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The Compatibility of a Federal Magistrate's Final Judgment With Nonmutual Issue Preclusion

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THE COMPATIBILITY OF A FEDERAL MAGISTRATE'S FINAL JUDGMENT WITH NONMUTUAL ISSUE PRECLUSION

> The legislature and the judiciary act responsibly when they provide and explore new, flexible methods of adjudication, especially where the evolution of the innovative mechanism is left in large part under the control of the judiciary itself.[1]
>
> *Justice Anthony M. Kennedy*

I. Introduction

The Federal Magistrate Act of 1979[2] (the Act) expanded the responsibility of federal magistrates,[3] empowering them to try civil

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1. Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 547 (9th Cir. 1983) (en banc), *cert. denied*, 469 U.S. 824 (1984) (decision on constitutionality of Magistrate Act of 1979).

2. Pub. L. No. 96-82, 93 Stat. 643 (codified as amended at 18 U.S.C. §§ 3060, 3401-3402 (1982); 28 U.S.C. §§ 604, 631-639 (1982)).

3. The Federal Magistrates Act of 1968, Pub. L. No. 90-578, 82 Stat. 1107 (codified as amended at 18 U.S.C. §§ 3060, 3401-3402 (1968); 28 U.S.C. §§ 604, 631-639 (1968)), abolished the office of United States commissioners and established the United States magistrate system. The purpose of the 1968 Act was to "reform the first echelon of the Federal judiciary into an effective component of a modern scheme of justice." H.R. REP. No. 1629, 90th Cong., 2d Sess. 11 [hereinafter H.R. REP. No. 1629], *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 4252, 4253-54. The 1968 Act raised the standards of the office and increased the responsibility given to magistrates. H.R. REP. No. 1629, *supra*, at 11-12, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 4252, 4254-55.

The 1976 Federal Magistrate Act, Pub. L. No. 94-577, 90 Stat. 2729 (codified at 28 U.S.C. § 636(b) (1976)), focused on the magistrate's role in conducting pretrial proceedings. The jurisdictional amendments were enacted to clarify the use of magistrates after an adverse United States Supreme Court decision in Wingo v. Wedding, 418 U.S. 461 (1974). *See* H.R. REP. No. 1609, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6162, 6164-65.

The Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643, expanded the criminal and civil jurisdiction of the United States magistrates. Magistrates were given the power "to dispose of certain minor criminal cases by including all Federal misdemeanors within their jurisdiction," and were also given "case dispositive jurisdiction . . . in civil cases where the parties to the litigation consent to the exercise of such power by the magistrate." S. REP. No. 74, 96th Cong., 1st Sess. 1 [hereinafter S. REP. No. 74], *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 1469, 1469.

Even before the 1979 statutory enlargement of power, United States magistrates had been conducting civil trials upon the consent of the parties in certain jurisdictions. *See The Federal Magistrate Act of 1979: Hearing on S. 237 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 17 (1979) (statement of Hon. Otto R. Skopil, Jr.,

cases and enter final judgments provided there is consent by the parties and district court reference.[4] The Act provides for a "supplementary judicial power designed to meet the ebb and flow of the demands made on the federal judiciary."[5] By enlarging the jurisdiction of magistrates, the Act improves access to the federal courts, particularly for less-advantaged parties.[6] It also relieves federal judges from hearing certain types of cases and thus allows them to devote more time to presiding over trials and writing opinions, thereby conserving scarce judicial resources.[7]

Similarly, the doctrine of issue preclusion, like the related doctrine of claim preclusion, has the effect of conserving judicial resources by preventing needless relitigation.[8] Issue preclusion mandates that

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Chief Judge, United States District Court, Portland, Or.); McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. ON LEGIS. 343, 359-61 (1979) [hereinafter McCabe]. The Act of 1979 explicitly permits such jurisdiction. *See* 28 U.S.C. § 636(c) (1982).

4. *See* 28 U.S.C. § 636(c) (1982).

5. H.R. REP. No. 1364, 95th Cong., 2d Sess. 5 (1978).

6. *See* S. REP. No. 74, *supra* note 3, at 4, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 1469, 1472.

> [T]he less-advantaged . . . lack the resources to cope with the vicissitudes of adjudication delay and expense. If their civil cases are forced out of court as a result, they lose all their procedural safeguards . . . . The imaginative supply of magistrate services can help the system cope and prevent inattention to a mounting queue of civil cases pushed to the back of the docket.

Id. While this result seems desirable, critics have argued that the effect could be discriminatory—magistrates will be reserved for the poor while district court judges preside over cases involving litigants who can afford article III delays and costs. *See* Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 553-54 (9th Cir.) (en banc) (Schroeder, J., dissenting), *cert. denied*, 469 U.S. 824 (1984); Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 YALE L.J. 1023, 1052-53 (1979) [hereinafter Note, *Article III Constraints*]. While considering the constitutionality of the 1979 Magistrate Act, the Court of Appeals for the Seventh Circuit stated that such a possibility was speculative and unlikely, drawing a comparison to the use of arbitrators which occurs regardless of the parties' wealth. *See* Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1041 (7th Cir. 1984).

7. *See* McCabe, *supra* note 3, at 356.

8. *See* Allen v. McCurry, 449 U.S. 90, 94 (1980); Montana v. United States, 440 U.S. 147, 153 (1979); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979).

"Res judicata" refers to the two ways in which a prior adjudication can have a binding effect in a later court action. The judgment rendered in the prior action can either prevent the relitigation of claims (res judicata) or the relitigation of issues (collateral estoppel). *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE § 11.3, at 532 (2d ed. 1977) [hereinafter F. JAMES & G. HAZARD]; RESTATEMENT (SECOND) OF JUDGMENTS § 17 (1982) [hereinafter RESTATEMENT (SECOND)]. An oft-quoted passage illustrates the distinction:

> [In res judicata], the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim

once an essential issue[9] has been actually litigated[10] and finally determined,[11] the determination is conclusive in a subsequent suit, whether that suit is on the same or a different claim.[12] Precluding relitigation serves to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication."[13]

The increasing use of magistrates in lieu of federal district judges[14] is currently accompanied by an expansive interpretation of issue preclusion.[15] As a result, a situation may arise in which a magistrate

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> or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. . . . Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.
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> But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.

Cromwell v. County of Sac, 94 U.S. 351, 352-53 (1877); *see also* Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 326 (1955) (describing difference between res judicata and collateral estoppel); Commissioner v. Sunnen, 333 U.S. 591, 597-98 (1948) (same).

Due to the potential confusion that may arise when the broad concept of res judicata is used to include the narrower concepts of res judicata and collateral estoppel, many commentators have chosen to refer to the narrower doctrines as claim preclusion and issue preclusion, respectively. *See, e.g.*, F. JAMES & G. HAZARD, *supra*, § 11.4, at 553; RESTATEMENT (SECOND), *supra*, § 27; 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4402, at 6-11 (1981) [hereinafter WRIGHT, FEDERAL PRACTICE]; Vestal, *Preclusion/Res Judicata Variables: Adjudicating Bodies*, 54 GEO. L.J. 857 (1966) [hereinafter Vestal]. This Note employs the terminology used by these commentators.

9. *See* F. JAMES & G. HAZARD, *supra* note 8, § 11.19, at 569-71 (issues not necessary to support judgment are not accorded preclusive effect because: (1) issues are not focus of parties' attentions; (2) issues most likely do not receive full judicial consideration; (3) unnecessary determinations usually are not subject to appeal).

10. *See* RESTATEMENT (SECOND), *supra* note 8, § 27 comment d (issue is actually litigated when it is "properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined").

11. *See id.* § 13.

12. *See id.* § 27.

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

14. From 1983 to 1984, magistrates' civil case disposition increased 13.4 percent. *See* [1984] DIR. ADMIN. OFF. U.S. CTS. ANN. REP. 207. Magistrates disposed of 3,717 civil cases on consent of the parties in 1985, an increase of 4.8 percent over the 3,546 cases disposed of in 1984. *See* LAW & BUSINESS, INC., THE LAWYER'S ALMANAC 826 (1986).

15. *See* Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982); Allen v. McCurry, 449 U.S. 90 (1980); Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

enters a final judgment and a nonparty seeks to estop a party from relitigating the underlying issues in a federal district court. If the trial court denies the party the opportunity to relitigate in the second suit, a magistrate's determination may have the effect of determining issues in, and possibly the outcome of, subsequent litigation, even though the parties in the subsequent suit have not consented to a magistrate trial and have demanded article III adjudication.[16]

This Note examines the propriety of issue preclusion as applied to a magistrate's factual determination. Initially, this Note provides an overview of section 636(c) of the Magistrate Act of 1979 and decisions holding its provisions constitutional.[17] It then briefly looks at the expanded use of issue preclusion, which is largely due to the elimination of the mutuality requirement.[18] Following an analysis of the consent given by the parties,[19] and an examination of whether various policies are promoted by this use of issue preclusion,[20] this Note recommends that nonmutual issue preclusion should apply to a magistrate's determination in a civil trial only if the parties are aware of the consequences that may result when they consent.[21]

II. Section 636(c) of the Federal Magistrate Act of 1979

Section 636(c) of the Federal Magistrate Act gives broad powers to magistrates in civil trials, authorizing them to conduct "any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case," provided that the district court designates the magistrate to exercise civil trial jurisdiction, and the parties consent to have a magistrate try their case.[22] The Act does not,

16. Article III, section 1 of the United States Constitution states:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. III, § 1. The "good Behaviour" clause has been interpreted to give judges life tenure, subject only to removal by impeachment. *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 16 (1955).

17. *See infra* notes 22-46 and accompanying text.

18. *See infra* notes 47-57 and accompanying text. This Note considers only the doctrine of issue preclusion.

19. *See infra* notes 58-71 and accompanying text.

20. *See infra* notes 72-86 and accompanying text.

21. *See infra* notes 87-101 and accompanying text. This Note examines issue preclusion as applied to a magistrate's factual determination in a consensual civil trial.

22. 28 U.S.C. § 636(c)(1) (1982).

however, protect magistrates with the lifetime tenure and irreducible salary provisions contained in article III of the United States Constitution:[23] (1) their appointment is for four or eight years;[24] (2) they can be removed by the judges of the district court in which the magistrate serves,[25] or in some cases by the judicial council of the circuit;[26] and (3) their salary can be reduced by an act of Congress.[27]

Critics argue that pursuant to section 636(c) magistrates are exercising the judicial power of article III[28] without enjoying its tenure and salary provisions, thereby thwarting the institution of an independent judiciary that the framers of the Constitution intended by these article III provisions.[29] Nevertheless, twelve of the thirteen

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23. *See supra* note 16.

24. *See* 28 U.S.C. § 631(e) (1982) (full-time magistrates are appointed for terms of eight years; part-time magistrates serve for terms of four years).

25. *See id.* § 631(i) ("[r]emoval . . . shall be only for incompetency, misconduct, neglect of duty, or physical or mental disability, but a magistrate's office shall be terminated if the conference determines that the services performed by his office are no longer needed").

26. *See id.* (concurrence of majority of judicial council will be used to remove magistrate if there is tie vote of district court judges on question of removal). Each judicial council consists of the chief judge of the judicial circuit, the number of circuit judges fixed by a majority vote of all circuit judges in regular and active service, and the number of district court judges fixed by a majority vote of all circuit judges in regular and active service. *See id.* § 332(a)(1).

27. *See id.* § 634(a) (Supp. III 1985) (rates cannot exceed those fixed by Section 225 of Federal Salary Act of 1967, 2 U.S.C. §§ 351-361 (1982)). Even though Congress sets the maximum rate of pay, salaries for magistrates are determined by the judicial conference, *see* 28 U.S.C. § 633(b) (1982), which consists of the Chief Judge of the United States, and the chief judge and a district court judge from each judicial circuit. *See* 28 U.S.C. § 331 (1982). The rates for full-time magistrates cannot be reduced during their terms. *See* 28 U.S.C. § 634(b) (1982).

28. The judicial power extends to all cases in law and equity arising under the Constitution, or laws and treaties of the United States; to cases affecting ambassadors, public ministers and consuls; to cases of admiralty; to controversies in which the United States is a party; and to controversies between states or citizens of different states. U.S. CONST. art. III, § 2.

29. The article III tenure and salary provisions guarantee an independent judiciary free from legislative or executive encroachment. *See e.g.*, Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58-60 (1982) (provisions provide "clear institutional protections" for an independent judiciary); O'Donoghue v. United States, 289 U.S. 516, 529-35 (1933) ("anxiety of the framers of the Constitution to preserve the independence especially of the judicial department is manifested by the [tenure and salary provisions]"); THE FEDERALIST No. 78, at 483 (A. Hamilton) (H. Lodge ed. 1888) (tenure "is the best expedient . . . to secure a steady, upright, and impartial administration of the laws"); *id.* No. 79, at 491 ("[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support").

Because magistrates must rely on article III judges for their tenure and Congress

federal circuits have been faced with the question of the constitutionality of section 636(c) and all have upheld it.[30] Recently, one

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for their salary, opponents contend that magistrates are not shielded from any disaffection or outside pressures. *See* Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1052-54 (7th Cir. 1984) (Posner, J., dissenting); Lehman Bros. Kuhn Loeb, Inc. v. Clark Oil & Refining Corp., 739 F.2d 1313, 1319-20 (8th Cir. 1984) (en banc) (Arnold, J., dissenting), *cert. denied*, 469 U.S. 1158 (1985); Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 548-51 (9th Cir.) (en banc) (Schroeder, J., dissenting), *cert. denied*, 469 U.S. 824 (1984).

30. K.M.C. Co. v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1985); Gairola v. Virginia Dep't of Gen. Servs., 753 F.2d 1281 (4th Cir. 1985); D.L. Auld Co. v. Chroma Graphics Corp., 753 F.2d 1029 (Fed. Cir.), *cert. denied*, 106 S. Ct. 83 (1985); United States v. Dobey, 751 F.2d 1140 (10th Cir.), *cert. denied*, 106 S. Ct. 63 (1985); Fields v. Washington Metro. Area Transit Auth., 743 F.2d 890 (D.C. Cir. 1984); Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037 (7th Cir. 1984); Lehman Bros. Kuhn Loeb, Inc. v. Clark Oil & Refining Corp., 739 F.2d 1313 (8th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 1158 (1985); Puryear v. Ede's Ltd., 731 F.2d 1153 (5th Cir. 1984); Collins v. Foreman, 729 F.2d 108 (2d Cir.), *cert. denied*, 469 U.S. 870 (1984); Goldstein v. Kelleher, 728 F.2d 32 (1st Cir.), *cert. denied*, 469 U.S. 852 (1984); Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537 (9th Cir. 1983) (en banc), *rev'g* 712 F.2d 1305 (9th Cir. 1983), *cert. denied*, 469 U.S. 824 (1984); Wharton-Thomas v. United States, 721 F.2d 922 (3d Cir. 1983).

Most of these courts have distinguished the Magistrate Act of 1979 from the Bankruptcy Act of 1978, which the Supreme Court analyzed in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). The Bankruptcy Act of 1978 established a bankruptcy court in each judicial district "as an adjunct to the district court." 28 U.S.C. § 151(a) (1982). The bankruptcy judges, who were not given life tenure, *see id.* § 153, or irreducible salaries, *see id.* § 154, had jurisdiction over "all civil proceedings arising under title 11 [the Bankruptcy title] or arising in or related to cases under title 11." *Id.* § 1471(b). They were subject to removal by the "judicial council of the circuit" for "incompetency, misconduct, neglect of duty, or physical or mental disability." *Id.* § 153(b).

Justice Brennan, writing in *Northern Pipeline* for a plurality of four justices, concluded that section 241(a) of the Bankruptcy Act of 1978 "impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court, and . . . vested those attributes in a non-Art. III adjunct." *Northern Pipeline*, 458 U.S. at 87. The plurality first concluded that the bankruptcy courts were not created pursuant to Congress' article I powers. *See id.* at 63-76. It also found that the bankruptcy courts were not proper "adjuncts" to the district court. *See id.* at 76-87. The plurality's main concern was with the separation of powers. It found "unwarranted encroachments upon the judicial power" because bankruptcy courts would be adjudicating constitutional rights in addition to rights created by federal statute. *Id.* at 83-84.

The Second Circuit's analysis of Section 636(c) of the Magistrate Act of 1979 in Collins v. Foreman, 729 F.2d 108 (2d Cir.), *cert. denied*, 469 U.S. 870 (1984), illustrates the perceived differences between the two acts:

> [T]he . . . factors deemed important in *Northern Pipeline* are present in adjudications under section 636(c). First, magistrates "must be specially designated to exercise such jurisdiction by the district court [quoting 28 U.S.C. § 636(c)(1) (1982)]." Second, the method of appointment and removal of magistrates was not affected by the 1979 Act; both respon-

circuit even granted attorney's fees to a defendant, based on the fact that eight circuits had upheld the constitutionality of this section before the plaintiff had opened its brief on appeal.[31] The United States Supreme Court has declined on a number of occasions to review the circuit courts' rulings upholding section 636(c).[32]

Section 636(c) permits a magistrate to enter final judgment.[33] Nevertheless, circuit courts have determined that this section provides sufficient independent article III control over magistrates to protect the judiciary from legislative and executive pressures,[34] because of

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> sibilities continue to be entrusted to the district court. Finally, the district court retains the power to withdraw the reference. . . . Section 636(c) . . . does not affect the allocation of power between Congress and the district courts. The factors that seem to have concerned the *Northern Pipeline* plurality—that bankruptcy judges were not appointed by the district court and could not be removed by the district court, that bankruptcy courts were vested with independent jurisdiction and that district courts could not withdraw cases from bankruptcy courts—are simply not present in adjudications under section 636(c) . . . .

Id. at 115 (citations omitted).

31. *See* D.L. Auld Co. v. Chroma Graphics Corp., 753 F.2d 1029, 1032-33 (Fed. Cir.) (plaintiff had "no reasonable basis for believing that its constitutional argument had any likelihood of prevailing"), *cert. denied*, 106 S. Ct. 83 (1985).

32. See *supra* note 30 for instances when the Supreme Court denied certiorari. The Supreme Court did review the 1976 Amendment to the Magistrate Act which permits district court judges to refer certain pretrial motions to a magistrate. In United States v. Raddatz, 447 U.S. 667 (1980), the Court sustained the use of a magistrate in a motion to suppress evidence, relying mainly on the fact that Section 636(b)(1)(B) of the Magistrate Act requires a district court judge to make a "*de novo* determination" of the portions of the magistrate's finding to which a party has objected, thereby making the judge the "ultimate decisionmaker." *Id.* at 677-84. *See also* Mathews v. Weber, 423 U.S. 261 (1976) (preliminary review function assigned to magistrate under § 636(b) is permissible due to fact that district judge can reject or accept recommendation, thus enabling district judge to make final determination).

Justice Blackmun, in his concurring opinion in *Raddatz*, felt that "the only conceivable danger of a 'threat' to the 'independence' of the magistrate comes from within, rather than without, the judicial department" because magistrates are subject to the control of article III judges. *Raddatz*, 447 U.S. at 685 (Blackmun, J., concurring). In response to this concern, both the Second Circuit and the Third Circuit have held that the question of separation of powers does not involve intrajudiciary pressures. *See Collins*, 729 F.2d at 115 ("the *Northern Pipeline* plurality . . . explicitly refused to assign any constitutional significance to such internal pressures"); *Wharton-Thomas*, 721 F.2d at 927 & n.8 ("[t]here is no reason to even speculate that district judges would improperly attempt to influence a magistrate's decision, but any such conduct would implicate due process, rather than Article III").

33. *See* 28 U.S.C. § 636(c)(1) (1982).

34. *See Fields*, 743 F.2d at 894; *Geras*, 742 F.2d at 1042-43; *Lehman Bros.*, 739 F.2d at 1315-16; *Collins*, 729 F.2d at 114-15; *Pacemaker*, 725 F.2d at 544-46; *Wharton-Thomas*, 721 F.2d at 927.

the appointment and removal powers of the district court[35] in addition to particular provisions of section 636(c) that give the district court the ability to vacate a case reference,[36] and the litigant the right to a full and automatic appeal to an article III court.[37]

The section garners most of its support from its requirement of litigant consent as a prerequisite to a magistrate's determination.[38] The Supreme Court has recognized the importance of party consent in referring a case to a non-article III officer since the early nineteenth century.[39] This factor has not lost its significance; in a recent Supreme Court case, *Northern Pipeline Construction Co. v. Marathon Pipe*

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35. *See* 28 U.S.C. § 631(a) (1982) (appointment powers); *id.* § 631(i) (removal powers).

36. *See id.* § 636(c)(6) (court can cancel reference either sua sponte or "under extraordinary circumstances shown by any party").

37. A party may appeal directly to the appropriate court of appeals, *see id.* § 636(c)(3), or, if the parties consent, to a judge of the district court. *See id.* § 636(c)(4). An appeal of a magistrate's decision is reviewed under the identical standards as an appeal of a district court judge's decision to the court of appeals. *See, e.g.*, Woods v. United States, 720 F.2d 1451, 1452-53 (9th Cir. 1983) (magistrate's finding allowed to stand unless clearly erroneous); Payne v. United States, 711 F.2d 73, 75 (7th Cir. 1983) (same). There is no limitation on a party's right to seek review by the United States Supreme Court. *See* 28 U.S.C. § 636(c)(5) (1982).

38. This requirement of consent is contained in Section 636(c)(1) of Title 28 of the United States Code. Numerous courts and critics have relied on the consent requirement in determining that Section 636(c) is constitutional. *See Lehman Bros.*, 739 F.2d at 1315 (holding that Supreme Court's decision in *Northern Pipeline* was not controlling because in that case one party objected to adjudication by Bankruptcy Court, whereas in case at bar both parties had consented to adjudication by magistrate); *Wharton-Thomas*, 721 F.2d at 925-26 (same); S. REP. No. 74, *supra* note 3, at 4, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS, 1469, 1473 ("[i]n light of this requirement of consent, no witness at the hearings on the bill found any constitutional question that could be raised against the provision"); H.R. REP. No. 287, 96th Cong., 1st Sess. 7-9 (1979) (consent of parties was sufficient to overcome objections based on constitutional grounds); *see also* Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U. L. REV. 1297, 1350-54 (1975) ("consent greatly increases the permissibility of reference") [hereinafter Silberman].

39. *See* Kimberly v. Arms, 129 U.S. 512, 524 (1889) ("when the parties consent to the reference of a case to a master or other officer to hear and decide all the issues . . . the master is clothed with very different powers from those which he exercises upon ordinary references, without such consent"); Newcomb v. Wood, 97 U.S. 581, 583 (1878) ("power of a court of justice, with the consent of the parties, to appoint arbitrators and refer a case pending before it, is incident to all judicial administration"); Heckers v. Fowler, 69 U.S. (2 Wall.) 123, 128 (1865) (practice of referring cases to referee with consent of parties "is coeval with the organization of our judicial system"); Alexandria Canal Co. v. Swann, 46 U.S. (5 How.) 82, 89 (1847) ("a trial by arbitrators, appointed by the court with the consent of both parties, is one of the modes of prosecuting a suit to judgment as well established and as fully warranted by law as a trial by jury").

Line Co.,[40] all the Justices referred to the importance of litigant consent in determining whether a provision of the Bankruptcy Act of 1978 violates article III.[41]

By consenting, litigants are actually waiving their right to an article III judge.[42] Waiver of this right has been compared to the permissible waiver by a criminal defendant of a fundamental right.[43] One can

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40. 458 U.S. 50 (1982) (plurality opinion).

41. *See id.* at 79-80 n.31 (plurality opinion) ("[b]efore the [1978 Bankruptcy] Act the referee had no jurisdiction, *except with consent*") (emphasis added); *id.* at 91 (Rehnquist, J., concurring) ("[n]one of the cases has gone so far as to sanction the type of adjudication to which Marathon will be subjected *against its will* under the provisions of the 1978 Act") (emphasis added); *id.* at 92 (Burger, C.J., dissenting) (limiting Court's holding to proposition that " 'traditional' state common-law action . . . must, *absent the consent of the litigants*, be heard by an 'Art. III court' if it is to be heard by any court or agency of the United States") (emphasis added); *id.* at 95 (White, J., dissenting) (under plurality's interpretation, state-law claims "would have to be heard by Art. III judges or by state courts—*unless the defendant consents to suit* before the bankruptcy judge") (emphasis added).

42. Some courts have interpreted the consent as waiving a personal right, conferred by article III, to article III adjudication. *See Geras*, 742 F.2d at 1041; *Pacemaker*, 725 F.2d at 541-42; *cf.* Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665, 698 (1969) (tenure provision was "not created for the benefit of the judges, but for the benefit of the judged").

Other courts have treated the consent as waiving a due process right. *See Fields*, 743 F.2d at 894; *Collins*, 729 F.2d at 120; *cf.* Note, *Federal Magistrates and the Principles of Article III*, 97 HARV. L. REV. 1947, 1962-63 (1984) (consent "protects the Magistrate Act from a constitutional challenge based on the due process clause"). Regardless of the source of the right to article III adjudication, all have concluded that it can be permissibly waived, distinguishing the waiver from the impermissible consent to subject matter jurisdiction. *See, e.g., Geras*, 742 F.2d at 1041-42 ("issue is not an expansion of the subject matter jurisdiction of the federal courts but rather the parties' choice of the forum"); *Pacemaker*, 725 F.2d at 543 ("litigant waiver in this case is similar to waiver of a defect in jurisdiction over the person, a waiver federal courts permit").

43. In *Pacemaker*, the Ninth Circuit stated:

> The Supreme Court has allowed criminal defendants to waive even fundamental rights: the right to be free from self-incrimination, *Garner v. United States*, 424 U.S. 648 (1976), the right to counsel, *Adams v. United States* ex rel. *McCann*, 317 U.S. 269 (1942), the right to be free from unreasonable searches and seizures, *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the right to a speedy trial, *Barker v. Wingo*, 407 U.S. 514 (1972), the right to a jury trial, *Duncan v. Louisiana*, 391 U.S. 145 (1968), and even, by pleading guilty, the right to trial itself. *See Boykin v. Alabama*, 395 U.S. 238 (1969). We refuse to reach the anomalous result of forbidding waiver in a civil case of the personal right to an Article III judge.

725 F.2d at 543 (parallel citations omitted); *see also Dobey*, 751 F.2d at 1142 (same); *Collins*, 729 F.2d at 120 ("Supreme Court has held that important constitutional rights may be waived even in criminal cases, which generally raise more troubling due process problems").

compare this waiver to the relinquishment or alteration of a right as provided for by the Federal Rules of Civil Procedure.[44] As long as a party freely and voluntarily consents,[45] it is now firmly established that a magistrate can constitutionally exercise civil jurisdiction.[46]

III. Issue Preclusion

A recent, expanded use of issue preclusion can be largely attributed to the abrogation of the mutuality requirement. Traditionally, issue preclusion was available only when it was "mutual," that is, when the party invoking the preclusion was bound by the prior adjudication.[47] This requirement of mutuality arose out of an interest in

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44. The Third Circuit compared the waiver of an article III judicial officer under 28 U.S.C. § 636(c) to: (1) Federal Rule 38(d), which provides for both the automatic waiver of a jury trial unless affirmatively exercised, and the withdrawal of a jury trial if both parties consent; and (2) Federal Rule 39(c), which authorizes the district court to order a jury trial, provided that both parties consent, when it is not otherwise triable by right. *See Wharton-Thomas*, 721 F.2d at 926; *see also* FED. R. CIV. P. 48 (parties can stipulate that jury trial shall consist of less than twelve jurors).

45. The Magistrate Act of 1979 provides that the parties' consent must be voluntary, and requires that local rules contain provisions to protect the litigants from coerced consent. *See* 28 U.S.C. § 636(c)(2) (1982).

Rule 73 of the Federal Rules of Civil Procedure incorporates a "blind consent" provision to ensure that the litigants' consent is obtained on a voluntary basis. FED. R. CIV. P. 73(b). It provides that neither the district judge nor the magistrate shall "be informed of a party's response to the clerk's notification [of the option to consent], unless all parties have consented to the referral of the matter to a magistrate." *Id.* This procedure is intended to protect the nonconsenting party from any prejudice that might subsequently follow in the trial before the district judge. *See* Silberman, *supra* note 38, at 1359-60. *See generally* K. SINCLAIR, JR., PRACTICE BEFORE FEDERAL MAGISTRATES §§ 23.03 -.05 (1986) (describing consent procedures) [hereinafter PRACTICE BEFORE FEDERAL MAGISTRATES].

46. The more recent circuit courts of appeals decisions addressing the constitutionality of Section 636(c) simply agree with the earlier circuit decisions and the courts have refrained from discussing the issue at any length. *See K.M.C. Co.*, 757 F.2d at 755; *Gairola*, 753 F.2d at 1284-85; *D.L. Auld*, 753 F.2d at 1031-32.

47. Numerous early Supreme Court decisions required mutuality. *See, e.g.*, Triplett v. Lowell, 297 U.S. 638, 644-45 (1936), *overruled by* Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313 (1971); Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 127 (1912); Keokuk & W. R.R. v. Missouri, 152 U.S. 301, 317 (1894); Litchfield v. Goodnow's Adm'r, 123 U.S. 549, 552 (1887). Consequently, the prior and subsequent litigation had to involve the same parties or their privies.

Privity is used as the basis for imposing issue preclusion because it represents that "the relationship between the one who is a party on the record and another is close enough to include that other." Bruszewski v. United States, 181 F.2d 419, 423 (3d Cir.) (Goodrich, J., concurring), *cert. denied*, 340 U.S. 865 (1950); *see* 1B

fairness: since a stranger could not be bound by the prior adjudication,[48] it was thought to be somehow unfair to allow him to claim the benefits of a prior adjudication.[49]

After numerous commentators called for the demise of the mutuality rule,[50] Justice Traynor finally dispensed with it in *Bernhard v. Bank of America National Trust & Savings Ass'n*.[51] The *Bernhard*

J. MOORE, FEDERAL PRACTICE ¶ 0.411[1], at 392-96 (2d ed. 1984) (same) [hereinafter J. MOORE]; RESTATEMENT OF JUDGMENTS §§ 83-92 (1942) (describing situations in which privity exists).

48. The due process clause of the Fourteenth Amendment prohibits applying issue preclusion against a litigant who was neither a party nor a privy in the prior litigation because the litigant has not been afforded an opportunity to be heard. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 (1979); *Blonder-Tongue*, 402 U.S. at 329; Hansberry v. Lee, 311 U.S. 32, 40 (1940).

49. This alleged principle of unfairness has not found much support. *See e.g., Parklane*, 439 U.S. at 327 (mutuality based on premise that it was somehow unfair to allow otherwise); Comment, *Privity and Mutuality in the Doctine of Res Judicata*, 35 YALE L.J. 607, 608-09 (1926) (mutuality based on "some supposed and unprovable principle of 'natural' fairness") [hereinafter Comment, *Privity and Mutuality*].

50. For example, in 1843, Jeremy Bentham assailed the mutuality requirement:

> There is reason for saying that a man shall not lose his cause in consequence of the verdict given in a former proceeding to which he was not a party; but there is no reason whatever for saying that he shall not lose his cause in consequence of the verdict in the proceeding to which he was a party, merely because his adversary was not.

J. BENTHAM, *The Rationale of Judicial Evidence*, in 7 WORKS OF JEREMY BENTHAM 171 (Bowring ed. 1843). For further criticism of the mutuality rule, see Comment, *The Requirement of Mutuality in Estoppel by Judgments*, 29 ILL. L. REV. 93, 96 (1934); Recent Decisions, 27 VA. L. REV. 955, 956 (1941); Comment, *Privity and Mutuality*, *supra* note 49, at 610-11.

51. 19 Cal. 2d 807, 122 P.2d 892 (1942). In *Bernhard*, the first proceeding was determined by a probate court. *See id.*, 122 P.2d at 893. After objections and a hearing, the probate court declared that the decedent had made a gift during her lifetime to her executor. *See id.* at 807, 122 P.2d at 893. One of the objectors, Helen Bernhard, who was appointed administratrix after the executor resigned, instituted a second action against the bank, seeking to recover a deposit on the ground that the decedent had not authorized the executor to withdraw it. *See id.*

The trial court gave judgment in favor of the bank, allowing the bank to invoke the probate court's determination of the ownership of the money. *See id.*, at 808, 122 P.2d at 894. Although the bank would not have been bound had there been an unfavorable judgment in the first action, the California Supreme Court affirmed the use of issue preclusion (the court referred to it as res judicata). *See id.* at 808, 122 P.2d at 894. Justice Traynor observed that "[n]o satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as res judicata against a party who was bound by it is difficult to comprehend." *Id.* at 808, 122 P.2d at 895. The court held that three questions, which were all answered in the affirmative in *Bernhard*, were pertinent to determine the validity of a plea of issue preclusion:

> Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in

case involved the "defensive" use of issue preclusion—a new defendant estopped the plaintiff from relitigating an issue the plaintiff had previously litigated unsuccessfully in another action.[52] Courts have also allowed the "offensive" use of issue preclusion—a new plaintiff estops the defendant from relitigating an issue the defendant previously litigated unsuccessfully in a prior action.[53] To prevent any unfairness that may result when a nonparty is allowed to preclude a party from relitigating, two broad limitations have emerged: (1) nonmutual issue preclusion can be defeated if the first action did not provide a full and fair opportunity to litigate;[54] and (2) courts

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privity with a party to the prior adjudication?

Id. at 808, 122 P.2d at 895.

52. 19 Cal. 2d 807, 122 P.2d 892 (1942). The Supreme Court of the United States upheld the defensive use of issue preclusion twenty-five years later in Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313 (1971), thus overruling Triplett v. Lowell, 297 U.S. 638 (1936). Other cases have embraced the *Bernhard* doctrine. *See* Preston v. United States, 696 F.2d 528, 542-43 (7th Cir. 1982); Gill & Duffus Servs., Inc. v. Nural Islam, 675 F.2d 404, 407 (D.C. Cir. 1982); Lujan v. United States Dep't of the Interior, 673 F.2d 1165, 1168 (10th Cir.), *cert. denied*, 459 U.S. 969 (1982); Oldham v. Pritchett, 599 F.2d 274, 278-80 (8th Cir. 1979); Cramer v. General Tel. & Electronics Corp., 582 F.2d 259, 267-68 (3d Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979); Lowell v. Twin Disc, Inc., 527 F.2d 767, 771 (2d Cir. 1975); Federal Sav. & Loan Ins. Corp. v. Hogan, 476 F.2d 1182, 1187 (7th Cir. 1973); Bruszewski v. United States, 181 F.2d 419, 421 (3d Cir.), *cert. denied*, 340 U.S. 865 (1950).

53. *See* Speaker Sortation Sys. v. United States Postal Serv., 568 F.2d 46, 48-49 (7th Cir. 1978); Garcy Corp. v. Home Ins. Co., 496 F.2d 479, 483 (7th Cir.), *cert. denied*, 419 U.S. 843 (1974); Rachal v. Hill, 435 F.2d 59, 61-62 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971); Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Cas. Co., 411 F.2d 88, 94-95 (3d Cir. 1969); Zdanok v. Glidden Co., 327 F.2d 944, 953-56 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964); Lange v. Heglund, 391 F. Supp. 128, 129-30 (W.D. Wash. 1974); United States v. United Air Lines, 216 F. Supp. 709, 725-29 (E.D. Wash. 1962), *aff'd on this ground sub nom.* United Air Lines v. Wiener, 335 F.2d 379, 404 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964); B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 143-48, 225 N.E.2d 195, 196-99, 278 N.Y.S.2d 596, 597-602 (1967); Bahler v. Fletcher, 257 Or. 1, 474 P.2d 329 (1970).

54. *See, e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 332-33 (1979) (since petitioners "received a 'full and fair opportunity' to litigate their claims" in first suit, petitioners are precluded from relitigating same questions in second suit); Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 333 (1971) (potentially estopped party may attempt to demonstrate that he did not have " 'a fair opportunity procedurally, substantively and evidentially to pursue his claim' " (quoting Eisel v. Columbia Packing Co., 181 F. Supp. 298, 301 (D. Mass. 1960.))).

The abrogation of the mutuality requirement rests on the premise that it is untenable to afford a party more than one full and fair opportunity to relitigate the same issues. *See Blonder-Tongue*, 402 U.S. at 328-29 ("[p]ermitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out" represents misallocation of resources); *Bernhard*, 19 Cal. 2d at 808, 122 P.2d at 895 (it is "unjust to permit one who has had his day in court to reopen identical issues by merely switching adversaries").

possess broad discretion to deny nonmutual preclusion in order to protect against unfairness.[55]

Today, nonmutual issue preclusion presumptively applies unless the trial court finds that the application is unfair.[56] Courts have necessarily determined this matter on a case-by-case basis.[57]

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55. *See Parklane*, 439 U.S. at 331 (granting trial courts "broad discretion to determine when offensive issue preclusion should apply); *Blonder-Tongue*, 402 U.S. at 334 ("[i]n the end, decision will necessarily rest on the trial courts' sense of justice and equity").

The Supreme Court in *Parklane* offered some examples to the lower courts of when preclusion would be unfair. *See Parklane*, 439 U.S. at 330-31. The *Parklane* Court acknowledged that its source for these examples was the Restatement (Second) of Judgments. *See id.* at 330-31 nn.13-15. Section 29 of the Restatement (Second) of Judgments enumerates a list of circumstances that might justify affording a party an opportunity to relitigate:

> A party precluded from relitigating an issue with an opposing party . . . is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue. The circumstances to which considerations should be given include those enumerated in § 28 [exceptions to the general rule of preclusion in mutual situations] and also whether:
>
> (1) Treating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;
>
> (2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined;
>
> (3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;
>
> (4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;
>
> (5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding;
>
> (6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;
>
> (7) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based;
>
> (8) Other compelling circumstances make it appropriate that the party be permitted to relitigate the issue.

RESTATEMENT (SECOND), *supra* note 8, § 29. Comments to Section 29 indicate that the circumstances enumerated do not exhaust all possible circumstances that a court might consider, *see id.* § 29 comment j, nor are any of the circumstances dispositive on the issue of preclusion. *See id.* § 29 comment b.

56. *See* 1B J. MOORE, *supra* note 47, ¶ 0.441[3.-4], at 744.

57. *See, e.g.*, Montana v. United States, 440 U.S. 147, 162 (1979) ("sole remaining question is whether *the particular circumstances of this case* justify an

IV. Issue Preclusion and Magistrates

A question of preclusion may arise when a nonparty to the prior action seeks to estop a party from relitigating an issue that a magistrate has determined. The following hypotheticals illustrate this situation:[58]

> (1) *A* sues *B* for breach of contract. *A* and *B* properly consent to have a federal magistrate try the case, thereby waiving their rights to an article III judge. After both parties fully litigate, final judgment is entered for *B*. Subsequently, *A* sues *C* for inducing a breach of the contract that *A* made with *B*. The suit between *A* and *C* is before a district court judge. *C* seeks to estop *A* from relitigating the issue of whether there was a breach of contract by invoking defensive issue preclusion.
>
> (2) *K* and *L*, driver and passenger in a car, are hit by a car driven by *M*. *K* sues *M* for injuries arising from *M's* negligence. Both consent to have a magistrate try the case. Before the trial starts, *L*, who was unable to join the action between *K* and *M*, files suit in district court against *M* for injuries due to *M's* negligence. The suit before the magistrate goes to trial first and, after both parties fully litigate, the magistrate enters judgment for *K*. *L* then seeks to estop *M* from relitigating the factual issue of *M's* negligence by invoking offensive issue preclusion.

The trial court's final decision depends on the particular facts of each case.[59] Nevertheless, an analysis of the parties' waiver and of

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exception to general principles of estoppel") (emphasis added); *Parklane*, 439 U.S. at 332 ("none of the considerations that would justify a refusal to allow the use of offensive collateral estoppel is present *in this case*") (emphasis added); Western Oil & Gas Ass'n. v. United States Envtl. Protection Agency, 633 F.2d 803, 809-10 (9th Cir. 1980) ("*circumstances of each case* must provide the touchstone for decision") (emphasis added); Butler v. Stover Bros. Trucking Co., 546 F.2d 544, 551 (7th Cir. 1977) ("determination . . . depends upon a *case by case analysis*") (emphasis added); Miller v. Johns-Manville Sales Corp., 538 F. Supp. 631, 632-33 (D. Kan. 1982) (must examine "*particular facts of the case*") (emphasis added).

58. The fact patterns in the hypotheticals indicate that the cases are in federal court. Assuming that these are diversity cases, the trial court must apply the state rule on mutuality. *See* B.C.R. Transport Co. v. Fontaine, 727 F.2d 7, 11-12 (1st Cir. 1984); Watkins v. M. & M. Tank Lines, Inc., 694 F.2d 309, 311-12 (4th Cir. 1982); Ritchie v. Landau, 475 F.2d 151, 154 (2d Cir. 1973); Vestal, *Res Judicata/ Preclusion by Judgment: The Law Applied in Federal Courts*, 66 MICH. L. REV. 1723, 1728-33 (1968).

In Nevada v. United States, 463 U.S. 110 (1983), the Supreme Court noted that "mutuality has been for the most part abandoned" in cases involving issue preclusion. *Id.* at 143. This Note assumes that the applicable state law has abandoned the mutuality requirement.

59. *See supra* note 57 and accompanying text.

the benefits, if any, of issue preclusion in this situation should guide this determination.

A. Construing the Waiver

When a magistrate enters a final judgment and a nonparty seeks to estop a party from relitigating based on this final judgment, a trial court's inquiry should extend beyond whether the party had a full and fair opportunity to litigate in the first suit.[60] In order to apply issue preclusion, the district court in the later action should also scrutinize the consent form signed by the party common to both actions, *A* and *M* in the hypotheticals. The consent form should be scrutinized because it embodies the parties' *waiver* of their constitutional rights to an article III judge.[61] Courts carefully scrutinize waivers of constitutional rights in order to determine whether the waiving party intentionally relinquished a known right.[62] Consequently, the trial court should ascertain whether the common parties validly waived article III adjudication of all issues the magistrate decided, not only in the particular suit before the magistrate, but also in subsequent litigation.

The parties must execute the consent form before a magistrate can exercise his authority.[63] The federal form states, in pertinent part, that:

> In accordance with the provisions of [Section 636(c) of the Magistrate Act], the parties to the above-captioned civil matter hereby voluntarily waive their rights to proceed before a judge of the United States district court and consent to have a United States magistrate conduct any and all further proceedings in the case, including trial, and order the entry of a final judgment.[64]

The language of the form is clear and unequivocal as to the constitutional waiver in the first suit: the named parties waive their right to a district court judge for the proceedings in that case. This language, however, does not, on its face, amount to a waiver in future suits. The United States Supreme Court has required that "a waiver of constitutional rights in any context must, at the very *least*, be clear."[65] It is well established that a court must closely scrutinize

60. *See supra* note 54 and accompanying text.
61. *See infra* note 64 and accompanying text.
62. *See infra* notes 65-70 and accompanying text.
63. *See* FED. R. CIV. P. Form 34.
64. *Id.*
65. Fuentes v. Shevin, 407 U.S. 67, 95 (1972) (emphasis in original).

any waiver and indulge every reasonable presumption against it.[66] In order for the waiver to be effective, a party must voluntarily and knowingly waive a known right[67] with "sufficient awareness of the relevant circumstances and likely consequences."[68]

This high level of scrutiny is not confined to waivers of constitutional rights in the criminal context, but extends to waivers in the civil area as well.[69] Since the consent form apparently fails to warn litigants of the far-reaching consequences that may result when they relinquish their right to proceed before a district judge, the parties may not have voluntarily and knowingly waived their rights to an article III determination in future cases when they signed the consent form. Because of this possible lack of awareness, a magistrate's determination should not be the proper basis for issue preclusion.[70] On the other hand, the resulting benefits of preclusion[71] may favor altering the consent form so that it clearly indicates that the waiver extends to all issues litigated.

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66. *See, e.g.,* Brewer v. Williams, 430 U.S. 387, 404 (1977) (waiver of right to counsel); Bueno v. City of Donna, 714 F.2d 484, 492 (5th Cir. 1983) (waiver of right to notice and hearing); Piankhy v. Cuyler, 703 F.2d 728, 730 (3d Cir. 1983) (waiver of right to counsel); United States v. Margiotta, 662 F.2d 131, 143 (2d Cir. 1981) (waiver of privilege against self-incrimination), *cert. denied*, 461 U.S. 913 (1983).

67. Numerous Supreme Court decisions require that a waiver of constitutional rights be voluntary and knowing. *See, e.g.,* Brady v. United States, 397 U.S. 742, 748 (1970); McCarthy v. United States, 394 U.S. 459, 466 (1969); Miranda v. United States, 384 U.S. 436, 475 (1966).

68. Brady v. United States, 397 U.S. 742, 748 (1970).

69. *See* D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 187 (1972) (plaintiff "voluntarily, intelligently, and knowingly waived the rights it . . . possessed to prejudgment notice and hearing, and . . . it did so with full awareness of the legal consequences" when it entered into contractual agreement); Mosley v. St. Louis Southwestern Ry., 634 F.2d 942, 946 (5th Cir.) ("[w]hen considered against the background of plaintiffs' limited formal education, their lack of legal experience and the ambiguous circumstances under which the settlement agreements were signed, this denial [of access to counsel] operates to vitiate the settlement agreements"), *cert. denied*, 452 U.S. 906 (1981).

70. This conclusion stems from the fact that courts often scrutinize waivers to ensure that the waiving party is aware of the rights he has waived and of the legal consequences. *See* Fuentes v. Shevin, 407 U.S. 67 (1972) (contract provision giving seller right to repossession did not waive buyer's procedural due process rights partly because there was no proof that buyer was aware of purported waiver provision); *D. H. Overmyer*, 405 U.S. at 187 (plaintiff corporation waived its rights to pre-judgment notice and hearing "*with full awareness of the legal consequences*") (emphasis added); United States v. Oliver, 525 F.2d 731, 735-36 (8th Cir. 1975), *cert. denied*, 424 U.S. 973 (1976) ("[i]t is possible . . . that the mere taking of the [polygraph] examination is tantamount to a waiver of constitutional rights *if adequate warnings are givern*") (emphasis added).

71. *See infra* notes 72-86 and accompanying text.

B. The Benefits of Issue Preclusion

Courts justify issue preclusion on the ground that it: (1) conclusively resolves disputes; (2) conserves judicial resources; (3) protects the parties' adversaries from the expense and vexation of multiple litigation; and (4) minimizes the possibility of inconsistent decisions.[72] The trial court should ascertain whether applying issue preclusion to a magistrate's determination promotes these goals, and, if so, whether the federal consent form should be altered so that the parties are aware of the legal consequences of their consent to magistrate adjudication.

1. Conclusive Resolution of Disputes—Finality

There is a strong interest in bringing a controversy to an end in order to establish certainty in legal relations.[73] Even if the prior judgment is erroneous, both issue preclusion and claim preclusion are applied for the sake of repose.[74]

Letting *A* and *M* retry the same issues in the subsequent litigation will not alter the magistrate's determination of the first suit. Nevertheless, denying relitigation avoids subjecting the parties to inconsistent rulings. It also enables nonparties to order their future affairs with the outcome of the first suit in mind.[75]

2. Conservation of Judicial Resources

If a court denies issue preclusion, one unwanted consequence is that the trial judge will have to reconsider factual issues already decided by the magistrate. The Supreme Court's decision in *Parklane Hosiery Co. v. Shore*[76] manifests the strong public policy disfavoring this result. The Court refused to allow relitigation of factual issues that the petitioners had fully and fairly litigated in a prior proceeding,

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72. *See* Allen v. McCurry, 449 U.S. 90, 94 (1980); Montana v. United States, 440 U.S. 147, 153-54 (1979); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979).

73. *See* Nevada v. United States, 463 U.S. 110, 129 (1983); Montana v. United States, 440 U.S. 147, 153 (1979); Commissioner v. Sunnen, 333 U.S. 591, 597 (1948).

74. *See* Federated Dep't Stores v. Moitie, 452 U.S. 394, 398 (1981); Reed v. Allen, 286 U.S. 191, 199-201 (1932); Westwood Chem. Co. v. Kulick, 656 F.2d 1224, 1231 (6th Cir. 1981); Mitchell v. National Broadcasting Co., 553 F.2d 265, 272 (2d Cir. 1977).

75. *See* 18 WRIGHT, FEDERAL PRACTICE, *supra* note 8, § 4403, at 16-17 (establishing repose for nonparties allows them to "breathe freer [and] direct their future conduct according to the results of an adjudication between strangers").

76. 439 U.S. 322 (1979).

despite the petitioners' objection that use of issue preclusion violated their seventh amendment right to a jury trial.[77] The petitioners were not entitled to a jury trial in the first suit because it was an equitable injunctive action. In the subsequent legal action, however, the petitioners had an opportunity to have the facts determined by a jury. Nevertheless, the Court foreclosed the relitigation of factual issues that had already been resolved.[78] The Court reasoned that there was "no further factfinding function for the jury to perform" since the previous action had resolved common factual issues.[79]

If the trial court's factfinding function is not similarly limited after a magistrate determines factual issues, disappointed litigants such as *A* and *M* will seek retrial, hoping for a favorable judgment on their second day in court. If critics of the Magistrate Act are correct in their assertions that a magistrate may reach a result that he thinks will please the district court because of the district court's control,[80] the result reached in the second action may in fact be no different than that obtained in the first. In any event, courts have found that it is untenable to permit relitigation when parties have already had a full opportunity in the prior suit.[81] To hold otherwise would frustrate the policies furthered by the use of issue preclusion.

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77. *See id.* at 333-37. Petitoners' argument was based on the fact that the seventh amendment is intended to preserve the right to jury trial as it existed in 1791. *See id.* at 335. Reference to the common law as it existed in 1791 indicates that mutuality was required as a condition of issue preclusion. Consequently, the petitioners contended that the use of issue preclusion unconstitutionally violated their seventh amendment right to a jury trial since mutuality was absent. *See id.* at 335. The Court, not persuaded by petitioners' argument, found that "many procedural devices developed since 1791 . . . have diminshed the civil jury's historic domain" yet are not inconsistent with the seventh amendment. *Id.* at 336. The seventh amendment was intended "to preserve the basic institution of jury trial in only its most fundamental elements." *Id.* at 337 (quoting Galloway v. United States, 319 U.S. 372, 392 (1943)). Therefore, the Court noted, the law of issue preclusion, which has evolved since 1791, does not violate the seventh amendment simply for the reason that developments in issue preclusion, such as the absence of mutuality, did not exist in 1791. *See id.*

78. *See id.* at 335-36.

79. *See id.* at 336.

80. *See* Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1053 (7th Cir. 1984) (Posner, J., dissenting) (magistrates are beholden to judges); Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 552-53 (9th Cir.) (Schroeder, J., dissenting) (control by district judge prevents, rather than preserves, independent decision making), *cert. denied*, 469 U.S. 824 (1984); Note, *Article III Constraints*, *supra* note 6, at 1056-57 (magistrates "may be encouraged to adopt a risk-averse strategy of adjudication by the pressure of judicial scrutiny"); *cf.* Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 713 ("heart of judicial independence . . . is judicial individualism").

81. *See, e.g.*, Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313 (1971).

Nevertheless, the application of issue preclusion may also produce undesirable results. For example, litigants may refrain from relinquishing their right to an article III judge if they can be barred from reasserting it on the same issues in future suits. If parties are aware of the far-reaching consequences of the magistrate's decision once issue preclusion applies, they may choose to litigate the first suit more thoroughly. As a result, the magistrate system may be beseiged with cautious if not overzealous litigants, thereby losing some of the efficiency that it was developed to offer.[82]

3. *Protection Against Multiple Lawsuits*

The party benefiting from the use of nonmutual issue preclusion is the one who has not yet litigated, and therefore generally does not need protection from the expense and vexation of multiple lawsuits.[83] Nevertheless, both parties and courts may be spared the harassment of having to litigate an issue that has already been determined. If, for example, *A* in hypothetical (1) was denied the opportunity to relitigate, there would be a significant conservation of resources because little remains of the second claim. Nevertheless, if the subsequent litigation involves different issues, in which case the parties will still gain access to an article III judge, or if background information and necessary facts of the first suit must be presented in the second suit, savings may be no more than minimal.[84]

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82. *Cf.* Perschbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings*, 35 U. FLA. L. REV. 422, 449 (1983) (increasing use of issue preclusion will likely result in investment of additional time and expenses in first suit, consequently negating efficiency of administrative decisionmaking) [hereinafter Perschbacher]; Note, *Mutuality of Estoppel and the Seventh Amendment: The Effect of* Parklane Hoisery, 64 CORNELL L. REV. 1002, 1017-18 (1979) (same).

83. *See* Perschbacher, *supra* note 82, at 447.

84. Some courts have refused to apply nonmutual preclusion when it does not significantly conserve the resources of the litigants or the court. *See, e.g.*, Miller v. Johns-Manville Sales Corp., 538 F. Supp. 631, 634 (D. Kan. 1982) (preclusion denied when plaintiff had to present same evidence in second case as was offered in first trial in order to educate jury); Hawaiian Paradise Park Corp. v. Becker, 314 F. Supp. 1133, 1134 (D.D.C. 1970) (basic reason for applying issue preclusion, to prevent relitigation, is absent because second case must be tried on closely related issues and much of same evidence must be presented to jury); *see also* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 355 & n.24 (Rehnquist, J., dissenting) ("ultimate irony" of majority's decision permitting preclusion is that amount of savings is doubtful at best because jury must still be impaneled, which causes much of the delay, to determine amount of damages).

4. Prevention of Inconsistent Decisions

If different results are reached when a matter is twice litigated, disrespect for the legal system may follow.[85] The confidence of the district court, the legal profession, and the parties is essential if a magistrate system is to succeed under a consensual framework.[86] Any embarassment due to inconsistent decisions must be minimized if a magistrate's effectiveness is to be maximized. A conflicting decision will otherwise undermine the social importance of trust in the magistrate, and frustrate reliance on a magistrate's dispute resolution if unhappy parties can relitigate issues already determined.

V. Recommendations

Decisions made by administrative agencies have often been the basis of issue preclusion.[87] Since the same principles of judicial efficiency that support applying issue preclusion to judicial determinations also justify applying it to quasi-judicial proceedings,[88] this expansion of issue preclusion occurs when the administrative forum provides litigants with the essential procedural characteristics of a court.[89] The Supreme Court stated in *United States v. Utah Construction & Mining Co.* that "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact

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85. *See* 18 WRIGHT, FEDERAL PRACTICE, *supra* note 8, § 4403, at 12-13.

86. *See* H.R. CONF. REP. No. 444, 96th Cong., 1st Sess. 8, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 1487, 1489.

87. *See* Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982) (decision of New York State Division of Human Rights was given preclusive effect); CIBA Corp. v. Weinberger, 412 U.S. 640, 644 (1973) (decision of Food and Drug Administration); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 402-04 (1940) (decision of National Bituminous Coal Commission); Long v. United States Dep't of Air Force, 751 F.2d 339, 343-44 (10th Cir. 1984) (decision by presiding official of the Merit Systems Protection Board); Korach v. Chicago Mercantile Exch., 747 F.2d 414, 416 (7th Cir. 1984) (decision of Commodity Futures Trading Commission); Anthan v. Professional Air Traffic Controllers Org., 672 F.2d 706, 709-10 (8th Cir. 1982) (decision by administrative law judge of United States Department of Labor); Bowen v. United States, 570 F.2d 1311, 1320-23 (7th Cir. 1978) (decision of National Transportation Safety Board); Roberts v. American Airlines, 526 F.2d 757, 760 (7th Cir.) (decision of Civil Aeronautics Board), *cert. denied*, 425 U.S. 951 (1975).

88. *See* RESTATEMENT (SECOND), *supra* note 8, § 83 comment b ("public economy and private repose resulting from the rule of issue preclusion generally are . . . as important when an issue has been determined in an administrative tribunal as when it has been determined by a court").

89. *See id.*; *see also* 18 WRIGHT, FEDERAL PRACTICE, *supra* note 8, § 4475, at 764-65 ("administrative decision commands preclusive effect only if it resulted from a procedure that seems an adequate substitute for judicial procedure").

properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose."[90]

Issue preclusion has also been extended to arbitration awards when the arbitration "affords opportunity for presentation of evidence and argument substantially similar in form and scope to judicial proceedings."[91] The institutional differences between courts and arbitrators, however, have led courts to apply issue preclusion cautiously in an arbitration context.[92]

In light of the standards used by the courts in according preclusive effect to these actions, it can be strongly urged that issue preclusion should also apply to a magistrate's determination. The parties' consent to have a magistrate preside over the trial does not waive the jurisdiction of the district court.[93] Instead, the parties are choosing one judicial officer within the district court over another.[94] As a result, the same rules and statutes that bind proceedings in a district court govern the civil trial before a magistrate.[95] Moreover, magistrates presiding over consensual civil trials are vested with all of the judicial power of an article III judge except the power to punish for contempt of court.[96] Consequently, the similarities between both

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90. 384 U.S. 394, 422 (1966).

91. RESTATEMENT (SECOND), *supra* note 8, § 84 comment c. For court decisions giving preclusive effect to arbitration awards, see Ritchie v. Landau, 475 F.2d 151 (2d Cir. 1973); Kamakazi Music Corp. v. Robbins Music Corp., 534 F. Supp. 69 (S.D.N.Y. 1982); Barnes v. Oody, 514 F. Supp. 23 (E.D. Tenn. 1981); Eagle Transport Ltd. v. O'Connor, 470 F. Supp. 731 (S.D.N.Y. 1979).

92. *See* 18 WRIGHT, FEDERAL PRACTICE, *supra* note 8, § 4475; *see also* Vestal, *supra* note 8, at 881 ("only in a very limited situation is preclusiveness to be accorded to an issue decided by an arbitrator's award").

93. *See* Wharton-Thomas v. United States, 721 F.2d 922, 926 (3d Cir. 1983).

94. *See id.*; PRACTICE BEFORE FEDERAL MAGISTRATES, *supra* note 45, § 2.01 ("magistrate is a subordinate judicial officer of the district court").

95. PRACTICE BEFORE FEDERAL MAGISTRATES, *supra* note 45, § 2.01 (Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, and Federal Rules of Evidence are applicable to proceedings before both magistrates and judges).

96. In Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037 (7th Cir. 1984), the majority of the court stated:

> The vesting of this power [to punish for contempt of court] exclusively in the hands of Article III judicial officers would seem . . . to provide an adequate distinction between such judges and non-Article III officers. This clear line [of demarcation between the power of an Article III officer and a magistrate] also serves to limit the ultimate exercise of judicial power to persons enjoying the constitutional guarantee of independence.

Id. at 1044. Judge Posner, not persuaded by the majority's emphasis on the reservation of this power for article III judges, characterized in a dissenting opinion the contempt power "about as crucial as the [federal judge's] robe." *Id.* at 1049 (Posner, J., dissenting).

adjudication procedures and powers of a magistrate and a judge indicate that preclusion would be proper.

Failure to permit issue preclusion after a magistrate has made a final factual determination unreasonably affords litigants the opportunity of getting a second opinion on issues already fully litigated. This result would have the effect of rendering magistrates less useful to district courts than they were intended to be, since a district court judge will have to retry issues that have already been conclusively determined by a magistrate.[97] Correlatively, opening the door to possible inconsistent decisions would undermine the public esteem needed if the magistrate system is to succeed.[98]

Even if the objective requirements for the application of issue preclusion have been satisfied, however, lower courts still have broad discretion to deny preclusion in order to prevent any unfairness.[99] Unfairness in these cases exists unless parties are explicitly told of all the consequences of their consent. Otherwise, the parties' waiver of their rights to an article III judge extends further than is embodied in the federal consent form. The strong public policy compelling the fair application of nonmutual issue preclusion[100] juxtaposed with the courts' rigid requirement of a voluntary and intelligent waiver of constitutional rights[101] seems to outweigh any benefits from the use of issue preclusion.

The consent form should not be a trap for the unwary. Instead, it should adequately notify parties that they may be barred from having issues redetermined by an article III judge once a magistrate decides the issues. If the language of the consent form clearly indicates that the parties are waiving article III adjudication of all issues raised, even if the issues arise in subsequent suits, then allowing preclusion would comport with public policy surrounding waivers. In addition, an overworked district judge will not have to retry issues that a factfinder has already determined. Finally, this proposal will enable courts to continue the current practice of applying issue preclusion when it is appropriate.

VI. Conclusion

The use of federal magistrates in a consensual civil trial has been greeted with overwhelming approval. Concurrently, the requirement

97. *See supra* notes 76-81 and accompanying text.
98. *See supra* notes 85-86 and accompanying text.
99. *See supra* note 55 and accompanying text.
100. *See supra* notes 54-57 and accompanying text.
101. *See supra* notes 65-70 and accompanying text.

of mutuality as a precondition for the use of issue preclusion has largely been abandoned. Consequently, a nonparty in a subsequent action may wish to invoke a magistrate's factual determination in order to estop a party from relitigating identical issues before an article III judge. Permitting issue preclusion can occur only if the waiver of a constitutional right is interpreted broadly. Rather than having to resort to a broad interpretation, which may not be justified, the federal consent form encompassing the waiver should be altered so that parties are aware of the exact ramifications of their consent. In this way, reliance on a magistrate's dispute resolution can be sustained, and even strengthened.

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