

Res Judicata & Access to Justice

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Motivation

I was asked to discuss:

“Inequalities that arise in access to justice and in legal proceedings and what economic design approaches could be used to alleviate them ..”

in Mechanism/Market Design Theory ..

- Designer usually imposes “individual rationality” (IR) or participation constraints that ensure a certain minimal level of utility for each participant ..
- So, inequality in “access to justice” is not usually perceived as a problem in the theoretical literature ..

In Practice ..

- Inequality in access to justice usually refers to inequality across different demographic groups (gender, ethnicity, age, etc.)
- For example, a **small claims court** facilitates access by allowing disputants to represent themselves, simplified rules of procedure and evidence, lower court fees, etc.

Consistency and Res Judicata

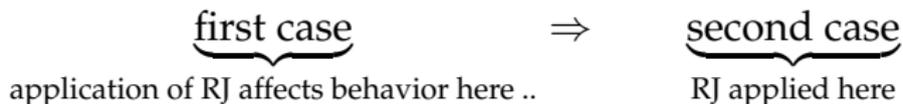
- One of the major themes in substantive law is **consistency**.
- Consistency is necessary to ensure that the law is just and efficient.
- However, the structure of litigation allows for separate trials, and hence risks inconsistent application of substantive law.
- The major procedural mechanism that addresses the concern of inconsistency is **res judicata**.
- We examine when res judicata is indeed necessary to maintain consistent application of the law.

Res Judicata / Estoppel

- The thing, or matter, adjudged /
- A bar or impediment (obstruction) which precludes a person from asserting a fact or a right or prevents one from denying a fact.

Res Judicata / Estoppel

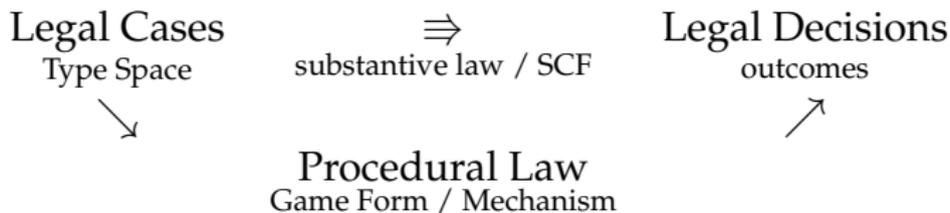
“Specifies the effect that any adjudication has on all subsequent litigation.”
(Casad & Clermont, 2001)



Claim Preclusion. “A party generally may not relitigate a claim decided therein by a valid and final judgement. The judgement extinguishes the whole claim, precluding all matters within the claim that *were or could have been litigated* in that initial action.” (C&C)

Issue Preclusion. “A party generally may not relitigate any issue of fact or law actually litigated and determined therein *if the determination was essential to a valid and final judgement.*” (C&C)

Procedural vs. Substantive Law



Stanley Reiter Diagram / Triangle

Ex Ante vs Ex Post

Ex Ante, preclusion induces the plaintiff to expand its claim as much as possible ..

Ex Post, preclusion is used by the court to reduce its workload and prevent inconsistency by importing prior decisions ..

Res judicata law is not always clear \Rightarrow effect on **Inequality**

Benefits

Factors favoring preclusion:

$$E_w + E_i + E_r + F_{er} + F_{ie} + F_{rs} + \sum S_p = P$$

E_w – efficiency of avoiding wasteful litigation;

E_i – efficiency of avoiding possibly inconsistent adjudication;

E_r – efficiency of avoiding any decrease in the certainty and stability of *repose*;

F_{er} – for “invoker,” eliminates burden of conducting new litigation;

F_{ie} – for “invokee,” eliminates profiting from abusively repetitive litigation tactics;

F_{rs} – furtherance of reliance interests and similar treatment;

$\sum S_p$ – relevant substance specific goals (e.g., establishing market conditions in cases of title to land).

Costs

Factors favoring nonpreclusion:

$$F_{ee} + F_{ir} + F_{mt} + E_a + E_o + E_t + \sum S_n = N$$

F_{ee} – unfairness of forfeiting a fresh look at the matter;

F_{ir} – invoker's misbehavior in putting the opponent in a res judicata bind;

F_{mt} – fair-outcome value of deciding on merits rather than on technicalities;

E_a – costs of administering res judicata doctrine;

E_o – costs of stimulating overlitigation in the initial action;

E_t – error costs of not seeking truth trying to correct initial mistake;

$\sum S_n$ – relevant substance specific goals (e.g., when fiduciary-attorney wields res judicata against a beneficiary-client).

Remarks

Efficiency: preclude IFF $P > S$.

“Admittedly, although pretty simple and comprehensible, this formulaic schema looks a little silly” (C&C, 2001)

Complexity: *res judicata* rules are complicated and are subject to many exceptions. Many mistakes are made in their interpretation by litigants and application by courts.

Unfairness vs. Inequality: *Res judicata* may be unfair. Its complexity implies that high quality legal representation is crucial. Hence, the potential for inequality.

Research Question

- The simplest application of res judicata is to bar repetitive litigation of the same issue (**double jeopardy**).
- The question is what to do when different issues arise.
 - ▶ What issues should be precluded by a former decision on an issue ?
 - ▶ **Claim Preclusion**: a decision on one issue bars decisions on other “related” issues.
 - ▶ **Issue Preclusion**: a decision on one issue bars decisions on the same issue in totally different claims/contexts.

Model / Example

- For simplicity, suppose that there are two cases, and two possible decisions in each case $d \in \{Y, N\}$.
- We compare application of res judicata to treating the two cases independently of each other.
- When faced with two possible decisions, a court chooses the correct one with probability $p \geq \frac{1}{2}$.

Two Notions of Relatedness (determined by substantive law)

1. The correct decision in the two cases is **stochastically correlated**

$d_1 \backslash d_2$	Y	N	
Y	p_1	p_2	and $\frac{p_1}{p_3} \neq \frac{p_2}{p_4}$.
N	p_3	p_4	

2. The social welfare from the two cases is **not separable**

$$W(d_1, d_2; \theta_1, \theta_2) \neq W_1(d_1; \theta_1) + W_2(d_2; \theta_2)$$

or

$$W(x_1, x_2, x_3) \neq W_1(x_1) + W_2(x_2)$$

where $x_1, x_2 \in \{\text{correct}, \text{not}\}$ if $d_i =, \neq \theta_i$, and $x_3 \in \{\text{coherent}, \text{not}\}$, respectively [to illustrate, suppose $p_2 = 0$].

Perfect Correlation + Separable

Perfect correlation

$d_1 \backslash d_2$	Y	N
Y	$\frac{1}{2}$	0
N	0	$\frac{1}{2}$

Res judicata implies that $Y \rightarrow Y$ and $N \rightarrow N$.

Separable

$$W(d_1, d_2; \theta_1, \theta_2) = W'(d_1; \theta_1) + W'(d_2; \theta_2)$$

where

$$W'(d_i; \theta_i) = \frac{1}{2} \quad \text{if } d_i = \theta_i \text{ and } 0 \text{ otherwise.}$$

Applying res Judicata:

$$Welfare = \frac{1}{2} \cdot p \left(\frac{1}{2} + \frac{1}{2} \right) + \frac{1}{2} \cdot p \left(\frac{1}{2} + \frac{1}{2} \right) = p$$

Deciding independently:

$$Welfare = 2 \cdot \left[\frac{1}{2} \cdot p \cdot \frac{1}{2} + \frac{1}{2} \cdot p \cdot \frac{1}{2} \right] = p$$

Perfect Correlation + Not Separable

Perfect correlation

$d_1 \backslash d_2$	Y	N
Y	$\frac{1}{2}$	0
N	0	$\frac{1}{2}$

Not Separable

$W(d_1, d_2; \theta_1, \theta_2) = 1$ if $(d_1, d_2) = (\theta_1, \theta_2)$ and 0 otherwise.

Applying res Judicata:

$$Welfare = \frac{1}{2} \cdot p \cdot 1 + \frac{1}{2} \cdot p \cdot 1 = p$$

Deciding independently:

$$Welfare = \frac{1}{2} \cdot p^2 \cdot 1 + \frac{1}{2} \cdot p^2 \cdot 1 = p^2.$$

Stochastic Independence + Not Separable

Stochastic independence

$d_1 \backslash d_2$	Y	N
Y	$\frac{1}{4}$	$\frac{1}{4}$
N	$\frac{1}{4}$	$\frac{1}{4}$

Not Separable

$W(d_1, d_2; \theta_1, \theta_2) = 1$ if $(d_1, d_2) = (\theta_1, \theta_2)$ and 0 otherwise.

Applying res Judicata:

$$Welfare = \frac{1}{2} \cdot p \left(\frac{1}{2} \cdot p + \frac{1}{2} \cdot p \right) + \frac{1}{2} \cdot p \left(\frac{1}{2} \cdot p + \frac{1}{2} \cdot p \right) = p^2$$

Deciding independently:

$$Welfare = 4 \cdot \frac{1}{4} \cdot p^2 = p^2.$$

Conclusions

Conclusion 1. Both notions of relatedness are necessary to justify res judicata. Neither is sufficient on its own.

Conclusion 2. In the case of perfect correlation, res judicata dominates independent adjudication if social welfare is non-separable and satisfies “increasing differences.”

Increasing Differences.

$$W(c, c) - W(n, c) > W(c, n) - W(n, n).$$

Perfect Correlation + Not Separable

Perfect correlation

$d_1 \backslash d_2$	Y	N
Y	$\frac{1}{2}$	0
N	0	$\frac{1}{2}$

Non-separable: $W(c, c) = 1$, $W(c, n) = a$, $W(n, c) = b$, $W(n, n) = 0$.

Applying res Judicata: $Welfare = \frac{1}{2} \cdot p + \frac{1}{2} \cdot p = p$

Deciding independently:

$$Welfare = 2 \cdot \frac{1}{2} \cdot [p^2 + ap(1-p) + b(1-p)p].$$

- Under perfect correlation, applying res judicata **dominates** deciding independently IFF $a + b < 1$ IFF increasing differences.

Conclusions

- Increasing differences captures idea that “full justice” is super-additive or that violating the legal rule (coherence) is costly.
- Decreasing differences captures idea that justice has decreasing marginal social utility.
- Generally,
 - ▶ applying res judicata implies that coherence is maintained so that when the court makes an error it is a large one;
 - ▶ not imposing res judicata implies that coherence may be violated, but that errors are smaller.
- Hence the importance of the relative cost of small vs. large mistakes.

Future Work

- Extend the model to allow the plaintiff to be strategic about whether to litigate both claims together or one after the other, and if the latter about the order of claims, possibly under asymmetric information.
 - ▶ Notice that this requires description of the relationship between the litigants' payoffs and social welfare.