

REFLECTIONS ON THE SUBSTANCE OF FINALITY

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As Professor Burbank says, there is a good case for the proposition that the Enabling Act¹ does not embrace the subject of res judicata. From this proposition he concludes that the subject of res judicata must be embraced by the Rules of Decision Act,² except of course to the extent that in specific contexts the matter of res judicata may be embraced by federal statute.³ Aside from such exceptions, so Professor Burbank's argument goes, since the Rules of Decision Act calls generally for state law "rules of decision," it follows that state law governs the res judicata effect of a federal judgment in an action wherein a federal court has adjudicated rights based on state law.

There is something very substantial to the argument, as there is to all of Professor Burbank's work on this complex subject.⁴ Yet it seems to me his argument proves both too much and too little. It proves too much because, if the Rules of Decision Act determines the res judicata effect of a federal judgment adjudicating state-law based claims, why does it not also determine the res judicata effect of a federal judgment adjudicating federal-law based claims? I am not here arguing that state law has this effect by reason of the full faith and credit statute.⁵ It is common ground that the full faith and credit statute concerns state court judgments, not judgments of federal courts.⁶ And of course it is correct that because the full faith and credit statute is inoperative on federal judgments, it does not follow that the Rules of Decision Act is also inoperative on them. So far so good.

But Professor Burbank then argues that the Rules of Decision

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¹ 28 U.S.C. § 2072 (1982).

² 28 U.S.C. § 1652 (1982).

³ See, e.g., *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 55-59 (1974) (affording preclusive effect to arbitration would be inconsistent with congressional intent for title VII enforcement).

⁴ See Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

⁵ 28 U.S.C. § 1738 (1982).

⁶ See also Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741 (1976).

Act *does* govern federal judgments, because other possibilities have been foreclosed. The Rules of Decision Act therefore operates as a residuary clause. But for some reason, which I could not find in his argument, state law governs federal judgments only part way. It governs them only when they adjudicate state-law based claims. However, there is nothing in the Rules of Decision Act stating or implying any such limitation. Its language is comprehensive: "The laws of the several states, except where [federal law shall] otherwise require . . . shall be regarded as rules of decision . . ." ⁷ Why does this mandate not apply in cases involving adjudication of federal-law based claims? I can think of policy reasons for such a conclusion, and so evidently can Professor Burbank. There are also policy reasons for holding that the Rules of Decision Act is wholly inapplicable to federal judgments, whatever the subject of adjudication.

However, first let us consider the underreach of Professor Burbank's position. His argument proves too little because there are sources of federal law besides the Rules of Decision Act and the full faith and credit statute, and the Enabling Act for that matter. If these sources have effect, the Rules of Decision Act does not come into effect. These include other federal statutes, which could speak to the matter of *res judicata*. I am aware of only one federal statute that expressly deals with *res judicata*, the well-known provision concerning issue preclusion in the Clayton Act.⁸ All other federal preemptions of *res judicata* have been created by the courts on the premise that a mandate to that effect is to be found in some specific substantive federal statute.⁹ But there is of course another general source—the Constitution and the statutes creating the federal courts. To be sure, those texts do not expressly deal with the *res judicata* effect of federal judgments. The Constitution in particular does not even mention federal judgments; it merely authorizes, among other things, the creation of courts to administer justice and provides that federal law should be supreme in its sphere.

I do not see that Professor Burbank has negated the possibility that these constitutional provisions, as implemented in the statutes creating the federal courts, impliedly preempt the issue of the *res judicata* effect of federal court judgments. More particularly, if in a specific substantive context the *res judicata* effect of a federal judgment can be impliedly preempted by a federal substantive statute—which Professor Burbank affirms—why cannot that matter impliedly and generally be preempted by the constitutional and

⁷ 28 U.S.C. § 1652 (1982).

⁸ 15 U.S.C. § 16 (1982).

⁹ See *supra* text accompanying note 3.

statutory provisions that create the instruments of government from which those judgments emanate?

As a matter of logic, of course, the plausibility of the one implication is essentially the same as the other. The law—the courts, anyone versed in legal technique—*can* find an implied affirmation or exception in any legal text. The question is whether such an implication ought to be found. The inspiration for finding such an implication springs from basic conceptions and interpretations of the matter at hand—here, the nature of the federal courts. For his basic conception and source of inspiration for his thesis about the Rules of Decision Act, Professor Burbank looks to the *Erie* doctrine. More exactly, he looks to *Guaranty Trust Co. v. York*,¹⁰ and the Frankfurter thesis that “a federal court adjudicating a State-created right . . . is . . . only another court of the State”¹¹

Of course, one can start with this premise in reading the Rules of Decision Act. And if one does start that way, the conclusion is invited and perhaps compelled that a federal judgment adjudicating state-law based claims has only the effect of a state court judgment. However, at the level of generality of the Frankfurter dictum in *Guaranty Trust Co. v. York*, we also have available Justice Brennan’s counterpart statement in *Byrd v. Blue Ridge Rural Electric Cooperative*¹² that “[t]he federal system is an independent system for administering justice”¹³ There are other statements to this same effect.¹⁴

Taking as a major premise the proposition that the federal courts are an “independent system for administering justice,” the following line of analysis is invited if not compelled:

1) The federal courts, being an independent system of administering justice, are fully competent as such by reason of their creation.

2) The essence of adjudication is finality after a hearing conducted by fair procedure. Federal law determines what is fair procedure in federal courts and correlatively ought to define what is final. Federal law may for convenience or policy incorporate state law in specifying fairness and finality, but it does so expressly and not by implication or compulsion.

3) Congress has never comprehensively regulated how the federal courts should administer justice. It dealt with the main ele-

¹⁰ 326 U.S. 99 (1945).

¹¹ 326 U.S. at 108.

¹² 356 U.S. 525 (1958).

¹³ 356 U.S. at 537.

¹⁴ See, e.g., *Herron v. Southern Pac. Co.*, 283 U.S. 91, 94 (1931) (“The function of the trial judge in a federal court is not in any sense a local matter”).

ments of fairness in the Judiciary Act of 1789¹⁵ and its sequelae, including the Enabling Act of 1934. In section 34 of the Judiciary Act,¹⁶ Congress dealt with the substantive law to be applied in federal courts, but it left equity and admiralty in general and a host of procedural particulars to resolution by decisional law of the federal courts. Congress spoke to the *res judicata* effects of state court judgments in the full faith and credit statute; under the principle of *expressio unius*, that left the matter of federal judgments as one of those matters to be resolved by federal decisional law.

This line of analysis is surely a supportable implication of the proposition that the federal courts are an "independent system for administering justice." It does no violence to the text of the Rules of Decision Act, and indeed accords a meaning to that statute that its historical and technical context imply. At least this suggested analysis, given its premise, is as supportable as Professor Burbank's thesis, given the premise he has adopted.

So the question probably is one of major premise. Should we look at a federal court in its adjudication of state-law claims as "only another court of the state," or as part of an "independent system of administering justice"? I submit that Justice Frankfurter's thesis in *Guaranty Trust Co. v. York* is simply an improper premise and that it is long since time to recognize that fact. *Guaranty* was not compelled by *Erie*, or even suggested by it.¹⁷ *Guaranty* was inconsistent with *Sibbach v. Wilson Co.*¹⁸ *Guaranty* invited the shameful evasion of a federal statute in *Bernhardt v. Polygraphic Co. of America.*¹⁹ It invited the shameful distortions of a Federal Rule of Civil Procedure in *Palmer v. Hoffman*²⁰ and *Ragan v. Merchants Transfer & Warehouse Co.*²¹ It invited the casuistry of *Cohen v. Beneficial Industrial Loan Corp.*²² It led to the anomaly footnoted by the Supreme Court in *Walker v. Armco*

¹⁵ Ch. 20, 1 Stat. 73 (1789).

¹⁶ Ch. 20, 1 Stat. 73, 92 (current version codified at 28 U.S.C. § 1652 (1982) (Rules of Decision Act)).

¹⁷ In *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), Justice Brandeis referred to the discriminatory effect of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), but unmistakably defined that effect in substantive terms: "[*Swift v. Tyson*] made *rights* enjoyed under the unwritten 'general law' vary according to whether *enforcement* was sought in the state or in the federal court . . ." 304 U.S. at 74-75 (emphasis added).

¹⁸ 312 U.S. 1 (1940).

¹⁹ 350 U.S. 198, 204-05 (1956) (federal arbitration act does not apply to arbitration agreement in diversity case if arbitration could not be compelled in state court).

²⁰ 318 U.S. 109, 117 (1943) (rule 8(a) does not establish contributory negligence as affirmative defense; it is merely pleading rule).

²¹ 337 U.S. 530, 532-33 (1949) (rule 3, regarding when an action is commenced in federal court, not relevant to determining whether state statute of limitations tolled).

²² 337 U.S. 541, 555-57 (1949) (state statute requiring security for shareholder's derivative action applies in diversity case).

Steel Corp.,²³ that the terms of a Federal Rule of Civil Procedure have one consequence when the claim being adjudicated is based on state law and a diametrically opposite consequence when it is based on federal law.²⁴ And it carried the Supreme Court in *Byrd v. Blue Ridge* to the brink of adopting the absurdity that a constitutionally prescribed rule of procedure, the seventh amendment guaranty of jury trial, is unconstitutional because it makes an "outcome" difference.

Directly to the distinction that Professor Burbank wishes to establish, why is it that when a federal court adjudicates a federally-created right, it is a legally autonomous tribunal but not when it adjudicates something else? The problem is not limited to that involved in adjudication of local state law. Thus, what exactly is a federal court doing when it adjudicates a right based on the law of a state other than that in which the federal court sits? What, exactly, is a federal court doing when it adjudicates a right based on the law of a foreign nation, or international law? Is it in these cases "simply another court of the state"?²⁵ What is a federal court adjudicating when a case before it involves federal legal limitations on the administration of justice under state law, as in the federal habeas corpus that Professor Resnik addresses in this symposium?

In today's world, we may not think diversity jurisdiction a fit subject for the federal courts. It has often been suggested that the *Guaranty* line is a product of hostility to diversity jurisdiction. But if diversity jurisdiction is not a fit subject for the federal courts, that is for Congress to decide. And supposing that diversity is not a fit subject for federal courts, it is surely a perverse reason for trying to assimilate federal courts to their state counterparts when they do adjudicate diversity matters. Finally, what would the Founders have thought, who created diversity in the Constitution, fought for it in *The Federalist*,²⁶ and uniquely implemented it in the Judiciary Act of 1789?²⁷ That the idea was to create pro hac vice "simply another court of the state"?

Trying to assimilate the federal courts to state courts is in any case impossible and therefore quixotic, even if we look at it in terms

²³ 446 U.S. 740 (1980).

²⁴ 446 U.S. at 751 n.11 ("We do not here address the role of Rule 3 as a tolling provision . . . if the cause of action is based on federal law.").

²⁵ A state court is not "simply another court of the state" when it adjudicates a multistate or international case. It is subject to important extrinsic legal controls on its jurisdiction and substantive bases of jurisdiction. See, e.g., *Rush v. Savchuk*, 444 U.S. 320 (1980) (state may not constitutionally exercise quasi in rem jurisdiction over defendant with no forum contacts by attaching insurer's contractual obligation to defendant); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 104 S. Ct. 1868 (1984); E. SCOLES & P. HAY, *CONFLICT OF LAWS* § 3.20-.35 (1984).

²⁶ See *THE FEDERALIST* No. 80, at 534 (A. Hamilton) (J. Cooke ed. 1961).

²⁷ Ch. 20, § 11, 1 Stat. 73, 78 (1789).

of "legal rules," as *Guaranty* put the question.²⁸ If we look at the legal rules as a whole, and not simply those to be seen through an inverted telescope, we find that:

- Federal judges have life tenure, while most state judges do not, a condition that is the product of legal rules.
- Federal judges are appointed by the President of the United States, and confirmed by the United States Senate, and have a commission to prove it, status characteristics that state judges do not have and which are created by legal rules.
- Federal judges are elected by a multi-filter, relatively visible, ultimately high level appointive process, a basis of investiture not enjoyed by most state judges, who are chosen through low visibility nomination and nearly invisible election, except where their selection is by political election—selection systems that are founded on legal rules.
- Federal judges are part of the United States Government, including the Department of Justice, the Federal Bureau of Investigation, the Internal Revenue Service, the Securities and Exchange Commission, the Equal Employment Opportunity Commission, the Federal Trade Commission—an entire institutional matrix that is the creature of legal rules.

Are all these rules also displaced by the Rules of Decision Act? And are they not synergistically, systemically, and ubiquitously "outcome determinative?" Compared to the total effect of these constitutive rules, the differences between the Federal Rules of Civil Procedure and state procedural rules, or between federal *res judicata* and state *res judicata*, are marginal, episodic, and fortuitous. The *Guaranty* worldview is a jurisprudence preoccupied with technical conundrums while being oblivious to the total effect of legal institutions. Indeed, *Guaranty* invites us to believe that a legal institution is best understood as an aggregate of technical conundrums.

If we step back and look at the legal institution, we see the government of the United States, the judicial power of which is comprised in the courts of the United States. Those courts have their own judges, their own procedure, their own bar, their own enforcement auxiliaries, their own tradition, their own identity. They are an institution having autonomous legal authority, of which the rules of *res judicata* are simply the technical specification. Why try to pretend, and make some isolated misfortunate outcomes depend upon the pretense, that in some aspects of their functions they are simply state courts?

²⁸ *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945) (outcome in diversity case should be "the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court").

As one contemplates the spidery insubstance of *Guaranty*, there comes to mind what Holmes said about *Swift v. Tyson*: "If I am right the fallacy [is one] which no lapse of time or respectable array of opinion should make us hesitate to correct."²⁹

When we look at Professor Resnik's paper, one could think we are seeing the opposite refraction of the matter under consideration. Whereas Professor Burbank minutely examines a specific rule, without, it seems to me, adequate consideration of the larger context, Professor Resnik gives us a global appraisal of the federal-state adjudicative relationship without, it seems to me, adequate consideration of specific rules. It is also paradoxical that Professor Resnik urges, on the ground of substantial justice, that federal courts accord less deference to the product of those same state courts that Professor Burbank urges the federal courts more closely to emulate, also on the ground of substantial justice. If the state courts are as bad as Professor Resnik suggests they are, why should federal courts seek to be like them, even—or especially—as far as "legal rules" go?

There is also a deeper paradox revealed in comparison of Professor Resnik's thesis with that of Professor Burbank: From the 1940s onward, the federal courts under *Guaranty* have been episodically displacing their own civil procedure with that of the states, while simultaneously displacing state criminal procedure with that of the federal system.³⁰

I confess suffering several kinds of confusion over Professor Resnik's thesis. First, I do not understand the significance of her system of "models." It would seem simpler to put the problem this way: Adjudication entails elements of both fairness and finality; in most if not all aspects of adjudication there is a trade-off between these elements; one of the stages where such a trade-off has to be made is that of post-judgment review; and striking the balance in post-judgment review between fairness and finality is further complicated where the problem also entails one judicial system's reviewing the adjudications of another. Concerning this problem, Professor Resnik's proposition is that the Supreme Court of late has attached too much value to finality, at too great a sacrifice of fairness. That proposition is debatable, but it is also intelligible.

The proposition is debatable because Professor Resnik does not offer us a norm for the proper balance between fairness and finality by which to assess the recent decisions of the Supreme Court. It seems clear that the Court in recent years has been giving

²⁹ *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

³⁰ See, e.g., H. FRIENDLY, *The Bill of Rights as a Code of Criminal Procedure*, in *BENCHMARKS* 235 (1967).

greater weight to finality in state court criminal judgments than it was disposed to give a few years ago. However, it also seems clear that the Court now gives less weight to such finality than it did fifty years ago. Which of these weighings is better is of course not evident a priori but only in terms of the satisfactoriness (to whom?) of the system of criminal justice as a whole.

Professor Resnik says that finality should be given less weight these days because the state courts are so heavily overburdened and understaffed that they cannot do their job in a fair manner. There is no question that most state criminal courts in large urban centers are brutal production lines. But given the very large number of crimes that the state courts must deal with today, one could take the position that finality should be given still greater emphasis so that the state courts can have more time to try to be fairer in the first place. Indeed, the elaborate "model" of successive revisions, which Professor Resnik argues for, now results in a perverse allocation of the resources for affording fairness. A large share goes to prisoners almost all of whom are guilty of serious offenses, warranting the long prison terms that afford them time to litigate. This share of resources is used to deal with marginal procedural issues usually irrelevant to guilt, while small shares go to the long queue of poor folks who are accused, sometimes unjustly, of offenses that are petty to the system but important to them and which turn on fact issues in out-of-court events that no amount of post-trial review is likely to enlighten.

Quite possibly Professor Resnik might agree that a lot of the resources now poured into post-judgment review, and particularly federal post-judgment review, might better be devoted to improving the competence, thoroughness, and discernment of first-instance police work in state-level criminal justice. At least we might talk about that possibility if we were interested in more equal justice. But, as Professor Resnik suggests, resources for the front lines is a political problem, rather than a legal one. Since apparently we are to look at the problem as lawyers, we therefore must also think in terms of legal solutions, and particularly solutions in the form of legal review. But we might momentarily think as citizens, realize that our fellow citizens do not care to do anything about the charnel houses of criminal justice, and then go back to our writs.

A second kind of confusion that I suffer in addressing Professor Resnik's exposition concerns the concept of "decisionmaking." "Decision" is resolution, more precisely final resolution. "Making" is whatever one does to achieve resolution. Professor Resnik, however, treats decisionmaking as discussion, review, deliberation, opportunity for persuasion, palaver. All these processes are part of

fair decisionmaking, as Professor Resnik indicates by contrasting deliberative decisionmaking with that accomplished by the roll of dice. But deliberations do not necessarily, or even ordinarily, result in decisions. People spend much of their lives in discussing, pondering, reviewing, and trying to persuade and trying to be persuaded—at home, at school, in the office, on the plant floor—without deciding anything. Adjudication is different. In a legal sense, nothing gets decided except in court and then only and finally when opportunity for reopening has ended.

Decisionmaking is not something that is augmented or made to realize its essence more fully by doing it over and over. *Fairness* in decisionmaking may be augmented by doing it over, at least sometimes and to some extent. There ought to be some review of trial judges to prevent them from becoming autocratic or otherwise behaving badly. The sorry history of human experience is that judges if unreviewable will indeed act autocratically, or with haste, sloth, indifference, distraction, ignorance, bias, malevolence, or vengeance. But, on the other hand, what if everything a trial judge does is in principle merely provisional, subject to approval by higher authority, both as to substance and as to technical regularity? In that model of system the first instance functionary epitomizes the low level bureaucrat. Who more than the latter is prone to haste, sloth, indifference, distraction, ignorance, bias, malevolence, or vengeance—and being autocratic? Has anyone gone through the Traffic Bureau in New York City? Professor Resnik seems to suppose that state court trial judges can continue to act something like judges even if they are not treated like judges.

It may be that state trial court judges are not so great. But compared to whom, doing what? There are few legal workproducts that any law faculty I know of would endorse firmly and finally. After all, state trial judges are about as good people as there are locally to take the job. They are as experienced in the law as the average lawyer and probably more so than most. They are bound by the Constitution and charged with being fair while they pass final judgment on their fellow citizens. That such people regularly fail, especially according to the light of the Supreme Court or law school elites, is not surprising. It is also not remediable, except in occasional exemplary instances.

We could consider the model Professor Resnik describes as one not of decisionmaking but suggestion-making. In that model, a criminal sentence in a serious case is a preliminary finding that is legally ordained to be relitigated on appeal and by habeas. The original judgment is a provisional suggestion, that perhaps this person ought to go to jail. The initial suggestion is of course important

in that it shifts the litigant's residence *pendente lite* from the streets to jail, at least after his appeal in state court has been concluded. The preliminary finding may also shift the presumption from one of innocence to one that the convicted person is *prima facie* guilty. From the entry of the trial judgment onward, however, the central concern of the model is not whether the accused is guilty, a question which indeed becomes incidental.³¹ The central concern is whether the trial court—overburdened, understaffed, minimally competent, assisted by a subcompetent criminal bar, as Professor Resnik describes it—did its job in conformity with procedural rules whose meaning is indeterminate to the Justices of the Supreme Court. As the case file moves upwards through Bleak House, Criminal Division, at each level more words are said and more entries are written. More words and more law, but no more facts. Indeed, the facts have long since submerged in the oral and written reconstructions of the accused, the police, the prosecution, defense trial counsel, the attorney general, defense appellate counsel, and successive judges in their ensuing responsive opinions. Professor Resnik wants to make sure we have enough of this. Not *res judicata* but *res interlocuta*.

A final kind of confusion for me is whether Professor Resnik has confronted some of the implications of her indictment. Again not disputing her assessment of the error rate in criminal cases, why is it not likely that there is a similar error rate in acquittals and reversals? Indeed, it must be a certainty that the error rate in that direction is much higher than it is in the direction of conviction. The system is designed that way. The presumption of innocence, the privilege against self-incrimination, the right to counsel, and all the rest of the legal protections given an accused are means to lead the system into regularly making Type II errors. But, if the system is even more error-prone in the direction of acquittal than it is in the direction of conviction, why not revision—indeed multi-tiered revision—at the instance of prosecution? Professor Resnik does not address this possibility of course, but without explanation.

There are legal systems in which acquittals can be reexamined. I am glad I do not live in one. But there are many people who are getting tired of living in a society where convictions can be so extensively reexamined at the instance of the accused that, as they see it, any given conviction of a serious offense is in effect merely a suggestion that perhaps the guilty party might go to jail sometime after every judge in the line agrees.

If that state of affairs is assumed as a social fact, the victimized

³¹ Cf. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970) (author argues that collateral attack should be limited to matters that may have bearing on actual guilt or innocence).

general populace—for whom the criminal prosecution is of course a vicar—may decide more widely to use, as they now say, alternative dispute resolution mechanisms. I have in mind mechanisms such as that recently used by Mr. Goetz³² on the New York subway, or regularly employed in Lebanon and by the Mafia. In matters of justice, finality can take more than one form.

³² See N.Y. Times, Jan. 26, 1985, at A1, col. 1.