102. Although the Supreme Court disclaimed any intention to recede from pendent and ancillary jurisdiction principles already established, Finley v. United States, 490 U.S. 545, 556 (1989) (speaking particularly of Gibbs), some authorities had expressed concern that the decision could have that effect. *See, e.g.*, Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 B.Y.U. L. REV. 247 (1990).

103. *E.g.*, FED. R. CIV. P. 20(a).

104. 7 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1659 (1986).

105. The doctrine of sovereign immunity may present a similar problem where the plaintiff seeks to join the United States in a Tucker Act claim and another defendant. *Id.* at § 1658 (discussing Lowe v. United States, 37 F. Supp. 817 (D.N.J. 1941)).

106. 28 U.S.C. § 1367, enacted in October 1990, corrects the problem of *Finley*, but not of *Owen*. Section 1367(a) provides for "supplemental jurisdiction" over claims so related to claims in a civil action where there is jurisdiction "that they form part of the same case or controversy under Article III of the United States Constitution." *Id.* This provision would allow a claimant suing one defendant on the basis of a federal question to join a nonfederal claim against another defendant without regard to lack of diversity, the situation in *Finley*. Section 1367(b), however, expressly excludes claims by plaintiffs in diversity actions against

interpleader, including nationwide service, ancillary jurisdiction, and relaxed venue.

### 2. Cumulative Liability

The last three-party case is one in which the liability of the two defendants, rather than being alternative, is cumulative, meaning that both can be held liable but that the claimant is entitled to only one satisfaction. The cases fall into two categories, one in which the liability of one defender is derived from the other's behavior and the second in which liability is independent.

#### a. Derivative Liability

Suppose, for example, that C is A's employer who may be liable to B on that account if A is liable to B. If B proceeds against them separately, it is possible that B will recover from one but not the other and suffer in consequence because the party against whom B recovers is judgment-proof. A slightly different, real-case illustration is *Bernhard v. Bank of America National Trust & Savings Association*,[107] where in suit #1 a legatee (B) sued an executor (A) for misappropriation of a bank account allegedly belonging to the testator and lost on a finding that the testator had made a gift of the account to the executor during her lifetime. Thereafter, the legatee, who had by then become the administratrix of the decedent's estate, brought a second action against the bank (C). Again, permissive joinder by B of A and C as defendants is available, but it is limited by standard jurisdiction and venue restrictions. Conceivably, B might choose not to join in the hope of having two chances to recover should the first effort fail.

Preclusion is more helpful. In *Bernhard* the California Supreme Court held that the second suit was barred by the outcome of the first because the legatee had had her day in court there. This case has become the foundation precedent for nonmutual preclusion.[108] If B loses to A or C in suit #1, B will be precluded in suit #2. In fact, it is likely that even in a jurisdiction generally adhering to mutuality, a loss to A in suit #1 will preclude B in a second suit against C. In those courts preclusion is based on an exception to the mutuality requirement growing out of the fact that

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persons made parties under Rules 14, 19, 20, and 24, and claims by persons proposed to be joined under Rule 19 or seeking intervention under Rule 24 as plaintiffs. This would bar assertion by plaintiff of a claim against a third-party defendant, the situation in *Owen*. Ancillary jurisdiction over intervention as of right under FED. R. CIV. P. 24(a), a concept which had been assumed legitimate by most authorities, is also curtailed by the restriction.

107. 19 Cal. 2d 807, 122 P.2d 892 (1942).

108. The lustre of Roger Traynor seems to have overshadowed the existence of an earlier, like opinion of the Delaware court in Coca Cola Co. v. Pepsi Cola Co., 36 Del. 124, 172 A. 260 (Super. Ct. 1934), which Traynor himself cited. Bernhard v. Bank of America Nat. Trust & Savings Assn., 19 Cal. 807, 812, 122 P.2d 892, 898 (1942).

C's liability to B is derivative.[109] *Bernhard* could have been decided on this basis without the more dramatic abandonment of mutuality. Where mutuality prevails, however, a loss to C in suit #1 would not bar B in suit #2 against A. The exception to mutuality operates only when the claimant sues the primarily liable party first.

At first blush, this kind of case appears to be another of those in which inconsistent judgments simply signal the existence of an erroneous decision which cannot be identified. Seen in that light, the problem requires no solution for inconsistency reasons. In fact, however, the problem is more complicated than that. *Bernhard*, for example, without preclusion, presented the legatee (B) with two chances to recover, two bites at the same apple.[110] Moreover, if the legatee had been allowed to prevail in the second suit, the prospect of still a third suit, by the bank (C) against the executor (A) whose liability was primary, loomed. It was to deal with this prospect that the mutuality exception, which might be called "one-way privity," was invented.[111] The third suit necessarily will be inconsistent with the result of the first or the second. One commentator described the situation as anomalous for that reason.[112] It is more than that. What makes it so, I believe, is that the third suit taken with the second presents another case of liability over which was discussed in Part V.B.1. If the court holds C liable in suit #2 because mutuality (without the exception) bars preclusion there, C should not be vulnerable to losing to A in suit #3. In a sense, it could be said that, long before the abolition of mutuality, an exception to the doctrine was created precisely to protect *C* from becoming the victim of inconsistency. The invention occurred in the rare three-party case in which preclusion could be an effective preventive without running afoul of due process because B had had his day in court in suit #1. Nonetheless, the exception also reflected judicial willingness to address the plight of a potential victim of inconsistency in a fashion rather radical for the time. As such, the example ought to encourage similar procedural reform today, by courts or legislatures, to prevent similar injuries in analogous cases. However, in preventing those injuries in other contexts, any reform must be designed with constitutional obstacles in mind.

### b. Independent Liability

When liability is cumulative but independent (no right of indemnity or contribution), it seems to me that inconsistency presents no problem per se.

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109. *See Coca Cola Co.*, 36 Del. at 127, 172 A. at 263. RESTATEMENT OF JUDGMENTS § 96 (1942) (as an exception to § 93, which adopted a rule of mutuality).

110. *Bernhard*, 19 Cal. 2d at 813, 122 P.2d at 895.

111. Mutuality was said to interfere with the right of indemnity. RESTATEMENT OF JUDGMENTS § 96 comment a (1942). It is one-way because C is not bound if A loses but is judgment-proof and B brings the second suit to get satisfaction from a deeper pocket. RESTATEMENT OF JUDGMENTS § 93 (1942).

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

Suppose that B claims he was injured by the negligence of both A and C. In one of separate suits against them it might be found that B suffered a compensable injury while in the other suit it might be found that he did not. If, because of this inconsistency, B recovers from one defender but not the other, one of the decisions is in error, but we do not know which. Neither A nor C can insist that B join them in a single action because of the common question. Permissive joinder is available to B on the usual jurisdiction and venue terms. If B loses the first suit, he might be precluded in the second suit under the authority of *Bernhard*. Absent privity, B can take no advantage in the second suit of a first-suit victory. No one is trapped by any inconsistency, however; consequently, no special precaution is necessary to prevent the possibility.

## VI. Inconsistency Between Different Parties

A final class of cases is that in which there is no party common to the two suits and the parties in one suit are unrelated to those in the other. A sues B in suit #1, and C sues D in suit #2. The typical occasion for this situation is when the two suits present the same issue of law with regard to separate transactions. For example, a number of actions in different bankruptcies have presented the question whether, for the purpose of preference recapture, payment by check is a transfer at the time of delivery of the check or at the time it is honored.[113]

Within a single jurisdiction, consolidation of the two suits, if they are pending at the same time, may prevent inconsistency.[114] Normally, we would expect this only at the appellate stage when the focus is on issues of law. Because of the absence of privity between the party losing the first suit and a party in the second, preclusion is not an effective preventive of inconsistency.

Even where consolidation and preclusion are inapplicable, stare decisis may prevent inconsistent judgments. Once a court decides the question, that decision ordinarily will be followed in subsequent actions in the same court or lower courts of the same jurisdiction.[115] While this may be done in part for the sake of appearances,[116] the primary reason is to treat people in like circumstances alike.[117] However, stare decisis as a way of responding to the

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113. *See* In re Belknap, Inc., 909 F.2d 879, 883-84 (6th Cir. 1990) (holding, as do most courts of appeals, that delivery effects the transfer).

114. *E.g.*, Fed. R. Civ. P. 42(a).

115. Professor Schauer would say that I have conflated precedent and stare decisis with the latter principle applying only to the decisions of subsequent inferior courts. Schauer, *supra* note 6, at 576 n.11.

116. *Id.* at 600.

117. *Id.* at 595-97. Professor Schauer argues that this justification, unanswerable in the abstract, conceals the more serious question of the size of categories of likeness. If large, following precedent is a significant constraint; if small, precedential constraint is small. He suggests that predictability and decisional efficiency are additional supports for following precedent. *Id.* at 596-600. *See also* Hazard, *Preclusion as to Issues of Law: The Legal System's Interest*, 70 Iowa L. Rev. 81, 82 (1984).

possibility of inconsistency is not an absolute preventive. In the second suit a party may persuade the court to overrule the earlier precedent and establish a different, and presumably better, rule. When the two actions are litigated before courts of different jurisdictions, although the earlier ruling may be cited as persuasive, the first ruling is not binding in the second action. The second court will decide differently if it thinks the first decision unsound. Thus the state courts are often described as laboratories for solving legal problems, and we think it good that the court in suit #2 is unfettered by the decision in suit #1. Similarly, we see instances in which the Supreme Court seems to hold its hand while a difficult issue is litigated repetitively by different parties in different circuits. This, too, may be regarded as good because conflict among the circuits helps the high court to reach the best possible conclusion when settling the matter.

Because they lack common or related parties, these cases are not ones in which a litigant can be caught between two adverse decisions with consequences akin to double liability. The cases bear a much closer resemblance to those cases in which inconsistency signals error but does not identify its locus. I think that is a contributing factor to the explanation of why we allow litigants to urge that precedent be overruled, why we expect one court to disregard the decision of another regarded as misguided, and why it sometimes makes sense for the Supreme Court to await multiple adjudications of the same issue in the lower courts before reviewing one of them and settling the matter. Repetition in these situations is aimed at the elimination of error, which must be regarded as ultimately a more important component of justice than preserving appearances or treating similarly people in like circumstances.[118] Perhaps the balance struck here should tell us something about the lack of importance of consistency for these purposes in the multiple litigation situations involving common parties where no injury results from the inconsistency itself. Of course issues of law are usually more pervasive in their effect than issues of fact are likely to be, and that could add weight to the importance of error correction as to law.

Seemingly at odds with the idea of giving error correction primacy over consistency on matters of law is the idea embodied in the Restatement (Second) of Judgments extending issue preclusion to questions of law that arise between the same parties or their privies in successive suits.[119] This means that no argument can be made in the second action that the first decision of law was erroneous. Preclusion is limited, however, to those who

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118. Professor Schauer readily acknowledges that one cost of a rule of precedent is perpetuation of what is conceived to be error, Schauer, *supra* note 6, at 588; this leads him to consider that the constraint of precedent need not be absolute, that it might provide a reason for decision that is not absolute. *Id.* at 591-92.

119. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982). The rule of this section is subject to exceptions. *Id.* at § 28. In particular, section 28(2) sets apart instances in which "the two actions involve claims that are substantially unrelated" and "a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws." *Id.* at § 28(2).

have had their day in court on the issue (or their privies), and even so limited it can present problems.[120] Perhaps it reflects a belief that not much new can be expected from one who has already been heard on the point. Probably it simply shows that preclusion is designed to implement values other than consistency, such as repose.[121]

The practice in some federal circuits that a decision of a panel thereafter will be followed in the circuit by other panels, even as to other parties, unless overruled by the court sitting en banc[122] is more obviously at odds with the idea of giving error correction primacy over consistency and comes close to preclusion of nonparties. This practice may achieve economy, although it surely must increase the number of petitions for en banc hearings, and equal treatment of those similarly situated. Whether those values should outweigh error correction as to issues of law is not so clear. The practice, if rigorously followed, also seems to be on the borderline of a denial of due process to the party who is adversely affected by the prior decision. He has no true day in court on his claim or defense. What might be thought to excuse this is the adversely affected party's opportunity to petition for en banc review by the court of appeals or for certiorari in the Supreme Court. In such a petition the adversely affected party has a chance to argue to the tribunal with power to rectify the matter that the precedent is wrong-headed. Since denial of the petition can be for nonmerits reasons, it can be argued that the right to petition does not quite amount to a hearing on the merits and is therefore arguably unconstitutional. Pointing the other

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120. Two examples are found in two 1984 Supreme Court decisions. United States v. Mendoza, 464 U.S. 154, 160 (1984) (holding nonmutual offensive issue preclusion inoperative against the government); United States v. Stauffer Chemical Co., 464 U.S. 165 (1984) (allowing the private litigant defensive issue preclusion against the government without resolving a problem arising from a competing precedent involving other parties in another circuit where the private party did business).

121. One justification for extending preclusion to issues of law is the difficulty of distinguishing fact and law. J. FRIEDENTHAL, M. KANE, & A. MILLER, *supra* note 37, at § 14.10. Professor Hazard defends a qualified rule of preclusion. Hazard, *supra* note 117, at 81. Suggesting that preclusion was not needed historically, *id.* at 89-90, he argues that qualification of the rule is needed under the circumstances of modern judicial structure, especially in litigation involving a public agency. *Id.* at 90-93.

122. This practice in the Fifth Circuit led that court to allow intervention as of right to one claiming development rights on an offshore coral reef in an action brought by the United States against a competing developer to enjoin development. Atlantis Development Corp. v. United States, 379 F.2d 818, 828-29 (5th Cir. 1967). Professor Hellman says that all of the courts of appeal are committed to it. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541, 545 (1989); Bennett & Pembroke, *"Mini" In Banc Proceedings: A Survey of Circuit Practices*, 34 CLEV. ST. L. REV. 531, 536 (1986); Wald, *Changing Course: The Use of Precedent in the District of Columbia Circuit*, 34 CLEV. ST. L. REV. 477, 480 (1986). Professor Hellman notes that lawyers in the Ninth Circuit do not believe the practice succeeds in producing uniformity. Hellman, *supra*, at 543. Although he acknowledges "disarray" in some areas, his own conclusion, based on a study of the Ninth Circuit, is that inconsistency among panels is not as frequent and not as important, because it does not affect planned transactions, as has been perceived. *Id.* at 595-97.

way, however, is the analogous proposition that a decision of the Supreme Court on an issue of federal law will be binding on nonparties in subsequent proceedings in lower courts although Supreme Court review of the later decision would be discretionary.

## VII. Conclusion

Unless one is going to worry about appearances and equality of treatment at the risk of error, the only cases of inconsistent judgments requiring a remedy are those in which, absent a remedy, a repeat litigant may be caught between two adverse judgments. This occurs in three contexts: 1) when the litigant is subjected to double liability; 2) when the litigant is held liable but is unable to recover over; and 3) when the litigant fails in establishing liability of one or another of parties alternatively liable. The injury to him in these cases is the same; he is out of pocket the value of a single liability. From the perspective of a victim of such inconsistency, this injury is probably more serious than the burden of multiple suits and cries out for redress.

No one has conceived an effective preventive other than joinder or preclusion. Both pose problems. Joinder has jurisdiction and venue obstacles. These can be minimized but probably not totally eliminated. These obstacles have been minimized in case 1), partly minimized in case 2), and substantially ignored in case 3). In light of Supreme Court decisions, further reform to improve the joinder situation in cases 2) and 3) almost certainly requires legislation. For due process reasons, preclusion, as we know it in operation, is only fortuitously effective in these cases in the main. Only in the liability-over context has preclusion been truly useful. The idea of preclusion based on giving a nonparty notice and an opportunity to intervene and be heard, however, does offer an alternative to joinder, more promising where the absent party is a claimant. This solution, too, appears to require legislation in light of Supreme Court precedent.

Enlarging joinder, preclusion, or both in the ways suggested here has costs. The relaxation of federal jurisdiction and venue limits would increase the workload of already busy federal courts. Nationwide service would mean more expense for some litigants and could have an adverse effect on access to evidence in some cases. Protection from inconsistency, as opposed to mere error, seems to me to be well worth these costs. Gauging the effect on adjudication that will come from expansive joinder is more difficult.[123] Increased use of joinder complicates litigation because it adds voices in the argument. The additional voices doubtless would take more time. More important is the fact that they are likely to mean more evidence and more theories about law and fact. All this may be confusing. It is sure to make judging harder. On the other hand, it might just make the product better.

123. It must be recognized that even preclusion, if based on notice and the opportunity to intervene, becomes a joinder device for the invitation to intervene will sometimes be accepted.