Fifty Years of Bernhard v. Bank of America is Enough: Collateral Estoppel Should Require Mutuality but Res Judicata Should Not

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Fifty Years of *Bernhard v. Bank of America* Is Enough: Collateral Estoppel Should Require Mutuality But Res Judicata Should Not

Michael J. Waggoner

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I. Introduction

The law of who may invoke collateral estoppel and res judicata has developed in the wrong direction for fifty years, starting with *Bernhard v. Bank of America.*\(^1\) Earlier, the requirement of mutuality had reigned: only parties or those in privity to the prior action could invoke the res judicata or collateral estoppel effects of a judgment.\(^2\) Since then most jurisdictions have dropped the mutuality requirement for collateral estoppel but retained it for res judicata.\(^3\) The law should have produced the opposite result: the res judicata defense should be available to those not parties to the prior action, but the collateral estoppel issue should not. Recent criticisms of nonmutual collateral estoppel\(^4\) are more likely to be persuasive

1. 122 P.2d 892 (Cal. 1942).
4. See, e.g., Jack Ratliff, *Offensive Collateral Estoppel and the Option Effect,* 67
if the possible litigation increase from restoring the mutuality requirement in that context could be offset by the likely litigation reduction from approving nonmutual res judicata.

Part II of this Article suggests that nonparties should be allowed to invoke res judicata. A plaintiff would be required to assert claims against all potential defendants arising from one transaction in the first action, on pain of losing claims not asserted. This proposed nonmutual res judicata would be significantly more efficient than is existing nonmutual collateral estoppel in preventing redundant litigation, yet it would not greatly change the way litigation is at present normally conducted.

Part III recommends that nonparties should not be allowed to invoke collateral estoppel. It demonstrates how none of the policies advanced to justify nonmutual collateral estoppel—confidence the first decision was accurate, fairness, promoting litigation efficiency, or the need for consistency—can withstand careful examination. As a step in the analysis, this part proposes rejecting the distinction currently drawn between defensive and offensive collateral estoppel. It proposes instead distinguishing situations involving one claim or injury ("mono-claims") from those involving multiple claims or injuries ("poly-claims").

Part IV shows the weaknesses of the admittedly vast authority allowing non-parties to invoke collateral estoppel. The strong reasons for requiring mutuality for collateral estoppel, combined with the weaknesses of the contrary authorities, suggest it is not too late to make the change.

TEX. L. REV. 63, 64 (1988) (arguing that nonmutual collateral estoppel does little to reduce duplicative litigation but creates "an unfair 'option effect' that cannot be removed without destroying" the effectiveness of collateral estoppel or Due Process rights of litigants); Note, Exposing the Extortion Gap: An Economic Analysis of the Rules of Collateral Estoppel, 105 HARV. L. REV. 1940 (1992) (demonstrating the asymmetrical effect of the present rules of issue preclusion).
II. Res Judicata

"Res judicata," sometimes called "merger" and "bar" or "claim preclusion," provides a defense against new litigation of claims arising from a transaction that was the subject of prior litigation. The res judicata defense is available whether the plaintiff won or lost the prior litigation, whether the prior case had a consent or default judgment or was litigated on the merits, and whether the new litigation involves the same theories and items of recovery as the prior case or new ones. For example, if one sues on a contractual theory for injury to one's arm, a later attempt to proceed with regard to that same incident on a tort or civil rights theory or to recover for injury to one's head or shirt will be subject to the defense of res judicata.

Res judicata produces a windfall to the party successfully invoking it. That party need never meet on the merits an opponent's contention if that contention was omitted from an earlier litigation between the two involving the same transaction. This occasional windfall is thought to be less harmful to the operation of the legal system than it would be to permit a party to bring successive claims on the same transaction.

5. RESTATEMENT (SECOND) OF JUDGMENTS §§ 18, 19 (1982).
7. Dismissals for lack of venue or jurisdiction, for failure to join a needed party, and those specified to be "without prejudice" do not have res judicata effect. FED. R. CIV. P. 41(b).
8. Res judicata might usefully be compared to Rules 13(a) (requiring, with certain exceptions, that a defending party assert claims arising out of the same transaction as the claim being defended) and 19 (requiring joinder of persons needed for complete relief among those already parties and of persons who might be unfairly prejudiced if absent or in whose absence present parties might be subject to inconsistent obligations). Failure to join a party as required by Rule 19 is likely to prevent the case from going forward. Failure to assert a claim as required by Rule 13(a) or by res judicata will not prevent the case from going forward but will only preclude a later assertion of that claim. Thus Rule 13(a) and res judicata merely say, "If not now, never; but it is your choice whether or not to assert it now." Tactical reasons may counsel against asserting all available claims in order to simplify or speed up the litigation, but the cost of adhering to these very sensible tactical considerations is that the foregone claims may not later be resurrected. A defending party must similarly choose among available defenses in light of the need for speed and economy.
9. Although doubts have been expressed about the doctrine of res judicata, see,
Often the scope of a transaction for res judicata purposes may be unclear. This uncertainty creates few practical problems, however, because it may be avoided by asserting all claims which might possibly be precluded if not asserted. The ease of applying the doctrine of res judicata may be contrasted with the difficulty frequently encountered in applying collateral estoppel.\(^\text{10}\)

**A. The Current Law: Requirement of Mutuality**

The defense of res judicata normally requires mutuality: only a party to the prior action may assert the defense. Thus a tortfeasor or an agent cannot invoke res judicata from the plaintiff's prior action involving the same transaction against another tortfeasor or the principal.

The rule of mutuality for res judicata has long had two major exceptions, indemnity relationships and vicarious or derivative liability. First, a judgment exonerating a person owing a duty to indemnify can be asserted as res judicata by the nonparty entitled to be indemnified.\(^\text{11}\) For example, under the law of agency, the principal is liable for the torts of an agent committed within the scope of the agent's employment,\(^\text{12}\) but the principal has a right to be indemnified by the agent.\(^\text{13}\) A judgment exonerating the agent may be pleaded as res judicata by the principal. Were the law otherwise, the agent might be required to indemnify the principal for a claim the agent had already defeated on the merits, an obvious e.g., Edward W. Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339 (1948) (suggesting that while plaintiffs who earlier lost should be barred, those who won should be allowed to collect additional items of damages or pursue additional theories of relief upon payment to defendant of any extra costs incurred), it has since been enthusiastically reaffirmed by the United States Supreme Court. Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394 (1981). Great Britain and other countries following its legal traditions apply a similar doctrine called "cause of action estoppel." Garry D. Watson, *Issue Estoppel, Abuse of Process and Repetitive Litigation: The Death of Mutuality*, in *INTERNATIONAL PERSPECTIVES ON CIVIL JUSTICE* 179, 181 (I.R. Scott ed., 1990). However, most civil law countries do not have a rule against splitting a claim. See RUDOLF SCHLESINGER ET AL., *COMPARATIVE LAW* 454-55 (5th ed. 1988).

10. *See infra* notes 43-44 and accompanying text.
11. **RESTATEMENT OF JUDGMENTS** § 96 (1942).
13. *Id.* § 401.
unfairness to the agent. To shield the agent by denying the principal the right of indemnification, where the principal has done nothing to lose this right, would be unfair to the principal unless the principal were also shielded. Second, and often overlapping the first, a judgment exonerating a party whose actions allegedly made a nonparty vicariously or derivatively liable may provide a res judicata defense to that nonparty.\textsuperscript{14}

It must be emphasized (in a legal system now accustomed to nonmutual collateral estoppel) that these exceptions to the mutuality requirement arose in the context of res judicata, not collateral estoppel.

\textbf{B. Proposal to Eliminate the Requirement of Mutuality}

These ancient exceptions to the mutuality requirement should be extended to produce a general rule that mutuality is not required for res judicata. Res judicata should be a defense, not only to claims against the defendant in the prior case, but also to claims against persons who could have been made defendants in that case, if the other requirements for res judicata are met. A person having claims arising from the same transaction against both agent and principal, or against alternative defendants, should be required to proceed against all at once, or forego the claims against those omitted. Thus the proposal merely encourages (but does not require) joining defendants; it does not address the thorny issue of requiring joinder of plaintiffs.\textsuperscript{15}

Dropping the mutuality requirement from res judicata will further the goals of res judicata to promote efficient use of courts, consistent court decisions, and fairness to litigants.\textsuperscript{16} First, it is likely to be as expensive to the court system to relitigate a transaction with a new defendant as with the original one. Another jury may be required for the second trial, subjecting a second set of

\textsuperscript{14} \textsc{Restatement of Judgments} § 99 (1942). It may be noted that a similar doctrine in the common law of felonies—that one cannot be convicted as an accessory unless the principal has been convicted—has largely been eliminated by statute. \textsc{Standefer v. United States}, 447 U.S. 10 (1980) (construing 18 U.S.C. § 2). By analogy, this exception to mutuality in civil litigation may not continue to be recognized.

\textsuperscript{15} \textit{See infra} note 88.

\textsuperscript{16} \textit{See Allen v. McCurry}, 449 U.S. 90, 94 (1980).
citizens to the burdens of jury duty, when the first jury might have handled the matter. The judge, other court personnel, and the court facilities would be used to look at the transaction again. The same witnesses are likely to be used in both trials, inconveniencing them twice when once should be enough. The costs to society of uncertainty, of people being unable to transfer or improve property or otherwise commit their resources because of the risk of litigation, will continue although a single case could have terminated that uncertainty if mutuality were not required for res judicata.

Second, allowing a second judgment against a new defendant creates a risk of inconsistent judgments and consequent reduction in the prestige and public acceptance of the courts. The risk with different defendants involved in the multiple judgments is similar to the risk with one defendant. Thus the first two factors of court efficiency and decisional consistency strongly suggest res judicata should not require mutuality.

The third factor of fairness to litigants is less certain. Unlike the original defendant, a new defendant has not already had to defend claims growing out of the transaction earlier sued on. The new defendant might, however, have had to participate in a lesser way by responding to discovery or appearing as a witness.17 Turning to the opposing party, a plaintiff normally has control over the litigation, choosing the time, court, parties, and claims. Nonmutual res judicata would limit these rights. On the other hand, those rights are already subject to such limits as statutes of limitation, jurisdictional rules, rules about needed parties, and mutual res judicata. These limits balance the interests of plaintiff, defendant, and the public. The court system should give little weight to the plaintiff’s tactical interest in proceeding sequentially rather than concurrently against all potential defendants involved in the same transaction. It should be noted that current res judicata law would

17. See Edwin H. Greenebaum, In Defense of the Doctrine of Mutuality of Estoppel, 45 IND. L.J. 1, 6 (1969). The defendant in the new action might, in some scenarios, have been a party to the prior case and thus subjected to both the expense and risk of litigation, although not the subject of a claim by the plaintiff. For example, in a prior action by this plaintiff against one potential defendant, the then-sued defendant might have sought indemnity under Rule 14 from the now-sued defendant. See, e.g., Gillispie v. Thomasville Coca-Cola Bottling Co., 195 S.E.2d 45, 46-47 (N.C. Ct. App. 1973), cert. denied, 196 S.E.2d 275 (N.C. 1973). Such a situation would present the strongest case for nonmutual res judicata.
prevent the plaintiff from pursuing a second case merely by finding another theory against the same defendant, and that nonmutual collateral estoppel is likely to prevent the plaintiff from pursuing the same claim against a new defendant. The result should not differ merely because the plaintiff finds both a new claim and a new defendant. Plaintiff's slight interest does not outweigh the substantial interest in court efficiency and decisional consistency and the (admittedly lesser) new defendant's interest in not being troubled twice by the same transaction, once in discovery as a witness, and again as a defendant.

Joining all available defendants, as would be strongly encouraged by the change proposed here, is well advised under current law for four reasons. First, because of the existence of the exceptions to the mutuality requirement for res judicata, a litigant who sues the actor or indemnitor unsuccessfully already risks loss of any claim against those vicariously liable or entitled to indemnification. Second, there is the risk of assertion of nonmutual collateral estoppel by those omitted if the first case is lost. Third is the problem of litigating against alternatively liable defendants. There may be great tactical advantages to the plaintiff in having all such defendants in the same courtroom making the plaintiff's case against each other. If instead the plaintiff proceeds against only one of the alternatively liable defendants, the defendant in court will be able to cast blame on those absent, who will adopt a similar strategy when later haled into court. The result may be the plaintiff losing all cases even though it may be clear that one of the defendants should be liable. Finally there is the matter of costs: one litigation is likely to be less costly to plaintiff or to plaintiff's contingent-fee lawyer than two or three or more would be. Because of these existing incentives to join all available defendants, the change in the law of res judicata proposed here is not likely to change significantly normal practices under current law.

18. See supra text accompanying notes 11-14.

19. See infra part III.

20. See, e.g., Great Northern Tel. Co. v. Yokohama Specie Bank, 76 N.E.2d 117 (N.Y. 1947) (reversing the denial of plaintiff's motion to join an additional party defendant against whom alternative relief was sought); see also Watts v. Smith, 134 N.W.2d 194 (Mich. 1965) (reversing the denial of plaintiff's attempt to join two defendants with whom plaintiff had had unrelated accidents the same day).
There has been very little academic discussion of nonmutual res judicata, in contrast to the many works on nonmutual collateral estoppel. The Wright, Miller & Cooper treatise has a thoughtful, albeit brief analysis of the problem. Many other commentators assume without explanation that res judicata must involve the same parties, an odd assumption in works attacking the idea that collateral estoppel should involve only the same parties.

There are some developments tending towards nonmutual res judicata. Although only a few cases expressly apply the doctrine, in quite a number of cases privity has been stretched to achieve the effect of nonmutual res judicata. In the latter cases, because

21. WRIGHT ET AL. supra note 3, § 4464 nn.24-27. See also Allan D. Vestal, Extent of Claim Preclusion, 54 IOWA L. REV. 1, 4-12, 17 (1968) (discussing exceptions to the mutuality requirement for res judicata and suggesting the exceptions be expanded); Herbert Semmel, Collateral Estoppel, Mutuality and Joiner of Parties, 68 COLUM. L. REV. 1457 (1968) (explaining that the issue in many cases should be not whether the second case controls the first through collateral estoppel, but why the second case should be allowed under res judicata).


23. See Nevada v. United States, 463 U.S. 110, 143 (1983) (apparently rejecting dictum to the contrary in Montana v. United States, 440 U.S. 147, 154 (1979)); see also Lubrizol Corp. v. Exxon Corp., 929 F.2d 960, 966 (3d Cir. 1991) (holding res judicata to bar a plaintiff from asserting essentially the same claims against different defendants where the prior and present defendants are closely or significantly related), cert. denied, 113 S.Ct. 186 (1992); In re El San Juan Hotel Corp., 841 F.2d 6, 10-11 (1st Cir. 1988) (noting that nonmutual claim preclusion is appropriate when "new defendants have a close and significant relationship with the original defendants"); Gambocz v. Yelencsis, 468 F.2d 837, 842 (3d Cir. 1972) (holding that res judicata applies when sole material change is addition of parties who have close relation to individuals listed in first suit); Hazzard v. Weinberger, 382 F. Supp. 225, 227 (S.D.N.Y. 1974) (one not party to prior suit can claim protection of res judicata if prior party to action had full and fair opportunity to contest the issues), aff'd, 519 F.2d 1397 (2d Cir. 1975).

24. See, e.g., Lowell Staats Mining Co. v. Philadelphia Elec. Co., 878 F.2d 1271, 1276 (10th Cir. 1989) (agent is in privity with principal in action for damages); Scott v. Fort Bend County, 870 F.2d 164, 167-68 (5th Cir. 1989) (judge defendant...
typically some employees of a corporation or government agency are treated as being in privity with other employees or the entity, the employees sued in the second case can invoke res judicata from the first case won by the other defending employees or by the entity. While such a rule is unexceptionable when the actions are for injunctions binding the employee in the scope of employment and thus effectively binding the agency,25 that approach seems clearly wrong when the actions are for damages payable by the sued employee. Surely one employee's loss should not be available as estoppel against another employee who had no contact with the prior case. These cases seem to reflect judicial receptivity to the basic fairness and efficiency of nonmutual res judicata. It would be better if litigants were expressly warned that this new doctrine is the law. It is dangerous to stretch privity to accomplish this end, as opinions so written26 may be used as precedent in other areas such as estoppel where they would be unfair.

25. See, e.g., Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 403 (1940) (holding that litigation involving one representative of the United States is binding on other agents of the United States).

26. See the following cases finding privity (with little analysis) contrary to the suggestion in the text: Williams v. Bennett, 689 F.2d 1228, 1235 n.6 (7th Cir. 1986) (officers, directors, and employees in privity with bank are protected by res judicata); Scott v. Kuhlmann, 746 F.2d 1377, 1378 (9th Cir. 1984) (privity between federal employees and the office they work for sufficient to apply res judicata); Fiumara v. Fireman's Fund Ins. Cos., 746 F.2d 87, 92 (1st Cir. 1984) (insurance company employees in privity with company, res judicata bars subsequent suit on claim argued in prior trial); Kutzik v. Young, 730 F.2d 149, 152 (4th Cir. 1984) (university faculty and administrators in privity with university bars subsequent suit on same claim); Mandarino v. Pollard, 718 F.2d 845, 850 (7th Cir.) (government and its officers in privity for res judicata purposes), cert. denied, 469 U.S. 830 (1983); Ruple v. City of Vermilion, 714 F.2d 860, 862 (8th Cir.) (government and its officers in privity), cert. denied, 465 U.S. 1029 (1983); Micklus v. Greer, 705 F.2d 314, 317 (8th Cir. 1983) (government and its officers in privity for res judicata purposes).
A change such as that proposed here might be made more fairly by amending Rules 18 through 20 (dealing with joinder of claims and parties)\textsuperscript{27} or by other legislative or administrative action, rather than by judicial decision, to avoid unfairly surprising those who have relied on res judicata retaining its present form. Alternatively, if the change is made judicially, it might be limited to judgments rendered (or cases commenced) a reasonable period of time after the new doctrine is announced.\textsuperscript{28}

A rule eliminating mutuality as a requirement for res judicata will not always require a plaintiff to join multiple defendants on peril of losing the claim against those foregone. Sometimes limits of personal jurisdiction, subject matter jurisdiction, or venue will preclude assembling all defendants, particularly in cases where the first claim is asserted not by filing a complaint but rather under Rules 13 and 14.\textsuperscript{29} Res judicata has long provided an exception for the parts of the transaction foreclosed by jurisdictional limitations,\textsuperscript{30} and that exception should continue if res judicata is applied without the mutuality requirement.\textsuperscript{31}

\textsuperscript{27} For example, one might add at the end of Rule 18:

\begin{quote}
(c) Required Joinder. A party asserting any claim must assert any other claim over which the court has jurisdiction arising out of the transaction, or relating to the property, that is the subject of the claim asserted, whether those other claims are against the same opponent, another party, or a nonparty. Claims not asserted as required by this rule may not be asserted in any other litigation. A party asserting a claim shall inform the court if the claim has already been asserted in another proceeding.
\end{quote}


\textsuperscript{29} Rule 13 authorizes asserting cross-claims and counterclaims. Rule 14 permits a defendant to assert claims against a third party "not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff." FED. R. CIV. P. 14(c).


\textsuperscript{31} See Gargiul v. Tompkins, 790 F.2d 265, 274 (2d Cir. 1986). Those beyond
Similarly, although nonmutual res judicata would encourage the plaintiff to join all potentially liable defendants subject to the court's jurisdiction, the power to sever under Rule 42 would be available to prevent trials from becoming too complicated.

Where the defendants are kept out of the first courtroom by jurisdictional problems or by the judge severing the cases against them, they should—contrary to present law—be unable to invoke the victory of the defendant in the first trial as nonmutual collateral estoppel, for reasons to which we now turn.

III. Collateral Estoppel

"Collateral estoppel," sometimes called "issue preclusion,"\textsuperscript{32} precludes relitigation in a subsequent case of an issue that was actually litigated, decided, and necessary to the judgment in a prior case between the same parties.\textsuperscript{33} Thus collateral estoppel can apply only to litigated cases, not to judgments produced by default or settlement, and it applies only to issues necessarily decided, not to issues omitted nor to issues which were raised and decided but not necessary to the judgment. By analogy to the concepts of dictum and holding under our system of precedent, those matters necessarily decided are thought to be more reliable because they will have received the parties' and the judge's or jury's full attention and because they may be subject to appeal. As an additional safeguard, the person subject to collateral estoppel will be allowed to show that the first case in some manner did not produce a full and fair opportunity to litigate.\textsuperscript{34}


\textsuperscript{33} Cromwell v. County of Sac, 94 U.S. 351, 351 (1876); Russell v. Place, 94 U.S. 606, 608 (1876).

\textsuperscript{34} Great Britain and countries following its legal traditions have a doctrine similar to collateral estoppel called "issue estoppel." Robert C. Casad, Issue Preclusion and Foreign Country Judgments: Whose Law?, 70 IOWA L. REV. 53, 62-63 (1984). Issue estoppel may extend to issues admitted as well as those litigated, contrary to the practice in the United States. Compare Vestal, supra note 32, at 473-
Collateral estoppel may be invoked only against parties to the first action and persons in privity with them. Traditionally the law of collateral estoppel required mutuality: because only parties could be bound, only parties could invoke the benefits of the judgment.\(^{35}\) Thus, if one were to sue a principal unsuccessfully, the issues decided in that case would not be collateral estoppel if the same person were later to sue the agent. Similarly, if several people were injured by the same airplane crash, one victim’s victory in court could not be invoked by the other victims as collateral estoppel on the issues.

Over the last half century the mutuality requirement has been dropped from collateral estoppel by many jurisdictions.\(^{36}\) The earliest cases renouncing mutuality typically involved “defensive” or “shield” collateral estoppel, where one person had one claim which might be collected from various parties, as in the example above of the principal and agent.\(^{37}\) Thus issues necessarily decided in


Legal systems in France, Germany, Argentina, Japan, Sweden and Mexico have only the most narrow use of collateral estoppel. Casad, *supra*, at 63-69. Those systems normally apply estoppel only to the matters expressly declared in the judgment, not to findings necessary to the judgment, and limit the estoppel to the same cause of action. *Id.* at 69. Recall that civil law systems generally have no rule against splitting a claim, *see*, *e.g.*, SCHLESINGER ET AL., *supra* note 9, at 454-55, so it is possible to have multiple litigation on the same cause of action. Something like collateral estoppel can be achieved by either party seeking a declaratory judgment as to a particular issue. Casad, *supra*, at 70. This narrow approach to collateral estoppel has less impact in civil law systems than it would here because the judge (civil systems do not use juries) is free to use the record of another action between the same parties, including the findings, as evidence. SCHLESINGER ET AL., *supra* note 9, at 456.

An interesting tracing of the origins of collateral estoppel and res judicata may be found in Robert W. Millar, *The Historical Relation of Estoppel by Record to Res Judicata*, 35 *U. ILL. L. REV.* 41 (1940).

35. See *supra* note 2.
36. See *supra* note 3.
37. Bruszewski v. United States, 181 F.2d 419 (3d Cir. 1950) (using the term
unsuccessful litigation against either agent or principal could be invoked by the other in subsequent litigation brought by the common claimant. Later cases would similarly reject mutuality in applying "offensive" or "sword" collateral estoppel, where many unrelated persons had related but separate claims against one defendant, as in the example above of the claims growing out of the airplane crash.38

This Article proposes to restore the mutuality requirement for collateral estoppel. To discuss mutuality in the context of collateral estoppel will be more illuminating if one separates three typical situations. First, one injury or claim might permit litigation against several different defendants, either jointly, severally, or in the alternative. These might be called "mono-claims." An example would be a person injured in a car wreck who might have claims against the drivers involved, their employers, the vehicle owners, and those who manufactured or maintained the vehicles. Second, several related but separate injuries or claims may involve one or more common parties on one side and on the other side several unrelated parties. These might be called "poly-claims." Examples would include a stock seller pursued by many purchasers of the same stock issue, an airline pursued by many victims or their families for the same accident, and a patent owner pursuing claims against many who similarly infringed the same patent. Third, the first action might involve government enforcement and the subsequent actions might be by private parties for civil remedies. As the following discussion will demonstrate, considering these three situations is more useful than using the commonly drawn distinction between defensive and offensive collateral estoppel.

“res judicata” but apparently meaning collateral estoppel); Bernhard v. Bank of America Nat’l Trust and Savings Ass’n, 122 P.2d 892 (Cal. 1942); Coca Cola Co. v. Pepsi Cola Co., 172 A. 260 (Del. 1934).

A. Mono-Claims: One Claim Against Multiple Defendants

The earliest rejections of mutuality as a requirement for collateral estoppel occurred in cases in which one claim could be asserted against multiple defendants. In *Coca-Cola Co. v. Pepsi Cola Co.*, Coca-Cola had unsuccessfully sued three of Pepsi Cola's retail distributors for substituting Pepsi Cola products when a customer ordered Coca-Cola products. Coca-Cola then asserted essentially the same claim against Pepsi Cola. In *Bernhard v. Bank of America*, beneficiaries of an estate had first unsuccessfully objected that the administrator had wrongfully taken money belonging to the estate. The beneficiaries then sought to assert essentially the same claim against the bank which had honored the administrator's transfer of funds from the estate. Although these cases were decided on the grounds of nonmutual collateral estoppel, they could both have been decided within the well-recognized exceptions to res judicata's mutuality requirement where the first case exonerated the indemnitee or the actor and the second case was asserted against the indemnitee or person vicariously liable.

Such cases may present a strong case for nonmutual collateral estoppel, but that point need not be addressed if as recommended above res judicata is freed from the requirement of mutuality. One should ask, should the common party be allowed another opportunity in court by discovering both a new issue and a new opponent, when conventional res judicata would preclude that party's going forward merely by discovering a new issue (the parties remaining the same), and collateral estoppel (in its present nonmutual form) would preclude that party going forward on the issue lost previously merely because another party is found? The policy of requiring those asserting claims to assert all those arising from one transaction provides a sensible answer here, if as recommended above the rule is not limited to those sued in the first case but rather is extended to include others possibly liable for claims growing out of that same transaction.

In three major respects res judicata would be more effective than collateral estoppel in discouraging unnecessary litigation. First, res

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39. 172 A. 260 (Del. 1934).
40. 122 P.2d 892 (Cal. 1942).
41. *See supra* text accompanying notes 11-14.
judicata can be applied against the winner in the prior case as well as against the loser, where collateral estoppel normally applies only against the prior loser.\textsuperscript{42} Second, collateral estoppel applies only to issues necessary to the first judgment. Those issues may not be dispositive of the second case (e.g., the second case might involve a theory of recovery different from that asserted in the first case). Finally, most cases are ultimately resolved by settlement, so have no collateral estoppel effect. There may be significant expense and disruption caused a person merely by the receipt of a summons and complaint, and of course significant expense and disruption are the norm if there are extensive pretrial motions and discovery, even though the case is not ultimately decided by trial on the merits. It is because of these costs that res judicata applies to cases resolved short of trial. Res judicata without mutuality will do a better job of controlling such costs than will collateral estoppel without mutuality.

In addition to being more effective, res judicata is easier to apply, involving only a determination of whether a prior case involved the same transaction as does this case, and whether this case would have been within the prior court’s jurisdiction. To apply nonmutual collateral estoppel is often very difficult. One must determine whether the issue in the second case is the same as that in the first,\textsuperscript{43} whether the issue was decided in the first case and necessary to the first case’s judgment (an inquiry made more difficult if the first case was decided by a general verdict), and whether the party against whom collateral estoppel is being asserted had a full and fair opportunity to litigate the first case.\textsuperscript{44} Such

\textsuperscript{42} Collateral estoppel might be applied against the winner of the prior case if litigation postures change in the second case. For example, an employee in the first case might seek to establish permanent disability in order to receive compensation, then try in a second case to establish excellent health in order to obtain reinstatement. Gibson v. Missouri Pac. R.R. Co., 314 F. Supp. 1211 (E.D. Tex. 1970) (finding this argument inapplicable on the facts), rev'd on other grounds, 441 F.2d 784 (5th Cir. 1971).

\textsuperscript{43} See, e.g., \textit{Restatement (Second) of Judgments} § 27 cmt. c (1982) (indicating the complexity of determining whether issues are the same).

\textsuperscript{44} See supra note 32. Several factors may indicate that the first case provided less than a full and fair opportunity to litigate. See, e.g., Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331-32 (1979) (explaining that there is fair opportunity where subsequent suits were foreseeable, previous judgment was not inconsistent with any previous decision, and no procedural opportunities were available in the second action that were unavailable in the first); \textit{Restatement (Second) of Judgments} § 29
inquiries are difficult and uncertain, providing great potential for delay at trial and reversal on appeal. Although required to apply collateral estoppel fairly, such inquiries are not required to apply res judicata.

Thus nonmutual collateral estoppel should not be necessary in the situation where it originated, where one claim is collectible from multiple parties, because nonmutual res judicata would provide an easier and more effective solution to this problem. This discussion turns now to a situation where nonmutual collateral estoppel is likely to be unfair.

(1982) (noting that consideration should be given to the following factors: whether treating the issue as conclusively determined would be incompatible with the scheme of remedies, procedural opportunities not available in the first action, inconsistent determinations, prior determination may have been affected by relationship among parties or was a compromise verdict, treating issues as conclusively determined may complicate determination of other issues, the issue is one of law, other compelling circumstances); Hazard, supra note 22, at 1044 (noting that consideration should be given to the sum involved in the first case, the burden of proof, whether the prior result was a compromise, newly discovered evidence, the party seeking preclusion could have participated in the prior action, the first result is inconsistent with that reached as to others similarly situated); Janet S. Ellis, Note, Nonmutuality: Taking the Fairness out of Collateral Estoppel, 13 IND. L. REV. 563, 578 (1980) (explaining that a court will deny collateral estoppel if the original suit did not give a procedural opportunity that was both full and fair); Note, Civil Procedure—Collateral Estoppel, 63 MARQ. L. REV. 114, 125-26 (1979) (noting that the factors which will prevent the use of issue preclusion are: the sum involved in the first case, foreseeability of the second action, potential inconsistency of prior determination with previous judgments, whether the second action affords procedural opportunities unavailable in the first action, whether the prior judgment involved comparative fault or was a compromise verdict, incompatibility with a particular remedial scheme, lack of opportunity or incentive to obtain appellate review). The particular problems posed by the second plaintiff who might perhaps have been in the first case are discussed in Ratliff, supra note 4, at 84-87, Bruce Kempkes, Issue Preclusion: Parklane Hosiery Co. v. Shore, Revisited, 31 DRAKE L. REV. 111 (1981) (both suggesting Parklane's strictures against allowing nonmutual collateral estoppel to those who avoid joining the first action are not very rigorously enforced), and Alan J. Statman, The Defensive Use of Collateral Estoppel in Multidistrict Litigation after Parklane, 83 DICK. L. REV. 469 (1979) (suggesting denial of nonmutual collateral estoppel to those who block transfers which are sought in order to consolidate). The extremes to which an inquiry into the fairness of the prior proceeding can lead are suggested by Katz v. Eli Lilly & Co., 84 F.R.D. 378 (E.D.N.Y. 1979) (allowing depositions of jurors in prior state case).
B. Poly-Claims: Separate but Related Claims, Unrelated Parties

The second situation to which nonmutual collateral estoppel might be applied concerns a common party with separate but related claims involving unrelated parties. Examples here fall into two broad categories, those involving multiple claimants and those involving multiple defendants. The multiple claimant problem is typified by the airplane crash with multiple unrelated victims and by the securities fraud with multiple unrelated buyers. The multiple defendant problem is typified by the owner of a copyright, trademark, or patent who may have claims against multiple unrelated infringers. We will begin with the multiple claimant problem.

1. Multiple Claimants.—This category is commonly called offensive or sword nonmutual collateral estoppel. In a multiple claimant problem such as an airplane crash, plaintiffs are not required to join under Rule 19, and in many cases there will be several state and federal courts available, so that consolidation of the related cases may be difficult or impossible. Under nonmutual collateral estoppel, the common party's loss of the first case may be available to all the other claimants as an estoppel of the common party on issues which may be dispositive, yet a victory by the common party cannot be used against the other claimants because of the limitations of the Due Process Clause. Thus the common party in litigating the first case can win no more than that case, but the common party may lose all the cases.

The following subsections argue that nonmutual collateral estoppel cannot be justified in this context. The risk of inaccuracy in litigation is too high to let us justify estoppel by confidence that the first result is likely to have been correct. The basis for accepting litigation results, fair risk allocation rather than accuracy, does not apply to the second claimant who did not participate in the risks of the first proceeding. Any litigation efficiency from such estoppel is more apparent than real, and in any event cannot justify the

45. 28 U.S.C. § 1407(a) (1982) allows cases pending in different federal district courts to be transferred to one federal district court for pretrial, but it does not apply to trials or to cases pending in state courts.

unfairness. Nor does a refusal to permit such estoppel create too great a risk of judicial inconsistency. Even adding a few more arguments cannot tip the scales in favor of offensive nonmutual collateral estoppel.

a. First Case Accurate?.—Can nonmutual collateral estoppel be justified on the ground that the first result was accurate? One can find many statements suggesting that a fairly tried case should produce a correct result. For example, the United States Supreme Court in its justification for applying collateral estoppel stated that it was "assuming that the issue was resolved correctly in the first suit."47 Similarly the Oregon Supreme Court stated: "[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 ... for ... the suggestion that a decision rendered after full and fair presentation ... might be decided differently in another go-round."48 Academic commentary is often along the same lines.49

47. Blonder-Tongue Labs., Inc. v. University of Ill. Found., 402 U.S. 313, 329 (1971). In a similar vein, the Court later stated that it was "assuming that a perfectly sound judgment of invalidity has been rendered," and that "[t]he patentee is expending funds on litigation to protect a patent which is by hypothesis invalid," id. at 338, and that "the claims are in fact invalid." Id. at 346. The standard Blonder-Tongue adopts does not require that the prior decision be correct (as the Court earlier presumed) but merely that "the prior case was [not] one of those relatively rare instances where the courts wholly failed to grasp the technical subject matter." Id. at 333. Blonder-Tongue is discussed in part IV.D. Along the same optimistic lines, the Court stated in Standefer v. United States, 447 U.S. 10, 23 n.18 (1979), "[t]he estoppel doctrine, however, is premised upon an underlying confidence that the result achieved in the initial litigation was substantially correct," although the Court later more realistically stated, "[t]his case does no more than manifest the simple, if disconcerting, reality that 'different juries may reach different results under any criminal statute.'" Id. at 25 (quoting Roth v. United States, 354 U.S. 476, 492 n.30 (1957)). Roth's statement also seems applicable to judges and to civil statutes.


49. "[I]f the factfinder has a complete case before it, there is no reason to suspect error." Note, Parklane Hosiery—Offensive Use of Collateral Estoppel in the Federal Courts, 29 CATH. U. L. REV. 509, 525 (1980). Collateral estoppel is justified in part "by underlying confidence that the result reached is substantially correct." RESTATEMENT (SECOND) OF JUDGMENTS § 29 cmt. f (1982). "If a verdict in a single trial of a criminal case is sufficient to send the defendant to the gallows, it is difficult to see
Despite this authority, two factors establish that collateral estoppel is not premised on the accuracy of the first determination. First, one met with an assertion of collateral estoppel, while allowed to show that in some manner the first determination was unfair, will not be allowed to show that it was erroneous.\(^5\) Second, there can be little doubt that many cases are decided incorrectly. As *Ecclesiastes* reminds us, "the race is not to the swift, nor the battle to the strong, [nor the result of litigation to the just,] . . . but time and chance happeneth to them all."\(^5\) Justice Jackson's statement about the United States Supreme Court, "[w]e are not final because we are infallible, but we are infallible only because we are final,"\(^5\)\(^2\) would seem applicable to all decisions by the courts. The United States Supreme Court has stated that collateral estoppel "renders white that which is black, and straight that which is crooked."\(^5\)\(^3\) Others have described litigation as a "sublimated, regulated brawl, why a verdict in a single trial of a civil case should not be taken as reliable enough to dispose, in whole or in part, of related claims." Maurice J. Holland, *Modernizing Res Judicata*, 55 IND. L.J. 615, 628 n.33 (1980). Of course many commentators do harbor doubts about the death penalty on the ground that trials are not infallible, even with the extra procedural safeguards for criminal trials generally and capital cases in particular. See cases cited infra note 65 (debating the likelihood of erroneous executions). If executions are to occur there seems little alternative to a trial, whereas in all invocations of collateral estoppel there is always the realistic alternative of a second trial. "[T]he new model of judgments and due process which follows from *Parklane* permits 'issues' to emerge as free-floating independent entities, and views trials as experiments concerning the merits of the 'issues' they comprise." Laurence C. George, *Sweet Uses of Adversity*, 32 STAN. L. REV. 655, 657 (1980). One may wonder whether the justices who decided *Parklane* would accept that statement.

50. Compare RESTATEMENT (SECOND) OF JUDGMENTS §§ 28 & 29 cmt. j (1982) (discussing the basis for issue preclusion and noting that a court must consider the totality of circumstances when deciding whether issue preclusion is fair) with § 17 cmt. d (noting that general rules on issue preclusion apply even if the judgment is erroneous because the original party's remedy is to get the original judgment set aside or reversed).


a private battle conducted in a court-house,”54 and as “not a laboratory experiment for the discovery of physical laws of universal application but a means of settling a dispute between litigants.”55

Although we are committed to a litigation process which is fair, accurate, and efficient, it is clear that many cases could be decided either way. This is so because a variety of mechanisms discourage trials of cases or defenses lacking merit. First, many possible cases could easily be disposed of by a motion on the pleadings under Rule 12(b)(6), 12(c), or 12(f).56 Such claims or defenses, as the case may be, are unlikely to be asserted, and in any event such pleadings motions are unlikely to give rise to collateral estoppel. Second, other possible cases might be resolved on a motion for summary judgment,57 so one would expect many such claims or defenses not to be asserted, or to be easily resolved. Third, claims and defenses passing both the prior hurdles are still subject to sanctions under 28 U.S.C. § 1927, Rule 11 or Rules 36 and 37(c), or under the court’s inherent power,58 which should also help to weed out those lacking

54. JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 7 (1949).
56. Rule 12(b)(6) allows the defense of “failure to state a claim upon which relief can be granted” to be raised in a pre-answer motion or in the answer. Rule 12(f) authorizes a motion to strike “any insufficient defense,” and thus can be the plaintiff’s equivalent of defendant’s motion under Rule 12(b)(6). Rule 12(c) allows a motion for judgment on the pleadings by either party. These Rule 12 motions generally accept the factual accuracy of the pleadings and test only their legal sufficiency.
58. Section 1927 allows a court to impose on an attorney the excess costs, expenses, and attorney’s fees that the attorney caused by unreasonably and vexatiously multiplying the proceedings. 28 U.S.C. § 1927 (1980). Under Rule 11, a party whose actions are not “well grounded in fact and . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law” may be required to pay the opposing party’s “reasonable expenses . . . including a reasonable attorney’s fee” incurred in resisting those actions. Rules 36 and 37(c) authorize a request to admit a matter conclusively for the purposes of the present action only. The sanction for one who refuses to admit material matters without having “reasonable grounds to believe that he might prevail on the matter” is to pay
merit. It is only the cases surviving the threat of these three measures that are litigated. A large but unknowable proportion of the cases which are litigated (the cases which might be invoked as collateral estoppel) thus have enough merit on both sides that they could fairly be decided either way.

Not only does the court system accept that many questions could be decided either way, it also insists that decisions that are probably erroneous be accepted. A jury will be allowed to return a verdict, rather than have judgment entered as a matter of law, so long as the evidence is such that a reasonable person could arrive at the jury's verdict, even if that verdict is probably wrong. A judge's findings of fact must be accepted even though they are probably wrong, so long as they are not clearly erroneous. Similarly, an exercise of discretion may have a substantial impact on the outcome of a case, yet that exercise of discretion will not be reversed in the absence of clear abuse. The preceding examples concern direct review; once there is a final judgment the grounds of collateral attack are much more severely restricted. Such rules of deference to jury, judge, and judgment show that while the court system...

his opponent's "reasonable expenses . . . including reasonable attorney's fees" of proving the matter. Chambers v. NASCO, Inc., 111 S. Ct. 2123 (1991), upholds federal courts' inherent power to sanction litigants for bad faith conduct.

59. FED. R. CIV. P. 50; Boeing Co. v. Shipman, 411 F.2d 365 (9th Cir. 1969) (en banc). On a lesser showing a new trial might be ordered. See FED. R. CIV. P. 59.


61. See Maurice Rosenberg, Judicial Discretion in the Trial Court, Viewed from Above, 22 SYRACUSE L. REV. 635 (1971). Also, any decision made under the burden of proof rules, which tell the finder of fact what to do if unable to determine what actually occurred, has a substantial chance of being erroneous. Here, however, while the result may be erroneous, a consistent application of the burden of proof rules will at least produce consistent decisions, unlike consistent application of the rules of deference to jury and judge. Similar to the burden of proof rules are rules of evidence which serve policies other than maximizing the accuracy of the truth determining process, such as the privilege protecting communications between spouses. They may produce the wrong answer, but they should do so consistently.

62. See FED. R. CIV. P. 60(b); Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394 (1981) (holding that the res judicata consequences of a final, unappealed judgment based on an erroneous view of the law is not open to collateral attack and must be corrected on direct appeal).
considers accuracy an important goal, accuracy must be balanced with, and sometimes subordinated to, other goals.

A variety of observations confirm this obvious truth that many civil cases could fairly be decided either way. For example, although many procedural protections in criminal cases protect privacy interests, other protections such as requiring proof beyond a reasonable doubt assure that those accused in criminal cases are not falsely convicted. Would those latter protections be necessary if civil trials were normally accurate? Second, sophisticated clients spend vast sums retaining able attorneys because the clients believe that such expenditures increase the chances of success in litigation. Similarly, able and experienced attorneys research and analyze and rehearse, then re-research and re-analyze and re-rehearse, because they believe that such efforts increase the chances of success. Further, those who have watched many trials are often unable to predict the outcome when the jury or judge retires to decide the case, suggesting that even at that late stage of the trial the case could still be decided fairly either way.

Unfortunately it is hard to imagine a practical method to determine how often court decisions are incorrect. Two further observations suggest that inaccuracy is likely. First, erroneous rulings of law are common enough that our society maintains

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63. "[A]s any trial lawyer will admit, proper preparation is the be all and end all of trial success." LOUIS NIZER, MY LIFE IN COURT 8 (1961). Cf. David M. Cutler & Lawrence H. Summers, The Costs of Conflict Resolution and Financial Distress: Evidence from the Texaco-Pennzoil Litigation, 19 RAND J. ECON. 157, 167 (1988) (estimating that after-tax legal fees in the litigation between Texaco and Pennzoil over the acquisition of Getty Oil may have been $525 million; based on the 34% corporate income tax rate, the total cost may have been $800 million).

64. "[I]f there was anything God Almighty didn't know, it was what verdict a jury was going to bring in in a given case." RICHARD HARRIS, BEFORE AND AT TRIAL 206 (James M. Kerr ed., 1st Am. ed., Northport, N.Y., Edward Thomson Co. 1890). Cf. Michael O. Finkelstein, A Statistical Analysis of Guilty Plea Practices in the Federal Courts, 89 HARV. L. REV. 293, 309 (1975) (suggesting that many who plead guilty would not be convicted, perhaps suggesting the indeterminacy of trial generally).

systems of appellate courts, and these courts frequently reverse trial court rulings in cases that are appealed. One might expect errors on factual questions to occur with at least similar frequency; the determinations of law are made by judges trained in the law, where fact determinations may be made by jurors lacking formal training in fact-finding. Second, a crude indication that error is likely emerges from perhaps the three leading cases on nonmutual collateral estoppel. Each involved a first case which was allowed to be used as collateral estoppel although it was inconsistent with another case and thus arguably decided incorrectly. In Bernhard v. Bank of America, a unanimous opinion written by Justice Traynor, the trial judge in the second case initially held against the bank on the merits before reconsidering the res judicata/collateral estoppel issue and resolving it in the bank's favor. Zdanok v. Glidden, a unanimous opinion written by Judge Friendly, applied collateral estoppel from a decision whose correctness the trial court in the second case doubted and which would be overruled unanimously by an en banc court four years later. In Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, a unanimous opinion written by Justice White, a first decision invalidating a patent was held to be collateral estoppel although the trial court in the case on appeal found the patent valid.

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67. 122 P.2d 892 (Cal. 1942).
68. The record on appeal in Bernhard contains a minute order dated January 19, 1940, ordering judgment for the plaintiff. Record at 298, Bernhard v. Bank of America, 122 P.2d 892 (Cal. 1942) (No. 13023) (on file with author and available at the Legal Information Center, Hastings College of the Law). A minute order dated March 5, 1940 vacated the prior minute order and ordered judgment for the defendant on the grounds of the prior decision. Id. The difference in rulings was based on the decision in Waterland v. Superior Court, 98 P.2d 211 (Cal. 1940), decided January 15, 1940, but probably not available to the trial court when it first ruled, clearing up a point of probate court jurisdiction in California.
69. 327 F.2d 944 (2d Cir.), cert. denied, 377 U.S. 934 (1964).
70. Id. at 949.
71. Local 1251, United Auto Workers of America v. Robertshaw Controls Co., 405 F.2d 29 (2d Cir. 1968) (en banc).
73. Id. at 350. The patent was ultimately declared invalid on remand. University of Ill. Found. v. Blonder-Tongue Labs., Inc., 334 F. Supp. 47 (N.D. Ill.
The indeterminacy of litigation was graphically demonstrated when one case was simultaneously tried to five juries and produced quite divergent answers to special interrogatories.\textsuperscript{74}

Would the argument presented above suggest we replace trials with a system of coin flips? Of course not. The argument is that we should make allowances for the unavoidable uncertainty of human attempts to determine past events, not that uncertainty is desirable. We should seek the greatest accuracy that can be achieved at reasonable cost, with reasonable promptness, in light of such other values as protecting privacy. But we should not be so proud of our judicial systems’ efforts to achieve accuracy that we mislead ourselves into believing that they normally succeed. We should not put the results of litigation to uses that could be justified only if the results could confidently be expected to be accurate.

If decisions are too often inaccurate to be accepted for nonmutual collateral estoppel, why should their results be accepted even in the first case (other than because they may be enforced by the coercive power of the government)? There are three reasons. First, the alternative to accepting court decisions is either suffering injuries without redress or resorting to self-help with the risk of escalating retaliations.\textsuperscript{75} One accepts one’s losses in court because one expects other cases to produce victories. Second, the court systems do make a major effort to produce accurate results, and this effort deserves respect even though accuracy may often not be achieved. Viewed another way, to demand infallibility from fallible mortals as a precondition to accepting court’s decisions would


\textsuperscript{75} Without civil order, life is “solitary, poore, nasty, brutish, and short.” THOMAS HOBBES, LEVIATHAN 89 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651).
preclude having courts. Finally, court decisions should be accepted as gambles or risk allocations, the subject of the following discussion.

b. Fairness?.—Is nonmutual collateral estoppel fair to the party estopped? A necessary condition for the application of nonmutual collateral estoppel is that the party estopped must have had a full and fair opportunity to establish its position in regard to that issue. Moreover, because that party is on notice under existing precedents that there is a substantial risk of being nonmutually estopped, it cannot claim unfair surprise. That these possible sources of unfairness have been eliminated does not make the process fair, however, because there remains a fundamental problem.

That nonmutual collateral estoppel is unfair emerges from the fact that litigation involves a substantial element of chance, that the results of litigation run a substantial risk of being inaccurate. If the results of litigation were assured to be accurate, it would be hard to argue that estopping the common party or even a stranger to the first case would be unfair. Once the likelihood of inaccurate litigation

76. It has been argued that the importance of the court lies, not in the capacity for finding the factual truth, but rather in the fact that it gives individuals an opportunity to participate in protecting their rights. "[P]reclusion is not... based on the proposition that a question is foreclosed because we already know 'the truth.' I do not think we have enough confidence in the judicial process, or, indeed, in the verifiability of an assertion of historical fact through any process, to justify such an explanation." David L. Shapiro, Should a Guilty Plea Have Preclusive Effect?, 70 IOWA L. REV. 27, 45 (1984). "Courts can only do their best to determine the truth on the basis of the evidence, and the first lesson one must learn on the subject of res judicata is that judicial findings must not be confused with absolute truth." Brainerd Currie, Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine, 9 STAN. L. REV. 281, 315 (1957).


78. See George, supra note 49, at 657 (arguing that courts should recognize two new categories of persons who will be bound by a judgment: "Other plaintiffs who must share in an earlier plaintiff's loss to a common defendant, and an offensive class of 'other defendants' who must share in an earlier defendant's loss to a common plaintiff"); AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT § 5.05 & cmt. a, n.2 (Tentative Draft No. 2, 1990) (noting that another possible reform proposal is to revise the rule of mandatory joinder); Note, supra note 4 (suggesting that either complete mutuality for collateral estoppel or preclusion of relitigation of the issue once the defendant has either won or lost is preferable to the current use of asymmetrical
results is recognized, once litigation is seen as to a great extent a matter of chance, then the unfairness of nonmutual collateral estoppel is manifest.

The risk in litigation is much like the risk in a coin flip, even though the court system by a variety of mechanisms tries to resolve disputes accurately, and even though each side tries by retention of skilled counsel and by diligent preparation to make the odds as much as possible favor it. In such a coin flip you put up your money and you abide by the result, win or lose. That seems fair. Now suppose a bystander who has watched the coin flip but who has not risked his cash were to approach the loser and say, "Pay me, too." Such a demand would be laughed away, it is so obviously unfair. Yet such demands are now commonly enforced under the doctrine of nonmutual collateral estoppel.79

Nonmutual collateral estoppel fundamentally and unfairly changes the risks in litigation. Consider first litigation generally, then the changes made if estoppel is nonmutual.

In most litigation, what one party wins is what the other party loses. Either plaintiff wins $Y and $Y is what defendant must pay, or the plaintiff loses a claim of uncertain value and defendant is relieved from the threat of liability for that claim. Even in an action for an injunction, where the value of the injunction to the winning party may be different from the injunction's cost to the losing party,80 it is still the same injunction at stake for both parties even though their perceptions of its value may differ. Collateral estoppel with mutuality merely increases the amount at stake. Instead of one claim involving $Y, there may be X claims involving in total $XY which may depend on the resolution of a particular issue, but there is still the same proportion between the parties.

79. Other commentators have criticized the unfairness of nonmutual collateral estoppel. See Elvin E. Overton, The Restatement of Judgments, Collateral Estoppel, and Conflict of Laws, 44 TENN. L. REV. 927, 949 (1977); Ratliff, supra note 4, at 77-81; Ellis, supra note 44; Note, supra note 4; Steven C. Malin, Comment, Collateral Estoppel: The Fairness Exception, 53 J. AIR L. & COM. 959, 988 (1988).

80. Compare the problem of valuing an injunction for purposes of determining the amount in controversy in federal courts. 14A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3704 & n.18 (1985).
Collateral estoppel without mutuality fundamentally changes the situation. The defendant might be faced with many claims involving the same issue asserted in many different civil actions by many different plaintiffs. In each civil action the most defendant can win is release from the threat of liability for the plaintiff's claim in that action, but defendant may lose not merely the $Y paid to that plaintiff but also the many claims asserted by similarly situated plaintiffs able to invoke collateral estoppel if mutuality is not required. Without mutuality, while the defendant can at most win only the case at hand, defendant risks losing not only that case but also all the cases involving an issue subject to estoppel. The defendant thus may lose not only to the opposing party but also to the kibitzers.

The other claimants able to invoke nonmutual collateral estoppel are able to win without having risked anything. While such a result might seem appropriate if we were confident the first result was correct, such confidence cannot be justified. There is no fair claim to such a windfall. The other claimants have done nothing to entitle them to this benefit, nor has the common party committed any wrong deserving such an imposition. With nonmutual res judicata, by comparison, while the other defendants may have a relatively weak claim to the doctrine's benefit, the common party's attempt to do in multiple litigation what could have been done in one deserves sanctions to discourage imposition of unnecessary costs on the courts and society.  

That the result achieved by nonmutual collateral estoppel is unfair is suggested by the rejection of similar results when Rule 23 on class actions was revised in 1966. The purposes of that revision included eliminating one-way intervention in which members of a spurious class would intervene if the class won but be free to litigate separately if the class lost. That revision of the rules required that class actions be binding whichever way they came out,

81. See supra text accompanying notes 16-17 (discussing the benefits of dropping the mutuality requirement for res judicata).

82. See Amendments to Rules of Civil Procedure, 39 F.R.D. 69, 105-06 (1966) (rejecting one-way intervention by potential class members in cases favorable to them while not binding them to unfavorable decisions); see also Benjamin Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 HARV. L. REV. 356, 385-86 (1967) (noting the criticisms that were leveled against one-way intervention before Rule 23 was revised).
not only if they resulted in a victory in favor of the class. To tolerate nonmutual collateral estoppel is to resurrect the unfairness the 1966 revision of the federal rules sought to inter. 83

Thus nonmutual collateral estoppel cannot be justified either by an expectation that the first case was correctly decided or by considerations of fairness.

c. Litigation Efficiency?—The goal of promoting litigation efficiency might be invoked to justify nonmutual collateral estoppel. The potential savings from nonmutual collateral estoppel may seem clear: the common party's loss of the first case eliminates all future cases.

Such a perception, however, is misleading. Two major factors reduce the potential savings in litigation costs from the application of nonmutual collateral estoppel. First, the savings may not be that great. There is no savings if the common party wins. Even if there is a loss by the common party, it will only eliminate issues, not cases, and other issues are likely to remain. At least it will be necessary to determine damages, and it may be necessary to determine other issues affecting liability. With a trial thus still necessary, the savings from estoppel on a few issues may be slight. In contrast, nonmutual res judicata will eliminate the second case, not merely issues in it. Second, nonmutual collateral estoppel has costs. The effort needed in the second case to litigate whether to apply the doctrine may be substantial. 84 Claimants may hang back from the first case, hoping to invoke the doctrine if the common party loses, whereas without the doctrine they would have joined forces in the first case, with a decision either way binding on all. The common party is likely to litigate the first case more intensively and extensively because of the exposure under nonmutual collateral estoppel, and that effort likely will have to be matched by the common party's first opponent. 85


84. See Goodson v. McDonough Power Equip., Inc., 443 N.E.2d 978 (Ohio 1983) (demonstrating the extent to which litigating the issue of nonmutual collateral estoppel consumes judicial resources).

85. Id. at 982-83.
Of course, there may be a great savings in litigation costs if the common party is coerced in the early cases into abandoning a valid position by fear of the disproportionate costs of the slight risk of defeat being applied as nonmutual collateral estoppel in the later cases. Reducing litigation by driving those with meritorious positions from court, however, has little to commend it.

Possible savings from nonmutual collateral estoppel should be weighed against other methods of obtaining greater efficiency. Five suggestions follow. First, if claimants lose the advantage now provided by nonmutual collateral estoppel, they might consolidate several cases or agree with the common party to a test case which might effectively resolve many similar cases. Second, some cases might appropriately be resolved by class actions. Third, the federal panel on complex litigation helps to simplify litigation of cases pending in different federal trial courts by transferring related cases pending in different federal district courts to one federal district court for pretrial proceedings; this procedure might be extended to include trials as well as pretrial and to include state cases. Fourth, some of the issues on which nonmutual collateral estoppel might be invoked could perhaps instead be resolved as a

86. See, e.g. Ratliff, supra note 4, at 68-69; David Rosenberg, Class Actions for Mass Torts, 62 IND. L.J. 561 (1987); cf. In re “Agent Orange” Prod. Liab. Litig., 100 F.R.D. 718 (E.D.N.Y. 1983) (holding that a class action is appropriate for all Vietnam veterans exposed to Agent Orange to seek recovery for personal injuries from the manufacturers). But cf. McDonnell Douglas Corp. v. United States Dist. Court for Cent. Dist. of Cal., 523 F.2d 1083 (9th Cir. 1975) (rejecting a class action composed of kin of victims of an airplane crash); Mertens v. Abbott Labs., 99 F.R.D. 38 (D.N.H. 1983) (holding that a suit could not be maintained as a class action to seek recovery for injuries from DES).
87. See 28 U.S.C § 1407(a) (1982).
88. AMERICAN LAW INSTITUTE, PRELIMINARY STUDY OF COMPLEX LITIGATION 238-39 (1987). It should be noted that there is substantial disagreement about the virtues of greater required consolidation. Compare Thomas D. Rowe & Kenneth D. Sibley, Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction, 135 U. PA. L. REV. 7 (1986) (urging the creation of new federal subject matter jurisdiction for multiparty, multiforum litigation) with Roger H. Trangsrud, Joinder Alternatives in Mass Tort Litigation, 70 CORNELL L. REV. 779 (1985) (arguing for an end to the practice of ordering joint trials in mass tort cases). See also Sherman, Aggregate Disposition of Related Cases: The Policy Issues, 10 REV. LITIG. 231 (1991) (arguing that although aggregation is problematic, it offers a useful option in resolving mass tort litigation). The problems with required consolidation are likely also to appear in proposals to estop nonparties. See supra note 78.
matter of judicial notice, if on balance the scientific evidence although voluminous and complicated permits but one answer, or at least excludes certain answers.\textsuperscript{89} Areas appropriate for such treatment might include whether a company's products have certain characteristics and whether those characteristics can cause certain conditions. Fifth, many issues involving the application of the law to fact or the evaluation of conduct which at times are treated as issues of fact might instead be treated as issues of law, if the circumstances in which they arise become common enough that a rule of law becomes appropriate.\textsuperscript{90} Areas appropriate for such treatment might include evaluating whether a particular manufacturing process was negligent or unduly hazardous and whether particular labeling constituted adequate notice. All five of these approaches would have the advantage of applying whether or not the common party prevailed; the judicial notice and the rule of law approaches would also apply to others in the position of the common party but not involved in this litigation. That is, precedent and

\textsuperscript{89} See Bertrand v. Johns-Manville Sales Corp., 529 F. Supp. 539, 544 (D. Minn. 1982) (noting that whether asbestos can cause asbestosis and mesothelioma “is so firmly entrenched in the medical and legal literature that it is not subject to serious dispute”). Cf. Miller Brewing Co. v. G. Heileman Brewing Co., 561 F.2d 75, 80-81 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978) (holding “Lite” as applied to beer was a generic term and thus not a valid trademark, based on a “less complete record” and judicial notice of the English language). That decision was applied as nonmutual collateral estoppel in Miller Brewing Co. v. Jos. Schlitz Brewing Co., 605 F.2d 990, 996 (7th Cir. 1979), cert. denied, 444 U.S. 1102 (1980). A fairer approach might have been to have decided both cases as a matter of judicial notice.

\textsuperscript{90} See White Earth Band of Chippewa Indians v. Alexander, 683 F.2d 1129, 1133-35 (8th Cir. 1982), cert. denied, 459 U.S. 1070 (1982) (deciding the issue of whether an Indian tribe had been disestablished by an 1889 Congressional statute as a matter of nonmutual collateral estoppel; this issue might better have treated the matter as a question of law to be decided by precedent); OLIVER WENDELL HOLMES, THE COMMON LAW 123-26 (Boston, Little, Brown, and Co. 1881). Carr v. District of Columbia, 646 F.2d 599 (D.C. Cir. 1980), treated the issue of whether the United States holds title to alleys in the District of Columbia as a matter of nonmutual collateral estoppel, again an issue which would seem better decided as a matter of law and precedent. See also Mooney v. Fibreboard Corp., 485 F. Supp. 242, 250 (E.D. Tex. 1980) (holding that the unreasonably dangerous nature of asbestos has been determined as a matter of stare decisis). The nonmutual collateral estoppel aspects of Alexander and Carr may be inconsistent with United States v. Mendoza, 464 U.S. 154 (1984), discussed in part IV.F.
judicial notice developed in litigation against General Motors might also be applicable to litigation against Toyota.

Judicial efficiency might be promoted not merely by making one case decide many, but also by allowing one case to influence many. The Seventh Circuit has authorized the use of judgments as evidence in patent cases, and similar use of antitrust judgments is authorized by statute. Such use of judgments as evidence rather than collateral estoppel might significantly increase judicial efficiency.

Thus while there probably are savings in litigation costs from the application of nonmutual collateral estoppel, these savings are less than they might initially appear, and similar savings are possible by other mechanisms. The savings from estoppel are too small to justify the unfairness of the doctrine.

d. Need for Consistency?—To require mutuality may be to tolerate a greater number of inconsistent decisions by the courts, with a consequent tarnishing of the courts' public image. Might this concern justify nonmutual collateral estoppel? No, for three reasons.

First, it is not clear how much more inconsistency there will be. By allowing nonmutual res judicata, as proposed above, the number of inconsistent decisions when one has a single claim against multiple parties will be reduced. Even in the situation of related claims by unrelated parties, here called poly-claims, the encouragement to consolidate litigation, provided by restoring the mutuality requirement to collateral estoppel, may result in many circumstances in which there is only one answer and thus will reduce inconsistency in those circumstances where the common party wins the first case. Similarly, the other methods discussed above of increasing efficiency should result in fewer decisions and thus a reduced risk of inconsistency.

Second, there will always be significant numbers of inconsistent decisions so long as every person is entitled to a day in court under


the due process clause. A consequence of permitting a certain margin for error by juries and trial judges is that the same case can and will be decided either way. To restore the mutuality requirement to collateral estoppel is thus unlikely to increase dramatically the total amount of inconsistency in the judicial system.

Finally, one must ask whether it is good for the courts to pretend to have greater accuracy than they possess. In the long run, institutions are likely to operate better with their flaws revealed and subject to pressure for reform, than if they hide their flaws and leave dissatisfaction to fester until the institution is thoroughly deficient or its support gone. As John Stuart Mill wrote, the reason for freedom of ideas is in part to permit the new to emerge, and in part to preserve the strength of the old by periodically subjecting them to challenge and reconsideration. Our courts do not seem so frail that they must be treated as tender hothouse orchids; rather they are mature trees able to withstand, perhaps by bending a little, the fiercest gale. They can tolerate the relatively small amount of inconsistency caused by restoring the mutuality requirement to collateral estoppel. On the other hand, some courts may not be able to tolerate image-promoting falsehood. A major assumption of courts approving nonmutual collateral estoppel, an assumption that may be present even if not stated, is that a fairly tried case necessarily produces the right answer. That obviously erroneous assumption may have been induced in part by the various mechanisms judges adopt which promote the courts’ public image. One reason to be careful about one’s own image promotion is to keep one’s own head clear.

e. Miscellaneous.—Three possible justifications for nonmutual collateral estoppel—that it might be justified by substantive policies, that mutuality versus nonmutuality doesn’t matter, and that we don’t want the common defendant who loses each case to

94. "Inconsistent results may be embarrassing to a degree, but it is much more disastrous to pretend an infallibility which does not exist and to sacrifice justice, as perceived by its victims, to a compulsion for tidiness." Greenebaum, supra note 17, at 14.

95. See JOHN STUART MILL, ON LIBERTY 15-52 (Elizabeth Rapaport ed., 1978).

96. See text accompanying notes 47-48.

97. See text accompanying notes 50-76.
force each plaintiff seriatim to put on a case—may be briefly addressed.

Could nonmutual collateral estoppel be justified by substantive policies favoring the opponents of the common party? Probably not. Because the doctrine applies in all substantive contexts, it seems unlikely to be motivated by substantive concerns. The advantage to the noncommon parties, and the disadvantage to the common party, of nonmutual collateral estoppel increases with the number of unrelated parties, again a factor which makes it unlikely that the doctrine advances any substantive policy. The effect of nonmutual collateral estoppel has other perverse aspects. It heavily favors the first who settle (as they use the other claimants as leverage), but it burdens those who litigate early (as the common party is likely to put extra resources into the early cases because of the fear of losing the remaining cases by estoppel). Whether it benefits those who settle or litigate late depends on the outcome of the earlier cases.

One might ask whether the lack of a mutuality requirement to collateral estoppel constitutes a serious problem. One might expect that the first case tried, whichever way it goes, would tend to influence settlements heavily. While that is true, having the force of law behind one of the settling parties through nonmutual collateral estoppel is likely to increase greatly that effect.

Would restoring the mutuality requirement for collateral estoppel in this context mean that after an airplane crash the manufacturer could force each litigant to put on a case, despite the manufacturer’s loss of all previous cases? That would be a most unlikely possibility. Such a defense would run a serious risk of sanctions under Rules 11 and 37(c) after the first few losses. Surely plaintiffs’ attorneys would not proceed seriatim but would rather assemble a few large cases. As a practical matter, after a few cases the remain-


100. See supra note 58 (discussing these rules).

der would settle. In other cases, such as asbestos litigation, individual differences of period and type of exposure to the hazard, differences in ages of the victims at exposure, differences in time since the exposure, and differences in other health characteristics would preclude either joinder or the application of nonmutual collateral estoppel as it now exists, so reinstating the mutuality requirement would have no effect.

Thus offensive nonmutual collateral estoppel cannot be justified. The acceptance of such estoppel has been based on a misunderstanding of the nature of courts. Courts are used not because they are accurate (on the contrary they appear often to be inaccurate), but because they attempt to be fair and accurate and they are a reasonable risk allocation mechanism. A process justified by fair risk allocation cannot fairly be extended to others who risked nothing. None of the arguments against mutuality is sufficient to overcome this basic unfairness.

2. Multiple Defendants.—The preceding discussion of the multiple claimant problem argued that nonmutual collateral estoppel cannot be justified in that context. A similar problem is presented when one faces multiple defendants, if one has separate but related claims against each. This problem is likely to arise in litigation about possible infringement of patents, copyrights, and trademarks, as well as in litigation about form contracts such as with employees regarding secrecy or with franchisees. For example, the owner of a patent bringing an action against an alleged infringer may meet a defense that the patent is invalid or narrow in scope. That defense might also be raised by other alleged infringers in other enforcement actions. A successful assertion of such a defense in one action may

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102. See, e.g., Green, supra note 74, at 141. For similar reasons offensive nonmutual collateral estoppel on the issue of causation of certain injuries in an airplane crash was rejected in Schneider v. Lockheed Aircraft Corp., 658 F.2d 835 (D.C. Cir. 1981), cert. denied, 455 U.S. 994 (1982), and on the issue of design defect and negligence in the Dalkon Shield litigation in Setter v. A.H. Robins Co., 748 F.2d 1328 (8th Cir. 1984).
be available under existing law as nonmutual collateral estoppel in other enforcement actions where that defense is raised.

A mental picture may be helpful. The litigation after an airplane crash might be viewed as a core of the airline (possibly with additional defendants) surrounded by passengers or their representatives asserting claims. This is the classic context for offensive nonmutual collateral estoppel: a target at which many arrows or claims are aimed. Consider now the patent holder beset by multiple infringers. The picture is basically the same. There is a core of the patent holder surrounded by infringers. The only difference is that now the arrows point out from the core rather than in towards it.

Like the multiple claimant problem, this multiple defendant problem exposes the common party in each action to risk of losing all the cases through nonmutual collateral estoppel while that party is able to win at most only that one action. Like the common party facing multiple claimants, the common party facing multiple defendants has limited control over the forum. Each of the multiple defendants can only be sued in courts satisfying personal jurisdiction, subject matter jurisdiction, and venue requirements, only after that defendant has acted and been discovered, and only before the statute of limitations has run.

Unlike the situation which might permit the nonmutual res judicata defense, where a party has essentially one claim which might be asserted against several defendants (a mono-claim), here we are concerned with separate claims for separate injuries against the different defendants (poly-claims). Consider a typical mono-claim. A person should have only one claim for the injuries that person sustained in an automobile accident, even though several cars were involved, and even though as to each car there are possible claims against the car's driver, owner, manufacturer, and maintainer, and the driver's employer. The additional defendants would not add to one's recovery. Amounts collected from one defendant would reduce collections from the others under a system of joint liability; under proportionate liability, each would be liable for only that part of the injury each caused. Contrast a typical poly-claim. Each infringer (or group of cooperating infringers) inflicts a separate injury. Each infringer is likely acting at a separate time and place and each may infringe in a different way. Collections from one infringer or group of infringers would not reduce amounts collected from another. Although this second category has been considered
merely defensive,\textsuperscript{103} much like the cases considered earlier where one claim may be collected from several different parties,\textsuperscript{104} it belongs instead with the cases normally classified as offensive in a broader category of multiple separate but related claims between one common core party and several unrelated parties, what this Article proposes to call poly-claims. In neither the multiple claimant nor the multiple defendant version of this category can nonmutual collateral estoppel be justified.

\section*{C. Government Enforcement Actions}

We now proceed to the third situation in which nonmutual collateral estoppel has been applied: the first litigation is a government enforcement action, the second a private civil action. It is useful to distinguish three types of government enforcement actions: criminal prosecutions, actions where the government seeks relief for private parties, and other government actions.

\subsection*{1. Criminal Prosecutions}—There seems little risk of unfairness in applying estoppel from a criminal conviction to a civil action. The unusual procedural safeguards for the accused in a criminal prosecution make an erroneous conviction much less likely than an erroneous civil decision. The risk of imprisonment, fine, and harm to reputation following a criminal conviction assure that the accused has full incentive to put on the best defense possible. Estoppel in civil cases may even be applied from guilty pleas in criminal cases, contrary to the rule that limits estoppel from civil cases to issues actually litigated.\textsuperscript{105} There would be no estoppel from an acquittal, because the government’s inability to sustain the very high burden

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\textsuperscript{103} See, e.g., Blonder-Tongue Labs., Inc. v. University of Ill. Found., 402 U. S. 313 (1971).

\textsuperscript{104} See supra part III.A.

\textsuperscript{105} Compare Pilkay v. Commissioner of Internal Revenue, 61 T.C.M. (CCH) 2281 (1991) (Pilkay estopped from denying he misappropriated funds after pleading guilty in state court) and Rodriguez v. Schweiger, 796 F.2d 930 (7th Cir. 1986) (Rodriguez estopped in civil rights case from claiming that the police fired first shot after pleading guilty to attempted murder), \textit{cert. denied}, 481 U.S. 1018 (1987) \textit{with} \textsuperscript{with} \textit{restatement} (\textit{second}) \textit{of} \textsuperscript{of} \textit{judgments} § 28 (1982) (providing an exception to the rule that limits estoppel from civil cases to issues actually litigated where, for example, the party “sought to be precluded . . . did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action”).
\end{flushright}
of proof in criminal cases of “beyond a reasonable doubt” does not predetermine the result in civil litigation where the burden is generally the much lower “more likely than not.” Because the special protections for the accused in criminal trials make estoppel based on criminal cases fundamentally different from estoppel based on civil cases, estoppel from criminal convictions are proper without regard to mutuality.

2. Relief for Private Parties.—There are difficult problems in the application of collateral estoppel, from actions in which the government seeks relief for private parties, to litigation in which those private parties seek similar relief. For example, racial discrimination in housing might lead to both government enforcement actions and private actions for similar relief. Normal doctrines of privity might apply, because the government to a significant extent represents the private beneficiaries of its enforcement action, and because the private beneficiaries have a substantial interest in the government’s action. If privity is determined to be satisfied, then the private litigants would be bound by the government’s defeats as well as its victories. Unless legislation clearly provides differently, our tradition of one-bite-at-the-apple would suggest that the defendant should not be exposed in two cases to the risk of having to provide the same remedy to the same people, a loss in either proceeding being decisive, nor should plaintiffs have two opportunities to obtain the same relief, a win in either case being adequate.

That the legislature intended to increase the chances for private recovery by providing for government enforcement action should not without more imply rejection of the one-bite-at-the-apple norm. Having the government action be binding on those it attempts to benefit seems particularly appropriate where the government seeks relief such as an injunction or receivership, where it is clear that there will be but one remedy (two injunctions or receivers would risk imposing incompatible obligations on defendant). On the other hand, the government is pursuing general enforcement policies and its own political goals, not merely representing the beneficiaries, and

106. See supra note 2.
107. See supra note 2 and infra note 143 (discussing privity).
the beneficiaries have no right to intervene in or control the government's action. If we are unwilling to bind private litigants by the government's defeats, then the preceding analysis suggests it is unfair to allow private litigants to invoke government victories.

3. Other Government Actions.—The weakest case for estoppel is where the government is seeking only civil penalties. Here the defendant lacks the extra safeguards available in a criminal prosecution, and here it is hard to argue that the government is in privity with the private litigants because the government is not seeking relief for the private litigants' particular benefit. The case for estoppel is weaker still if the action for a civil penalty is conducted in a special proceeding lacking the normal procedural protections of civil litigation.

This section has argued that in no situation is nonmutual collateral estoppel from civil litigation appropriate. Similar or better results may be obtained in appropriate areas, however, by applying nonmutual res judicata or by making the estoppel mutual.

IV. How the Law Went Astray

How did the law get into this position of rejecting mutuality for collateral estoppel, yet requiring it for res judicata? The purpose of this historical analysis is to show the very shaky foundations supporting the now-widespread rejection of the mutuality requirement for collateral estoppel, thus indicating that the policies


discussed above favoring the mutuality requirement should be implemented notwithstanding the doctrine of stare decisis.

A. Jeremy Bentham

Although there are some earlier authorities, the first major attack on mutuality is the famous quotation from Jeremy Bentham that mutuality is "a maxim which one would suppose to have found its way from the gaming table to the bench."110 Use of this quotation is misleading on two counts.

First, the quotation did not address the use of judgments as estoppel but merely as evidence, a far different subject.111 The initial sentence of the paragraph containing the quoted sentence states, "Another curious rule is, that, as a judgment is not evidence against a stranger, the contrary judgment shall not be evidence for him."112

Second, the words are not Bentham's but merely those of his editor. That editor was John Stuart Mill, certainly a distinguished scholar in his own right, but he wrote those words when he was at most twenty-one years of age.113 Ten years later he apologized for "the air of confident dogmatism perceptible in some of his notes and additions"114 to Bentham's work, perhaps referring to the language quoted above.115

111. See Motomura, supra note 93, at 980.
112. BENTHAM, supra note 110, at 579.
113. Mill lived from 1806 to 1873, so he was 21 years old when Rationale of Judicial Evidence was published in 1827, and may have been even younger when the words were written. Bentham lived from 1748 to 1832, and was thus 79 years old (and five years from death) when Mill's edition was published, so he may not have given it careful attention.
115. Id. at 170. The preface notes, "The papers, from which the work now [1827] submitted to the public has been extracted, were written by Mr. Bentham at
Thus Bentham provides no effective opposition to mutuality of collateral estoppel, and to rely on (then) young Mill is to lean on at best a slender reed.

B. Bernhard v. Bank of America

Although there are earlier cases, the landmark case rejecting the mutuality requirement for collateral estoppel is Bernhard v. Bank of America. This case applied nonmutual collateral estoppel, from an estate’s beneficiaries’ unsuccessful attempt to charge the administrator with misappropriation of the estate’s funds, to defeat the beneficiaries’ action against the bank which had honored the administrator’s transfer of funds. The opinion is highly questionable authority because it departs from normal judicial processes, its “holding” was not necessary to decide the case as the same result would have been reached under well-established doctrine, it confuses terminology, and it improperly uses authority.

There is no hint in the record of this case prior to the California Supreme Court’s decision that the requirement of mutuality for collateral estoppel was in question. Our respect for our highest courts should not blind us to the importance of having advocates attempt to persuade and educate trial and intermediate appellate courts, and of having the judges of those courts wrestle with the issues, each learning from what has gone before. The opinion states, “No satisfactory rationalization has been advanced for the requirement of mutuality,” yet no realistic opportunity was

various times, from the year 1802 to 1812.” THE WORKS OF JEREMY BENTHAM, supra note 113, at 201. Later the preface states:

[I]t has sometimes (though but rarely) occurred, that while one topic was treated several times over, another, of perhaps equal importance, was not treated at all. Such deficiencies it was the wish of Mr. Bentham that the Editor [Mill] should endeavor to supply. In compliance with this wish, some cases of the exclusion of evidence in English law, which were not noticed by Mr. Bentham [thus Mill is using his own thoughts, not unwritten thoughts of Bentham, to fill the gaps in Bentham’s writing], have been stated and commented upon in the last chapter of the book [from which the quotations in the text above are taken].

Id. at 202.

117. Copies of the record are available in the author’s office and at the University of California Hastings College of the Law Library.
118. 122 P.2d at 895.
provided for plaintiff's counsel to produce that justification. An attorney who suddenly is hit by an unprecedented and unargued position in the highest appellate court available is at a serious disadvantage in trying to resuscitate his case in a petition for rehearing.

Moreover, even had the attorney persuaded the court to reconsider whether mutuality should be required for collateral estoppel, it is still most unlikely that plaintiff could have prevailed on the merits, as the case fit within both well-established exceptions to the mutuality requirement for res judicata. Had the bank been held liable to the estate's beneficiaries for improperly paying the estate's former administrator, the bank would normally seek reimbursement from the former administrator who had wrongfully received the funds. But the former administrator had already been exonerated. Thus the case is an example of the exception to mutuality for res judicata when the first case discharges a person owing a duty of indemnity and the second case is brought against the person entitled to indemnity. The case is also an example of the other exception to mutuality for res judicata, in which the first case exonerates one whose actions are the basis for imposing liability on another in the second case. Thus the rejection of mutuality for collateral estoppel was not needed to decide the case.

Why did the court not, as this Article suggests, eliminate the mutuality requirement for res judicata rather than for collateral estoppel? There may have been a problem with the terminology. Although the concepts of "res judicata" and "collateral estoppel" are clearly different and are recognized as such in the opinion, the term "res judicata" was applied to both. Such minor linguistic

119. Note that while the opinion suggests ignorance of any reason to require mutuality, it presents no reasons for dropping mutuality.
120. See supra notes 11-14 and accompanying text (discussing traditional exceptions to mutuality of res judicata).
121. "The doctrine of res judicata precludes parties . . . from relitigating a cause of action . . . . Any issue necessarily decided in such litigation is conclusively determined as to the parties . . . if it is involved in a subsequent lawsuit . . . ." Bernhard, 122 P.2d at 894 (citations omitted). The first sentence deals with res judicata, the second with collateral estoppel. Following the quote, the first sentence deals with collateral estoppel, the next with res judicata, again without distinguishing the concepts. This confusing use of terms is hardly surprising, because "res judicata" has traditionally been used to refer to both "res judicata" and "collateral estoppel" as
problems may at times impede analysis. In this case, all the exceptions to mutuality discussed were exceptions to res judicata, not to collateral estoppel, but this important point was hidden by using the first term to cover both topics.

One might criticize the court’s use of authority. It cites Bentham’s famous comparison of mutuality to the gaming table,\textsuperscript{122} not noting that the passage referred to the admissibility of judgments as evidence rather than to collateral estoppel, not noting that the passage was arguably written not by Bentham but by a youthful John Stuart Mill. The court’s statement that “The commentators are almost unanimously in accord” with abandoning the mutuality requirement is followed by a string of citations, all but one of which are to student comments and the other is to an article by a man admitted to the bar only three years before the article was published.\textsuperscript{123} The court overlooked such authorities as the leading works on evidence and judgments,\textsuperscript{124} a law review article by the former chief justice of the Pennsylvania Supreme Court\textsuperscript{125} (all cited earlier in the opinion for other purposes), and the drafts of the first \textit{Restatement of Judgments} (circulated the year before Bernhard was decided),\textsuperscript{126} all of which endorsed the mutuality requirement.

\textsuperscript{122} P.2d at 895.
\textsuperscript{124} 1 SIMON GREENLEAF, GREENLEAF ON EVIDENCE § 524 (15th ed. 1892) (this passage is retained in two later editions of the work edited by John H. Wigmore and William Draper Lewis); 2 HENRY C. BLACK, BLACK ON JUDGMENTS § 548 (2d ed. 1902), 1 A.C. FREEMAN, FREEMAN ON JUDGMENTS §§ 428-29 (5th ed. 1925).
\textsuperscript{126} \textit{Restatement of Judgments} § 416 (Tentative draft No. 2, 1941).
C. Brainerd Currie

The most prominent academic supporter of the requirement of mutuality for collateral estoppel was Professor Brainerd Currie.\footnote{Currie, supra note 76.} He discussed the problem of the multiple claimant anomaly,\footnote{The multiple claimant anomaly had been raised earlier by Warren A. Seavey in RESTATEMENT OF JUDGMENTS § 416 Note to Members (Proposed Final Draft, Part II, 1942) and Res Judicata with Reference to Persons neither Parties nor Privies—Two California Cases, 57 HARV. L. REV. 98, 104-05 (1943).} using a hypothetical involving a train wreck injuring fifty people. Currie demonstrated why, after the railroad successfully defended twenty-five actions, it should not be estopped in the remaining actions if it loses a single action.\footnote{An otherwise fascinating analysis of mutuality assumed that under nonmutuality any loss by the common party would forfeit all remaining cases, even if the loss were preceded by many wins. Note, A Probabilistic Analysis of the Doctrine of Mutuality of Collateral Estoppel, 76 MICH. L. REV. 612, 641-45 (1978). Although a few cases so hold, they seem inconsistent with Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330-31 (1979). See, e.g., Stevenson v. Sears, Roebuck & Co., 713 F.2d 705, 709 (Fed. Cir. 1983); Mississippi Chem. Corp. v. Swift Agric. Chems. Corp., 717 F.2d 1374, 1376-80 (Fed. Cir. 1983). The Michigan note's error is repeated in Note, Exposing the Extortion Gap: An Economic Analysis of the Rules of Collateral Estoppel, 105 HARV. L. REV. 1940, 1941 (1992).} Currie then asked why we would accept a defeat by the railroad in the first action, because that defeat too could be aberrational. Currie then suggested a reluctance to enforce nonmutual collateral estoppel against one who lacked the initiative in the first case because of the disadvantage of having one's opponent pick the forum and time for litigation. Here Currie was correct in seeing the problem, but incorrect in diagnosing it.

The problem is not one of lack of initiative but rather in the nature of the litigation. A problem, like the multiple claimant anomaly, may also be presented to a party having the initiative. Like a common party facing multiple related but separate claims asserted by unrelated parties (the multiple claimant anomaly), a common party asserting such claims against unrelated parties (e.g., the patent holder beset by infringers) has a serious problem if mutuality is not required. A loss of the first case entails for each the risk of loss of all the cases, yet no more can be won than the one
case currently being litigated. That one-sided risk of loss cannot be justified.\(^\text{130}\)

While the initiative in litigation may of course be useful, Currie may have exaggerated its importance. First, a plaintiff’s control of the litigation may be less than Currie thought. The plaintiff has the advantage of choice of forum, but only from among those satisfying jurisdiction and venue requirements, and this choice may be overcome by forum non conveniens or a transfer under § 1404(a).\(^\text{131}\) The plaintiff may pick the time, but only from the period begun by the claim accruing and ended by the statute of limitations or laches. The plaintiff may pick the parties, but the court may require additional parties under Rule 19, the opponent may add parties under Rules 13(h) and 14, other persons may intervene under Rule 24, and the case may be consolidated with others under Rule 42. Second, surely any decent procedural system will be generally fair both to plaintiffs and defendants.\(^\text{132}\)

Thus Currie’s criticism was rejected, even though it was not the criticism which was invalid, but only Currie’s explanation of his criticism. Unfortunately those who rejected Currie’s explanation (including at a later date even Currie himself)\(^\text{133}\) did not probe deeper to seek a better explanation.

D. Blonder-Tongue Laboratories

The United States Supreme Court first gave its blessing to nonmutual collateral estoppel in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*.\(^\text{134}\) This case, like

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130. See supra part III.B.
131. 28 U.S.C. § 1404(a) (1982) (“For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.”).
132. Bahler v. Fletcher, 474 P.2d 329, 337 (Or. 1970) (“[T]here would be something radically wrong with our system of justice if we were required to start basing rules of law upon the proposition that defendants do not, on the average, have a fair opportunity to litigate relevant issues.”).
133. Brainerd Currie, *Civil Procedure: The Tempest Brews*, 53 CAL. L. REV. 25, 31 (1965) (abandoning his earlier-proposed “initiative” test in favor of a “particularized inquiry” whether the party “in the former action had a full and fair opportunity to litigate” to control excesses of nonmutual collateral estoppel).
Bernhard, 135 presented a substantial departure from normal judicial processes. The Court also seemed to have misunderstood the litigation posture of the case before it, and to have over-estimated the accuracy of court determinations.

Neither party had recommended rejecting the doctrine of mutuality until prodded to do so by the Court in questioning at oral argument. 136 Once again a major decision on nonmutual collateral estoppel would be made by a court lacking the education normally provided by the parties in our adversary system, and a top appellate court would decide a case without the normal education and development provided by having the contention made, opposed, and decided in the trial court and intermediate appellate court.

The Court saw the case as just another defensive case, using Currie's framework, and so did not go into the problem of the multiple claimant anomaly. The Court apparently did not understand that the patent case it was deciding was the litigation equivalent of the multiple claimant problem. 137

The Court, in arguing for nonmutual collateral estoppel, presumed that the first case was correctly decided, and if that were indeed true it would constitute a powerful argument for applying nonmutual collateral estoppel, but of course, as discussed above, the chances were too great that the first case was not correctly decided. The case before the Court involved an earlier determination by one federal district court that a patent was invalid, followed by a different federal district court in the case on appeal having found the patent valid. 138 No reason is apparent why the first decision should be preferred to the second; on the contrary, the education of both sides from the first case might lead one to prefer the second.

E. Parklane Hosiery

Almost a decade later the United States Supreme Court again considered nonmutual collateral estoppel, this time in Parklane

135. See supra notes 116-126 and accompanying text.
137. Id. at 330 ("But the case before us involves neither due process nor 'offensive use' questions.").
Hosiery Co. v. Shore.139 Here, unlike Bernhard and Blonder-Tongue, the litigants and the lower courts addressed the subject. Unfortunately, the attention of all—litigants, lower courts, and the United States Supreme Court—was focused on another issue. Although the case has a very nice discussion of the policies underlying collateral estoppel, encouraging litigation efficiency and assuring fairness to the litigants,140 the attention of all was focused on the question of whether nonmutual collateral estoppel from an equitable action to a legal one violates the constitutional right to jury trial.141 This question was an offshoot of earlier debates in the Court over the right to jury trial in actions with both legal and equitable elements. The author of the principal dissent in some of those cases142 was at last in Parklane able to write for the majority, and a near unanimous majority at that. Because of the focus on the right to jury trial, the nonmutual collateral estoppel analysis again suffered.

A more thorough nonmutual collateral estoppel analysis would have considered at least the following three major points.

First, did the case even concern a lack of mutuality?143 There

140. Id. at 329-31.
is an argument that the private litigants were in privity with the Securities and Exchange Commission ("SEC") which litigated the first case. Those private litigants even more than other members of the public were arguably represented by the SEC because the SEC was seeking relief to their direct financial benefit, in fact essentially the same relief as was being sought in the private action, and those represented in the prior action are among those classically found to be in privity. It is noteworthy that the case involved an attempt by the SEC to obtain equitable relief including an injunction and the appointment of a special counsel. Surely there will be only one injunction and one special counsel in such a case to avoid subjecting the defendant to incompatible duties, and such a result can be justified under Rules 19 and 24 when the private litigants are not allowed to be parties only if the SEC is representing them.

Second, the Court said that the case had been thoroughly tried because it involved a four-day trial. The trial, however, was on a preliminary injunction with which the merits were consolidated, an authorized procedure, but one whose acceleration may impose some costs in accuracy. A four-day trial would seem somewhat abbreviated by modern securities litigation standards. Thus the Court's conclusion about the thoroughness of the trial is questionable.

144. See supra note 2 and accompanying text.

145. Rule 24(a)(2) denies intervention of right if "the applicant's interest is adequately represented." Rule 19, requiring joinder of parties under certain circumstances, does not have an express exclusion of those already adequately represented, but it would seem highly unlikely that Rule 19 would be read to require joinder of one who had no right to intervene under Rule 24(a)(2).


Finally, it is not clear who won the first case. True, the SEC won a declaratory judgment that the proxy solicitation had been false and misleading, but the SEC failed in its attempts to enjoin the merger or to have a special counsel appointed. On balance that looks like a mixed result, probably tilting somewhat against the SEC. Unless the SEC did win, however, there is no basis for applying nonmutual collateral estoppel against the SEC’s opponent when the second case comes along.\textsuperscript{148}

F. \textit{United States v. Mendoza}

When in \textit{United States v. Mendoza}\textsuperscript{149} the Court finally did consider nonmutual collateral estoppel in a case thoroughly briefed and argued by the parties, fully considered by the lower courts, and free of other major distracting issues, the Court held the doctrine inapplicable: offensive nonmutual collateral estoppel could not be applied against the United States government. Although many aspects of the case were peculiar because the target of nonmutual collateral estoppel was the United States government, some of the points the Court makes would be equally applicable to a private litigant exposed to (or asserting) multiple related claims involving unrelated parties.\textsuperscript{150}

Thus although the clear weight of authority rejects the mutuality requirement for collateral estoppel, that authority cannot withstand careful scrutiny.


\textsuperscript{149} 464 U.S. 154 (1984).

\textsuperscript{150} The Court’s concern about the government’s huge geographic breadth and involvement in many trials and appeals would apply to many large private litigants, although other points such as the government’s concern about conserving judicial resources and the change in policies caused by elections would not. \textit{Mendoza} has been applied to litigation against state governments. Hercules Carriers, Inc. v. Florida Dep’t of Transp., 768 F.2d 1558, 1578 (11th Cir. 1985). \textit{Cf.} Atwell v. Blackburn, 800 F.2d 502, 509 n.1 (5th Cir. 1986) (Goldberg, J., dissenting) (stating that “Mendoza . . . appear[s] to prohibit nonmutual defensive collateral estoppel against governmental parties in habeas corpus review of criminal cases”), \textit{cert. denied}, 480 U.S. 920 (1987).
V. Conclusion

Nonmutual res judicata should be implemented because it is both fair and efficient. Nonmutual collateral estoppel in civil cases should be rejected, because even where it might be fair and efficient nonmutual res judicata is more so, and because in other areas it is unfair. The authority in favor of nonmutual collateral estoppel is, upon careful examination, far weaker than it might initially appear, so weak that even at this late date reconsideration of the question whether to require mutuality for collateral estoppel should still be open.