1986

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Using Judgments as Evidence

Hiroshi Motomura*

INTRODUCTION

The doctrine of collateral estoppel or “issue preclusion” states that the parties to a lawsuit, and those in privity with them, are bound by any decision of fact or law fully and fairly litigated on a previous occasion and necessary to the court’s judgment.¹ No one who contests an issue and loses can relitigate it in a later suit, whether on the same or a different claim. In most cases, collateral estoppel operates in conjunction with the rule against hearsay to produce a fundamental but rarely examined result: when a court assesses a prior judgment’s effect on subsequent litigation, only two outcomes are possible. Either the prior finding is binding in the later proceeding, or it is inadmissible hearsay and has no effect at all. This all-or-nothing approach implicitly rejects a third possibility—admitting the prior judgment as evidence of the matters found,² but

1. Collateral estoppel or “issue preclusion” should be distinguished from merger and bar or “claim preclusion,” which states that a final judgment on the merits bars further suit by parties or their privies on the same claim. Although treatment in the literature varies, this article uses the term “res judicata” to encompass both collateral estoppel and merger and bar, rather than just collateral estoppel. On terminology, see Migra v. Warren City School Dist. Bd. of Educ., 104 S. Ct. 892, 894 n.1 (1984); 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4402 (1981 & Supp. 1985); Casad, Two Important Books on Res Judicata (Book Review), 80 Mich. L. Rev. 664, 675 (1982).

2. This Article uses the word “judgment” broadly, to include any assertion that results from deliberation and is intended to be final as far as that tribunal is concerned. The words “judgment” and “finding” are essentially interchangeable for the purposes of this Article.

3. Cf. Williams v. Bennett, 689 F.2d 1370, 1385-86 (11th Cir. 1982) (prior judgment establishes defendants were on notice of matters found), cert. de-
without giving it binding effect.

Technically speaking, of course, a prior judgment is hearsay.\(^4\) Most commentators realize, however, that the real issue is not whether a prior judgment is hearsay, but whether an exception to the rule against hearsay should be created allowing a prior judgment to be admissible as evidence.\(^5\) Over 150 years ago, Jeremy Bentham proposed the use of judgments as evidence as an alternative to collateral estoppel.\(^6\) More recently, Dean John Wigmore observed that “there are numerous situations in which it seems unreasonable and impractical to ignore the evidential use of a judgment in another proceeding involving the same fact as in the present case.”\(^7\)

Many have suggested evidentiary use of judgments,\(^8\) but no

\(^4\) The Federal Rules of Evidence define hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” FED. R. EVID. 801(c). “Analytically, [a prior judgment] is hearsay, since it is based on the opinion of twelve persons who have not been cross-examined and have no personal knowledge of the underlying facts . . . .” 4 J. WEINSTEIN & M. BERGER, WEINSTEIN’S EVIDENCE § 803(22)[01], at 803-350 (1985) (footnotes omitted).

\(^5\) See E. CLEARY, MCCORMICK’S HANDBOOK ON THE LAW OF EVIDENCE § 318, at 893-94 (3d ed. 1984) [hereinafter cited as MCCORMICK]; 4 J. WEINSTEIN & M. BERGER, supra note 4, ¶ 803(22)[01], at 803-350; 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1671a, at 807-08 (J. Chadbourn rev. 1974); Note, Judgments as Evidence, 46 IOWA L. REV. 400, 402 (1961) [hereinafter cited as Note, Judgments].

\(^6\) Bentham, The Rationale of Judicial Evidence, in 7 WORKS OF JEREMY BENTHAM 171 (Bowring ed. 1843) (“[T]hat, however, because [a judgment] ought not to be made conclusive, it ought not to be admissible, is an inference which none but a lawyer would ever think of drawing.”).

\(^7\) 5 J. WIGMORE, supra note 5, § 1671a, at 807.


Others have discussed the use of prior criminal judgments as evidence. See Cowen, The Admissibility of Criminal Convictions in Subsequent Civil Proceedings, 40 CALIF. L. REV. 225 (1952); Palmer, The Admissibility of Judg-
one has analyzed it in any detail. Courts rarely discuss the practice, perhaps because they assume that it is generally prohibited. As a leading commentary states: "Although older cases reflect occasional efforts to use prior findings simply as evidence, it has long been settled that preclusion ordinarily is an all or nothing thing."\(^9\)

This neglect is regrettable. An all-or-nothing orientation toward the use of prior judgments reflects hidden but pivotal assumptions about our system of procedure. These assumptions concern not only the appropriate scope and purpose of collateral estoppel and evidence, but also the nature and limits of adjudication. This Article examines these assumptions as well as the more specific question whether prior judgments should be admissible into evidence in subsequent civil litigation.\(^10\)

Part I examines several of the scattered categories of prior judgments that courts have admitted into evidence and develops a hypothesis to explain why courts have done so. Part II explores the similarities and differences between using judgments as evidence and collateral estoppel and suggests reasons for preferring one or the other. Part III discusses the significant difference under current doctrine, which is that a prior proceeding can be admitted into evidence against a nonparty to the original suit, but generally may not be used to collaterally estop a nonparty. Part IV discusses how this difference may be eroding under growing pressure to expand collateral estoppel to permit preclusion of nonparties and suggests that admitting prior judgments into evidence is a better alternative. Part V considers whether it is practical and wise to allow judges and juries to evaluate prior findings as evidence and determines, with some hesitation, that it is. Part VI concludes with a proposal that, as a general rule, prior judicial findings that would be

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9. 18 C. WRIGHT, A. MILLER & E. COOPER, supra note 1, § 4416, at 144 (footnotes omitted); accord McCORMICK, supra note 5, § 318, at 894; 5 J. WIGMORE, supra note 5, § 1671a, at 806-07.

10. This Article does not discuss later criminal proceedings because they raise some unique problems, particularly those under the confrontation clause of the sixth amendment.
collateral estoppel against a party should be admitted into evidence against a nonparty.

I. ADMISSIBLE PRIOR JUDGMENTS

There are several categories of judgments that are routinely admitted into evidence despite the general rule that prior judgments are inadmissible hearsay. Examples include administrative findings, criminal convictions, antitrust judgments, state employment discrimination findings, and judgments of patent validity. Although there is no apparent common theme that explains why judgments in these categories are admissible and other judgments are not, a closer analysis reveals that this odd array is attributable to the historical development of the law of collateral estoppel. Findings in these categories were initially allowed into evidence because collateral estoppel was, for various reasons, unavailable, and courts wanted to give the prior judgment at least some effect in subsequent litigation. Later, as courts adopted a more expansive interpretation of collateral estoppel, judgments in four of these categories were accorded collateral estoppel effect. By that time, admission as evidence was firmly entrenched, giving rise to a continuum of effect for prior judgments in these particular categories. A prior finding could be binding as collateral estoppel or be admissible as evidence. A closer look at these five categories of admissible judgments illustrates this point.

A. ADMINISTRATIVE FINDINGS

Most courts originally accepted the view that administrative findings were ineligible for either collateral estoppel or merger and bar. Since administrative findings were ineligible for collateral estoppel, courts began admitting them into evidence—otherwise the findings would have no effect at all on the subsequent litigation. The common law permitted a form of this practice, and modern evidence rules usually do so

11. Judgments of patent validity are still not given collateral estoppel effect. See infra notes 87-88 and accompanying text.
through a hearsay exception such as Rule 803(8)(C) of the Federal Rules of Evidence. Admission of administrative findings into evidence is now a frequent occurrence, provided the essential elements of the rule are satisfied.

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14. Rule 803(8) provides a hearsay exception for:

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth... (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

15. Rule 803(8)(C)'s basic requirements are discussed in Fraley v. Rockwell Int'l Corp., 470 F. Supp. 1264, 1266-67 (S.D. Ohio 1979); 4 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE, §§ 455-456 (1980). Rule 803(8)(C) applies only to "civil actions and proceedings and against the Government in criminal cases." FED. R. EVID. 803(8)(C). The hearsay in the administrative finding must be a "factual finding," the finding must have resulted from an investigation authorized by law, and the hearsay statement must not be untrustworthy. Id.


With similar generosity, courts generally hold that an investigation "authorized by law" need not be required by law, only permitted. See, e.g., Fraley v. Rockwell Int'l Corp., 470 F. Supp. 1265, 1266 (S.D. Ohio 1979). Furthermore, the rule does not require that the agency official act on personal firsthand
In 1966, the United States Supreme Court expanded the scope of collateral estoppel to include many types of administrative findings. In *United States v. Utah Construction & Mining Co.*, the Court held that administrative findings are collateral estoppel "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate."
Under the *Utah Construction* approach, agency procedure is a critical factor in determining the binding effect of an administrative finding. Formal proceedings, with procedures typical of courts, make collateral estoppel both appropriate and likely. Collateral estoppel is more appropriate when an agency applies special expertise and less appropriate when it acts outside its expertise. Likewise, an agency’s legislative and policy-making authority, or other sources of potential bias, may skew its decision making and make collateral estoppel an inappropriate extension of agency authority.

These requirements may be more difficult to meet in the administrative context, which, for example, may make it difficult to find identity of issues. See *Metropolitan Detroit Bricklayers Dist. Council v. J.E. Hoetger & Co.*, 672 F.2d 580, 583-84 (6th Cir. 1982); *Atlantic Richfield Co. v. Federal Energy Admin.*, 556 F.2d 542, 550-51 (Temp. Emer. Ct. App. 1977).

Collateral estoppel also may be an inappropriate extension of agency authority. See *Wickham Contracting Co. v. Board of Educ. of New York*, 715 F.2d 21, 28 (2d Cir. 1983); *Lightsey v. Harding, Dahm & Co.*, 623 F.2d 1219, 1221-23 (7th Cir. 1980), cert. denied, 449 U.S. 1077 (1981).


For example, courts have noted that the National Labor Relations Board applies its special competence in its hearings. See *NLRB v. Denver Bldg. & Constr. Council*, 341 U.S. 675, 691 (1951).


See *Perschbacher*, supra note 8, at 454.

pel inappropriate. The scope of judicial review, or the lack thereof, can have a similar effect. Finally, some agency proceedings are not sufficiently adjudicative, even if formal, to be collateral estoppel. Thus, several courts have held that an "adjudication" may be used as collateral estoppel, but that a "rulemaking" proceeding may not.

The net result is that after Utah Construction, administrative findings can affect subsequent litigation in two different ways. If they are not given preclusive effect through the application of collateral estoppel, they can still be given evidentiary effect as an exception to the rule against hearsay. This continuum of effect, and the choice that it gives courts, has a certain appeal to common sense. But it effectively gives administrative findings greater influence on later litigation than other types of findings exercise. Administrative findings that do not qualify for collateral estoppel may be admitted into evidence. Judicial findings, on the other hand, are not admissible under Rule 803(8)(C), so a judicial finding that is not collateral es-


25. "[R]ulemaking bodies do not generally make the kind of discrete factual findings of past conduct that the adjudicative process is specifically designed to provide." International Tel. & Tel. Co. v. American Tel. & Tel. Co., 444 F. Supp. 1148, 1158 (S.D.N.Y. 1978); see also Second Taxing Dist. of Newark v. Federal Energy Regulatory Comm'n, 683 F.2d 477, 484 (D.C. Cir. 1982) (collateral estoppel does not apply to reconsideration of policy judgments in quasi-legislative proceedings); United States v. American Tel. & Tel. Co., 498 F. Supp. 353, 360-63 (D.D.C. 1980) (court must carefully scrutinize findings to differentiate policy-oriented conclusions and factual findings and conclusions).

26. For example, one district court recently held that certain Federal Communications Commission findings were not collateral estoppel in related antitrust litigation. It noted, however, that its holding "does not appear to render the FCC's conclusions and recommendations completely meaningless" because they might be admissible under Rule 803(8)(C) of the Federal Rules of Evidence. International Tel. & Tel. Co. v. American Tel. & Tel. Co., 444 F. Supp. 1148, 1160 n.22 (S.D.N.Y. 1978). The court, however, declined to express a view on admissibility. See also United States v. School Dist. of Ferndale, Mich., 577 F.2d 1339, 1349-50, 1354-55 (6th Cir. 1978) (no collateral estoppel but admissible under Rule 803(8)(C)); United States v. American Tel. & Tel. Co., 498 F. Supp. 353, 365 n.40 (D.D.C. 1980) (lack of collateral estoppel effect does not bar use as evidence).

toppel is ignored completely. Neither case law nor commentary adequately explains why administrative findings should enjoy this greater range of subsequent effect.28

B. CRIMINAL CONVICTIONS

Earlier in this century, criminal convictions were ineligible for collateral estoppel because they lacked mutuality. The prevailing view at that time was that no one should benefit from a prior proceeding who could not be bound by it. Parties could claim collateral estoppel, but nonparties could not because they generally could not be bound by the prior judgment. Private litigants could not use criminal convictions as collateral estoppel because the government, not the private parties, had prosecuted.29 Since convictions could not be collateral estoppel in

the “trustworthiness” criterion is “totally unsuited to evaluating judicial findings.” Id. Third, where the drafters of the Rules “wished to make judicially found facts admissible, they did so expressly.” Id. And finally, judicial findings “would likely be given undue weight by the jury, thus creating a serious danger of unfair prejudice.” Id. at 1186. Part V discusses this last point by analyzing how decisionmakers in later litigation can properly evaluate prior findings. See infra text accompanying notes 296-327.

28. One might argue that administrative findings deserve more weight than judicial findings because they reflect agency expertise that a judicial determination does not, or because agency procedures might generate a more comprehensive paper record that is easier to evaluate. These arguments, however, are based on shaky factual assumptions. And if Rule 803(8)(C) is largely based on the belief that public officials perform their official tasks carefully and without bias or corruption, that rationale applies to judges at least as well as to agency officials.

In fact, most administrative findings inspire less, perhaps much less, confidence than judicial findings. Rule 803(8)(C) admits agency determinations that barely constitute official investigative activity. It admits other determinations, such as accident investigation reports, that are thorough but do not entail procedures normally associated with adjudication. See, e.g., Walker v. Fairchild Indus., 554 F. Supp. 650, 653 (D. Nev. 1982) (United States Air Force aircraft investigation report); see also Revlon, Inc. v. Carson Prods. Co., 602 F. Supp. 1071, 1080 (S.D.N.Y. 1985) (affidavit of FDA official involved in official investigation).

29. See Chatangco v. Abaroa, 218 U.S. 476, 481 (1910); Smith v. New Dixie Lines, 201 Va. 468, 472, 111 S.E.2d 434, 438 (1959). See generally Hinton, Judgment of Conviction—Effect in a Civil Case as Res Judicata or as Evidence, 27 Ill. L. Rev. 195, 196 (1932) (citing “the great mass of decisions that a judgment of conviction does not conclude the convict in a subsequent civil action between him and a stranger as to the existence of the facts on which the prosecution was based”). Part IV will discuss the mutuality requirement and its abandonment in greater detail. See infra notes 216-240 and accompanying text.

The government occasionally brings both criminal and civil cases. See Local 167, International Bhd. of Teamsters v. United States, 291 U.S. 293 (1934); United States v. Monkey, 725 F.2d 1007, 1010-11 (5th Cir. 1984).
later civil litigation, it was conceivable that convicted criminals might escape civil liability for their crimes, or possibly even benefit from them. Some courts regarded this result as unacceptable and began admitting prior convictions into evidence. In typical early cases, courts admitted arson convictions in subsequent civil suits brought by the arsonist to recover fire insurance proceeds.\(^{30}\)

Rules of evidence now generally provide that criminal convictions are admissible under an exception to the rule against hearsay. The Federal Rules,\(^{31}\) for example, provide that a conviction of a serious crime is admissible to prove any fact essential to the conviction.\(^ {32}\) The rationale behind the exception is

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31. Rule 803(22) provides a hearsay exception for:

Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

FED. R. EVID. 803(22).

Rule 803(22) expressly excludes convictions based on nolo contendere pleas. It also excludes convictions of “persons other than the accused” when offered by the government in criminal prosecutions “for purposes other than impeachment.” Id. This restriction stems from the confrontation clause of the sixth amendment. See Kirby v. United States, 174 U.S. 47, 55-61 (1899); United States v. Koger, 646 F.2d 1194, 1199-1200 (7th Cir. 1981); FED. R. EVID. 803(22) advisory committee note. Thus, in a later criminal case, the government can use the conviction of a different defendant to show the fact of conviction, or for impeachment, but not to prove facts essential to the conviction. This restriction limits neither use of the prior conviction by the accused, nor use of prior convictions as evidence in later civil suits. Finally, a statute may override Rule 803(22) to prohibit admission of certain criminal convictions. For example, § 5(a) of the Clayton Act provides that “consent judgments or decrees entered before any testimony has been taken” in a criminal antitrust prosecution are not to be used as evidence. Clayton Act § 5(a), 15 U.S.C. § 16(a) (1982). See generally 4 D. LOUISELL & C. MUELLER, supra note 15, § 470, at 999 n.36; Comment, The Use of Government Judgments in Private Antitrust Litigation: Clayton Act Section 5(a), Collateral Estoppel and Jury Trial, 43 U. Chi. L. Rev. 338, 361-65 (1976) [hereinafter cited as Comment, Government Judgments].

32. Most commentators support the exception. See 4 D. LOUISELL & C. MUELLER, supra note 15, § 470, at 887-89, McCORMICK, supra note 5, § 318, at
that criminal convictions are reliable and trustworthy.\textsuperscript{33} There is a strong incentive to defend against serious charges. Moreover, convictions after trial must meet a high standard of proof, and guilty pleas are subject to parallel safeguards.\textsuperscript{34}

As time passed, courts slowly began to carve out an exception to the mutuality rule for criminal convictions, and collateral estoppel came into use. Courts and commentators cited the higher standard of proof required in criminal cases and policy reasons similar to those for admitting convictions into evidence as justifications for giving prior convictions collateral estoppel effect.\textsuperscript{35}

As with admission into evidence, courts first allowed a prior conviction to be collateral estoppel if it would prevent a convicted criminal from benefitting from the crime. In a leading early case, \textit{Eagle, Star & British Dominions Insurance Co. v. Heller},\textsuperscript{36} the Virginia Supreme Court recognized an arson conviction as collateral estoppel and foiled the convicted arsonist's attempt to collect on a fire insurance policy.\textsuperscript{37} This idea gradually expanded and courts allowed the offensive use of a prior conviction as collateral estoppel.\textsuperscript{38} For example, a later
civil plaintiff could rely on the conviction to establish an element of the claim against a criminal. Courts first allowed government agencies and then private litigants to recover the proceeds of a crime in this manner. As the mutuality requirement eroded away, collateral estoppel for criminal convictions stopped being an exception and became well established under general principles. By then, however, the use of criminal convictions as evidence had also become firmly entrenched.

The net result is that findings in criminal convictions, like administrative findings, enjoy a range of subsequent effect in collateral estoppel to determine the issue of felonious intent in a suit where the convicted beneficiary of a life insurance policy seeks to recover under the policy; Scott v. Robertson, 583 F.2d 188, 193 (Alaska 1978) (prior conviction of plaintiff while intoxicated is conclusive of the facts necessarily proved for the conviction, in a suit plaintiff brings alleging that defendant's negligent driving caused his injuries). See generally J. WEINSTEIN & M. BERGER, supra note 4, ¶ 803(22)(01), at 803-357 ("[c]ourts have been particularly prone to apply a conclusive effect when it would bar a criminal from profiting by the act for which he was convicted").


later civil litigation. They may be collateral estoppel, admissible as evidence, or inadmissible for any purpose. Again, neither the case law nor the literature explains why criminal convictions should have a greater opportunity to influence subsequent litigation than do other types of judgments.

C. ANTITRUST JUDGMENTS

Enforcement of the antitrust laws is based on a policy of parallel government and private action. The Department of Justice may bring civil and criminal actions against violators when it is in the public interest to do so. At the same time, "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may bring a private action for treble damages. This has been the basic enforcement scheme since the Sherman Act was passed in 1890.

By 1914, Congress had concluded that the Sherman Act's treble damage provision was not providing a sufficient inducement to private enforcement actions. Few private parties could afford to mount an antitrust suit, and even where prior government litigation had been successful, the defendant could force a private plaintiff to relitigate all previously decided issues. The mutuality requirement, which was then firmly entrenched, kept a nonparty to the earlier government proceeding

43. See Currie, Civil Procedure: The Tempest Brews, 53 CALIF. L. REV. 25, 29 n.12 (1965) ("It is important to note the dichotomy that is developing: use of the prior judgment collaterally in the civil action, or use merely as evidence in the civil action."). The drafters of the Federal Rules stated that Rule 803(22) "does not deal with the substantive effect of the judgment as a bar or collateral estoppel." It only addresses whether a prior conviction is "admissible in evidence for what it is worth" when "the doctrine of res judicata does not apply to make the judgment either a bar or a collateral estoppel." FED. R. EVID. 803(22) advisory committee note.

44. Criminal judgments may deserve more deference than ordinary civil judgments. Proof beyond a reasonable doubt and other procedural protections may make criminal convictions more reliable. However, if civil judgments really were significantly less reliable, they would not enjoy collateral estoppel effect as much as they do.


48. See S. REP. NO. 698, 63d Cong., 2d Sess. 10 (1914); H.R. REP. NO. 627, 63d Cong., 2d Sess. 14 (1914); Trusts and Monopolies, Address of the President of the United States Before the Joint Session of Congress, H.R. DOC. NO. 625, 63d Cong., 2d Sess. 8 (1914).
from using it as collateral estoppel. 49

Congress considered two ways of resolving this problem. The House wanted to make findings in government suits collateral estoppel in later private antitrust litigation, not only against, but also for defendants in government suits. 50 In response to objections that this would violate due process, the House eliminated the provision binding private plaintiffs if the defendant won the government suit, but retained the provision allowing conclusive effect against losing defendants. 51 The Senate, however, decided that allowing private plaintiffs to use findings from the government suit to collaterally estop defendants, because inconsistent with the mutuality rule, would be an impermissible violation of due process. 52 The Senate view prevailed.

The enacted version of section 5(a) made prior findings "prima facie evidence" to the extent that parties to the earlier litigation could assert them as collateral estoppel. 53 The intent was "to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions." 54 As Congress later explained, the statute "gave an antitrust plaintiff

50. See 51 CONG. REC. 9200 (1914) (statement of Rep. Green); id. at 13,851-57 (Senate debate concerning the requirement of mutuality of estoppel).
51. See id. at 9911.
52. S. REP. No. 698, 63d Cong., 2d Sess. 2 (1914); see also 51 CONG. REC. 13,851 (1914) (statement of Sen. Walsh); id. at 13,853 (statement of Sen. Chilton); id. at 13,854 (statement of Sen. Chilton); id. at 13,900 (statement of Sen. White). Some Representatives had also raised these doubts. See id. at 9487 (statement of Rep. Volstead); id. at 9491 (statement of Rep. Green).
more than the common law then permitted, and as much as was thought to be constitutionally permissible.”

Collateral estoppel rules changed with the passage of time. As a matter of general doctrine, courts gradually abandoned the mutuality requirement. At the same time, they continued to use section 5(a) to admit antitrust judgments as prima facie evidence. The relationship between section 5(a) and collateral estoppel became unclear. Some courts concluded that prior government antitrust judgments could affect later private actions through section 5(a), which, in their view, preempted general collateral estoppel rules in antitrust cases. Other courts and commentators urged that evidentiary effect under section 5(a) was a minimum standard only and that collateral estoppel should be available whenever general doctrine permitted.

In 1980, Congress amended section 5(a) to adopt this latter


56. See infra notes 216-240 and accompanying text.

57. See infra notes 58-59 and accompanying text.


The legislative history of the amendment observed that allowing collateral estoppel in antitrust cases "eliminates wasteful retrying of issues and thereby reduces the costs of litigation to the courts and the parties." Congress concluded that the original section 5(a) could not have preempted a collateral estoppel doctrine that did not exist, and that it would be anomalous and unfair to deny collateral estoppel to government antitrust judgments that would otherwise be included under modern collateral estoppel doctrine. Thus, since 1980, private plaintiffs have been able to use antitrust judgments along a continuum of effect from evidence to collateral estoppel.


A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken. Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel, except that, in any action or proceeding brought under the antitrust laws, collateral estoppel effect shall not be given to any finding made by the Federal Trade Commission under the antitrust laws or under section 45 of this title which could give rise to a claim for relief under the antitrust laws. Clayon Act § 5(a), 15 U.S.C. § 16(a) (1982).


D. STATE EMPLOYMENT DISCRIMINATION FINDINGS

Title VII of the Civil Rights Act of 1964 allows both state and federal agencies to investigate and decide employment discrimination claims. Typically, the claimant must first file with the appropriate state or local agency, which has exclusive jurisdiction for sixty days. If the state or local agency acts, the matter can stay in the state system if any party seeks state court review. After the sixty days have expired, or following an unfavorable resolution by the state agency or court, the claimant may file the charge with the federal Equal Employment Opportunity Commission (EEOC), which then has exclusive jurisdiction for 180 days to find "reasonable cause" to believe that a Title VII violation has occurred.

The EEOC lacks the authority to enjoin violations or order affirmative action, but after thirty days from the receipt of the charge, it may file suit in its own name in federal district court. If the EEOC sues, the claimant may intervene but may not sue separately. If the EEOC declines to sue, it issues a "right to sue letter," which gives the claimant ninety days to


65. The statute provides:
In the case of an alleged unlawful employment practice occurring in a State . . . which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) [sic] of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated . . . . Title VII, § 706(c), 42 U.S.C. § 2000e-5(c) (1982). Claimants must file charges within 180 days following the act complained of. Title VII, § 706(e), 42 U.S.C. § 2000e-5(e) (1982).


68. Id.
sue in federal district court. Federal courts may enjoin violations and order affirmative action to remedy the effects of unlawful discrimination.  

Until 1982, most federal courts held that state agency and state court findings were not res judicata and thus had no binding effect in later federal Title VII litigation. This widespread refusal to regard state determinations as collateral estoppel threatened to leave them totally without influence in subsequent federal proceedings. Courts responded by admitting state findings into evidence. For example, a Seventh Circuit panel stated that “the prior state record could have been introduced and stipulated as containing all the pertinent evidence and the court could have based its determination on that evidence without a new trial,” although it was “required to examine that evidence and make its own findings.” According to the Third Circuit, the proper approach was “to give the agency's conclusions appropriate but not necessarily controlling

69. Id.
weight." Other cases provided for evidentiary treatment in similar terms. In 1982, in *Kremer v. Chemical Construction Corp.*, the United States Supreme Court held that a state agency finding upheld by a state court is binding in later federal Title VII litigation. The plaintiff, Kremer, had first filed his discrimination claim with a New York state agency, which found no reasonable cause to believe a violation had occurred. A state court reviewed and upheld the agency determination. Kremer took his case to the EEOC, which also found no reasonable cause and issued a right-to-sue letter. Kremer then sued in federal district court under Title VII. The employer argued that the state determinations barred the federal suit, and the Supreme Court agreed.

Justice White, writing for a majority of five, reasoned that Congress did not intend Title VII, even with its provision for a federal trial de novo, to override 28 U.S.C. section 1738.

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The exception among the courts of appeals was the Second Circuit, which held in Sinicropi v. Nassau County, 601 F.2d 60 (2d Cir.) (per curiam), cert. denied, 444 U.S. 983 (1979), that a state agency determination would be binding in later federal Title VII litigation, at least if the state court had affirmed on review sought by the claimant. Id. at 61-62. Eventually, the Supreme Court adopted a position close to the Second Circuit's. See Kremer v. Chemical Constr. Corp., 456 U.S. 461, 466-72 (1982).

77. Id. at 476.
78. Id. at 464.
79. Id. at 463-66.
80. Id. at 473-76.
82. Id. at 473-76. 28 U.S.C. § 1738 (1982) provides that the "judicial proceedings [of any court of any state] shall have the same full faith and credit in
which requires the federal courts to give full faith and credit to state court decisions. Thus a state court's affirmation of a state agency finding is binding in a later federal Title VII suit if it would be binding in state court.\textsuperscript{83}  

\textit{Kremer} and other cases seem to say that state agency findings \textit{not} reviewed by state courts are not binding on the federal courts.\textsuperscript{84} Some courts, however, hold that state administrative findings are binding in federal court if the administrative tribunal was acting in a judicial capacity when rendering its decision.\textsuperscript{85} If the view that unreviewed state agency findings and findings made by an administrative tribunal not acting in an adjudicative capacity are not binding prevails, these findings presumably would still be admissible as evidence, as all state findings had been before \textit{Kremer}.\textsuperscript{86} Thus, once confined to in-


\textsuperscript{83} \textit{Kremer}, 456 U.S. at 466-72. The Court dismissed the argument that these particular proceedings were so procedurally deficient that they should not bind federal courts. \textit{Id.} at 477-78. \textit{But cf. Patzer v. Board of Regents of University of Wis. Sys.}, 763 F.2d 851, 857 (7th Cir. 1985) (judgment not on merits); \textit{Ross v. Communications Satellite Corp.}, 759 F.2d 355, 361-62 (4th Cir. 1985) (issues not identical).


\textsuperscript{85} \textit{See Buckhalter v. Pepsi-Cola Gen. Bottlers, Inc.}, 768 F.2d 842, 853-55 (7th Cir. 1985); \textit{Zywicki v. Moxness Prods., Inc.}, 610 F. Supp. 50, 52 (E.D. Wis. 1985); \textit{O'Hara v. Board of Educ.}, 590 F. Supp. 696, 701-03 (D.N.J. 1984), \textit{aff'd mem.}, 760 F.2d 259 (3d Cir. 1984); \textit{see also United Farm Workers v. Arizona Agricultural Employment Relations Bd.}, 669 F.2d 1249, 1255 (9th Cir. 1982) (‘‘decisions of the courts or administrative agencies of one state are entitled to the same \textit{res judicata} effect in all other states as they enjoy in the state of rendition’’).  

\textsuperscript{86} \textit{See Snow v. Nevada Dep't of Prisons}, 543 F. Supp. 753, 755 (D. Nev. 1982) (citing \textit{Kremer}, 456 U.S. at 470-72 & n.8). The Supreme Court also re-
fluence through evidentiary treatment, state employment discrimination findings can now influence later federal litigation along a continuum from admission as evidence to collateral estoppel.

E. JUDGMENTS OF PATENT VALIDITY

There can be no collateral estoppel in the typical patent validity case, because collateral estoppel operates only against parties to the prior proceeding and those in privity with them.\textsuperscript{87} A patentee cannot use a prior finding of patent validity to collaterally estop a different alleged infringer, who was not a party to the prior proceeding, from contesting the validity of the patent.\textsuperscript{88}

With collateral estoppel categorically unavailable, the only alternative to completely disregarding prior findings of validity was to admit them into evidence,\textsuperscript{89} and courts have consistently done so. The Seventh Circuit, which has produced the largest number of cases, calls this the "Rovico rule" after a 1967 case,\textsuperscript{90} but the rule is older than that by at least fifty years.\textsuperscript{91} Its purpose is to relieve a patent holder of the expense and uncertainty of reestablishing validity from scratch whenever the

\textsuperscript{87} See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979); RESTATEMENT (SECOND) OF JUDGMENTS § 34 (1982); 18 C. WRIGHT, A. MILLER & E. COOPER, supra note 1, § 4449, at 411.

\textsuperscript{88} Farmhand, Inc. v. Anel Eng'g Indus., 693 F.2d 1140, 1144 n.6 (5th Cir. 1982); Sidewinder Marine, Inc. v. Starbuck Kustom Boats & Prods., Inc., 597 F.2d 201, 206 (10th Cir. 1979); American Safety Flight Sys. v. Garrett Corp., 528 F.2d 288, 289 (9th Cir. 1975).

\textsuperscript{89} At least one court has expressly held that admission into evidence against a nonparty is consistent with due process precisely because it involves evidence rather than collateral estoppel. Columbia Broadcasting Sys. v. Zenith Radio Corp., 391 F. Supp. 780, 786 (N.D. Ill. 1975).

\textsuperscript{90} American Photocopy Equip. Co. v. Rovico, Inc., 384 F.2d 813, 815-17 (7th Cir. 1967), cert. denied, 390 U.S. 945 (1968).

\textsuperscript{91} See Federal Elec. Co. v. Flexlume Corp., 33 F.2d 412, 413 (7th Cir.), cert. denied, 280 U.S. 590 (1929); Freeman-Sweet Co. v. Luminous Unit Co., 254 F. 107, 108 (7th Cir.), cert. denied, 253 U.S. 486 (1920); Penfield v. C. & A. Potts & Co., 128 F. 475, 478 (6th Cir. 1903).
patent is challenged. 92

The Seventh Circuit has explained that "Rovico seems a sensible and just means of avoiding wasteful, repeated de novo examination of an issue." 93 Some decisions cite goals of repose and respect for the decisions of other courts, 94 while others point out that patent litigation is particularly expensive. 95 Still other cases describe the rule as an application of stare decisis. One of these said that Rovico is a recognition of the principle that validity is an issue of law and as long as the facts are the same, the issue of law remains the same. 96

The cases differ in their descriptions of the weight they assign a prior finding, but they agree in general approach. The Seventh Circuit cases typically say that the alleged infringer's burden is to show a "material distinction" between the two cases and present "persuasive new evidence." 97 Other courts require the alleged infringer to show that the prior finding of validity suffers from "very palpable error." 98 Some courts

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96. Illinois Tool Works v. Foster Grant Co., 547 F.2d 1300, 1302-03 (7th Cir. 1976), cert. denied, 431 U.S. 929 (1977); see also Stevenson v. Sears, Roe-buck & Co., 713 F.2d 705, 711 n.5 (Fed. Cir. 1983). But see 18 C. WRIGHT, A. MILLER & E. COOPER, supra note 1, § 4416, at 147 (Rovico rule cases "change the ordinary rules of evidence in a much more particularized way than results from ordinary concepts of stare decisis.").

97. Rovico, 384 F.2d at 815-16; see also Mercantile Nat'l Bank v. Howmet Corp., 524 F.2d 1031, 1032 (7th Cir. 1975); Illinois Tool Works, Inc. v. Sweetheart Plastics, Inc., 436 F.2d 1180, 1182 (7th Cir.), cert. dismissed, 403 U.S. 942 (1971); cf. Columbia Broadcasting Sys. v. Zenith Radio Corp., 391 F. Supp. 780, 786 (N.D. Ill. 1975) (must show error in the prior finding or that the "previous litigation was incomplete in some material aspect").

are less precise but still plainly give the prior finding some weight short of collateral estoppel.99

Although the historical development of evidentiary treatment for patent validity findings is largely similar to the other four categories, patent cases differ in one important respect. Collateral estoppel doctrine has not expanded to the point where it includes patent validity findings. Courts still honor the general rule restricting the application of collateral estoppel to parties and their privies. The result is that admission into evidence remains the only way for a finding of patent validity to influence later litigation.

F. OTHER ADMISSIBLE JUDGMENTS

Courts have also admitted into evidence many judgments outside these five categories. Judgments from foreign countries have served as "prima facie evidence" in litigation in the United States.100 Early cases under the full faith and credit statute considered whether a federal court would give an earlier state judgment conclusive or evidentiary effect.101 Some courts have admitted judgments against a partner into evidence in later litigation involving a copartner,102 and other courts admit a judgment against a principal obligor into evidence in later litigation involving a surety.103 The Federal Rules of Evidence allow certain judgments to be used as evidence of "personal, family, or general history, or boundaries."104 Some courts ad-

99. See Radio Corp. of Am. v. Radio Eng'g Laboratories, Inc., 293 U.S. 1, 8 (1934) (stare decisis will result in prior finding of validity being adhered to in subsequent action if "substantial identity of evidence"); Stevenson v. Sears, Roebuck & Co., 713 F.2d 705, 711 n.5 (Fed. Cir. 1983) (weight "will vary depending on the additional prior art or other evidence on patentability that is produced in the subsequent suit"); Farmhand, Inc. v. Anel Eng'g Indus., 693 F.2d 1140, 1144 (5th Cir. 1982) (prior finding is not dispositive but is relevant evidence to be considered by the trier of fact); General Tire & Rubber Co. v. Firestone Tire & Rubber Co., 489 F.2d 1105, 1115-16 (6th Cir. 1973) (prior finding cannot be ignored), cert. denied, 417 U.S. 932 (1974).
100. See Hilton v. Guyot, 159 U.S. 113, 227-28 (1895). More recent cases, however, tend to recognize them as binding in later United States litigation. See Restatement (Second) Conflict of Laws § 98 (1971).
102. See generally Restatement (Second) of Judgments § 60 comment a & reporter's note to comment d (1982); 18 C. Wright, A. Miller & E. Cooper, supra note 1, § 4449, at 418 n.21.
103. See Note, Judgments, supra note 5, at 409.
104. Fed. R. Evid. 803(23). They are admissible if the matters are "essential to the judgment," provided they "would be provable by evidence of reputation." See Grant Bros. Constr. Co. v. United States, 222 U.S. 647, 663 (1914);
mit prior judgments which decided the same issue being contested in later litigation, but with reference to an earlier time. Courts also have admitted other judgments that do not lend themselves to categorization.\textsuperscript{105} Several of these are collected in one commentary that describes their occurrence as "sporadic."\textsuperscript{106}

It is therefore apparent that, despite the conventional wisdom that prior findings affect later litigation either through collateral estoppel or not at all, many findings are admissible as evidence in later civil litigation. The reason that some categories of prior findings are admissible and some are not is essentially historical. For various doctrinal reasons, findings in these five categories originally were deemed ineligible for collateral estoppel treatment. Courts, not wanting to completely ignore prior findings in these categories, used admission into evidence as a substitute that would give them some effect on later litigation.\textsuperscript{107} Over time, the scope of collateral estoppel expanded to include these previously excluded categories.\textsuperscript{108} By that time, evidentiary treatment was firmly entrenched, and findings in these categories came to enjoy what amounts to preferential

\begin{itemize}
\item United States v. Mid-Continent Petroleum Corp., 67 F.2d 37, 43-44 (10th Cir.), cert. denied, 290 U.S. 702 (1933); 4 D. LOUSELL & C. MUELLER, supra note 15, § 471, at 916-21.
\item 106. 18 C. WRIGHT, A. MILLER, & E. COOPER, supra note 1, § 4416, at 148; see, e.g., Midgett v. United States, 603 F.2d 835, 845-48 (Ct. Cl. 1979) (state court finding in in rem proceeding that soldier had died on the day of his disappearance in Vietnam admitted to show he did not desert).
\item 107. See supra notes 11-99 and accompanying text. One commentator's approach to administrative findings implicitly confirms this analysis. Professor Rex Perschbacher argues that administrative findings generally are too informal and too often biased by agency policies to merit collateral estoppel. He argues that administrative findings should be rebuttably presumed not to be collateral estoppel, as they were before Utah Construction. He then suggests, without extended discussion, that they be admitted into evidence, thus adopting the same approach that courts once used to compensate for the lack of collateral estoppel. This would approximate the situation prior to Utah Construction. See Perschbacher, supra note 8, at 452, 454-55, 459-62.
\item 108. Patent validity findings, however, are still not given collateral estoppel effect. See supra notes 87-99 and accompanying text.
\end{itemize}
treatment—a full continuum of effect from use as evidence to collateral estoppel.

This historical explanation for how judgments in certain categories came to be used as evidence disproves two alternative hypotheses. First, nothing suggests that courts intentionally restricted the admission of prior findings to those categories of findings that were especially suited for evidentiary treatment. Second, nothing suggests that admission into evidence developed as a compromise solution for close individual cases, in which courts felt the binding effect of collateral estoppel was too harsh yet still wanted to give the prior finding some effect. After all, prevailing doctrine regarded those groups of findings as categorically ineligible for collateral estoppel, so there was no room for "compromise." Although some administrative findings, and perhaps also some state findings in suits on federal claims, might prompt compromise because they may not be sufficiently reliable to justify the binding effect of collateral estoppel, the same can not be said for criminal, antitrust, and patent findings.

The continuum of effect from evidence to collateral estoppel that is reflected in four of the five categories discussed thus came into being later, and more by historical accident than by design or policy, as collateral estoppel expanded. But now that collateral estoppel includes so many prior findings that formerly could only be admitted into evidence, much of the original impetus for evidentiary treatment has disappeared. This raises the question whether it makes sense to continue admitting judgments in these four categories into evidence. Does using a prior judgment as evidence serve a different purpose than using a prior judgment as collateral estoppel? Are there reasons for allowing both types of treatment? If there are, would those same reasons justify a general rule allowing civil judgments to be used as evidence? In order to answer these questions, it is necessary to take a closer look at the policies underlying collateral estoppel and use of judgments as evidence.

II. POLICIES BEHIND COLLATERAL ESTOPPEL AND USE OF JUDGMENTS AS EVIDENCE

Three separate goals are commonly advanced in support of giving collateral estoppel effect to prior judgments. First,
there is efficiency: neither courts nor litigants should be burdened with repetitious litigation.\textsuperscript{110} Second, there is repose: lawsuits should provide binding answers so that issues are settled once and for all.\textsuperscript{111} Third, there is consistency: respect for the judicial process will be undermined if separate litigation produces inconsistent results on the same matter.\textsuperscript{112}

Admitting prior judgments into evidence may not promote efficiency. Although in some cases the prior finding can abbreviate a lengthy reconsideration of the matter,\textsuperscript{113} in most cases it will not shorten the lawsuit because admitting a prior finding into evidence still leaves the issue undecided. Yet in many cases collateral estoppel is also very inefficient. It may simply substitute one area of contention for another. Instead of arguing the merits of the case, the parties argue about what the prior litigation decided.\textsuperscript{114} And, collateral estoppel often does not shorten discovery, which is frequently the most time-consuming and expensive part of modern civil litigation. Furthermore, collateral estoppel is an affirmative defense and may be waived.\textsuperscript{115} Most fundamentally, however, efficiency is difficult to define as an independent value in litigation.\textsuperscript{116} As one commentator noted, "[c]ourts exist for the purpose of trying lawsuits. If the courts are too busy to decide cases fairly and on the merits something is wrong."\textsuperscript{117} Efficiency should not be


\textsuperscript{111} See id. at 153-54.


\textsuperscript{113} See, e.g., Illinois Tool Works v. Foster Grant Co., 547 F.2d 1300, 1302-03 (7th Cir. 1976), cert. denied, 431 U.S. 929 (1977) (evidentiary use of prior finding of patent validity eliminates need for repeated full scale trials).

\textsuperscript{114} See, e.g., Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 341-48 (5th Cir. 1982).

\textsuperscript{115} FED. R. CIV. P. 8(c); see also National Treasury Employees Union v. Internal Revenue Serv., 765 F.2d 1174, 1176 n.1 (D.C. Cir. 1985); 18 C. Wright, A. Miller & E. Cooper, supra note 1, § 4405, at 32-34; Cleary, Res Judicata Reexamined, 57 YALE L.J. 339, 348-49 (1948).


\textsuperscript{117} Cleary, supra note 115, at 348.
viewed as a purpose of collateral estoppel, but rather as a benefit that may accrue when other factors make binding effect appropriate.\textsuperscript{118}

Repose is another argument used to justify the binding effect of collateral estoppel. Repose has been called “the most important product of res judicata.”\textsuperscript{119} In one sense, admitting a prior finding into evidence does not provide repose, because the other side can still contest the finding. Yet, courts admitting prior judgments into evidence have observed that repose comes with reliance on earlier decisions.\textsuperscript{120}

To the extent that admitting a judgment into evidence achieves repose, it is not the complete repose that comes with collateral estoppel, but rather the partial repose that comes from knowing that prior judgments will be respected and incorporated into a system that tries to achieve consistent results. This respect for prior judgments and desire for consistent results is the goal most clearly shared by collateral estoppel and evidence. In his seminal article, Professor Edward Cleary wrote that “[a]ccording insufficient weight to prior decisions encourages disrespect and disregard of courts and their decisions and invites litigation.”\textsuperscript{121} Both collateral estoppel and use of judgments as evidence are devices by which the fact finder in later litigation will give appropriate weight to prior proceedings.\textsuperscript{122} Furthermore, if the parties know that collateral estoppel or evidentiary effect is likely, they will allow the prior judgment to affect negotiation and settlement.\textsuperscript{123}

The degree of deference a legal system gives to prior find-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{118} See 18 C. WRIGHT, A. MILLER & E. COOPER, supra note 1, § 4403, at 13-14; Flanagan, Offensive Collateral Estoppel: Inefficiency and Foolish Consistency, 1982 ARIZ. ST. L.J. 45, 52 (offensive collateral estoppel is not efficient); Green, The Inability of Offensive Collateral Estoppel to Fulfill Its Promise: An Examination of Estoppel in Asbestos Litigation, 70 IOWA L. REV. 141, 178-80, 207-12 (1984); Hazard, Preclusion as to Issues of Law: The Legal System's Interest, 70 IOWA L. REV. 81, 81-83 (1984) (the fundamental justifications for preclusion rules are epistemological and institutional in nature); Perschbacher, supra note 8, at 1-49 (judicial economy only partially applies to collateral estoppel); von Moschzisker, Res Judicata, 38 YALE L.J. 299, 300 (1929) (repose is more important than efficiency).
\item \textsuperscript{119} See 18 C. WRIGHT, A. MILLER & E. COOPER, supra note 1, § 4403, at 15.
\item \textsuperscript{120} See Pachmayr Gun Works v. Olin Mathieson Chem. Corp., 502 F.2d 802-06 (9th Cir. 1974); Penfield v. C. & A. Potts Co., 126 F. 475, 478 (6th Cir. 1903).
\item \textsuperscript{121} Cleary, supra note 115, at 345; see also Flanagan, supra note 118, at 49; Perschbacher, supra note 8, at 445.
\item \textsuperscript{122} See Montana v. United States, 440 U.S. 147, 153-54 (1979).
\item \textsuperscript{123} See Green, supra note 118, at 180-83; Palmer, supra note 8, at 156.
\end{enumerate}
\end{footnotesize}
ings is an indication of how seriously the legal system regards those findings. It also reflects how seriously the legal system views itself or, if it did not make the finding, how seriously it views the system that made it.\textsuperscript{124} The degree of deference given to prior judgments also helps to determine whether an inevitably imperfect system can achieve the consistency of results that is the basis of public respect.\textsuperscript{125}

Whether any deference will be given to a prior judgment depends largely on our confidence that it is "reliable," in the sense that we believe it accurately ascertains historical truth. A leading commentary observes that "hearsay is excludable because it is generally less reliable than live testimony."\textsuperscript{126} Live testimony is considered more reliable because it is given under oath, in the personal presence of the trier of fact, and is subject to cross-examination.\textsuperscript{127} The exceptions to the rule against hearsay are justified on grounds that substitute assurances of reliability or "trustworthiness" are present.\textsuperscript{128} Even though

\textbf{124. Cf.} Semler v. Psychiatric Inst., 575 F.2d 922, 927 (D.C. Cir. 1978) (repetitive litigation is to be avoided to "establish certainty and respect for court judgments"); Mercantile Nat'l Bank v. Howmet Corp., 524 F.2d 1031, 1032 (7th Cir. 1975) (Rovico rule designed to promote "stability in the law and judicial economy"), cert. denied, 424 U.S. 957 (1976); Restatement (Second) of Judgments introduction, at 11-13 (1982); 18 C. Wright, A. Miller & E. Cooper, supra note 1, § 4403, at 12 ("The most purely public purpose served by res judicata lies in preserving the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results."); Palmer, supra note 8, at 153, 155 (not admitting criminal convictions into evidence is "somewhat of a denigration of the adversary process and judicial system"; "policy demands that the findings cannot be ignored").

\textbf{125. See} Hazard, supra note 118, at 82-83.

\textbf{126. 4 D. Louisell & C. Mueller, supra note 15, § 413, at 69; see also} Southmark Properties v. Charles House Corp., 742 F.2d 862, 875 (5th Cir. 1984); McCormick, supra note 5, § 245, at 726-28; 4 J. Weinstein & M. Berger, supra note 4, § 800(01), at 800-10 to -11; Tribe, Triangulating Hearsay, 87 Harv. L. Rev. 957, 958-59 (1974).


\textbf{128. See} Frazier v. Continental Oil Co., 568 F.2d 378, 382 (5th Cir. 1978) ("dangers inherent in hearsay testimony can be obviated by a requirement that such statements be trustworthy and necessary"); Sabatino v. Curtiss Nat'l Bank, 415 F.2d 632, 636 (5th Cir. 1969) (evidence must be "necessary" and "exhibit an intrinsic probability of trustworthiness"), cert. denied, 396 U.S. 1057 (1970); Mid-City Bank & Trust Co. v. Reading Co., 3 F.R.D. 320, 322 (D.N.J. 1944) ("The rules of evidence were designed to obtain the truth. They are intended to exclude testimony that is unreliable ..."); see also 4 D. Louisell & C. Mueller, supra note 15, § 413, at 72-73; 5 J. Wigmore, supra note 5, § 1422, at 253-54 ("circumstantial probability of trustworthiness"). Courts of-
this view underlies each hearsay exception, it is most apparent in the residual exceptions\textsuperscript{129} which cover statements outside the enumerated exceptions “but having equivalent guarantees of trustworthiness.”\textsuperscript{130}

Collateral estoppel shares this basic concern with reliability, and the requirements that must be met to use a prior judgment as collateral estoppel are similar but often stiffer than those necessary to use a judgment as evidence. For example, an administrative finding that lacked a hearing\textsuperscript{131} or other procedural protections,\textsuperscript{132} or that was not necessary to the outcome of the case,\textsuperscript{133} cannot be used as collateral estoppel, although it still may be sufficiently trustworthy to be admissible as evidence under Rule 803(8)(C). Similarly, a finding from a rulemaking proceeding cannot be used as collateral estoppel,\textsuperscript{134} but still may be admissible as evidence.\textsuperscript{135} Administrative col-

\begin{itemize}
  \item See Fed. R. Evid. 803(24), 804(b)(5). In pertinent part, the Federal Rules of Evidence provide exceptions for:
    \begin{itemize}
      \item A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.
    \end{itemize}

\textit{Id.} The difference between the two rules is that unavailability of the witness is a requirement for Rule 804(b)(5) but not for Rule 803(24). See id.

\item See Herdman v. Smith, 707 F.2d 839, 842 (5th Cir. 1983); see Dallas County v. Commercial Union Assurance Co., 286 F.2d 388, 387-88 (5th Cir. 1961); 1 D. LOUISELL & C. MUELLER, supra note 15, § 29, at 202-04 (1977). Part VI discusses Rules 803(24) and 804(b)(5) as possible authority for using prior judgments as evidence. See infra notes 355-372 and accompanying text.


\item See, e.g., Baker v. Eleona Homes Corp., 588 F.2d 551, 558 (6th Cir. 1978).

\item See In re Air Crash Disaster at Mannheim, Germany, 586 F. Supp. 711, 725-26 (E.D. Pa. 1984) (army recommendation following its accident inves-
lateral estoppel is also more difficult to obtain because its proponent must prove that all of the requirements are met, while the opponent of admission into evidence must prove a finding is not trustworthy.\footnote{136} Collateral estoppel's severity justifies its stiff requirements as to reliability. A prior judgment given collateral estoppel effect is conclusive and leaves no opportunity for rebuttal. A prior judgment admitted into evidence, in contrast, can heavily influence the outcome of litigation, but is not binding on the subsequent litigants.

The contrast in reliability standards is a difference in degree, not in kind. A more fundamental difference between collateral estoppel and use of judgments as evidence concerns overall perspective, especially the nature of policy considerations underlying each one. While admission into evidence is primarily concerned with reliability, collateral estoppel has always gone further and considered policies that have little or nothing to do with reliability. These policies often prevent a reliable prior finding from being given collateral estoppel effect.

Numerous examples demonstrate that collateral estoppel requirements consider policies that go beyond reliability. Take, for example, the mutuality requirement and the rule against preclusion of nonparties. Both reflect collateral estoppel's emphasis on the identity of the parties to the prior proceeding. The reliability of a prior finding, however, depends on how it was rendered, not on who later uses it as collateral estoppel, or against whom.\footnote{137} Similarly, reliability was not the sole justifi- 

\footnote{136. See Federal Ins. Co. v. United States, 618 F.2d 661, 663 (10th Cir. 1980); Oldham v. Pritchett, 599 F.2d 274, 277 (8th Cir. 1979); see also 18 C. WRIGHT, A. MILLER & E. COOPER, supra note 1, \S 4405, at 38.}


cation behind the old rules denying collateral estoppel effect to administrative findings and state employment discrimination findings. Even though concerns about reliability may have been a partial justification, these rules also reflected the view that collateral estoppel was less appropriate absent the judicial imprimatur, or absent federal involvement, regardless of reliability in individual cases.

The best explanation for this basic difference in perspective is that collateral estoppel, because of its relative severity, must be more sensitive to the nature and limits of adjudication. Litigation is not an infallible determiner of historical truth, but rather an imperfect exercise that may produce a different result each time, influenced heavily but unpredictably by the identity of the parties, the advocates, and the decisionmakers. As Professor Brainerd Currie pointed out, "judicial findings must not be confused with absolute truth." The very basis of collateral estoppel is that the prior judgment is binding even if it is wrong.

Accordingly, the perceived fairness of collateral estoppel depends to a large extent on factors that do not bear directly on whether that finding is correct. For example, the jury is a legitimizing factor that does not necessarily add to the reliability of the outcome. Whether a court is state or federal is a similar consideration. The most crucial factor influencing perceived fairness, however, is the parties' role in the process—whether they take part and, if so, how. As one commentator recently

that investigation provided adequate assurance of reliability." McCormick, supra note 5, § 318, at 894.

139. See supra notes 12-28 and accompanying text.

140. See supra notes 64-86 and accompanying text.


142. Currie, supra note 8, at 315.


144. See Shapiro, Should a Guilty Plea Have Preclusive Effect?, 70 Iowa L. Rev. 27, 45 (1984) ("[T]he doctrine of preclusion is not, I believe, a doctrine based on the proposition that a question is foreclosed because we already know 'the truth.'").

noted, "[w]e value a day in court for reasons not wholly related to the ascertainment of objective truth—reasons that derive from our belief in the importance of participation and individual autonomy." If the parties participated fully in the prior proceeding, it does not necessarily enhance reliability, but it does make binding effect more palatable, at least as against those parties.

This difference in orientation explains the policy barriers that constitute the key difference between collateral estoppel and using judgments as evidence. These barriers have come and gone over time. Today, because many are gone or eroding quickly, the significance of admitting judgments into evidence has diminished. When, however, a policy consideration extrinsic to reliability still survives to bar collateral estoppel, admission into evidence remains important because it is the only way a prior judgment can affect later litigation.


147. Cf. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 332-33 (1979) (important factor in determining whether application of collateral estoppel would be unfair is whether party against whom it is asserted had a "full and fair" opportunity to litigate the issue).

148. See 4 D. LOUISELL & C. MUELLER, supra note 15, § 470, at 893. This commentary states:

Of course the principal aims of collateral estoppel differ from those of the hearsay doctrine. The one seeks mainly to prevent unnecessary relitigation of matters which the party to be estopped already actually litigated, with fair procedural opportunity to do so; the other seeks mainly to prevent receipt of unreliable evidence.

Id.; see also id. at 909-10. But cf. Thau, supra note 30, at 1081 ("the concept of reliability . . . provides the most accurate explanation of when courts actually apply collateral estoppel").

149. See infra text accompanying notes 214-295.

150. For example, federal courts hearing Title VII cases continue to admit federal agency findings into evidence, but deny them collateral estoppel effect, even after Kremer, which only concerned prior state court findings. See Chandler v. Roudebush, 425 U.S. 840, 863 n.39 (1976) (administrative findings regarding federal employees' Title VII claims held admissible but not conclusive); Jones v. WFYR Radio/RKO Gen., 626 F.2d 576, 577 (7th Cir. 1980) (EEOC findings); Bradshaw v. Zoological Soc'y, 569 F.2d 1066, 1069 (9th Cir. 1978) (EEOC findings); cf. McClure v. Mexia Ind. School Dist., 750 F.2d 396,
Moreover, while collateral estoppel and evidence overlap much more than they used to, policy barriers probably will not disappear completely as long as collateral estoppel and evidence differ fundamentally in purpose and application. Identifying any remaining policy barriers, and analyzing their significance, is the key to determining whether prior judgments should be more liberally admitted into evidence.

III. EFFECT OF PRIOR PROCEEDINGS ON NONPARTIES

Major policy barriers to collateral estoppel have eroded or disappeared over the years. As Part I demonstrated, prior findings may now be used as both evidence and collateral estoppel against a party in four categories where previously they could only be used as evidence.151 Yet, barriers to the use of collateral estoppel still remain, even in those four categories. The most significant barrier is the rule against nonparty preclusion, which states that collateral estoppel may only be used against parties to the prior litigation and their privies and may not be used against a nonparty.152 Consequently, the only way to use a prior judgment against a nonparty to the original suit is by admitting it into evidence. For example, several cases involving prior administrative findings discuss their use as evidence but never consider collateral estoppel because the parties to the later litigation had not been parties to the administrative proceeding.153

Indeed, administrative proceedings provide a good example of this approach because the rule against nonparty preclusion can be especially restrictive in the administrative context. Administrative proceedings are often more investigative than ad-

399-403 (5th Cir. 1985) (prior EEOC finding admissible into evidence under Federal Rule of Evidence 803(8)(C); harmless error to admit entire EEOC file); Walton v. Eaton Corp., 563 F.2d 66, 75 (3d Cir. 1977) (admissibility within trial court's discretion); Cox v. Babcock & Wilcox Co., 471 F.2d 13, 15 (4th Cir. 1972) (same).

151. See supra notes 11-86 and accompanying text.

152. The discussion of patent validity findings in Part I is an example of the continued viability of this rule. See supra notes 87-99 and accompanying text.

versarial and may even be so nonadversarial that no one can be identified as a "party" subject to collateral estoppel. This observation is consistent with courts' general reluctance to accord collateral estoppel effect to determinations made in administrative rulemaking or legislative activity. Findings from this sort of administrative proceeding can affect later litigation only through admission as evidence.

Cases outside the administrative context also illustrate the use of a finding as evidence against a nonparty when collateral estoppel is unavailable. Schwartz v. United States involved, among other things, a dispute between Schwartz and the federal government over ownership of corporate stock. To prove that Schwartz did not own the stock, the government used the verdict from a prior criminal trial in which Schwartz's associate, Irvin Koven, had been convicted. The jury in that trial found that Koven owned the stock. Schwartz argued that the finding in Koven's trial could not estop him from asserting ownership because he had not been a party to that trial. The court agreed, but still admitted the special verdict into evidence against him. In several similar cases, courts have used prior criminal convictions as evidence against nonparties instead of giving them collateral estoppel effect.

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155. See supra text accompanying notes 12-28.

156. See, e.g., Stasiukevich v. Nicolls, 168 F.2d 474, 479-80 (1st Cir. 1948) (congressional legislative reports admissible); Major v. Treen, 574 F. Supp. 325, 330 n.6 (E.D. La. 1983) (records of regularly conducted session of state legislative committees admissible).


158. Id. at 227-28.

159. Id. at 225.

160. Id. at 227.

161. Id. at 227-28.

162. See, e.g., Semler v. Psychiatric Inst., 538 F.2d 121 (4th Cir.), cert. denied, 429 U.S. 827 (1976). Semler involved a wrongful death action against a psychiatric institute for negligent release of a patient who killed the plaintiff's daughter. The murder conviction of the former patient was admitted into evidence to prove the murder. Id. at 127. The institute, however, was not a party to the prior criminal conviction. See also Rozier v. Ford Motor Co., 573 F.2d 1322, 1346-47 (5th Cir. 1978) (guilty plea of driver not excluded by hearsay rule but inadmissible because of irrelevance); cf. New England Mut. Life Ins. Co. v. Null, 554 F.2d 896 (8th Cir. 1977). Null held that a criminal prosecution cannot bind a nonparty, but did not consider whether it could be admitted into evidence. Id. at 901. One commentary has stated, however, that "any suggestion
Thus even after the erosion of most of the policies that once barred collateral estoppel in these four categories, collateral estoppel is still unavailable, and use of a judgment as evidence is still potentially significant, whenever the prior finding is used against a nonparty to the prior proceeding. Using judgments as evidence against nonparties can supplant collateral estoppel in response to a policy barrier, just as other policy barriers prompted the use of judgments as evidence in earlier times.\textsuperscript{163} Outside the categories of admissible prior judgments, however, the use of prior judgments as evidence still runs counter to the general rule that prior judgments are hearsay and not admissible.\textsuperscript{164}

In addition to using prior judgments as evidence, there are two other closely analogous, and more widely accepted, ways in which a prior proceeding can affect nonparties in later litigation: through the introduction of testimony from a prior proceeding and through stare decisis. The availability of these analogues suggests that a general rule admitting prior judgments into evidence against nonparties may be justified.

Rule 804(b)(1) of the Federal Rules of Evidence admits former testimony from a deposition, hearing, or trial in the same or different proceeding\textsuperscript{165} if the witness is unavailable\textsuperscript{166} to testify in person. The testimony can be used against a litigant only if it, or a "predecessor in interest," had an "opportunity and similar motive to develop the testimony" in the prior proceeding by direct, cross, or redirect examination.\textsuperscript{167}

Congress did not define the terms "predecessor in inter-

\textsuperscript{163} But cf. Note, \textit{Judgments}, supra note 5, at 409 ("[t]he evidentiary use of civil judgments in subsequent civil cases is almost entirely precluded by the doctrine of res judicata").

\textsuperscript{164} See supra note 4 and accompanying text.

\textsuperscript{165} Rule 804(b)(1) of the Federal Rules of Evidence provides an exception to the hearsay rule for: Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

\textsuperscript{166} For a definition of "unavailability," see Fed. R. Evid. 804(a).

\textsuperscript{167} See Fed. R. Evid. 804(b)(1).

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\textsuperscript{163} LOUISELL & C. MUELLER, supra note 15, § 470, at 909.

\textsuperscript{164} See supra note 4 and accompanying text.

\textsuperscript{165} Rule 804(b)(1) of the Federal Rules of Evidence provides an exception to the hearsay rule for: Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

\textsuperscript{166} For a definition of "unavailability," see Fed. R. Evid. 804(a).

\textsuperscript{167} See Fed. R. Evid. 804(b)(1).
The original draft of the Rules would have admitted former testimony against a nonparty, as long as someone with opportunity and similar motive had participated in the prior proceeding. The House limited the provision to later civil cases and added the “predecessor in interest” language. Some cases have interpreted the House's modification as imposing an additional requirement that goes beyond “opportunity and similar motive to develop the testimony” and which amounts to common-law privity. If so, former testimony would be admissible only against persons subject to collateral estoppel, and thus not against nonparties. The majority of cases, however, have held that the House added no such privity requirement, and that the rule requires only opportunity and similar motive. This reading may

168. The “predecessor in interest” apparently need not have been a party to the prior proceeding, as long as it had the opportunity to develop testimony. See id. This provision applies only to admission of former testimony into evidence in civil cases. Id. Admission in criminal cases raises problems under the confrontation clause of the sixth amendment. See Mccormick, supra note 5, § 256, at 766; Martin, The Former Testimony Exception in the Proposed Federal Rules of Evidence, 57 Iowa L. Rev. 547, 570-93 (1972). 169. The advisory committee draft of Federal Rule of Evidence 804(b)(1) provided a hearsay exception for

[t]estimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered.


The Committee considered that it is generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party. The sole exception to this, in the Committee's view, is when a party's predecessor in interest in a civil action or proceeding had an opportunity and similar motive to examine the witness.

Id.


172. See 4 D. LOUISELL & C. MUELLER, supra note 15, § 487, at 1103-04; McCormick, supra note 5, § 256, at 766.

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strain the legislative history, but it enjoys the support of leading commentators. One commentator has suggested that the House wanted a more restrictive approach only in later criminal cases. Indeed, even if the “predecessor in interest” language was added to limit the exception, nothing indicates that it goes so far as to require privity. The Senate’s comment that the difference between the House version and the original draft can be illustrated by the major case in this area. Lloyd, a seaman, was hurt in a fight with another crew member, Alvarez. Lloyd sued the ship owner, Export, for negligence and unseaworthiness. Export filed a third-party claim against Alvarez, who then counterclaimed against Export, also for negligence and unseaworthiness. The trial court dismissed Lloyd’s claim after he failed to prosecute, leaving only Alvarez’s counterclaim against Export. Id. at 1181. The court refused to admit Lloyd’s testimony from an earlier Coast Guard hearing as evidence against Alvarez. Id. at 1182. The jury found for Alvarez. Id. at 1181.

The Third Circuit reversed, finding that “there was a sufficient community of interest shared by the Coast Guard in its hearing and Alvarez in the subsequent civil trial to satisfy Rule 804(b)(1).” Id. at 1185-86. Moreover, the court felt that “the basic interest advanced by both was that of determining culpability and, if appropriate, exacting a penalty for the same condemned behavior thought to have occurred.” Id. at 1186 (citation omitted). The court therefore held that a “predecessor in interest” is anyone who had “a like motive to cross-examine about the same matters as the present party would have, [and] was accorded an adequate opportunity for such examination.” Id. at 1187 (quoting MCCORMICK, supra note 5, § 256, at 619-20).


174. See MCCORMICK, supra note 5, § 257, at 766-67 (“Had it been intended to reinstate the outmoded concept of privity as developed at the common law, a statement to that effect could easily have been included, with unmistakable [sic] meaning, but no such statement was made.”); see also 4 D. LOUISELL & C. MUELLER, supra note 15, § 487, at 1103-11.

175. See MCCORMICK, supra note 5, § 257, at 766.

176. See Lloyd, 580 F.2d at 1185; In re Master Key Antitrust Litig., 72 F.R.D. 108, 109 (D. Conn.), aff’d mem., 551 F.2d 300 (2d Cir. 1976). In isolated cases, opportunity and motive may be harder to establish than common-law privity. For example, even against parties and privies in an earlier proceeding, the rule does not admit former testimony unless they had “opportunity and similar motive.” See 4 D. LOUISELL & C. MUELLER, supra note 15, § 487, at 1105 n.11.
“is not great” has provided additional support for this view.\(^\text{177}\) A less restrictive interpretation of the “predecessor in interest” and “opportunity and similar motive” language in Rule 804(b)(1) is consistent with the steady broadening of the former testimony exception at common law.\(^\text{179}\) Although earlier cases had insisted on strict identity of issues between proceedings, more recent cases have required only “substantial identity” of issues and excluded former testimony only where the differences resulted in a lack of opportunity or similar motive to develop testimony.\(^\text{180}\) Courts also once imposed a type of mutuality that forbade nonparties to the prior proceeding to use any former testimony in subsequent litigation.\(^\text{181}\) Well before the adoption of the Federal Rules of Evidence, however, courts stopped insisting on identical parties and instead allowed nonparties to introduce former testimony against other nonparties if someone had been given the opportunity and similar motive to develop the testimony in the prior proceeding.\(^\text{182}\) Past and present practices under the former testimony ex-

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\(^\text{177}\) S. REP. No. 1277, 93d Cong., 2d Sess. 28, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7051, 7074.

\(^\text{178}\) See Lloyd, 580 F.2d at 1185 (citing S. REP. No. 1277, 93d Cong., 2d Sess. 28 (1974)); Zenith, 505 F. Supp. at 1253 (same).


\(^\text{181}\) See Metropolitan St. Ry. v. Gumby, 99 F. 192, 197-99 (2d Cir. 1900); United States v. Aluminum Co. of Am., 1 F.R.D. 48, 48-50 (S.D.N.Y. 1938); McInturf v. Insurance Co. of N. Am., 248 Ill. 92, 95-98, 93 N.E. 369, 370-71 (1910); Concordia Fire Ins. Co. v. Wise, 114 Okla. 345, 349-50, 264 N.W. 396, 397 (1936); School Dist. of Pontiac v. Sachse, 274 Mich. 345, 349-50, 264 N.W. 396, 397 (1936); Harrell v. Quincy, O., & K.C.R.R., 186 S.W. 677, 679 (Mo. 1916). Wigmore was an early advocate of this trend. See 5 J. WIGMORE, supra note 5, § 1388, at 103 (3d ed. 1940); see also 4 J. WEINSTEIN & M. BERGER, supra note 4, ¶ 804(b)(1)[04].
ception are consistent with earlier conclusions about the similarities and differences between using judgments as evidence and collateral estoppel. Former testimony, like a prior finding, is admissible into evidence if it is reliable. Cross-examination by someone with opportunity and similar motive is one way to establish reliability. This reliability is sufficient to justify admission against a nonparty, especially since the nonparty has a chance to offer rebuttal evidence at the subsequent trial. Rules that would bar collateral estoppel, such as the rule against nonparty preclusion, should not be applied to former testimony because such rules reflect policies that go beyond the basic concern with reliability.

Stare decisis is another way in which prior litigation can be used to affect later litigation without the binding effect of collateral estoppel. Like collateral estoppel and the use of judgments as evidence, stare decisis helps to maintain consistency among judgments and respect for the legal system. Like former testimony and use of judgments as evidence, stare decisis can operate against nonparties and provides an alternative to collateral estoppel.

183. In Lloyd, for example, former testimony was admissible, even against a nonparty, Alvarez, because he and the Coast Guard had the same interests with respect to Lloyd's testimony. See Lloyd, 580 F.2d at 1186.

184. See Lloyd, 580 F.2d at 1184-87; In re Master Key Antitrust Litig., 72 F.R.D. 108, 109 (2d Cir. 1976); In re IBM Peripheral EDP Devices Antitrust Litig., 444 F. Supp. 110, 112 (N.D. Cal. 1978); von Moschzisker, supra note 118, at 300.

185. See McCormick, supra note 5, § 257, at 767-68; 5 J. WIGMORE, supra note 5, § 1388, at 118-20; Falknor, supra note 179, at 655; Martin, supra note 168, at 555 n.43.

186. Stare decisis is not binding because cases can always be distinguished. Yet, even without binding effect, stare decisis can determine the outcome of cases. This is apparent in cases that decide whether an applicant for intervention of right has "an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest." FED. R. CIV. P. 24(a). Courts thus allow intervention because stare decisis can bind the nonparty as a practical matter even though collateral estoppel does not apply. See Oneida Indian Nation v. New York, 732 F.2d 261, 265-66 (2d Cir. 1984), cert. denied, 106 S. Ct. 78 (1985); Corby Recreation, Inc. v. General Elec. Co., 581 F.2d 175, 177 (8th Cir. 1978); Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 578 F.2d 1341, 1345 (10th Cir. 1978); Martin v. Travelers Indem. Co., 450 F.2d 542, 554 (6th Cir. 1971); Nuesse v. Camp, 385 F.2d 694, 702 (D.C. Cir. 1967); Florida Power Corp. v. Granlund, 78 F.R.D. 441, 444 (M.D. Fla. 1978); In re Oceana Int'l, Inc., 49 F.R.D. 329, 331-32 (S.D.N.Y. 1970).

187. See von Moschzisker, supra note 118, at 300.

In theory, the overlap between stare decisis and collateral estoppel should be minimal. Collateral estoppel applies to issues of fact, although it may also apply to issues of law on the same or similar facts.189 Collateral estoppel applies only "where the controlling facts and applicable rules remain unchanged,"190 and is inappropriate as to unmixed questions of law in successive actions involving substantially unrelated claims.191 These principles permit flexibility and growth in the law, recognizing that collateral estoppel should not "freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical."192 Stare decisis, on the other hand, is the appropriate mechanism for giving effect to a prior judgment when the issues are legal, abstract, and unrelated to the facts of particular cases.193 It is not an appropriate mechanism for giving subsequent effect to fact-specific prior findings, including most jury findings.194

190. Commissioner v. Sunnen, 333 U.S. 591, 600 (1948); accord Limbach v. The Hooven & Allison Co., 104 S.Ct. 1857, 1843 (1984); United States v. Stone & Downer Co., 274 U.S. 225, 236 (1927); RESTATEMENT (SECOND) OF JUDGMENTS § 28(2) (1982) (collateral estoppel does not apply if “[t]he issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws”).
193. See Commissioner v. Sunnen, 333 U.S. 591, 601 (1948) ("[i]f consistency in decision is considered just and desirable, a court may rely on stare decisis"); RESTATEMENT (SECOND) OF JUDGMENTS § 28 comment b (1982) (“the more flexible principle of stare decisis is sufficient to protect the parties and the court from unnecessary burdens”); id. § 29 comment i ("the rule of preclusion should ordinarily be superseded by the less limiting principle of stare decisis"); see also 18 C. WRIGHT, A. MILLER & E. COOPER, supra note 1, § 4425, at 244; von Moschzisker, supra note 118, at 300.
194. See Green, supra note 118, at 175 n.199. Several commentators have likened stare decisis to preclusion of nonparties, see Berch, supra note 8, at
In actual practice, however, there is a murky area where issues of law appropriate for collateral estoppel and other "unmixed" issues of law appropriate for stare decisis overlap. Within this overlap, both stare decisis and collateral estoppel are available to give effect to the results of prior litigation. If the prior finding is being used against a nonparty, however, only stare decisis will be available because of the rule against nonparty preclusion.

Several recent asbestosis cases from the Eastern District of Texas illustrate this practice of using stare decisis as an alternative to collateral estoppel in a nonparty situation. The chief case is *Borel v. Fibreboard Paper Products Corp.*, in which a Fifth Circuit panel upheld a jury finding that asbestos is "a defective and unreasonably dangerous product." This ruling established strict tort liability for asbestosis, an eventually fatal lung condition linked to asbestos exposure.

Inevitably, the "defective and unreasonably dangerous" issue reappeared in other victims' suits, such as *Mooney v. Fibreboard Corp.* Mooney sued all of the Borel defendants plus one new defendant and tried to incorporate the Borel "defective and unreasonably dangerous" finding into his case. Judge Joseph Fisher, who had been the trial judge in *Borel*, held that the "defective and unreasonably dangerous" finding did not collaterally estop the new defendant, because merely

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195. In fact, the Supreme Court declined several recent opportunities to define "unmixed questions of law," holding only that the concept did not apply to the facts presented.

An exception which requires a rigid determination of whether an issue is one of fact, law or mixed fact and law, as a practical matter, would often be impossible to apply because "the journey from a pure question of fact to a pure question of law is one of subtle gradations rather than one marked by a rigid divide."


196. See infra notes 197-206 and accompanying text. See generally Green, supra note 118, at 172-78.


198. Id. at 1087-92.

199. See Id. at 1091-92.


201. Id. at 244.
making the same arguments does not establish privity.\textsuperscript{202} He held, however, that \textit{Borel} controlled the \textit{Mooney} case as "stare decisis" and granted summary judgment against the new defendant on the issue.\textsuperscript{203}

Another asbestosis case from the same district reached similar results. In \textit{Flatt v. Johns Manville Sales Corp.},\textsuperscript{204} Judge Robert Parker hesitated to apply collateral estoppel against a nonparty, but he held that "as a matter of law products containing asbestos are defective and dangerous within the meaning of section 402A of the Restatement [(Second) of Torts]."\textsuperscript{205}

Although there is some question whether this particular use of stare decisis is proper,\textsuperscript{206} scattered cases provide further examples of stare decisis as an alternative to collateral estoppel. One case held that certain administrative findings "have no collateral estoppel effect, as distinguished from persuasive force,"\textsuperscript{207} but added, "[o]f course, interpretations are exceedingly helpful to interested parties and the public as indicative of the policy and reasoning of the agency, and their persuasive

\textsuperscript{202} \textit{Id.} at 249.
\textsuperscript{203} \textit{Id.}
\textsuperscript{204} 488 F. Supp. 836 (E.D. Tex. 1980).
\textsuperscript{205} \textit{Id.} at 841. The \textit{Flatt} opinion is somewhat unclear. It first seems to deny collateral estoppel, \textit{see id.} at 839-40, but after discussing stare decisis, it says that the nonparty is collaterally estopped. \textit{Id.} at 840. The Fifth Circuit later treated the opinion as based on stare decisis. \textit{See Migues v. Fibreboard Corp.}, 662 F.2d 1182, 1186 (5th Cir. 1981); Green, \textit{supra} note 118, at 174-75 n.199.
\textsuperscript{206} In \textit{Migues}, the Fifth Circuit cast considerable doubt on this use of stare decisis. \textit{Migues}, 662 F.2d at 1189. Judge Parker, the trial judge in \textit{Migues}, had used \textit{Borel} to establish, even against nonparties, that "all asbestos products are unreasonably dangerous \textit{as a matter of law}." \textit{Id.} at 1183. The Fifth Circuit reversed, pointing out that \textit{Borel} had held only that the jury could have found that asbestos products unaccompanied by adequate warnings were unreasonably dangerous. \textit{See id.} at 1189.

The true import of \textit{Migues} is not clear. The decision may rest on the limited ground that \textit{Borel} did not decide the issue of law that Judge Parker thought it had. The opinion's tone, however, suggests a more general skepticism toward the use of stare decisis to prevent relitigation when collateral estoppel is unavailable. The Fifth Circuit showed a similar attitude in reversing Judge Parker in \textit{Hardy v. Johns-Manville Sales Corp.}, 509 F. Supp. 1353 (E.D. Tex. 1981), \textit{rev'd}, 681 F.2d 334 (5th Cir. 1982). Judge Parker had held that the new defendant's and the \textit{Borel} defendants' interests were close enough to place them in privity with each other. \textit{Hardy}, 509 F. Supp. at 1361. In the alternative, he took judicial notice of the relationship between asbestos and plaintiffs' ailments, relying on Rule 201 of the Federal Rules of Evidence. \textit{Id.} at 1362-63. The Fifth Circuit in \textit{Migues} declined, however, to review Judge Parker's use of judicial notice in \textit{Hardy}. \textit{See Migues}, 662 F.2d at 1187 & n.9.

effect may widely transcend any binding force.”208 In another case, the defendant relied on an earlier finding from the same judicial district, but on different facts, that the limitation provision in its standard contract was reasonable.209 The plaintiff, as a nonparty to the earlier suit, could not be collaterally estopped, but the Ninth Circuit found that it could “properly notice a doctrine or rule of law from such prior case and apply that principle under the theory of stare decisis.”210 In a third case, the First Circuit applied the Rovico rule to a matter not involving patents.211 It held that while an earlier judgment would not be collateral estoppel against nonparties, “the doctrine of stare decisis should be invoked to give our resolution of the [same] issue in that case precedential effect.”212

It is easy to overstate the significance of these cases given the major differences between stare decisis and collateral estoppel. Yet as long as issues arise in the murky area between questions of law appropriate for collateral estoppel and other “unmixed” questions of law appropriate for stare decisis, courts will continue to view stare decisis as one means of using a prior judgment against a nonparty when collateral estoppel is unavailable.213

IV. NONPARTIES AND COLLATERAL ESTOPPEL

The most prominent remaining barrier to collateral estoppel is the barrier that shields nonparties. Prior findings as evidence, former testimony, and stare decisis all have the greatest

208. Id.; see also Cinema Assocs. v. City of Oakwood, 417 F. Supp. 146, 150 (S.D. Ohio 1976) (previous determination that a film is not obscene precludes relitigation of obscenity in judicial district in which prior determination was rendered).


210. Id. (citing 29 AM. JUR. 2D Evidence § 58, at 92 (1967)). The court rejected the defendant’s argument that it should judicially notice the earlier finding. Id.

211. United States v. 177.51 Acres of Land, 716 F.2d 78 (1st Cir. 1983).

212. Id. at 81.

213. Some courts will issue confusing opinions that waver between collateral estoppel and stare decisis. See Flatt, 488 F. Supp. at 841. Courts also may consider judicial notice and law of the case, but these two doctrines are much less significant because of their inherent limits. Judicial notice applies only to uncontroverted facts. See FED. R. EVID. 201. Law of the case applies only to findings in the same case. See Greiner v. Wilke (In re Staff Mortgage & Inv. Corp.), 625 F.2d 281, 285 (9th Cir. 1980); 18 C. WRIGHT, A. MILLER & E. COOPER, supra note 1, § 4478; Vestal, Law of the Case: Single-Suit Preclusion, 1987 Utah L. Rev. 1, 1.
practical significance when they allow subsequent effect in spite of this barrier. In this regard, all three further undermine the belief that prior proceedings affect later litigation through collateral estoppel or not at all.

Recently, however, the rule against nonparty preclusion has been weakening, and collateral estoppel doctrine has crept slowly toward binding nonparties by narrowly casting the issue as collateral estoppel vel non. This development has generated a great deal of commentary among scholars, who tend to view the issue in all-or-nothing terms: either the prior finding binds the nonparty, or it has no effect at all on the subsequent litigation. Both sides to the nonparty preclusion debate have framed the issue too narrowly, however, because neither considers the third alternative: using prior judgments as evidence, rather than collateral estoppel, against nonparties.

A. THE DEMISE OF MUTUALITY

The nonparty preclusion debate is best understood as part of a larger debate that has occupied collateral estoppel doctrine for most of this century—whom can a prior finding benefit and whom can it bind? The trend for the past several decades has been for courts to broaden the group of litigants who can benefit from collateral estoppel. They have done so by gradually abandoning the mutuality requirement, under which no litigant could use a favorable prior finding as collateral estoppel unless that prior finding, if adverse, would have bound the same litigant. In effect, mutuality meant that a prior finding would be binding only if both the party benefitted and the party to be bound were parties to the prior proceeding.

214. See infra notes 241-278 and accompanying text.
215. 18 C. WRIGHT, A. MILLER & E. COOPER, supra note 1, § 4416, at 144 (footnotes omitted) (citing Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1349-51 (3d Cir. 1975)).
217. See Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 127 (1912); 18 C. WRIGHT, A. MILLER & E. COOPER, supra note 1, § 4463, at 559-61.
218. The first Restatement of Judgments included a mutuality requirement. See RESTATEMENT OF JUDGMENTS § 93 & comment d (1942). Many commentators of the period supported mutuality. See Seavey, Res Judicata with Refer-
Most commentators trace the abandonment of mutuality to Justice Roger Traynor's opinion for the California Supreme Court in *Bernhard v. Bank of America National Trust and Savings Association*. According to the *Bernhard* court, collateral estoppel applied if the party to be estopped had litigated and lost the same issue once before, regardless of who the first adversary was. Over the past forty years, federal courts and most state courts have adopted this general view, although mutuality may still be required in certain situations. For example, nonmutual collateral estoppel may not be allowed if there is reason to doubt the accuracy of the prior finding. Prior outcomes may be inconsistent, or procedural differences between the two proceedings may make it likely that the issue will be decided differently. Similarly, the prior finding may reflect different tactical relationships among the parties, jury compromise, or lack of incentive in the first action to litigate or appeal.

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219. 19 Cal. 2d 807, 122 P.2d 892 (1942). For earlier criticism, see 7 WORKS OF JEREMY BENTHAM, supra note 6, at 171.

220. *Bernhard*, 19 Cal. 2d at 813, 122 P.2d at 895.

221. Professor Robert Casad counted only nine states that have followed the mutuality rule recently: Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, New Mexico, North Carolina, and North Dakota. See Casad, *Inter-system Issue Preclusion and The Restatement (Second) of Judgments*, 66 CORNELL L. REV. 510, 511 n.1 (1981); see also Fisher v. Space of Pensacola, Inc., 461 So. 2d 790, 792 (Ala. 1984) (declining to abandon privity and mutuality requirements). See generally 18 C. WRIGHT, A. MILLER & E. COOPER, supra note 1, § 4464, at 470-80 (covering abandonment of the mutuality requirement).


225. See *Parklane*, 439 U.S. at 330 (citing Berner v. British Commonwealth
Courts often distinguish between "defensive" and "offensive" nonmutual collateral estoppel. Defensive use occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another adversary.226 This type of nonmutual use was approved by the California Supreme Court in *Bernhard*, and in 1971 by the United States Supreme Court in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*.227 Courts tend to look favorably on the defensive use of collateral estoppel because it encourages plaintiffs to consolidate claims against multiple defendants into one lawsuit.228 Offensive use of collateral estoppel occurs "when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party."229 Courts tend to disfavor offensive use because of its potential for tactical manipulation by a plaintiff who stands aside and awaits the outcome of similar litigation by other plaintiffs.230

Professor Brainerd Currie's "multiple claimant anomaly" is the classic illustration of a problem inherent in the offensive use of collateral estoppel.231 In his hypothetical, a railroad accident leaves the railroad facing separate suits by each of fifty injured passengers. If the railroad wins on liability in one case, it cannot collaterally estop the other passengers who sue later because they are nonparties. But if the railroad loses, it can be collaterally estopped by other plaintiffs who rely on their fellow passenger's victory.232 The results are multiple lawsuits233
and an advantage to the “wait and see” plaintiff, who benefits from an arguably unfair shift of litigation risks to the common defendant.

Courts have developed flexible guidelines to control such manipulation, and trial judges have broad discretion in this area. In many cases, for example, courts will not permit non-mutual collateral estoppel if the person seeking to assert it could have joined the earlier action but did not. Many commentators, however, still have serious doubts about the wisdom of abandoning mutuality in general, and the use of offensive nonmutual collateral estoppel in particular.

Although the scholarly debate continues, it is doubtful that courts will return to a general mutuality requirement to correct the one-sidedness that offensive collateral estoppel is believed to produce. An alternative way of approaching the problem would be to continue to expand collateral estoppel and allow the collateral estoppel of nonparties. This would allow a common defendant to use a judgment against later plaintiffs who, after the demise of mutuality, may use a judgment against the common defendant. The multiple claimant anomaly would disappear and mutuality, albeit of a different sort, would be restored.

234. See Parklane, 439 U.S. at 330.
239. See, e.g., Flanagan, supra note 118, at 52 (offensive collateral estoppel is not efficient); Flanagan, The Efficiency Hypothesis and Offensive Collateral Estoppel: A Response to Professor Callen, 1983 Ariz. St. L.J. 835, 836 (similar).
240. See generally Berch, supra note 8, at 529-31 (arguing that binding nonparty may be consistent with due process); Schroeder, supra note 146, at 922 (nonparty preclusion goes “too far” and ignores party control of litigation).
B. THE DEVELOPMENT OF NONPARTY PRECLUSION

The rule against nonparty preclusion permits collateral estoppel to be used only against parties and those in privity with them. A typical definition of a person in "privity" is one "who claims an interest in the subject-matter affected by the judgment through or under one of the parties, i.e., either by inheritance, succession or purchase; and this interest must have been acquired after rendition of the judgment." Some recent decisions, however, have stretched traditional doctrine and allowed collateral estoppel to be used against nonparties in some situations. These decisions do not fall readily into neat categories, but rough groupings are possible.

Some cases work with the "privity" concept but allow collateral estoppel when traditional "privity" probably would not. These cases do not define privity precisely. For example, one court stated that "certain individuals may be so closely related, their interests so closely interwoven, or their rights so similar that it is unfair to treat them separately." These cases find privity based on a variety of significant relationships independent of litigation. Several have found privity between husband


243. See infra notes 245-272 and accompanying text.

244. See First Alabama Bank of Montgomery, N.A. v. Parsons Steel, Inc., 747 F.2d 1367, 1378 (11th Cir. 1984) ("A finding of privity is no more than a finding that all of the facts and circumstances justify a conclusion that nonparty preclusion is proper."); rev'd on other grounds, 106 S. Ct. 766 (1986); Aer-ojet-Gen. Corp. v. Askew, 511 F.2d 710, 719 (5th Cir. 1975) (interests of parties so closely aligned that party in first action is the "virtual representative" of party in second action); Lynch v. Glass, 44 Cal. App. 3d 943, 497, 119 Cal. Rptr. 139, 142 (1975) (the question is "whether a nonparty was 'sufficiently close' so as to justify the application of collateral estoppel."). The Restatement (Second) of Judgments has abandoned the term privity and instead identifies types of nonparties who may be bound. Compare RESTATEMENT (SECOND) OF JUDGMENTS introduction, at 13-14 (1982), with RESTATEMENT OF JUDGMENTS § 83 & comment a (1942).

and wife, and between a decedent's parents and the administrator of his estate. Other cases define "privity" to cover certain corporate, partnership, and associational ties as well as contractual relationships. Still others include, in some situations, the relationship between government and private citizen.


247. See Gerrard v. Larsen, 517 F.2d 1127, 1134-35 (8th Cir. 1975) (court speaks of functional privity between decedent's parents and administrator).


249. See United States v. Geophysical Corp. of Alaska, 733 F.2d 693, 697-98 (9th Cir. 1984) (suit involving general partner binds limited partners and partnership). See generally RESTATEMENT (SECOND) OF JUDGMENTS § 60 (1982) (binding effect of judgment in action by an injured person against a partner is dependent upon whether judgment is against or in favor of the injured person).


A second group of cases goes beyond "privity" to apply collateral estoppel to a nonparty who "participated" in a prior proceeding, perhaps as strategist or financier. In *Montana v. United States*, the United States Supreme Court held the federal government bound by findings in an earlier suit that it had required to be filed, and in which it had reviewed and approved the complaint, paid attorneys' fees, appeared as amicus curiae, and directed strategy on appeal. The Court pointed out that nonparties who "[had] a direct financial or proprietary interest" in earlier litigation may be bound by the results of that litigation. "[A]lthough not a party, the United States plainly had a sufficient 'laboring oar' in the conduct of the state-court litigation to actuate principles of estoppel."

A related type of "participation" case bases nonparty preclusion on implied consent to be bound. In *Boyd v. Jamaica Plain Co-operative Bank*, the Boyds challenged a requirement that they prepay property taxes into escrow without receiving interest from their mortgagee. The court held the Boyds bound by their earlier acquiescence in a decision that another plaintiff's parallel complaint would be "designated as the

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*United States, 224 U.S. 413, 445-46 (1912); Hickman v. Electronic Keyboarding, Inc., 741 F.2d 230, 233-34 (8th Cir. 1984); see also Superior Oil Co. v. City of Port Arthur, 726 F.2d 203, 206 (5th Cir. 1984) (judgment in favor of state, county, or municipal corporation affecting the public interest is binding on all citizens and taxpayers); Berman v. Denver Tramway Corp., 197 F.2d 946, 951 (10th Cir. 1952) (similar); United States v. Olin Corp., 606 F. Supp. 1301, 1304-08 (N.D. Ala. 1985) (similar); Battle v. Cherry, 339 F. Supp. 186, 192 (N.D. Ga. 1972) (similar); Restatement (Second) of Judgments § 41 (1982); 18 C. Wright, A. Miller & E. Cooper, supra note 1, § 4458, at 512-22.

Id. at 147 (1979).

Id. at 155.

Id. at 154 (citing Souffront v. Compagnie des Sucreries, 217 U.S. 475, 486-87 (1910)).


pilot case for trial purposes."$^{258}$

Many courts have rejected the expanded privity and participation approaches to preclusion.$^{259}$ Even where courts have adopted them, these approaches are still arguably consistent with traditional doctrine and thus unlikely to foster a radical change in collateral estoppel doctrine. The first works within the "privity" concept, and the second works through the "party/privity" rule to include participants as "parties."

The most radical departure from the rule against nonparty preclusion is found in a third group of "virtual representation" cases.$^{260}$ These cases hold that a nonparty is bound if a party who had the same interests litigated the prior case, even though the nonparty was neither a participant nor in privity with a party in the prior proceeding.$^{261}$

The seminal case is *Aerojet-General Corp. v. Askew*.$^{262}$ Aerojet had an option to buy land that it leased from two Florida state agencies. The state enacted a law prohibiting one of the agencies from selling land to private buyers without first offering it to the county in which it was located. Aerojet tried to exercise the option, but the state agencies refused to sell.$^{263}$ Aerojet successfully sued to obtain specific performance from the state agencies, which did not argue that the option was voided by the statute.$^{264}$ Dade County, where the land was lo-
cated, then sued to buy the land as provided by statute.265 Aerojet sued to enjoin Dade County's suit, arguing that it was barred by the first suit.266

The district court agreed with Aerojet.267 In affirming, the Fifth Circuit stated that under federal law "a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative."268 The first suit bound Dade County because both it and the state had been interested primarily in blocking Aerojet’s purchase.

Other cases follow the Aerojet approach.269 For example, a Missouri federal district court held that truckers challenging government regulations were bound by findings in a similar suit by approximately sixty other carriers represented by the same counsel.270 A Mississippi federal district court held that an earlier unsuccessful challenge by environmental groups to a navigation project bound nonparty challengers “having the same interest.”271 At least one court has held that a party who could intervene but fails to try to do so should be bound.272


266. Id.

267. Id. at 908-11.


269. These cases treat merger and bar and collateral estoppel cases interchangeably. See Jackson v. Hayakawa, 605 F.2d 1121, 1126 (9th Cir. 1979), cert. denied, 445 U.S. 952 (1980); Makariw v. Rinard, 336 F.2d 333, 334 (3d Cir. 1964); Environmental Defense Fund v. Alexander, 501 F. Supp. 742, 749-50 (N.D. Miss. 1980); In re Nissan Motor Corp. Antitrust Litig., 471 F. Supp. 754, 756-60 (S.D. Fla. 1979); Century 21 Preferred Properties, Inc. v. Alabama Real Estate Comm’n, 401 So. 2d 764, 770 (Ala. 1981); see also RESTATEMENT (SECOND) OF JUDGMENTS § 34 comment a (1982); 18 C. WRIGHT, A. MILLER & E. COOPER, supra note 1, § 44.06, at 44.


271. Environmental Defense Fund v. Alexander, 501 F. Supp. 742, 749 (N.D. Miss. 1980); see also Waitkus v. Pomeroy, 31 Colo. App. 396, 406, 506 P.2d 392, 398 (1972) ("the doctrine of collateral estoppel . . . is applicable in a situation where, although the parties were not identical, their interests were identical"), rev’d on other grounds, 183 Colo. 344, 417 P.2d 396 (1969).

Placing a case into one of these three groupings is difficult at best. Many cases could fit several.\textsuperscript{273} Of the three, the virtual representation approach has met with the most resistance in both case law\textsuperscript{274} and commentary.\textsuperscript{275} Unfortunately, it is often unclear whether courts are rejecting the doctrine, limiting it, or just not applying it to the facts of the specific case.\textsuperscript{276}

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\textsuperscript{274} Even the Fifth Circuit, the source of many virtual representation cases, has limited the doctrine. In Southwest Airlines Co. v. Texas Int’l Airlines, \textit{546 F.2d} 84 (5th Cir.), \textit{cert. denied}, \textit{343 U.S.} 932 (1977), a Fifth Circuit panel found preclusion but declined to base it on “virtual representation” generally. \textit{Id.} at 97-98. Instead, Judge J. Minor Wisdom focused on the particular relationship between the government agency that had brought the first suit and the later private litigants. He reasoned that the relationship was “close enough to preclude relitigation.” \textit{Id.} at 98. They had the same interests, and the government parties had provided “adequate representation” in the prior proceeding. \textit{Id.} at 100; see also United States v. ITT Rayonier, Inc., \textit{627 F.2d} 996, 1003 (9th Cir. 1980).

\textsuperscript{275} Another Fifth Circuit case, Pollard v. Cockrell, \textit{578 F.2d} 1002 (5th Cir. 1978), limits \textit{Aerojet} in more general fashion, by restating virtual representation doctrine much more narrowly than set forth in \textit{Aerojet}. According to Pollard, virtual preclusion requires an “express or implied legal relationship in which parties to the first suit are accountable to non-parties who file a subsequent suit raising identical issues.” \textit{Id.} at 1008. An “abstract interest” in the outcome of a controversy is not enough. \textit{Id.} at 1009. Accord Hardy v. Johns-Manville Sales Corp., \textit{681 F.2d} 334, 340 (5th Cir. 1982) (viewing \textit{Aerojet} as resting on the closely aligned interests of two governmental entities); see also American Postal Workers Union, Columbus Area Local v. United States Postal Serv., \textit{736 F.2d} 317, 318-19 (6th Cir. 1984); Staten Island Rapid Transit Operating Auth. v. Interstate Commerce Comm’n, \textit{718 F.2d} 533, 542-43 (2d Cir. 1983); Dills v. City of Marietta, \textit{674 F.2d} 1377, 1379-80 (11th Cir. 1982) (following Pollard instead of \textit{Aerojet}), \textit{cert. denied}, \textit{461 U.S.} 905 (1983); General Foods Corp. v. Massachusetts Dep’t of Pub. Health, \textit{648 F.2d} 784, 790 (1st Cir. 1981) (declining to follow Pollard if it would bind subsidiary through judgment against parent corporation).

\textsuperscript{276} See Schroeder, \textit{supra} note 146, at 923-28; Note, \textit{Collateral Estoppel of Nonparties}, \textit{supra} note 146, at 1490-92.

\textsuperscript{276} For example, in Griffin v. Burns, \textit{570 F.2d} 1065 (1st Cir. 1978), McCormick, a candidate in a close election, had sued successfully to overturn an elec-
Yet, even where a court finds that virtual representation, standing alone, is insufficient grounds for nonparty preclusion, that court will generally treat virtual representation as an important factor to be considered.\textsuperscript{277} Thus, the development of these three approaches, individually and collectively, reflects significant pressure for the expansion of collateral estoppel to allow nonparty preclusion.\textsuperscript{278} This pressure has been strong in recent years and is likely to continue.

C. JUDGMENTS AS EVIDENCE IN LIEU OF NONPARTY PRECLUSION

Some commentators welcome this expansion of collateral estoppel to allow the preclusion of nonparties. One criticized the \textit{Restatement (Second) of Judgments} for omitting general language that would facilitate the further growth of nonparty preclusion,\textsuperscript{279} while others would bind nonparties by using the

\begin{footnotesize}
\textsuperscript{277} See 18 C. WRIGHT, A. MILLER & E. COOPER, \textit{supra} note 1, § 4457, at 495-99. “All of the cases that in fact preclude relitigation by a nonparty [by virtual representation] have involved several factors in addition to apparently adequate litigation by a party holding parallel interests.” \textit{Id.} § 4457, at 495.

\textsuperscript{278} See \textit{id.} § 4403, at 21 (stating that “there has been a . . . tendency to include more nonparties within the binding effect of unfavorable prior judgments”).

\end{footnotesize}
rules of mandatory joinder and compulsory intervention. Some commentators, however, view the development of non-party preclusion with skepticism or alarm.

The debate thus far has centered on procedural due process, with both sides attempting to ascertain the minimum amount of individual control and participation necessary to satisfy constitutional requirements. By limiting discussion to the requirements of procedural due process, however, both sides in the debate have framed the issue too narrowly. Collateral estoppel is just one of several ways in which a prior finding can affect later litigation. Even assuming nonparty preclusion is constitutionally permissible, there may be persuasive policy reasons for refusing to permit it.

Earlier discussion has demonstrated that the major difference between collateral estoppel and using judgments as evidence is that admission into evidence is less severe and depends

281. See Berch, supra note 8, at 533; Note, Absent Disputants, supra note 194, at 1562-76; Comment, Privity Rule, supra note 246, at 1122-32; Comment, Mandatory Intervention: Expansion of Collateral Estoppel in Favor of Single Defendants Against Multiple Plaintiffs in Federal Civil Litigation, 14 J. MAR. L. REV. 441, 459-64 (1981).
282. See 18 C. WRIGHT, A. MILLER & E. COOPER supra note 1, § 4457, at 500-02.
284. Although the issue is by no means settled, a reasonable argument can be made that nonparty preclusion passes constitutional muster. See George, supra note 194, at 661-62; Vestal, Res Judicata/Preclusion: Expansion, 47 S. CAL. L. REV. 357, 376-79 (1974). See generally Pielemeyer, supra note 146, at 415-35 (discussing due process limitations and competing considerations). Under the Federal Rules of Civil Procedure, class actions pursuant to Rule 23(b)(1), 23(b)(2), and in some cases 23(b)(3) bind absentees who do not receive adequate notice, if they have adequate representation. See Jones v. Diamond, 594 F.2d 997, 1022-23 (5th Cir. 1979); Society for Individual Rights v. Hampton, 528 F.2d 905, 906 (9th Cir. 1975); Ryan v. Shea, 525 F.2d 268, 275 (10th Cir. 1975); Keene v. United States, 81 F.R.D. 653, 657-59 (S.D. W. Va. 1979); FED. R. CIV. P. 23; see also RESTATEMENT (SECOND) OF JUDGMENTS § 41(2) & comment f (1982); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1766, at 142-43 (1972) (discussing notice requirements for class actions under FED. R. CIV. P. 23 (c)); Hutchinson, supra note 116, at 499-500, 504-06 (discussing representational aspects of class actions).

At least one court has held that a nonparty may be bound by a suit originally filed as a class action, but never formally certified, if the named "class members" and the nonparty had substantially identical interests. See Jackson v. Hayakawa, 605 F.2d 1121, 1124-26 (9th Cir. 1979), cert. denied, 455 U.S. 962 (1982).
primarily on whether a prior finding is reliable. In contrast, reliability has never been sufficient to justify the use of collateral estoppel. Because of its severity, collateral estoppel has had to be more sensitive to the limits of adjudication, particularly the fact that litigation, although reliable, cannot infallibly determine historical truth. It is an inevitable fact that courts can never do better than their best approximation of what actually happened, because they are handicapped by imperfect knowledge and often by an inability to consider the controversy as a whole.

Since our confidence in the accuracy of prior adjudications is limited, other factors are necessary to justify the binding effect of collateral estoppel. The most important of these is participation by the party to be bound. If a party has had its “day in court,” it is easier to accept the possibility that the party is being bound by a finding that may be wrong, because at least that party has been heard. Because participation is the key to collateral estoppel, “adequate representation” by a similarly motivated litigant in a prior proceeding is not enough, at least not by itself, to justify binding a nonparty.

Nonparty preclusion changes the balance completely, in effect basing collateral estoppel on reliability alone. According to its proponents, “adequate representation” by a similarly motivated litigant in a prior proceeding is enough to bind a non-party, because it is sufficient to insure that, as a general matter, the finding is reliable. Participation in the prior proceeding, a “day in court,” is no longer required.

There are a number of significant assumptions underlying nonparty preclusion. The first is that findings may be abstracted out of the context in which they were first decided. As one commentator noted, the demise of mutuality reflects a view “that most lawsuits are essentially fungible for purposes of preclusion, and therefore, no reason exists to retry issues that have already been resolved in any one action.”

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285. See supra notes 109-150 and accompanying text.
287. See supra notes 260-272 and accompanying text.
289. Schroeder, supra note 146, at 948-49; see also Flanagan, supra note 239, at 835. Professor James Flanagan stated:

[M]utuality is a way of looking at the scope of litigation and says nothing more than in a dispute between two parties only those directly involved are affected by the decision. We no longer have this restricted concept of litigation and now accept the idea that litigation may re-
party preclusion takes this abstraction of issues one step further by allowing the collateral estoppel of a nonparty to the original suit. It reflects a view that litigation decides issues as "free-floating, independent entities." 290 A second, related assumption is that individual control and participation in litigation have limited value. In effect, two similarly situated litigants belong to a "class" for purposes of a particular issue. As in a formally certified class action, an adequately represented nonparty can be bound by the judgment in the earlier suit. 291 These first two assumptions lead to a third: that the purpose of litigation is to ascertain the "truth" about the unknown. 292 Under this view, by deciding an issue, the legal system disposes of it. Accepting those results as true eliminates multiple, vexatious lawsuits and inconsistent outcomes, and strengthens public confidence in the courts.

The wisdom of nonparty preclusion depends on the soundness of these interwoven assumptions about the nature and limits of adjudication. It is probable that, in these respects, nonparty preclusion is based on a flawed vision of the judicial process. 293 And, by basing collateral estoppel on reliability

solve questions of interest to and affecting more than just the named parties.

Id.

290. George, supra note 194, at 657.

291. Society's interest in judicial efficiency, a goal often cited in support of class actions, is mentioned frequently to justify nonparty preclusion. See Vestal, supra note 284, at 378-79. Other commentators have also likened nonparty preclusion to class actions because both reflect an issue-oriented view of litigation. See Berch, supra note 8, at 535-36; George, supra note 194, at 656-57; Note, Collateral Estoppel of Nonparties, supra note 146, at 1497; Comment, Privity Rule, supra note 246, at 1103-05.


293. One recent United States Supreme Court decision, United States v. Mendoza, 104 S. Ct. 588 (1984), illustrates healthy skepticism toward the assumptions behind nonparty preclusion. Mendoza involved a petition for naturalization under a special procedure established at the end of World War II for Filipino veterans of the United States Army. Although the procedure had lapsed 32 years earlier, the petitioner argued that naturalizations had been administratively blocked in violation of due process for much of the time he could have filed. Id. at 570. Without reaching the merits of that argument, the district court allowed Mendoza to use offensive collateral estoppel against the federal government, which had already lost on the issue against other petitioners. Id. The Ninth Circuit affirmed. Id. A unanimous Supreme Court reversed, holding that a private party may not use nonmutual offensive collateral estoppel against the government. Id. at 574. The Court concluded that to allow offensive collateral estoppel against the government
alone, nonparty preclusion also upsets a sound division of labor by expecting collateral estoppel to do what evidence historically has done, which is to give effect to a prior proceeding when collateral estoppel is barred by policies other than reliability. The erosion of some of these policies has meant that evidentiary use of judgments is required less often than it once was. Unfortunately, it also has tempted courts and commentators to rely uncritically on collateral estoppel alone to achieve the basic goal of deference to prior adjudication that both collateral estoppel and evidence share.

The proponents of nonparty preclusion ask the courts to turn too readily to collateral estoppel and to disregard the one policy concern that, quite properly, still limits it. That policy dictates that the fairness of collateral estoppel depends heavily on the bound party's participation in the prior proceeding. The critics of nonparty preclusion also have presented the issue in needlessly stark terms. Their rejection of collateral estoppel means that subsequent litigation totally ignores reliable prior findings. The multiple claimant anomaly is one result. In short, both sides to the nonparty preclusion debate have viewed the issue too narrowly.

An intermediate position, admitting reliable prior findings into evidence against nonparties, is the best response to the nonparty problem. It would parallel the courts' past response in similar situations, when they admitted judgments into evidence because of other barriers to collateral estoppel. Now, as then, it would honor differences in purpose between evidence and collateral estoppel. It would defer to reliable prior findings so as to minimize multiple lawsuits and inconsistent adjudication. At the same time, by providing nonparties an opportunity to be heard, it would recognize limits on accepting findings as "true" out of context, thus avoiding the due process and policy problems associated with collateral estoppel.

"would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." Id. at 572. *Mendoza* thus shows that when relitigation would serve an important purpose, courts are quick to recognize that judicial findings are not synonymous with absolute truth and to forego the system's stake in regarding the first determination as correct and binding.

294. See supra notes 11-108 and accompanying text.

295. Other proposed solutions include the transfer and consolidation of related suits, see Schroeder, supra note 146, at 963-80, and the expanded use of Rule 36 of the Federal Rules of Civil Procedure, see Flanagan, supra note 118, at 72-76.
V. PRACTICAL CONCERNS WITH USE OF JUDGMENTS AS EVIDENCE

The use of judgments as evidence is much more widespread and logical than many people realize. Examining the relationship between evidence and collateral estoppel reveals that a sound general rationale for admitting prior judgments into evidence is the fact that they can be used against nonparties. Admitting prior findings into evidence against nonparties is a far better method of giving effect to prior judgments than the present trend toward nonparty preclusion. Practical considerations must be addressed, however, among them whether juries are institutionally capable of fairly evaluating prior judgments, and whether meaningful standards can be provided to assist them in that task. Any problem with evaluation of prior findings is much less severe when the later litigation involves a bench trial.

A. JURY COMPETENCE

The more fundamental issue is the jury's ability to weigh a prior finding as evidence without undue prejudice. Some say that a jury has no way to evaluate the prior finding, especially where the later litigation includes rebuttal evidence.\textsuperscript{296} The criticism is that the prior finding has both too much and too little influence on the jury. A prior finding has too much influence if it is given so much weight that the jury does not reach an independent conclusion. If the jury does act independently, however, the prior finding may have too little influence because the jury's consideration of the prior finding may be unguided.

One early proponent of this view is Judge E. W. Hinton, writing in 1932. He acknowledged that if the prior finding is not rebutted, “we might indulge in a presumption and so settle the matter.”\textsuperscript{297} He objected, however, in the more likely situation in which the other party comes forward with rebuttal evidence:

[If there is other evidence on the questions what effect should be given to the fact that another jury on an unknown state of the evidence arrived at a given conclusion? The present jury, if it really considers the matter, must either blindly accept the conclusion of the first jury or ignore it because there is no rational alternative.\textsuperscript{298}]

\textsuperscript{296} See infra notes 297-298 and accompanying text.
\textsuperscript{297} Hinton, supra note 29, at 198.
\textsuperscript{298} Id. The author did not elaborate on his reasoning. In the same pas-
In contrast, most modern commentators would not categorically declare juries incompetent to weigh prior determinations. Dean John Wigmore, for example, argued that our system is based on a trust in juries that makes evidentiary use of judgments appropriate. More recently, Professors David Louisell and Christopher Mueller have noted that "the procedural safeguards available in the prior proceedings go far to reduce the significance of the objection" that the jury has no means to evaluate the prior finding. The drafters of the Federal Rules of Evidence noted that Rule 803(22) provides the jury with no guidance for weighing criminal convictions, but calmly observed that "it seems safe to assume that the jury will give [the criminal conviction] substantial effect unless defendant offers a satisfactory explanation, a possibility not foreclosed by the provision." One argument in favor of a jury's competence to evaluate prior judicial findings is that they are like expert testimony. Several courts have so characterized administrative findings admitted into evidence. Of course, the prior finding would not be subject to cross-examination, as expert testimony normally is, but the same objection does not keep courts from admitting administrative findings under Rule 803(8)(C) or former testimony by an expert under Rule 804(b)(1). Prior judicial findings probably are more reliable and need cross-examination less

sage, however, he confides that "[p]rivately we may doubt the capacity of the jury to evaluate ordinary evidence," id., thus revealing that his views actually may be attributable to his general skepticism of juries. See also 4 J. WEINSTEIN & M. BERGER, supra note 4, § 803(22)(01), at 803-352. 299. "For can we in the same breath say that the jury is to be trusted to determine the fate of the parties in the present case, but that juries generally are not to be trusted and that their verdicts are worthless?" 5 J. WIGMORE, supra note 5, § 1671a, at 808. 300. 4 D. LOUISELL & C. MUELLER, supra note 15, § 470, at 912-13; see also 4 J. WEINSTEIN & M. BERGER, supra note 4, § 803(22)(01), at 803-352 (noting that the Federal Rules of Evidence advisory committee felt that the judicial fact-finding process produces reliable results). 301. FED. R. EVID. 803(22) advisory committee note. 302. See Palmer, supra note 8, at 154. 303. See Melville v. American Home Assurance Co., 584 F.2d 1306, 1316 (3d Cir. 1978); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1125, 1148 (E.D. Pa. 1980), aff'd in part and rev'd in part sub nom. In re Japanese Elec. Prods. Antitrust Litig., 723 F.2d 233 (3d Cir. 1983), rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 106 S. Ct. 1348 (1986); Sage v. Rockwell Int'l Corp., 477 F. Supp. 1205, 1207 (D.N.H. 1979); see also FED. R. EVID. 702 (allowing objections to expert witnesses' qualifications); FED. R. EVID. 705 (allowing disclosure of basis of expert's opinion on cross-examination); Note, Trustworthiness, supra note 15, at 492-93.
than these other types of admissible hearsay.\textsuperscript{304}

The analogy to expert testimony raises another, more serious, problem: a jury may regard a prior finding as so reliable that it will not conscientiously consider rebuttal evidence. For example, in *Coleman Motor Co. v. Chrysler Corp.*,\textsuperscript{305} the Third Circuit held that the trial court had erred in admitting the verdict of a similar case against the same defendant.\textsuperscript{306} The court noted that “[a] jury is likely to give a prior verdict against the same defendant more weight than it warrants. The admission of a prior verdict creates the possibility that the jury will defer to the earlier result and thus will, effectively, decide a case on evidence not before it.”\textsuperscript{307}

It is improbable that juries will be so blindly deferential. Jury instructions can make it clear that prior findings are mere evidence and not binding. Proper jury instructions allow the jury to consider the prior finding but impress it with the need to reach its own decision. The potential difficulties with this practice are no greater than those with instructions on corroboration or presumptions, which can be very complex.\textsuperscript{308} Furthermore, courts customarily admit evidence with instructions to consider defects not serious enough to bar admission but affecting the weight that the evidence deserves.\textsuperscript{309} A few courts

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\textsuperscript{304} See 4 J. \textsc{Wigmore}, supra note 5, § 1346, at 794. \textsc{Wigmore} asks: “Is not the finding of a judge, or the verdict of a jury, based on at least as thorough an inquiry as those other reports and certificates? Has it not some value as evidence, even though not conclusive?” \textit{Id.; see also id.} § 1671a, at 806; Palmer, \textit{supra note} 8, at 158.

\textsuperscript{305} 525 F.2d 1338 (3d Cir. 1975).

\textsuperscript{306} \textit{Id.} at 1350-51; see Mt. Lebanon Motors, Inc. \textit{v.} Chrysler Corp., 283 F. Supp. 453 (W.D. Pa. 1968), aff'd, 417 F.2d 622 (3d Cir. 1969).

\textsuperscript{307} \textit{Coleman}, 525 F.2d at 1351; see also City of New York \textit{v.} Pullman Inc., 662 F.2d 910, 915 (2d Cir. 1981) (excluding prior administrative findings on unfair practice grounds), \textit{cert. denied}, 454 U.S. 1164 (1982); \textit{Zenith}, 505 F. Supp. at 1186 (judicial findings “would likely be given undue weight by the jury, thus creating a serious danger of unfair prejudice”); \textit{Fowler v. Firestone Tire & Rubber Co.}, 92 F.R.D. 1, 2 (N.D. Miss. 1980) (excluding administrative findings). Unfair prejudice arguments have also been made with respect to reports that may have a “false aura of scientific infallibility.” \textit{In re “Agent Orange” Prod. Liab. Litig.}, 611 F. Supp. 1223, 1256 (E.D.N.Y. 1985). This danger is present with all expert testimony. See, \textit{e.g.}, Marx & Co. \textit{v.} Diners' Club, Inc., 550 F.2d 505, 511-12 (2d Cir.) (holding that reversible error occurred when plaintiff's securities expert stated to the jury, conclusively, the proper resolution of the issue), \textit{cert. denied}, 434 U.S. 861 (1977).


\textsuperscript{309} \textit{See In re Paducah Towing Co.}, 692 F.2d 412, 421 n.16 (6th Cir. 1982); \textsc{Georator Corp. v. EEOC}, 592 F.2d 765, 769 (4th Cir. 1979); \textit{Baker v. Eleona Homes Corp.}, 588 F.2d 551, 558-59 (6th Cir. 1978), \textit{cert. denied}, 441 U.S. 933
have commented that a finding admitted into evidence can be conclusive in practical effect. These cases, however, seem to say only that a finding admitted into evidence can be practically conclusive absent rebuttal evidence, and not that rebuttal evidence, when offered, is always ineffective. Thus, the chance to rebut a prior judgment is a meaningful one, and concerns that judges and juries may be unwilling to consider rebuttal evidence appear unjustified.

The history of section 5(a) of the Clayton Act supports this view. The United States Supreme Court has said that section 5(a) has limited practical value because prima facie evidence falls far short of collateral estoppel. Similarly, the 1980 amendment to section 5(a) was based on the view that giving prior government findings evidentiary effect left too much opportunity for meaningful rebuttal.

In another context, one court observed that admitting administrative findings into evidence does not usurp the function of the jury under the seventh amendment because it "interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury." Indeed, confidence that juries will not defer blindly to a prior finding is the basis for admitting it as evidence and thereby disregarding the other policies that often bar collateral estoppel.

Another serious concern is that admitting judgments into evidence can be conclusive in practical effect. These cases, however, seem to say only that a finding admitted into evidence can be practically conclusive absent rebuttal evidence, and not that rebuttal evidence, when offered, is always ineffective. Thus, the chance to rebut a prior judgment is a meaningful one, and concerns that judges and juries may be unwilling to consider rebuttal evidence appear unjustified.

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evidence necessarily subjects prior proceedings to later challenge. Admitting the prior judgment and allowing an opportunity for rebuttal may lead to a rerun of the first proceeding in the second proceeding, in addition to what the second proceeding itself requires. Furthermore, a rule of evidence that seems to encourage attack on the workings of other courts may be bad policy.

It is doubtful that these are real problems in a significant number of cases. For tactical reasons, litigants will probably find it unnecessary and undesirable to argue that a tribunal’s judgments are inherently and categorically suspect or unreliable. In most cases, litigants will find the better tactic is to rebut prior judicial findings much more narrowly, by pointing out, for example, that the earlier proceeding failed to consider probative evidence. Moreover, nothing suggests that admission into evidence would subject judgments to more scrutiny than they must endure today when they are offered as collateral estoppel and courts go outside the prior record, which they do routinely.317 Our decision making institutions are not so fragile that they cannot withstand review. The opportunity to appeal a judgment is premised on that fact.

Of course, if prior judgments are unusually confusing or prejudicial, or if litigants insist on a lengthy reexamination of the first proceeding, some especially difficult situations arise. This does not justify generally rejecting the use of judgments, however. Such problems are frequent in evidence doctrine, especially when dealing with hearsay, and there are several ways of addressing them.

First, courts can always consider the effectiveness of a limiting jury instruction.318 Second, Rule 403 of the Federal Rules

317. Even if the record seems clear on its face, extrinsic evidence is permitted to show which issues actually were litigated and determined in the prior action. Restatement (Second) of Judgments § 27 comment f (1982); see Russell v. Place, 94 U.S. 606, 608-09 (1876); Lloyd v. American Export Lines, 580 F.2d 1179, 1187-90 (3d Cir.), cert. denied, 439 U.S. 969 (1978); Seaboard Air Line R.R. v. George F. McCourt Trucking, Inc., 277 F.2d 593, 597 (5th Cir. 1960); 4 D. Louisell & C. Mueller, supra note 15, § 470, at 896-901; 18 C. Wright, A. Miller & E. Cooper, supra note 1, § 4420, at 189-92. If what the first case decided remains unclear, it has no effect. Russell, 94 U.S. at 609-10; Basista v. Weir, 340 F.2d 74, 81-82 (3d Cir. 1965); cf. Columbia Plaza Corp. v. Security Nat’l Bank, 676 F.2d 780, 790 (D.C. Cir. 1982) (prior general verdict, admitted under Rule 803(22), proves nothing in subsequent case as to guilt on specific counts).

318. See Fed. R. Evid. 403 advisory committee note; accord Fed. R. Evid. 106 (providing that “[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is
of Evidence allows the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Courts frequently use Rule 403 to exclude otherwise admissible prior findings, where, for example, the prior finding might be prejudicial or confusing. If introducing the judgment is likely to lead to an indis-
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criminate reexamination of the prior proceeding, Rule 403 allows a court to conclude that the judgment's probative value is not worth the time.\textsuperscript{321} Rule 403 also applies when, wholly apart from considerations of prejudice, confusion, or time, little can be gained by admitting the prior finding into evidence. Rule 102, which sets out the goal of "elimination of unjustifiable expense and delay," provides further authority for refusing to admit judgments in these types of cases.\textsuperscript{322}

In addition to these general provisions, some specific rules that admit findings into evidence are self-limiting if prejudice, confusion, or inefficiency outweigh probative value. For example, Rule 803(8)(C), which admits administrative findings, requires "trustworthiness."\textsuperscript{323} In fact, litigants opposing the admission of an administrative finding typically make a three-

\textsuperscript{321} See Coleman, for example, the court reached this conclusion largely because the prior verdict was offered only to show witness bias. Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1350-51 (3d Cir. 1975). By authorizing an ad hoc exclusion, these cases actually support admission into evidence as a general rule. See also City of New York v. Pullman, Inc., 662 F.2d 910, 915 (2d Cir. 1981) (affirming as "eminently sound," the trial court's exclusion from evidence of a government report which, because incomplete and based on hearsay would have falsely given it "an aura of special reliability and trustworthiness" it did not merit); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1125, 1149 (E.D. Pa. 1980) (arguing that even though evidence is highly probative it can be excluded under Federal Rule of Evidence 403 in the court's discretion), aff'd in part and rev'd in part sub nom. In re Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238 (3d Cir. 1983), rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 106 S. Ct. 1348 (1986).

\textsuperscript{322} Rule 102 provides: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." FED. R. EVID. 102.

\textsuperscript{323} See supra notes 12-28 and accompanying text.
pronged argument: that the finding is not “factual,” that it is not “trustworthy,” and that in any event it is unduly prejudicial under Rule 403.324

Of course, none of these ways to control use of judgments as evidence can make jury deliberations rational or verdicts predictable. The jury system simply does not work that way. To the extent that the admission of a prior judgment introduces additional uncertainty, litigants can deal with it through the only way to conform outcomes to perceived probabilities of winning or losing—through negotiation and settlement.325 Finally, courts should not be so concerned with excluding some problematic findings that they overlook the many that are particularly useful in later litigation. For example, when the passage of time has made an accurate inquiry difficult, considering a prior finding adds both efficiency and accuracy.

Of course, whether one believes a jury can fairly evaluate a prior judgment when it is admitted into evidence depends largely on one's feelings about juries. The commentators who have addressed these questions have tended to reason inductively from their own untestable assumptions about the behavior and competence of judges and juries.326 These assumptions probably play too great a role for any answer, even one based on empirical research, to be fully persuasive to all observers.327 Taken together, however, these considerations bearing on the


326. See supra notes 297-302 and accompanying text.

competence of juries justify admitting judgments into evidence in certain situations.

B. STANDARDS FOR JURIES

One potential problem with admitting judgments into evidence is providing meaningful standards by which juries can assess the weight that should be given the prior judgment. This, however, is probably more of a problem in theory than in practice. Courts have ample experience in presenting prior findings to a jury with instructions that they are merely evidence that may be rebutted. Courts can draw on their experience in cases in which administrative findings, criminal convictions, antitrust convictions, state employment discrimination findings, or judgments of patent validity have been admitted into evidence.

An important source of guidance is the United States Supreme Court opinion in Emich Motors Corp. v. General Motors Corp. The Court’s opinion sets forth basic guidelines to

328. See infra notes 341-342 and accompanying text.

329. 340 U.S. 558 (1951). Plaintiffs, a former Chevrolet dealer and its related finance company, sought treble damages for an alleged violation of § 1 of the Sherman Act. They claimed that defendants General Motors and its wholly-owned subsidiary, General Motors Acceptance Corporation (GMAC), had conspired to force dealers to arrange new and used car purchases through GMAC. Id. at 562-63.

Earlier, General Motors and GMAC had been indicted and convicted on criminal conspiracy charges for the same activities. United States v. General Motors Corp., 121 F.2d 376 (7th Cir.), cert. denied, 314 U.S. 618 (1941). Relying on § 5(a) of the Clayton Act, the plaintiffs sought to introduce into evidence the six-volume record of testimony and exhibits in the criminal case. Emich, 340 U.S. at 564. The trial judge refused to admit the entire record, but he did admit the prior criminal indictment, verdict, and judgment. Id. He allowed the plaintiffs to rely on the conviction to show that the defendants had conspired unlawfully to compel the use of GMAC financing and to cancel dealerships to coerce compliance. Id. at 565. The jury found for the plaintiffs. Id.

On appeal, the Seventh Circuit upheld admission of only the conviction itself, and only as prima facie evidence of the conspiracy. Id. at 568. In its view, the trial court had erred in admitting the indictment and in instructing that the jury could use it to “ascertain the means and acts committed in furtherance of the conspiracy,” including the conspiracy’s resort to cancellation of dealerships to coerce compliance. Id. at 565-67 (quoting and discussing Emich Motors Corp. v. General Motors Corp., 181 F.2d 70, 75-76 (7th Cir. 1950), rev’d, 340 U.S. 558 (1951)).

On review, the Supreme Court concentrated on the language of § 5(a), which provides that the prior judgment is “prima facie evidence of all matters respecting which the judgment ‘would be an estoppel’ between the defendants and the United States.” Id. at 568 (quoting Clayton Act, ch. 323, § 5, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 16(a) (1982))). The Court said that “plaintiffs are entitled to introduce the prior judgment to establish prima
assist trial judges in dealing with the two problems that the Court associated with the use of judgments as evidence. First, the trial judge should examine the entire record to ascertain what the prior findings were.\(^3\) This is particularly important in the typical case, where the judgment is based on a general verdict.\(^3\)

Second, the trial judge must present the prior findings to the jury. "It is the task of the trial judge to make clear to the jury the issues that were determined against the defendant in the prior suit, and to limit to those issues the effect of that judgment as evidence in the present action."\(^3\) He "must be free to exercise 'a well-established range of judicial discretion'" to educate and inform the jury about the prior litigation.\(^3\)

The Court explained that the trial judge "is not precluded from resorting to such portions of the record, including the pleadings and judgment, in the antecedent case as he may find necessary or appropriate to use in presenting to the jury a clear picture of the issues decided there and relevant to the case on trial."\(^3\) When necessary, the judge should omit prejudicial aspects of the prior finding.\(^3\) The judge may give these instructions either when the prior judgment is offered into evidence, or at any later appropriate time.\(^3\)

facie all matters of fact and law necessarily decided by the conviction and the verdict on which it was based." \(^{Id.}\) at 569. Finally, the Court agreed with the trial court that the conviction was admissible to prove the specific coercive practices as well as the conspiracy. \(^{Id.}\) at 570-71.

30.\(^{Emich,}\) 340 U.S. at 569 ("Under these circumstances what was decided by the judgment must be determined by the trial judge hearing the treble damage suit, upon an examination of the record, including the pleadings, the evidence submitted, the instructions under which the jury arrived at its verdict, and any opinions of the courts.") (citations omitted).


32. \(^{Emich,}\) 340 U.S. at 571.

33. \(^{Id.}\)

34. \(^{Id.}\) at 571-72; \(^{see\ also}\) Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 194 F.2d 846, 853-54 (8th Cir.) (allowing admission of excerpt from jury instructions given at previous trial), \(^{cert. denied}\) 343 U.S. 942 (1952).

35. \(^{See\ S.\ Saltzburg\ &\ K.\ Redden,\ Federal\ Rules\ of\ Evidence\ Manual\ 583-85\ (3d\ ed.\ 1982\ &\ Supp.\ 1985).}\)

36. \(^{Emich,}\) 340 U.S. at 572. Several years after \(^{Emich,}\) the Supreme Court provided more specific guidance by approving the following instruction, in which the trial judge had explained the force of a prior judgment on related facts:

\[\text{These same defendants had, at a time previous to the opening of the Crest Theatre, conspired together in restraint of trade in violation of}\]
Emich thus established guidelines when before there had been few. Along with other later Clayton Act cases, it has guided the use of judgments as evidence in other situations, even those that do not use the express “prima facie evidence” formula found in the Clayton Act. For example, Rule 803(22) of the Federal Rules of Evidence does not say what weight prior criminal convictions should receive, but courts admitting them into evidence have followed Emich either explicitly or implicitly. Emich is particularly applicable to criminal con-

these same Anti-Trust laws, in restricting to themselves first run and in establishing certain clearances in numerous places throughout the United States. Thus, these proven facts, I instruct you, become prima facie evidence in the present case, which the plaintiff may use in support of its claim that what the defendants have done since those decrees, in the present case in Baltimore, is within the prohibition of those earlier decrees. However, this is only prima facie evidence. There was not before the Court in the prior case the present factual situation which is before you now with respect to Baltimore theatres. Therefore, it is still necessary in the present case, in order for the plaintiff to recover, for it to prove to your satisfaction, by the weight of the credible evidence, that these defendants, or some of them, have conspired in an unreasonable manner to keep first run exhibitions from the plaintiff, or have conspired to restrict plaintiff to clearances which are unreasonable.


337. For additional commentary on Emich, see Timberlake, The Use of Government Judgments or Decrees in Subsequent Treble Damage Actions Under the Antitrust Laws, 36 N.Y.U. L. Rev 991, 996-1008 (1961). For a discussion of some of these techniques in the Rule 803(8)(C) context, see Note, Trustworthiness, supra note 15, at 597-99. Before Emich, “the practice seems to have been to admit rather haphazardly all or portions of the complaint of indictment, the decree or judgment, and perhaps parts of the record which indicated relevant issues determined in the Government litigation.” Note, Government Antitrust Judgments as Evidence in Private Actions, supra note 58, at 1404 (citing Eastman Kodak Co. v. Southern Photo Materials Co., 295 F. 98, 100 (5th Cir. 1923), aff’d on other grounds, 273 U.S. 359 (1927)).


victions because both the Clayton Act and Rule 803(22) admit into evidence only findings that were necessary to the prior judgment.340

In other contexts, such as administrative findings, courts have used an approach that is consistent with Emich, but have not relied expressly on antitrust or criminal cases. For example, the United States District Court for the Western District of Missouri gave the following instruction, which is typical in cautioning that the administrative finding is mere evidence, and in suggesting why the jury might reach a different conclusion:

[The finding] is not binding on you. This lawsuit is an independent inquiry. You are hearing testimony that was not or may not have been presented to the government agency. In this lawsuit we are having a hearing in which attorneys for both sides can cross examine witnesses, which may help you in determining the truth in this case. The government agency did not hold such a hearing, under its procedures, and you may consider that in determining how much weight, if any, to give the findings and actions of the [agency]. You may consider the extent of the [agency] investigation, as recited in the report . . . and other testimony in this case, and you may give the report as much weight, if any, in your deliberations as you conclude should be given to it.341

In a different case, the Fifth Circuit upheld a less elaborate instruction concerning administrative law judge findings adopted by the Federal Trade Commission. The district court instructed that the findings “may be received as evidence instead of, for example, having a witness testify to those matters or instead of having a document introduced to show it. It is simply evidence to be considered by you along with all the other evidence in the case.”342

Title VII cases are less instructive because none of the par-

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ties have a right to a jury trial. The relevant factors, however, are similar, and were set out by the Supreme Court in *Alexander v. Gardner-Denver Co.*, which concerned the use of arbitral findings as evidence in later Title VII suits. Factors to consider in assessing the weight to be given the prior determination include the similarity between the substantive principles in the two proceedings, the "degree of procedural fairness," the "adequacy of the record," and the "special competence of particular arbitrators." The prior finding may be entitled to "great weight" if it gave "full consideration" to the Title VII claim, especially when the issue was "solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record." At least one lower court has used these guidelines for state findings in Title VII cases, and the EEOC has incorporated them into its regulations.

Some courts have gone one step further and tried to relate the evidentiary weight of a prior judgment to burdens of production and persuasion. According to most courts, the prior judgment is "prima facie evidence" in the sense that it satisfies the plaintiff’s burden of production on the issue. The de-

345. *See supra* notes 64-86 and accompanying text.
347. *Id.*
349. The regulations provide:

> "Substantial weight" shall mean that such full and careful consideration shall be accorded to final findings and orders, as defined above, as is appropriate in light of the facts supporting them, when they meet all of the prerequisites set forth below: (i) The proceedings were fair and regular; and (ii) The practices prohibited by the State or local law are comparable in scope to the practices prohibited Federal law; and (iii) The final findings and order serve the interest of the effective enforcement of Title VII: *Provided*, That giving substantial weight to final findings and orders of a 706 Agency does not include according weight, for purposes of applying Federal law, to such Agency’s conclusions of law.

fendant can still offer rebuttal evidence, and the plaintiff still has the burden of persuasion. Commentators generally agree with this approach. The authorities do not discuss whether the prior judgment is “prima facie evidence” in the sense that it would require a verdict be directed for the plaintiff if the defendant offers no rebuttal evidence at all, perhaps because such cases are rare or nonexistent. In any event, this ambiguity is not a problem for the jury, but rather for the judge.

These previous observations address the situation in which the party with both the burdens of production and persuasion offers the judgment into evidence. In the patent validity cases, the party who offers the prior finding has neither burden. The prior finding of validity enhances the burden borne by the party asserting invalidity, by requiring it to overcome the combined effect of the statutory presumption and the prior finding. This approach presumably would apply in other cases in which the offering party does not have the burdens of production and persuasion.

Distilling a more specific rule for presenting prior findings to juries, given the variety of situations in which the issue can arise, is difficult at best and misleading at worst. The more prudent course is to use prior experience to draw a few limited conclusions about handling judgments as evidence. First, courts have developed some guidelines that are very general but may be tailored to fit each case. Second, many courts have applied some form of these guidelines in many cases. Finally, there has been no serious criticism of these standards, either generally or for their apparent lack of precision.

Courts have vast experience with judgments as evidence. If their guidelines seem imprecise, they are imprecise in ways

nlications Co. v. American Tel. & Tel. Co., 740 F.2d 1011, 1021 (D.C. Cir. 1984); McCook v. Standard Oil Co., 393 F. Supp. 256, 260 (C.D. Cal. 1975). Another court has said that prima facie evidence “results in shifting the burden of proof to the defendants, but the statute does not preclude them from putting up a defense.” Illinois v. General Paving Co., 590 F.2d 680, 681 (7th Cir.), cert. denied, 444 U.S. 879 (1979). It would be consistent with the other interpretations of “prima facie evidence” set forth above to assume that the term refers to the burden of production, not the burden of persuasion.


352. Because the patentee has established validity in a prior proceeding, the burdens of production and persuasion shift to the alleged infringer who must present convincing justification for departing from the prior finding of validity. See supra notes 97-99 and accompanying text.

353. See supra notes 89-99 and accompanying text.
that courts in the common-law tradition generally find acceptable and perhaps even desirable. Criticism of the practice has been absent when its use has been heaviest, and this silence speaks powerfully in its favor. As previously discussed, the haphazard pattern of admissible judgments reflects the historical expansion of collateral estoppel, not the view that juries can evaluate these findings better than others. Finally, the alternative is unattractive. Unless judgments are admitted into evidence against nonparties, the pressure for nonparty preclusion threatens to distort collateral estoppel.

VI. A PROPOSAL

The foregoing analysis suggests that the general rule of law preventing the evidentiary use of prior judgments should be modified. More specifically, a new rule should be adopted stating that, to the extent that a prior finding would be collateral estoppel against a party, it should be admissible as evidence against a nonparty. The most direct method of implementing this modification would be to add an appropriately drafted hearsay exception to the rules of evidence. Alternatively, prior findings might also be admissible under existing residual exceptions, such as Rules 803(24) and 804(b)(5) of the Federal Rules of Evidence.

Evidence offered under the residual exceptions must have "circumstantial guarantees of trustworthiness" equaling those of the other hearsay exceptions. It must be "offered as evidence of a material fact" and "more probative on the point for

354. See supra notes 11-108 and accompanying text.
355. Rule 803(24) provides a hearsay exception for [a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant. FED. R. EVID. 803(24). Rule 804(b)(5) is an identically worded provision that applies when the declarant is unavailable. See FED. R. EVID. 804(b)(5). Courts generally analyze and apply the two provisions in roughly the same manner. See 4 D. LOUISELL & C. MUELLER, supra note 15, § 472, at 922-23.
356. FED. R. EVID. 803(24), 804(b)(5).
which it is offered than any other evidence which the proponent can procure through reasonable efforts. Admission must accord with "the general purposes of these rules and the interests of justice." Lastly, the proponent must provide notice of its intent to offer the evidence.

At present, no reported cases have admitted a prior domestic judicial finding into evidence under either residual exception in the Federal Rules. Moreover, no commentators proposed reading the residual exceptions to allow admission of prior judicial findings. Several cases, however, have used these exceptions to admit material from earlier judicial proceedings, and Judge Jack B. Weinstein has observed that "rules 803(22) [judgment of previous conviction], 803(23) [judgment as to personal, family, or general history, or boundaries], and 803(24) [residual exception] provide the possibility for development of a broader exception for judgments." Nothing in the language or history of the rules suggests that they cannot apply to judicial findings.

The "material fact" and "interests of justice" requirements merely restate general principles already established under Rules 401 and 402, and under Rule 102, respectively. The notice requirement presents no obstacle, and the trustworthiness of a judicial finding is likely to equal or surpass that of "industry standards" and "opinion polls," which courts regularly admit under the residual exception.

357. Id.
358. Id.
359. Id.
362. 4 J. WEINSTEIN & M. BERGER, supra note 4, \$ 802(23)[01], at 803-367.
363. See 4 D. LOUISELL & C. MUELLER, supra note 15, \$ 472, at 934, 939; 4 J. WEINSTEIN & M. BERGER, supra note 4, \$ 803(24)[01].
364. See Stonehocker v. General Motors Corp., 587 F.2d 151, 155-57 (4th Cir. 1978) (federal safety standards admissible); Doss v. Apache Powder Co., 430 F.2d 1317, 1322 (5th Cir. 1970) ("safety manual properly admitted because
The major technical barrier to admission is that the prior finding must be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." Under a grudging reading, the finding must be more probative than all other evidence already received on the issue. This interpretation would exclude a reliable finding even if its proponent has been diligent and admitting it would help resolve a conflict in evidence. A better interpretation of the residual exception would require only that the proponent introduce all evidence within reasonable reach that is "more probative" than the prior finding before offering the finding itself.

A more basic problem with admitting prior judgments under the residual exception concerns its general purpose. On the one hand, the residual exception reflects a recognition that not all hearsay that should be admissible can be described in specific exceptions. On the other hand, it is equally clear that the rule against hearsay remains a rule of exclusion with enumerated exceptions, and Congress cautioned that the residual exception be "used very rarely, and only in exceptional circumstances." Its use to admit judgments into evidence depends on courts' willingness to read the exception broadly.

The substance of the proposal is the same whether prior judgments are admitted under a new hearsay exception or under existing Rules 803(24) and 804(b)(5). In either case, the proposal for use of judgments as evidence is a limited one. Judgments would be admissible into evidence only against a nonparty not subject to collateral estoppel. They would be admissible only to the extent that they would be collateral estoppel against a party. The word "evidence" refers to the degree


[Fed. R. Evid. 803(24), 804(b)(5).


of subsequent effect that courts have accorded to the groups of admissible prior findings that this Article has discussed.\textsuperscript{369} The finding itself gives rise to an inference, and this inference is sufficient to satisfy the burden of production. If the opponent comes forward with rebuttal evidence, the issue is for the trier of fact. The admission of the prior finding does not shift the burden of persuasion. As a mere inference, it does not create a rebuttable presumption that would compel a directed verdict on the issue absent rebuttal evidence.\textsuperscript{370}

There are reasons for the limiting features of this proposal. Using judgments as evidence will be manageable if courts use strict collateral estoppel rules to ascertain what an earlier case decided. By hypothesis, this will be no more difficult for judgments as evidence than it is for collateral estoppel.\textsuperscript{371} A prior finding would be admitted only as to matters actually and necessarily decided.\textsuperscript{372} These rules will help screen out prejudicial, unreliable, and useless prior findings. They also will allow courts admitting judgments as evidence against nonparties to rely on a well-established body of case law.

Another reason to limit the proposed rule is the inevitable skepticism about a jury’s ability to fairly and competently evaluate a prior judgment. Not everyone will be convinced of a

\begin{footnotesize}
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\item[369.] See supra notes 11-108 and accompanying text.
\item[370.] For discussion of the often confusing terminology, see Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 253-56 & nn.7 & 8 (1981); 1 D. LOUISELL & C. MUELLER, supra note 15, § 67, at 532-39 (1977); Shapiro, supra note 144, at 49-50 & n.108. Under the Federal Rules of Evidence, Rule 301 governs “presumptions” and provides that a “presumption imposes on the party against whom it is directed the burden of going forward with evidence to meet or rebut the presumption,... but does not shift the risk of nonpersuasion.” FED. R. EVID. 301. Shifting the burden of persuasion, however, against a non-party raises serious due process concerns. See Armstrong v. Manzo, 380 U.S. 545, 551-52 (1965).
\item[371.] In fact, several of the categories of admissible judgments rely on collateral estoppel rules. Rule 803(22) admits a prior conviction “to prove any fact essential to sustain the judgment.” FED. R. EVID. 803(22); see supra notes 29-44 and accompanying text. The infrequently used hearsay exception for personal, family, or general history, or boundaries, similarly refers to matters “essential to the judgment.” FED. R. EVID. 803(23). Similarly, § 5(a) of the Clayton Act admits antitrust judgments “as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto.” Clayton Act § 5(a), 15 U.S.C. § 16(a) (1982); see supra notes 45-63 and accompanying text. “The evidentiary use which may be made under § 5 of the prior conviction of respondents is thus to be determined by reference to the general doctrine of estoppel.” Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568 (1951).
\item[372.] Eagle Lion Studios v. Loew’s, Inc., 248 F.2d 438, 444 (2d Cir. 1957), aff’d by an equally divided Court, 358 U.S. 100 (1958).
\end{enumerate}
\end{footnotesize}
This proposal focuses on cases of greatest need—litigation involving nonparties to the first case. For the same reason, the evidentiary treatment proposed is merely at the level of "inference."

These limitations are acceptable because they do not thwart the basic purpose of the proposal, which is to insure proper respect for the processes and decisions of courts and similar tribunals. That respect suffers most when neither collateral estoppel nor the rules of evidence allow a reliable finding to affect later litigation involving new parties. Sound collateral estoppel doctrine always will be an incomplete solution because its concerns go beyond the reliability of the prior finding. Until courts and commentators recognize that collateral estoppel and evidence are both methods of giving effect to the reliable results of prior decision making, each with its own role, the law in both areas is likely to suffer.

CONCLUSION

No general rule permits the evidentiary use of prior judgments, and the conventional wisdom is that they are inadmissible hearsay. Conventional wisdom notwithstanding, courts routinely admit several large categories of prior findings into evidence. These findings were originally admitted into evidence because they were, for various reasons, ineligible for collateral estoppel. Use as evidence was the only avenue that would give them any effect in the subsequent proceeding. As the doctrine of collateral estoppel expanded, however, these types of findings came, quite by historical accident, to enjoy preferential treatment: a range of subsequent effect from use as evidence to full collateral estoppel effect. This state of affairs forces us to ask if judgments are still useful as evidence, and if so, when they should be used as evidence instead of collateral estoppel.

Comparing collateral estoppel and use of judgments as evidence reveals a basic difference in approach. Evidence doctrine in general is concerned primarily with reliability, and prior findings were admitted into evidence because they were reliable. Collateral estoppel is also concerned with reliability, but because of its severity, it encompasses other policies as well, the most important of which is the party's opportunity to participate in the prior proceeding.

It is consistent with these similarities and differences between evidence and collateral estoppel that a prior judgment
generally may not be employed to collaterally estop someone who was not a party or a privy to the prior proceeding. It also follows that prior judgments should be admissible into evidence against a nonparty. Indeed, under present law, prior proceedings can affect nonparties through several avenues that resemble the use of prior findings as evidence. As yet, however, prior judgments are not generally admissible into evidence.

Recently, the rule against collateral estoppel of nonparties has shown signs of weakening, and prior findings have in some cases been used to collaterally estop persons who were not parties or privies in the prior proceeding.

By allowing the collateral estoppel of nonparties to the original suit, courts and commentators are forcing collateral estoppel to fulfill a function that has historically been filled by admitting judgments into evidence: that of giving prior judgments subsequent effect when those judgments are reliable but other policies, extrinsic to reliability, bar the use of collateral estoppel. This is a most unfortunate development, because it fails to recognize the inherent limits of adjudication and the fact that participation in the prior proceeding is one of the most significant justifications for collateral estoppel.

A much sounder method for enabling prior findings to affect nonparties is to admit them into evidence. Extensive experience with the categories of prior judgments that are already admissible indicates that juries are institutionally capable of fairly evaluating prior judgments, and that courts can provide sufficient standards to assist them in that task. Through either a new exception to the rule against hearsay, or through a liberal interpretation of the residual exception, a new rule should be created stating that, to the extent a prior finding would be collateral estoppel against a party, it should be admissible as evidence against a nonparty.