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THE USE OF COLLATERAL ESTOPPEL BY A PRIVATE PARTY IN SUITS AGAINST PUBLIC AGENCY DEFENDANTS

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Collateral estoppel[1] has been defined as "the facet of the doc-

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[1] Collateral estoppel is a part of the general doctrine of res judicata but must be distinguished from total res judicata. Unfortunately, there is no agreement about the correct terminology for these principles. *See* 1B MOORE'S FEDERAL PRACTICE ¶0.441[2], at 3776 (2d ed. 1974). The term res judicata will be used herein to describe the general doctrine of judicial finality, which subsumes total res judicata and collateral estoppel. Total res judicata describes claim preclusion, or merger and bar. RESTATEMENT OF JUDGMENTS §§ 45 (a), (b) (1942). Collateral estoppel describes issue preclusion only. *Id.* § 45 (c).

Res judicata prevents relitigation of matters already decided. The doctrine has two major aspects. Total res judicata prevents the parties to Case I from relitigating that lawsuit. If Case I and Case II involve the same parties or their privies, *see, e.g.*, Expert Elec., Inc. v. Levine, 554 F.2d 1227, 1233 (2d Cir.), *cert. denied*, 434 U.S. 903 (1979), and the same claim, *see, e.g.*, Herendeen v. Champion Int'l Corp., 525 F.2d 130, 134 (2d Cir. 1975), and the judgment in Case I was on the merits, *see, e.g.*, Weston Funding Corp. v. LaFayette Towers, Inc., 550 F.2d 710, 713 (2d Cir. 1977), then total res judicata precludes relitigation of Judgment I. If Judgment I was in favor of the defendant, then the claim in Case I has been extinguished and plaintiff is barred from suing on that claim. This aspect of total res judicata is known as the doctrine of bar. RESTATEMENT OF JUDGEMENTS § 45(b) (Comment on Clause (b)) (1942). *See also* Cromwell v. County of Sac, 94 U.S. 351, 352 (1876). If Judgment I was in favor of the plaintiff, the original claim is extinguished and merges into the plaintiff's claim based on Judgment I. This aspect of total res judicata is known as the doctrine of merger. RESTATEMENT OF JUDGMENTS § 45(a) (Comment on Clause (a)) (1942). In either situation, the judgment in Case I is final "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." Cromwell v. County of Sac, 94 U.S. 351, 352 (1876). The Supreme Court later elaborated on this principle: "The judgment puts an end to the cause of action, which cannot be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment." Comm'r v. Sunnen, 333 U.S. 591, 597 (1948) (citations omitted).

Collateral estoppel, on the other hand, is triggered when Case I and Case II are based on different claims or causes of action. Since Judgment I does not preclude Case II, the parties to Case II are free to litigate their new claim, but this freedom extends only to questions not at issue in Case I. "[M]atters which were actually litigated and determined in the first proceeding cannot later be relitigated." *Id.* at 598. Collateral estoppel is thus applied more liberally and more restrictively than total res judicata. It is more liberal in

trine of judicial finality that deals with a judgment's conclusive effect in a suit on another cause of action."[2] It precludes relitigation of a previously decided issue when that same issue arises in the context of a subsequent suit based on a different claim.[3]

Traditionally, a party seeking to assert collateral estoppel must establish three elements: (1) identity with an issue actually and necessarily litigated in the prior case,[4] (2) mutuality of parties, that is, the same parties or their privies in the second case as in the first,[5] and (3) a final judgment rendered in the first case.[6] In addition, collateral estoppel has traditionally been used defensively rather than offensively,[7] and has been held to apply only to questions of fact.[8]

In recent years the judiciary, responding in part to the increased congestion of court dockets, has expanded the scope and flexibility of the doctrine of collateral estoppel. This trend has had a significant and beneficial impact in multiparty tort litigation,[9] patents and trademarks,[10] and antitrust law.[11] However,

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that it applies to new claims and even to new parties. However, collateral estoppel, unlike total res judicata, is restricted to matters actually litigated in Case I.

[2] 1B MOORE'S FEDERAL PRACTICE ¶0.441[2], at 3776 (2d ed. 1974) (footnote omitted).

[3] Comm'r v. Sunnen, 333 U.S. 591, 598 (1948).

[4] Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326 n.5 (1979); 1B MOORE'S FEDERAL PRACTICE ¶0.405[1], at 622-24. Although the identity of issue element appears straightforward, it could become a problem as courts apply collateral estoppel more frequently. It is possible to give the term "issue" a broad definition and include therein matters which might have been urged to sustain or defeat its determination. In addition, not all matters litigated nor all findings of the court need to be considered "necessary" to the decision. *See generally* Polasky, *Collateral Estoppel Effects of Prior Litigation,* 39 IOWA L. REV. 217, 224-28 (1954). *See also* the discussion of the identity of issue element in United States v. School Dist. of Ferndale, 400 F. Supp. 1141, 1145-46 (E.D. Mich. 1975) *and* Maynard v. Wooley, 406 F. Supp. 1381, 1385 n.6 (D.N.H. 1976), *aff'd,* 430 U.S. 705 (1977).

[5] Nominal parties who neither exercise control nor have a real interest may not be bound. On the other hand, nonparties who have a proprietary interest and control the litigation from behind the scenes could be held to be parties for collateral estoppel purposes even under the traditional rule of mutuality. *See* Polasky, *supra* note 4, at 242-43.

[6] United States v. United Air Lines, Inc., 216 F. Supp. 709, 718-19 (E.D. Wash. 1962), *aff'd in part, mod. in part,* United Airlines v. Weiner, 335 F.2d 379 (9th Cir. 1964), *cert. dismissed,* 379 U.S. 951 (1964); Zdanok v. Glidden Co., 327 F.2d 944, 955 (2d Cir. 1964), *cert. denied,* 377 U.S. 934 (1964); RESTATEMENT OF JUDGMENTS § 41, Comment a (1942).

[7] *See* section III *infra.*

[8] *See* section V *infra.*

[9] *See, e.g.,* Bemer v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965), *cert. denied,* 382 U.S. 983 (1966); United States v. United Airlines, Inc., 216 F. Supp. 709 (E.D. Wash. 1962), *aff'd in part, mod. in part,* United Airlines, Inc. v. Weiner, 335 F.2d 379 (9th Cir. 1964), *cert. dismissed,* 379 U.S. 951 (1964).

[10] *See generally* Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971); Langsam, *Res Judicata Effects of Consent Judgments in Patent Infringement Litigation,* 36 FED. B.J. 171 (1971); Comment, *Res Judicata Effect of Consent Judgments in Patent Litigation,* 18 B.C. IND. & COM. L. REV. 66 (1976).

[11] *See* McWilliams, *Federal Antitrust Decrees: Should They be Given Conclusive Ef-*

the same cannot be said for public interest litigation, civil rights, and poverty law. This article discusses the application of collateral estoppel against a public agency defendant in civil litigation. Welfare law hypotheticals are used to illustrate the procedural points. The authors are here concerned with cases in which a private litigant might take advantage of a favorable ruling in a prior case to which he or she was not a party by asserting collateral estoppel.[12]

I. COLLATERAL ESTOPPEL AGAINST PUBLIC AGENCY DEFENDANTS

Lawyers who regularly counsel disadvantaged clients know that there will never be available enough financial or legal resources to insure adequate representation for every individual in need. The low income population is too large and its legal problems are both numerous and intractable. These problems are compounded by the difficulty of institutionalizing legal gains. The poverty lawyer who wins an important victory usually returns to the office with the knowledge that many other similarly situated persons will be unaffected by the result because the policies of the defendant public agency will remain unchanged.

Consider the following two hypotheticals:

A. The plaintiff in Case I was a medically needy Medicaid recipient. Although not eligible for cash public assistance, the plaintiff was eligible for medical assistance since his income was insufficient to meet his medical expenses.[13] The plaintiff contended that the Social Security Act[14] and federal regulations[15] re-

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fect in a Subsequent Private Action?, 48 MISS. L.J. 1 (1977).

[12] This article does not discuss the use of collateral estoppel by a public agency against a civil rights litigant where the private party was also a party in the earlier case. For a discussion of collateral estoppel in this context, see Theis, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem*, 70 NW. U.L. REV. 859 (1976); Torke, *Res Judicata in Federal Civil Rights Actions Following State Litigation*, 9 IND. L. REV. 543 (1976); Vestal, *State Court Judgment as Preclusive in Section 1983 Litigation in a Federal Court*, 27 OKLA. L. REV. 185 (1974); Comment, *Civil Procedure-Res Judicata-Challenge of Racial Discrimination under 42 U.S.C. § 1981 Barred by Prior Submission of Civil Rights Question to State Court*, 30 VAND. L. REV. 1260 (1977); Comment, *State Court Affirmance of State Agency Determination of State Discrimination Claim Precludes Subsequent Suit in Federal Court Under 42 U.S.C. §1981*, 12 SUFFOLK L. REV. 139 (1978). Nor is there discussion of the application of collateral estoppel against an individual where the prior decision was rendered by an administrative body. For a discussion of collateral estoppel in this context, see Note, *The Collateral Estoppel Effect of Administrative Agency Actions in Federal Civil Litigation*, 46 GEO. WASH. L. REV. 65 (1977).

[13] 42 U.S.C. § 1396(a)(10)(C)(i) (1976); 42 C.F.R. §§ 425.300, 435.310, 435.800-.845 (1979).

[14] 42 U.S.C. §§ 1396(a)(10)(C), 1396a(a)(17) (1976).

[15] 42 C.F.R. §§ 435.410(c)(1), 435.831(a)(i) (1979).

quire that he be treated the same as Aid to Families with Dependent Children (AFDC) recipients with respect to receipt of Medicaid benefits. AFDC recipients may deduct work-related expenses from their income in determining their level of benefits.[16] The department of social services, however, refused to permit the plaintiff to deduct these expenses and instead calculated his Medicaid level based on his income before expenses. The plaintiff thereupon sued in state court and won: the court held that the law mandates equal treatment for medically needy Medicaid recipients.[17] The department did not appeal, but refused to apply Judgment I to persons other than the plaintiff. In Case II the identical issue is raised. The Case II plaintiffs sue in federal court, however, and obtain statewide class certification. The court in Case II reconsiders the very complicated statutory question adjudicated in Case I, and reaches the same result as did the court in Case I.[18]

B. In Case I plaintiff sued because she was denied AFDC benefits although pregnant with her first child. On appeal the state intermediate level court held that unborn children have needs separate from their mothers' and are therefore eligible for AFDC (Judgment I).[19] Leave to appeal to the New York Court of Appeals was denied,[20] as was the department's petition for certiorari to the United States Supreme Court.[21] Nevertheless, more than a year after the denial of certiorari, the department was not enforcing Judgment I statewide. Persistent denial of applications for AFDC from pregnant women continued to result in litigation. The identical issues were involved in many subsequent cases, with the department raising new arguments to no avail.[22] Finally, in 1977, two and one half years after the New York Court of Appeals denied leave to appeal in Case I, that court reaffirmed the holding in Case I by publishing a short memorandum affirmance of a Case II decision.[23]

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[16] 45 C.F.R. § 233.20(a)(7) (1979).

[17] *See, e.g.*, Newborn v. Toia, 89 Misc. 2d 409, 391 N.Y.S.2d 786 (Sup. Ct. 1976).

[18] *See, e.g.*, Greklek v. Toia, 565 F.2d 1259 (2d Cir. 1977).

[19] *See, e.g.*, Boines v. Lavine, 44 A.D.2d 765, 354 N.Y.S.2d 252 (4th Dept. 1974).

[20] Boines v. Lavine, 34 N.Y.2d 519, 359 N.Y.S.2d 1026 (1974).

[21] Lavine v. Boines, 419 U.S. 1040 (1974).

[22] *See, e.g.*, Catoe v. Lavine, 51 A.D.2d 545, 378 N.Y.S.2d 623 (2d Dept. 1976); Rankin v. Lavine, 50 App. Div. 2d 1091, 376 N.Y.S.2d 355 (4th Dept. 1975); Sanders v. Lavine, 87 Misc. 2d 379, 384 N.Y.S.2d 636 (Sup. Ct. 1976).

[23] Rankin v. Lavine, 41 N.Y.2d 911, 363 N.E.2d 343, 394 N.Y.S.2d 618 (1977). By this time the New York Court of Appeals felt moved to remind the defendants that they had exhausted their welcome in the courts of New York. The court said: "The commissioner's remedy lies in his own regulations, not in the courts. Until then the department should comply with the existing final determination of the courts." *Id.* at 912, 363 N.E.2d at 344,

In examples A and B, the Case II plaintiffs were forced to litigate issues that had previously been resolved against the same public agency defendant. It is clear that under the traditional formulation of the doctrine of collateral estoppel neither the AFDC mother not the medicaid recipient above would be able successfully to assert collateral estoppel against the defendant social services department because they did not meet the mutuality of parties requirement of collateral estoppel.

The plaintiffs in Case II could rely on Judgment I, but only as persuasive authority. Had the defendants appealed Judgment I to the state high court and lost, the decision would have established a controlling precedent for the Case II litigation. Absent such a ruling, however, each case after Case I necessarily involves a de novo examination of the central isues of Case I.

Agency defendants know that decisions of trial courts do not have *stare decisis* effect in a coordinate jurisdiction. Thus, they repeatedly litigate at the trial level rather than risk loss on appeal.[24] Moreover, even after an appeal is perfected, usually by a plaintiff who lost at the trial level, a year or more can elapse before a final decision is rendered. In the meantime, thousands of similarly situated persons are adversely affected by an administrative practice already examined and declared illegal by a state or federal court.

Frustration with the incremental development of the common law through *stare decisis* is not a new phenomenon among poverty lawyers. In the late 1960's, many hoped the problem would be solved through increased use of the class action under the then recently revised Rule 23 of the Federal Rules of Civil Procedure.[25] In some instances legal services attorneys were successful

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394 N.Y.S.2d at 619 (citing Matter of Jones v. Berman, 37 N.Y.2d 42, 52-53, 371 N.Y.S.2d 422, 428-429, 332 N.E.2d 303, 307-309 (1975)) (class certification unnecessary in a suit against the Department of Social Services). *See also* note 29 and accompanying text *infra*. The issue of whether an unborn child has needs of its own was subsequently decided by the United States Supreme Court in Alcola v. Burns, 420 U.S. 575 (1975).

[24] It is financially advantageous for social welfare agencies to litigate anew with each plaintiff rather than to seek an authoritative decision on appeal, since most welfare decisions favorable to a recipient result in an increase in public assistance or other services. Although the agency must pay its own attorneys and provide a higher level of benefits to each successful plaintiff, it can continue to pay the lower level of benefits to the many thousands of persons affected by the illegal regulation but unable to obtain legal representation.

[25] FED. R. CIV. P. 23.

> The class action was an invention of equity . . . mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs . . . . By Rule 23 the Supreme Court has extended the use of the class action device to the entire

in obtaining statewide and even nationwide class certification. In recent years, however, judicial interpretations of Rule 23 and analogous state statutes have been increasingly restrictive.[26]

In public agency cases, federal courts frequently decline to convene a class pursuant to Rule 23, incorrectly presuming that responsible public officials will concede benefits won by one plaintiff to others similarly situated.[27] For example, the Court of Appeals for the Second Circuit held class certification unnecessary in appropriate circumstances, since "it would be unthinkable that the municipal defendants would insist that additional actions be brought."[28] The New York Court of Appeals has adopted a policy holding that class action certification in a suit challenging governmental operations is "unnecessary."[29]

More concerted use of collateral estoppel could eliminate these barriers to comprehensive implementation of favorable court decisions and thus alleviate some of the problems facing low income people who seek to assert rights against public agency defendants. Since it precludes relitigation of previously decided

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field of federal civil litigation by making it applicable to all civil actions. Montgomery Ward & Co. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948). "It provides a means by which, where a large group of persons are interested in a matter, one or more may sue or be sued as representatives of the class without needing to join every member of the class." C. WRIGHT, FEDERAL COURTS 345 (3d ed. 1976). Poverty attorneys hoped that this rule would not only hasten the incremental development of the common law but would allow groups of "similarly situated parties" of moderate means to pool their resources and accomplish as a group what each alone was too poor to attempt.

[26] *See* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1754 (1972); Comment, *The Federal Courts Take a New Look at Class Actions*, 27 BAYLOR L. REV. 751 (1975)). The suggestion has been made that collateral estoppel might serve as a substitute for class actions under a sufficiently liberal application of the doctrine. *See* Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF. L. REV. 433 (1960).

[27] For example, in Feld v. Berger, 424 F. Supp. 1356 (S.D.N.Y. 1976), residents in nursing homes sought to certify a class to attack a provision which would allow the department of social services to reduce the level of their aid prior to a hearing. The court refused class certification as "superfluous" since the defendants, "public officials, mindful of their responsibilities, will apply the determination here made to all persons similiarly situated." *Id.* at 1563.

[28] Vulcan Soc'y v. Civil Serv. Comm'n, 490 F.2d 387, 399 (2d Cir. 1973) (attempted certification of a class by minority fire fighters against the civil service commission claiming that the procedures used to select New York City firemen discriminated against blacks and Hispanics in violation of the equal protection clause of the Fourteenth Amendment); Galvan v. Levine, 490 F.2d 1255, 1261 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974) ("But insofar as the relief sought is prohibitory, an action seeking declaratory or injunctive relief against state officials on the ground of unconstitutionality of a statute or administrative practice is the archetype of one where class action designation is largely a formality, at least for the plaintiffs.").

[29] Baumes v. Lavine, 38 N.Y.2d 296, 305, 379 N.Y.S.2d 760, 767 (1975); Jones v. Berman, 37 N.Y.2d 42, 57, 332 N.E.2d 303, 311, 371 N.Y.S.2d 422, 432 (1975). Class actions in the New York courts are governed by N.Y. CIV. PRAC. LAW §§ 901-09 (McKinney 1976).

issues, collateral estoppel provides an effective and efficient means of enforcing a prior ruling in a subsequent case. Until recently, however, application of the doctrine was limited. It was doubtful whether a person who was not a party to a prior action could benefit from a favorable decision by invoking the doctrine. Today, however, there is general agreement that this can be done.[30] Furthermore, a recent case establishes the right of a plaintiff to assert collateral estoppel offensively.[31] Finally, the traditional reluctance to assert collateral estoppel with respect to questions of law, as opposed to questions of fact, is disappearing.[32]

This article will discuss these three common law developments which provide a sound theoretical basis for the assertion of collateral estoppel by a stranger to the judgment against a public agency with respect to many important questions of public law that affect low income people.[33] Expanded use of collateral estoppel will conserve judicial resources, insure finality and uniformity of judgments, and protect low income persons and their lawyers from harrassment by overly litigious public agency adversaries.[34] In the long run it could contribute appreciably to the quality of justice for the poor.

II. DEMISE OF MUTUALITY

Traditionally, the doctrine of mutuality of estoppel barred a nonparty to Case I from invoking Judgement I for purposes of collateral estoppel. The view adopted by the Restatement of

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[30] *See* section II *infra*.

[31] *See* section III *infra*.

[32] *See* section V *infra*.

[33] A problem can result in applying collateral estoppel where different jurisdictions with different collateral estoppel—mutuality rules render Judgment I and Judgment II. Welfare law issues involving the same defendant agency will normally arise as follows: (1) Case I (state court), Case II (same jurisdiction); (2) Case I (federal court), Case II (federal court); (3) Case I (state court), Case II (federal court). In the first situation the Case II court would, of course, apply the rule of collateral estoppel of that jurisdiction. See note 42 *infra*. In the second and third situations the Case II federal court would apply the federal rule of collateral estoppel even if that rule is different from the rule in the Case I state court jurisdiction. See Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation, 402 U.S. 313, 324 n.12 (1971). More complex choice of law questions could arise outside of welfare law, *e.g.*, Case I (NY state court), Case II (Michigan state court), or when jurisdiction in the federal court is based on diversity and not a federal question. *See* Cunningham, *Collateral Estoppel*, 41 Mo. L. REV. 521, 538 (1976); Vestal, *supra* note 12.

[34] For a critical discussion of the federal agency practice of relitigating matters already decided, see Vestal, *Relitigation by Federal Agencies: Conflict, Concurrence and Synthesis of Judicial Policies*, 55 N.C. L. REV. 123 (1977).

Judgments[35] and advocated by Professor Moore[36] is that "[u]nless both parties (or their privies) in a second action are bound by a judgment in a previous case, neither party (nor his privy) in the second action may use the prior judgement as determinative of an issue in the second action."[37] Recently, however, many courts have decided to abandon the requirement of mutuality rather than to waste scarce public and private resources relitigating already decided issues.[38]

The demise of this doctrine can be traced to the California Supreme Court's opinion in *Bernhard v. Bank of America National Trust & Savings Association.*[39] Instead of requiring mutuality, the *Bernhard* court asked only whether the party against whom collateral estoppel was sought in Case II was a party or privy to a party in Case I.[40] Following the lead of *Bernhard,* many federal courts have de-emphasized the need for mutuality of estoppel. In *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,*[41] the Supreme Court reversed its long standing adherence to the rule of mutuality. The defendant in *Blonder-Tongue* was charged with infringing a patent that had been declared invalid in prior litigation. The plaintiff was a party to the earlier case; the defendant was not. A unanimous Court held that the defendant should be permitted to assert collateral estoppel on the patent validity question and thereby deny plaintiff a second chance to litigate the issue. Similarly, many state courts have rejected the rule of mutuality.[42] In fact, the New York Court of Appeals

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[35] RESTATEMENT OF JUDGMENTS § 93 (1942).

[36] 1B MOORE'S FEDEAL PRACTICE ¶0.412[1], at 1808-12 (2d ed. 1974).

[37] Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 320-21 (1971).

[38] *See, e.g.,* Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 322-27 (1971); Zdanok v. Glidden Co., 327 F.2d 944, 954 (2d Cir. 1964); Cunningham, *supra* note 33; Note, *Collateral Estoppel: The Demise of Mutuality,* 52 CORNELL L.Q. 724, 725 (1967).

[39] In Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, Justice Traynor, for a unanimous court, said:

> There is no compelling reason . . . for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation.
>
> No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as res judicata against a party who was bound by it is difficult to comprehend.

19 Cal. 2d 807, 812, 122 P.2d 892, 894-95 (1942) (citations omitted).

[40] *Id.* at 813, 122 P.2d at 895.

[41] 402 U.S. 313 (1971).

[42] Approximately half the states have abandoned the rule of mutuality. Of this number, half have done so where collateral estoppel was asserted offensively. Alaska: Pennington v. Snow, 471 P.2d 370 (1970) (dicta); Colorado: Pomeroy v. Wiatkus, 183 Colo.

has called the doctrine a "dead letter."[43]

344, 517 P.2d 396 (1973) (dicta) (*see also* McGary v. Rocky Ford Nat'l Bank, 523 P.2d 479 (Colo. App. 1974)); Illinois: Garcy Corp. v. Home Ins. Co., 496 F.2d 479 (7th Cir. 1974) (applying Illinois law); Minnesota: Gammel v. Ernst & Ernst, 245 Minn. 249, 72 N.W.2d 364 (1955); Nebraska: Cover v. Platte Valley Pub. Power & Irr. Dist., 162 Neb. 146, 75 N.W.2d 661 (1956); New Jersey: Continental Can Co. v. Hudson Foam Latex Prod. Inc., 129 N.J. Super. 426, 324 A.2d 60 (1974); Desmond v. Kramer, 96 N.J. Super 96, 232 A.2d 470 (1967); New York: Schwartz v. Public Adm'r, 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969); B.R. DeWitt Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967); North Carolina: King v. Grindstaff, 284 N.C. 348, 200 S.E.2d 799 (1973); Ohio: McHone v. Montgomery Ward & Co., 406 F. Supp. 484 (S.D. Ohio 1975) (applying Ohio law) (*but see* Whitehead v. General Tel. Co., 20 Ohio St. 2d 108, 254 N.E.2d 10 (1969)); Rhode Island: Skrzat v. Ford Motor Co., 389 F. Supp. 753 (D.R.I. 1975) (applying Rhode Island law); Washington: Lange v. Heglund, 391 F. Supp. 128 (W.D. Wash. 1974) (applying Washington law); Henderson v. Bardahl Int'l Corp., 72 Wash. 2d 109, 431 P.2d 961 (1967) (dicta); Wisconsin: McCourt v. Algiers, 4 Wisc. 2d 607, 91 N.W.2d 194 (1956).

The following cases abandoned mutuality where the doctrine was asserted defensively: California: Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942); Delaware: Foltz v. Pullman, Inc., 319 A.2d 38 (Super. Ct. 1974); Coca Cola Co. v. Pepsi Cola Co., 36 Del. 124, 172 A. 260 (1934) (derivative liability); Georgia: Gilmer v. Porterfield, 233 Ga. 671, 212 S.E.2d 842 (1975) (dicta); Hawaii: Ellis v. Crockett, 451 P.2d 814 (1969); Iowa: Bertran v. Glens Falls Ins. Co., 232 N.W.2d 527 (1975) (*but see* Third Missionary Baptist Church v. Garrett, 158 N.W.2d 771 (1968)); Maryland: Pat Perusse Realty Co. v. Lingao, 249 Md. 33, 238 A.2d 100 (1968); Massachusetts: Home Owners Fed. Sav. & Loan v. Northwestern Fire & Marine Ins. Co., 354 Mass. 448, 238 N.E.2d 55 (1968); Albernaz v. City of Fall River, 346 Mass. 336, 191 N.E.2d 771 (1963); Missouri: Gerhardt v. Miller, 532 S.W.2d 852 (Ct. App. 1975); New Hampshire: Sanderson v. Balfour, 247 A.2d 185 (1968); Oklahoma: Anco Mfg. & Supply Co. v. Swank, 524 P.2d 7 (1974); Oregon: Bahler v. Fletcher, 474 P.2d 329 (1970); Pennsylvania: Posternack v. American Cas. Co., 421 Pa. 21, 218 A.2d 350 (1966).

Seventeen states have reaffirmed the traditional rule of mutuality in cases that presented appropriate opportunities to follow the *Bernhard* line of decisions. In these jurisdictions, proverty lawyers will have to await the demise of the rule of mutuality before asserting collateral estoppel against a public agency on behalf of a plaintiff who was not a party to Case I.

Alabama: Suggs v. Alabama Power Co., 271 Ala. 168, 123 So. 2d 4 (1960); Arizona: Spettigue v. Mahoney, 8 Ariz. App. 381, 445 P.2d 557 (1968) (*but see* DiOrio v. Scottsdale, 2 Ariz. App. 329, 408 P.2d 849 (1965)); Arkansas: Hogan v. Bright, 214 Ark. 691, 218 S.W.2d 80 (1949); Florida: Hill v. Colonial Enterprises Inc., 219 So. 2d 51 (Dist. Ct. App. 1969) (*but see* Akins v. Hudson Pulp & Paper Co. Inc., 330 So. 2d 757 (Dist. Ct. App. 1976)); Indiana: Tobin v. McClellan, 225 Ind. 335, 73 N.E.2d 679 (1947); Kansas: Adamson v. Hill, 202 Kan. 482, 449 P.2d 536 (1969) (*but see* Crutsinger v. Hess, 408 F. Supp. 548 (D. Kan. 1976)); Kentucky: Stillpass v. Kenton County Airport Bd. Inc., 403 S.W.2d 46 (1966); Louisiana: Barnett v. Develle, 289 So. 2d 129 (La. 1974); Michigan: Howell v. Vito's Trucking & Excavating Co., 386 Mich. 37, 191 N.W.2d 313 (1971); Mississippi: Pace v. Barnett, 205 So. 2d 647 (Miss. 1968) (dicta); New Mexico: Atencio v. Vigil, 86 N.M. 181, 521 P.2d 646 (1974); North Dakota: Armstrong v. Miller, 200 N.W.2d 282 (N.D. 1972); Puerto Rico: Gonzales v. Fireman's Fund Ins. Co., 385 F. Supp. 140 (D.P.R. 1974); Tennessee: Booth v. Kirk, 53 Tenn. App. 139, 381 S.W.2d 312 (1963) (*but see* Cantrell v. Burnett & Henderson Co., 187 Tenn. 552, 216 S.W.2d 307 (1948)); Texas: Swilley v. McCain, 374 S.W.2d 871 (Tex. 1964) (*but see* Seguros Tepeyac, S.A., Compania Mexicana de Seguros Generales v. Jernigan, 410 F.2d 718 (5th Cir. 1969)); Vermont: Gilman v. Gilman, 115 Vt. 49, 51 A.2d 46 (1947); Virginia: Rhines v. Bond, 159 Va. 279, 165 S.E. 515 (1932) (*but see* Graves v. Associated Trans. Inc., 344 F.2d 894 (4th Cir.

Absent the requirement of mutuality of parties, a stranger to the Case I judgment could assert collateral estoppel in Case II against one who was a party or privy to a party in Case I.[44] Under this formulation of the doctrine, the AFDC mother and the Medicaid recipient in hypotheticals A and B would be in a position to assert collateral estoppel against the social services department since that public agency was a party to the prior judgments.[45]

In breaking with mutuality, however, the courts have not abandoned the policy underlying the requirement. While they have allowed collateral estoppel to be invoked in cases that do not present identical parties and a rigidly reciprocal fact pattern, fairness of application has remained an important concern.

A safeguard against potential abuse was approved by the Supreme Court in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation.*[46] The Court held that where a plaintiff seeks to assert a claim that he has previously litigated and lost against another defendant, he may be estopped from doing so by the Case II defendant if it is determined that the plaintiff had a full and fair opportunity to litigate in the first case.[47] The "full and fair opportunity" standard has been generally followed by the courts.[48] The various factors which should enter into a deter-

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1965)).

[43] B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 278 N.Y.S.2d 596 (1967).

[44] Thus a "stranger to the judgment" is a party in Case II who was not a party in Case I and is not otherwise bound by Judgment I. There are four possible permutations involving a stranger to the Case I judgment: (1) A losing plaintiff from Case I sues a stranger defendant in Case II. The stranger asserts collateral estoppel defensively. (2) A losing plaintiff in Case I is a defendant in Case II and a stranger plaintiff asserts collateral estoppel offensively. (3) A losing defendant in Case I is a plaintiff in Case II and the stranger defendant in Case II asserts collateral estoppel defensively. (4) A losing defendant in Case I is also a defendant in Case II. The stranger plaintiff in Case II asserts collateral estoppel offensively.

[45] It should be noted that the social services department is not in a reciprocal position. It cannot assert collateral estoppel against our hypothetical plaintiffs because they were not parties to Case I. If a nonparty were bound by the Case I judgment, it would violate due process. Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971); Postal Telegraph-Cable Co. v. Newport, 247 U.S. 464, 476 (1918); Humphreys v. Tann, 487 F.2d 666, 671 (6th Cir. 1973); Maryland v. Capital Airlines, Inc., 267 F. Supp. 298, 304 (D. Md. 1967).

[46] 402 U.S. 313 (1971).

[47] *Id.* at 350.

[48] *See, e.g.*, Zdanok v. Glidden Co., 327 F.2d 944, 956 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964). In a second action by union members to enforce a provision of their collective bargaining agreement the court held that the employer was barred by collateral estoppel from introducing further evidence on the issue of its liability even as against employees who had not been parties in the prior action since he had a full and fair opportunity to litigate in the first case. *See also* Maryland v. Capital Airlines, Inc., 267 F. Supp. 298 (D. Md. 1967); Schwartz v. Pub. Adm'r, 24 N.Y.2d 65, 298 N.Y.S.2d 955 (1969).

mination whether a party had his day in court in Case I include such considerations as the size of the claim, the forum of the prior litigation, the use of initiative, the extent of the litigation, the competence and experience of counsel, the availability of new evidence, indications of a compromise verdict, differences in the applicable law, and foreseeability of future litigation.[49] While "the full and fair opportunity" inquiry should not prove a barrier for the plaintiffs in hypotheticals A and B, however, it should be noted that they are not in the same Case II procedural posture as those parties who were allowed to invoke collateral estoppel in *Blonder-Tongue.*

III. OFFENSIVE USE OF COLLATERAL ESTOPPEL

If the stranger to the judgment is a defendant in Case II, he or she will generally seek to use collateral estoppel defensively to prevent the plaintiff from asserting a claim that the plaintiff has previously litigated and lost against another defendant in Case I.[50] If the stranger is a plaintiff in Case II, he or she will seek to use collateral estoppel offensively to foreclose a defendant from litigating an issue the defendant previously litigated and lost against another plaintiff in Case I. Thus, both the defensive and offensive postures presuppose that the party against whom collateral estoppel is asserted has litigated and lost the issue in a previous case. Nonetheless, courts and commentators have traditionally allowed only the defenseive use.[51] Plaintiffs facing public

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There was some fear initially that *Bernhard* might be abused. Commentators suggested various rules of thumb governing the use of collateral estoppel without mutuality. *See* Note, *supra* note 38, at 726. Professor Currie suggested that collateral estoppel should not be invoked without mutuality against a party who was not a plaintiff in Case I. Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine,* 9 STAN. L. REV. 281, 308 (1957). Professor Currie feared that the lack of initiative in Case I worked a prejudice that should not bind the defendant in Case II. However, only eight years later, Currie repudiated his rule of thumb for the more general full and fair opportunity approach. *See* Currie, *Civil Procedure: The Tempest Brews,* 53 CAL. L. REV. 25 (1965). The full and fair opportunity test has elsewhere been called "the best solution to the problems created by the gradual erosion or summary abandonment of the mutuality rule." Note, *supra* note 38, at 729.

[49] Schwartz v. Pub. Adm'r, 24 N.Y.2d 65, 72, 298 N.Y.S.2d 955, 961 (1969).

[50] *See* note 44 *supra. See also* Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation, 402 U.S. 313, 324 n.11 (1971).

[51] An early case approving "offensive" use is B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 278 N.Y.S.2d 596 (1967).

DeWitt involved the offensive use of collateral estoppel in a negligence case. In Case I the operator of a cement truck successfully sued defendant for personal injuries. In Case II the owner of the cement truck sued the same defendant for property damage to the truck and attempted to invoke the Case I findings through collateral estoppel. The Court of Appeals permitted this procedure, stating that

agencies in court seek to use collateral estoppel offensively, as a sword instead of as a shield.

A major reservation regarding the offensive use of collateral estoppel is the possibility of anomolous results, particularly in a multiple party accident such as an airline crash.[52] Use of such an example in the hypothetical above illustrates the problem: in six suits for AFDC benefits for unborn children, suppose all the trial courts decide in favor of the department of social services, finding that the unborn children have no needs of their own. The Case VII plaintiff raises the same issue, but because she was not a party to Cases I through VI she cannot be bound by prior judgments. Assume she collects in Case VII when that court finds the unborn child to have separate needs. In a jurisdiction that no longer requires mutuality, collateral estoppel could then bar relitigation of the issue in subsequent suits. The plaintiff in Case VIII could rely on the Case VII judgment and ignore the earlier decisions. Thus, the defendant who won in Cases I through VI is unable ever to assert collateral estoppel. Yet, because collateral estoppel is available to each new plaintiff, the defendant is forced to live with Judgment VII thereafter.

Recently, in *Parklane Hosiery Co., Inc. v. Shore,*[53] the Supreme Court recognized this problem and voiced three other concerns regarding the offensive use of collateral estoppel, but nevertheless allowed it to be invoked.[54] One concern was that the

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> [w]hile it is true that most of the relevant cases in this area in New York have arisen under circumstances wherein the defendant sought to use the prior adjudication against the plaintiff, there seems to be no reason in policy or precedent to prevent the "offensive" use of a prior judgment.

Id. at 143, 278 N.Y.S.2d at 598.

However, despite the very broad language in *DeWitt,* the opinion can be read more narrowly. Assuming that there is no reason for requiring mutuality

> where the plaintiff in the present action, the owner of the vehicle, derives his right to recovery from the plaintiff in the first action, the operator of said vehicle, although they do not technically stand in the relationship of privity, there is no reason either in policy or precedent to hold that the judgment in [Case I] is not conclusive in the present action.

Id. at 148, 278 N.Y.S.2d at 602. *See* Note, *supra* note 38, at 736.

[52] *See* Currie, *supra* note 48, at 285-89; Note, *supra* note 38, at 724.

[53] 439 U.S. 322 (1979).

[54] In Case I the Securities and Exchange Commission (SEC) filed suit alleging that a proxy statement issued by Parklane was materially false and misleading. The trial court so held and the Second Circuit affirmed. SEC v. Parklane Hosiery Co., 422 F. Supp. 477 (S.D.N.Y. 1976), *aff'd,* 558 F.2d 1083 (2d Cir. 1977). The Case II stockholders of Parklane sued the same corporate defendants the SEC had sued in Case I. The false and misleading nature of the proxy statements was again at issue. The plaintiffs in Case II asserted collateral estoppel offensively. The Supreme Court found that the case was a proper one for asserting collateral estoppel offensively even though as a result the defendants would be denied a jury trial on an important questtion of fact. 439 U.S. at 337.

offensive use of collateral estoppel runs counter to the doctrine's purpose of promoting judicial economy. As the Court explained:

> Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a "wait and see" attitude, in the hope that the first action by another plaintiff will result in a favorable judgment. Thus offensive use of collateral estoppel will likely increase rather than decrease the total amount of litigation, since potential plaintiffs will have everything to gain and nothing to lose by not intervening in the first action.[55]

The Court further noted that the defendant in the first action, if sued for "small or nominal damages," might not have had an incentive to defend vigorously.[56] Finally, Case II might provide the defendant with new procedural advantages, such as a more convenient forum, which might have changed the result in Case I.[57]

In spite of these considerations, the Supreme Court concluded "that the preferable approach . . . is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied."[58] In exercising this discretion, the general rule to be followed is that "in cases where, . . . a plaintiff could easily have joined in the earlier action or where the application of offensive estoppel would be unfair to a defendant,"[59] the use of offensive collateral estoppel should not be allowed.

Parklane Hosiery erased any lingering doubts that courts and commentators may have had concerning the ultimate propriety of applying collateral estoppel in an offensive use context.[60] Today, before invoking collateral estoppel offensively or defensively, a court need be assured of only three things: identity of

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[55] *Id.* at 330.

[56] *Id.*

[57] *Id.*

[58] *Id.* at 331.

[59] *Id.*

[60] Thus, much of the equivocal dicta in earlier offensive use cases, such as Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir. 1964), is reduced in significance. In *Zdanok* the Second Circuit applied collateral estoppel offensively in an action by employees based on a collective bargaining agreement, but in the same decision it suggested new criteria for applying collateral estoppel that confuse rather than clarify.

an issue in Case II necessarily decided in Case I, a final judgment rendered in Case I, and a full and fair opportunity to litigate in Case I by the party against whom collateral estoppel is asserted in Case II.

IV. THE FAIRNESS QUESTION

The only real barrier to the offensive use of collateral estoppel against a public agency defendant by a stranger to the judgment is the requirement that the agency have a full and fair opportunity to litigate in Case I.[61] Where the defendant is the state department of social services, many of the factors suggested in *Blonder-Tongue* are irrelevant or within the control of the defendant.[62] The forum of Case I would generally be the state or federal trial court in the state or district where the department is located. It can be assumed that the department is an experienced litigant in all these courts and suffers no handicap in any Case I forum. Likewise, the use of the intiative in choosing venue, which conceivably is beneficial in a tort suit,[63] has minimal, if any, impact on the outcome of Case I where the questions mainly concern the construction of laws and regulations. Thus, a public agency should not be heard to complain about its position as a defendant in Case I or the subsequent action.

Other factors are in the control of public agencies, for example, the extent of the litigation in Case I, the decision to appeal Case I, and the competence of defendant's counsel in Case I. Future litigation is always foreseeable where the policies of public agencies such as the state department of social services affect large numbers of people. Challenges to a restriction in AFDC benefits, for example, can be expected to arise wherever the cutback is effective. This foreseeability provides an increased incentive for state departments to litigate fully in Case I. Thus, when a plaintiff seeks to invoke collateral estoppel in Case II, a heavy burden should rest with the department involved to prove that it did not have a full and fair opportunity to litigate in Case I. This is particularly so when the case involves a challenge to the validity of an agency regulation or practice or raises a question concerning the interpretation of a rule or statute as applied to a class or an individual asserting a particular status.

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[61] The full and fair opportunity standard has been litigated extensively. *See* 1B MOORE'S FEDERAL PRACTICE ¶0.412, at 100-01 (Supp. 1976).

[62] *See* note 49 and accompanying text *supra*.

[63] *See* Currie, *supra* note 48, at 304.

The size of the claim in Case I is sometimes thought to bear upon the appropriateness of applying collateral estoppel. The significance of this factor must be discounted when the litigation concerns public assistance benefits. By their nature, public assistance benefits are meager and it is unlikely that any single suit involving even several months of retroactive benefits could involve more than a few thousand dollars. As pointed out above, however, since there are vast numbers of welfare recipients, department policies affecting these recipients involve huge sums of money. For that reason, the size of the claim in Case I should be measured not by the dollar amount the recipient plaintiff in Case I seeks to gain but by the total cost to the department of a statewide implementation of an adverse decision in Case I.[64] This policy would encourage the department to litigate fully the first time.

V. COLLATERAL ESTOPPEL AS TO QUESTIONS OF LAW

Litigation against government agencies primarily involves questions of law. For example, whether unborn children have needs independent of their mothers[65] and whether medically needy Medicaid recipients must be treated equally with categorical Medicaid recipients[66] are essentially legal determinations.[67]

Few cases have considered whether the doctrine of collateral estoppel, even as traditionally formulated with the mutuality requirement, should apply to questions of law. This is probably because the benefits that accrue from the use of collateral estoppel are usually most dramatic when the issue being precluded is

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[64] At first glance, this rule would seem to make the size of the claim in Case I enormous in all cases, thus skewing the whole full and fair opportunity test in favor of the recipient. This is not necessarily so. A change in the law or the unavailability of certain benefits in the past could create a situation where few recipients would have been affected by Case I at the time it was decided, yet many would be affected at the time of Case II. In such a situation, the defendant could argue that the minimal impact of Case I did not provide the incentive or the opportunity to litigate fully at that time. In cases where vast numbers of people are potentially affected by the outcome in Case I, however, the defendant should be encouraged to litigate fully so that the benefits of the Case I decision accrue to those recipients as quickly as possible.

[65] *See* notes 19-23 and accompanying text *supra*.

[66] *See* notes 13-18 and accompanying text *supra*.

[67] Like most questions reviewed by courts, these are at bottom mixed fact/law questions. Nevertheless, the issues raised in hypotheticals A and B and in much public interest litigation are often thought to present legal rather than factual questions because the outcome does not rest so much on an analysis of the particular facts of the named plaintiff's case as it involves a judgment by the court about what should be the legal consequences in *any* case that presents the same pattern of social and economic facts.

a question of fact which requires a relatively large amount of time and money to resolve. In *Blonder-Tonque,* the Supreme Court noted that long delays before trial and crowded dockets influenced courts in part to expand the use of the doctrine and to abandon the mutuality rule. In addition, the Court was cognizant of the unnecessary expense to litigants of a de novo trial with respect to an issue previously resolved. The tax burden on the public to support the judicial system was also a factor.[68]

The resolution of questions such as those posed in hypotheticals A and B do not generally require a lengthy evidentiary hearing, but they obviously put demands on limited public and private resources. When applied to questions of law in the public agency context, collateral estoppel will therefore conserve limited funds since it will necessarily result in fewer trials and will further the jurisprudential values of finality and uniformity of judgments.

The Restatement of Judgments distinguishes between collateral estoppel as to questions of fact and questions of law.[69] If collateral estoppel as to a question of fact is asserted and the traditional elements of the doctrine are met, the Restatement would generally permit its application without more.[70] However, questions of law are not accorded collateral estoppel effect under the Restatement unless it can also be shown that the Case I and Case II claims arose out of the same subject matter or transaction and that injustice would not result.[71]

A different rule is emerging in the recent drafts to the Restatement of Judgments (Second) submitted to the membership of the American Law Institute by the Council. The separate sections pertaining to factual questions and legal questions have been merged. Section 68 as proposed provides that when an issue of fact or law is actually litigated and determined by a valid and final judgment and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.[72] According to this proposal, a party asserting collateral estoppel on a question of law would no longer have the burden of showing that Case II involves the same transaction as Case I.[73] Rather, if

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[68] 402 U.S. 313, 328-29 (1971).

[69] RESTATEMENT OF JUDGMENTS §§ 68, 70 (1942).

[70] *Id.* at § 68.

[71] *Id.* at § 70.

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

[73] This is equally true in a case involving a stranger to the judgment, notwithstanding the reference to mutuality of parties in § 68. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 88 (Tent. Draft No. 2, 1975).

preclusive effect is to be denied to a question of law the tentative draft requires that a party opposing application of collateral estoppel show that the two actions involve claims that are substantially unrelated or that the applicable law has changed.[74]

The shift in the burden of proof and the difference between the 1942 language ("same subject matter or transaction") and the 1977 language ("claims that are substantially unrelated") are significant. It is unlikely that the Case II plaintiffs in hypotheticals A and B could show that their case arises out of the same transaction as that of the Case I plaintiffs.[75] They could, however, with far less difficulty defend against a public agency assertion that the Case I and Case II claims are substantially unrelated.[76]

The Supreme Court applied collateral estoppel to preclude relitigation of a question of law where a Civil War veteran sued the United States for deficiencies in retirement pay.[77] Although expressing some limits on the use of collateral estoppel,[78] the Court applied that doctrine to the prior determinations of plaintiff's right to recover as a matter of law, holding that "[a] determination in respect of the status of an individual upon which his right to recover depends is as conclusive as a decision upon any other matter."[79]

A series of cases from the field of taxation present conflicting holdings on the application of collateral estoppel to questions of law.[80] In *Tait v. Western Maryland Railway Co.*,[81] the United

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

[75] The term "transaction" suggests the same fact-specific circumstance.

[76] The plaintiffs in hypotheticals A and B occupy the same status, assert claims pursuant to the same statutes and regulations, request benefits comparable in nature and amount, and present indistinguishable eligibility fact patterns against the same public agency.

[77] United States v. Moser, 266 U.S. 236 (1924). Plaintiff's right to recover the difference between the retirement pay of a captain and a rear admiral depended on whether or not his service at the Naval Academy during the Civil War was considered *service* during the Civil War. This issue had been litigated and decided in the veteran's favor in three previous actions for prior installments of the increased pay; the Court of Claims had held that his time at the Naval Academy qualified as *service* during the Civil War. When the government again opposed the plaintiff in Case IV, he sought to preclude relitigation of the question, arguing that res judicata applied.

[78] *See* 1B MOORE'S FEDERAL PRACTICE ¶0.448, at 4234 (2d ed. 1974).

[79] United States v. Moser, 266 U.S. 236, 242 (1924). The government argued that res judicata does not apply to questions of law. The Court replied that "in a sense, that is true. It does not apply to unmixed questions of law." *Id.* But the Court did apply collateral estoppel to a prior determination of the plaintiff's right to recover salary. That decision had been based essentially on statutory construction; there were no disputed questions of fact. Thus, the Court's distinction between an unmixed question of law and the right to recover benefits is rather vague.

[80] *See* Note, *Collateral Estoppel: Loosening the Mutuality Rule in Tax Litigation*, 73 MICH. L. REV. 604 (1975).

States Supreme Court affirmed a decision of the United States Court of Appeals for the Fourth Circuit that a finding of no income tax liability for a given year would estop the Internal Revenue Service (IRS) from bringing a later action touching the same taxpayer's liability in a subsequent year for the same event.[82] Rejecting the argument that collateral estoppel should not apply because different tax years give rise to separate tax liabilities and separate claims, the Court noted that "it does not follow that Congress in adopting this system meant to deprive the government and the taxpayer of relief from redundant litigation of the identical question of the statute's application to the taxpayer's status."[83]

In *Commissioner v. Sunnen*,[84] however, the Supreme Court distinguished *Tait* and declined to invoke collateral estoppel. Again, Suits I and II involved the same taxpayer. Unlike *Tait*, however, *Sunnen* did not involve one tax event with implications in subsequent years, but a series of related tax events over a period of time.[85] In its opinion in Case II the Supreme Court found that the fact that separable tax events were involved provided sufficient ground for denying the Eighth Circuit Court of Appeals judgment the collateral estoppel effect that arguably should have followed from *Tait*.[86]

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[81] 289 U.S. 620 (1933).

[82] In 1917 the Western Maryland Railway Company was consolidated with several subsidiaries. The new corporation recognized as its own obligation the outstanding first mortgage bonds issued by its two predecessors. In 1918 and 1919 the company took as a deduction from gross income an amortized proportion of the discount on the sales of bonds by the first and second companies. The Commissioner of Internal Revenue disallowed the deduction and the case was ultimately decided in the company's favor by the United States Court of Appeals for the Fourth Circuit. Western Maryland Ry. Co. v. Comm'r, 33 F.2d 695 (1929). Nevertheless, deductions taken on the same ground in subsequent years were again disallowed by the Commissioner who asserted that a judgment in a suit concerning income tax for a given year could not estop either party in a later action touching liability for taxes of another year. The court held for the company, concluding that although

> the scheme of the Revenue Acts is an imposition of tax for annual periods, . . . the exaction of one year distinct from that of any other, . . . it does not follow that Congress in adopting this system meant to deprive the government and the taxpayer of relief from redundant litigation of the identical question of the statute's application to the taxpayer's status.

289 U.S. at 624

[83] *Id.* at 624.

[84] 333 U.S. 591 (1948).

[85] In *Sunnen*, the taxpayer had assigned to his wife all right, title and interest in several patent licensing agreements. The IRS claimed unsuccessfully in Suit I that the taxpayer retained control over the assigned agreements. Each licensing agreement and each assignment was identical in form and indistinguishable for all purposes relevant to resolving the tax law question.

[86] *Id.* at 601.

More recently, in *Divine v. Commissioner*,[87] the United States Court of Appeals for the Second Circuit refused to apply collateral estoppel to preclude the IRS from relitigating a question of law already decided by another circuit.[88] In Case I, a stockholder petitioned the Tax Court disputing an alleged deficiency due to the corporation's reduction of its earnings to reflect a loss occasioned by a bargain sale of stock to corporate employees.[89] The Seventh Circuit Court of Appeals ultimately held for the taxpayer, ruling that the corporate reduction in earnings was permissible.[90] The IRS, however, continued to assert Divine's deficiency. In Case II, another stockholder argued that the IRS was collaterally estopped from relitigating the tax consequences of the corporate action.[91] The IRS countered that the doctrine of mutuality precluded the use of collateral estoppel. Acknowledging the many cases abandoning the doctrine of mutuality,[92] including its own decision in *Zdanok v. Glidden Company*[93] and *Blonder-Tongue*,[94] the Court of Appeals for the Second Circuit stated that there had been no "wholesale rejection" of the doctrine.[95] *Blonder-Tongue* was distinguished by confining it to its patent context.[96] *Zdanok* was distinguished more obscurely. In that case the court had observed that collateral estoppel should not be applied where legal issues "subject to varying appraisals"

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[87] 500 F.2d 1041 (2d Cir. 1974).

[88] It is sometimes inappropriate to apply collateral estoppel in Case II where the forum is not the same as in Case I. This is because there may be different procedural protections, different burdens of proof, or different jurisdictional monetary limits in the two forums. *See* note 33 *supra*. No impediment exists, however, where Case I and Case II are in United States Courts of Appeals. Circuit Court of Appeals decisions are accorded considerable weight and viewed as persuasive in other circuit courts. In the early part of this century, circuit courts occasionally applied the rule of controlling decision to the holdings of a sister court. Vestal, *supra* note 34, at 140.

[89] In 1961 and 1962, a corporation in which Divine owned stock made large cash distributions. Divine contended that these distributions were non-taxable returns of capital; the IRS asserted that they were taxable as dividends and it sent notices of deficiency to Divine and others. The underlying question was whether the corporation could reduce its earnings to account for the expenses allegedly incurred by the loss occasioned through a bargain sale of stock to corporate employees. 500 F.2d 1041, 1044 (2d Cir. 1974).

[90] Luckman v. Comm'r, 418 F.2d 381, 387 (7th Cir. 1969).

[91] Divine v. Comm'r, 500 F.2d 1041 (2d Cir. 1974).

[92] *Id.* at 1046.

[93] 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964).

[94] Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971).

[95] Divine v. Comm'r, 500 F.2d 1041, 1046 (2d Cir. 1974).

[96] The Second Circuit maintained that mutuality had been abandoned in *Blonder-Tongue* for reasons specific to patent litigation. Primarily, the court emphasized the disproportionate amount of judicial time and the prohibitive expense required by patent litigation. These factors assertedly compelled great reliance on the decision in Case I. *Id.* at 1048.

are presented. Negligence questions, appropriate for resolution by a jury, were distinguished from a contract construction issue.[97] The former was an example of an issue subject to varying appraisals, the latter one was not.[98] In response to Divine's assertion that the IRS had a full and fair opportunity to litigate in Case I and therefore should not have a second chance, the court said, "This approach fails to comprehend that these tests appear to have been intended only to apply to certain classes of issues which for policy reasons it has been decided should be generally litigable only once."[99]

Thus, the *Divine* court rejected the "full and fair opportunity" test articulated in *Blonder-Tongue* and *Zdanok* and indicated that it was inappropriate for policy reasons.[100] Instead, the *Divine* court adopted the other test suggested by *Zdanok*, concluding that tax questions are complex and subject to varying appraisals.[101]

In reaching its decision that collateral estoppel could not be asserted on a question of law against the IRS in an offensive context by a stranger to the first judgment, the court emphasized certain policy considerations present in tax cases. Because tax statutes are far reaching and potentially affect millions of citizens, it is particularly important that they be uniformly applied. This desired uniformity can be achieved only through ultimate Supreme Court resolution of these questions.[102] Since this is likely only after a disagreement among the circuits has appeared, fresh consideration of tax questions is desirable.[103] Moreover, because of the unusual complexity of the tax laws, judicial conflict is likely to occur.[104]

Unfortunately the Second Circuit Court of Appeals has shed little light on how one determines which issues should be litigated more than once. Its policy analysis is unconvincing because it fails to distinguish *Divine* from *Zdanok*, *Blonder-Tongue*, or the kinds of public law questions under consideration here. While it is true that federal tax questions are most satisfactorily resolved by the Supreme Court following a conflict among

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[97] Zdanok v. Glidden Co., 327 F.2d 944, 956 (2d Cir. 1964).
[98] *Id.*
[99] Divine v. Comm'r, 500 F.2d 1041, 1047 (2d Cir. 1974).
[100] *Id.*
[101] *Id.* at 1048-49.
[102] *Id.* at 1049.
[103] *Id.*
[104] *Id.*

the circuits, the same is true for other questions of federal law. Indeed, this is a common sense rule that should hold in any three-tiered judicial system. The *Divine* court makes note, for example, of the general public interest in correctly resolving tax questions.[105] The same is true of antitrust, environmental, and civil rights issues.

The "subject to varying appraisals" test advocated by the Court of Appeals for the Second Circuit is even less instructive.[106] It is a convenient rubric under which a court can consider the correctness of a prior decision, but it does not itself help in deciding whether to apply collateral estoppel. It gives a court the discretion to hear a question a second time either because it is not absolutely clear that the Case I judgment was correct or for other reasons. Discretion to apply or withhold collateral estoppel is an important aspect of the doctrine, particularly in offensive use, stranger to the judgment cases. When discretion is exercised, however, it should be described as such and reasons should be given to support it. Befuddling tests such as the one used to distinguish *Zdanok* from *Divine* should be avoided.

Although *Divine* could be read expansively to preclude application of collateral estoppel to many public law issues, it is more probable that the decision will be limited to the tax field. This is particularly so in light of the Supreme Court's recent *Parklane Hosiery* decision[107] and its emphasis on equitable factors that distinguish tax questions from welfare, civil rights, and environmental issues. In *Parklane Hosiery* the Court noted the problem of misuse of resources occasioned by needless relitigation of decided issues. In public interest and poverty law this concern takes on added importance because of the limited financial resources of the private party litigant. In addition, lawyers' fees and litigation expenses are frequently borne by publicly funded legal services offices and private foundations. The impact of *Divine* is further minimized by considering the practical effect on the plaintiffs of having many different courts consider a poverty law question so that it can be finally resolved by the Supreme Court.[108] A tax claim is unlikely to be a matter of urgency, especially where the collection of the tax is stayed pending the litiga-

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[105] *Id.*

[106] For a related criticism of this test, see Vestal, *supra* note 34, at 177.

[107] Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

[108] *See* Note, *supra* note 38, at 726.

tion.[109] On the other hand, the loss of a subsistence allowance or a cutoff in medical assistance can be expected to have drastic consequences for a recipient.

CONCLUSION

As local, state, and federal governmental entities assume greater responsibility for the development of policies and the administration of programs that affect the social and economic well-being of broad segments of the society, there is a concomitant increase in private party litigation against public agencies. Many public agencies, free of the market place disincentives associated with use of the courts to resolve disputes, have earned reputations as aggressive and highly litigious adversaries. The economic and social cost of this policy is high. Judges concerned with the increase in the percentage of public agency/public law cases on their dockets should consider applying collateral estoppel as frequently and firmly as would be done when a tortfeasor attempts to relitigate liability for an automobile accident a second, or third, or fourth time.[110]

The use of collateral estoppel would expedite resolution of poverty law disputes in two ways. First, since collateral estoppel can be invoked summarily, Case II would be a quicker proceeding. Second, if the defendant in Case I knew it would face collateral estoppel in Case II, it would be motivated to appeal an adverse ruling in Case I immediately. This would result in early clarification of the legality of administrative practices, thereby relieving subsequent recipients of the burden of obtaining legal counsel to sue to enforce a right to public assistance benefits. These considerations should move courts to apply collateral estoppel against a litigious department of social services in circumstances where similar application against the IRS might not be as wise or as beneficial. Those who litigate against the IRS, as a class, are better able to carry the financial burden of relitigating.

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[109] This would occur when the taxpayer elected to dispute a deficiency in the Tax Court. *See* 26 U.S.C. § 6213 (1976).

[110] Collateral estoppel should not be applied, however, against public agencies where: (1) Case I turned on particular facts missing from Case II, such as the credibility of a witness, or the sympathetic circumstances of a particular party; or (2) there is not clear Case I precedent to adopt because several courts have raised serious questions or have already reached inconsistent results on the identical question; or (3) there has been an intervening change in the applicable legal context.

The ultimate question in each case where offensive collateral estoppel is asserted will be whether the general aims of res judicata outweigh the perceived utility of a reevaluation of the merits of the case. The use of collateral estoppel against public agencies will further the general goals of res judicata at a minimal cost. It will foster reliance on final judgments, and will minimize repetitious litigation, thus helping to relieve the burdens on the judiciary. Moreover, it will relieve recipients of the economic burdens of relitigating questions already decided. Use of collateral estoppel will have additional beneficial impacts on the programs which public agencies implement and the persons affected by them. Agencies will be encouraged to respond more efficiently to court decisions and to seek early resolution of disputes. Recipients who cannot sue will be better protected. Finally, treatment of recipients will become more equal as the differential treatment between litigants and persons without counsel disappears.