RECONSIDERING *RES JUDICATA*: A COMPARATIVE PERSPECTIVE

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"*Res judicata* changes white to black and black to white, it makes the crooked straight and the straight crooked."[1]

INTRODUCTION

Final judgments create legal barriers to relitigation. These barriers are the rules of res judicata ("RJ"), which means "a matter that has been adjudicated."[2] The term res judicata refers to the various ways in which one judgment exercises a binding effect on another. The rules of RJ have undergone a significant change in scope.[3] In the old common law, its scope was quite narrow. A judgment entered in a case on one form of action did not prevent litigants from pursuing another form of action, although only one recovery was permitted for a single loss.[4] With changes in the rules of litigation as part of the evolution of modern procedure, the scope of the rules of RJ is wider. The basic proposition of RJ, however, has remained the same: a party should not be allowed to relitigate a matter that it has already litigated.[5] As the modern rules of procedure have expanded the scope of the initial opportunity to litigate, they have correspondingly limited subsequent opportunities to litigate a subsequent one.[6] As we shall see, this is the clear tendency in the modern law of RJ.

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1. Bourrer's Institute of American Law, *quoted in* BLACK'S LAW DICTIONARY 1471 (4th ed. 1945).

2. *See* FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE 673 (5th ed. 2001).

3. *See id.* at 674-75.

4. *See* O.L. McCaskill, *Actions and Causes of Action*, 34 YALE L.J. 614 (1925).

5. JAMES ET AL., *supra* note 2, at 674-75.

6. *Compare* Ernst Schopflocher, *What Is a Single Cause of Action for the Purpose of the Doctrine of Res Judicata?*, 31 OR. L. REV. 319 (1942), *with* RESTATEMENT (SECOND) OF JUDGMENTS

RJ is a classic common law doctrine that applies in the legal systems of both England[7] and the United States.[8] Some commentators are of the opinion that the doctrine is a necessary "product of the adversary system of litigation practised in English Courts,"[9] or, as stated by some U.S. legal scholars, "[o]ur legal system could not exist without [RJ]."[10] The doctrine of RJ is also a cornerstone of the Canadian legal system.[11]

Many legal scholars believe that "every legal system has produced a body of [RJ] law,"[12] and some scholars have made unequivocal statements to that effect. For instance, one legalist asserts that "[t]he doctrine of [RJ] is a principle of universal jurisprudence forming part of the legal systems of all civilized nations."[13] Another legalist writes "[it] may be assumed that the need for finality of judgment is recognized by many, if not by all, systems of law."[14] A third writes that "[i]t seems clear that the adjudicative process would fail to serve its social and economic functions if it did not have [the support of RJ]."[15]

In this Article I challenge these assumptions and show that some well known legal systems do not accept the main tenets of RJ. Furthermore, I demonstrate that these systems may reject RJ for good reasons: the rules of RJ raise many difficulties and have many drawbacks[16]—moral, conceptual, social, and economic—and create problematic incentives for litigating parties. Indeed, these difficulties and drawbacks do not necessarily lead to a

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§24 (1982). *See also* Allan D. Vestal, *Res Judicata/Claim Preclusion: Judgment for the Claimant*, 62 NW. U. L. REV. 357 (1967).

7. *See, e.g.*, GEORGE SPENCER BOWER & ALEXANDER K. TURNER, THE DOCTRINE OF RES JUDICATA (2d ed. 1969) [hereinafter BOWER]; NEIL ANDREWS, PRINCIPLES OF CIVIL PROCEDURE 501-12 (1994); ADRIAN ZUCKERMAN, ZUCKERMAN ON CIVIL PROCEDURE ch. 24 (2d ed. 2006).

8. *See generally* RESTATEMENT (SECOND) OF JUDGMENTS (1982); ALLEN D. VESTAL, RES JUDICATA/PRECLUSION (1969); WARREN FREEDMAN, RES JUDICATA AND COLLATERAL ESTOPPEL (1988); ROBERT C. CASAD, RES JUDICATA IN A NUTSHELL (1976); ROBERT C. CASAD & KEVIN M. CLERMONT, RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE (2001); DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS (2001); JAMES ET AL., *supra* note 2, at 671-712.

9. BOWER, *supra* note 7, at 13.

10. CASAD & CLERMONT, *supra* note 8, at 5 (answering the question whether societies would be better off without res judicata).

11. DONALD J. LANGE, THE DOCTRINE OF RES JUDICATA IN CANADA 4-10 (2d ed. 2004).

12. *See, e.g.*, CASAD & CLERMONT, *supra* note 8, at 5.

13. A.C. FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS § 627 (5th ed. 1925).

14. Eliahu Harnon, *Res Judicata and Identity of Actions: Law and Rationale*, 1 ISR. L. REV. 539, 539 (1966).

15. *See* JAMES ET AL., *supra* note 2, at 674.

16. For a discussion of these difficulties, see Edward W. Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339 (1948); CASAD & CLERMONT, *supra* note 8, at 33-34. The present Article introduces a larger number of policy considerations in its critique of the rules of res judicata.

full abandonment of the concept of RJ, for arguments support at least a minimal concept of RJ. Nevertheless, this Article presents arguments that should prompt us at least to reconsider the contemporary broad-scope common law model of RJ.

Martin Shapiro claims that a chief purpose of comparative law should be to provide data for testing general theories about law.[17] Indeed, examination of legal history reveals that the principle of finality did not always apply to cases, and parties could reopen a case in some legal systems. For example, in the procedural systems employed in Jewish rabbinical courts[18] a unique concept of non-finality of judgments prevails.[19] This existed both in ancient Talmudic and post-Talmudic law, and still exists in present-day rabbinical courts in the State of Israel.

Comparative law truly holds exciting potential to help us better understand law and legal systems, because it offers, as argued by John C. Reitz, at least two significant intellectual benefits that are not easily obtained outside the comparative method: "(1) the tendency to push analytic categories to higher levels of abstraction in order to bridge differences between legal systems, and (2) the tendency to force the researcher to expand the analysis to include the whole legal system and its relationship with the rest of human culture and its material and spiritual context in order to understand the differences and similarities observed."[20] The present Article seeks to accomplish these two benefits of comparative law. Furthermore, Reitz asserts that "the comparative method has the potential to lead to even more interesting analysis by inviting the comparatist to give reasons for the similarities and differences among legal systems and to analyze their significance for cultures under study."[21] Indeed, a good comparatist should consider not only global comparison of legal systems, but also similarities and differences in the respective political and historical traditions of which they are a part.[22] This Article reveals both legal and cultural differences between Jewish tradition and dominant Western societies.

Modern analyses of procedural rules among widely divergent legal systems have prompted many to question—and sometimes change—the

17. MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS, at vii (1980).

18. *See generally* Haim H. Cohn & Yuval Sinai, *Practice and Procedure*, *in* 16 ENCYCLOPAEDIA JUDAICA 434, 434-46 (2d ed. 2007).

19. For the Jewish law perspective, see generally Moshe Chigier, *The Doctrine of Res Judicata*, 8 JEWISH L. ANN. 127, 129-34 (1989).

20. John C. Reitz, *How to Do Comparative Law*, 46 AM. J. COMP. L. 617, 636 (1998).

21. *Id.* at 626.

22. *Id.* at 627.

rules in their own legal system, often importing these rules from other systems. A central axis of comparison runs between the adversarial system, practiced in common law countries such as England and the United States, and the inquisitorial system, practiced in the European continent. An additional axis of comparison extends between the adversarial-inquisitorial systems on the one hand and the procedural system of Jewish law on the other. The body of legal literature that compares these systems takes into account not only legal rules but also cultural differences between Judaism and dominant Western society. Some scholars believe that Jewish law provides a basis for the reform and development of Western law.[23] In the United States, some scholars use—and often reinterpret—Jewish law to provide a counter-model to dominant conceptions in contemporary U.S. legal theory.[24] The comparative research presented below can serve as a paradigm for dealing with the subject of procedure in light of the conflict between common law, European Continental law, and Jewish law. The present article analyzes the justifications, advantages, and disadvantages of three models of RJ: (a) the broad-scope common law model; (b) the narrow-scope German–Continental model; and (c) the non-finality of judgments model prevalent in Jewish Law. Nevertheless, the present Article does not show, for instance, why and how the Jewish system should be followed by common law RJ systems.

Part I presents an overview of the broad common law model of RJ and the main justifications for the rules of RJ. Analysis shows that the best reason for accepting the rules of RJ in Anglo-American law should be based on the "conflict solving" approach of the adversarial system rather than on many of the more traditional justifications, which are more rhetorical arguments than sensible rationales.

Part II contains an extensive analysis of conceptual arguments against the common law rules of RJ from three major perspectives: (a) the behavior modification model; (b) the valued features of the adversarial process; and (c) economic cost efficiency. I argue that the rules of RJ are not consistent with several important aspects of the behavior modification model, that the doctrine does not necessarily contribute to an economically efficient legal system, and that it contradicts many of the prized features of Anglo-American procedure, such as litigant autonomy, litigants' opportunities to plead their case, correctness, revisionism, and consistency.

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23. *See, e.g.*, PATRICK GLENN, THE LEGAL TRADITIONS OF THE WORLD 120-21 (2007).

24. *See* Suzanne L. Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813 (1993). For an example of a comparative research dealing with procedural law, see Yuval Sinai, *Affirmative Defenses in Civil Cases: Between Common Law and Jewish Law*, 34 N.C. J. INT'L L. & COM. REG. 111 (2008).

Part III reviews the narrow continental model of RJ applied in Germany. Although this model appears to be superior according to the three standards noted above to the broader common law rules of RJ, its cost efficiency raises some difficulties.

Part IV reviews the unique non-finality of judgments model practiced in Jewish Law, in which the judge can reconsider his initial decision and render a revised decision if needed, resulting in an efficient judicial process of error correction. I also examine the balanced approach of Jewish Law, from the perspectives of behavior modification and cost efficiency, with regard to the doctrine of cause of action/issue preclusion. The unique concept of the non-finality of judgment is a central feature of the Jewish legal system, a system of law in which all elements of justice are subordinated to the discovery of the truth, and which was not designed exclusively to promote conflict resolution, as arguably is the case with the common law.

Part V presents a comparative analysis of the three models and argues that the non-finality of judgments system practiced in the Jewish law model is preferable in many respects to the common law or the German models of RJ, although some good arguments support at least a minimal concept of RJ.

I. FIRST MODEL: BROAD-SCOPE RES JUDICATA

A. Overview of the Common law Rules of RJ

In common law systems the doctrine of RJ has two main forms: in England[25] and Canada,[26] the forms are called "issue estoppel" and "cause of action estoppel;" in U.S. terminology, the two forms are referred to as "issue preclusion" (traditionally known as "collateral estoppel") and "claim preclusion" respectively.[27] In *Arnold v. National Westminster Bank*,[28] the House of Lords explained these two forms, as they are applied in English common law, as follows:

> Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having

25. *See, e.g.*, ANDREWS, *supra* note 7, at 503.

26. *See* LANGE, *supra* note 11, at 1.

27. *See, e.g.*, VESTAL, *supra* note 8, at 13-15.

28. Arnold v. Nat'l Westminster Bank, [1991] 2 A.C. 93 (H.L.) [104-05] (appeal taken from Eng.).

> involved the same subject matter . . . . [The] bar is absolute in relation to all points decided unless fraud or collusion is alleged . . . .[29]

"Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue."[30]

There is an important requirement in English law: in both cause of action and issue estoppels,[31] the estoppel applies not only to points that have actually been decided but also to points "which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."[32] It is emphasized by Zuckerman: "[t]he bar to advancing an identical cause of action is absolute."[33]

Similar definitions and distinctions between issue and cause of action estoppel are accepted in the Canadian legal system.[34] The key principles governing cause of action estoppel in Canadian courts[35] are similar to the English ones: "the plaintiff must present the subject matter of the entire case relating to the cause of action at one time, once and for all; and any remedy following from the cause of action is based on that subject matter." The same principle applies to defendants.[36] All subject matter germane to the claim or defense that could have been presented in the first action by exercise of reasonable diligence, but was not, is estopped in a second action.[37]

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29. *Id.* at 104.

30. *Id.* at 105.

31. *See* ANDREWS, *supra* note 7, at 504.

32. Henderson v. Henderson, (1843) 3 Hare 100, 115; 67 E.R. 313, 320.

33. ZUCKERMAN, *supra* note 7, at 939. The author comments further:

> Neither the discovery of new evidence that could not have been known before, nor a change in the law since the first decision, can justify reopening an adjudicated cause of action. The only way of reviving the cause of action is by having the original judgment set aside on grounds of fraud.

Id. at 939-40.

34. *See, e.g.*, LANGE, *supra* note 11, at 4.

35. The key principles were quoted approvingly in Laufer v. Canadian Investment Protection Fund, [2004] O.J. No. 4016, para. 7 (S.C.J.). *See id.* at 125. For the key principles of issue estoppel, see *id.* at 25.

36. *Id.* In other words, the defendant must present both the entire defense related to the subject matter at one time, once and for all, and any related counterclaim that is not a separate and distinct cause of action. *See id.*

37. A separate and distinct cause of action, however, is not governed by the cause of action estoppel and need not to be brought in the same action, either as a claim by the plaintiff or as a

The U.S. legal system uses similar definitions and distinctions. In U.S. terminology, "claim preclusion" refers to the effects of a former judgment on a second action, when the second action proceeds on all or part of the claim that was the subject of the first action.[38] The judgment "bars" or annuls the entire cause of action or claim, including items that were not raised in the former action. The U.S. Supreme Court formulated the concept of claim preclusion as a final judgment on the merits that were or could have been raised in that action.[39] But what does the term "claim" mean for RJ purposes? The old view and the modern one differ.[40] The present trend in the United States is to regard a "claim" in factual terms and make it coterminous with the transaction, irrespective of what substantive theories or forms of relief may be available to the plaintiff; irrespective of what or how many primary rights may have been infringed upon; and irrespective of how different the evidence needed to support the theories or rights may be.[41] The transaction is the basis of the litigative unit or entity, and it cannot be divided. In other words, according to the modern, transactional view of RJ, the plaintiff should fully litigate all grievances arising from a transaction in a single lawsuit, just as the plaintiff would do under the modern rules of procedure.[42] As Casad commented, the rationale of this transactional view "is that this view increases efficiency, with an acceptable burden on fairness."[43]

The concept of claim preclusion is also referred to as "the rule against splitting a single cause of action."[44] The bar of a judgment for the defendant extinguishes the entire cause of action or claim, including items of the claim that were not in fact raised in the former action.[45] The plaintiff can no longer sue on the original cause of action or any item of it even if

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counterclaim by the defendant. Another key principle is that the cause of action estoppel applies to the same parties and their privies, in the second action and in a second proceeding that is not an action. *See generally id.*

38. *See* JAMES, *supra* note 2, at 675-76.

39. Allen v. McCurry, 449 U.S. 90, 94 (1980).

40. *See* CASAD & CLERMONT, *supra* note 8, at 62:

> [T]he old view, to which some jurisdictions still adhere, defines cause of action more narrowly in terms of a single theory or a single substantive right or remedy of the plaintiff. The modern view is that a claim includes all theories' bestowal of rights on the plaintiff to remedies against the defendant with respect to the *transaction* from which the action arose.

(emphasis in original).

41. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982).

42. CASAD & CLERMONT, *supra* note 8, at 62.

43. *Id.*

44. *See* JAMES ET AL., *supra* note 2, at 676.

45. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 17 cmt. b, 19 (1982).

that item was omitted from the original action.[46] A second effect of RJ, referred to in the United States as "issue preclusion," is that an issue adjudicated in a prior action cannot be relitigated if it arises in a later action based on a different claim or demand.[47]

The present Article deals mainly with claim preclusion and especially with the rule against splitting a claim/cause of action. As we have seen, in common law systems a plaintiff who obtains a judgment on a cause of action cannot initiate a second action on the same cause of action, although some exceptions to the general rule have been carved out in some common law systems in unusual circumstances.[48] For example, Rules 59 and 60 of the U.S. Federal Rules of Civil Procedure prescribe diverse circumstances in which an American federal court might reopen a case to correct a case.[49] Injunctions are generally open to reconsideration if erroneous.[50]

B. Rationale and Justifications

1. Public Policy and Individual Rights

The justification for the common law rules of RJ has been debated extensively by legal scholars.[51] In Anglo-American legal systems, this justification is usually based on two theories.[52] First, it is in the general public interest to end disputes that have already been litigated by establishing the finality of judicial decisions.[53] Lord Simon of Gaisdale expressed this idea:

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46. *See id.* § 17 cmt. a, 18.

47. *See* JAMES ET AL., *supra* note 2, at 676.

48. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 26 (1982); BOWER, *supra* note 7, at 149-151, 378-80 (for the doctrine of RJ in England); CASAD & CLERMONT, *supra* note 8, at 85-106 (for the doctrine of RJ in the U.S.); LANGE, *supra* note 11, at 231-84 (for the doctrine of RJ in Canada); VESTAL, *supra* note 8, at 103.

49. *See* FED. R. CIV. P. 59, 60. Similar rules abide in most, perhaps all, state courts. Also note the law-equity distinction and the willingness of American "chancellors" to correct mistakes in the ancient tradition of Chancery. For the rise of equity and the chancellor's decree in United States, see JAMES ET AL., *supra* note 2, at 16-22.

50. *See* FED. R. CIV. P. 60(b); JAMES ET AL., *supra* note 2, at 789-90.

51. *See, e.g.*, Allan D. Vestal, *Rationale of Preclusion*, 9 ST. LOUIS U. L.J. 29 (1964); *see generally* Harnon, *supra* note 14, at 542-50; BOWER, *supra* note 7, at 10-15; VESTAL, *supra* note 8, at 7-12; CLEARY, *supra* note 16; ANDREWS, *supra* note 7, at 511; Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 444-45 (1973); CASAD & CLERMONT, *supra* note 8, at 29-38; JAMES ET AL., *supra* note 2, at 671-74; LANGE, *supra* note 11, at 4-9.

52. *See, e.g.*, BOWER, *supra* note 7, at 10-11; VESTAL, *supra* note 8, at 8-9; Vestal *supra* note 51.

53. *See, e.g.*, Stiftung v. Rayner & Keeler Ltd. [1967] 1 A.C. (H.L.) 853 (U.K.).

> There is a fundamental principle of English law . . . generally expressed by a Latin maxim which can be translated: "It is in the interest of society that there should be some end to litigation . . . ." Important though the issues may be, how extensive so ever the evidence, whatever the eagerness for further fray, society says: "We have provided courts in which your rival contentions have been heard. We have provided a code of law by which they have been adjudged. Since judges and juries are fallible human beings, we have provided appellate courts which do their own fallible best to correct error. But in the end you must accept what has been decided. Enough is enough." And the law echoes: "*res judicata*, the matter is adjudged."[54]

The second justification for RJ is the individual's right of protection from repetitive litigation. This rationale of RJ was formulated more than four centuries ago by Lord Coke in the *Ferrer* case:

> [O]therwise great oppression might be done under colour and pretence of law; for if there should not be an end to suits, then a rich and malicious man would infinitely vex him who hath right by suits and actions; and in the end (because he cannot come to any end) compel him (to redeem to his charge and vexation) to leave and relinquish his right . . . .[55]

Canadian courts also traditionally base RJ upon these two policy considerations,[56] as evident in the judgment by the Supreme Court of Canada in *Clark v. Phinney*, which indicates that RJ must be applied because of the following public policy reasons: "[T]hat judgment must conclude the parties and negative the defence here as well upon the ground of public policy."[57]

2. Economic Efficiency of the Courts

Another common justification for the RJ rules is the need to end litigation in order to ensure the economic efficiency of the courts and the speedy termination of controversies. The doctrine of RJ is thus applied to avoid squandering the courts' resources and imposing additional costs on the litigants.[58] Litigating the same matter more than once defeats this purpose.[59]

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54. The Ampthill Peerage Case [1977] A.C. (H.L.) 547 at 575-76 (U.K.).

55. Ferrer v. Arden (1599) 77 Eng Rep. 263, 266; 6 Co. Rep. 7 a (Eng.).

56. *See* LANGE, *supra* note 11, at 4-6.

57. Clark v. Phinney [1896] S.C.R. 633, 642-44 (Can.).

58. *See* LANGE, *supra* note 11, at 7 (noting that these policy considerations have been expressed also by the Canadian courts).

59. *See* Vestal, *supra* note 6, at 31-32; VESTAL, *supra* note 8, at 10-12.

3. Consistency and Stability

RJ is also justified as a means to reduce controversies and disputes and to promote stability,[60] an important requirement of judgments of the court.[61] It is in the public interest to seek to prevent, or at least reduce, the possibility of inconsistent judgments.[62] Inconsistent judgments undermine the courts' prestige and the respect the courts inspire.[63] According to some Anglo-American jurists, RJ supports the prestige of the courts.[64] Moreover, courts tend to respect the decisions of other courts, a practice that fosters a general attitude that later decisions should be consistent with earlier ones. Canadian courts also agree that the doctrine of RJ avoids conflicting decisions and promotes both confidence in the courts and predictability.[65]

4. Summary

The English jurist Andrews sums up the dominant Anglo-American rationale and justification of RJ:

> The "principle of finality" is rooted in several inter-related policies. If a decision were not treated as final, many inconveniences would result: the dispute would continue to drag on; greater legal expense and delay would result; scarce "judge-time" would be spent re-hearing the matter; inconsistent decisions might follow; litigation would cease to be a credible means of settling disputes; finally, it would be a hardship on the victorious party if the first case were to be re-opened; the victor is entitled to assume that at the first action he was not merely attending a dress rehearsal for further performances.[66]

Some of these policies raise issues of private justice between the parties, upholding their expectations that the judgment will not be undermined by later proceedings and protecting each party from delaying tactics. But most of the arguments are expressions of public policy:

> [T]he promotion of economical litigation; the need to ration judicial and other court time and resources; avoidance of inconsistent decisions; prevention of additional delay in the disposal of litigation;

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60. JAMES ET AL., *supra* note 2, at 675; Harnon, *supra* note 14, at 544.

61. *See* JAMES ET AL., *supra* note 2, at 675 (noting that the importance lies not only in that the parties and others can rely on the judgments in ordering their practical affairs and be protected from repeated litigation, but also in upholding the moral force of court judgments).

62. *See, e.g.*, ANDREWS, *supra* note 7, at 511.

63. *See, e.g.*, State Hosp. v. Consol. Water Co., 267 Pa. 29, 38 (1920) ("The doctrine of res judicata . . . produces certainty as to individual rights and gives dignity and respect to judicial proceedings.").

64. *See* VESTAL, *supra* note 8, at 12; Harnon, *supra* note 14, at 544; Vestal, *supra* note 6, at 33.

65. *See* LANGE, *supra* note 11, at 7.

66. ANDREWS, *supra* note 7, at 511.

> preserving the authority of courts to reach decisions which will be presumptively binding. . . These considerations of public policy and private justice apply most clearly to the general rule set out above of cause of action and issue estoppels.[67]

C. RJ and the Adversarial System

I maintain that the traditional justifications presented above are not the major reason for accepting RJ in its broad scope. A legal system that favors a broad-scope RJ, such as the common law, reflects an approach that in principle emphasizes such values as public interest, consistency, stability, and efficiency over revealing the truth. However, in modern common law, RJ is often not applied in a way consistent with the major justifications provided by the common law jurists.[68] Furthermore, Anglo-American law accepts only a relative concept of RJ, rather than the absolute concept described above.

For example, to consider a plea of RJ, courts expect the parties to raise it explicitly,[69] because courts will not do so on their own initiative.[70] This approach reflects undue emphasis on the private interest of the parties in applying RJ, rather than on the public interest. It also shows that in Anglo-American law RJ is applied not according to the main justification of the public interest. If the main rationale for RJ were indeed the public interest, the litigants' wishes or convenience would be of no relevance to a determination of RJ. The decisive factor would be the mere fact that a former judgment on the same case already exists. After a judgment has been handed down and the court has settled the controversy between the parties, further resort to the court on the same matter would be a waste of courts' time.[71] But, in the Anglo-American view, the court can ignore former judgments if nobody complains of being vexed or harassed.[72]

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67. *Id.*

68. *See* Harnon, *supra* note 14, at 544-49.

69. *Id.* at 549.

70. *See, e.g.*, RESTATEMENT OF THE LAW (FIRST) OF JUDGMENTS § 1(a) (1942) ("Although the principle is based upon the interest of the public as well as that of the parties, yet if the prior judgment is not relied upon in pleadings or in evidence in the new action, the prior judgment will not preclude the new litigation of matters determined by the judgment. The court does not take judicial notice of the existence of the defense of res judicata.").

71. *See* Harnon, *supra* note 14, at 547.

72. Of course, the fact that the American legal system sometimes values procedure over substance does not necessarily stand for the proposition that the system does not value fair results. In addition, the fact that an issue will not be re-litigated absent a party's request is probably more a reflection of the adversary system than any reflection of the system's lack of concern for a just outcome; in the United States, judges cannot re-open cases sua sponte. Furthermore, some U.S. court decisions tend to deviate from the above principle and permit the court to initiate RJ. *See, e.g.*, Alyeska Pipeline Service Co. v.

Although the public interest rationale of RJ is justified by the general trend to promote stability, certainty, and consistency, in practice modern Anglo-American rules often do not promote these values. For example, the major trend in the development of the modern doctrine of RJ expands the theoretical applicability of the preclusion rules,[73] at the same time recognizing and generating ever more broad exceptions to this doctrine.[74] For example, English law provides that new evidence unavailable at the time of trial can constitute under certain circumstances an exception to the application of RJ.[75]

Some commentators question the desirability of many aspects of this trend.[76] It is clear that this trend does not contribute to certainty and consistency, because in many cases it is not clear whether the action under preclusion or it fits into one of the exeptions. Although, in many cases, all the factors of the action appear to support a general rule of preclusion, in any individual case, these same factors may call for non-preclusion, justifying a special exception to the rule. Another factor causing uncertainty and inconsistency is the variety of definitions offered by judges, scholars, and statute-writers to the phrase "cause of action": the broader the definition, the broader the scope of preclusion. Despite the attempts made to find an acceptable definition of "cause of action,"[77] no consensus has been reached.[78]

It appears, therefore, that RJ should be understood in the Anglo-American systems as a product of the competing private interests that are valued in the adversarial system, rather than as a principle rooted in the traditional proffered justifications, which appear to be more rhetorical than actual bases for RJ. The explanation of the well-known English jurist John Salmond illustrates this contention:

> A judgment is conclusive evidence as between the parties, and sometimes against all the world, of the matter adjudicated upon. The

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United States, 688 F.2d 767, 771 (Ct. Cl. Sept. 8, 1982); Walsh v. Int'l Longshoremen's Ass'n, 630 F. 2d 864, 867 (1st Cir. 1980); Boone v. Kurtz, 617 F.2d 435, 436 (5th Cir. 1980).

73. For the wider modern scope of finality, see JAMES ET AL., *supra* note 2, at 674-75.

74. *See* CASAD & CLERMONT, *supra* note 8, at 36. Exceptions to RJ are indicated in the sources cited *infra* note 131.

75. *See e.g.*, ANDREWS, *supra* note 7, at 505.

76. *See, e.g.*, CASAD & CLERMONT, *supra* note 8, at 36.

77. For a summary of the different definitions see JAMES ET AL., *supra* note 2, at 684-88. *See also* Cleary, *supra* note 16, at 341-42 (criticizing the extensive efforts to define cause of action).

78. *See* Harnon, *supra* note 14, at 550-59. Furthermore, in my opinion, it is not easy to justify RJ on the grounds of the public interests to prevent inconsistent judgments and to contribute the prestige of courts. Is the law always against inconsistent judgments? By granting a right of appeal the law in fact invites such possible inconsistencies.

> Court of Justice may make mistakes but no one will be heard to say so. For their function is to terminate disputes and their decisions must be accepted as final beyond question.[79]

RJ is justified by the view that the function of the courts is "to terminate disputes." This view is typical of the adversarial system, but it is doubtful whether it would be accepted by other legal traditions that hold different conceptual views about the role of the court. Bower and Turner maintained that the doctrine of RJ "is the product of the adversary system of litigation practised in English Courts. Its essence is that *as between opposed parties* an issue, once litigated, should be regarded as for ever decided."[80] They added that, "in a different system of jurisprudence where the court exercised an inquisitorial function, it might be thought unjust or inexpedient that it should be impeded in its search for truth by the principle *res judicata* . . . . But this is not the system under which English courts administer justice . . . ."[81]

In *The Faces of Justice and State Authority*, Mirjan Damaska stated that the doctrine of RJ can be justified only by the conflict-solving model of the Anglo-American adversarial legal system.[82] According to this approach, the conflict-solving style of proceedings used in common law systems is averse to changing decisions, even if they are based on legal or factual error, because substantively correct outcomes are relatively less important to adversarial legal systems operating in reactive governments.[83] The great desire for stability, typical to common law adversarial systems, produces a broad preclusion effect on future litigation.[84] In the conflict-solving, purely adversarial model, reconsideration of decisions "can occur only on the initiative of the parties, not as part of the court's official duty."[85] Damaska concludes his analysis of RJ as follows:

> To an outside observer, a system of justice may seem seriously flawed—perhaps even perverse—where fairness of procedure can justify a substantively erroneous decision and where faulty procedures can undermine substantively correct decisions:[86] the cart appears to be

79. JOHN SALMOND, JURISPRUDENCE 484 (Williams eds., 10th ed. 1947) (1920).

80. BOWER, *supra* note 7, at 13-14 (emphasis in original).

81. *Id.* at 14.

82. *See* MIRJAN R. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY 145-46 (1986).

83. *Id.*

84. *Id.*

85. *Id.* at 86.

86. This is related to another important feature of the res judicata rules under common law, as Damaska points out:

> put before the horse. But in a justice administration that values the integrity of the contest above the attainment of accurate outcomes on the merits, this result seems perfectly normal and acceptable.[87]

The role of an adversarial trial judge is generally compared with that of a referee in a game in which he plays no active part,[88] his function being restricted to ensuring that the parties comply with the rules of the game.[89] The adversarial system has been compared to a competition in which the party breaching the rules of the game incurs a technical loss, and the winner is determined by comparing the parties' competitive levels at the end of the game.[90] Many scholars are of the opinion that the major goal of the judge in the adversarial system is not to reveal the truth but to resolve disputes and to choose between the contentions of law and fact laid before him by the litigants.[91] In this type of legal system, the rules of RJ, favoring values other than truth finding, and the fact that the courts do not consider the rules of RJ on their own initiative, make more sense.[92]

II. CRITIQUE OF RJ: CONCEPTUAL DIFFICULTIES

A. General Methodological Goals

As illustrated above, some justifications exist for at least a minimal application of RJ. However, the rules of RJ also create many conceptual difficulties and have many drawbacks. These difficulties, nonetheless, do not necessarily invalidate the concept of RJ, but they should prompt us to reconsider the contemporary broad-scope common law model of RJ.

British jurists have voiced criticisms of the doctrine of RJ, but the principal questions they have raised concern individual aspects of the

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> While even substantively erroneous decisions can enjoy a high degree of immunity from subsequent change, this immunity does not extend to decisions obtained through unfair practice or fraud. Where the winner of the forensic contest has engaged in some sort of "foul play," subsequent discovery and revelation of his misconduct may revive the dispute laid to rest in the decision. Res judicata loses its bindingness when it does not emanate from a fair contest: *fraus omnia corrumpit* (fraud spoils everything).

Id. at 145.

87. *Id.*

88. *See* Jones v. Nat'l Coal Bd., [1957] 2 Q.B. 55 at 63 (Eng.).

89. *See id.*

90. Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 581 (1973).

91. *See* Geoffrey C. Hazard, Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017, 1019 (1998); STEPHAN LANDSMAN, READING ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 3 (1988); *cf.* Marvin Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1034 (1975) ("[O]ur adversary system rates truth too low among the values that institutions of justice are meant to serve.").

92. *Cf., e.g.*, JAMES ET AL., *supra* note 2, at 4-8.

doctrine and matters of detail, rather than the doctrine as a whole.[93] In an article published in 1948, Edward Cleary initiated a reexamination of RJ,[94] but the conceptual difficulties of the doctrine have yet to be thoroughly examined in general. The following critique of RJ has three major methodological goals: to (a) reexamine the rules of RJ in light of the behavior modification model; (b) establish whether the doctrine of RJ serves the ostensibly valued features of the adversarial systems; and (c) evaluate the economic efficiency of RJ.

1. Reexamining RJ in the Light of the Behavior Modification Model

In his essay, Kenneth Scott presents two models of the civil process: the conflict resolution model and the behavior modification model.[95] The conflict resolution model regards civil procedure "primarily as a method of achieving peaceful settlement of private disputes."[96] In the interests of preserving the peace, society offers through the courts a mechanism for impartial judgment of personal grievances as an alternative to retaliation or forcible self-help. By contrast, the behavior modification model "sees the courts and the civil process as a way of altering behavior by" exacting a price for undesirable behavior.[97] The emphasis, in this case, is not on "the resolution of the immediate dispute but [on] its effect on the future conduct of others."[98] Scott argues that these two models conflict only if the first is taken as exclusive, as defining the outer bounds of the proper use of the civil process. Presently, that seems too often to be the case. "The Conflict Resolution Model is in the ascendant, and its implications seem to be carrying the day, at least in the federal courts."[99] Scott "urge[s] a more careful consideration of the claims and implications of the behavior modification model."[100] RJ defines the outer bounds of the civil process, so we should conduct a careful consideration of the implications of the behavior modification model on RJ.

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93. *See* BOWER, *supra* note 7, at 12:

> It has been questioned, for instance, whether judgments by default ought always to have the same authority, binding the parties by estoppel *per rem judicatam*, as judgments in which the issues have been decided after contest; and, again, whether judgments in foreign courts should not be more carefully examined, before being held to be binding by estoppel, than domestic judgments.

94. *See supra* note 16 and accompanying text.

95. Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937, 937-40 (1975).

96. *Id.* at 937.

97. *Id.* at 938.

98. *Id.*

99. *Id.* at 950.

100. *Id.*

2. Does RJ Serve the Valued Features of Adversarial Systems?

RJ is considered to be the product of the conflict resolution model of the adversarial system of litigation practiced in English and U.S. courts. The premise of U.S. Federal Rules of Civil Procedure, as indicated in Rule 1, is that "they should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."[101] But in practice, the effects of RJ are not consistent with some of the main characteristics of the Anglo-American system. In the following sections I reexamine the doctrine of RJ in light of some of the twelve valued features of the procedural system, as identified by Judith Resnik,[102] such as litigant autonomy, litigants' persuasion opportunities, correctness, revisionism, consistency, and economy.[103] The reexamination reveals that RJ stands in tension with many of these features.

3. Economic Efficiency

A major feature of civil procedure is ensuring that the legal system produces results with the least possible expenditure of time, money, and energy.[104] Economic considerations legitimize the outcomes on the ground that the decisions are rendered with the interests of both the individual and society in mind.[105] Many consider RJ to contribute significantly to the economic efficiency of the courts. But others consider this justification to be insufficient, as Edward Cleary argued:

> Courts exist for the purpose of trying lawsuits. If the courts are too busy to decide cases fairly and on the merits, something is wrong. Decision solely in terms of the convenience of the court approaches the theory that the individual exists for the state. Maintenance of the judicial system is a very minor portion of the cost of government. If the judges are too few to be able to decide cases fairly and on the merits, the public probably can afford to have more judges.[106]

"Decisions about whether and how to economize often occur at points of tension between individuals' and the public's needs," and cutting costs can mean sacrificing other valued needs, as in the case of RJ.[107] Even if we reject Cleary's view, the doctrine of RJ remains problematic in many ways.

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101. FED. R. CIV. P. 1.

102. Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 840, 844-59 (1984).

103. Resnik identifies six other values that are not relevant to our discussion because they deal with the structure of the decisionmakers' system. *See generally id.*

104. *See, e.g.*, *id.* at 857-58; JAMES ET AL., *supra* note 2, at 381-83.

105. Resnik, *supra* note 102, at 857.

106. Cleary, *supra* note 16, at 348.

107. Resnik, *supra* note 102, at 857. For another example of the tension between individual and public needs, see *id*.

As illustrated below, RJ does not necessarily contribute to producing an economically efficient legal system.[108]

B. Litigants' Perspective

1. Litigant Autonomy

The first valued feature of the adversarial system that Resnik mentions is litigant autonomy.[109] In the Anglo-American adversarial system, litigation is generally prosecuted by the parties, not by the court, for each party knows best how to manage its own affairs and should therefore conduct its own litigation.[110] The value at stake is the preservation of individual freedom in democratic society, and litigants express this freedom by conducting their own legal affairs.[111] The judge expresses these values through self-restraint and not interfering in the proceedings.[112]

In the Anglo-American system, litigants can make their way alone, define the parameters of their disputes, and select the types of relief sought. In this approach, the parties are free to press or waive points as they see fit, and society's interest in guaranteeing the citizens' legal rights is adequately served by the parties enforcing their self-interest.[113]

Clearly, the concept of RJ contradicts the litigants' autonomy—especially when dealing with claim preclusion, which forces the plaintiff to present the entire case relating to the cause of action as well as every remedy sought at one time, once and for all. James, Hazard, and Leubsdorf note the conflict between the two fundamental goals of civil procedure:

> On the one hand, the procedural system aims to permit full development of the contentions and evidentiary possibilities of the various parties so that the case is decided on the merits. On the other hand, the system also aims to bring an adjudication to a final conclusion with reasonable promptness at a reasonable cost. By and

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108. I accept the more balanced view expressed by Casad & Clermont:

> A fuller explanation of the policies that detail res judicata would recognize that efficiency factors can counsel not only for but also against preclusion. Moreover, although some arguments that draw instead on fairness do favor preclusion, powerful fairness concerns cut the other way, counseling either to stop the rule of res judicata short of the particular case or to create an exception to the rule of res judicata for the particular case. Finally, res judicata does not exist in a procedural vacuum, but responds to specific substantive policies as well.

CASAD & CLERMONT, *supra* note 8, at 30-31.

109. Resnik, *supra* note 102, at 845-47.

110. *See* Mirjan Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 535 (1975).

111. *See id.*

112. *See id.*.

113. JAMES ET AL., *supra* note 2, at 4-5.

> large, modern procedure gives greater weight to the first of these objectives during the course of a proceeding.[114]

The rules permit the presentation of alternative positions and considerable freedom in developing both claim and defense during the trial. Similar liberality should be allowed after the judgment, as noted by James, Hazard, and Leubsdorf:

> There is, in principle, no reason why the rules of res judicata could not be limited to the narrow question whether the prior action actually decided the issues necessarily involved in awarding the judgment. This could be called a minimal concept of res judicata; without it, a judgment would not conclusively decide anything. It seems clear that the adjudicative process would fail to serve its social and economic functions if it did not have this minimal effect.[115]

2. Litigants' Persuasion Opportunities

The second valued feature, litigants' persuasion opportunities, reflects a belief that [a dispute should be resolved] only after the parties have had an opportunity to be heard" by the judge. [116] The persuasion opportunities of litigants are a valued feature mainly because of their relationship to outcomes, as explained by Resnik:

> [P]ersuasion opportunities provide an information basis for case disposition. If one assumes the possibility of "correctness," of results that accurately reflect fact and law, then the information obtained through persuasion enhances decisionmakers' abilities to base their conclusions on the "true" facts, to apply the law "correctly," and to provide the "right" remedy.[117]

Errors cannot always be corrected in the appellate court, and the rules of RJ limit the litigant's persuasion opportunities by blocking the litigants' opportunity to persuade the trial court to reverse an incorrect judgment. Claim preclusion presents the same problem, as it often shuts the door on a plaintiff who forgot to include a specific claim for remedy in his initial cause of action. In this case, the plaintiff is deprived of any persuasion opportunity.

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114. *Id.* at 673.

115. *Id.* at 674. Furthermore, the authors stress that appeal could be, but is not, an opportunity for the comprehensive reconsideration of the case. Motions for extraordinary relief from judgments could serve a similar function, but they do not because they their scope is much more limited. *See id*. at 740-95.

116. Resnik, *supra* note 102, at 847.

117. *Id.* at 848.

An important constitutional value is that civil courts ensure access to judicial decisionmaking.[118] Citizenship entails not only "access to the government decisionmakers but [also] the opportunity to participate in the shaping of government policy."[119] Owen Fiss argues that "courts exist to give meaning to our public values, not to resolve disputes."[120] Access and participation are not merely important, but, according to Leubsdorf, "they are constitutionally important," and therefore "one should protect the rights of citizens to enter the courthouse and argue before the judges."[121] But one of the main obstacles that interferes with the constitutional civil procedure is "the doctrine of res judicata, which could be interpreted as barring the relitigation in federal court of a constitutional claim that was raised or might have been raised in a state court."[122] Leubsdorf believes that "[a]lthough the Court has embraced the broad application of res judicata to Civil Rights Act suits, it is not obliged to continue doing so."[123]

The requirement of due process is arguably limited to ensuring that

> . . . the parties have had a full and fair opportunity to present their positions on the issues in dispute . . . [and] given the costliness of relitigation, the same parties should not be allowed to present the same matter for resolution to a court again. One full and fair day in court is enough. There must be an end to litigation, even if the first judgment was actually erroneous.[124]

But this "is a gross simplification," [125] as Casad and Clermont, two leading scholars of RJ, explain when discussing the drawbacks of the traditional justification of RJ:

> In the first place, this explanation conflates issue preclusion, which reaches only matters actually litigated and determined, with claim preclusion, which blocks "relitigation" of matters never even litigated. In the second place, this explanation fails to predict the considerable complexity of res judicata doctrine, constructed as it is of fine rules and peppered as it is with fuzzy exceptions. In the third place, this explanation has managed to pervert res judicata on recent occasions,

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118. *See, e.g.*, John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 591, 597-99 (1984).

119. *Id.* at 597.

120. Owen M. Fiss, *Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 29 (1979). *See also* Scott, *supra* note 95.

121. Leubsdorf, *supra* note 118, at 598.

122. *Id.* at 606.

123. *Id.*

124. CASAD & CLERMONT, *supra* note 8, at 30.

125. *Id.*

> because its simplistic emphasis on judicial economy can blind courts to other relevant policies that would argue against expanding res judicata"[126]

Thus, because RJ is a drastic measure, it should be applied only in clear cases when a matter has been specifically litigated and a litigant has had his actual day in court.[127] It ought not to be extended to matters that could or should have been raised and litigated in the first action.

3. The Effect of Claim Preclusion on the Conduct of Litigation

a. The Behavior Modification Model Perspective

The rule of claim preclusion and the rule against splitting a single claim are considered by many as a fundamental contribution to the efficiency of judicial proceedings, as emphasized by Robert C. Casad: "Modern procedure seeks to maximize the efficiency of judicial proceeding by encouraging the presentation of all claims that can conveniently be tried together in the framework of a single law suit."[128]

This traditional approach assumes that an efficient judicial system should seek to include all actions and remedies in a single "claim." Nevertheless, I argue that the rules of RJ, especially those of claim preclusion, are inconsistent with the behavior modification model because their impact on the conduct of litigation is in many cases negative and harmful.

The rule of claim preclusion is often referred to as prohibiting the splitting of a cause of action.[129] If plaintiffs fail to include any part of a demand or cause of action in the first action, they cannot bring another action to claim the omitted part after judgment has been pronounced, whether as an item of damage or a ground of recovery.[130] In most common law systems, a plaintiff who obtains a judgment on a claim cannot initiate a second action on the same claim, although some exceptions to the general rule have been carved out in unusual circumstances.[131]

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126. *Id.*

127. A similar approach was expressed by the English court in *Ord v. Ord* [1923] KB 432 at 439 (Eng.). But further on, the court stated the traditional, broader definition of RJ.

128. CASAD, *supra* note 8, at 26.

129. *See* JAMES ET AL., *supra* note 2, at 676.

130. *See, e.g.*, *id.* at 685.

131. *See, e.g.*, VESTAL, *supra* note 8, at 103; CASAD & CLERMONT, supra note 8, at 85-106; BOWER, *supra* note 7, at 149-51, 378-80; LANGE, *supra* note 11, at 231-84.

Insisting on the inclusion of all distinct claims in one action has some disadvantages,[132] for litigants may argue each point with greater intensity for fear of the future effects of RJ. The rule of claim preclusion forces plaintiffs to include all the claims and remedies that may be developed from one cause of action, significantly aggravating the dispute between the parties and forcing them to litigate their potential claims to the utmost.[133]

What are the effects of the rule against splitting a single claim on the plaintiff's incentives to sue? On the one hand, there is no doubt that without broad-scope claim preclusion the chance of endless litigation is greater, and therefore an argument can be made that, without claim preclusion, the plaintiff may have an incentive to sue the defendant again and again. On the other hand, splitting a cause of action may provide a strong incentive for a plaintiff to sue for all the potential claims and remedies that can be included in one cause of action. This is because the plaintiff knows that, if he or she fails to include any part of a demand or cause of action in the first action, the plaintiff cannot bring another action to claim the omitted part after judgment has been pronounced.

At the same time, under a more flexible system that allows a cause of action to be split, the plaintiff can pursue his or her claims in stages using legitimate strategic considerations and is therefore not forced to press all claims to the utmost, as would be the case under the common law system. At a particular stage in the dispute, the plaintiff may be interested only in one claim or remedy but, because of claim preclusion, he or she is forced to sue for all potential claims and remedies. If the plaintiff were permitted to sue initially for only a portion of the remedies, without the risk of estoppel looming over the other remedies, later he or she may forgo the other remedies or these may become irrelevant with time.

An Israeli Supreme Court judgment illustrates a typical case in which the strategic interest of the plaintiff is to not sue immediately for all the

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132. In another article I challenged the traditional assumption that the rule against splitting a single claim/cause of action increases efficiency by introducing some economic and behavioral effects of the rule. *See* Yuval Sinai, *The Downside of Preclusion: Some Behavioral and Economic Effects of Cause of Action Estoppel in Civil Actions*, 56 MCGILL L. J. (forthcoming 2011). The article discusses the problematic incentives of litigating parties under the current Anglo-American rule of claim preclusion, and its harmful effects on the conduct and cost of litigation, and on the chance of reaching a settlement. Some of the aspects mentioned in brief in II.B.3 of the present article are further developed in *The Downside of Preclusion*. *See also* JAMES ET AL., *supra* note 2, at 687 (noting disadvantages).

133. *See also* Geoffrey C. Hazard, *An Examination Before and Behind the 'Entire Controversy' Doctrine*, 28 RUTGERS L.J. 8, 7 (1966); Robert A. Erichson, *Of Horror Stories and Happy Endings: The Rise and the Fall of Preclusion-Based Compulsory Party Joinder Under the New Jersey Entire Controversy Doctrine*, 9 SETON HALL CONST. L. J. 757 (1999).

remedies but to retain the option to sue for other remedies at a later date.[134] The *Stefania Hotel* case involved a breach of contract that obliged a company to purchase land and build a structure on it. The plaintiff wanted to split his claims so that in the first stage he could claim only enforcement/imposition, and at a later stage he could sue for other remedies such as compensation for the damages incurred because of the breach of contract. Justice Haim Herman Cohn stated

> [i]n this case we are dealing with a large and expensive object. It is possible that if the plaintiff wins and obtains an order to enforce the contract he accomplishes all his business objectives and will no longer be interested in compensation for damages because his damages could be repaid by his profits. If he lost and the court decided that the contract is not binding, he may decide to avoid spending more money on a second lawsuit for damages caused by the breach of the contract. And if the court dismissed the first lawsuit for enforcement although the contract was binding, there is no reason why he cannot sue later for compensation for damages.[135]

In this case, the Israeli court legitimized the plaintiff's strategic considerations.[136] The plaintiff's strategic considerations are also relevant when there has been a long relationship between the litigants as, for example, between a supplier and a large customer. In this type of situation, the damaged party is not likely to want to sue its business partner for all the remedies that may flow from one cause of action because it wants to continue the relationship. Instead, the party may want to claim one remedy and reserve the option to sue later for the other remedies. Applying claim preclusion in such cases would force the litigants into a broad legal battlefront that would probably damage their future relations, which is against the interests of the litigants and of the public. Indeed, the public interest and that of the litigants is best served by allowing the plaintiff to split the cause of action in such cases. The court should allow the plaintiff to split the cause of action in such cases ex ante (when requested by the plaintiff at the beginning of the proceedings) or even ex post (when it was not requested before).

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134. In the non-religious Israeli law the common law broad-scope RJ concept usually applies. *See* HARNON, *supra* note 14.

135. CA 329/73 Stafania Hotel Ltd. v. Miller 28(1) PD 19, 20 [1980] (translated from Hebrew by the author). For a discussion of the effects of this theory on Israeli law, see Benjamin Rotenberg, *Splitting Remedies*, (Hebrew) 16 MISHPATIM 390, 397 (1987) (Isr.).

136. *See* ISR. R. CIV. P. 45 (1984) (stating that the legal basis of the decision is the court's authority to allow splitting the remedies flowing from one cause of action).

The theory of mediation illustrates how the process of determining which issues are included in a legal process—and in what order they are included—greatly affects outcomes.[137] Many mediators recommend discussing the less problematic issues in the beginning and leaving the more emotional and intensely disputed issues for a later stage, or perhaps not addressing them at all.[138] This settlement strategy helps establish a more congenial atmosphere in which the parties are more cooperative and have a greater chance of reaching a settlement. Therefore, the mediator steers the discussion toward those issues that are most likely to be relevant to finding a solution or a settlement.[139] By contrast, the rules of claim preclusion act as major obstacles to achieving a desirable behavior modification model of litigation and to reaching a settlement.[140] This does not mean, however, that the court should always allow claims to be split. As shown in Part IV.A.6 *infra*, in Jewish law the court should not permit the plaintiff to split his or her claims if the judge believes that the plaintiff is dishonest or that the plaintiff wants to harass the defendant one claim at a time in order to harm the defendant. This procedure makes sense because in such a case the plaintiff has no legitimate reason for splitting one cause of action, for the claim does not contribute to the behavior modification of litigation, which should be a major consideration in allowing a claim to be split. These considerations help explain the need for a more balanced model that would replace the contemporary broad-scope common law model of RJ. Limiting the scope of RJ would provide a balanced model between the interests of efficiency of judicial proceeding and the behavior modification of litigation.

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137. *See* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION 67 (1994). *See also* Susan Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y 1, 7 (1986).

138. For example, studies on divorce disputes show that mediators have a tendency not to discuss issues concerning intimate relations between spouses, such as trust and self-evaluation, although these issues have been raised by the parties. The mediators preferred to concentrate on factual issues, such as money, property, and child custody rather than dealing with the spouses' private relations. *See* BARUCH BUSH & FOLGER, *supra* note 137, at 67 (citing WILLIAM A. DONOHUE, COMMUNICATION, MARITAL DISPUTE AND DIVORCE MEDIATION 160-64 (1991)). For another approach, see Silbey & Merry, *supra* note 137, at 16-17.

139. *See* James A. Wall & Dale E. Rude, *Judicial Mediation: Techniques, Strategies and Situational Effects*, 41 J. OF SOC. ISSUES 44, 53 (1985).

140. On the other hand, it may be argued that without RJ the litigants might pursue endless litigation rather than a settlement. But this argument is not so convincing, because, as mentioned above, the judge should have the authority to prevent the plaintiff from splitting claims when doing so does not contribute to a behavior modification model of litigation. For analyses of the effects of the rule against splitting a cause of action on the chances of reaching a settlement see Sinai, *supra* note 132.

b. Economic Efficiency

Many scholars are increasingly using economic models to analyze litigation outcomes.[141] Indeed, the possibility that a given trial outcome has preclusive effects on future litigation significantly influences the outcome of negotiations[142] and is relevant to the question of settlement extortion.[143] Some scholars argue in favor of broad-scope preclusion:

> If two trials would produce a large overlap of issues or evidence, it is wasteful to society and harassing to the adversary to have more than one trial. This will often be the case even when the evidence and issues are not identical. Consider the wastefulness of trying in separate actions the alternative theories of breach of express contract to pay for goods or services and breach of an implied undertaking to pay the reasonable value of the same items.[144]

But, as illustrated above, insisting on including all factually distinct claims in one action has some disadvantages, some of which significantly affect cost efficiency for both the litigants and the courts. Preclusion is likely to force parties to litigate their potential claims to the utmost and thus increase the costs of litigation. But if the plaintiff were permitted to sue first for only a portion of the remedies without the risk of estoppel, suing for the other remedies might be unnecessary in the end. In the cases I described in the previous section, it is in the public's interest to allow the plaintiff to split the cause of action in order to maximize the efficient operation of the courts and to reduce costs for both the litigating parties and for the courts. Claim preclusion is also likely to cause parties to include possible claims that they may be unwilling to forgo but also hesitant to press,[145] which can also result in increased costs of litigation. Casad and Clermont clarified this issue as follows:

> The simplistic approach is to assume that res judicata, at least if effortlessly applied, always saves costs by foreclosing additional

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141. It has been noted that none of the models so far incorporate the effects of preclusion. Note, *Exposing the Extortion Gap: An Economic Analysis of the Rules of Collateral Estoppel*, 105 HARV. L. REV. 1940, 1942-43, n.17 (1992) [hereinafter *Exposing the Extortion Gap*]. *See also*, Steven Shavell, *Suit, Settlement and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982); Lucian Ayre Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404 (1984).

142. *See, e.g.*, *Exposing the Extortion Gap*, *supra* note 141, at 1953-55.

143. *See, e.g.*, Lucian Ayre Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. LEGAL STUD. 437 (1988).

144. JAMES ET AL., *supra* note 2, at 686-87. S*ee also* VESTAL, *supra* note 8, at 103. For efficiency factors favoring preclusion, see CASAD & CLERMONT, *supra* note 8, at 31-33.

145. JAMES ET AL., *supra* note 2, at 687.

> litigation. But a moment's thought reveals countervailing effects. A broad rule of claim preclusion will encourage a claimant to put everything before the first court, while a narrower rule might result in unasserted matters never having to be litigated at all. A broad rule of issue preclusion, which establishes an outcome for all purposes in all contexts for all times, may produce litigation to the death over that issue in the initial action. Obviously, every res judicata problem requires the weighting of net savings: adding up the savings of avoided later litigation, but subtracting the costs of fighting over res judicata's application and also the costs of intensified initial litigation.[146]

Furthermore, the traditional view that "it is wasteful to society and harassing to the adversary to have more than one trial,"[147] and similar justifications of RJ address this rule from an ex post point of view, without considering the effects of the rules on the parties' potential incentives before a dispute has even been filed. Some scholars argue that procedural rules are often examined from a narrow perspective, focusing on the effect of the rules ex post.[148] In an effort to strike a proper balance between justice and efficiency, courts tend to ignore the ex ante effects of procedural rules before their actual application. The ex ante examination of legal rules is a fundamental concept of the economic approach to the analysis of law, designed to give jurists an insight into the effects of legal rules on the behavior of the parties.[149]

Ex ante analysis of the rules of cause of action/issue preclusion reveals the effect of these rules on the trial costs of the parties.[150] It appears that the broader the scope of the claim preclusion, the higher the costs of a particular procedure. First, under broad-scope claim preclusion, it is necessary to claim all remedies in one cause of action to prevent their estoppel in the future. Second, it is necessary to expend much greater effort on each cause of action because the consequences of the decision have far-reaching effects on future action.

These observations lead to the conclusion that, under broad-scope claim preclusion, fewer claims are submitted to the court but the costs of

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146. CASAD & CLERMONT, *supra* note 8, at 34.

147. *See supra* text accompanying note 144.

148. Alon Klement & Roy Shapira, *Justice and Efficiency in Civil Procedure—A Novel Interpretive Approach*, 7 LAW & BUS. 75 (2007) (Isr.).

149. *See, e.g.*, STEVEN SHAVEL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 1 (2004):

> Under the economic approach to the analysis of law, two basic types of questions about legal rules are addressed. The first type is *descriptive*, concerning the effects of legal rule . . . . Given the characterization of individuals' behavior as rational, the influence of legal rules on behavior can be ascertained.

150. Klement & Shapira, *supra* note 148, at 102. For an analysis of the influences of issue preclusion, see *Exposing the Extortion Gap*, supra note 141.

every claim is much higher than that of an average claim under a narrow RJ policy, which can have an adverse effect on access to judicial decisionmaking.[151] Ex ante considerations of broad-scope claim preclusion can prevent plaintiffs from submitting their claims to court because of the need to claim all remedies in one cause of action, which could increase trial costs to a level that may prevent them from submitting their claims at all.

C. Correctness and Revisionism

1. The Importance of Preventing Erroneous Decisions

There is a tension between finality and revisionism.[152] Finality is an expression of the desire to achieve an end. The motivation for revising decisions, as suggested by Resnik, includes "the hopes of correcting error; of altering outcomes based upon changed circumstances; of imbuing some decisions with more meaning by having them made repeatedly and sometimes by prestigious actors; of giving individuals a sense of having been fully and fairly heard."[153]

Error correction is one reason for revision, although a series of justifications have been offered for preferring the views of a second decisionmaker to those of the trial judge.[154] Kenneth Scott discussed the separate implications of the two models discussed above for appeals and due process.[155] Scott analyzed the proposition that the right of appealing a court ruling is never constitutionally guaranteed or essential for the conflict resolution model:[156]

> In terms of a mechanism for settling disputes, one hearing is enough to do the job, and it is all that arbitration and grievance procedures customarily afford. No doubt the loser would like another chance, but that is endlessly true. Rather than the outcome, it is the existence of a form of impartial arbitrament that is essential.[157]

Nevertheless, when assessing the issue of appeals from the point of view of the behavior modification model, the effects of error are a concern

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151. The discussion, *supra* Part II.B.2, focused on the ex post effects of broad-scope claim preclusion on the constitutional right to access to judicial decisionmaking—the prohibition of initiating further claims on behalf of the first cause of action. The above analysis draws attention to a more harmful effect on the access to judicial decisionmaking.

152. Resnik, *supra* note 102, at 854-55.

153. *Id.* at 855.

154. *See, e.g.*, *id.* at 855-57; Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379 (1995); Scott, *supra* note 95, at 945-47.

155. Scott, *supra* note 95, at 945.

156. *Id.* at 946.

157. *Id.*

because this model proposes to affect behavior by imposing costs correctly.[158] The function of the appeal is primarily to reduce the incidence of legal errors.[159] According to Scott, the behavior modification model proposes "that a discretionary channel of review be open for cases where the costs of legal error are high. Such a position explicitly reorganizes the lawmaking function of appellate courts and would require as a matter of due process that they be given the discretion to grant review in order to prevent the erroneous imposition of substantial costs or penalties."[160]

Indeed, applying RJ rules that prevent a trial-level tribunal from reconsidering its decisions does not help prevent erroneous decisions and is therefore not desirable from the perspective of the behavior modification model. As Casad and Clermont noted, RJ is not an end in itself but merely plays a role in a larger system of justice.[161] Some major fairness factors weigh against the rules of RJ, among them "the fair-outcome value of deciding on the *merits* rather than on technicalities and of refusing to curtail society's search for *truth.*"[162]

2. Producing an Efficient Judicial Process of Error Correction

a. The Error Costs of Not Seeking Truth

From the perspective of cost efficiency, as well, some factors weigh against the rule of preclusion, including "the error costs of not seeking *truth* by reaching the merits and trying to correct any initial mistake,"[163] as explained by Casad and Clermont:

> Because legal rules have goals—be they the maximization of economic value or other substantive goals—and because realization of modern goals requires accurate application of the law to the facts, mistakes by the judicial branch distance society from those goals. Judicial mistakes thus impose social costs, and the procedural system should strive to reduce those costs. Procedure should frown on any impediment to correcting mistake.[164]

Some scholars have argued, however, that the presence of errors in a prior judgment is irrelevant to RJ.[165] A typical economic analysis of RJ is

158. *Id.*
159. *Id.* at 947.
160. *Id.*
161. CASAD & CLERMONT, *supra* note 8, at 33.
162. *Id.* (emphasis in original).
163. *Id.* at 34 (emphasis in original).
164. *Id.*
165. *Id.*

presented by Judge Richard Posner, who justifies the doctrine in modern economic terms.[166] According to Posner, there is less justification for RJ "than there would be for a direct limitation on the amount that parties might spend on a law suit. The first loss should discourage the plaintiff from expending additional resources in trying to vindicate his claim; legal prohibition seems largely superfluous."[167] But, in the end, Posner finds an economic justification for RJ because of the direct costs incurred by the legal system if the court is to address the same matter again. Posner argues that, because a second round of litigation is unlikely to be more accurate, re-adjudication will not avoid error costs; that is, the costs caused to social goal maximization by mistaken outcomes. Given the increased direct costs of relitigation on the one hand and neutral error costs on the other, proponents of economic efficiency in the law should generally favor RJ.

Nevertheless, I agree with Casad and Clermont that "although commentators frequently observe that the existence of error in the prior judgment is irrelevant to res judicata, this is not really true."[168] The authors argue further that "it is certainly not true that error is irrelevant to the formulation of res judicata. In shaping the rules and exceptions of res judicata law, the lawmakers must remain aware that the possibility of error is relevant to efficiency, as well as fairness."[169]

b. Providing Information about the Occurrence of Error

Arguing in favor of RJ, Posner asks why we assume that re-adjudication by the trial judge or by another tribunal will be more accurate than adjudication by the first tribunal. The relevance of this question extends beyond the rules of RJ, and a similar question is frequently asked about the appeals process: why do we assume that the decision of the appeals court is more correct than that of the trial judge?

The answer to the last question, in my opinion, should lead to a search for an appropriate explanation of the general need to re-adjudicate and should lead to a position that favors non-preclusion. A persuasive explanation of the appeals process of error correction was provided by Steven Shavell, who suggested that, if litigants possessed information that errors had been made, and if the appeals courts could frequently verify the information, litigants might file appeals only when errors were likely to

166. *See* Posner, *supra* note 51, at 444-45.

167. *Id.* at 445.

168. CASAD & CLERMONT, *supra* note 8, at 34.

169. *Id.*

have been made but not otherwise.[170] In Shavell's opinion, under these circumstances, the appeals process could achieve error correction at low cost because the legal system would be burdened with reconsidering only in the subset of cases in which errors were more likely to have been made. In other words, the appeals process might enable society to take advantage of information that litigants have about erroneous decisions and thereby reduce the incidence of mistakes at a low cost.[171]

What causes errors in the court, and why are they not corrected at the trial but rather in the appeals court? These questions are more poignant in the case of clear mistakes made by the trial court. One of the explanations, given by Shavell, is as follows:

> Although it is true that when courts do make fairly clear mistakes, these will often be pointed out by litigants at trial and corrected there, that will not always be the outcome. On the one hand, a litigant may not have a chance to assert an error at trial: the error may be made in the court's decision itself—when it is too late to make an objection. On the other hand, an error that is asserted at trial may not be corrected there despite the fact that it would be seen on reflection as a clear mistake; to appreciate that an error has occurred may require deliberation that the press of trial does not allow. After trial, however, the losing litigant has both the time and a strong incentive to review his objections to single out those with merit.[172] Observe as well that the post-trial opportunity of litigants to inspect the record provides us a reason why litigants may discover trial court errors even though their general legal expertise may be inferior to the courts.[173]

In my opinion, these observations support a non-preclusion approach because granting the parties the option to relitigate in the trial court can contribute significantly to the process of error correction. Relitigation in the trial court can allow litigants to take advantage of information that they gain about erroneous decisions, reducing the incidence of mistakes at an even lower cost than that of error correction by the appellate court. Unlike the appellate judge, who learns the factual and legal grounds of the case on appeal, the trial judge is familiar with the details of the case, and the only

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170. Shavell, *supra* note 154, at 381. Shavell also notes that this outcome may be fostered by charging a fee for bringing an appeal to discourage appeals when decisions are likely to have been correct.

171. *Id.* at 382.

172. "Note that during the trial, before knowing the outcome, the litigant's incentive to discover errors is lower." *Id.* at 414, n.57.

173. *Id.* at 414. According to another explanation, "one presumes that trial courts will occasionally make even fairly clear mistakes owing to a variety of factors: the inexperience of some judges, the pressure of time, and the fact that the courts are responsible for applying a vast body of law." *Id.*

new information introduced would be new evidence or the litigant's argument that the judge's decision was incorrect. After trial, the defeated litigant has both the time and the incentive to review his objections to the trial court decision. At this stage it could be efficient to introduce these objections to the trial judge (often this is the first time the judge is notified that he or she may have made a mistake) and give him or her the opportunity to reconsider his initial decision. If the trial judge were persuaded by the objections he or she could reverse the original decision and issue a new and hopefully more correct one.

The probability that a second, revised decision by the trial judge would be more correct than the first one is often higher than the probability that the decision given by the appellate court is more correct than the initial decision. Judges—and people in general—do not easily admit that they have made an incorrect decision. Therefore, if the trial judge reaches the conclusion that he or she should reverse a decision, there is a good chance that his or her revised decision is more accurate than the first one.[174] This assumption does not apply to appellate judges, who were not involved in the initial process, and therefore the probability that their decision will be more correct than the initial one is lower than the probability of the trial judge rendering a more correct decision.

c. Judicial Incentive to Avoid Reversal

Another consideration that supports giving the trial judge the option of reconsidering his decision has to do with the judges' incentives to avoid reversal of their decisions. One of the justifications for the appellate process is its effect on errors made at trial because of trial judges' fear of reversal.[175] Judges fear reversal because it may affect their reputation, their salaries, or the likelihood of promotion.[176] Therefore, the appeals process can lead indirectly to increased trial court accuracy by encouraging judges to expend greater effort at trial. In this case, error prevention occurs without a formal appeal, during the initial trial, when litigants raise

174. At the same time, it is possible to argue that the trial judge is not likely to admit that he made a mistake, unlike the appellate judge who often finds the mistakes of the trial court. But this argument is not always true because the trial judge has a strong incentive to avoid reversal, which encourages him to render accurate decisions that will not be reversed on appeal.

175. SHAVELL, *supra* note 154, at 390-91.

176. Many articles address the incentives of judges. *See, e.g.*, Richard S. Higgins & Paul H. Rubin, *Judicial Discretion*, 9 J. LEGAL STUD. 129 (1980); Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUB. CHOICE 107 (1983); Mark A. Cohen, *The Motives of Judges: Empirical Evidence from Antitrust Sentencing*, 12 INT'L REV. L. & ECON. 13 (1992); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993).

objections to what they see as mistakes, in what Shavell calls "a system of appeal in the small."[177]

A non-preclusion legal system that permits the trial judge to reconsider his or her decision after the trial and to revise it if he or she finds the first decision to be incorrect can enhance significantly the likelihood that the trial judge will render accurate decisions. It is likely that the trial judge would use the opportunity to correct his or her mistakes after the trial to prevent an undesirable reversal—from his or her point of view—by the appellate court. And, if the error is not corrected by the trial judge, the error may still be corrected by the appellate court.

d. The Distinction between Law and Facts

The U.S. legal system, like other common law legal systems,[178] distinguishes between law and facts in separating issues that can be appealed from those that cannot.[179] In general, an appeal can be lodged on the grounds of error of law or error in applying the law to the facts. But ordinarily, an appeal cannot be lodged on the grounds that the discovered facts are incorrect, with some notable exceptions.

According to Shavell's rationale for the distinction between law and facts, when an error concerns rules and their application,

> it is possible in the ideal both for a litigant to recognize the error and for an appeals court to verify its occurrence . . . . By contrast to a claim that a rule was violated or misapplied, a claim that the found facts are themselves incorrect would often be difficult for an appeals court to corroborate, even though a litigant might know that the found facts were in error . . . . How could an appeals court confirm a claim by the defendant that the testimony is false? . . . For an appeals court to assess the validity of the witness's testimony, the appeals court would often have to engage in costly reexamination of the trial court record and perhaps hear live testimony. . . .[180]

But if cases are relitigated in the trial courts (as in Jewish law), factual issues can be reconsidered economically in the trial court because this court has already examined the main factual aspects of the case and, unlike the appellate court, the trial court does not need to learn all the details of the case to reconsider its initial decision.

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177. SHAVELL, *supra* note 154, at 426.

178. For restrictions on the scope of appeal in the English legal system, see, for example, ANDREWS, *supra* note 7, at 492-98.

179. The scope of the appellate review is discussed by JAMES, *supra* note 2, at 766-75.

180. Shavell, *supra* note 154, at 418-19.

III. SECOND MODEL: NARROW-SCOPE RES JUDICATA

The German–Continental civil-law system[181] demonstrates an interesting and narrower version of RJ. In this part, I argue that, although the German model appears to be superior to the broader common law rules of RJ, its cost efficiency is questionable.

A. Overview of the German–Continental Rules of RJ

The German model of RJ[182] is in many regards similar to the doctrine of RJ in Anglo-American jurisprudence, but "the scope and effect of the doctrine are somewhat different."[183] In the German civil system, only a judgment that is not "subject to further appeal (*formelle Rechtskraft*) stands as the conclusive adjudication" and is subject to RJ.[184] The rationale for this system is simple. Wherever there is a multilevel apparatus of justice, as in the continental system in general[185] and the German civil justice system in particular,[186] original decisions can be treated as tentative and decision stability is needed only after the highest authority has spoken.[187]According to one interpretation of the German doctrine, the goal of RJ is to "guarantee certainty in litigation and to preclude repeated relitigation of matters already litigated and decided."[188]

In addition, "German civil procedure does not recognize the concept of claim preclusion in the broad sense as is the case in common law countries."[189] The basic rule is that a judgment binds the parties with respect to the subject matter of claims actually asserted and decided, but parties are not bound in actual or potential claims not submitted for adjudication.[190] The concept of claim preclusion in the broader Anglo-American version does not apply in German civil procedure, for the

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181. I prefer to focus on Germany rather than other civil law systems because many jurists value this legal system and consider it a fine representative of the European–Continental system of civil procedure, valued more highly than the U.S. common law civil procedure. *See e.g.*, John H. Langbein, *The German Advantage In Civil Procedure*, 52 U. CHI. L. REV. 823 (1985). *See also* Benjamin Kaplan, Arthur T. von Mehren, & Rudolf Schaefer, *Phases of German Civil Procedure II*, 71 HARV. L. REV. 1443, 1443-72 (1958).

182. For the German rules of RJ, see PETER L. MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE 355-66 (2004).

183. *Id.* at 355 n.245.

184. *Id.* at 355-56.

185. *See* DAMASKA, *supra* note 82, at 28-39.

186. For the German appellate justice, see MURRAY & STÜRNER, *supra* note 182, at 367-418.

187. DAMASKA, *supra* note 82, at 145.

188. MURRAY & STÜRNER, *supra* note 182, at 355.

189. *Id.* at 357.

190. *Id.*

binding effect extends only to claims that could have been raised or might have arisen from the same occurrence.[191] Whenever the issue of RJ is raised, the court examines and compares formal claims for relief and factual elements of the current claim with those of the decided case, and the new case will not be dismissed if the court finds a difference in the operative facts.[192]

In Part II, I argued for the desirability of narrow-scope RJ. In this sense, the German model of RJ is superior to the common law model, but it poses some difficulties from the perspective of cost-efficiency, as discussed below.

The narrow concept of RJ in the German system can be explained in light of one of the main features of the Continental legal process: the implementation of government policy. According to Damaska, in a legal process designed to implement government policy, such as in Continental or socialist/communist jurisdictions,[193] the need to apply a doctrine of RJ is not great[194] because the stability of judgments is a matter of low priority and because all judgments are rendered provisionally. In these jurisdictions, "it is difficult to justify any obstacle to reversal and reconsideration" of errors in judgment, both factual and legal.[195] Nevertheless, Damaska stressed that "even the most energetic activist governments discover at some point that some stability and repose is needed . . . . Limited concessions to stability are made, and in their wake, some degree of decisional rigidity—a form of res judicata—emerges."[196]

Another aspect of the Continental concept of RJ concerns the initiator of an RJ claim. We have seen that, in the common law approach, the court does not acknowledge the doctrine of RJ on its own initiative.[197] By contrast, the idea that RJ primarily concerns the public interest has prompted many Continental countries to adopt an absolute principle of RJ, requiring the court to take into account a former judgment on its own initiative. In several European countries, explicit statutory provisions can be found to this effect.[198]

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191. *Id.*

192. *Id.* at 358.

193. In Soviet legal systems the revision of judgments was not limited for a long period. DAMASKA, *supra* note 82, at 179.

194. *Id.* at 178-79.

195. *Id.* at 178.

196. *Id.* at 179.

197. *See supra* text accompanying notes 69-72.

198. Robert Wyness Millar, *The Premises of Judgment as Res Judicata in Continental and Anglo-American Law*, 39 MICH. L. REV. 1, 8 (1940); *see also* MAURO CAPPELLETI & JOSEPH M. PERILLO, CIVIL PROCEDURE IN ITALY 254-55 (1965).

B. Inefficient Judicial Process of Error Correction

Despite the desirable narrow scope of its RJ rules, the German process of error correction is not efficient. German civil justice "has traditionally offered numerous appellate remedies . . . to parties aggrieved by judicial findings . . . at almost any stage of the proceedings." In almost every case appellants have at least two potential levels of resort beyond the first-instance local court or state district court proceeding.[199]

A party dissatisfied with the decision of a court of first instance is generally entitled to trial de novo in the court of second instance. Only the third court to consider a civil case would defer to the prior decision.[200] The "hierarchical" process reflects characteristics rooted in the Continental tradition,[201] as explained by Damaska: "Once a lower official has spoken, the procedural episode conducted before him comes to an end (*functum officio*): corrections of his decision, if needed, can now be made only by higher-ups in the organization. Requests to reconsider addressed to the initial adjudicator are therefore misplaced."[202] Even if new evidence is discovered while an appeal is pending, the evidence must be submitted to the reviewing authority rather than to the original adjudicator.[203]

These features of the Continental and German appellate processes produce inefficient error correction. Indeed, some reform proposals in Germany are "designed to reduce the appellate process and its consequent costs and delays."[204] But the reforms in appellate procedure enacted in July 2001 were relatively modest and did not seriously abbreviate or curtail appellate options in most civil cases.[205]

By contrast, a jurisdiction that allows the trial judge to reconsider and revise his or her decision if needed contributes significantly to an efficient judicial process of error correction. But German civil procedure, similar to that in other Continental legal systems, does not provide for a meaningful process of relitigation by the trial court. Only in rare cases does German civil procedure provide for special proceedings where a court may reopen its own civil judgment after all the appellate measures have been exhausted.[206] The grounds for reopening are described by Murray and

199. MURRAY & STÜRNER, *supra* note 182, at 367.

200. For the German appellate system, see generally *id.* at 367-417.

201. The coordinate style also reflects "features of the legal process in the English tradition," as explained by DAMASKA, *supra* note 82, at 47.

202. *Id.* at 49.

203. *Id.*

204. MURRAY & STÜRNER, *supra* note 182, at 369.

205. *Id.*

206. *See generally id.* at 362-65.

Stürner as a "particularly serious lack of correct procedure" or an "obvious disintegration of the correctness of the judgments."[207] These grounds are too narrow. From the perspective of cost efficiency, granting the parties broader options of relitigation in the trial court would be more appropriate and would contribute significantly to the process of error correction.

IV. THIRD MODEL: NON-FINALITY OF JUDGMENTS

A. Overview of the Jewish Law Model

1. Rejection of the Doctrine of RJ

Jewish law[208] rejects many—but not all—of the elements of RJ and adopts an entirely different approach.[209] By its nature, in which discovery of the truth is an element of justice to which all else is subordinated, Jewish law cannot accept an approach whereby a judgment is irreversible even when incorrect.[210] Jewish law uses a unique concept of non-finality of judgments.[211] In principle, a litigant can usually reverse a judicial decision after the judgment has been handed down. Judgments can be reopened for reconsideration based on an error in the judgment or on newly discovered evidence. Nevertheless, judgments are considered binding unless they are reversed by the trial court or an appellate tribunal.[212] Rabbinical sources

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207. *Id.* at 362.

208. For a general overview of some of the relevant sources in Jewish Law, see generally NAHUM RAKOVER, THE SOURCES OF JEWISH LAW (1994) and 3 MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES (1994). In general, "the principles and rules of Jewish law are based on the Scripture." RAKOVER, *supra*, at 15. Some rules are mentioned quite explicitly, but others are only implied. All are elucidated in the teachings of the *Tanna'im* and *Amora'im*—the rabbis of the *Mishnah* and *Talmud*—and presented systematically in the codes. "The Mishnah is the first topical compilation of the Oral Law (*Torah shebe'al peh*) . . . completed around 200 C.E." *Id.* at 33. "For some 300 years—approximately 200-500 C.E—after the redaction of the *Mishnah*, Jewish scholarship was devoted primarily to the study, clarification, and application of the *Mishnah*." *Id.* at 43. The scholars of this period, known as the *Amora'im*, wrote the *Talmud*. "Halakhic literature after the period of the *Talmud* includes . . . codes, halakhic glosses, response literature, and court decisions." *Id.* at 61. The main codes are the Maimonides code *Mishneh Torah* (1135-1204), *Tur* (1270-1340), and *Shulhan Arukh* (1488-1575), which are universally accepted as the authoritative code of Jewish law. Thus, over many generations, a comprehensive legal system has developed based on the Scripture as elaborated by exegesis and amplification.

209. A preference for this approach over that of English law is found in an opinion by Israeli Supreme Court Justice Berenson, in which he states that "it would be preferable to make recourse to this rule [SHULHAN ARUKH, Hoshen Mishpat 20] that is better suited to the conditions in Israel than to be loyal to the severe, rigid English rule." CA 395/60 Amrani v. Attorney General, 15 PD 594, 602 (1960).

210. *See* Chigier, *supra* note 19, at 129-30; ELIAV SHOCHETMAN, CIVIL PROCEDURE IN JEWISH LAW 423-41 (1988).

211. *See generally* SHOCHETMAN, *supra* note 210.

212. *See id.* at 441.

indicate that, if the court acquits the defendant in a suit and the plaintiff lodges a claim against the defendant in another court, the defendant need not litigate or answer the plaintiff's complaint in the second court; in addition, the second court is not permitted to hear the plaintiff because the defendant has already been acquitted by the first court.[213] Thus, some RJ-like principles can be found in Jewish law, but this role is minimal. In the Jewish legal system, a judgment is in principle subject to revision,[214] normally by the court that issued it. Courts revise judgments if new evidence comes to light undermining the facts on which the judgment was based, provided that the party seeking to adduce the new evidence is not debarred from so doing.[215] Judgments are also subject to revision for errors in the application of the law, as discussed in Part IV.4 *infra*.

2. Contemporary Application in Rabbinical Courts in the State of Israel

The ancient Jewish law concept of non-finality of judgments also applies in the contemporary system of Israeli rabbinical courts authorized in the modern State of Israel, which is a rather unusual legal system. In Israel, alongside the regular civil courts operates a separate system of religious courts that adjudicate matters of personal status involving members of the religious communities.[216] For Jews in Israel, matters of marriage and divorce are under the exclusive jurisdiction of the rabbinical courts, which rule according to Jewish family law.[217] The procedural rules of the rabbinical courts, which also deal with the issue of RJ, are somewhat modern in form. The promulgation of the Rules of Procedure for the rabbinical courts in the State of Israel marked the first attempt in the history of Jewish law to provide a modern compilation of the rules of procedure. In 1943, the Council of the Chief Rabbinate published the Rules of Procedure, based largely on the Jewish law classic literature.[218] The rules have been

213. *See* The RESPONSA at the end of HAZEH HATNUFAH, § 40, as mentioned in BEIT YOSEF, Hoshen Mishpat, § 12, and also accepted by RAMA in DARCHEI MOSHE, Hoshen Mishpat, 20:2.

214. *See* Cohn & Sinai, *supra* note 18, at 437-38, 445.

215. MISHNAH, Sanhedrin 3:8; SHULHAN ARUKH, Hoshen Mishpat 20:1.

216. *See, e.g.*, Menashe Shava, *The Rabbinical Courts in Israel: Jurisdiction Over Non-Jews?*, 27 J. CHURCH & ST. 99 (1985), *reprinted in* MENASHE SHAVA, SELECTED TOPICS IN FAMILY AND PRIVATE INTERNATIONAL LAW 197 (2000).

217. Section 1 of the RABBINICAL COURTS JURISDICTION (MARRIAGE AND DIVORCE) LAW OF 1953, 5713-1953, 7 LSI 139 (1952-1953), reads as follows: "Matters of marriage and divorce of Jews in Israel, being nationals or residents of the state, shall be under the exclusive jurisdiction of Rabbinical Courts," which rule according to the Jewish family law. Many Jews in the Diaspora voluntarily avail themselves of the services of private rabbinical courts.

218. *See* SHOCHETMAN, *supra* note 210, at 11-12.

revised several times over the years. The last revision was in 1993, and all references in the present article are to those rules.

The modern rules of procedure for the rabbinical courts provide for an option to reverse a judgment.[219]

3. Dilemma Between the Truth and Ending the Dispute

Jewish law has always taken into account the difficulty in allowing endless litigation between the same parties and the dilemma created by the conflicting policies: justice and efficiency.[220] On the one hand, justice demands that a case be reconsidered when the losing party claims to have new evidence establishing the truth. On the other hand, a legal system cannot allow a dispute to continue indefinitely. The Mishnah (the first topical compilation of the oral law, completed around 200 C.E.) records two diverging opinions of sages that reflect the tension between the two opposing policies.[221] The major principle mentioned in the beginning of the Mishnah states that "[a]ny time a party can produce any proof, the court may reverse the verdict." This statement rejects the doctrine of RJ entirely. But a limitation follows: "If the court said to him to bring all the evidence within thirty days, and he brought it after thirty days, the verdict may not be reversed."

According to this opinion, a dispute can end by setting a time limit for producing new evidence, after which time the verdict cannot be reversed. But this opinion was forcefully rejected by Rabbi Shimon Ben Gamliel, the President of the Sanhedrin, who demanded that justice be done: "What should he do when he did not find the evidence within thirty days but found it afterwards?"

According to Rabbi Shimon Ben Gamliel's approach, when a conflict between the public interest of finality of judgments and the commitment of rendering a true judgment based on true facts arises, the latter policy prevails. This strong argument against injustice was accepted by the Jewish law codifiers, and the 30-day limitation was withdrawn.[222] But the halakhic codifiers accepted another limitation. If a court asks a litigant whether he or she has other witnesses or evidence, and the litigant replies that he or she has no more witnesses or evidence, the litigant is not permitted to bring

219. *See id.* at 432-33. Chapter 14 of these rules contains the procedure for reversing a judgment and reconsidering a case.

220. Chigier, *supra* note 19, at 129.

221. *See* MISHNAH, Sanhedrin 3:8. Quotations that follws refer to the Sanhedrin unless otherwise indicated.

222. *See* SHULHAN ARUKH, Hoshen Mishpat 20:1.

them later to reverse the judgment.[223] Rabbi Shimon Ben Gamliel objected to this limitation as well, but the majority decided against him,[224] realizing that sooner or later every dispute must be stopped somehow. Nevertheless, the majority could not ignore the demand for justice, and they permitted litigants to present new evidence in some cases, even after the litigants had stated that they had no more witnesses or evidence, because the court found that they did not lie.[225] Note that these rules apply both to the plaintiff and the defendant.[226]

The rules accepted by the Jewish codifiers indicate that the right to revise a judgment is not time-limited.[227] This approach was adopted in the modern procedural rules of the Israeli rabbinical courts. According to Section One of Rule 129, a litigant has the right—at any time—to request that the court that adjudicated his or her case reconsider it. This rule, which does not set a deadline, is problematic, and it certainly does not contribute to the parties' sense of security or to the legal system's stability, for the possibility of endless litigation is always present. This problem can be solved, however, by adopting the minority opinion listed in the Jerusalem Talmud, whereby the right to request that the trial court reconsider a case has a deadline: the actual execution of the judgment by the parties.[228] In other words, the trial court may reconsider a case before the judgment has been carried out, but not after, as, for example, after one party has paid the other according to the judgment because this is the final stage of fulfillment of the judgment.[229] At this stage, the party that received the money is already counting on it; if the other party were allowed to reopen the case, it could damage the party that received the money. Although this opinion, which contains some elements of the RJ concept, was not accepted by the mainstream of Jewish law codifiers,[230] Jewish law could in principle

223. *See* MISHNAH, *supra* note 215, *as accepted in* SHULHAN ARUKH, Hoshen Mishpat 20:1.

224. *Id.*

225. This is because when he said he has no further proof he could not have known that other evidence existed, as for example when witnesses arrived from overseas after the trial, or if it has been proven that the briefcase in which he kept the documents was not in his possession at the time of the trial, etc.

226. *See* Chigier, *supra* note 19, at 131. The author noted that there may be good reason for differentiating between the two litigants. The sense of justice in the case of the defendant is stronger than in the case of the plaintiff, because it is the plaintiff's fault that he filed suit before ascertaining that he had all the evidence. Furthermore, as it regards the plaintiff the doctrine of RJ may be applied for the sake of public policy, but as it regards the defendant, it is to prevent his being harassed repeatedly by the plaintiff. This distinction was not accepted by the halakhic codifiers, as noted above.

227. *See* SHULHAN ARUKH, *supra* note 222.

228. *See* JERUSALEM TALMUD, Sanhedrin 3:12.

229. *See* RABBI AVRAHAM YITZHAK KOOK, BEHER ELIYAHU, § 20.

230. *See supra* text accompanying note 222.

recognize a clear new law (which does not exist in the contemporary practice) that set a time limit (for example, two or three years) on the right to request that the trial court reconsider a case, if such legislation were enacted by the rabbinical authorities.[231]

4. New Evidence and New Factual and Legal Arguments

As we have seen, a rabbinical trial court may reconsider its judgment if a litigant presents sufficiently probative evidence that was found after the judgment was made. In order to challenge the decision, the petitioner must show that the new evidence was not in his possession during the trial and that he was unaware of its existence.[232] This limitation was adopted by the modern procedural rules of the Israeli rabbinical courts. Section One of Rule 129 indicates that the litigant has the right at all times to request the court that adjudicated his case to reconsider the case based on a new factual argument or new evidence of which he was unaware during the original trial. The litigant must specify in his request the details of the new evidentiary or factual arguments he wishes to present in order to reverse the judgment.[233] The litigant must also explain why he did not present the evidence at the original trial.[234] The rabbinical court considers the request without hearing the parties[235] and may reject the request or invite the parties for a hearing. If the court decides to hear the claim, the court can delay enforcement of its judgment[236] until it renders a final decision on the request for reversal.[237]

These rules are related to another rule stating that after all claims and evidence have been presented at the trial, the court should ask the parties whether they have additional claims and evidence.[238] According to this rule, if the parties declare that they have no further evidence or claims, the court will not accept further evidence or claims in the future unless the litigant provides a good explanation for his request. Indeed, the evidentiary stage of the trial ends only after the parties clearly answer the court's question and their declarations are recorded in the trial protocol.[239] Note

231. *See* SHOCHETMAN, *supra* note 210, at 430.

232. *See* RESPONSA ROSH, 13:20. Relying on sources in Jewish law, Israeli Supreme Court Justice Kister held that new evidence cannot be introduced after a decision has been rendered if it could have been brought earlier. CA 211/65 *Attorney General v. Mazan*, 19 PD 32, 43-44 [1965] (Isr.).

233. Israeli Rabbinical Ct. R. 129, § 2. *See also* SHOCHETMAN, *supra* note 210, at 432.

234. Israeli Rabbinical Ct. R. 129 § 2.

235. Israeli Rabbinical Ct. R. 130 § 1.

236. Israeli Rabbinical Ct. R. 130 § 2.

237. Israeli Rabbinical Ct. R. 131.

238. Israeli Rabbinical Ct. R. 72.

239. *See* SHOCHETMAN, *supra* note 210, at 432 n.49.

that in practice, as a result of this rule, the Israeli rabbinical courts are asked to reverse few judgments, and a litigant who declares during the trial that he has no further evidence cannot present additional evidence later.[240]

There is a difference of opinion as to whether a party can challenge a decision on the basis of new legal arguments that were not raised at trial.[241] According to one view, a decision can be challenged only on the basis of new evidence;[242] however, the prevailing view appears to be that a decision can be challenged on the basis of new legal arguments as well.[243]

5. Appellate Tribunals and the Right to Reverse Erroneous Judgments

Most modern legal systems contain several hierarchically organized judicial tribunals. A litigant who is dissatisfied with a lower tribunal's decision can appeal the decision to a higher tribunal. The right of appeal is based on the presumption that the lower tribunal may have erred in its ruling. The aspiration for true justice requires (both in common law and German–Continental systems) that the litigant be given an additional opportunity to have his or her claims heard. By contrast, in traditional Jewish law, the availability of an appellate tribunal is not self-evident.[244] Admittedly, a rabbinical court that has erred is obligated to reexamine its decision and correct it,[245] and the litigant is entitled to return to the trial court after receiving its decision and attempt to convince it that a mistake has been made.[246] "[T]his is clearly not a satisfactory solution,"[247] and in many cases the rabbinical court disagrees that its decision was mistaken, a position that some litigants ascribe, "rightly or wrongly, to the stubbornness on the part of [judges] who are unwilling to amend their rulings."[248]

The establishment of rabbinical appellate tribunals in Israel in the twentieth century is "the result of extrinsic circumstances, such as competition with external judicial institutions."[249] The most prominent and

240. *See id.* at 433 n.52.

241. *See id.* at 436-67.

242. *Sho'el ve-Nish'al le-Rabbi Khalfon Moshe ha-Kohen*, pt. 5, *Hoshen Mishpat*, sec. 8 (S.V.ve-khen yesh le-hokhi'ah), SHULHAN ARUKH.

243. *Sefer Me'irat Einayim*, *Hoshen Mishpat* 20:1, SHULHAN ARUKH.

244. *See* Amichai Radzyner, *Appeal*, in 2 ENCYCLOPAEDIA JUDAICA 283-84 (2d ed. 2007).

245. SHULHAN ARUKH, *Hoshen Mishpat* 25:1–2.

246. SHULHAN ARUKH, *Hoshen Mishpat* 20:1.

247. *See* Radzyner, *supra* note 244, at 283.

248. *Id.*

249. *Id.* at 284.

influential of these tribunals is the Rabbinical Court of Appeals of the Chief Rabbinate, established in Jerusalem in 1921.[250]

Either party or the trial court can take the initiative to reverse a judgment that they believe is erroneous.[251] In a legal system that includes appellate tribunals, however, the right to request a reversal by the trial court would be superfluous because the authority to reconsider the judgment is already vested in the appellate court.[252]

In fact, the rules of procedure of the Israeli rabbinical courts specify that if there is a suspicion that a court has erred in rendering its judgment the court itself can take the initiative to reverse the judgment and invite the parties to reconsider the case.[253] Conversely, the parties do not have the right to request that the trial court reverse all errors in judgments but rather only those based on new evidence or arguments.[254] Furthermore, the right of the trial court to reverse its erroneous judgment exists only when the case is not before the Rabbinical Court of Appeals. After the Rabbinical Court of Appeals renders a final judgment, the trial court is not authorized to reconsider the case[255] because a rabbinical court functioning within a legal system that includes an appellate tribunal must (by law) respect the decision of the appellate court.[256]

6. Claim Preclusion

An important rabbinical authority, R. Shimeon b. Zemach Duran, the Rashbatz, a North African rabbi of the fourteenth century, was asked about a defendant's demand that the plaintiff aggregate all of his claims and remedies into one cause of action so that the plaintiff may not reopen the case later.[257] In other words, the defendant was seeking an ancient version of claim preclusion that would prevent the plaintiff from later reopening the case. Rashbatz wrote that no legal ground existed to compel the plaintiff to assemble all of his claims against the defendant into one cause of action. According to Rashbatz, the plaintiff has the right to first sue based on one

250. There was intense controversy among rabbis in Israel and abroad regarding the establishment of such a tribunal. "The main claim of its opponents was that such an institution was an innovation which contradicted traditional halakhah." *Id.*

251. *See* SHULHAN ARUKH, *Hoshen Mishpat* 17:8.

252. SHOCHETMAN, *supra* note 210, at 440.

253. Israeli Rabbinical Ct. R. 128.

254. These cases cannot be examined by the appellate court, but the parties have the right to request reversal of an erroneous judgment rendered by the Rabbinical Court of Appeals. *See* SHOCHETMAN, *supra* note 210, at 440.

255. *See id.*

256. *See* CA 682/81 Fried v. Fried 36(2) PD 695, 698-99 [1982] (Isr.).

257. RESPONSA TASHBETZ 2:2.

claim only and to later sue based on other claims. The plaintiff has the right to divide one cause of action into different stages and to sue separately based on different claims because he or she may have legitimate reasons for doing so. Rashbatz presented some of these reasons. First, the plaintiff may have witnesses who can appear in court readily to testify about one claim, whereas the witnesses related to another claim may be far and cannot appear in court immediately. In this situation it would be unjust to prevent the plaintiff from submitting a cause of action until he can include all of the claims. Second, the plaintiff may not want to submit all claims in the beginning because the defendant might later admit the second claim. Third, the plaintiff may believe that he and the defendant might be able to compromise and reach a settlement regarding the second claim. Fourth, the plaintiff may not at first know of all the potential claims he has against the defendant. All of these reasons are considered sufficient for dividing one cause of action into different claims, so that claim preclusion does not apply in these cases. The defendant can prevent the plaintiff from splitting the cause of action only if he can show that doing so would cause damage to his property.[258]

If splitting a claim is likely to damage the defendant, the court will sustain the defendant's objection to dividing the cause of action. For instance, if the plaintiff files a claim of non-ownership of land against a defendant who has possession of the disputed land and the plaintiff asks the court to address the issue of the land's ownership at a later stage, the defendant's objection would be sustained because delaying the judicial decision about ownership could affect the value of the land, which would decrease due to the rumors about the ownership dispute.[259]

Another North African rabbi of the sixteenth century, Radbaz, commented that the court should not permit the plaintiff to split his or her claims if the judge believes that the plaintiff wants to harass the defendant repeatedly with one claim at a time in order to make the defendant take a new oath each time.[260] In such a case the plaintiff has no legitimate reason to split one cause of action, contrary to the cases mentioned by Rashbatz.[261]

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258. Rashbatz's opinion was accepted by the main halakhic codifiers. *See* Rema, *Hoshen Mishpat*, SHULKHAN ARUKH, § 24.

259. *See* RESPONSA RASHBA 1:1077.

260. RESPONSA RADBAZ 4:1281.

261. Therefore there is no contradiction between Rashbatz and Radbaz, as explained in PITHEI TESHUVA, SHULKHAN ARUKH, Hoshen Mishpat, Sec. 24.

B. The Rationale: Truth Finding as a Major Element of Justice

The concept of non-finality of judgments is rooted in the central feature of the Jewish legal system: the discovery of truth. The late Israeli Supreme Court Justice, Haim Herman Cohn, stated that Jewish law is without parallel among other systems of law in that the discovery of truth is an element of justice and the law is subordinated to it.[262] Jewish law is religious law, and as such the central idea guiding the judge is truth-based litigation, an objective imposed on the judge as a religious obligation.[263] This obligation has implications on several levels.[264] Discovery of the truth is perhaps the most central value to shaping the approach of Jewish law to the nature of litigation.[265]

As I have written elsewhere, Jewish law constitutes a normative system in which religious commandments inform adjudication.[266] The judge is responsible not only to the litigants standing before him but also to God. This system differentiates Jewish law from secular systems operating in the liberal Western tradition. In modern Western legal systems, judges must render a clear and unequivocal decision on any legal question brought before them, and they are not perturbed by the possibility that their rulings might later be deemed mistaken.[267] By contrast, Jewish law does not impose an unqualified duty on the judge to render a decision. The Talmud praises the judge's responsibility and duty to render true justice: "he who judges in truth, even for a single hour, the Writ gives him credit as though he had become a partner to the Holy One, blessed be He, in the act of creation."[268] At the same time, Talmudic sages stressed that rendering judgment was an act carrying transcendental significance that required the judge to assume solemn religious responsibility for a ruling that might turn out to be mistaken.[269]

The Jewish rabbinical courts, the function of which is to establish the truth, were not designed to carry out proceedings in a conflict-solving style, as were the common law systems. Rendering a true judgment based on true

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262. *See* H. COHN, HAMISHPAT [The Court] 119 (1992).

263. YUVAL SINAI, THE JUDGE AND THE JUDICIAL PROCESS IN JEWISH LAW 469-70 (2009).

264. *See id.* (discussing the repercussions of that obligation on the formulation of the modes of court intervention in judicial proceeding, in view of the sources of Jewish law).

265. *See id.*

266. *See* Yuval Sinai, *The Religious Perspective of the Judge's Role in Talmudic Law*, 25 J.L. & RELIGION 357, 357 (2009-2010).

267. In Judge Pollock's opinion, *see Judicial Caution and Valour*, 45 L.Q. REV. 293, 296-97 (1929), a judge's readiness to risk a mistaken judgment is necessary to promote the creative development of the law.

268. BABYLONIAN TALMUD, Shabbat 10a.

269. *See, e.g.*, Sinai, *supra* note 266.

facts is the main function of the Jewish judge. Consequently, an incorrect judgment is absolutely null and void, and it may be said that the judge has not finished his work until he gives a true judgment. Therefore, if the judge finds that his judgment is incorrect, he must reconsider the case and meet his obligation to render true judgment.[270]

The litigant's right to reopen a judgment raises the following question: would inconsistencies in judgment undermine the court's prestige and public respect for its decisions?[271] The sages were aware of this matter and discussed it in the Talmud.[272] As we have seen above, the accepted approach is that a judgment can usually be reversed if it is incorrect. The first judgment will be reversed not only in cases involving clear evidence of error but also in cases where the judgment's accuracy is placed in doubt by new evidence.[273] This principle was justified by the view that the objective of a judgment in Jewish law is to reflect the truth.[274]

CONCLUSION

This Article confronts the common assumptions that a legal system cannot exist without some form of res judicata and that every legal system has produced a body of RJ law. We have seen other legal systems reject some of the main tenets of RJ. For instance, German law includes RJ that is narrower in scope than that in common law systems. Jewish law rejects RJ, although it does include some diluted version of RJ. The Article also argues that the RJ rules raise difficulties and present many moral, conceptual, social, and cost-of-efficiency drawbacks. Res judicata rules also provide problematic incentives to the parties involved. However, the problems of RJ mentioned in the article do not necessarily imply a complete indictment of the concept of RJ, and some good arguments support at least a minimal concept of RJ. But the arguments presented in this article should lead to reconsideration of the contemporary broad-scope common law model of RJ.[275]

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270. SHOCHETMAN, *supra* note 210, at 425.

271. *See* discussion *supra* Part I.B.3.

272. *See Ziluta de'bay dina*, *in* 12 TALMUDIC ENCYCLOPEDIA 119 (1991).

273. *See* SHOCHETMAN, *supra* note 210, at 429.

274. This is also why the argument of prestige of the court as grounds for RJ is not applicable. *See* Appeal 18 (1957), *in* 2 ISRAELI RABBINICAL COURTS DECISIONS 262, at 265.

275. In Sinai, *supra* note 132, I outline the basic elements needed for redesigning the rules of claim preclusion, proposing to abolish the strict and broad rule against splitting a cause of action that is being applied in contemporary common law, and argue in favor of a more lenient and flexible rule. The proposed model should seek to include in a single lawsuit only what is efficient to include in that lawsuit from the perspective of both the courts and the litigants, as it is not necessary to fully litigate all

An analysis of broad-scope RJ in common law reveals that the traditional justifications for RJ provided by common law jurists should not be considered the primary reasons why common law systems have accepted the doctrine of RJ in its broad scope. The relative weakness of the traditional justifications is manifest, especially in light of the strong arguments against RJ. A legal system that favors broad-scope RJ, as do common law systems, could merely reflect a principled approach that prefers such values as public interest, consistency, stability, and efficiency to truth finding. But in modern common law RJ is not applied consistently with these professed values that common law jurists use as justifications for the doctrine. To the contrary, the primary cause for accepting the rules of RJ in the Anglo-American systems can be best understood under the conceptual "conflict solving" approach of the adversarial system, whereas the traditional justifications serve more as rhetorical justifications. The main objective of the court in an adversarial system is not to ascertain the truth but to resolve disputes objectively and to choose between the contentions of law and fact laid before it by the litigants.

An analysis of the conceptual contentions against RJ shows that RJ is inconsistent with some of the major aspects of the behavior modification model. Furthermore, RJ does not necessarily contribute to an economically efficient legal system. Conceptually, the effects of RJ are inconsistent with some of the main characteristics of the Anglo-American system itself and contradict many of the valued features of procedure, such as litigants' authority and persuasion opportunities, correctness, revisionism, economy, and consistency. The litigants' autonomy is especially disregarded with the application of claim preclusion, which forces the plaintiff to submit the subject matter of the entire case relating to the cause of action at one time, once and for all, including every remedy flowing from the cause of action based on the subject matter. The rules of RJ also limit the litigants' persuasion opportunities by denying them the opportunity to persuade the court to reverse an incorrect judgment. In principle, as argued in the present Article, there is no reason why the rules of RJ could not be limited to the narrow question of whether the prior action actually decided the issues necessarily involved in awarding the judgment. According to this approach, RJ is a drastic measure and should be applied only in clear cases in which a matter has been directly litigated, when one "has had his day in court," and ought not to be extended to matters that could or should have been raised and litigated in the first action.

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grievances arising from a transaction. In my proposal, the default rule permits splitting a single cause of action, with exceptions to the general rule.

The rules of RJ, especially those of claim preclusion, do not comport with the behavior modification model because they have a negative and harmful effect on the conduct of litigation. The rule of claim preclusion forces the plaintiff to aggregate into one lawsuit all the claims and remedies that may be developed from one cause of action, significantly aggravating the dispute between the parties. At the same time, under a more flexible system that allows splitting a cause of action, the plaintiff can pursue his or her claims in stages using legitimate strategic considerations and would therefore not be forced to press his or her claims to the utmost, as would be the case under the common law system. The court should allow the plaintiff to split the cause of action in such cases ex ante (when requested by the plaintiff at the beginning of the proceedings) or even ex post (when not previously requested). The rules of claim preclusion act as major obstacles to achieving a desirable behavior modification model of litigation and to reaching a settlement. This does not mean, however, that the court should always allow splitting claims. In Jewish law, the court could not (by law) permit the plaintiff to split his or her claims if the judge believes that the plaintiff is dishonest and wants to harass the defendant repeatedly with one claim at a time in order to damage the defendant. This limitation makes sense because in such a case the plaintiff has no legitimate reason to split one cause of action since the split would not contribute to the behavior modification of litigation.

Forcing litigants to include all factually distinct claims in one action may have additional disadvantages, including a significant negative effect on cost efficiency for both the litigants and the courts since the parties are forced to litigate their potential claims to the utmost. By contrast, if the plaintiff is permitted to sue in the first stage for part of the remedies without the danger of the other remedies being blocked by estoppel, there is a reasonable chance that some plaintiffs may choose not to sue for the other remedies. An ex ante analysis of the rules of cause of action and issue preclusion shows that the broader the scope of the claim preclusion, the higher the costs of particular procedures will be, harming access to judicial decision making. Ex ante considerations of broad-scope claim preclusion may prevent plaintiffs from submitting their claims altogether because litigants need to aggregate all of their claims and remedies into one cause of action, which may increase trial costs to a prohibitive level.

The RJ rules that prohibit the tribunal of first instance from reconsidering its decisions do not help prevent erroneous decisions and are not desirable from the perspective of either the behavior modification model or from the point of view of cost efficiency. By contrast, the procedural system of Jewish law allows the trial judge to reconsider his or

her decision and to render a revised decision if needed, which contributes greatly to an efficient judicial process of error correction. When trial courts are able to relitigate cases and to take advantage of information that litigants have about erroneous decisions the incidence of mistakes is reduced at a lower cost than that of error correction by appellate courts. Unlike the appellate judge, who learns the factual and legal grounds of the case at the appeal, the trial judge is familiar with the details of the case and needs to learn only the litigants' arguments about the errors in his decision. After the trial, the defeated litigant has the time and a strong incentive to review his or her objections to the trial court's decision. Introducing these objections to the trial judge at this stage results in an efficient process that gives the judge an opportunity to reconsider the decision. If given the opportunity to correct his or her mistakes after the trial, the judge is likely to take advantage of the opportunity in order to prevent undesirable reversals by the appellate court. Allowing relitigation in the trial courts would also compensate for the absence of reexamination of factual issues by the appeals court because in the trial court factual issues can be reconsidered more economically.

The second model of RJ, the German model, does not recognize the concept of RJ in the broad sense used by the common law legal systems. The narrow scope of RJ in the German model seems superior to the broader rules of RJ that apply in common law, but the German model is also problematic from the point of view of cost efficiency. Some of the features of the Continental and German appellate process result in inefficient judicial error correction since the process does not provide for relitigation by the trial court.

The third model, the Jewish law model, relies on the concept of non-finality of judgments. Although RJ has some effect in Jewish law, the effect is minimal compared with the common law and Continental jurisdictions. In the Jewish legal system a judgment is always subject to revision, normally by the court that rendered it in the first place, if new evidence has come to light undermining the facts on which the judgment was based, provided that the party seeking to adduce such new evidence is not barred from doing so. Every judgment is also subject to revision for errors of law. The traditional, ancient concept of non-finality of judgments in Jewish law also applies in the contemporary rabbinical courts authorized in the modern State of Israel. Nevertheless, the acknowledged lack of finality in Jewish law arose at a time when no appellate-level court existed in the Jewish Law system. Once Israel established an appellate court process, the nature of finality changed (though a broader residual discretion

is left to trial adjudicators in religious courts to reopen cases that have not yet been appealed).

Jewish law has long recognized the difficulties of allowing endless litigation between the same parties. Religious sages have sought a balance between the demand of justice that a case be reconsidered when the losing party argues that new evidence establishes the truth and the need to settle disputes without allowing them to drag on endlessly. As a result, the halakhic codifiers accepted an important limitation to ensure that disputes are eventually settled. These procedural rules are accepted in contemporary rabbinical courts authorized in Israel and instruct judges to ask the parties, after all the claims and evidence have been presented at trial, whether they have additional claims and evidence. If the parties declare that they have no further evidence or claims, the court will not accept further evidence or claims in the future, unless the litigant gives a credible explanation for the delay. As a result of this rule, in practice, few requests to reverse a judgment are submitted to the Israeli rabbinical courts. The trial court has the right to reverse its erroneous judgment only if the case has not been addressed by the Rabbinical Court of Appeals. After the Rabbinical Court of Appeals gives its final judgment, the trial court is not authorized to reconsider the case.

Jewish law also adopts a balanced approach toward claim preclusion, both from the perspective of the behavior modification model and from the point of view of cost efficiency. In principle, the plaintiff has the right to divide a cause of action into different stages and to submit different claims because he or she may have legitimate reasons for doing so. Nevertheless, the court does not permit the plaintiff to split his or her claims if doing so would harm the defendant, or if the judge believes that the plaintiff is attempting to harass the defendant by submitting one claim at a time. The unique concept of non-finality of judgments in Jewish law is explained by its central feature, which is without parallel in the dominant legal systems of the West, whereby discovery of the truth is an element of justice to which all else is subordinated. The function of the Jewish rabbinical court is to establish the truth and not to solve conflicts. Rendering a true judgment based on true facts is the main function of the Jewish judge, and incorrect judgments are null and void. The work of a Jewish judge is not finished until he or she gives a true judgment. Therefore, if the judge finds that his or her judgment is incorrect the judge must reconsider the case and reverse it in order to fulfill his or her obligation to render true judgments.