The Public Right to Precedent: A Theory and Rejection of Vacatur

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In an attempt to promote judicial efficiency, federal and state courts have recently begun to permit the discretionary vacatur of judgments. Typically, vacatur occurs when the party who loses at trial offers the winning party a sum of money in exchange for an agreement to vacate the judgment. Once a judgment is vacated, any collateral or preclusive effects the judgment might have had are generally abolished. This Comment identifies the possibility that allowing discretionary vacatur will allow wealthy, repeat-player litigants to shape the law according to their interests by eliminating rules of law that affect their interests adversely. Moreover, the author argues that vacatur strikes at the heart of the law's normative appeal: its public function as a mechanism for resolving disputes without regard to the wealth or power of the parties involved. If the law is to retain its legitimacy, it must continue to fulfill this public function. Accordingly, vacatur should be limited to defective judgments; litigants should not be given control over the system of precedent.

INTRODUCTION

A final judgment, paradoxically, is not always final. A judgment entered by a court of competent jurisdiction is entitled to full faith and credit and the full preclusive effects of the doctrine of res judicata.[1] It establishes legal rights and duties. It may reward future litigants with useful legal precedent. Despite its significance, however, the judgment is not always the last word in the controversy. Obviously, a court may reverse a faulty judgment on appeal. But a litigant may wish to take a less risky route to reversing an unfavorable judgment—perhaps, for

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1. *See infra* Part II.C.

example, she does not want to pay for the appeal, or perhaps she wants to minimize publicity resulting from a judgment against her.

In this case, she need not attack the merits of the judgment at all. If she is in the position to do so, she can simply offer to settle the case. She can offer to pay the other party some percentage of what the court awarded that party at trial in exchange for vacatur of the trial court judgment. If the court grants vacatur, the judgment ceases to have legal effect on the parties or, in most cases, as precedent. Even though the judgment was in no way defective, it is essentially erased.

Vacatur is inefficient for a number of reasons. First, although some advocates of the practice contend otherwise,[2] vacatur discourages settlement. After all, vacatur allows parties to have a free shot at litigation. If vacatur were unattainable, a party uncertain of the outcome of pending litigation would surely make some effort to settle rather than spend thousands of dollars on a trial with no certain payoff. With vacatur as an option, a party can gamble and, if he loses, simply settle afterwards on the condition that the judgment be erased.[3]

Second, vacatur will be used almost exclusively by wealthy, repeat-player litigants, who have the greatest incentive to remove adverse precedent from the books. Unlike one-shot litigants, who tend to be less wealthy,[4] the wealthier litigant, who pays out money in exchange for vacatur, is principally concerned with the long-range effects of the judgment. The current controversy is not as central to her as the res judicata effects of the judgment or the resulting adverse publicity. For example, if the losing litigant is a corporation whose products have injured a large class of people, the corporation will have every incentive to destroy an adverse precedent, thereby preventing a future plaintiff from using offensive collateral estoppel to establish key findings of fact against it.[5] In fact, the availability of vacatur virtually ensures the destruction of precedent, because precedential effects of judgments provide the primary incentive for a party to have those judgments vacated.

Third and conversely, vacatur is unfair to poorer, one-shot litigants. It robs them of a basic litigation tool: the ability to hold conclusively and validly established findings of fact against an adversary. The net result is that the ability of wealthy parties to buy themselves out of unfavorable judgments limits the correlative rights of other, less powerful

2. *See* Brief of Amicus Curiae Trial Lawyers for Public Justice in Support of Petitioner at 6, Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27 (1993) (No. 92-1123); Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1501-04 (1994).

3. *See infra* Part II.A.

4. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 103 (1974).

5. *See infra* Part II.B.

parties. A vacatur-friendly regime inevitably produces, on aggregate, a body of law skewed toward the interests of the wealthy.

Such a product is especially distasteful in light of the legal system's public function. Although some courts hew to the narrower belief that courts exist for the convenience of the litigants,[6] others take the opposite approach, noting the public value of even the most private litigation.[7] Indeed, the public nature of law seems obvious. Long ago, Durkheim pointed out that contracts are not simply private agreements; they are agreements that are, at least potentially, publicly enforced.[8] Courts also may play a significant role in the development or articulation of social norms. At bottom, the courts play a crucial public role because, in a healthy society, individuals *must* believe justice will prevail if they should ever wind up in court.

Common-law legal systems develop through precedent, and precedent can be said to serve both an instrumental and a normative function. Precedent is instrumental because it promotes consistency, vindicates the settled expectations of parties, and enables fealty to the rule of law. It is normatively important because we rely on precedent, at least in part, because we believe that the previous court reached the correct decision. A correct judgment should logically influence the behavior of future litigants and guide the decisions of future courts. In this system, each case is a building block in a structure that aspires to uphold justice. When a party, for his own personal convenience, may remove a block, and thus alter the structure of the law that governs all public activity, his actions cheapen the law's public function and can damage its legitimacy.

Part I discusses the history of vacatur in both the federal and the Califoruia courts. It evaluates the Supreme Court's apparent resolution of the propriety of vacatur in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*,[9] and the real possibility that *Bonner Mall* will not entirely settle the issue. It also critiques the California courts' practice of "stipulated reversal," and the logic that drove the California Supreme Court to conclude the practice is beneficial. Part II discusses the advantages and disadvantages of the vacatur practice and attempts to demonstrate that the costs of vacatur far outweigh its often illusory benefits. Part III looks at some of the public functions the courts serve and

6. Not coincidentally, courts that take this stance often approve routine vacatur of judgments. *See* Manufacturers Hanover Trust Co. v. Yanakas, 11 F.3d 381, 384-85 (2d Cir. 1993); Orocare DPO, Inc. v. Merin, 972 F.2d 519, 522 (3d Cir. 1992); Neary v. Regents of Univ. of Cal., 834 P.2d 119, 120-22 (Cal. 1992).

7. *See In re* Memorial Hosp., 862 F.2d 1299, 1300 (7th Cir. 1988); *In re* United States, 927 F.2d 626, 628 (D.C. Cir. 1991).

8. *See* EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 316, 317 (W.D. Halls trans., MacMillan 1984).

9. 513 U.S. 18 (1994).

contrasts those public functions with the law's private role as a resolver of disputes. Part IV applies the public-decision model to the practice of vacatur and discusses three specific problems with vacatur. It argues that vacatur undermines the legitimacy of the judicial system, that vacatur makes the system of precedent less coherent and thus less effective, and that vacatur as judicially-created remedy should not be granted unless a correlative right has been violated.

Ultimately, this Comment argues that vacatur of a non-defective judgment has no place in the American legal system. The policy reasons for permitting vacatur are unpersuasive and, ultimately, only benefit wealthy litigants. Courts are public bodies that perform public functions—functions undermined by the practice of vacatur. Vacatur threatens the legitimacy of the courts; it favors the institutional litigant over the poorer one and subverts the growth of the law. The public value of judgments is too crucial to be submitted to an auction block.

I
VACATUR: HISTORY AND CURRENT DOCTRINE

Originally, vacatur served to remove truly defective judgments from the public record. Federal Rule of Civil Procedure 60(b) allows any federal court to vacate judgments tainted by fraud or mistake, or made unjust because of newly discovered evidence.[10] Some circuits allow district courts to vacate *sua sponte* in such circumstances.[11] The rule also permits vacatur for "any other reason justifying relief from the operation of the judgment."[12] Federal appellate courts have the power to vacate lower court judgments as part of their "general power of

10. The Federal Rules of Civil Procedure allow vacatur "upon such terms as are just" in the case of

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

FED. R. CIV. P. 60(b). The first four reasons enumerate basic defects in the judgment—mistake, newly discovered evidence, fraud, and legal voidness. The fifth justification does not look at defects in the judgment as much as changes in the external legal framework which undercut the judgment's foundation.

11. *See* Clifton v. Attorney Gen. of Cal., 997 F.2d 660, 664 (9th Cir. 1993) (discussing split in circuits).

12. FED. R. CIV. P. 60(b)(6).

review."[13] By vacating a decision, a court erases it from the books forever and generally eliminates its precedential or preclusive effect.[14]

This Part examines the history of the practice of vacatur in the federal courts and looks at an extension of vacatur—stipulated reversal—particular to the California court system. In doing so, it points out the divergent understandings of the practice articulated by the United States and California Supreme Courts and analyzes the current state of the law in each system.

A. Vacatur in the Federal System

Vacatur is not a constitutional issue; arguments for or against the practice must rely on a determination of whether it is good policy to allow courts to do away with non-defective judgments.[15] Historically, because vacatur was obscure and rarely used, the United States Supreme Court was slow to develop guidelines for the practice. The Supreme Court first addressed the issue in the 1950s in *United States v. Munsingwear*,[16] which authorized the vacatur of judgments mooted during the appellate process. *Munsingwear's* language was vague, however, and some litigants read it as *requiring* vacatur upon mootness.[17] It was not until 1987, in *Karcher v. May*,[18] that the Court clarified the *Munsingwear* decision, holding that vacatur was only required when a case became moot because of "happenstance;"[19] it was not required when the deliberate acts of the parties caused the mootuess.[20] The Court

13. Jill E. Fisch, *The Vanishing Precedent: Eduardo Meets Vacatur*, 70 NOTRE DAME L. REV. 325, 329 (1994).

14. *See id.* at 341 n.71 (cataloguing several courts that have given preclusive effect to vacated judgments, generally because the judge failed to consider the adverse effects of vacatur on other parties). *But see id.* at 341 n.72.

15. The Federal Rules of Civil Procedure allow courts to vacate judgments in a variety of cases. *See* FED. R. CIV. P. 60(b). The Supreme Court's determination of the contours of vacatur's availability, however, bave dealt less with the plain language of the Rule than with the wisdom (or lack of wisdom) of vacatur as policy. *See* U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 22-29 (1994).

16. 340 U.S. 36 (1950).

17. For an argument in support of the position that *Munsingwear* requires vacatur upon mootness, see Brief for the United States as Amicus Curiae Supporting Petitioner at 4, U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. (1994) (No. 93-714). To the contrary, *Munsingwear* states only that vacatur is "[t]he established practice" when cases have become moot while on appeal. 340 U.S. at 39 (citing Duke Power Co. v. Greenwood County, 299 U.S. 259, 267 (1936)). But in *Munsingwear*, where the government had "slept on its rights," the Court *denied* vacatur. *Id.* at 41. Far from mandating vacatur whenever a case becomes moot, *Munsingwear* requires a party to file a timely motion for vacatur after dismissal for mootness if vacatur is to be granted at all. *See id.* at 40-41.

18. 484 U.S. 72 (1987).

19. *Id.* at 83.

20. *See id.*

held *Munsingwear* "inapplicable" in the *Karcher* litigation because actions taken by the litigants mooted the case.[21]

In *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp*,[22] the Court had an opportunity to consider the propriety of routine vacatur[23] but dismissed the writ of certiorari on standing grounds.[24] Justice Stevens, joined by Justice Blackmun, dissented from the dismissal of the writ. Briefly reaching the vacatur issue, Justice Stevens offered two reasons for refusing routine vacatur: first, judgments serve a public function and should only be vacated if it is in the public interest to do so; second, routine vacatur reduces incentives to settle.[25]

1. Bonner Mall*: The Court Addresses the Problem*

Finally, in 1994, the Court attempted to limit the ability of litigants to provide for vacatur in a settlement agreement. In *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*,[26] the Court, in an opinion by Justice Scalia, held that mootness by reason of settlement does not justify vacatur. Emphasizing the *Karcher* distinction between deliberate acts and happenstance, Justice Scalia acknowledged the policy concerns that Justice Stevens had elucidated in *Izumi*.[27] He concluded that a court could vacate a case mooted by settlement in "exceptional circumstances," but emphasized that the mere fact that the settlement agreement provided for vacatur does not qualify as "exceptional."[28] Justice Scalia also rejected the petitioners' argument that trial court opinions were "presumptively less valid"[29] than appellate opinions, and thus more legitimate candidates for vacatur.[30] Nor, he wrote, should granting vacatur depend on whether the opinion to be vacated is or requires a writ of certiorari.[31] In the Court's analysis, all of these judicial decisions are worthy of respect: absent extraordinary circumstances, vacatur is inappropriate in all cases.

Although at first blush *Bonner Mall* appears to settle the practice of vacatur in the federal courts, the reality is not so certain. First, the meaning of "exceptional circumstances" will probably be interpreted in light of the policy goals in the opinion: fairness to the parties and

21. *See id.*
22. 510 U.S. 27 (1993) (per curiam).
23. *See id.* at 30.
24. *See id.* at 34.
25. *See id.* at 40-41 (Stevens, J., dissenting); *infra* Part II.A.
26. 513 U.S. 18 (1994).
27. *See id.* at 26-27.
28. *Id.* at 29.
29. *Id.* at 28.
30. *See id.*
31. *See id.*

encouragement of settlement.[32] But how should these goals be achieved? Is expense the proper yardstick? How expensive must litigation be before the court's desire to promote settlement qualifies as an "exceptional circumstance"? *Bonner Mall* gives little guidance to lower courts faced with lawsuits that are both profoundly important and profoundly inconvenient.

Second, the goals of fairness to the parties and encouragment of settlements are not coextensive in most cases. For example, suppose an employee is injured during work at a steel mill. He feels the company maintained the workplace negligently and wishes to sue for damages. His employment contract provides that any grievances against the employer will be settled by binding arbitration. The employer has used the same arbitration service for years; perhaps the service was itself chosen because the employer hoped it would render judgments in its favor. Use of arbitration obviously will be very efficient in the sense that the arbitration process will be faster, cheaper and more streamlined than traditional in-court litigation. On the other hand, it may not be fair to the employee, who will face a short, binding hearing before a private judge. He will have no right of appeal. If the arbitrator possesses pro-employer biases, she can deploy them at will. The employee will probably have counsel, but the employer will have uncommon leverage in such an arrangement. Simply because something is efficient, in other words, does not mean that it cannot be fundamentally unfair.

Consequently, courts seeking to apply the *Bonner Mall* standard may become confused over which policy goal is more central. Courts may solve this problem by refusing to find the "exceptional circumstances" required for vacatur. Even so, on occasions when courts are disposed to vacate, they must determine which goal—fairness or efficiency—better indicates an "exceptional circumstance."

The third reason *Bonner Mall* fails to set clear guidelines for the lower courts stems from the Court's statement that

> even in the absence of, or before considering the existence of, extraordinary circumstances, a court of appeals presented with a request for vacatur of a district-court judgment may remand the case with instructions that the district court consider the request, which it may do pursuant to Federal Rule of Civil Procedure 60(b).[33]

In part, Rule 60(b) allows vacatur for "any other reason justifying relief from the operation of the judgment."[34] In theory, at least, this is an extremely broad grant of discretion. This emphasis on the circuit court's

32. *See id.* at 20-22.
33. *Id.* at 29.
34. FED. R. CIV. P. 60(b)(6).

freedom of action under Rule 60 does not comport with the tenor of the *Bonner Mall* opinion as a whole. This largely undefined exception may swallow the Supreme Court's new rule.

2. *Problems with the Implementation of* Bonner Mall

Already, one circuit court has pushed *Bonner Mall* aside in the name of "exceptional circumstances." In *Motta v. District Director of Immigration & Naturalization Services,*[35] the First Circuit heard a habeas corpus petition. Facing deportation, Antonio Jose Motta alleged a violation of his Fifth Amendment right to due process. The district court agreed, staying his deportation "until the INS's Board of Immigration Appeals ('BIA') could issue a decision on Motta's pending motion to reopen his deportation proceeding."[36] Unhappy with this result, the INS appealed. During oral argument, the First Circuit raised the possibility of settlement and vacatur. The judges proposed that the INS grant Motta a stay similar in scope to the one issued by the district court. In exchange, Motta would agree to vacate the lower court judgment, thereby eliminating the precedent.

This ruling is only two paragraphs long. The court devotes the remainder of the opinion (still less than one page) to circumventing *Bonner Mall.*[37] Ultimately, the court decides that "the equities plainly favor vacatur" because "the INS has at all times sought to pursue its appeal; it has agreed to consider settlement only at the suggestion of this Court, the proposed settlement being an inexpensive, simple, and speedy way to accommodate the interests of both parties."[38] In other words, vacatur is not permissible when the parties decide to pursue it themselves. It is only allowable when a court suggests the possibility to them.

Nine months after *Bonner Mall,* this opinion is astonishing. In the earlier opinion, a unanimous Supreme Court had written that "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur."[39] To allow such a "refined form of collateral attack" would "disturb the orderly operation of the federal judicial system."[40] To be sure, the Court mentions the importance of fairness to

35. 61 F.3d 117 (1st Cir. 1995).

36. *Id.* at 118.

37. *See id.* at 118-19.

38. *Id.* at 118.

39. U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 26-27 (1994) (quoting Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp., 510 U.S. 27, 40 (1993) (Stevens, J., dissenting from the dismissal of the writ of certiorari)).

40. *Id.* at 27.

the parties, but it grounds its decision in "the public interest."[41] In contrast, the *Motta* court explicitly states that the public harm of "depriving the public and the judicial system" of the district court's precedent cannot "take priority over the parties' best interests."[42] The priorities of the First Circuit, in other words, directly contravene those enunciated by the United States Supreme Court.

Moreover, the *Motta* holding is disingenuous. The First Circuit distinguishes *Bonner Mall* because the court, rather than the parties, first suggested the idea of vacatur. This amounts to a wink and a nod, because courts are *always* eager to encourage litigants to settle their cases. If vacatur is good policy, it cannot be simply because the judge beats the parties to the subject. This reasoning also brings up an internal inconsistency: if the judge's role is to facilitate the wishes of the parties, why can only the judge suggest the possibility of vacatur? If the parties are the experts on their priorities and needs, why must they rely on the judge to divine what they truly want to do? Why can't they just suggest it themselves? *Motta* declines to address this point.

Most troubling, in *Motta* the government is a party. As an appellant and "a repeat player before the courts, [the INS was] *primarily* concerned with the precedential effect of the decision below."[43] Vacatur "allow[ed] the government to buy its way out of negative case law."[44] Although it may be "unseemly to allow [private] parties to erase case law by private agreement,"[45] it is even more disturbiug when the government thwarts the development of new case law and willfully erases findings of liability that implicate its policies.[46] Although the same stringent res judicata standards do not apply to the government as to non-governmental litigants, the precedent erased by government action might still be relied upon in a case between two non-governmental parties. At the very least, that precedent would be on the books as an example of governmental action that contravened the law. Even if it would not bind the government in future cases, no persuasive justification exists for its total erasure.

Finally, as precedent, *Motta* is perverse. It contravenes the holding of the Supreme Court in *Bonner Mall* and binds the states within the First Circuit to its interpretation of that case. At first glance, *Motta* would seem a sure candidate for appeal and reversal. The problem, of

41. *Id.* (noting that *Munsingwear* allows vacatur only when "demands of 'orderly procedure' cannot be honored") (citation omitted).

42. Motta v. District Dir. of INS, 61 F.3d 117, 118 (1st Cir. 1995).

43. *Id.* (emphasis in original).

44. Robert P. Deyling, *Dangerous Precedent: Federal Government Attempts to Vacate Judicial Decisions upon Settlement*, 27 J. MARSHALL L. REV. 689, 707 (1994).

45. *Id.*

46. *See id.* at 696-99.

course, is that there is no party to bring an appeal. Both parties in *Motta* were parties to the settlement; they were, one would suppose, pleased with the First Circuit's ruling. The ruling may be legally problematic, but it is shielded from further review.[47]

Because appeal is so unlikely, lower courts may consistently disregard courts of last resort in either the federal or state systems. Because parties to a vacated judgment are pleased with vacatur—because they asked the court for it and got what they wanted—they will not be disposed to contest it. It is remarkably easy for courts favoring vacatur to avoid accountability for their decisions. *Bonner Mall* originally came to the Supreme Court as a bankruptcy case;[48] the vacatur issue arose only when the parties agreed to a settlement before oral argument.[49] The controlling precedent, in other words, came about largely because of happenstance. With precedent in this field so rare and difficult to generate, *Motta* is doubly harmful. Although it remains to be seen if other circuit courts will follow suit, *Motta* illustrates the possibility that *Bonner Mall* was not the sweeping decision it originally seemed to be. At the very least, lower courts can easily circumvent the decision.

B. Vacatur in State Courts

Even if the federal system curtailed vacatur—and, as *Motta* illustrates, this is no easy task—the practice continues to flourish locally. The Supreme Court's managerial power does not reach state courts. Most states have a procedural vacatur rule modeled after the broad language of Federal Rule 60(b).[50] Application of these rules varies state by state.[51]

For example, Washington Civil Rule 60(b) incorporates all of Federal Rule 60(b) and includes additional reasons for relief, mostly relating to death or disability of a party to the suit.[52] Discretion to

47. Those third parties with an interest in the precedent may be unaware of the decision or, more likely, may lack standing to appeal a grant of vacatur.

48. *See* U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 2 F.3d 899 (9th Cir. 1993), *cert. granted*, 510 U.S. 1039 (1994) (No. 93-714) (granting certiorari to consider the wisdom of the new value exception to the absolute priority rule in bankruptcy).

49. *See* U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 511 U.S. 1002 (1994) (calling for argument on whether "the rule announced in United States v. Munsingwear, 340 U.S. 36 (1950) (citations omitted), [should] extend to cases that become moot in this Court because of the voluntary settlement of the parties"), *decided*, 513 U.S. 18 (1994).

50. *See, e.g.*, KY. CIV. R. 60.03 (providing for vacatur under equitable grounds provided the motion has not been denied in an earlier proceeding and would not be time-barred); N.D. R CIV. P. 60 (providing equitable grounds for vacatur); N.Y. C.P.L.R. 5015 (Consol. 1997) (same); WASH. CIV. R. 60 (same).

51. *See infra* Part I.C.

52. *See* WASH. CIV. R. 60(b)(7)-(10) (1994) (relating, respectively, to service of the defendant by publication, death of one of the parties before judgment, unavoidable casualty or misfortune preventing a party from prosecuting or defending, or an error in jndgment by a minor).

determine when a judgment should be vacated vests entirely in the trial court, and vacatur "will not be reversed in the absence of a manifest abuse of that discretion."[53]

New York's Civil Practice Rule 5015 is also based on, and similar to, the federal Rule.[54] Even where an institutional litigant obviously asked for vacatur to destroy an adverse legal precedent, New York courts have deferred to the "clear intentions of the parties" in allowing the vacatur and refusing to allow collateral estoppel.[55] Although "compelling circumstances" might permit collateral estoppel in some cases, the reliance interest of the parties should generally prevail and limit preclusion.[56] Although some New York courts have professed appreciation for *Bonner Mall*,[57] it is by no means clear that most courts of that state will follow suit. As noted earlier, a clever lower court can overcome even a clear statement by a jurisdiction's court of last resort that vacatur is improper, simply because, if both parties agree to the settlement, no party will bring an appeal.

Moreover, state courts of last resort rarely issue such clear statements.[58] This may be because most states vest discretion to vacate in trial courts and allow appellate courts to overturn motions to vacate only on a showing of abuse of discretion. But more likely, the shortage of appellate court opinions results from the *Motta* paradox: appellate courts rarely get the chance to pass on questions of vacatur because the parties to vacated judgments do not appeal. Such practical unreviewability is perhaps the most dangerous feature of vacatur.

C. Stipulated Reversal in the California Courts

At least one state court goes beyond vacatur in its desire to provide convenience to litigants. The California courts maintain a curious practice known as "stipulated reversal," which is similar to, but not the same as, vacatur.[59] A litigant who agrees to a stipulated reversal agrees to "reject [the judgment], undo it, turn it around."[60] One commentator points out that when the California Supreme Court authorizes not just vacatur, but reversal, it leaves itself vulnerable to charges of "rewriting

53. Gustafson v. Gustafson, 772 P.2d 1031, 1033 (Wash. Ct. App. 1989).

54. *See* N.Y. C.P.L.R. 5015 (Consol. 1997).

55. Mercantile & Gen. Reinsurance Co. v. Colonial Assurance Co., 556 N.Y.S.2d 183, 186 (N.Y. Sup. Ct. 1989).

56. *See id.* For a discussion of the types of "compelling circumstances" that might allow collateral estoppel, see Aetna Cas. & Sur. Co. v. Jeppeson & Co., 440 F. Supp. 394 (D. Nev. 1977).

57. *See, e.g.*, Paramount Communications v. Gibraltar Cas. Co., 623 N.Y.S.2d 850, 850 (1995).

58. A LEXIS search of state court databases found only eight decisions dealing with the propriety of routine vacatur pursuant to settlement agreements.

59. Stephen R. Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, 26 LOY. L.A. L. REV. 1033, 1067 (1993).

60. *Id.*

history" or putting the law up for sale.[61] Reversal is vacatur *plus*. Vacatur makes the judgment disappear; reversal turns the result around. With stipulated reversal, the winning litigant—whose arguments on the merits prevailed at trial—now loses, and the losing litigant—whose arguments were rejected at trial—suddenly wins. Money buys what facts and logic could not: a favorable verdict in a court of law.

1. Neary*: Stipulated Reversal of Trial Court Judgments*

Nowhere is the danger of stipulated reversal better illustrated than in the case that authorized stipulated reversal in California, *Neary v. Regents of University of California*.[62] In that case, University veterinarians had sprayed George Neary's cattle with pesticide.[63] They intended to ward off infestation of the scabies mite.[64] As a result of the spraying, however, the University killed 95 cows and over 400 calves. Neary blamed the pesticide.[65] The state hired three veterinarians to investigate the deaths. After inspecting the evidence, the veterinarians compiled a report concluding the cows died not from poisoning, but rather from mismanagement of the ranch.[66] The University read a state statute[67] as requiring publication and published the report over Neary's objection.[68] The published report was "discussed widely in the print and broadcast media."[69] Neary sued the University and the veterinarians for libel.[70]

After a four-month trial, the jury returned a verdict of $7 million in Neary's favor.[71] The defendants appealed and, while the appeal was pending, offered Neary a settlement. Neary would receive $3 million; in exchange, all parties would stipulate to dismissing the appeal with prejudice and the trial court opinion would be vacated. Lastly, the parties filed an application in the Court of Appeal asking it to reverse the trial court's opinion and remand the case to the trial court for a dismissal with prejudice.[72] This would complete the erasure: first, the appeal would be dismissed; then, the judgment at trial—rendered by a jury who sat for four months—would be vacated; finally, the trial court opinion would be reversed, and the parties would pretend the University really

61. *Id.* at 1067-68
62. 834 P.2d 119 (Cal. 1992).
63. *See id.* at 120.
64. *See id.*
65. *See id.* at 131 (Kennard, J., dissenting).
66. *See id.*
67. *See* CAL. GOV'T CODE §§ 6250-6265 (West 1980) (California Public Records Act).
68. *See Neary*, 834 P.2d at 131 (Kennard, J., dissenting).
69. *Id.*
70. *See id.*
71. *See id.* at 120.
72. *See id.*

had the better legal argument. The court of appeal refused the request, which brought the question to the California Supreme Court.[73]

By way of context, George Neary was an old man by the time his case made it to the California Supreme Court.[74] The dispute had dragged on for over twelve years.[75] Neary stood alone against the University of California. Although he had financial resources, he was not as solidly backed as the state. More to the point, he was aging and wanted to enjoy some of his monetary award during his lifetime. The *Neary* majority quotes from Neary's brief, painting him as a man tired of the endless fight of litigation.[76] Indeed, Neary's brief disdained the "expensive, time-consuming" struggle his case had become.[77] However, a letter from Neary to the court of appeal shows George Neary was not pleased about the possibility of reversal:

> "[T]o reverse the decision would be an outrage to me and other victims and an affront to the jury system. . . . Personally, they [the defendants] should be publicly horsewhipped and driven from the company of honest men and especially teachers."[78]

Nonetheless, Neary was, at some point, persuaded to temper his anger at the defendants and accept their offer of settlement, even though it meant giving up the judgment he won against them. The legal system should not prohibit Neary from settling his case on appeal. The state, however, sought not simply to end the matter but also to change the result of the trial after the fact.

The California Supreme Court, six Justices to one, held that courts of appeal should grant requests for stipulated reversal "absent a showing of extraordinary circumstances that warrant an exception to this general rule."[79] One example of such an extraordinary circumstance was given: "a contrary public interest."[80] In essence, the California Supreme Court in *Neary* reached the opposite conclusion of the United States Supreme Court in *Bonner Mall.*

In dissent, Justice Kennard found an obvious public interest in the judgment—in the fact that the defendant was a public institution.[81] In her judgment, the parties' preference for settlement should not be enough to invalidate a judgment bearing on "an evaluation of the

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73. *See id.*
74. *See id.* at 123.
75. *See id.*
76. *See id.*
77. *Id.*
78. Resnik, *supra* note 2, at 1504 (commenting on and quoting Letter from George Neary to Justice Kline (Feb. 8., 1991)).
79. *Neary*, 834 P.2d at 125.
80. *Id.* at 126.
81. *See id.* at 130-31 (Kennard, J., dissenting).

performance of public employees and public institutions."[82] A jury found that a report made public by public officials, and then discussed in the media, libeled Neary.[83] Taxpayers furnished the employees' salaries and the funding for both the inspection of Neary's property and publication of the report. Without conceding that the public interest should be limited to cases involving public institutions, Justice Kennard found ample public interest in the *Neary* controversy.

2. Sacramento County: *Stipulated Reversal of Appellate Court Judgments*

In her *Neary* dissent, Justice Kennard commented in passing that she doubted "that the majority would be as receptive to the parties' arguments about the benefits of settlement if the parties were seeking to annul by stipulation a decision of this court."[84] In the fall of 1995, the court proved her right. In *State ex rel. State Lands Commission v. Superior Court of Sacramento County*,[85] the Court refused to approve a stipulated reversal of an appellate court judgment. It gave three reasons. First, *Neary* was based on efficiency and encouragement of settlement. According to the Court, a case that has already proceeded to the appellate stage—"especially after an appellate decision is actually rendered"[86]—has already consumed so much judicial time and energy that allowing stipulated reversal would produce only a negligible gain. Second, the Court noted that appeals courts make binding precedent, which trial courts do not; although trial court opinions have some precedential value, appellate courts need not follow them. Stipulating the reversal of an appellate decision would destroy binding precedent and undermine the expectations of future litigants.[87] Third, the court found involvement of the state in the dispute at issue gave rise to a "'specific, demonstrable, well established, and compelling' public interest."[88] The state, of course, had been involved in *Neary* as well, albeit through the filter of the state university, but in *Sacramento County*, the state qua state was a party.

Although the outcome of *Sacramento County* might be interpreted as good news for those favoring limitations on vacatur, particularly vacatur of appellate court decisions, it still leaves the door open for vacatur of both appellate and trial court judgments. The arguments put forward by the court in *Neary* illustrate those used to defend the practice of

82. *Id.* at 130 (Kennard, J., dissenting).
83. *See id.* at 131 (Kennard, J., dissenting).
84. *Id.* at 128 (Kennard, J., dissenting).
85. 900 P.2d 648 (Cal. 1995).
86. *Id.* at 654.
87. *See id.*
88. *Id.* (quoting *Neary*, 834 P.2d at 125).

vacatur. As the next Part shows, arguments favoring vacatur are deeply flawed. In addition, the next Part notes other costs of the practice far more disturbing than mere inefficiency.

II
JUSTIFICATIONS AND PROBLEMS

Vacatur—and the California practice of stipulated reversal—have been justified on efficiency and fairness grounds. A careful analysis of the arguments, however, reveals vacatur is inefficient in the long run, because it discourages pretrial settlement and is unfair to many litigants.

A. Efficiency

The *Neary* court emphasized the efficiencies of settlement. And, indeed, it can be. If the parties do not wish to go to trial, settlement allows them to "reduc[e] the expense and persistency of litigation."[89] Resources that would have been spent on an undesired trial might then be allocated to other controversies. But not all pretrial settlements are necessarily efficient, if "efficiency" means making the best use of concededly limited judicial resources. For example, a corporation that has manufactured a faulty product may not wish to litigate the claims of those injured by the product. It may, instead, choose to pursue a pretrial settlement. If the plaintiff accepts, the corporation is spared the inconvenience and expense of litigation and the publicity that accompanies it, as well as a potential legal finding of fault against it. If one accepts the premise that an important part of the legal system's function is to channel behavior by compelling conformity with accepted legal standards, pretrial settlement may undermine this function by permitting guilty parties to escape the public eye. Under this model, an efficient use of judicial time would involve a greater concentration on cases of public importance. Where a controversy illustrates a broader point about proper standards of behavior—if the resolution of the case will benefit the public by modifying that behavior or warning the public about a particular wrongdoer or a particular product—then pretrial settlement of that controversy will be inefficient, because it will frustrate the public function of the courts. It may save time, but it will do so at the cost of curtailing the judiciary's accepted role as expositor of legal standards of conduct.

Invariably, what is and what is not efficient depends on whatever predetermined goal one wishes to achieve. If a corporation merely

89. *Neary*, 834 P.2d at 121 (quoting McClure v. McClure, 34 P. 822, 824 (Cal. 1893)). *See generally* Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 3-4 (1992) (describing how procedural innovations amplify the general policy in favor of settlement).

wishes to maximize its profits and nothing else, it may find that cutting its payroll, or reducing its employees' health benefits, is efficient. On the other hand, if the same corporation desires to maximize employee loyalty to the company, it may decide to offer *more* benefits, although it will surely do so in a manner that allows it to stay profitable. Whatever arrangement allows it to gain as much employee loyalty as possible for a given expenditure is efficient where maximizing employee loyalty is the predetermined goal. The same is true within the court system. For a judge seeking to clear a docket, whatever helps to encourage settlement of pending cases is efficient. For a defendant corporation wishing to stay in business despite several pending lawsuits, pretrial settlement is certainly efficient; it allows the defendant both to minimize its private costs—what it pays the potential plaintiffs—and its public costs—the damage to its reputation. For the plaintiff, settlement minimizes legal costs, saves time, and ensures a financial payoff.

If one adopts a different goal, however, the picture changes. If the most important role of courts is not simply to resolve private disputes but to illustrate standards of permissible public conduct, the efficiency inquiry would examine how much a court devotes its resources to that public function. By itself, efficiency does not mean anything; resources can only be distributed efficiently to attain a desired goal. Under this model, settlement may be inefficient, because cases settled before trial produce no addition to the system of precedent; settlements bind the parties, but create no new law. Nor do settled cases expose wrongdoers to the potentially corrective light of public scrutiny.

Even if pretrial settlements are efficient because they save time, paper, and labor-hours, the same does not hold for post-trial settlements. The *Neary* court begins by observing that pretrial settlements avoid the costs of trial.[90] Because postjudgment settlements occur after trial, the court continues, they may not be as efficient as pretrial settlements.[91] Post-judgmeut settlements are efficient nevertheless, because they "preclude the need for *future* expenditures of time and money by the parties and the judiciary."[92] As evidence of the efficiency of postjudgment settlements, the Court points out that "Courts of Appeal throughout the state . . . have routinely granted the parties' requests for stipulated reversals and similar procedures to effectuate settlement agreements."[93] Although postjudgment settlement and vacatur preclude

90. *See Neary*, 834 P.2d at 121.

91. *See id.*

92. *Id.* (emphasis in original).

93. *Id.* at 121. Professor Barnett contends that stipulated reversal was not nearly so routine as the court insisted. *See* Barnett, *supra* note 59, at 1063-65. Professor Barnett cites one published court of appeal opinion that "refused to grant a stipulated reversal because of the effect it would have on third parties." *Id.* at 1064 (citing *In re* Marriage of Shapiro, 114 Cal. Rptr. 277, 279 (1974)).

the need for future legal proceedings, this savings is a "false economy."[94] Professor Fisch points out that the ready availability of postjudgment vacatur might actually *prevent* settlement at the pretrial stage:

> Vacatur thus becomes an important aspect of D's [the defendant's] pretrial evaluation of the prospects of settlement. Absent the possibility of vacatur, D will be strongly inclined to settle the litigation prior to trial, thereby avoiding the possible collateral effects of an adverse judgment. If D can reasonably anticipate that the court will grant a postjudgment motion to vacate, D may be indifferent to the timing of the settlement or even disposed toward waiting until after trial to attempt to settle, because such a decision will not be costly.[95]

In other words, if a party can afford to litigate, she may be *less* likely to settle before trial if vacatur is permitted. If going to trial is not itself a prohibitive expense, the litigant will take a shot at winning on the merits. If she wins, she has a binding judgment in her favor. If she loses, she can attempt to settle and vacate the trial court judgment. A policy permitting routine vacatur allows wealthy litigants to take free—or at the very least, less expensive—shots at trials, consuming the valuable time of lawyers, judges, court employees, and other litigants. Moreover, these litigants consume the time of others knowing full well that, should the trial not end in their favor, they will simply cast aside the judgment and the efforts of everyone who helped to render it.

If the potential for vacatur discourages pretrial settlement, it is an especially costly practice because the initial stages of litigation are the most expensive ones. If the court cannot dispose of the matter through an early motion for summary judgment, the parties must face the lengthy and expensive discovery process. Many pretrial motions will be vigorously contested, and therefore "a case may result in the creation of multiple trial opinions and even appellate opinions prior to the completion of a trial."[96]

Not only does vacatur discourage pretrial settlement, it may even foster new litigation. Professor Fisch concludes that the practice

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Additionally, Division One of the Fourth Appellate District "refused such stipulations as a matter of policy." *Id.* (citing Defendant's Petition for Review at 3, Neary v. Regents of Univ. of Cal. 834 P.2d 119 (Cal. 1992) (No. 5020515)). Finally, the defendant's petition for review claimed that "probably the majority" of courts of appeal "would continue to grant stipulated reversal" if the Supreme Court did not grant review. *Id.* (citing Defendant's Petition for Review, *supra*, at 24). For these reasons, Barnett characterizes the Court's contention as "stretching facts." *See* Barnett, *supra* note 59, at 1062.

94. Fisch, *supra* note 13, at 337.

95. Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589, 636-37 (1991) (footnotes omitted).

96. Fisch, *supra* note 13, at 338 n.54.

"operat[es] to encourage speculative litigation because the potentially unfavorable results of litigation can be avoided."[97] At its worst, vacatur "encourages parties to attempt to manipulate the legal system,"[98] spurring relitigation of complex legal issues already adequately decided by the trial court. In doing so, vacatur casts aside the work of the court and of the parties.

Of course, in some cases, vacatur facilitates post-trial settlements. But Fisch paints the vacatur process as "a zero sum game" at best.[99] To be sure, both of the parties may benefit by a post-trial settlement: the losing party benefits by gaining control of the process and erasing an adverse judgment; the winning party benefits by "appropriat[ing] part of the societal value of final judgments" and by avoiding the costs of appeal.[100] But if the foregoing analysis is correct, the availability of vacatur discourages as many pretrial settlements as it encourages postjudgment settlements. Given that postjudgment settlements inherently waste more resources than pretrial settlements—they come after the costly and time-consuming work of trial is already done—the availability of vacatur results in a loss to the public. The parties may gain from the convenience of the remedy, but the public inherits the burden of wasted time and wasted money. If efficiency is measured by the number of valid judgments rendered for each dollar of public money spent, vacatur is inefficient.

B. Fairness to the Parties

An argument about the nature of the American judicial system lies at the heart of the vacatur debate. One side argues that courts exist to effectuate the wishes of private parties; the other side counters that the courts serve an important public function.[101] Assuming, for the moment, that courts should be solicitous of the needs of the parties, this section argues that the practice of vacatur acts to the advantage of wealthy, sophisticated litigants and to the detriment of the small, less sophisticated, one-time litigants. In addition, by erasing precedent, vacatur damages the interests of third parties who may end up in court at a later date.

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97. Fisch, *supra* note 95, at 637.

98. *Id.*

99. *Id.* at 640.

100. *Id.*

101. *Compare* Nestle Co. v. Chester's Mkt., Inc., 756 F.2d 280, 284 (2d Cir. 1985) (reversing lower court's refusal to grant vacatur because it violated the wishes of the parties) *with In re* Memorial Hosp., 862 F.2d 1299, 1302-03 (7th Cir. 1988) (refusing vacatur on the grounds that judicial decisions are public acts that private agreements cannot erase). *See also* Fisch, *supra* note 95, at 602-06 (discussing these and other cases).

1. Repeat Players or One-Shotters:[102] Who Are the Parties?

Some litigants are more interested in vacatur than others. Although one-shot litigants are primarily concerned with the disposition of their case, repeat players may be interested in the shape of the law generally.[103] Repeat players, by their very nature, know they will return to court; the last thing a repeat player wants is for a current judgment to come back to haunt it in a future matter. Eliminating the record of the judgment makes the collateral estoppel consequences of the judgment evaporate.[104] In addition, adverse judgments are embarrassing. For businesspeople, an adverse judgment may make the difference between success and failure. Obviously, vacatur cannot reduce attorney fees or damages, but it can prevent future business associates from discovering the judgment in the public record. Finally, adverse judgments may lead to other, external sanctions. A finding of negligence against a driver leads to an increase in insurance premiums; a finding of malpractice against a doctor leads to an increase in premiums and possible suspension from practice.[105] Vacatur may eliminate these additional adverse consequences.

The first and second concerns are confined primarily to repeat players. A one-shot litigant who loses his case will probably primarily be concerned with complying with the terms of the judgment. The conclusions of law resulting from the judgment, if any, concern him less, because he does not expect to return to court. For example, suppose a homeowner sues a contractor for failure to perform a contract. As a one-shot litigant, the homeowner has an interest in the resolution of these issues only so far as they impact whether or not he wins the suit. Conversely, the contractor, a repeat player, is interested in the general conclusions of law outside of their impact in the case at hand. In time, she may face the same claim again, and the resolution of the first action could determine her liability in the subsequent matter.

The same holds for embarrassment. Suppose that the contractor successfully defends against the homeowner's claim by proving the

102. The terminology of "repeat players" and "one-shotters" is taken from Galanter, *supra* note 4.

103. *See* Resnik, *supra* note 2, at 1487.

104. Indeed, several of the vacatur cases discussed in Part I.A., *supra*, involved a direct and acknowledged attempt on the part of one litigant to avoid collateral estoppel. *See* Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp., 510 U.S. 27, 40-41 (1993) (Stevens, J., dissenting); United States v. Munsingwear, 340 U.S. 36, 37 (1950) (cataloguing the procedural history of the case); *see also* Brief for Respondent at 2-7, Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27 (1993) (No. 92-1123) (describing history of previous litigation in Florida and Illinois). Collateral estoppel does not follow inevitably from any judgment. A court has some discretion, depending on the reliability of the judgment. *See infra* Part II.C.

105. *See* Resnik, *supra* note 2, at 1488 (discussing the effects of final judgments on licensed professionals under the California Business and Professions Code).

homeowner never paid his bills. To be sure, the homeowner may suffer *personal* embarrassment. If word of the judgment gets out, as it might, his neighbors may regard him with suspicion. His friends may mock him as cheap and think twice about loaning him money. Unless the homeowner lives in an extremely close-knit community, however, the judgment is unlikely to haunt him professionally. On the other hand, the contractor is in the lawsuit in a professional, rather than a personal, capacity. If she loses, she suffers acute professional embarrassment, running the risk of being branded unreliable and losing business.

The third adverse effect of judgment, external sanction, applies to both one-shotters and repeat players. As an example, consider a steel mill regulated by an administrative agency. The steel mill probably qualifies as a repeat player—it will face liability actions by injured employees, contract disputes among suppliers and buyers, and possible litigation with the government regulators. If the agency concludes the steel mill violated a regulation, it may assess a fine. If the agency decides the mill operates unsafely, it may implement a regulation that may drastically curtail the mill's profits. Sanctions likewise hurt the one-shot litigant; as noted above, professional suspensions and administrative fines are profound consequences of adverse judgments.

Other classes of litigants, such as professionals who do not necessarily expect to be repeat players, may favor vacatur. A litigant suing or being sued as a professional might, in the course of litigation, ask the court to create or clarify her rights or duties *as a professional.* For example, if a plaintiff suing on a novel malpractice theory wins, the doctor—and all other doctors within the jurisdiction—must follow the new law. Thus, the doctor may seek vacatur to remove the new obligation. Furthermore, embarrassment may cost more in the professional context. An adverse judgment can irreparably damage one's career and drastically limit financial prospects. Similarly, external sanctions can be far more damaging to a professional. It is true that a car accident sends a driver's personal insurance rates soaring. Professional sanctions, however, may prevent one from working, or allow work only at a prohibitive cost (in the case of the doctor with malpractice insurance).

Repeat players have continually lobbied for the widespread acceptance of vacatur. For example, in its amicus brief in *Izumi*, the government—the most frequent litigant in American courts—"pointedly noted that vacatur allows it to avoid the 'preclusive or precedential effects' of unfavorable judgments."[106] Similarly, members of "the Product

106. Amicus Brief at 6, Izumi Seimitsu Kogyo Kabuski Kaisha v. U.S. Phillips Corp, 510 U.S. 27 (1993) (No. 92-1123); *see* Brief for Respondent at 8, U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994) (No. 93-714) (citing the Solicitor General's approval of easily available vacatur in federal courts); Resnik, *supra* note 2, at 1488-89; Deyling, *supra* note 44, at 689.

Liability Advisory Council (whose corporate members include dozens of companies, including Eli Lilly, Dow Chemical, Johnson Controls, Philip Morris, and U.S. Tobacco)" support the practice as well.[107]

Not all repeat players are wealthy. Non-profit organizations—even those that are not particularly well-funded—may be repeat players. And it would be rather curious to refer to the ultimate repeat player, the government, as "wealthy." Given the above list of corporations, however, it is easy to connect repeat player status with substantial economic power and with advocacy of the practice of routine vacatur. How valid is that connection? The next section will address differing views of the link between vacatur advocacy and economic power.

2. *Fair to Whom?: Is Vacatur a Tool of the Wealthy?*

Some analysts challenge the argument that repeat players (or wealthier litigants) primarily use vacatur to the detriment of one-shotters (or poorer litigants). Professor Resnik, for example, makes three observations that bring into question the contention that vacatur is a tool of the wealthy.[108] First, she notes that Sears Roebuck and Izumi both opposed vacatur in *Izumi*, and neither of these corporations is a "stranger[] to litigation."[109] Second, she observes that repeat players may sue *each other*, and thus use the vacatur tactic against one another, not just against one-shotters.[110] Third, she suggests that one-shotters may benefit from vacatur offers, because through vacatur a poorer one-shot litigant "gains new economic wherewithal with which to make deals."[111] I respond to each point in turn.

At the outset, it is useful to note that a repeat player does not really "use" vacatur "against" its opponent in a particular litigation. Vacatur typically comes out of an agreement between the parties, hardly an adversary tactic. Instead, the repeat player uses vacatur "against" the public in general, the larger body of future possible litigants, by depriving them of favorable precedent on which to rely. When vacatur is understood in this way—as a means of controlling future consequential damages resulting from an adverse finding—the adversary party in the current litigation becomes irrelevant.

First, it is not surprising that a repeat player would in some cases oppose vacatur. For example, imagine a situation in which several creditors sue a corporation. The first creditor takes the corporation to court and wins a judgment against it. The judgment is fairly large, and

107. Resnik, *supra* note 2, at 1489 & n.74.
108. *See id.* at 1489-91.
109. *Id.* at 1489.
110. *See id.* at 1489-90.
111. *Id.* at 1491.

the corporation appeals, hoping, at the very least, for a reduction in the amount of the judgment. While the appeal is pending, the corporation makes a settlement offer conditioned on vacatur. The creditor accepts. In this case, the other creditors might very well oppose vacatur, because it deprives them of the opportunity to use the initial judgment—and its preclusive effects[112]—against the corporation. Such opposition might be shortsighted; as repeat players, the creditors would likely have occasion to use vacatur themselves in the future. Nevertheless, if the amount at stake is large enough, even the most devoted repeat player might oppose vacatur within the context of a specific lawsuit.

The second point, that repeat players often sue each other, amounts to saying that use of vacatur by the wealthy in conflicts among themselves results in no real harm. However, if one accepts a public law model, then real harm arises from vacating judgments that influence external behavior.[113] Another response is to note the effects of vacatur on parties not before the court.[114] In other words, although the instant conflict may be between two repeat players, the judgment may produce case law that a one-shot litigant could later use to her benefit. In vacating the judgments, repeat players may plan to prevent future litigants from using earlier judgments. Thus the bargaining power of repeat players can still frustrate one-shotters, even in conflicts among the wealthy.

Indeed, even where the erasure of precedent directly harms other repeat players, rather than one-shotters, vacatur is still objectionable. As I will discuss later,[115] any vacatur of a valid judgment destroys precedent, making it easier for a wrongdoer to escape liability. That the destruction of precedent by a wealthy party may mainly harm other wealthy parties does not make erasure of rules of law or evasion of liability less problematic.

The third argument—which contends that the availability of vacatur gives one-shot litigants greater purchasing power—is the most cogent. According to this argument, because the one-shotter is low on funds, she has no desire to prolong the litigation; vacatur allows her to get more money in settlement than she otherwise might. This, of course, may be entirely true. But the argument proves too much: because the one-shotter is unlikely to return to court, she is not concerned with the judgment's preclusive effect. The repeat player is the one who craves vacatur. Because she has no stake in the future precedential or collateral estoppel effect of the judgment, the one-shotter has no incentive *not* to

112. Assume for the moment that the second creditor could do so. *See* discussion *infra* Part II.C.
113. *See infra* Part III.
114. *See infra* Part II.C.
115. *See infra* Part III.B.

accede to vacatur, if the alternative is spending more money and time in court. For her, the judgment has a monetary value; for the repeat player on the other side of the bargaining table, the judgment's value is much more than monetary. It is hard to say the one-shotter exercises purchasing power;[116] her decision is largely automatic.

Moreover, one-shotters may be vastly underpaid for vacatur. Take the example of George Neary. He won a jury verdict of $7 million and eventually settled for $3 million. He may have settled for an amount far below the actual value of his claim because he was tired of litigation. Assuming the amount he received corresponded with the true value of his claim—or with the amount he would have received after an appellate court modified the original award—Neary had no means of determining how much *additional* money to charge for vacatur. First, a one-shot litigant lacks knowledge about how many future litigants are planning to use the first judgment as precedent. A large number of potential third-party litigants increases the value of vacatur. Second, rarely can a one-shot litigant calculate how much publicity will result from the judgment, and how that will translate into losses for the repeat player. Substantial publicity may increase the value of vacatur significantly. Third, in some cases—because of third party litigants and fear of adverse publicity—the repeat player values vacatur *more* than the initial judgment award. Nevertheless, in practice, the judgment amount likely will act as a ceiling, preventing the one-shotter from bargaining upward to the true value of the judgment's erasure.

Even if the one-shotter does receive a fair price, however, that does not get to the root of the problem. The difficulty with vacatur, in this context, lies not only in allowing repeat players to buy the law, but in allowing fortuitously-placed litigants—usually one-shot plaintiffs—to sell the law. For the purposes of a motion to vacate, sellers possess a piece of the law: an adverse judgment against a repeat player. Without accountability, a seller decides if the law will remain on the books or not. Because of her limited interest in the future shape of the law, she has little incentive not to accede to the buyer's request for vacatur. But regardless of her ultimate decision, the mere fact that she has the power to sell the law—and change, in some small measure, the rules by which society lives—is troubling. Paying a seller generously does not diminish the harm to the legal system.

Professor Resnik believes the benefit one-shot litigants receive from vacatur on consent make it "difficult to frame an argument—from the vantage point of the parties to the dispute and even with a keen awareness of the inequality of resources among litigants—that

116. *But see* Resnik, *supra* note 2, at 1491.

courts . . . should outlaw this form of bargaining."[117] As we have seen, one-shotters *do* benefit, but they still face the problems of valuation and limitations imposed by the initial verdict. Resnik may be correct when she writes that fairness to the parties is the most compelling reason to allow vacatur. Nonetheless, "a keen awareness of the inequality of resources among litigants"[118] shows that vacatur is fairer to some parties than others. The unfairness is not random—vacatur usually advantages wealthy parties and repeat players. And the limited "benefits" to less wealthy parties come at a high cost to the system of legal precedent in general; they allow individuals to buy and sell the law. The next section examines in detail the reasons why repeat players may tamper with the growth of the law.

C. Preclusion and Impact on Third Parties

Because judgments typically have preclusive effects, vacatur can affect the interests of third parties. The doctrine of res judicata (or claim preclusion) prevents relitigation of claims that were litigated and decided in a court of competent jurisdiction.[119] Similarly, the doctrine of collateral estoppel (or issue preclusion) prevents relitigation of any issue of fact or law actually determined and essential to a judgment.[120] Vacatur destroys these preclusive effects, thereby allowing repeat players a second chance at claims or issues initially decided against them.

The preclusive effects of vacated judgments are uncertain. Settlement itself generally does not "destroy the collateral estoppel effect of a judgment."[121] Vacatur is another matter. As *Moore's Federal Practice* states, "[a] judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect, both as res judicata and as collateral estoppel. The same is true, of course, of a judgment that is vacated by a trial court."[122] Most courts refuse to give preclusive effect to vacated judgments, although a minority consider the issue on a case-by-case basis.[123] This Comment, of course, contends that vacatur is an inappropriate remedy unless the judgment itself is

117. *Id.* at 1491 (footnote omitted).

118. *Id.*

119. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. a (1982).

120. *See id.* at § 27.

121. Fisch, *supra* note 95, at 615 & nn.142-43.

122. JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.416[2], at 517 (2d ed. 1988) (footnotes omitted).

123. *See, e.g.*, Jaffree v. Wallace, 837 F.2d 1461, 1466 (11th Cir. 1988); Dodrill v. Ludt, 764 F.2d 442, 444 (6th Cir. 1985). *But see* Chemetron Corp. v. Business Funds, Inc., 682 F.2d 1149, 1191-92 (5th Cir. 1982) (giving preclusive effect to vacated judgment where vacatur took place after trial but before entrance of a final judgment), *vacated on other grounds and remanded*, 460 U.S. 1007, *initial opinion adhered to on remand*, 718 F.2d 725 (5th Cir.), and *cert. denied*, 460 U.S. 1013 (1983).

defective.[124] Where vacatur *is* granted, however, courts should not be quick to discard preclusive effect. This section offers some guidelines for situations where honoring preclusion would be appropriate, vacation of the earlier judgment notwithstanding.

Res judicata and collateral estoppel exist to prevent parties from litigating claims and issues over and over again until they reach a satisfactory result. Obviously, one central reason for the doctrine is efficiency; it is enormously wasteful to allow litigants to relitigate claims or issues adequately and fairly decided in previous actions. To be sure, not all vacated judgments are subsequently relitigated. But routine vacatur does allow for the possibility of relitigation. As I have argued, vacatur is inefficient even during the initial process of litigation. The destruction of preclusive effects of valid judgments provides another powerful reason why vacatur profoundly wastes public resources.

1. Claim Preclusion

In the federal system, res judicata bars all claims arising out of the same "nucleus of operative facts" as those litigated in the first action. This is true regardless of whether the first action addressed such claims.[125] The preclusive effects of res judicata do not extend to third parties, however. Only parties to the first action, or those who were effectively represented, can be precluded in a subsequent action.[126]

In California, the test is slightly different: rather than the same nucleus of operative facts, res judicata bars claims seeking to uphold the same primary right at issue in the first action.[127] Under this test, "the significant factor is the harm suffered; that the same facts are involved in both suits is not conclusive."[128] For example, even though a federal Title VII employment discrimination claim and a state intentional infliction of emotional distress tort claim might involve the same core of

124. *See* discussion of FED. R. CIV. P. 60(b), *supra* note 10.

125. *See, e.g.*, Lane v. Peterson, 899 F.2d 737, 742-43 (8th Cir. 1990); Frier v. City of Vandalia, 770 F.2d 699, 702 (7th Cir. 1985); Olmstead v. Amoco Oil Co., 725 F.2d 627, 632 (11th Cir. 1984); RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. b (1982).

126. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 39-42 (1982). A party is effectively represented when he had such a close relationship to a party in the first action that his interests were adequately served by that party. Herbert Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457, 1459-60 (1968). This may result where the new party was a partner of the party to the litigation, with identical interests, or is merely an alter ego of the party to the litigation. *See* Teitelbaum Furs, Inc. v. Dominion Ins. Co., 375 P.2d 439, 441-42 (Cal. 1962) (holding that a company's president dominated the company to such an extent that he was an alter ego of the organization, and on that basis precluding a subsequent action by the president following an action by the company itself).

127. *See* Agarwal v. Johnson, 603 P.2d 58, 71-73 (Cal. 1979).

128. *Id.* at 72.

operative facts, litigation of one would not preclude litigation of the other, because the two represent different primary rights.[129]

From the very beginning, discretionary vacatur has been directly linked to the desire to avoid claim preclusion. Indeed, the controversy and the ensuing opinion in *Munsingwear,* which first authorized vacatur upon mootness in the federal system, came about because of government efforts to escape res judicata.[130] Fisch cites a federal district court case that refused a motion for vacatur.[131] In doing so, the court held that res judicata bars a second suit by a company's lawyers because of privity between the lawyers and the company itself, which was involved in the initial action.[132]

Clever litigants will not ask for vacatur and then refile their claim themselves. As in the above case, they might obtain vacatur and then sue again in the name of a different entity.[133] This, of course, is the exact result that res judicata aims to avoid. One solution to this problem is to apply res judicata to vacated judgments. If vacatur is justified because it facilitates settlement, res judicata should be applied to prevent litigants from simply refiling as soon as the motion to vacate is granted.

A further step might discourage this wasteful strategy. Many courts already read the traditional concepts of privity broadly, reaching litigants not present in the first action, but whose interests were adequately represented.[134] If vacatur is granted, a court that hears a subsequent action should follow this trend. Applying claim preclusion

129. *See id.*

130. 340 U.S. 36, 39 (1950).

131. Fisch, *supra* note 95, at 612 & n.123.

132. Davis, Wright & Jones v. National Union Fire Ins. Co., 709 F. Supp. 196, 201 (W.D. Wash. 1989) (extending res judicata beyond traditional concepts of privity to bind those effectively represented in the prior litigation).

133. *See id.*

134. *See, e.g.*, Nevada v. United States, 463 U.S. 110, 135 (1983) (holding a tribe, as a ward of the United States, was bound by a decree to which the United States had been a party); Southwest Airlines Co. v. Texas Int'l Airlines, 546 F.2d 84, 94-102 (5th Cir. 1977) (holding airline adequately represented by Civil Aeronautics Board in prior action); Roberts v. Goldner, 397 A.2d 1090, 1091-92 (N.J. 1979) (precluding a taxpayer suit because of earlier taxpayer action on same theory where both taxpayers were represented by the same lawyer). For a narrower view of the doctrine, see Martin v. Wilks, 490 U.S. 755 (1989). *Martin* involved a consent decree between African-American firefighters and the city of Birmingham, Alabama, setting forth an extensive remedial scheme providing for the hiring and promotion of Black firefighters. *See id.* at 758. A group of white firefighters, not themselves party to the suit, sued. The District Court precluded their action, holding the city adequately represented them in the consent decree. *See id.* The Eleventh Circuit reversed, 841 F.2d 399 (1988), and the Supreme Court affirmed that reversal, four Justices dissenting. *See* Martin v. Wilks, 490 U.S. 755 (1989). It is worth noting, however, that *Martin* involved a consent decree rather than a court judgment, thus making the quality of the first judgment more suspect. Too, the case involved race-based remedies, which might have given the Court cause to interpret privity narrowly rather than broadly. Because of these two important factors, *Martin* is more a unique case than a trend in the making.

broadly removes incentives for litigants to use vacatur to revive a defeated claim.

It is hard to see why the winning litigant would agree to vacatur if she knows the loser plans to refile. In fact, we can probably assume either the winner does not know the loser's plans, or the two litigants are engaged in collusive behavior beyond the scope of the litigation. This is another reason to apply res judicata rigidly to vacated judgments; either one litigant was not bargaining in good faith with the other, or the litigants together were not bargaining in good faith with the court. Either way, it is doubtful that the judge would have approved a settlement conditioned on vacatur if he had known the controversy would simply reappear in another form. Further, a clever party seeking vacatur would likely include a clause barring any refiling of claims as part of the settlement agreement.

As the above discussion shows, litigants can use vacatur to escape the clutches of res judicata. The practice is more commonly employed, however, to avoid collateral estoppel, and to allow relitigation of issues, rather than claims, already decided by a valid judgment. The next subsection will discuss the doctrine of collateral estoppel. One commentator argues for employing vacatur to prevent certain abuses of collateral estoppel.[135] As we shall see, the doctrine provides its own safeguards against abuse, making vacatur a dubious source for reform. Further, as in the res judicata context, vacatur is too often used not because the first court reached the wrong conclusion, but because one litigant is simply unhappy with the result.

2. *Issue Preclusion*

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.[136]

The doctrine of collateral estoppel requires first that the issue have been "actually litigated and determined." For example, suppose that a plaintiff sues a defendant on a negligence theory, and the defendant answers, pleading that she was not negligent, and, in the alternative, that the plaintiff was contributorily negligent. The jury issues a general verdict for the defendant. The issue then arises: what issues of fact or law did the jury actually determine? Did they find that there was no negligence? Did they find that the plaintiff was contributorily

135. *See* William D. Zeller, *Avoiding Issue Preclusion by Settlement Conditioned upon the Vacatur of Entered Judgments*, 96 YALE L.J. 860 (1987).

136. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

negligent? (Assume this action was brought in a jurisdiction where contributory negligence completely bars recovery.) The general verdict makes it impossible to determine *what* the jury relied on in coming to its conclusion. With this uncertainty in mind, a court in a subsequent action should not find that either issue—defendant's negligence or plaintiff's contributory negligence—was actually litigated and determined in the first action.

If the procedure available in the second court differs substantially from that used in the first court, the second court may view the first judgment as unreliable. For example, if the first suit is filed in municipal court, where the jurisdictional limit is $5,000 and there is no discovery available, the defendant may not expend much energy in defending against the claim. If a second plaintiff files a separate action in federal district court for $1,000,000, the defendant will be in trouble: the first judgment, to which he paid so little attention, may block him from adequately defending his interests in the second. Normally a court will recognize these types of discrepancies.[137] If evidence exists that the first judgment was not vigorously fought by both sides, it is less certain that any findings of fact or law from the first judgment were actually litigated in the preclusive sense.[138]

Second, the issue must be "essential to the judgment." Returning to our negligence hypothetical, suppose that instead of issuing a general verdict, the jury makes two specific findings of fact. First, they conclude that the defendant was not negligent. Second, they decide the plaintiff was contributorily negligent. Either of these grounds, by itself, would suffice for a defendant's verdict. In a subsequent action between the parties, should both of these issues be precluded? Neither? The Second Restatement of Judgments, contradicting the initial Restatement, takes the position that neither issue is essential to the judgment, and neither should be precluded in a subsequent action.[139] The Restatement position is not universally followed.[140]

The above scenario is an example of alternative and independent findings against a losing party. If that losing party wants to relitigate one of the findings, she is in a tricky position. First, it would do her no good to appeal just *one* of the findings. Even if that finding were reversed, the reversal would have no bearing on the disposition of the case, because the other finding would still be intact. If an appeal were taken,

137. *See* Parklane Hosiery v. Shore, 439 U.S. 322, 332 (1979) (finding "no procedural opportunities . . . that were unavailable in the first action of a kind that might be likely to cause a different result").

138. *See* RESTATEMENT (SECOND) OF JUDGMENTS §28 (1982).

139. *See id.* at § 27 cmt. i (1982). *But see* RESTATEMENT OF JUDGMENTS § 68 cmt. n (1942).

140. *See, e.g.*, Magnus Elecs. Inc. v. La Republica Argentina, 830 F.2d 1396, 1402 (7th Cir. 1987).

the winning party could simply demur, pointing out that the error, supposing it existed, was not essential to the judgment and would not require reversal of the judgment. A court might dismiss such an appeal as frivolous and sanction the losing party.

When neither fact is essential to the disposition of the case, the fact-finder may not have given either fact the rigorous attention it deserved. Because it is unclear whether the issue was examined rigorously and because appeal of one ground is inordinately difficult, courts sometimes conclude that alternative and independent grounds are not essential to the judgment and refuse to give preclusive effect.[141]

Third, the subsequent matter must be "between the parties." Historically, collateral estoppel, like res judicata, applied in a subsequent action only if both parties had been in the first action. In other words, if a defendant litigated an issue against plaintiff A and lost, he could litigate the same issue in a subsequent action against plaintiff B. This principle of mutuality has eroded considerably. The erosion of mutuality makes collateral estoppel important to the debate over vacatur.

The landmark case of *Bernhard v. Bank of America National Trust and Savings Association*[142] first authorized the practice of offensive collateral estoppel. In *Bernhard*, the California Supreme Court conceded that "requirements of due process forbid" collateral estoppel from being used against a party who had not been in the earlier judgment.[143] The Court noted, "There is no compelling reason, however for requiring that the party asserting [collateral estoppel] must have been a party, or in privity with a party, to the earlier litigation."[144] In other words, although parties to an action may not use collateral estoppel to establish facts in a subsequent action against a nonparty to the first action, a nonparty *may* use collateral estoppel to establish facts in a subsequent action against a party to the first action. So long as a party had a chance to fully and fairly litigate an issue, it may be treated as conclusively established in any later action involving that party.

The *Bernhard* doctrine made some courts and commentators uneasy for several reasons. First, offensive collateral estoppel may inhibit joinder. Offensive collateral estoppel allows plaintiffs to rely on prior judgments involving other litigants. Imagine a hypothetical in which a

141. *See* Halpern v. Schwartz, 426 F.2d 102, 105 (2d Cir. 1970) (noting the losing litigant may not have the foresight to appeal, and, even if an appeal is taken, the winning litigant may not oppose the claim of error on the merits but instead argue the claimed error was not essential to the judgment). *But see* Winters v. Lavine, 574 F.2d 46, 68 (2d Cir. 1978) (distinguishing *Halpern* where a plaintiff pursues "two actions simultaneously and thus could fully anticipate the potential barring effect of the earlier judgment in deciding not to appeal" (quoting Williams v. Ward, 556 F.2d 1143, 1154 (2d Cir. 1977))).

142. 122 P.2d 892 (Cal. 1942).

143. *Id.* at 894.

144. *Id.*

product injures a large number of consumers. Normally, plaintiffs in such a situation would join together in hopes of minimizing expenses and aggregating their bargaining power. If the courts allow offensive collateral estoppel, however, the plaintiffs have no incentive to join together. The individual plaintiffs may "adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment."[145] It may make sense to bar a plaintiff from using offensive collateral estoppel where he could easily have joined the first action, but chose to "wait and see."

Second, offensive collateral estoppel might be unfair to the defendant. As discussed above, the first action may have been filed in a court where damages were limited. Or the first plaintiff may have sued for nominal damages, reducing the defendant's incentive "to defend vigorously, particularly if future suits are not foreseeable."[146] Most unfair would be a scenario where earlier judgments had produced inconsistent results, and a plaintiff sought to rely on an earlier result that privileged his side. In an article on the *Bernhard* doctrine, Professor Currie gave an example of a railroad collision which injured fifty people.[147] After the railroad wins the first twenty-five suits, the twenty-sixth plaintiff recovers. In this situation, it is obviously not fair to allow the remaining plaintiffs to use the anomalous judgment to establish facts against the railroad. As a practical matter, such inconsistent results are rare.[148]

In *Parklane Hosiery Co., Inc. v. Shore*,[149] the United States Supreme Court agreed with the above concerns, holding offensive

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145. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330 (1979).

146. *Id.*

147. *See* Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine*, 9 STAN. L. REV. 281 (1957); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 88(4) (1982).

148. *See* State Farm Fire & Cas. Co. v. Century Home Components Inc., 550 P.2d 1185 (Or. 1976). In *Century Home*, over fifty actions were filed against the defendant for damages resulting from a fire. In the first case, the jury found for defendant, but the judgment was reversed on appeal. In the second case, the jury again found for defendant. In the third case, the jury found for plaintiff. Following that verdict, the first plaintiff refiled; the case went to trial without a jury, and the judge found for plaintiff. At this point, the defendant had won one final judgment and lost two. *Century Home* itself dealt with a group of plaintiffs seeking to use the two judgments adverse to the defendant to establish key factual issues. The *Century Home* court declined to apply collateral estoppel in this circumstance, but refused to reject the practice of offensive collateral estoppel in general:

> [T]he very notion of collateral estoppel demands and assumes a certain confidence in the integrity of the end result of our adjudicative process. There is no foundation in either experience or policy for accepting the suggestion that a decision rendered after a full and fair presentation of the evidence and issues should be considered either substantially suspect or infected with variables indicating the question might be decided differently in another go-round.

Id. at 1190. The court went on to say it would not allow offensive collateral estoppel where (1) there are inconsistent results on what amounts to the same claim, (2) there is evidence of jury compromise, (3) there is evidence the judgment was "manifestly erroneous," or (4) "newly discovered or crucial evidence" was not available to litigants in the first action. *Id.* at 1190-91.

149. 439 U.S. 322 (1979).

collateral estoppel could only be employed in federal courts, subject to the two qualifications listed above: "The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where . . . the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel."[150]

Vacatur generally destroys the preclusive effect of a judgment entirely,[151] which prevents *any* future litigant from using offensive collateral estoppel. In this sense above all others, vacatur is a truly powerful litigation tactic. Returning to Currie's example of the railroad accident, suppose the first plaintiff sues the railroad and wins. The railroad is well aware of the other forty-nine potential plaintiffs. With adverse findings of fact—and the threat of offensive collateral estoppel—hanging over its head, the railroad should seek a settlement conditioned on vacatur with the victorious first plaintiff. With the judgment vacated, the railroad can relitigate issues already conclusively determined in the first action. Moreover, the railroad likely can persuade the plaintiff to vacate; while the railroad *needs* vacatur to avoid liability to the remaining plaintiffs, the initial plaintiff has no incentive *not* to vacate.

Zeller argues vacatur should be discretionarily granted where a defendant seeks to avoid issue preclusion.[152] His argument for vacatur reads like the opinion in *Parklane Hosiery*. He comments that plaintiffs have no incentive to join and may adopt a "wait and see" attitude.[153] He lists five factors for the discretionary granting of vacatur: "inconsistency with prior judgments, ambivalence of the determination, existence of alternative independent bases for the holding, lack of adequate opportunity or incentive for defendant to obtain full and fair adjudication, and incompatibility of future preclusion with an applicable remedial scheme."[154]

Zeller provides a list of reasons why not to grant *offensive collateral estoppel* in a specific case, not reasons to grant vacatur. If the sole purpose of vacatur under his theory is to limit use of offensive collateral estoppel, which Zeller concedes,[155] that goal could be accomplished more simply. Rather than vacating reliable judgments, courts might simply refuse to grant offensive collateral estoppel where one of the *Parklane* factors is present. Indeed, this is *already* how most courts view the doctrine of offensive collateral estoppel; if the court perceives that

150. *Id.* at 331.
151. *See supra* text accompanying notes 117-122.
152. *See* Zeller, *supra* note 1335, at 876-78.
153. *Id.* at 873-74 (citing *Parklane Hosiery*, 439 U.S. at 330).
154. *Id.* at 877 (footnotes omitted).
155. *See id.* at 876.

preclusion would be unfair to the defendant, it is not allowed.[156] Vacatur is not necessary to prevent collateral estoppel abuses. A justification of vacatur should not rest solely on problems with the doctrine of offensive collateral estoppel.

Given that the vacatur process is weighted toward institutional litigants, it is not clear that vacatur is most useful for repeat players who wish to avoid the future consequences of judgments. A request for vacatur will generally have nothing to do with the reliability of the judgment. What matters is the judgment's adverse result and the looming specter of future litigants; these are the engines of motions for vacatur. When we add the inefficiency of the practice in promoting pre-trial settlements, it becomes evident that the common justifications for vacatur are deeply problematic.

Moreover, as the next two Parts discuss, vacatur should be rejected for reasons other than the failure of the policy justifications. Vacatur is not only ineffective on its own terms, it also directly conflicts with the most profound duty of the judicial system—to articulate meaningful social values through the creation of legal precedent. As much as each citizen has a right to bring disputes before the court for fair resolution, the public as a whole has a right to reliable, valuable, and sensible precedent.

III

THE PUBLIC FUNCTIONS OF THE LEGAL SYSTEM

One basic foundational question lies at the root of the vacatur debate: what is the role of the judiciary? The two principal visions of that role are the "dispute resolution" model and the "law-expounding" model.[157] The dispute resolution model pictures lawsuits simply, as disputes between parties. The judiciary's role is to consider and resolve those disputes in the manner most convenient for the parties. The law-expounding model, to the contrary, conceptualizes lawsuits as media through which social values are interpreted.[158] The role of judges in this system is to derive the appropriate legal rule from the values articulated in the constitutions and statutes of the federal and state governments. Under the law-expounding model, "precedent is not merely a by-product" of lawsuits;[159] rather, developing precedent is the entire point of adjudication.

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156. *See Parklane Hosiery*, 439 U.S. at 331-32.

157. Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur*, 30 HARV. C.R.-C.L. L. REV. 109, 113-16 (1995).

158. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

159. Slavitt, *supra* note 157, at 115; *see also* Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 5 (1984).

This Part discusses the emergence of a public-law model of adjudication, which is substantially similar to the law-expounding model described above. Because the context in which the model emerged is important, this section briefly examines the growth of the public-law model through lawsuits dealing with structural reform, rather than simple private disputes. It goes on to question the distinction between structural and private disputes and then examines a particularly relevant feature of the public-law system: the breakdown of the strong link between rights and their (formerly) correlative remedies.

A. The Emergence of the Public-Law Model

Traditionally, lawsuits have been seen largely as "vehicle[s] for settling disputes between private parties about private rights."[160] Confined in this way, the lawsuit can be described as bipolar, a contest between two parties or, at least, two common and opposed interests. It is self-contained—once it was over, the court let the parties be. The parties initiate and control it, leaving the judge to his role as a neutral arbiter.[161] That the decision may articulate a valuable public standard of conduct is important, but secondary: the focus of the decree is the just allocation of liability between the parties. A paradigmatic controversy of this type is a contract dispute. Below, I examine two theories of the structure and meaning of lawsuits, in hopes of teasing out the potential public significance of even seemingly private controversies.

1. Public-Law Litigation Described

In an influential early article on what might be termed "public law," Professor Chayes draws the contours of a new public-law system by focusing on that system's formal opposition to the private-law model discussed above.[162] In his article, Chayes lists eight "crucial characteristics" of public-law litigation:

> (1) The scope of the lawsuit is not exogenously given but is shaped primarily by the court and parties.
>
> (2) The party structure is not rigidly bilateral but sprawling and amorphous.
>
> (3) The fact inquiry is not historical and adjudicative but predictive and legislative.
>
> (4) Relief is not conceived as compensation for past wrongs in a form logically derived from the substantive liability and con-

160. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976).

161. *See id.* at 1282-83.

162. *See generally id.*

> fined in its impact to the immediate parties; instead, it is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees.
>
> (5) The remedy is not imposed but negotiated.
>
> (6) The decree does not terminate judicial involvement in the affair: its administration requires the continuing participation of the court.
>
> (7) The judge is not passive, his function limited to analysis and statement of governing legal rules; he is active, with responsibility not only for credible fact evaluation but for organizing and shaping the litigation to ensure a just and viable outcome.
>
> (8) The subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy.[163]

An obvious example of a public-law controversy is a suit to obtain a school desegregation order. Such a case leaves the traditional form of the lawsuit behind. There are many plaintiffs and several defendants. The litigation may be forward looking, the outcome affecting hundreds of children not yet born or too young to attend school. Right and remedy are detached, with remedies flowing to future students who have never experienced the injury of forced segregation. The matter does not end with the decree, but requires supervision. The parties cannot shape the contours of the suit as in a simple contract claim. The judge takes an activist role in public-law matters, guiding the hands of the parties in determining liability and relief. Certainly, many claims fall in the vast middle between the two poles of pure public or pure private law. The emergence of the public-law model, however, suggests a changing conception of what some lawsuits do, and, consequently, the costs of vacating judgments.

2. *The Social Value of Public Law Litigation*

Professor Owen Fiss, in an equally famous article, sets the emergence of the public-law model in a broader context. For him, the judiciary has a duty to give legal meaning to shared values.[164] Fiss sees the development of public law not merely as a response to one particularly thorny problem, such as violations of equal protection by public institutions, but as a logical endpoint. As he writes, "[t]he task of a judge,

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163. *Id.* at 1302.

164. *See* Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

then, should be seen as giving meaning to our public values."[165] Adjudication is "the process through which that meaning is revealed or elaborated."[166]

Like Chayes, Fiss describes aspects of the new public-law model. Under his description, the lawsuit deals primarily with social conditions rather than incidents of private wrongdoing, plaintiffs and defendants are frequently many, the judge is activist, and right and remedy are not tightly interdependent. Fiss, however, states explicitly what Chayes implies: the public-law system is an appropriate means of dealing with vexatious social problems. In fact, he argues that resolving social problems is *the* most important task the judiciary can take up; mere private disputes, he contends, are best dealt with out of the public eye by arbitrators, and paid for by private dollars rather than public funds.[167]

B. The Public Value in Private Litigation

Professor Fiss adheres to a binary distinction between what he calls "structural reform"—that is, public-law litigation brought to vindicate public values that have fallen prey to bad policymaking, and "dispute resolution," or private-law claims. But such a dichotomy is simplistic. It is certainly true that some claims are by definition more public than others, if by public we mean matters that impact a wide range of people. A desegregation order, for example, is by this standard more public than our paradigmatic contract dispute. But Fiss' model pays little attention to the fact that even the most private dispute may help articulate a rule of law just as responsive to the shared values of our community as any public dispute. The next section shows how private disputes are valuable to the public. It discusses the difficulty of distinguishing between "private" and "public" in the first place, and identifies the ways in which private judgments reflect important societal values and develop standards of public conduct.

Fiss argues that the public-law system originated with attempts at structural reform. Structural reform, he writes, "is premised on the notion that the quality of our social life is affected in important ways by the operation of large-scale organizations."[168] A structural suit attempts to change the character of these organizations and thereby secure basic constitutional values and liberties. Fiss limits structural reform to lawsuits of significant constitutional character involving a conflict "between the judiciary and the state bureaucracies."[169]

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165. *Id.* at 14.

166. *Id.*

167. *See id.* at 28-30. *See generally* Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976).

168. Fiss, *supra* note 164, at 2.

169. *Id.*

But even the most private of suits—suits involving no constitutional issue at all, or not even extending beyond the paradigmatic two-party structure—may have some valuable public effect. The growth of the public-law system has alerted lawyers to the potential of individual judicial decisions' contributions to public norms. But the extent of what makes the law public stretches far beyond the public-law system itself. The public-law system as described by Fiss is only an introduction to the law's potential public functions.

This section discusses the impossibility of maintaining any clean distinction between public and private values. In the end, I make a claim that is at once more and less ambitious than the claim of the public-law model. I do not argue, as the public law argument might suggest, if takeu to its logical endpoint, that the courts are or should be the guardians of all public values, or that the courts are better-suited to the task of protecting the public than the other branches of government. My argument is that because all litigation—not just structural reform litigation, but dispute resolution suits as well—takes place in a public forum, is paid for by public dollars, and works toward the articulation of a just and legitimate public norm, all litigation is, to some degree, public. The public value in all judgments makes vacatur a dangerous practice.

1. Public Standards of Conduct Created by Adjudication of Private Disputes

Resolution by a court of a controversy between private parties can spell out a new, broadly applicable rule of conduct. Over time, courts of last resort both at the federal and state level consider competing rules and go on to choose the rule judged most effective. There may be different reasons for choosing one rule over another. Whatever reason supports the choice, though, the consequences of that choice have public significance. A rule promulgated by a court of last resort binds all courts within that jurisdiction. Potential litigants may take notice of the rule and modify their conduct, thus avoiding litigation. Even if they cannot modify their conduct, litigants make pre-trial decisions based on their chances for recovery under existing legal rules.

Examples of the public effect of courts' resolutions of private disputes abound in the common law. For example, Learued Hand's formula in *United States v. Carroll Towing Co.*[170] made the law of negligence far more accessible and economically rational. Eschewing a general rule, Hand conceptualized negligence algebraically. His formula took the entire context of the allegedly negligent behavior into

170. 159 F.2d 169 (2d Cir. 1947).

account: "[I]f the probability be called P; the injury, L; and the burden [of taking adequate precautions to prevent the injury], B; liability depends upon whether B is less than L multiplied by P: i.e., whether B < PL."[171] This calculus provided a formula that any business could use in deciding whether or not to take safety precautions. If the burden of preventing injury far exceeds the gravity of that injury, discounted by the unlikelihood of its occurrence, the business might feel more comfortable not taking precautions. If injury did occur and the business was sued, it could argue the *Carroll Towing* formula to the court. If it could establish that the costs of taking precautions were disproportionately high, it might avoid liability. Valuations under *Carroll Towing* could be problematic, but by couching negligence in terms of dollars, the Hand formula made it easier for businesses to calculate their own risks.

A second example of how private controversies lead to public standards of conduct is the development of the doctrine of strict liability for defective products. Justice Traynor of the California Supreme Court first proposed the rule in *Escola v. Coca-Cola Bottling Co.*[172] that " a manufacturer incurs an absolute liability when an article that he has placed on the market . . . proves to have a defect that causes injury to human beings."[173] Justice Traynor's opinion in *Escola* was only a concurrence, and strict liability did not become law in California until almost twenty years later.[174] From there, other states followed suit in adopting the doctrine.[175] Before strict liability, tort liability for a product causing injury due to a design or manufacturing defect depended on whether the product was "inherently dangerous."[176] Courts had inconsistently determined which products were inherently dangerous and which were not.[177] A coffee urn was inherently dangerous,[178]

171. *Id.* at 173.

172. 150 P.2d 436 (Cal. 1944).

173. *Id.* at 461 (Traynor, J., concurring).

174. *See* Greenman v. Yuba Power Prods., 377 P.2d 897 (Cal. 1963) (affirming that strict liability is a tort theory rather than a contract theory based on warranty of merchantability, and that the purpose of strict liability is to ensure that manufacturers rather than consumers bear the cost of defective products).

175. *See* Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960) (creating strict liability based on a warranty theory); Voss v. Black & Decker Mfg. Co., 450 N.E.2d 204 (N.Y. 1983) (approving strict liability based on design defects in products).

176. *See* MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916) (allowing immediate purchasers to recover on a warranty theory, based on privity of contract); Devlin v. Smith, 89 N.Y. 470 (1882); Thomas v. Winchester, 6 N.Y. 397 (1852); Winterbottom v. Wright, 10 Eng. Rep. 408 (Ex. 1842) (holding that a plaintiff, injured by a defective product that she had not bought, could only recover if the product was inherently dangerous).

177. For a discussion of the evolution of the inherently dangerous doctrine, see EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 8-27 (1948).

178. *See* Statler v. George A. Ray Mfg. Co., 88 N.E. 1063 (N.Y. 1909).

while a steam boiler was not.[179] Although its relative fairness or efficiency is debatable, strict liability told manufacturers where they stood legally. A manufacturer now had incentives to test even its most innocuous products rigorously, to buy liability insurance and to settle claims it might otherwise have litigated. Again, judgments involving private parties profoundly influenced the public life and expectations of American industry.

Like tort law, contract law is full of seemingly insignificant private disputes that have profound public consequences. *Dougherty v. Salt,*[180] for example, clarified the law regarding illusory promises, concluding that without consideration flowing to the promisor, a promise could not be legally enforced. This simple rule spoke to anyone who might consider entering into a contract. Similarly, *Hamer v. Sidway*[181] broadened the definition of consideration when the court held that a person who voluntarily accepts a detriment gives consideration just like the person who confers a benefit. Both of these cases grew out of private, intrafamily disputes, but both enunciated important rules of law that, once accepted by other courts, shifted the expectations of contracting parties.

None of these disputes attempted structural reform. Yet they all led to the enunciation of important rules with far-reaching consequences. To the extent that the common law generates new, and ideally better, rules by building on its old successes and failures, vacatur presents an obvious problem. When a valid judgment is vacated, it no longer exists as a building block in the law's overall structure. If the law can be said to generate new rules by relying on the best of what has come before, vacatur distorts the base from which new rules are chosen. Moreover, that base is likely to be skewed in a particular direction: If it is wealthy parties that have the resources to buy off a winning litigant, the system of precedent is likely to shift to favor the interests of wealthier litigants.[182]

2. *Public Expenditure of Funds to Adjudicate Private Disputes*

Disputes between private litigants have public significance for another reason: they are adjudicated in a public courtroom. The courtroom is staffed by judges, clerks, and bailiffs whose salaries are paid by the government. The costs of litigation are certainly burdensome, but the existence of government courts allows litigants to avoid paying an arbitrator to hear their case.

179. *See* Losee v. Clute, 51 N.Y. 494 (1873).
180. 125 N.E. 94 (N.Y. 1919).
181. 27 N.E. 256 (N.Y. 1891).
182. *See infra* Part IV.B.

Imagine what litigation might be like if the government did not make courtrooms available to the public for civil trials. Litigants who wished to resolve a dispute would have to hire a neutral arbitrator. Even assuming the existence of professional arbitration services that would reduce the transaction costs of such disputes, the parties would nevertheless have to find and rent a site for the adjudication; each party would have to arrange depositions for its own witnesses; there might be endless wrangling over discovery. The varying procedures available in each case, depending on the preferences of the litigants, might dictate substance.

In addition to the benefit of public funds and an established system of adjudication, litigants in a public courtroom receive a judgment buttressed by the system of precedent. In other words, the judgment has the entire force of the law's inherent public natnre at its back. The judgment may, of course, be legally faulty and may be appealed. Barring some breakdown in the court's public function, however (such as jury tampering, material mistake of fact by the factfinder, or newly discovered evidence) a public final judgment, bought with public funds and supported by the system of precedent, should not simply be set aside. To do so disregards the public natnre of the courts.

Moreover, litigants may choose public courts precisely because they are public. They may think that the public nature of the courts encourages fairness by the judge or jury. Depending on the specific facts of the case, they may, like George Neary, wish to try the case in public to draw attention to the bad behavior of their opponent. But when parties enter into a public court they necessarily give up a portion of control over the contours of their dispute. If the parties wish to retain full control over the shape of the dispute, or wish to reserve the right to vacate a final judgment, they can always agree to private arbitration and avoid the public stage altogether.[183]

If one accepts this conception of the court system, one necessarily redraws the line between public and private. In the previous subsection, I refer to all disputes involving broad social rights, such as the right to attend a desegregated school or be free from state establishment of religion, as public and all other disputes—torts and contracts and property controversies—as private. Put another way, disputes become public when government policies are implicated as violating substantive constitutional rights held by broad classes of people.[184]

183. Arbitration might be beyond the means of poorer litigants because of the additional costs of setting up a private court. However, it is also true that poorer litigants tend to be one-shot litigants, who, by and large, are not interested in vacatur. *See supra* Part II.B.1. In other words, only repeat parties would need to preserve the right to vacatur using arbitration. In all probability, the repeat player *could* afford arbitration.

184. *See supra* Part III.B.1.

The implications of this subsection suggest a different definition of public and private. All disputes resolved in public courts are public. This is so for at least two reasons: these disputes help articulate rules of law that guide future public behavior, and the judgments are rendered by a public court, using public funds and the imprimatur of impartial public process. Under this model, a "public" decision is one rendered in a government court that contributes to a body of precedent aimed at illustrating standards of public conduct. A "private" decision is rendered by a private arbitrator according to rules the litigants specify themselves. Given the value of public decision-making to society generally,[185] it becomes difficult to argue for the vacatur of public decisions.

IV

PROBLEMS WITH VACATUR OF PUBLIC DECISIONS

This Part discusses three specific problems of vacatur under this new public model. First, vacatur casts doubt on the legitimacy of the judicial system, because it allows wealthy parties to purchase the law, and fortuitiously-placed parties—usually plaintiffs—to sell the law, when the law is really not theirs to buy or sell. Second, vacatur stunts the growth of the law's organic progress by removing links from the chain of legal precedent. Third, vacatur can be seen as a judicially-created remedy that should only be granted where a legal right has been violated.

A. Vacatur and Legitimacy

Vacatur threatens the legitimacy of the judicial function in two ways. First, it is an activist departure on the part of judges from the ordinary growth-process of the law. Second, it allows parties to place dollar values on public judgments. By casting doubt on the legitimacy of the courts' reputation for fairness and consistency, vacatur undermines public confidence in the judicial system as a whole.

In the administrative state, law grows in large part through the passage of statutes and agency regulations. Within courts, however, law grows case by case. Each case represents an addition, another brick added to a foundation built up over a period of many decades. Vacatur removes bricks from this structure. Instead of allowing the law to take its generally conceived path, where judges synthesize all applicable precedent in order to discover the most meaningful and useful rule, judges who grant vacatur actively remove cases from consideration. Not only does this judicial activism break with tradition, it directly attacks the tools of the judiciary.

185. *See infra* text accompanying notes 187-199.

Moreover, when litigants ask a court to vacate a judgment, they engage in a kind of lobbying common in legislatures, but largely unheard of in courts.[186] Slavitt describes the reaction of one court that received many requests from lawyers—not themselves parties, representatives, or *amici curiae*—to vacate a newly-rendered opinion.[187] Shocked, the court accused the lawyers of "violat[ing] conventional rules of fairness."[188] Most motions for vacatur are less troublesome, because parties to the judgment are the ones asking for relief from the court. Still, advocacy of routine vacatur calls for a change in judicial practice, one in which a party can ask a court to do away with a valid judgment. Parties may justify a request for vacatur by urging the efficiency of the practice and the benefits that would accrue to society as a whole if the practice were adopted.

Vacatur also "hides the actual state of the law," making litigants less certain of what positions courts have accepted.[189] When litigants stipulate to a vacatur, future litigants normally cannot cite to that decision, and future courts are, in theory, not allowed to rely on it. Unless a litigant has significant resources, he may be entirely unaware that the earlier decision even exists. This is a dereliction of the judiciary's widely understood duty to say what the law is.[190] When the political branches pass a law, they expect consistency and candor in its application and interpretation by the judiciary. Vacatur allows confusion and uncertainty to creep into this interpretive process.

This first objection leads to a second one: given that judges break from traditional practice and allow vacatur, whom does the practice benefit? As I have argued,[191] vacatur is most often, and most effectively, used by wealthy institutional litigants. Those litigants use vacatur most often to remove precedent they do not like from the books. Once it is removed, future litigants cannot rely on that precedent. Institutional litigants can therefore change the actual state of the law through vacatur. To do so, they must simply persuade their opponent to agree to vacate the judgment, which they accomplish with money. If they offer enough money, presumably the other party agrees to the vacatur, and the law changes. If they offer too little, the law stays the same. The state of the law, then, depends on how much money the losing party will or can pay.

Whatever one's views of the proper role of the judiciary, most of us would probably agree that the law should not be sold. It is illegal to

186. *See* Slavitt, *supra* note 157, at 132-33.

187. *See id.*

188. *Id.* (quoting Gardner v. Charles Schwab & Co., 267 Cal. Rptr. 326, 340 (Ct. App. 1990) (ordering partial publication)).

189. *Id.* at 133. Slavitt's comments about selective publication apply with equal force to vacatur.

190. *See* Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 176 (1803).

191. *See supra* Part II.B.2.

tamper with juries. It is illegal to bribe judges. Vacatur allows for one litigant to tell the court, "While I appreciate your effort, I disagree with your conclusions, and I would like them expunged." If he comes up with enough money to keep his opponent quiet, the conclusions *are* expunged, and the state of the law changed. It is true that vacatur cannot force a court to accept a contrary result;[192] it merely nullifies whatever result that court reached.[193] The practice is an example of the market run amok; courts should guard against such dangerous market failures by adopting rules that make vacatur available only for defective judgments.

A public-law argument would go one step further. Vacatur is clearly illegitimate when examined in light of the public function of the law. Judgments illustrate appropriate standards of conduct; within those standards of conduct is social meaning. Vacatur allows cash bounties to manipulate the legal norms that goveru our lives. Judgments are also rendered in public fora by public officials and paid for by public funds. It is both wasteful and dangerous to allow the vacatur of judgments rendered publicly. When laid down in the public eye, judgments take on a social force. They do more than simply clarify rights and duties and apportion liability. The acts of courts bind society together. Vacatur sacrifices this broad social meaning for a quick payoff. What makes the situation worse is that the payoff, of course, does not flow to society as a whole, but to the private litigants. The losing party pays a fee but gains vacatur; the winning party gives up a final judgment but gains a monetary reward.

Vacatur, then, is illegitimate because it undermines the judiciary's traditional role as a branch of government. It allows for individual litigants to usurp the role of the courts, subjects courts to lobbying, and hides the state of the law. In a most visceral sense, it is illegitimate because it allows a dollar value to be placed on legal doctrine. This violates the notion that the growth of the law is a matter of public right, and undervalues the public worth of a fair judicial process.

B. Vacatur and the System of Precedent

If one recognizes the operation of the system of precedent, one should reject routine vacatur. As suggested above, vacatur casts doubt on the legitimacy of the judicial system because it forces judges to assume an uncomfortable role—removing precedent rather than adding it.

192. The California court system's practice of stipulated reversal does exactly this. *See supra* Part I.C.

193. Again, it might be urged that trial court judgments are not precedent in the sense that appellate court judgments might be. *See* State *ex rel.* State Lands Comm'n v. Sacramento County, 900 P.2d 648, 654 (Cal. 1995) (distinguishing *Neary* on grounds that the instant case proceeded further in the appellate process). This objection will be addressed and answered in Part IV.B., *infra*.

Another objection has to do with the system of precedent itself: vacatur changes the operation of the system for the worse by distorting the path of the law. One position may gain currency over another, not because it is more popular or more sensible, but because it fell prey to vacatur less often.

In practice, this distortion will hamper some litigants more than others. Vacatur is more valuable to repeat institutional litigants, because they can be directly harmed by the judgment again in the future. It is more accessible to wealthy litigants because they can pay the price. Suppose an industry is divided more or less equally between five large and prosperous manufacturers. All five qualify as repeat players. Each manufacturer makes and markets a similar product. Now suppose the products turn out to be unsafe because of a flaw with their foundational technology.[194] All five manufacturers are sued.

It is possible that the lawsuits will result in inconsistent judgments. Perhaps they are brought in different states, each with a distinct substantive tort law. For simplicity's sake, suppose that of the first ten judgments—two per each institutional defendant—five result in liability and five do not. Suppose the verdicts do not turn on a factual matter—whether the product is unreasonably unsafe, for example—but on the legal standard that each court applies to the fact pattern, such as whether an entire industry's technology can be considered negligent,[195] or whether strict product liability can be limited by the doctrines of assumption of risk or contributory negligence.[196]

At first, the result in terms of precedent would be confusion. Several courts would have heard similar questions of tort law, and a difference of opinion would emerge. This, of course, is not uncommon—recall the differences of opinion that courts had over the question of vacatur itself.[197] Ordinarily, the two positions compete against each other; ideally, the more logical doctrine would win out. If vacatur were available, however, the two positions might never get the opportunity to compete. The manufacturers would pay the five plaintiffs who won to

194. Recall the lawsuits brought against manufacturers of silicone breast implants in the early 1990s, when an entire industry's technology was found to be faulty.

195. *See* The T.J. Hooper v. Northern Barge Corp., 60 F.2d 737, 740 (2d Cir. 1932) (holding that an entire industry's standard of care can be negligent).

196. *See* Daly v. General Motors Corp., 575 P.2d 1162 (Cal. 1978) (overruling Li v. Yellow Cab Co., 532 P.2d 1226 (Cal. 1975)) (holding, contrary to precedent, that strict liability recovery can be limited by the plaintiff's negligence in product use); *see also* Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976).

197. *Compare* U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994), *In re* Memorial Hosp., 862 F.2d 1299, 1300 (7th Cir. 1988), *and In re* United States, 927 F.2d 626, 628 (D.C. Cir. 1991) (refusing grants of routine vacatur *because* of the public value in judgments), *with* Manufacturers Hanover Trust v. Yanakas, 11 F.3d 381, 384-85 (2d Cir. 1993), Orocare DPO, Inc. v. Merin, 972 F.2d 519, 522 (3d Cir. 1992), *and* Neary v. Regents of Univ. of Cal., 834 P.2d 119, 120-22 (Cal. 1992) (granting routine vacatur because of the convenience of the parties).

vacate. With those judgments gone forever, only the decisions in favor of the manufacturers would remain. If future courts sought to determine the best legal rule to apply by examining past decisions, they would be looking at a distorted picture.

In this way, if vacatur is readily available and two distinct—if not necessarily diametrically opposed—legal rules compete for an audience, it is possible that the rule favored by institutional litigants will win. It will win because those litigants have the motive to seek vacatur of adverse judgments and the money to pay for it. It may be that, for a variety of reasons, justice is often, or perhaps always, contingent on the wealth of the parties. Insolvent parties may be unable to pay for competent lawyers, or any lawyers at all, or may be unable to conduct effective discovery because they do not have the resources to sift through tall stacks of documents. Vacatur, however, results in the adoption of a *legal rule* favored by wealthier parties. Here, procedures are not to blame. Here, wealth captures the substance of the law.

Vacatur usually affects trial court opinions rather than appellate court opinions. Because trial court rulings are not necessarily binding precedent in the way that appellate court opinions are, it could be argued that vacatur of a trial court opinion is less costly to the growth of the law. In some cases, this may be true. *Bonner Mall,* however, makes no distinction between trial and appellate opinions, finding vacatur of either equally illegitimate.[198] This is significant for two reasons. First, if the First Circuit can ignore the Supreme Court's commands in vacating a decision of a district court, it is possible that they would do the same for one of their own decisions. Given the First Circuit's reliance on efficieucy in *Motta*, this possibility is not unreasonable. Second, by their very nature, vacated judgments never get appealed. A trial court decision that is vacated on appeal loses its chance to become a new rule. The cost of vacating a trial court opinion may be smaller, but that same opinion, after review by an appellate court, might become valuable precedent. The costs of vacating trial court opinions, therefore, are not certain, and are certainly not as insubstantial as one might initially guess.

Vacatur not only tilts the playing field inexorably in favor of the wealthy, it distorts the meaning of the system of precedent itself. Slavitt finds three important values in the system.[199] First, precedent supplements legislative rule-making by filling the gaps left in statutes by legislatures. Armed with precedent, judges need not reinvent the wheel by "retesting every legal proposition."[200] Second, precedent promotes

198. *See Bonner Mall,* 513 U.S. at 27-29.
199. *See* Slavitt, *supra* note 157, at 140-41.
200. *Id.* at 140.

consistency among judges and uniformity in the law. When law is more certain, litigants can "structure their affairs to avoid disputes."[201] Third, a system of precedent allows public values to be discovered and given meaning. When precedent exists, the public can be sure courts are guided by principles rather than caprice.

Vacatur damages all three of these values. First, vacatur creates inefficiency within the system of precedent by forcing judges to reexamine conclusions. Not only does vacatur increase the chance of creating an institution-friendly rule of law, it wastes the time of judges who worked hard developing the previous rule. Second, vacatur makes uniformity less likely by removing links from the chain of precedent. When the law is not uniform or consistent, litigants face greater uncertainty as they go about their affairs. An uncertain litigant may not take proper precautions to avoid liability, such as the purchase of liability insurance or vigorous testing of new products. Third, the social meaning created when the system of precedent is weighted down by vacatur may be simply that "money talks." The rule of law is likely to be slanted toward wealthy parties. Moreover, if precedent can simply vanish because of the desires of individual litigants, social meaning, like practical meaning, may become less clear. The law may be inhibited from performing its most precious function: illustrating shared values through legal standards of conduct.

C. Vacatur and Remedy

Vacatur does more than damage the legitimacy of the judicial system as a whole and pose a threat to the effective function of the system of precedent—it provides a remedy where no right has been violated. Indeed, if vacatur is seen as a remedy—as Justice Douglas viewed the federal government's request for vacatur in *Munsingwear*[202]—it is difficult to pinpoint why any litigant has a right to ask for the vacatur of a non-defective judgment.

In this Section, I will discuss changes in the relationship between right and remedy stemming from structural reform suits. A limited disjunction between rights and remedies is primarily seen in these large-scale structural suits, where remedies that extend beyond the personal rights of the litigants may be the only way to redress the valid grievances of disenfranchised social groups. I will argue that despite these changes in the right-to-remedy relationship, the correlation between the right violated and the remedy extended still holds in most cases. Even in structural reform suits, where courts have extended remedies over

201. *Id.*

202. *See* United States v. Munsingwear, 340 U.S. 36, 40 (1950) (noting the government "did not avail itself of the remedy it had to preserve its rights" in waiting too long to ask for vacatur).

time, they have never created a remedy where no legal right was violated.

If vacatur is viewed as remedial, it becomes clear that it is unlike other remedies in that it is granted even though no right has been violated. I will explore various arguments that might be made in favor of vacatur as a remedy and conclude by rejecting them, arguing that unless a violation of rights, such as inhere in the maintenance of a defective judgment, can be established, the remedy of vacatur is improper.

1. The Disjunction Between Rights and Remedies

Historically, rights have been seen as personal to each plaintiff, and only a plaintiff personally affected has standing to pursue a remedy. Similarly, that remedy, if granted, is typically limited to the extent of the plaintiff's injury. For example, returning to our basic contract dispute, suppose a homeowner promises to pay a contractor $20,000 for work on the homeowner's house. If the homeowner fails to pay, the contractor suffers the violation of a legal right—the right to recovery under the terms of a fully performed bilateral contract. The remedy to which the contractor is entitled follows from the violation of that right. That is to say, the contractor has performed the contract fully. He has a legal right to that $20,000 because the parties agreed on that sum before performance began.

Desegregation suits sharply illustrate how disconnected right and remedy can become. For example, suppose a school district is sued and a federal court finds the district guilty of maintaining a dual school system. Once a violation is established, the court imposes a remedy. Consistent with *Brown v. Board of Education (Brown II)*,[203] the court may take control of the district entirely, actively supervising its progress from a dual system to a unitary one.

In this case, the original plaintiffs won a judgment recognizing that their rights had been violated. That finding entitles them to a remedy. But suppose the court decides that the best, most effective remedy would be a slow, incremental integration process to be completed over fifteen years. In this case, the disjunction of right and remedy becomes obvious. The original plaintiffs, whose rights were violated, will not receive the precise remedy they sought; the district will not become integrated until long after they have graduated. Those who do receive the remedy of a unitary system were not plaintiffs in the original suit. Their rights to a unitary school system were never violated, and yet it is to them that the benefit of the original judgment runs.[204] The converse is true as well. The original defendants, the men and women who run the school

203. 349 U.S. 294, 300-01 (1955).

204. *See* Chayes, *supra* note 160, at 1292.

district, will not be in full compliance with the law right away. By the time compliance is achieved, a new school board may be in place, and those who run it will be burdened by a judgment to which they were not parties. Similarly, the inconvenience of busing will be felt more severely by future students. If the remedy truly is incremental, the current students may not be subject to busing; it will be their successors who will be bused, despite the fact that they have never attended a dual school system.

Obviously, the Warren Court felt that this disjunction—and the inconvenience of managing large structural injunctions—was worth the effort. *Brown II* itself created the disjunction by authorizing federal courts to supervise local school districts over long periods of time.[205] Indeed, the Supreme Court recognized that it was requiring massive social change. It hoped to buffer the shock of its decrees by making desegregation incremental, allowing courts to proceed "with all deliberate speed."[206] In doing so, it granted remedies to those whose rights were never violated and imposed liabilities on those who had committed no violation.[207]

The disjunction, of course, is hardly complete. The deeds of past defendants still have real impact on the successors of past plaintiffs. The current school board members, similarly, are the successors in interest of the past defendants; they have inherited the responsibility to rectify the constitutional violations of their predecessors. In other words, the disjunction is more formal than substantive. The intent to segregate may no longer be present, but the effects of the segregation remain. Unless one would limit the remedy in these cases to money damages payable to the original victims of the dual school system, some remedial burden must be imposed in the present. That burden, however, is imposed only as the result of a constitutional violation; it still depends on the violation of some plaintiff's rights by some defendant. It may have been extended over time, but it is not given where there has been no violation.

Even at is most disjunctive, then, remedies still do depend on the violation of rights. This is a final reason why vacatur of non-defective judgments should not be granted; vacatur provides a remedy where no violation of rights exists.

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205. *See Brown II*, 349 U.S. at 301.

206. *Id.*

207. *See* Fiss, *supra* note 164, at 46-48 (explaining the "tailoring principle" used to limit structural remedies by the Supreme Court in cases such as Milliken v. Bradley, 418 U.S. 717 (1974), and Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977)).

2. Vacatur as a Remedy

Vacatur can be seen as a remedy. Functionally, it behaves as one; Justice Douglas noted as much in his opinion for the Court in *Munsingwear*.[208] If a litigant has lost his case, he is subject to the terms of the adverse judgment. If a court vacates the judgment, the litigant is no longer subject to that judgment because it no longer exists. Vacatur can be tremendously advantageous to a losing litigant. As we have seen, it not only releases a litigant from the weight of an adverse judgment, it also destroys the preclusive effect of that judgment. If other litigants are waiting to sue on the same theory, vacatur destroys precedent. It may also minimize adverse publicity that a company or a governmental body may experience after losing in court. It is perfectly understandable why, when vacatur is available, institutional litigants pursue it with vigor.

In the federal courts, Rule 60 of the Federal Rules of Civil Procedure putatively governs vacatur. Rule 60 offers a remedial conception of the practice. A court should grant vacatur, the rule instructs, when the underlying judgment is unreliable because of mistake, newly discovered evidence, fraud, or legal voidness.[209] Rule 60(b)(5) allows for vacatur if the judgment has been satisfied, or if the authority under which the court decided the judgment has been reversed, or if continuing prospective application of the judgment would be unjust.

The first four reasons allow for vacatur in the event of gross procedural breakdowns that render judgments internally defective. A judgment delivered pursuant to some mistake of fact does not represent a carefully considered conclusion of the legal system; it is a fluke. Similarly, where key evidence was missing from a trial, the judgment cannot be considered completely fair.[210] Fraud, much like mistake, indicates that the fact-finder rendered the judgment while under false pretenses. Voidness, while somewhat murkier, means the judgment has "no legal force or binding effect."[211] Vacating a void judgment causes no harm to any other entity because, by its own terms, the judgment was unenforceable and useless as precedent.

Rule 60(b)(5) offers another reason for vacatur. Not concerned with breakdowns in the system that leave the judgment internally flawed, it permits vacatur where the external circumstances around the judgment have changed to such an extent that the judgment no longer makes

208. *See* United States v. Munsingwear, 340 U.S. 36, 40 (1950).

209. *See* FED. R. CIV. P. 60(b).

210. FED. R. CIV. P. 60(b)(2) omits those instances where the evidence in question "could . . . have been discovered in time to move for a new trial under Rule 59(b)." This prevents a litigant from suppressing evidence, undermining a trial, and gaining the benefits of his own duplicity.

211. BLACK'S LAW DICTIONARY 1573 (6th ed. 1990).

sense. Three examples of this exist. First, a court may vacate a judgment that has been satisfied, discharged, or released.[212] The Supreme Court's decision in *Karcher v. May*,[213] which held that a court should not grant vacatur if the deliberate acts of the parties caused mootness, limits the court's discretion.[214] Second, a judgment may be vacated if the legal authority under which it was decided has itself been reversed or vacated. For example, suppose that a federal court applied state law in a diversity suit. Suppose also that the supreme court of that state had not resolved the question, and the federal court was forced to select the prevailing opinion among that state's intermediate appellate courts. Right after the federal court rendered judgment, the state supreme court decided the same question in the opposite way. Under this circumstance, a litigant might seek vacatur because the federal court was bound to follow state law; if the state law was applied incorrectly, or has changed, the judgment is obviously suspect.[215] Third, vacatur is an option where continued prospective application of a judgment is inequitable. This clause allows parties to ask the court for modification of injunctions where equitable relief is no longer appropriate.

In all of these instances, vacatur is allowed because the rights of the litigants have been compromised. The judgment itself is either inherently unreliable or no longer serves the purpose for which it was designed. This is the appropriate use of vacatur. A judgment should be vacated only when it is defective as defined by the provisions of Rule 60(b). Accordingly, any discretionary vacatur outside the bounds of the rule should be refused.

It might be argued that refusal to grant vacatur violates rights. One such argument is that judgments exist for the convenience of the parties, and a court violates those parties' rights by not granting their mutual desire for vacatur. As I have discussed, the dispute resolution model is lacking in some important respects. It devalues the importance of the courts' role in expounding public values. It pays insufficient attention to the significance of precedent. When vacatur is available, it distorts the system of precedent, leading to the adoption of rules of law favoring institutional litigants. Vacatur of non-defective judgments neglects to consider that courts are publicly funded institutions and that litigants who wish to settle their disputes in private have other options, such as arbitration and mediation. When parties file a dispute in a public court run by the government, they surrender their control of the judgment.

212. *See* FED. R. CIV. P. 60(b)(5).

213. 484 U.S. 72 (1987).

214. *See id.* at 83.

215. *But see* DeWeerth v. Baldinger, 38 F.3d 1266 (2d Cir. 1994) (refusing to vacate judgment after state-court clarification of underlying issue in diversity case).

The court takes the responsibility of finding facts and applying its understanding of the existing law to those facts. If the parties wish to keep the option of vacatur open, they should create their own private-law system; they should hire an arbitrator and sign a contract preserving their right to vacatur of the arbitrator's decision upon settlement. In other words, if parties wish to enjoy the benefits of unfettered dispute resolution, they should take the initiative and settle their dispute privately, rather than using the public courts. It could be argued that a litigant who urges the validity of the dispute-resolution model is trying to have her cake and eat it, too—she wants the benefits of dispute resolution without accepting its costs and is willing to accept the public character of the courts only insofar as they provide her with a relatively inexpensive public forum.

In sum, a litigant has no right to be free of a non-defective adverse judgment. If there is no right to be free of a non-defective adverse judgment, it follows that the remedy of vacatur should not be granted in these cases. As we have seen above, remedies have become detached from rights in some important ways. Nevertheless, remedies are not granted in cases where no rights whatsoever have been violated. Vacatur, functionally, is a remedy, and it should never be given unless the underlying judgment is inherently flawed or no longer serves the purpose for which it was designed.

CONCLUSION

Discretionary vacatur is a relatively new practice that carries with it the potential to undermine our system of precedent and the public legitimacy of the law. The Supreme Court attempted to place limits on the practice in *Bonner Mall,* but at least one circuit court has largely ignored its pronouncement. Further, the Supreme Court's ruling does not control in state courts, where the practice of vacatur may continue to thrive. The problem is compounded by the fact that it is very difficult for an appellate court to supervise lower courts that may wish to grant vacatur. Normally, no appeal will be taken from the vacated judgment because both parties to that case will have agreed to the post-trial settlement.

Vacatur could be curtailed if the federal Courts of Appeals would adopt local rules clarifying their position on the practice and narrowing the grounds for vacatur—if possible, reserving it for defective judgments. If state appellate courts followed suit, it is possible that a consistent policy disfavoring vacatur would emerge. Even so, the problem may remain; exceptional cases may still surface that would persuade courts to grant vacatur in the interests of short-term "efficiencies." But such limited exceptions would be a far cry from the broad allowance of

the practice by the First Circuit in *Motta* and the California Supreme Court in *Neary*. If the American judicial system is to retain its legitimacy, it cannot allow the law to be sold. The short-term efficiency of settlement should not obscure broader inefficiencies and deeper injustices when courts allow the vacatur of valid judgments.