JUDICIAL ESTOPPEL—BEATING SHIELDS INTO SWORDS AND BACK AGAIN

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INTRODUCTION

Suppose that drivers A and B are involved in an automobile accident in which a bystander, C, is also injured. The state in which the accident occurs is a comparative negligence jurisdiction. A sues B, and on the advice of counsel, in order to expedite the case, admits to being twenty percent responsible for the accident. A wins his suit against B. C then sues A for his injuries, and A denies responsibility. C claims that A may not attempt to contradict his earlier assertion, and thus moves for summary judgment for twenty percent of his damages. The judge finds that A asserted his partial responsibility for the accident with B, that the prior court accepted that assertion, and that A is now judicially estopped from denying twenty percent responsibility for the accident, byproducts of which were C's injuries. Is it fair to prevent A from disclaiming responsibility for C's injuries in the later action simply because, on the tactical advice of his attorney, he asserted partial responsibility for the accident in question?

Judicial estoppel, sometimes called the doctrine against the assertion of inconsistent positions,¹ prevents a litigant from attempting to assert a position inconsistent with one that he has asserted in a previous judicial proceeding.² The doctrine has not been uniformly adopted by either state or federal courts,³ and the

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¹ See *Ellis v. Arkansas La. Gas Co.*, 609 F.2d 436, 440-41 (10th Cir. 1979), *cert. denied*, 445 U.S. 964 (1980); Note, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 GEO. WASH. L. REV. 409, 410 n.8 (1987) [hereinafter *Refurbishing a Judicial Shield*]; Comment, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 NW. U.L. REV. 1244 (1986) [hereinafter *Inconsistent Statements*].

² This Comment will not explore the difficult question of whether, if the doctrine should be used at all, it should apply to assertions not made in actual "court cases." See generally *Konstantinidis v. Chen*, 626 F.2d 933, 935 (D.C. Cir. 1980) (statements made to workmen's compensation board); B. SHIPMAN, *HANDBOOK OF COMMON-LAW PLEADING* 435 (3d ed. 1923) (noting the operation of estoppels from different matters).

³ For federal circuits that have accepted the doctrine, see, e.g., *Astor Chauffeured*

United States Supreme Court has never explicitly ruled on the validity of the doctrine, only mentioning it once in passing.⁴ The power granted by the doctrine of judicial estoppel permits both plaintiffs⁵ and defendants to prevent the disposition of otherwise meritorious cases—in other words it is capable of being used as a sword, rather than as a shield.⁶

Limousine Co. v. Runnfeldt Inv. Corp., 910 F.2d 1540, 1547-48 (7th Cir. 1990); *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 716 (9th Cir. 1990); *Young v. United States Dep't of Justice*, 882 F.2d 633, 639-40 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1116 (1990); *Water Technologies Corp. v. Calco, Ltd.*, 850 F.2d 660, 665 (Fed. Cir.), *cert. denied*, 488 U.S. 968 (1988); *American Nat'l Bank v. Federal Deposit Ins. Corp.*, 710 F.2d 1528, 1536 (11th Cir. 1983); *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982); *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982). *But see* *New York Chinese TV Programs, Inc. v. U.E. Enterprises, Inc.*, No. 89-6082 (S.D.N.Y. June 14, 1991) (LEXIS, Genfed library, Dist file) (finding the doctrine to conflict with Rule 8(e)(2) and noting that its vitality in the Second Circuit is in serious doubt); *David v. Showtime/The Movie Channel, Inc.*, 697 F.Supp. 752, 762-63 (S.D.N.Y. 1988).

For federal circuits that have rejected the doctrine, see, e.g., *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1520 n.10 (10th Cir. 1991) ("this court does not recognize the doctrine of judicial estoppel"); *Konstantinidis v. Chen*, 626 F.2d 933, 938 (D.C. Cir. 1980); *Parkinson v. California Co.*, 233 F.2d 432, 438 (10th Cir. 1956); *cf.* *Dugan v. EMS Helicopters, Inc.*, 915 F.2d 1428, 1432 (10th Cir. 1990) (reaffirming *Parkinson*).

For state courts adopting the doctrine, see, e.g., *Ray v. Midfield Park, Inc.*, 289 Ala. 137, 142, 266 So.2d 291, 295 (1972); *Smith ex rel. Smith v. Marchant Enters., Inc.*, 791 P.2d 354, 356 (Alaska 1990); *Rosa v. CWJ Contractors, Ltd.*, 4 Haw. App. 210, 219, 664 P.2d 745, 751 (1983); *Panama Processes, S.A. v. Cities Serv. Co.*, 796 P.2d 276, 286 (Okla. 1990); *Hicks v. Andrew Johnson Bank*, No. 137 (Tenn. Ct. App. filed Mar. 16, 1990) (LEXIS, States library, Tenn file); *Long v. Knox*, 155 Tex. 581, 585, 291 S.W.2d 292, 295 (1956); *Allen v. Allen*, 550 P.2d 1137, 1142 (Wyo. 1976).

For states rejecting the doctrine, see, e.g., *Brown v. Gerstein*, 17 Mass. App. Ct. 558, 568-69 n.19, 460 N.E.2d 1043, 1051 n.19 (1984), *review denied*, 391 Mass. 1105, 464 N.E.2d 73; *MacFarlane v. Manly*, 274 S.C. 392, 395, 264 S.E.2d 838, 840 (1980).

⁴ See *Huffman v. Pursue*, 420 U.S. 592, 606 n.18 (1975). In *Huffman*, the Court stated that

[w]e in no way intend to suggest that there is a right of access to a federal forum for the disposition of all federal issues, or that the normal rules of res judicata and judicial estoppel do not operate to bar relitigation in actions under 42 U.S.C. § 1983 of federal issues arising in state court proceedings.

Id. However, due to the facts of that case, it is likely that the Court was not referring to judicial estoppel, since it involved the relitigation of previously decided issues between the same parties. See *id.* at 595-99. Thus, the Court has never actually considered the use of judicial estoppel in federal courts.

⁵ See *infra* note 15 regarding offensive use of judicial estoppel.

⁶ The title of this Comment is derived from a remark made by the Supreme Court in *Edelman v. Jordan*, 415 U.S. 651 (1974), in which the Court said of the holding in *Ex parte Young*, 209 U.S. 123 (1908), that it had enabled the Civil War Amendments to "serve as a sword, rather than merely as a shield, for those whom they were

Even those jurisdictions that accept the doctrine cannot agree on its purpose or requirements.⁷ The first use of the doctrine, in Tennessee in 1857, held that the assertion of any position in a judicial proceeding could work an estoppel on a later attempt to contradict that position in the same or a different proceeding, unless the first assertion was caused by a mistake, inadvertence, or fraud.⁸ The Tennessee Supreme Court justified this "absolute rule"⁹ with its desire to protect the sanctity of the oath, and to safeguard the judicial system from being abused and having its image tainted.¹⁰ Other courts have said that the purpose of the doctrine is "[t]o avoid repetitious litigation and to protect justifiable reliance on opposing parties' positions in litigation."¹¹ Tennessee requires only that the previous assertion have been made under oath¹² and that the new assertion be inconsistent with it.¹³ Other jurisdictions tone down that rule somewhat by requiring that the parties be in privity or that the party contesting the estoppel have enjoyed a "prior success" with the first assertion.¹⁴

Whatever the justifications and requirements of the doctrine may be, its application is fraught with the potential for causing litigants great hardship. The doctrine may also impede the truth-

designed to protect." See *Edelman*, 415 U.S. at 664.

⁷ See *Young v. United States Dep't of Justice*, 882 F.2d 633, 639 (2d Cir. 1989) ("The circumstances under which the doctrine could be applied are far from clear."), *cert. denied*, 110 S. Ct. 1116 (1990); cf. *Konstantinidis v. Chen*, 626 F.2d 933, 936 n.6 (D.C. Cir. 1980) (rejecting the doctrine, but noting that "[t]he definitions of . . . 'judicial estoppel' vary considerably throughout the literature of this confused area of the law"). See *infra* notes 38-84 and accompanying text.

⁸ See *Hamilton v. Zimmerman*, 37 Tenn. (5 Sneed) 39, 47-48 (1857).

⁹ See *Inconsistent Statements*, *supra* note 1, at 1246.

¹⁰ See *Hamilton*, 37 Tenn. (5 Sneed) at 48. See also *Young*, 882 F.2d at 639 (describing the purpose of the doctrine as protecting judicial integrity and avoiding "unseemliness"); *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953) (describing the maintenance of inconsistent positions as "playing 'fast and loose with the courts,'" which was an "affront to judicial dignity").

¹¹ *Ellis v. Arkansas La. Gas Co.*, 609 F.2d 436, 440 (10th Cir. 1979) (applying the Oklahoma version of the doctrine in a diversity case), *cert. denied*, 445 U.S. 964 (1980). Oklahoma's justifications for judicial estoppel are strikingly similar to those advanced for equitable estoppel in other jurisdictions. This similarity is not surprising in light of the fact that under Oklahoma law the two doctrines appear to have almost identical requirements. See *id.*; *infra* notes 28-29 and accompanying text.

¹² See *Hamilton*, 37 Tenn. (5 Sneed) at 48. That requirement may have fallen by the wayside recently. See *Hicks v. Andrew Johnson Bank*, No. 137 (Tenn. Ct. App. filed Mar. 16, 1990) (LEXIS, States library, Tenn file).

¹³ See *Hamilton*, 37 Tenn. (5 Sneed) at 48.

¹⁴ See generally *Inconsistent Statements*, *supra* note 1, at 1249-50 (detailing various formulations of the doctrine).

seeking purpose of the judicial system, as its use will more often than not result in a litigant's entire case being thrown out.¹⁵ Moreover, there are certain cases in which a litigant cannot help but assert inconsistent positions in separate judicial actions, and judicial estoppel, at least in its absolute form,¹⁶ would appear to apply to these cases to prevent a court from uncovering the truth of a matter.¹⁷

¹⁵ See *id.* at 1244 n. 2; *Finley v. Kesling*, 105 Ill. App. 3d 1, 433 N.E.2d 1112 (1982). In *Finley*, the plaintiff had asserted in an Indiana divorce suit that his children owned 40% of the stock of the Oakland A's baseball team. The court accepted that assertion in dividing up the marital property. Eight years later, when the plaintiff instituted this suit for a declaratory judgment that he was the beneficial owner of that stock, the Illinois court held that he was judicially estopped from maintaining such a claim. See 105 Ill. App. 3d at 2-6, 433 N.E.2d at 1114-16. That holding only precluded the position that *Finley* was the beneficial owner of the stock in question, yet its result was the dismissal of his suit in its entirety. See *id.* at 10, 433 N.E.2d at 1119. It is interesting to note that the assertions in this case may not in fact have been "inconsistent," if Illinois distinguishes between actual ownership and beneficial ownership. The court did not discuss this point, but simply assumed that the plaintiff's claim was that the stock was "in effect, his property." See *id.*; *infra* notes 199-204 and accompanying text (regarding flawed analyses of consistency). A far more interesting point about *Finley* is that the case was in fact decided under Illinois' doctrine of collateral estoppel. The court used judicial estoppel only to add force to its holding that *Finley* was collaterally estopped from "challenging" the Indiana divorce decree in its courts. See 105 Ill. App. 3d at 10, 433 N.E.2d at 1119. As a result of its factual posture, *Finley* presents several problems regarding choice of law. Not only is there the choice of which state's estoppel formulations to apply, there is also the choice of which state's common law or statutes regarding (beneficial) ownership should apply. In a case of this nature, which state's law should a court use to decide if the assertions are actually inconsistent?

In large part, this Comment presumes that a defendant is seeking to preclude a plaintiff from asserting a position contrary to one previously taken. However, it is also possible for judicial estoppel, like collateral estoppel, to be used "offensively" by a plaintiff against a defendant. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331-33 (1979). Indeed, it is difficult to see why the estoppel permitted in *Parklane Hosiery* could not just as easily be labeled "judicial." The only difference is that the defendant in that case was not successful in maintaining its prior position. However, as the hypothetical in the opening paragraph of this Comment reveals, satisfying this prior success requirement is conceivable.

Tennessee, always at the vanguard with respect to judicial estoppel, appears to have permitted offensive use of the doctrine this past year, in *Moore v. Mundy*, No. 01-A-01-9002-CH-00071 (Tenn. Ct. App., Aug. 1, 1990) (LEXIS, States library, Tenn. file). In that case, the defendant was first judicially estopped from asserting a defense inconsistent with a position that he had maintained successfully in a prior suit against a different party. See *id.*, slip op. at 3. The court then used the prior position to find the defendant liable to the plaintiffs and enter judgment for them. See *id.*, slip op. at 7-8.

¹⁶ See *supra* notes 8-9 and accompanying text.

¹⁷ For example, jurisdictional peculiarities may require that different aspects of a plaintiff's asserted rights be adjudicated in different fora, and hence in separate

In its most basic form, judicial estoppel operates to prevent a litigant from attempting to contradict a position which he has asserted¹⁸ in a prior judicial proceeding, whether or not the prior proceeding was against the party seeking to use the estoppel.¹⁹ Some jurisdictions, however, have demanded that the party seeking to use the estoppel have been a party to the prior action.²⁰ Other jurisdictions have required that the party seeking the benefit of the doctrine demonstrate that it justifiably relied on the prior assertion.²¹

actions. This raises the possibility that a plaintiff might have to elect which rights to pursue even when election of remedies would not have been required had all claims been presented in a single proceeding. *Cf. Guy James Constr. Co. v. Trinity Indus.*, 644 F.2d 525, 529-30 (5th Cir. 1981) (discussing application of Texas law of election of remedies).

In *In re Johnson*, 518 F.2d 246, 253 (10th Cir.), *cert. denied*, 423 U.S. 893 (1975), the court noted that one of the claims could not have been brought in the earlier proceeding. In *Kalikow 78/79 Co. v. State*, No. 41299-89 (N.Y. Sup. Ct. filed Feb. 2, 1990), the plaintiff had previously brought a proceeding under New York's Article 78 to have the real estate taxes lowered on several properties. The plaintiff then sued the state of New York for a declaratory judgment that, among other things, its real estate tax assessment system was unconstitutional. The court found that he was judicially estopped to claim first that his taxes were too high and then ask for relief that would, in effect, raise everyone's taxes. *See id.*, slip op. at 10, 15. The plaintiff would, however, have been able to make both assertions in one proceeding, except that actions for declaratory judgments may not be brought in Article 78 proceedings and vice-versa. *See N.Y. CIV. PRAC. L. & R.* 3014 (Consol. 1989); *Ammex Warehouse Co. v. Procaccino*, 85 Misc. 2d 327, 329, 378 N.Y.S.2d 848 (Sup. Ct. N.Y. Co.), *aff'd*, 55 A.D.2d 535, 389 N.Y.S.2d 548 (1976). Judicial estoppel is thus capable not only of preventing a court from finding the truth, but also of forcing a litigant to choose amongst otherwise valid rights to assert.

¹⁸ Most jurisdictions require that the party to be estopped have enjoyed some success in the maintenance of that prior assertion. *See* cases cited in appendix, *infra* notes 286-332. *But see* *Hamilton v. Zimmerman*, 37 Tenn. (5 Sneed) 39, 48 (1857) (requiring only that the prior assertion have been under oath).

¹⁹ *See, e.g.,* *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982) ("[J]udicial estoppel may be applied even if . . . privity does not exist."); *Konstantinidis v. Chen*, 626 F.2d 933, 937 (D.C. Cir. 1980) (same).

²⁰ *See, e.g.,* *Ellis v. Arkansas La. Gas Co.*, 609 F.2d 436, 440 (10th Cir. 1979) ("[T]he parties . . . must be the same."), *cert. denied*, 445 U.S. 964 (1980); *Johnson*, 518 F.2d at 252 (same); *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953) ("A plaintiff who has obtained relief from an adversary [with] one position may not be heard . . . to contradict himself . . . to establish against the same adversary a second claim inconsistent with [the first].").

²¹ *See, e.g.,* *Young v. United States Dep't of Justice*, 882 F.2d 633, 639 (2d Cir. 1989) ("The key ingredient, however, is reliance."), *cert. denied*, 110 S. Ct. 1116 (1990); *Ellis*, 609 F.2d at 440 ("[T]he party claiming estoppel must have . . . changed his position.").

This Comment will argue that the doctrine of judicial estoppel, as it has been defined and applied since 1857,²² yields harsh and unjust results. In addition, it violates the principles behind the now almost universally accepted practice of permitting inconsistent and alternative pleading.²³ Consequently, this Comment will argue that the doctrine should be abandoned in jurisdictions whose rules of civil procedure, including their discovery rules, are similar to the Federal Rules of Civil Procedure.²⁴

Part I of this Comment will examine the forms of judicial estoppel that have been applied (and rejected) in the federal circuits and in representative state courts, along with other forms of estoppel that are commonly used, and will also look at the purposes behind such doctrines, their benefits, and their drawbacks. Part II will examine the purposes and policies behind procedural systems which permit inconsistent and alternative pleading, and will specifically look into the rationales for the adoption of Rule 8(e)(2) of the Federal Rules of Civil Procedure. Part III will argue that the doctrine of judicial estoppel conflicts with the goals behind systems that permit or encourage inconsistent and alternative pleading, and will examine other objections to the doctrine. Finally, Part IV will examine the Tenth Circuit's recent affirmations of its anti-judicial estoppel stance,²⁵ and will propose a model for the use of prior

²² See *supra* note 8 and accompanying text.

²³ See, e.g., FED. R. CIV. P. 8(e)(2) (permitting inconsistent, alternative and hypothetical pleading); N.Y. CIV. PRAC. L. & R. 3014 (Consol. 1989) (same); *Parkinson v. California Co.*, 233 F.2d 432, 438 (10th Cir. 1956) (holding that judicial estoppel conflicts with the spirit of Rule 8(e)(2)); cf. *Giannone v. United States Steel Corp.*, 238 F.2d 544, 547-48 (3d Cir. 1956) (noting the court's perception that it would defeat the policy behind Rule 8(e)(2) by permitting prior inconsistent pleadings to be admissible as evidence against their maker in a later case). See generally C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING, 254-58 (2d ed. 1947) (noting that by that time, at least 20 states and the federal courts had adopted systems that permitted alternative and inconsistent pleading).

²⁴ It is beyond the scope of this Comment to attempt to canvass, on a state-by-state basis, the pleading systems now in effect in the United States. For that reason, this Comment will confine itself to an examination of judicial estoppel in the federal courts and in selected state courts, where that examination is illustrative. The author leaves for another day the task of categorizing the state pleading systems and deciding which ones fit the analytical framework of this Comment, and does not mean to imply that this Comment constitutes an exhaustive study.

²⁵ See *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1520 n.10 (10th Cir. 1991); *Dugan v. EMS Helicopters, Inc.*, 915 F.2d 1428, 1432 (10th Cir. 1990); *United States v. 49.01 Acres of Land*, 802 F.2d 387, 390 (10th Cir. 1986). But see *Refurbishing a Judicial Shield*, *supra* note 1, at 426 (claiming that the Tenth Circuit had been retreating from its hostility to judicial estoppel and was attempting to limit *Parkinson* to its facts).

inconsistent positions to create a "bursting bubble" presumption²⁶ as to the truth of prior assertions. This presumption, along with the appropriate use of sanctions against both attorneys and litigants,²⁷ would accomplish all that judicial estoppel arguably does and more, with few, if any, of the harsh results.

I. DEFINITIONS AND USES OF DOCTRINES OF ESTOPPEL

The purpose of this section is to examine the various formulations of judicial estoppel that have been accepted over the years, both in state and federal courts, as well as the claimed purposes and benefits of each of the formulations. It will then attempt to distill from these formulations a "core" set of requirements and justifications which can be analyzed within the framework of alternative and inconsistent pleading systems. By way of introduction, it begins with a short description of more traditional forms of estoppel—res judicata, equitable estoppel, and collateral estoppel—so that the reader can have in mind the different forms of preclusion available to courts as judicial estoppel is discussed in detail.

A. *Other Forms of Estoppel*

Equitable estoppel is a doctrine designed to do justice between the parties, as opposed to maintaining the integrity of the judicial system or the sanctity of the oath.²⁸ The doctrine is applicable only when the party who seeks to assert it was an adverse party to the prior proceeding (the privity requirement), has acted in reliance upon the previously asserted position, and can demonstrate that his interests would be prejudiced if the court permitted the opposing party to change positions.²⁹

²⁶ See, e.g., *Tenneco Chem., Inc. v. William T. Burnett & Co.*, 691 F.2d 658, 663-64 (4th Cir. 1982) (discussing the operation of presumptions under the Federal Rules of Evidence).

²⁷ See, e.g., *Chambers v. Nasco, Inc.*, 59 U.S.L.W. 4595 (U.S. June 6, 1991) (discussing the federal courts' inherent sanction powers); *Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, 111 S. Ct. 922, 933 (1991) (applying the same standard to represented parties and attorneys under Rule 11); *FED. R. CIV. P.* 11 (providing sanctions for an attorney, a party, or both).

²⁸ See *Konstantinidis v. Chen*, 626 F.2d 933, 937 (D.C. Cir. 1980); cf. *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953) (classifying intentional self contradiction as "a means of obtaining unfair advantage in a forum provided for suitors seeking justice").

²⁹ See *Konstantinidis*, 626 F.2d at 937.

Collateral estoppel, or issue preclusion, serves several functions. It protects litigants from having to relitigate identical issues, either with the first adverse party or his privies, or against anyone else.³⁰ It also "promot[es] judicial economy by preventing needless litigation."³¹ The doctrine has two requirements. First, the issue to be precluded must actually have been litigated and decided by the previous court. A litigant can meet this requirement by demonstrating that the issue was merely put into evidence by one party, as long as a determination of the issue was made.³² Second, the issue must have been necessary to the outcome of the first action.³³ The Supreme Court now permits the use of "offensive collateral estoppel," by means of which a plaintiff seeks "to estop a defendant from relitigating the issues which the defendant previously litigated and lost against another plaintiff."³⁴

Res judicata, or claim preclusion, on the other hand, is an estoppel doctrine that applies only between parties to the original action and their privies.³⁵ In order to encourage "reliance on judicial decisions," prevent vexatious or harassing litigation, and enable the courts to consider other, implicitly more meritorious disputes, the doctrine prohibits relitigation of "all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding."³⁶ The doctrine only applies once the court has rendered a final judgment on the merits of the proceeding,³⁷ thereby discouraging piecemeal litigation.

³⁰ See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979) (noting that one purpose of collateral estoppel is to "protect[] litigants from the burden of relitigating an identical issue with the same party or his privy"); *Blonder-Tongue Laboratories, Inc. v. University of Ill. Found.*, 402 U.S. 313, 328-29 (1971) (abandoning the requirement of mutuality in patent cases, in order not to force defendants "to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action").

³¹ *Parklane Hosiery*, 439 U.S. at 326.

³² See *Continental Can Co., U.S.A. v. Marshall*, 603 F.2d 590, 596 (7th Cir. 1979). This would appear to permit collateral estoppel, in effect, to be accorded to an issue which was merely pleaded by one side and not opposed at trial by the other party. See *Refurbishing a Judicial Shield*, *supra* note 1, at 415 n.35 (same). But see *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982) (implying that the court might not utilize collateral estoppel if the issue had not been contested at trial).

³³ See *Parklane Hosiery*, 439 U.S. at 326 n.5.

³⁴ *Id.* at 329.

³⁵ See *Brown v. Felsen*, 442 U.S. 127, 131 (1979); *Parklane Hosiery*, 439 U.S. at 326 n.5 (1979).

³⁶ *Brown*, 442 U.S. at 131 (1979).

³⁷ See *id.*

B. *Judicial Estoppel*

The 1857 Tennessee Supreme Court case in which the doctrine of judicial estoppel made its first appearance was *Hamilton v. Zimmerman*.³⁸ Hamilton alleged that he was the defendant's partner in a drug store, but the defendant claimed that Hamilton was only a store clerk.³⁹ The defendant then discovered pleadings⁴⁰ from an earlier court action in which Hamilton stated that a number of allegations in a pleading that described Hamilton as a store clerk were "substantially true."⁴¹ The Tennessee Supreme Court held that Hamilton's answer was an implicit admission under oath that he was a clerk in the employ of the defendant, and that such an assertion judicially estopped him from asserting, in the second case, that he and the defendant were partners.⁴² Later Tennessee courts explicitly stated that the prior assertions of a litigant fully precluded him from attempting to contradict the matters contained therein, and thus were conclusive evidence of those matters in a later proceeding.⁴³ Thus, in its original formulation, a litigant seeking to judicially estop his opponent from asserting a position need only have shown that his opponent had asserted an inconsistent position under oath in a prior judicial proceeding.

Other states have accepted the doctrine, but have imposed more restrictions on its use.⁴⁴ Texas, for example, requires both prior success—the party against whom estoppel is sought must have "successfully maintained" the prior position, and prejudice—permitting the reversal must prejudice the current adversary other than in the way that any assertion by one party is necessarily prejudicial to her opposition.⁴⁵ Oklahoma's version of the doctrine shares these

³⁸ 37 Tenn. (5 Sneed) 39 (1857). See also *Inconsistent Statements*, *supra* note 1, at 1252 n.73 (describing the doctrine's birth in the Tennessee courts).

³⁹ See 37 Tenn. (5 Sneed) at 41.

⁴⁰ Pleadings apparently were called "bills" during that period. See *Inconsistent Statements*, *supra* note 1, at 1252 n.73.

⁴¹ 37 Tenn. (5 Sneed) at 47.

⁴² See *id.* As in *Finley v. Kesling*, 105 Ill. App. 3d 1, 433 N.E. 2d 1112 (1982), this ruling probably resulted in the dismissal of the plaintiff's case. See *supra* note 15.

⁴³ See, e.g., *Sartain v. Dixie Coal & Iron Co.*, 150 Tenn. 633, 653, 266 S.W. 313, 318 (1924) (holding that a prior assertion is "not merely evidence against the litigant, but [rather estops] him from denying its truth").

⁴⁴ See *Inconsistent Statements*, *supra* note 1, at 1251 (stating that only Tennessee courts follow the absolute rule of judicial estoppel).

⁴⁵ *Herd Corp. v. Triple "J" Inv., Inc.*, No. B14-86-506-CV, slip op. at 8 n.2. (Tex. App. 14th Dist. Sept. 24, 1987). But see *Johnson Serv. Co. v. Transamerica Ins. Co.*,

requirements, and the Tenth Circuit has claimed that Oklahoma also requires that the party seeking to assert the estoppel must have been a party to the prior proceeding.⁴⁶

In describing its version of the doctrine, the Alabama Supreme Court cited with approval two of its earlier cases that applied judicial estoppel within the same proceeding.⁴⁷ The first case involved a defendant's attempt to deny a sworn affidavit securing circuit court jurisdiction, while the second involved an attempt to defeat jurisdiction in the same manner.⁴⁸ Wyoming appears to require only prior success in order to warrant application of the doctrine.⁴⁹ Tennessee, hewing to its absolute position, still does not require any form of prior success.⁵⁰

Massachusetts, South Carolina, and Louisiana have rejected judicial estoppel outright. In *Brown v. Gerstein*,⁵¹ the Court of Appeals of Massachusetts stated that the courts of Massachusetts had never adopted the doctrine and showed no signs of doing

485 F.2d 164, 174 (5th Cir. 1973) (claiming to apply the Texas law of judicial estoppel, but not requiring prior success or prejudice).

⁴⁶ See *Ellis v. Arkansas La. Gas Co.*, 609 F.2d 436, 440 (10th Cir. 1979), *cert. denied*, 445 U.S. 964 (1980). *Ellis* also held that the party claiming the estoppel "must have been misled and have changed his position" as a result of the assertion by the opposing party of its prior position. *Id.* But see *In re Johnson*, 518 F.2d 246, 252 (10th Cir.), *cert. denied*, 423 U.S. 893 (1975) (requiring only prejudice and prior success). *Johnson* is also noteworthy because it appears to hold that Oklahoma's version of judicial estoppel may be applied to inconsistent positions within a single proceeding. See *id.* This appears to run directly counter to Oklahoma's pleading rules, which parallel the Federal Rules of Civil Procedure. See OKLA STAT. tit. 12, § 2008(E)(2) (Supp. 1991). The Oklahoma Supreme Court has recognized this problem, and the larger problem of whether or not its revised rules of pleading permit the continued use of judicial estoppel, but has not yet been faced with a proper case in which to make that decision. See *Panama Processes v. Cities Serv. Co.*, 796 P.2d 276, 287 n.43 (Okla. 1990).

⁴⁷ See *Ray v. Midfield Park, Inc.*, 289 Ala. 137, 142, 266 So.2d 291, 295-96 (1972).

⁴⁸ See *id.* at 142, 266 So.2d at 295-96 (citing *Brown v. French*, 159 Ala. 645, 49 So. 255 (1909) and *Maner v. Maner*, 279 Ala. 652, 189 So.2d 336 (1966)). Judicial estoppel has also been applied to a position assumed by a litigant in a memorandum of law in order to secure a court's favorable disposition of a case. See *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 213 (1st Cir. 1987).

⁴⁹ See *Allen v. Allen*, 550 P.2d 1137, 1142 (Wyo. 1976). It is unclear whether or not privity is required under Wyoming law, since *Allen* involved a post-divorce declaratory judgment action between a husband and a wife (together with her son), and the Wyoming Supreme Court did not state explicitly that it was resting any part of its holding on the existence of privity. See *id.*

⁵⁰ See *Hicks v. Andrew Johnson Bank*, No. 137 (Tenn. Ct. App., filed Mar. 16, 1990) (LEXIS, States library, Tenn file).

⁵¹ 17 Mass. App. Ct. 558, 460 N.E.2d 1043 (1984).

so.⁵² The court implied that it was doubtful that the doctrine could have any vitality in Massachusetts because of its rules of evidence and pleading. It cited the Massachusetts statute that permits allegations of fact filed in pleadings, even those from prior proceedings, to be considered admissions on the part of the party who made them. Such admissions, however, are open to explanation and contradiction.⁵³ In *MacFarlane v. Manly*,⁵⁴ the South Carolina Supreme Court made the extraordinarily sweeping statement that litigants in South Carolina had always been able to plead inconsistently between different proceedings, and that the mere fact of an inconsistency was not enough to bar their rights of recovery.⁵⁵ Interestingly, South Carolina's pleading rules parallel the Federal Rules of Civil Procedure.⁵⁶ Louisiana's Supreme Court recently reaffirmed its anti-judicial estoppel stance in *Doyle v. State Farm (Mutual) Insurance Co.*⁵⁷

Federal circuits that have applied judicial estoppel have done so in different ways depending upon whether the case arose under federal question jurisdiction⁵⁸ or diversity jurisdiction.⁵⁹ The Tenth Circuit refuses to apply the doctrine in federal question cases, but permits the application of state judicial estoppel formulations in diversity cases.⁶⁰ The Federal Circuit is unusual because it has held, in at least one case, that when judicial estoppel arises in a case involving "patent counts," it will apply the judicial estoppel law of "the regional circuit . . . where the appeal would lie but for the patent counts."⁶¹ The Ninth Circuit has accepted the doctrine

⁵² See *id.* at 568-69 n.19, 460 N.E.2d at 1051 n.19.

⁵³ See *id.*; MASS. ANN. LAWS ch. 231, § 87 (Law. Co-op. 1990).

⁵⁴ 274 S.C. 392, 264 S.E.2d 838 (1980).

⁵⁵ See *id.* at 395, 264 S.E.2d at 840.

⁵⁶ See S.C.R. CIV. P. 8, 18 (1985).

⁵⁷ 415 So.2d 216 (1982).

⁵⁸ See 28 U.S.C. § 1331 (1988).

⁵⁹ See 28 U.S.C. § 1332(a) (1988). Those circuits that accept the doctrine cannot agree whether to apply a federal formulation of judicial estoppel or a state formulation, because of the difficulty of ascertaining whether this is a substantive or a procedural doctrine. Compare *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1167 n.4 (4th Cir. 1982) (applying federal law) with *Johnson Serv. Co. v. Transamerica Ins. Co.*, 485 F.2d 164, 174-76 (5th Cir. 1973) (applying Texas law).

⁶⁰ Compare *Parkinson v. California Co.*, 233 F.2d 432, 437-38 (10th Cir. 1956) (refusing to recognize the doctrine) with *Ellis v. Arkansas La. Gas Co.*, 609 F.2d 436, 440 (10th Cir. 1979) (applying Oklahoma's judicial estoppel doctrine), *cert. denied*, 445 U.S. 964 (1980) and *In re Johnson*, 518 F.2d 246, 252 (10th Cir.) (applying Oklahoma's judicial estoppel formulation), *cert. denied*, 423 U.S. 893 (1975).

⁶¹ *Water Tech. Corp. v. Calco, Ltd.*, 850 F.2d 660, 665 n.3 (Fed. Cir.), *cert. denied*, 488 U.S. 968 (1988) (citing *Digital Equip. Corp. v. Emulex Corp.*, 805 F.2d 380, 383

as viable in the abstract sense, but has not decided which version to apply.⁶²

The First Circuit is anomalous, as it seems to have both accepted and rejected the doctrine. In *Patriot Cinemas, Inc. v. General Cinemas Corp.*,⁶³ Judge Campbell noted that the doctrine had been accepted in the First Circuit as long ago as 1911.⁶⁴ But in an earlier decision, *Keebler Co. v. Rovira Biscuit Corp.*,⁶⁵ Judge Campbell had joined in an opinion which declined to apply a doctrine similar to judicial estoppel because it conflicted with Rule 8(e)(2).⁶⁶ The *Patriot* court never mentioned *Keebler*, which suggests that the availability of the doctrine in the circuit may be an open question.⁶⁷

The federal circuits that have accepted the doctrine and have fleshed out the requirements for applying it have restricted its use inconsistently.⁶⁸ All require that the party against whom the estoppel is asserted have enjoyed at least some prior success with its previous assertion.⁶⁹ The major difference is whether the circuit requires that the "prior success" be demonstrated by the party

n.3 (Fed. Cir. 1986)). This raises the bizarre possibility that the Federal Circuit could be required to apply as many as ten different formulations (including not applying it at all, because the Tenth and District of Columbia Circuits reject the doctrine) of judicial estoppel. While this does not fall under the definition of an "outcome determinative" rule that would require a federal court to apply state law in a diversity case, see *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), it is to be kept in mind in deciding whether to permit judicial estoppel at all, considering the lack of uniformity in the doctrine's formulations in those jurisdictions that apply it.

⁶² See, e.g., *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 716-17 (9th Cir. 1990) ("This circuit . . . has yet to state the requirements for the doctrine's application[,] . . . [and i]n this case it is unnecessary to . . ."); *Stevens Technical Serv., Inc. v. SS Brooklyn*, 885 F.2d 584, 589 (9th Cir. 1989).

⁶³ 834 F.2d 208 (1st Cir. 1987).

⁶⁴ See *id.* at 212.

⁶⁵ 624 F.2d 366 (1st Cir. 1980).

⁶⁶ See *id.* at 373-74 n.7.

⁶⁷ The *Patriot* decision easily could be limited to its facts, however, due to the court's feeling that it was holding *Patriot* to a bargain that it had made with a state court in the prior action. See *Patriot*, 834 F.2d at 214.

⁶⁸ See *supra* notes 58-67 and accompanying text.

⁶⁹ See, e.g., *Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp.*, 910 F.2d 1540, 1548 (7th Cir. 1990) (requiring successful legal action); *Jackson Jordan, Inc. v. Plasser Am. Corp.*, 747 F.2d 1567, 1579 (Fed. Cir. 1984) (requiring, in dicta, some previous success with claim); *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982) (requiring successful and unequivocal assertion); *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1167 (4th Cir. 1982) (found prior successful assertion compelling); *City of Kingsport v. Steel and Roof Structure, Inc.*, 500 F.2d 617, 620 (6th Cir. 1974) (found that the law requires prior success).

having won its earlier case on the merits,⁷⁰ or by convincing the previous court of the truth of that specific assertion.⁷¹ The federal circuits are similarly split on whether the application of the doctrine requires that the party asserting estoppel have been a party to the previous suit or be in privity with such a party.⁷² Another frequently mentioned requirement is reliance upon the previous assertion by the opposing party.⁷³ Some of the federal circuits explicitly require reliance,⁷⁴ others explicitly do not,⁷⁵ and others ignore it.⁷⁶

Several circuits have claimed that a court may apply the doctrine if it appears that a litigant has attempted to take advantage of the judicial system.⁷⁷ This requirement has been stated in several

⁷⁰ The Seventh Circuit stated this requirement when it held that it would apply "judicial estoppel only if a party *prevails* in Suit #1 on the basis of a position inconsistent with that latterly taken." *Astor Limousine*, 910 F.2d at 1548.

⁷¹ The Sixth Circuit stated that "[a] party need not finally prevail on the merits in the first proceeding." *Edwards*, 690 F.2d at 599 n.5. The Federal Circuit was unclear on this point when the court said that the allegedly estopped party must have "received some benefit from the previously asserted position," yet also says that the party must have "won" because of it." *Jackson Jordan*, 747 F.2d at 1579. This language could refer to either possibility. The Fourth Circuit waffled between the two possibilities in *Allen* when it stated that the doctrinal application was "not necessarily confined to situations where the party asserting the earlier contrary position there prevailed . . ." 667 F.2d at 1167; *see also City of Kingsport*, 500 F.2d at 620 (using similar language).

⁷² Compare *Jackson Jordan*, 747 F.2d at 1579 (finding no authority for the application of the doctrine "in favor of a total stranger to the first phase of the dispute") with *Edwards*, 690 F.2d at 598 ("judicial estoppel may be applied even if . . . privity does not exist").

⁷³ See the discussions of equitable and collateral estoppel, *supra* notes 28-34 and accompanying text.

⁷⁴ See, e.g., *Young v. United States Dep't of Justice*, 882 F.2d 633, 639 (2d Cir. 1989) ("The key ingredient, however, is reliance."), *cert. denied*, 110 S.Ct. 1116 (1990); *Jackson Jordan*, 747 F.2d at 1579 ("there must be 'representation, reliance and prejudice'") (citing 1B MOORE'S FEDERAL PRACTICE, ¶ 0.405[8] at 239 (1983)); *In re Southwestern Bell Tel. Co.*, 535 F.2d 859, 861 ("[f]ederal courts deciding federal issues . . . usually confin[ed] [the doctrine] to circumstances in which the opposing party took action in reliance . . ."), *aff'd en banc*, 542 F.2d 297 (5th Cir. 1976), *rev'd on other grounds*, *Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723, *reh'g denied*, 431 U.S. 975 (1977).

⁷⁵ See, e.g., *Edwards*, 690 F.2d at 598 ("judicial estoppel may be applied even if detrimental reliance . . . does not exist"); *Tenneco Chem. v. William T. Burnett & Co.*, 691 F.2d 658, 665 (4th Cir. 1982) ("Reliance . . . is not a factor to be considered in judicial estoppel cases.").

⁷⁶ See *Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp.*, 910 F.2d 1540, 1548 (7th Cir. 1990).

⁷⁷ See, e.g., *American Nat'l. Bank v. Federal Deposit Ins. Corp.*, 710 F.2d 1528, 1536 (11th Cir. 1983) ("The doctrine is designed to prevent parties from making a mockery of justice by inconsistent pleadings.").

forms. The most common is that the litigant must have been attempting to "play fast and loose" with the courts.⁷⁸ The Federal Circuit has gone somewhat farther, saying in dicta that a court may apply judicial estoppel if "the court itself feels that it has been misused."⁷⁹ This may be related to the requirements imposed by Rule 11. In *Astor Limousine*, the Seventh Circuit, having rhetorically asked why a litigant should be permitted to win two different suits by disproving an assertion in one and proving it in the other, went on to say that this "inconsistency probably demonstrates a violation of Fed.R.Civ.P. 11."⁸⁰

The last requirement often considered by courts discussing judicial estoppel is that of prejudice to the party asserting the estoppel. If a party were permitted to maintain a position inconsistent with his previous assertion, then it would be inequitable to permit the change in position. When this idea is discussed, the courts always require some showing of prejudice.⁸¹ Some courts, however, never discuss prejudice, and thus do not explicitly require it.⁸² Finally, in *Tenneco Chemicals* the Fourth Circuit was asked to apply judicial estoppel to Tenneco's previous misstatements regarding the procedural law applicable to the case.⁸³ That court held that judicial estoppel could not be applied to statements of the law, since opposing parties are never relieved of the requirement of knowing the law that controls their cases.⁸⁴

This Comment will use the most widely accepted model of judicial estoppel,⁸⁵ which requires prior judicial success,⁸⁶ to

⁷⁸ See, e.g., *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 212 (1st Cir. 1987) (using phrase); *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1215 (9th Cir. 1984) (quoting *Scarano v. Central R.R.*, 203 F.2d 510, 513 (3d Cir. 1953)), *cert. denied*, 469 U.S. 1197 (1985); *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982) (using the phrase); *Tenneco Chem.*, 691 F.2d at 665 (quoting *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1177-78 (1975)).

⁷⁹ *Jackson Jordan, Inc., v. Plasser Am. Corp.*, 747 F.2d 1567, 1579 (Fed. Cir. 1984). Cf. *Tenneco Chem.*, 691 F.2d at 665 ("the determinative factor is whether the [litigant] intentionally misled the court").

⁸⁰ *Astor Limousine*, 910 F.2d at 1548.

⁸¹ See, e.g., *Jackson Jordan*, 747 F.2d at 1580 ("we see no justification for wholly dispensing with reliance and prejudice as minimum requirements"); *In re Johnson*, 518 F.2d 246, 252 (10th Cir.) (judicial estoppel applies when "assuming an inconsistent position [would prejudice] the adverse party"), *cert. denied*, 423 U.S. 893 (1975).

⁸² See cases cited in appendix, *infra* notes 286-332.

⁸³ See *Tenneco Chem.*, 691 F.2d at 664.

⁸⁴ See *id.* at 664-65.

⁸⁵ See *Inconsistent Statements*, *supra* note 1, at 1270 (urging the adoption by all federal circuits of this formulation); *Refurbishing a Judicial Shield*, *supra* note 1, at 435

analyze critically the doctrine in light of the rationales invoked by jurisdictions that permit inconsistent or alternative pleading. This Comment will also consider other objections to judicial estoppel.

Before examining inconsistent and alternative pleading systems, it is worthwhile to examine the different reasons that courts have given for applying judicial estoppel.

The most frequently cited rationale for judicial estoppel is to prevent litigants from "playing fast and loose" with the judicial system.⁸⁷ Most jurisdictions that recognize judicial estoppel invoke this reason to justify the doctrine.⁸⁸ Even those that reject the doctrine recognize this as a valid purpose.⁸⁹ This rationale has been asserted to justify Tennessee's absolute formulation of judicial estoppel, which does not require prior success using the previous assertion.⁹⁰ Ironically, one objection to the doctrine is that its application actually erodes the integrity of the judicial system.⁹¹

(defining judicial estoppel "as a bar against the alteration of a factual assertion that is inconsistent with a position sworn to and benefitted from in an earlier proceeding").

⁸⁶ See *supra* notes 69-71 and accompanying text; appendix, *infra* notes 286-332 and accompanying text.

⁸⁷ *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953) (adopting this rationale); see also *supra* note 3 (citing cases adopting this doctrine which cite *Scarano*).

⁸⁸ See, e.g., *Young v. United States Dep't of Justice*, 882 F.2d 633, 639 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1116 (1990); *Stevens Technical Serv., Inc. v. SS Brooklyn*, 885 F.2d 584, 588 (9th Cir. 1989); *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 212 (1st Cir. 1987); *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982); *Sperling v. United States*, 692 F.2d 223, 227 (2d Cir. 1982) (Van Graafeiland, J. concurring) (applying judicial estoppel to criminal appeals in federal habeas corpus proceedings), *cert. denied*, 462 U.S. 1131 (1983); *Rosa v. CWJ Contractors, Ltd.*, 4 Hawaii App. 210, 219, 664 P.2d 745, 751 (1983); *Allen v. Allen*, 550 P.2d 1137, 1142 (Wyo. 1976).

⁸⁹ See, e.g., *Konstantinidis v. Chen*, 626 F.2d 933, 937 (D.C. Cir. 1980) (rejecting judicial estoppel because it has never been adopted by a District of Columbia court, but noting that judicial estoppel "may be invoked to prevent a party from playing 'fast and loose with the courts'" (quoting *Scarano*, 203 F.2d at 513)).

⁹⁰ See *Stevens Technical Serv.*, 885 F.2d at 589; see also *Inconsistent Statements*, *supra* note 1, at 1251 (noting that "[f]rom this policy flows the absolute rule").

⁹¹ In *Farley v. Frost-Johnson Lumber Co.*, 133 La. 497, 63 So. 122 (1913), the Louisiana Supreme Court cast serious doubt on the validity of the entire doctrine of judicial estoppel, stating:

The justice or propriety of penalizing the offender, beyond the logical effect of his conduct in the case itself, and his punishment, so far as the acts are criminal, upon direct proceedings, appears to be open to grave doubt. That a court of justice should 'strike back' at one attempting fraud upon the purity of its proceedings by depriving him of a fair consideration of the real merits of his case does not seem consistent with its dignity. The sounder rule of judicial administration seems to be to the effect that the situation as

The oldest justification for the doctrine was expounded by the Tennessee Supreme Court in 1857: the necessity to protect the sanctity of the oath.⁹² Many jurisdictions that currently recognize the doctrine hold this to be one of the reasons for so doing,⁹³ and even those jurisdictions that reject judicial estoppel recognize the need to have this type of protection.⁹⁴ Protecting the sanctity of the oath naturally leads to another purpose of the doctrine: protecting the integrity of the judicial system and process. One commentator has stated that these two purposes are actually the same.⁹⁵ A majority of the jurisdictions, both state⁹⁶ and federal,⁹⁷ that apply judicial estoppel do so on this basis.

Several federal circuits have reasoned that judicial estoppel is necessary to prevent unscrupulous litigants from obtaining an unfair advantage over their adversaries by engaging in intentional self-contradiction.⁹⁸ However, this rationale appears to require

developed should not be extended beyond its logical bearings and that a litigant ought not to be deprived of his legal rights by refusing to receive other and relevant evidence in his favor, unless, indeed, the jury would not, as a matter of reason, be justified, after the disclosures, in acting favorably upon it.

Id. at 544-45, 63 So. at 138 (citation omitted); *see also* *Tenneco Chem. v. William T. Burnett & Co.*, 691 F.2d 658, 665 (4th Cir. 1982) (directly conflicting with the rationale that judicial estoppel protects the "integrity" of the judicial process); *Bertha Bldg. Corp. v. National Theatres Corp.*, 248 F.2d 833, 837 (2d Cir. 1957) (Hand, J. dissenting) (stating that "[j]udgment by estoppel is not designed as a moral sanction against inconsistency"), *cert. denied*, 356 U.S. 936 (1958).

⁹² *See supra* notes 9-10 and accompanying text.

⁹³ *See, e.g., Stevens Technical Serv.*, 885 F.2d at 588 (stating that "the doctrine upholds the 'public policy which exalts the sanctity of the oath'" (quoting *Konstantinidis*, 626 F.2d at 937 (quoting *Melton v. Anderson*, 32 Tenn. App. 335, 339, 222 S.W.2d 666, 669 (1948)))); *Smith ex rel. Smith v. Marchant Enters., Inc.*, 791 P.2d 354, 356 (Alaska 1990) (same).

⁹⁴ *See Konstantinidis*, 626 F.2d at 937 (upholds the sanctity of the oath).

⁹⁵ *See Inconsistent Statements, supra* note 1, at 1251.

⁹⁶ *See, e.g., Smith ex rel. Smith*, 791 P.2d at 356 (noting that the doctrine ("protect[s] the integrity of the judicial process")); *Rosa v. CWJ Contractors, Ltd.*, 4 Haw. App. 210, 219, 664 P.2d 745, 751 (1983) (same); *Allen v. Allen*, 550 P.2d 1137, 1142 (Wyo. 1976) (noting that the doctrine prevents a litigant from "play[ing] hanky-panky with the courts of this state and thus interfer[ing] with the integrity of the judicial system"); *see also* appendix, *infra* notes 286-332 and accompanying text (table listing state cases accepting or rejecting judicial estoppel).

⁹⁷ *See, e.g., Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp.*, 910 F.2d 1540, 1547 (7th Cir. 1990) (stating that "[s]ometimes courts justify the doctrine on the ground that it is an offense against the judicial system to take inconsistent positions"). *See generally Inconsistent Statements, supra* note 1, at 1245 n.8 (collecting cases).

⁹⁸ *See, e.g., Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953) (decrying

reliance by the opposing party in order to apply the estoppel; without reliance, it is difficult to see how the threatened reversal of position could result in an unfair advantage being gained. The language used by these courts suggests that their concerns are the fraud and bad-faith pleading tactics contemplated by Rule 11, suggesting further that such misconduct would be handled more appropriately through the broad sanction powers available to federal judges.⁹⁹ At least one court has also stated that judicial estoppel should be applied to further principles of "manifest justice."¹⁰⁰

Occasionally, courts reason that judicial estoppel, like its cousins collateral estoppel and *res judicata*, should be used in order to further the "general consideration[s] of the orderly administration of justice"¹⁰¹ or, as the Supreme Court of Hawaii put it, "considerations of the orderliness, regularity, and expedition of litigation."¹⁰² The orderly administration of justice, however, is not at all threatened by the assertion of inconsistent positions, but rather is threatened by the possibility of having inconsistent results. Thus those courts that justify judicial estoppel on efficiency grounds actually may desire to have the doctrine subsumed within collateral estoppel or *res judicata*.¹⁰³

Another court has used judicial estoppel to enforce "bargains" that a litigant had made with another court.¹⁰⁴ The plaintiffs in

the use of "intentional self-contradiction . . . as a means of obtaining unfair advantage in a forum provided for suitors seeking justice"); *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 212 (1st Cir. 1987) (same); *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1215 (9th Cir. 1984) (same), *cert. denied*, 469 U.S. 1197 (1985); *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1167 (4th Cir. 1982) (explaining that judicial estoppel's "function and justification is to prevent the use of 'intentional self contradiction . . . as a means of obtaining unfair advantage'" (quoting *Scarano*, 203 F.2d at 513)).

⁹⁹ See *Chambers v. Nasco, Inc.*, 59 U.S.L.W. 4595 (U.S. June 6, 1991); *infra* notes 261-81 and accompanying text.

¹⁰⁰ *Rosa v. CWJ Contractors, Ltd.*, 4 Haw. App. 210, 218-19, 664 P.2d 745, 751 (1983) (lending support to those courts that have shown a willingness to raise the issue of judicially estopping a party *sua sponte*, giving them the ability to claim that the doctrine was a tool to be used to serve justice). *Cf.* *Allen v. Allen*, 550 P.2d 1137, 1142 (Wyo. 1976) (discussing the general supervisory authority of that court and its "liberty to decide a case upon any point which in our opinion the ends of justice require").

¹⁰¹ *Shamrock*, 729 F.2d at 1215 (citing 1B MOORE'S FEDERAL PRACTICE ¶ 0.405[8], at 767).

¹⁰² *Trask v. Tam See*, 42 Haw. 324, 333 (1958) (cited in *Rosa v. CWJ Contractors, Ltd.*, 4 Haw. App. 210, 219, 664 P.2d 745, 751 (Hawaii App. 1983)).

¹⁰³ See *supra* notes 30-37 and accompanying text.

¹⁰⁴ See *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 213-14 (1st Cir. 1987).

Patriot Cinemas had represented, in a memorandum of law to a Massachusetts Superior Court, that in exchange for that court not staying the Superior Court case, pending the outcome of its appeal in the First Circuit, it would not pursue an antitrust claim against the same defendants in the state court. The plaintiff then sought to assert the antitrust claim after the Superior Court denied the stay.¹⁰⁵ In that case, the First Circuit noted that:

Patriot can be said to have made a bargain with the superior court. It traded its chance for success on the antitrust claim for an increased pace in the proceedings on the remaining three counts. . . . Now, however, Patriot wants to have it the other way: it wants to revive its antitrust claim and have it remanded to the state court while enjoying the benefit of the increased pace of its current state action—a benefit obtained by telling the superior court that it would not proceed with its antitrust claim. This is the sort of self-serving self-contradiction, or “playing fast and loose with the courts,” that is barred by the doctrine of judicial estoppel.¹⁰⁶

The First Circuit recognized that this was not “classic” judicial estoppel, but reasoned that the district courts had been extending the doctrine to cover cases of this nature and that this presented a better case for estoppel than mere factual reversals.¹⁰⁷ However, it would appear that both the First and Second Circuits have mistaken equitable estoppel for judicial estoppel,¹⁰⁸ for this case demonstrated privity, reliance, and prejudice, and thus presented a classic case for equitable rather than judicial estoppel on the basis of a promise made to a court.¹⁰⁹

Finally, there is a disagreement among some of the federal circuits regarding the nature of the true evil to be prevented by judicial estoppel. According to the Seventh Circuit, the problem lies in permitting a litigant to win in one action by saying “X is true” and then win in a second action by saying “X is false.”¹¹⁰ That is, the Seventh Circuit fears that without judicial estoppel, different

¹⁰⁵ See *id.* at 211.

¹⁰⁶ *Id.* at 213.

¹⁰⁷ See *id.* at 214.

¹⁰⁸ See *supra* notes 28-29 and accompanying text (discussing equitable estoppel).

¹⁰⁹ Cf. *Young v. United States Dep't of Justice*, 882 F.2d 633, at 639-40 (2nd Cir. 1989), *cert denied*, 110 S. Ct. 1116 (1990) (describing the situation in which a party obtains relief with an “implicit but misleading representation to a court”).

¹¹⁰ See *Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp.*, 910 F.2d 1540, 1548 (7th Cir. 1990).

courts could rule inconsistently on the same issue. The Sixth Circuit, on the other hand, objects to the mere assertion of opposing statements in separate actions.¹¹¹ In *Jackson Jordan, Inc. v. Plasser American Corp.*,¹¹² the Federal Circuit, trying to resolve this dilemma, claimed that the doctrine allowed a judge to decide whether to permit estoppel by focusing on the inconsistency, rather than the outcome of a particular case.¹¹³ This simply begs the question, however, by permitting the judge to do what the judge feels is right, and legitimizing that discretion by baptizing it "judicial estoppel."

Not all federal judges appear to be bothered by the possibility of inconsistent outcomes in separate trials. Chief Justice Rehnquist, dissenting in *Parklane Hosiery v. Shore*,¹¹⁴ contended that when the first action was not before a jury and the second action would be, it would be unfair to prevent the jury from deciding the case.¹¹⁵ He accepted the fact that, without estoppel, the jury might reach a different result, because he believed that the doctrine interfered with the right to civil jury trials guaranteed by the seventh amendment.¹¹⁶ While *Parklane* was not a case about judicial estoppel, Chief Justice Rehnquist's concerns apply just as well to the use of any form of estoppel when the first action was not before a jury but the second action could be.

II. ALTERNATIVE AND INCONSISTENT PLEADING SYSTEMS

In order to discuss the reasons for rejecting the doctrine of judicial estoppel, this Comment will examine the purposes of having a system that permits or encourages inconsistent and alternative pleading, by looking into the spirit of Rule 8(e)(2) of the Federal Rules of Civil Procedure.¹¹⁷

¹¹¹ See *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982).

¹¹² 747 F.2d 1567.

¹¹³ See *id.* at 1578-79 (citing WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION, § 4477, at 779 (1981)).

¹¹⁴ 439 U.S. 322 (1979).

¹¹⁵ See *id.* at 353 (Rehnquist, J., dissenting).

¹¹⁶ See *id.* at 353-55 (Rehnquist, J., dissenting).

¹¹⁷ "A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11." FED. R. CIV. P. 8(e)(2). See also *Parkinson v. California Co.*, 233 F.2d 432, 438 (10th Cir. 1956) (discussing the spirit of Rule 8(e)(2)).

A. *Getting to the Truth*

One reason to move to a pleading system with simpler and less regimented pleading rules was to avoid the numerous traps and pitfalls that accompanied the "meticulous particularity" required by the "common-law special plea[s]."¹¹⁸ Beyond the desire to eliminate technicalities, the encouragement of alternative, hypothetical, and inconsistent pleading evinces a broader desire to "get to the merits" of a case, rather than permit cases to be disposed of on purely procedural missteps.¹¹⁹

This leads to what is perhaps the most important reason to have alternative, hypothetical, and inconsistent pleadings—to get to the truth.¹²⁰ In this context, one author who was involved directly with the drafting of Michigan's revised rules of pleading stated that they were designed with the following maxim in mind:

The effort must be to choose that approach which is most likely . . . to develop as fully as possible . . . a complete knowledge of all the events which created the conflict resulting in the litigation, and to assist in the evaluation of such events and in the awarding of such consequences as accord with the maximum feasible conceptions of justice.¹²¹

Drafters of pleading rules are not alone in these feelings. The Supreme Court has stated that it prefers the fullest possible inquiry into the facts and evidence in a case,¹²² noting that estoppel in general can "blockade[] unexplored paths that may lead to truth."¹²³ On other occasions, the Court has stated that discovering the truth was the "*sine qua non* of a fair trial,"¹²⁴ and that our system of justice values the search for truth in judicial proceedings.¹²⁵ Truthseeking has been cited as a direct reason for the

¹¹⁸ *Rules of Civil Procedure for the District Courts of the United States: Hearings with Regard to the "Rules of Civil Procedure for the District Courts of the United States," Adopted by the Supreme Court of the United States Pursuant to the Act of June 19, 1934 (48 Stat. 1064) and on H.R. 8892 Before the House Committee on the Judiciary, 75th Cong., 2d Sess. 98 (1938) (statement of Edgar Tolman) [hereinafter House Hearings].*

¹¹⁹ *See id.* at 24 (statement of William Mitchell).

¹²⁰ *Cf. United States v. Beechum*, 582 F.2d 898, 908 (5th Cir. 1978) (*en banc*) (noting that "[t]ruth is the essential objective of our adversary system of justice"), *cert. denied*, 440 U.S. 920 (1979)).

¹²¹ McDonald, *Alternative Pleading*: I, 48 MICH. L. REV. 311, 312 (1950).

¹²² *See, e.g., Brown v. Felsen*, 442 U.S. 127, 138 (1979) (refusing to accord collateral estoppel effect when to do so would prevent the "fullest possible inquiry" to be made by a court).

¹²³ *Id.* at 132.

¹²⁴ *See Estes v. Texas*, 381 U.S. 532, 540 (1965).

¹²⁵ *See Nix v. Williams*, 467 U.S. 431, 445 (1984). It could be argued, for example,

adoption of rules of pleading akin to Rule 8(e)(2), which explicitly permits inconsistent pleading, at least within the confines of a single legal action.¹²⁶ Gradually, both courts and the drafters of rules on pleading came to realize that it was virtually impossible to require a litigant to know, with absolute certainty, what the facts were at the commencement of an action.¹²⁷ It makes sense to permit her to plead everything she can within the bounds of good faith and Rule 11, give notice to her opponent, and then leave the determination of the facts to discovery,¹²⁸ pre-trial hearings,¹²⁹ and trial.¹³⁰ Dean Clark¹³¹ noted that permitting a plaintiff to shift position was by far the best rule to have, especially in light of the modern trend toward liberal pleading rules, which he characterized as "sacrific[ing] consistency" in order to work "substantial justice."¹³² Indeed, Clark argued that, at least with respect to inconsistent defenses, the rules should only proscribe pleadings that would require a party to "commit perjury in order to testify."¹³³ Clark relied on the general right of a party to "present his version of the case to the court or jury," a right not limited to a defendant.¹³⁴

that res judicata bars "inefficient" pleading and thus truth finding to a certain extent. Yet res judicata precludes the litigation or relitigation of claims that were or could have been decided in a previous action between the same parties or their privies, and is thus designed to encourage the resolution of as many claims as possible in one action. See *supra* notes 35-37 and accompanying text.

¹²⁶ See *Astor Chauffeured Limousine v. Runnfeldt Inv. Corp.*, 910 F.2d 1540, 1548 (7th Cir. 1990).

¹²⁷ See, e.g., Hankin, *Alternative and Hypothetical Pleadings*, 33 YALE L.J. 365, 367 (1924) (noting that "[t]he courts must recognize the fact that there is bound to be some uncertainty on the part of the pleader").

¹²⁸ See FED. R. CIV. P. 26-37; *House Hearings*, *supra* note 118, at 98 (statement of Edgar Tolman).

¹²⁹ See E. Sunderland, *The Theory and Practice of Pre-Trial Procedure* 7-10 (1938) (unpublished manuscript) (available in Charles E. Clark Papers, Manuscripts and Archives, Yale University Library, Box 104, Folder 34).

¹³⁰ See generally *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957) (holding that giving adequate notice of claims is the only purpose of pleadings under the Federal rules); *Garman v. Griffin*, 666 F.2d 1156, 1158-59 (8th Cir. 1981) (discussing notice) (*citing* MCCORMICK, EVIDENCE § 265 at 634 (2d ed. 1972)); C. CLARK, *supra* note 23, at 254-58 (2d ed. 1947) (stating that "the questions in each case should be [whether] the pleader truthfully stat[ed] his own position and [gave] fair notice").

¹³¹ Dean Clark was the Reporter for the committee that drafted the Federal Rules of Civil Procedure, Dean of Yale Law School, and a judge on the Second Circuit Court of Appeals.

¹³² See C. CLARK, *supra* note 23, at 497-98 & n.212.

¹³³ *Id.* at 631-32.

¹³⁴ *Id.* at 632.

While Clark argued these points in the context of a single action, they are equally valid when applied to pleading between separate actions. To work "substantial justice" in the second action, it might be necessary to permit a litigant to change positions;¹³⁵ if a party has a right to present her version of a case in one action, then she should have the same right in any subsequent action. Following this reasoning, the only time a party should be estopped from pleading an inconsistent statement, even in two different proceedings, is when it is plain that she has violated Rule 11.¹³⁶

Many sources, however, note a basic difference between permitting inconsistent pleadings within the confines of one action and doing so between two separate actions. If the inconsistency arises in a single case, the court will adopt only one of the inconsistent statements, but if the inconsistency arises in separate proceedings, the first court might adopt one statement as true, while the second court adopts the opposing statement.¹³⁷ This argument, however, overlooks the possibility that a pleader may have a valid reason to plead inconsistently other than mistake, inadvertence, or fraud, the standard exceptions to judicial estoppel.¹³⁸ For example, in *Konstantinidis v. Chen*,¹³⁹ the district court estopped the plaintiff from pleading that the defendant's alleged medical malpractice had caused the plaintiff's disability. The plaintiff maintained that the disability resulted from an acupuncture treatment administered by the defendant doctor, when a needle tip broke off and lodged in the plaintiff's neck. The district court applied judicial estoppel because the plaintiff had claimed in an earlier workmen's compensation action that his disability had been caused by an accident.¹⁴⁰ The plaintiff may have pleaded the inconsistency in good faith, however, because neither the plaintiff nor his attorney could have known the true cause of his disability at the time.¹⁴¹ Yet neither he nor his lawyer could be said to have been mistaken,¹⁴² inadvertent, or the victim of fraud, since the

¹³⁵ See *infra* notes 139-43 and accompanying text (discussing *Konstantinidis*).

¹³⁶ Cf. *Astor Chauffeured Limousine v. Runnfeldt Inv. Corp.*, 910 F.2d 1540, 1548 (7th Cir. 1990) ("inconsistency probably demonstrates a violation of" Rule 11).

¹³⁷ See, e.g., *Astor Limousine*, 910 F.2d at 1548 (noting that, within a case, "[i]nconsistency is acceptable because, at the end of the day, only one of [the inconsistent] positions can obtain"); *Refurbishing a Judicial Shield*, *supra* note 1, at 420-25 (noting the federal courts' limited use of judicial estoppel in two separate trials).

¹³⁸ See *supra* note 8 and accompanying text.

¹³⁹ 626 F.2d 933 (D.C. Cir. 1980).

¹⁴⁰ See *id.* at 935-36.

¹⁴¹ See *id.* at 940.

¹⁴² The only way to bring this case within the "mistake" exception is if the mistake

plaintiff's neurosurgeon believed at the time of the earlier action that the broken needle tip had no effect on the plaintiff's condition.¹⁴³

At the very least, this case points out the need for another exception to judicial estoppel in those jurisdictions that apply judicial estoppel: the excuse that the party did not have a full and fair opportunity to litigate the prior position.¹⁴⁴ Proponents of the doctrine might argue that a party's own admission of a position constitutes a waiver of the right to relitigate that point. That argument forgets that the primary purpose of pleadings in the modern system is to give notice to the opposing party.¹⁴⁵ As one court noted, parties often assert positions which they know they may not be able to prove for tactical and other reasons.¹⁴⁶ Thus the mere fact that an assertion was made should not constitute a waiver of the opportunity to relitigate it.¹⁴⁷

B. *Responding to Changing Factual Situations*

Permitting inconsistent pleading in separate actions also helps discourage reliance on "obsolete or erroneous" decisions.¹⁴⁸ In *Commissioner v. Sunnen*,¹⁴⁹ the Court stated that collateral estoppel was meant only to prevent relitigation of matters which "have remained substantially static, factually and legally."¹⁵⁰ This language recognizes that facts can change over time. Therefore, a party can plead that "X is true" and win because of it today, and yet

exception were held to apply to anyone involved in making a prior statement, including those simply furnishing some of the underlying information. But if that were the case, judicial estoppel would never apply, because a litigant seeking to change positions could always find someone who had been "mistaken," and the exception would swallow the rule.

¹⁴³ And even if this were true, some jurisdictions might still permit estoppel. See *Hicks v. Andrew Johnson Bank*, No. 137 (Tenn. Ct. App., filed Mar. 16, 1990) (LEXIS, States library, Tenn file); *Rosa v. CWJ Contractors, Ltd.*, 4 Haw. App. 210, 218 n.12, 664 P.2d 745, 751 n. 12 (1983).

¹⁴⁴ See *infra* note 222 and accompanying text. It is uncertain, however, whether this new exception would have alleviated the problem in *Konstantinidis*, because we cannot be sure whether further litigation in the original case would have uncovered the malpractice.

¹⁴⁵ See *supra* note 130 and accompanying text.

¹⁴⁶ See *infra* note 248 and accompanying text.

¹⁴⁷ But note that this practice might not always be useful. See *supra* note 144.

¹⁴⁸ See *Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948).

¹⁴⁹ 333 U.S. 591 (1948).

¹⁵⁰ *Id.* at 599.

be required¹⁵¹ to say that "X is false" in another action years later, because the facts have changed.¹⁵² The current exceptions to judicial estoppel would not encompass this situation, and all jurisdictions that accept the doctrine would bar the later statement.¹⁵³ Thus, permitting inconsistent or alternative pleading is necessary to enable litigants to respond to situations in which the "controlling facts" have changed,¹⁵⁴ whether that change occurs during one case or from one case to another.¹⁵⁵ A proponent of judicial estoppel might claim that under changed circumstances, conflicting assertions are not actually inconsistent. Judicial estoppel, however, examines the *facial* consistency of the assertions in question, rather than the facts behind them.¹⁵⁶

¹⁵¹ Required, for example, by FED. R. CIV. P. 11's threat of sanctions.

¹⁵² This would not be covered by the exception to judicial estoppel for "mistakes," since at the time of the first assertion, it was true. It would stretch the meaning of the word "mistake" beyond all limits to say that one who asserted something that was true could have been "mistaken." However, one could say that he was guilty of a tactical error, as was the plaintiff in the introductory hypothetical.

¹⁵³ Cf. *Kalikow 78/79 Co. v. State*, No. 41299-89, slip op. at 10 (N.Y. Sup. Ct., filed Feb. 2, 1990) (plaintiffs judicially estopped from asking for relief that, in the opinion of the court, would have raised property taxes, when they previously claimed that their property tax assessments were too high).

¹⁵⁴ See *Sunnen*, 333 U.S. at 599-600 (noting that collateral estoppel is designed to prevent "repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally . . . [T]he matter raised in the second suit [must be] identical in all respects with that decided in the first proceeding and . . . the controlling facts and applicable legal rules [must] remain unchanged").

¹⁵⁵ See the discussion of *Kalikow 78/79 Co.*, *supra* note 17, from which the following explanatory hypothetical is constructed: A sues B on a cause of action which requires him to prove that fact "X" is true, and wins on the merits. Several years pass, and fact "X" ceases to be true. A then wishes to assert a new cause of action against C, requiring proof that fact "X" is false. Surely A should not be estopped from so pleading, since an estoppel would be manifestly unjust. Cf. *Sunnen*, 333 U.S. at 599 ("collateral estoppel must be used . . . so as to avoid injustice").

¹⁵⁶ The fallacy of requiring facial consistency can best be exposed by varying the facts of *Hamilton v. Zimmerman*, 37 Tenn. (5 Sneed) 39 (1857), discussed *supra* notes 38-42 and accompanying text. Suppose that at the time of the first action, Hamilton was a clerk, but that by the time of the second action, he had become a partner in the business. As the Tennessee courts applied judicial estoppel in 1857 and apply it now, they would look only to the fact that he had asserted, in the first action, that he was a clerk. The statements "I am just a clerk" and "I am a partner in the business" are facially inconsistent. The only way to state that they are not inconsistent is to permit the introduction of the first statement as evidence against the truth of the later statement, subject to rebuttal. See *infra* notes 220-24 and accompanying text.

C. *Policies Behind the Adoption of Rule 8(e)(2)*

This Comment will now turn to an examination of the specific reasons given for the adoption of Rule 8(e)(2), which permits inconsistent and alternative pleading in federal courts. Reliance upon summary judgment and discovery was especially important to the drafters of the federal rules. One drafter, Dean Clark, preferred disposing of cases through summary judgment, rather than using motions to dismiss on the basis of the pleadings, because this made the discovery process available to clarify the facts.¹⁵⁷ One commentator has suggested that the entire basis of the federal rules rests on the use of pretrial discovery to introduce and explore factual theories for recovery.¹⁵⁸

Several members of the drafting committee noted that Rule 8 was drafted in order to align practice in the federal courts with the developing jurisprudence in the state systems and equity rules.¹⁵⁹ In addition, discussions in committee hearings indicate that the drafters specifically intended to allow plaintiffs and defendants to make inconsistent pleadings.¹⁶⁰ Moreover, Attorney General Mitchell, when testifying before the House of Representatives regarding the proposed rules, stated that the whole point of Rule 8(e)(2) was to make "truth and merit" the ends of the system of pleading, rather than encouraging blind obedience to technicalities.¹⁶¹

In a recent class action decision, *Arizona v. Shamrock*,¹⁶² the Ninth Circuit supported this policy.¹⁶³ The plaintiff class changed its position not once, but three times, in separate actions, in response to the facts disclosed by discovery.¹⁶⁴ The court refused to apply judicial estoppel to the plaintiffs, implicitly realizing that

¹⁵⁷ See Note, *Plausible Pleadings: Developing Standards For Rule 11 Sanctions*, 100 HARV. L. REV. 630, 647 n. 87 (1987) [hereinafter Note, *Plausible Pleadings*] (citing Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 927-28 (1976)).

¹⁵⁸ See *id.* at 651.

¹⁵⁹ See generally B. SHIPMAN, *supra* note 2, at 520 n.6 (discussing prior state and equity practices); Hearings of the Committee to Draft the Proposed Federal Rules of Civil Procedure 741-a (Nov. 16, 1935) (available in Charles E. Clark Papers, Manuscripts, and Archives, Yale University Library, Box 94, Folder 3) [hereinafter Proposed Rules] (noting the desire to import those practices into the federal rules).

¹⁶⁰ See Proposed Rules, *supra* note 159, at 741-d, 741-e.

¹⁶¹ See *House Hearings*, *supra* note 118, at 24 (statement of Edgar Tolman).

¹⁶² 729 F.2d 1208 (9th Cir. 1984).

¹⁶³ *Id.* at 1215.

¹⁶⁴ See *id.* at 1214-16.

since the assertions in question might not actually have been inconsistent, implicitly realizing that estopping the plaintiffs' assertions would undermine their attempts to use the discovery system as it was intended to be used.¹⁶⁵

A final benefit of the system created by the federal rules, particularly Rule 8(e)(2), was the creation of a highly liberalized pleading system in which attorneys and parties were freer than in the past (but now subject to Rule 11) to advance more creative legal and factual theories.¹⁶⁶

III. JUDICIAL ESTOPPEL IS NOT COMPATIBLE WITH PERMITTING OR ENCOURAGING ALTERNATIVE AND INCONSISTENT PLEADING

At the outset, we may separate the formulations of judicial estoppel into two categories, those that permit its application to inconsistent assertions made within a single proceeding and those that do not. The former are plainly barred, at least in the federal courts, by Rule 8(e)(2),¹⁶⁷ while the latter does not fall within the language of that rule.¹⁶⁸ Federal courts that have rejected judicial estoppel have done so because they perceived a conflict between

¹⁶⁵ See *id.* at 1215-1216; *supra* note 128 and accompanying text; cf. *Giannone v. United States Steel Corp.*, 238 F.2d 544, 548 (3d Cir. 1956) (stating that certain uses of pleadings as evidence would discourage the use of alternative and inconsistent pleadings and discovery).

¹⁶⁶ See Note, *Plausible Pleadings*, *supra* note 157, at 634 n.18 (discussing the unintended impact of Rule 11 on the liberal standard of pleading).

¹⁶⁷ The rule reads:

A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency, and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

FED. R. CIV. P. 8(e)(2); cf. *Refurbishing a Judicial Shield*, *supra* note 1, at 418 n.56 (noting that the "[i]nconsistent position doctrine must not be allowed to interfere with [Rule 8(e)(2)] within a single action" (citations omitted)). Presumably such a doctrine would also be barred in a state whose pleading rules were substantially similar to the Federal Rules. See, e.g., N.Y. CIV. PRAC. L. & R. 3014 (Consol. 1990) ("Separate causes of action or defenses . . . may be stated regardless of consistency").

¹⁶⁸ See, e.g., *Teledyne Indus., Inc. v. NLRB*, 911 F.2d 1214, 1217 n.3 (6th Cir. 1990) ("The doctrine of judicial estoppel does not clash with the right to plead inconsistent claims under FED. R. CIV. P. 8(e)(2).").

judicial estoppel and the purpose or spirit underlying Rule 8(e)(2).¹⁶⁹ This section will argue both that the Tenth Circuit's reasoning in *Parkinson v. California Co.*¹⁷⁰ was correct, and that additional reasons for rejecting judicial estoppel are applicable to systems that do not advocate or permit inconsistent or alternative pleading.

In *Parkinson*, the Tenth Circuit was asked to apply judicial estoppel to a plaintiff who had pending complaints in both state and federal court arising from the same incident against separate defendants.¹⁷¹ *Parkinson* involved the explosion of propane gas that had not been "malodorized." The plaintiff, Parkinson, initiated an action in a Wyoming court against the California Company and Stanolind Oil and Gas ("the federal defendants") and two others. California Company and Stanolind Oil demurred to that complaint, and Parkinson moved to dismiss the state action against them. This left the state complaint alive against the two other parties. Parkinson then instituted an action in federal district court solely against the federal defendants. The two complaints alleged the same negligent behavior, failure to malodorize the propane gas, but the federal complaint claimed that the federal defendants were responsible for the explosion, while the state complaint claimed that the remaining state defendants were at fault.¹⁷² The Tenth Circuit refused to apply the doctrine,¹⁷³ and in sweeping language rejected the viability of judicial estoppel in the Tenth Circuit, stating that to permit its use "would not be in keeping with the spirit of . . . rule 8(e)(2) . . . and would discourage the determination of cases on the basis of the true facts as they might be established ultimately."¹⁷⁴

¹⁶⁹ See *Parkinson v. California Co.*, 233 F.2d 432, 438 (10th Cir. 1956).

¹⁷⁰ 233 F.2d 432 (10th Cir. 1956).

¹⁷¹ See *id.* at 434-35.

¹⁷² See *id.* at 434-35.

¹⁷³ The *Parkinson* court noted that the pleadings involved were not actually inconsistent, but rather one omitted facts contained in the other. See *id.* at 438. Although that interpretation was correct when the state action was initiated, it was no longer true after the state action was dismissed against the federal defendants. The effect of the dismissal was that the state action claimed the state defendants were the cause of the explosion, while the federal action claimed the federal defendants were the cause of the explosion. See *id.* at 434-35.

¹⁷⁴ *Id.* at 438. The Tenth Circuit's language seems to recognize, implicitly, the potential for inconsistent decisions, yet does not seem bothered by this possibility. The court stated that there were better ways to accomplish the goals of judicial estoppel than to suppress the exposition of the truth in the future. See *id.* When coupled with the court's recognition that the trier-of-fact, when faced with evidence of the prior assertions, might disregard them and come to the opposite conclusion,

The Tenth Circuit reaffirmed its holding last year in *Dugan v. EMS Helicopters, Inc.*,¹⁷⁵ in which the court cited *Parkinson* for the proposition that judicial estoppel is not a viable legal theory in the Tenth Circuit.¹⁷⁶ In addition, other courts have relied on *Parkinson* in order to sustain similar holdings.¹⁷⁷ One commentator wrote that the *Parkinson* court failed to note that Rule 8(e)(2) does not permit "bad faith inconsistency."¹⁷⁸ The problem is that the author assumes what he seeks to prove—that a litigant seeking to contradict an assertion that she had made in a prior case and that was adopted by a prior court is necessarily guilty of bad faith.¹⁷⁹ One need look only as far as *Konstantinidis v. Chen*¹⁸⁰ to see that this is a faulty assumption.¹⁸¹ In *Konstantinidis*, the plaintiff harbored an honest post-litigation doubt about what caused his injuries, and most likely, with the information available at the time of the first suit, his only option was to assert the positions that he later controverted.¹⁸²

The reasoning used by the Tenth Circuit in *Parkinson*, that permitting judicial estoppel violates the spirit of Rule 8(e)(2) and the federal rules in general, is not as bizarre as it might seem. In *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*,¹⁸³ a case which heralded the demise of mutuality of estoppel, Justice White cited, with approval, a district court's holding that an earlier Supreme Court decision "conflicted . . . with the spirit of certain provisions of the Federal Rules of Civil Procedure."¹⁸⁴

this case suggests that the Tenth Circuit was willing to accept the existence of inconsistent results. See *id.*

¹⁷⁵ 915 F.2d 1428 (10th Cir. 1990).

¹⁷⁶ See *id.* at 1431-32. And to make the point absolutely clear, the Tenth Circuit recently stated that "this court does not recognize the doctrine of judicial estoppel." *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1520 n.10 (10th Cir. 1991).

¹⁷⁷ See *Konstantinidis v. Chen*, 626 F.2d 933, 938 (D.C. Cir. 1980); *Keebler Co. v. Rovira Biscuit Corp.*, 624 F.2d 366, 373 n.7 (1st Cir. 1980).

¹⁷⁸ See *Refurbishing a Judicial Shield*, *supra* note 1, at 422.

¹⁷⁹ See *id.* at 422-23.

¹⁸⁰ 626 F.2d 933 (D.C. Cir. 1980).

¹⁸¹ See *supra* notes 139-43 and accompanying text.

¹⁸² See *supra* note 141 and accompanying text; see also *Keebler Co. v. Rovira Biscuit Corp.*, 624 F.2d 366, 373 n.7 (1st Cir. 1980) (defendant sought to introduce affirmative defense that was directly inconsistent with assertion made in earlier registration proceeding). But see *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 212-14 (1st Cir. 1987) (party asking for inconsistent relief in bad faith).

¹⁸³ 402 U.S. 313 (1971).

¹⁸⁴ *Id.* at 318 n.5 (citing *Technograph Printed Circuit, Ltd. v. Packard Bell Elec. Corp.*, 290 F. Supp. 308, 317-19 (C.D. Cal. 1968)).

Thus, the Tenth Circuit was correct to examine judicial estoppel in light of the purpose of Rule 8(e)(2).

Other courts have applied similar analyses in other situations.¹⁸⁵ Judge Learned Hand argued that judicial estoppel was "plainly contrary to the underlying basis" of the whole doctrine of estoppel.¹⁸⁶ Similarly, the Third Circuit made known its discomfort with certain aspects of judicial estoppel, stating that it thought the policy behind Rule 8(e)(2) would be undermined if allegations made in prior pleadings were admitted as evidence against their pleader, saying that "[p]arties will hesitate to make notice-giving allegations at the risk of their being used as evidence"¹⁸⁷ This policy consideration is not a relic of the 1950s; a majority of the federal courts now hold this view.¹⁸⁸ If the admission of prior pleadings as evidence conflicts with the policies that underlie a rule permitting inconsistent pleading, then their admission as conclusive evidence is even worse.

One objection to *Parkinson* is that the court did not explain what this "conflict" was.¹⁸⁹ The Tenth Circuit's objection was that permitting judicial estoppel would "irrevocably freeze[]" whatever assertions the pleader had made in his initial action.¹⁹⁰ Any

¹⁸⁵ State courts, as well as federal courts, have applied this mode of analysis. The Supreme Court of Oklahoma recently showed a willingness to consider overturning its long-standing policy of permitting judicial estoppel, in light of changes to the Oklahoma Pleading Code which bring the code more in line with the federal rules. *See Panama Processes, S.A. v. Cities Serv. Co.*, 796 P.2d 276, 286 n.43 (Okla. 1990). That court held the doctrine inapplicable to the case at bar as the inconsistent asserted positions related to legal theories, not matters of fact, and thus declined to decide the question of the doctrine's continued validity. *See id.* at 286-87.

¹⁸⁶ *Bertha Bldg. Corp. v. National Theatres Corp.*, 248 F.2d 833, 837 (2d Cir. 1957) (Hand, J., dissenting), *cert. denied*, 356 U.S. 936 (1958).

¹⁸⁷ *Giannone v. United States Steel Corp.*, 238 F.2d 544, 548 (3d Cir. 1956). The court, however, declined to rule on that question.

An easy way around this problem is to say that judicial estoppel should only apply to pure assertions of known facts, as opposed to notice-giving allegations. The problem is how to distinguish these without admitting the prior pleadings as evidence subject to explanation, and thus eviscerating the doctrine. The *Parkinson* court was aware of this distinction and took it into account in its decision, finding that in general, "the allegations of a complaint may be pierced by uncontradicted evidentiary matter and in such event, will not be deemed sufficient to raise a genuine fact issue." *Parkinson v. California Co.*, 233 F.2d 432, 439 (10th Cir. 1956).

¹⁸⁸ *See, e.g., Continental Ins. Co. v. Sherman*, 439 F.2d 1294, 1298 (5th Cir. 1971) (noting the conflict); *Garman v. Griffin*, 666 F.2d 1156, 1159 (8th Cir. 1981) (finding *Continental* to express the majority view); *see also Refurbishing a Judicial Shield, supra* note 1, at 420 n.72 (collecting cases).

¹⁸⁹ *See Refurbishing a Judicial Shield, supra* note 1, at 422.

¹⁹⁰ *See Parkinson*, 233 F.2d at 438.

doctrine that freezes earlier assertions because they have been made to and accepted by another court completely frustrates Rule 8(e)(2)'s policy of getting to the merits¹⁹¹ by ignoring the fact that judges and juries make mistakes, and that "facts" can either change with time or be unprovable at a certain time.¹⁹²

This Comment noted that a major concern of the drafters of the pleading rules has been the search for the truth.¹⁹³ The Supreme Court has noted that estoppels which "blockade[] unexplored paths that may lead to truth" are to be applied with great caution.¹⁹⁴ In most cases, when a party is judicially estopped from asserting a position, that will end its action and foreclose all further inquiry into the underlying claim; this result plainly conflicts with the truth-seeking function of the courts.¹⁹⁵

Judicial estoppel seeks to dispose of a case on the pleadings alone, which plainly conflicts with a policy of encouraging discovery and summary judgement in the disposition of cases.¹⁹⁶ The effect is to force attorneys to plead with an eye to avoiding judicial estoppel, rather than with an eye to complying with the liberal policies of modern pleading systems. This effect has been criticized with respect to other judge-made policies impinging on the "spirit" of the federal rules.¹⁹⁷ Judicial estoppel clearly conflicts with the policy of discouraging reliance on obsolete decisions.¹⁹⁸ If judicial estoppel were permitted to run free, a plaintiff could not hope to correct a previously correct assertion that had become incorrect.

¹⁹¹ See *supra* note 119 and accompanying text.

¹⁹² For example, it appears that with the medical evidence available to Mr. Konstantinidis at the time of his second action, he would have been unable to prove the assertion, which he later sought to demonstrate, that the broken needle was one cause of his injuries. See *supra* notes 139-43 and accompanying text.

¹⁹³ See *supra* notes 118-34 and accompanying text.

¹⁹⁴ *Brown v. Felsen*, 442 U.S. 127, 132 (1979). See also *Hankin*, *supra* note 127, at 368 (precluding alternative assertions may deny a litigant the right to assert the truth).

¹⁹⁵ Some would say that the litigant has made his bed and must now sleep in it. However, as the introductory hypothetical and the facts of *Kalikow 78/79 Co. v. State*, No. 41299-89 (N.Y. Sup. Ct., filed Feb. 2, 1990) show, this is not simply a question of holding someone to a decision in order to prevent bad faith—the doctrine is capable of causing great harm to litigants who do not try to "play fast and loose" with the courts, and who even attempt to aid the courts through tactical decisions.

¹⁹⁶ See *supra* notes 157-58 and accompanying text.

¹⁹⁷ For a criticism of expanded judicial use of Rule 11 sanctions as undermining the pleading system created by the federal rules, see Note, *Plausible Pleadings*, *supra* note 157.

¹⁹⁸ See *Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948) for a discussion of decisions that have become obsolete due to changes in the underlying facts or law.

Beyond conflicting with the spirit of the federal rules, other objections may be leveled at judicial estoppel. First, in order to apply the doctrine, a court must analyze the consistency of the pleadings, and this analysis may in itself be flawed. In fact, this consistency analysis has been criticized as being *ad hoc*.¹⁹⁹ The problem lies with the "close cases" which appear facially inconsistent, but may not be.²⁰⁰ In these situations, courts should heed Rule 8(f), which states that "[a]ll pleadings shall be so construed as to do substantial justice," and resolve doubts regarding consistency in favor of consistency. This approach would be consistent with one approach to Rule 11, which has been interpreted to be inapplicable when reasonable attorneys would agree that the pleading presented plausible claims.²⁰¹ If one of the purposes behind judicial estoppel is to preserve judicial resources, then failure to resolve doubts in favor of consistency clearly goes against this purpose, as it lengthens the judicial process by requiring appeals and remands.²⁰² The tendency of other preclusion doctrines to promote inefficiency has been noted by Professor Brunet.²⁰³ Brunet's analysis depended on the ease with which the requirements of collateral estoppel can be twisted around a set of facts. This leads to a large number of appeals on estoppel findings.²⁰⁴ Due

¹⁹⁹ See *Jackson Jordan, Inc. v. Plasser Am. Corp.*, 747 F.2d 1567, 1579 (Fed. Cir. 1984) ("Because of the absence of defined principles, [judicial estoppel] has been criticized, as it is basically an 'ad hoc' decision in each case.").

²⁰⁰ For examples of "close cases," see *United States v. 49.01 Acres of Land, More or Less*, 802 F.2d 387 (10th Cir. 1986) and *Parkinson v. California Co.*, 233 F.2d 432 (10th Cir. 1956).

²⁰¹ See Note, *Plausible Pleadings*, *supra* note 157, at 651 (arguing for such an approach).

²⁰² See, e.g., *Jackson Jordan*, 747 F.2d at 1578-80 (reversing finding of inconsistency); *Ellis v. Arkansas La. Gas Co.*, 609 F.2d 436, 440 (10th Cir. 1979) (same), *cert. denied*, 445 U.S. 964 (1980); *Johnson Serv. Co. v. Transamerica Ins. Co.*, 485 F.2d 164, 175 (5th Cir. 1973) (finding no inconsistent positions, and arguing against resolving doubts in favor of estoppel).

²⁰³ See Brunet, *A Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria*, 12 GA. L. REV. 701, 719-20 (1978).

²⁰⁴ Noting that "determinations of questions of law should reflect the goal of justice and prevent harmful side effects," *id.* at 710, Brunet went on to remark that

[a]lthough collateral estoppel is designed to achieve efficiency by avoiding duplicative trials on identical issues, the complexity of its preclusion norms warrants minimizing the need to consider whether collateral estoppel applies. The court's determination of intricate questions of issue preclusion increases the likelihood of appeals, thereby adding to the social cost to the litigants and taxpayers of dispute resolution.

Id. at 719-20 (footnote omitted).

to the greater malleability of judicial estoppel, that reasoning is even more applicable to it.

Judicial estoppel also conflicts with another of its own justifications—preserving the dignity of the courts and the sanctity of the oath.²⁰⁵ In *Farley v. Frost-Johnson Lumber Co.*,²⁰⁶ the Louisiana Supreme Court noted that it was inherently inequitable to punish someone, even if he had “played fast and loose” with the courts, by refusing to permit him to have his case decided upon its merits.²⁰⁷ In that case, a settlement of the prior action had resulted in the court entering judgment on a stipulation by the parties.²⁰⁸ The Louisiana Supreme Court felt that it was better to punish them in some other way, more suited to the “wrong” that they had committed, than to sacrifice a potentially meritorious suit.²⁰⁹ The Tenth Circuit seized upon this idea in *Parkinson*, saying that even when it came to outright perjury, “public policy [could] be vindicated otherwise—and more practicably and fairly in most instances—than through suppression of truth in the future.”²¹⁰

Another objection to the *Parkinson* holding might be that Rule 8(e)(2) permits pleading inconsistent causes of action or defenses, but not inconsistent facts.²¹¹ Once again, however, the comments of the drafters of the federal rules overcome this objection by noting that Rule 8(e)(2) is an attempt to codify the famous “kettle case” defense, where purely inconsistent facts were pled.²¹² Since

²⁰⁵ See *supra* notes 92-97 and accompanying text.

²⁰⁶ 133 La. 497, 63 So. 122 (1913).

²⁰⁷ Admittedly this value judgment is open to debate. The intent of this Comment, however, is to show that the balance of the debate tips, even if just slightly, away from utilizing judicial estoppel. It seems better to elicit the truth and then punish abusers of the judicial system than to permit factually incorrect decisions to stand as barriers to legitimate recoveries.

²⁰⁸ See *id.* at 503, 63 So. at 123-24.

²⁰⁹ See *id.* at 544-45, 63 So. at 138; *supra* note 91 and accompanying text.

²¹⁰ *Parkinson v. California Co.*, 233 F.2d 432, 438 (10th Cir. 1956). See also *Konstantinidis v. Chen*, 626 F.2d 933, 938 (D.C. Cir. 1980) (citing *Parkinson* favorably).

²¹¹ Cf. *Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp.*, 910 F.2d 1540, 1548 (7th Cir. 1990) (discussing the difference between pleading facts and theories of recovery).

²¹² The drafters' model for a Rule 8(e)(2) defense was the famous British “kettle case,” in which “[t]he allegation was that the defendant borrowed [sic] the plaintiff's kettle in a new condition and returned it greatly damaged. The defendant put in a defence, first, ‘I never borrowed it; second, it was cracked when I got it; and third, it was all right when I returned it.’” See Proposed Rules, *supra* note 159, at 741-d, 741-e (statement of Mr. Donworth); see also *Astor Limousine*, 910 F.2d at 1548 (noting a similar defensive posture).

the rule is not limited to defensive use, it must permit a plaintiff to plead inconsistent facts, as opposed to theories of recovery.²¹³ In fact it is difficult to imagine how one could be expected to plead two or more inconsistent causes of action without at the same time alleging inconsistent facts. Thus, inconsistent causes of action must subsume inconsistent factual allegations in Rule 8(e)(2).

The foregoing discussion has shown that judicial estoppel is precluded not by the rules that encourage inconsistent pleading themselves, but rather by the policies underlying such rules. Analysis of common law doctrines in this manner is both accepted and productive. Use of the doctrine is also inherently tilted toward disparaging the very policies it was designed to uphold.

IV. PROPOSAL FOR A NEW PROCEDURAL SYSTEM TO REPLACE JUDICIAL ESTOPPEL

Even if judicial estoppel were eliminated, as Section III urges, the problems that it was designed to prevent and the policies that it was designed to further would still remain. This section argues for the adoption of a new evidentiary presumption and increased use of Rule 11 sanctions, both against litigants and their attorneys. These proposals, taken together, would replace judicial estoppel and be immune to most of the above criticisms.²¹⁴

The doctrines of equitable estoppel, collateral estoppel and res judicata can and should be invoked to dispose of the majority of judicial estoppel cases.²¹⁵ The Louisiana Supreme Court advanced this argument in 1913, questioning seriously the validity of the doctrine as a tool to preserve the integrity of the judicial process.²¹⁶

In this respect, it is useful to categorize those types of cases that are amenable to disposition through other forms of estoppel. In the

²¹³ See *Teledyne Indus., Inc. v. NLRB*, 911 F.2d 1214, 1217 n.3 (6th Cir. 1990); cf. *Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, 111 S. Ct. 922, 928-30 (1991) (noting that Rule 11 was to be given its plain meaning, and finding no contrary intent in the Advisory Committee's comments).

²¹⁴ Unfortunately, a similar objection applies to the use of prior pleadings as evidence against the pleader. This section will thus argue that with proper safeguards, that objection will be rendered less threatening, if not removed entirely.

²¹⁵ See *supra* notes 28-37 and accompanying text.

²¹⁶ See *Farley v. Frost-Johnson Lumber Co.*, 133 La. 497, 63 So. 122 (1913). The *Farley* Court articulated the Louisiana rule that prior assertions do not become conclusive evidence against the pleader unless there is reliance and prejudice. See *id.* at 514, 63 So. at 137.

analyses that follow, "A" denotes a party asserting estoppel against "B." In order to ensure that B's assertion could have been litigated in the prior action, this section assumes that the assertion is logically inconsistent with one made in a previous action. To reiterate, these cases can be categorized by looking at four characteristics: privity or sameness of parties, successful maintenance of the assertion in question, reliance by the opposing party on that assertion, and prejudice to the opposing party resulting from reversal of that assertion.

If there is privity or sameness of parties, the case is amenable to *res judicata*²¹⁷ and possibly equitable estoppel.²¹⁸ If there is not privity or sameness of parties, but the assertion was successfully maintained, then the case is amenable to the use of collateral estoppel, for then the issue must actually have been litigated.²¹⁹ Thus, the only situations in which a court might need to apply judicial estoppel are when there is no privity or sameness of parties and the assertion was not successfully maintained.

For those cases, the prior pleadings should be admitted as evidence against B to create a bursting bubble presumption²²⁰ as to the validity of the prior assertion.²²¹ The court should then permit B to come forward with evidence, in the form of affidavits if necessary to withstand a motion for summary judgment, to rebut the presumption. Such evidence could include proof of a lack of full and fair opportunity to litigate the issue in the previous action, perhaps due to burden of proof or discovery differences, fraud, honest mistake, inadvertence, changed facts, or unavailability of facts at the time of the prior assertion.²²² If B successfully rebuts

²¹⁷ See *supra* notes 35-37 and accompanying text.

²¹⁸ See *supra* notes 28-29 and accompanying text.

²¹⁹ See *supra* notes 30-34 and accompanying text.

²²⁰ This presumption would be governed by FED. R. EVID. 301: "In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption," and would hence disappear in the face of evidence sufficient to rebut it. See *Tenneco Chem. v. William T. Burnett & Co.*, 691 F.2d 658, 663 (4th Cir. 1982) (stating that "it is axiomatic that a presumption is not evidence and disappears in the face of evidence sufficient to rebut it" (citing *Union Pac. R.R. v. United States*, 524 F.2d 1343 (Ct. Cl. 1975))).

²²¹ Contrast this with the implicit presumption created by judicial estoppel that any party seeking to reverse a prior position does so in bad faith.

²²² For general exceptions to collateral estoppel, see RESTATEMENT (SECOND) OF JUDGMENTS, § 28 (1982). It is likely that most of the cases in which there was no reason to disturb the prior holding would be disposed of on partial summary judgment as follows: A would move for partial summary judgment, submitting a copy

the presumption, the case should go forward on the merits. If not, the issue should be deemed established as it was previously asserted, and the court should grant A partial summary judgment on that issue if appropriate. The court should then move to consider imposing sanctions on both the attorney and the litigant.²²³ This would allow the court to determine the truth in light of all the facts available to the pleader seeking to change positions, as suggested by *Parkinson*.²²⁴

This approach will protect the sanctity of the oath by presuming the validity of a prior pleading, while not blindly following its assertions in the face of evidence to the contrary.²²⁵ It also protects the integrity and dignity of the judicial process by showing that the courts will settle disputes with reference to the best available approximation of the truth, admitting the frailties of the judicial process, while punishing those who actually abuse it, rather than who are presumed to have abused it. Finally, it permits great latitude in pleading, while allowing the courts to dispose of cases via summary judgment and motions to dismiss when proper.

The court might determine that the assertion of the incorrect position did not violate Rule 11, for example, because "reasonable inquiry" into the facts at the time of the assertion would not have revealed the latterly discovered truth. This should be the outcome in a case with facts similar to *Konstantinidis* if the court determines that there has been no perjury or Rule 11 violation. In some cases, however, the court will determine that there has been a violation.

Misconduct by the party seeking to change positions could arise in two forms. First, and easiest to deal with, is when the court determines that the party originally asserted the truthful position in the first action, and sought to perjure itself in the later action. The court could then sanction the offending party under Rule 11,²²⁶

of the prior pleading(s) with his motion papers. B would then submit whatever evidence he could muster in an attempt to rebut the presumption. If successful, the case would go forward on the merits. If not, it could go forward on any issues that were left open in light of conclusive determinations by prior assertions.

²²³ Cf. C. CLARK, *supra* note 23, at 632 (arguing that in the case of defenses, the issue of sanctions against both counsel and party should never be considered unless the pleading was "so false as to be stricken").

²²⁴ See *supra* note 174 and accompanying text.

²²⁵ But see the seventy cases cited in *Farley v. Frost-Johnson Lumber Co.*, 133 La. 497, 538-39, 63 So. 122, 136 (1913) (holding that previous assertions estop pleaders from contradicting them even if it is clear that the previous assertions were false).

²²⁶ Recently, the Supreme Court held that the 1983 amendments to Rule 11 impose an objective standard of reasonable inquiry into the facts on both a

or under its inherent power to sanction, and refer the charge of perjury to the appropriate authority,²²⁷ while according preclusive effect to the prior position.

But what if the court determines that the party seeking to change positions is telling the truth in the instant action, having committed perjury in the previous action? Contrary to the beliefs of those who favor judicial estoppel, it is not necessary to have inconsistent decisions in the two actions. First, the trial judge might refer the possible perjury charges to the United States Attorney, or state attorney general, for investigation and disposition.²²⁸ Unfortunately, the statute of limitations for perjury is limited to five years, at least in the federal system.²²⁹ The Supreme Court has acknowledged this difficulty for many years, but has accepted that it is neither possible nor desirable to punish someone for defrauding or misbehaving toward a court after the statute of limitations has run.²³⁰ Thus, a party might escape punishment for perjury if the initial action occurred more than five years before the second action.

Punishing the party for perjury only takes care of half of the inquiry, however. The possibility of inconsistent judgements still remains. In the federal system, at least, that situation can be remedied.²³¹ Under the Federal Rules of Civil Procedure, a litigant may make a motion or institute a separate action under Rule 60(b)²³² to reopen a previous judgment. Assuming that the party

represented party as well as his attorney. *See* *Business Guides, Inc. v. Chromatic Communications Enters., Inc.* 111 S. Ct. 922, 933 (1991). Thus, both the party and his attorney now may be sanctioned under similar, if not identical, standards. *Cf. id.* (stating that the reasonability standards will not always be identical). Since a party will typically be given more leeway even under the new objective standard, this could mean that once it has been determined that the party violated Rule 11, the attorney's violation would be clear as well, upon a finding that he acquiesced in or encouraged the party's actions.

²²⁷ In the federal court system, the perjury would be reported to the United States Attorney for that district.

²²⁸ In the federal system, perjury is defined and its punishment prescribed in 18 U.S.C. §§ 1621-1623 (1988).

²²⁹ *See* 18 U.S.C. § 3282 (1988).

²³⁰ *See* *Pendergast v. United States*, 317 U.S. 412 (1943).

²³¹ The discussion that follows also applies to state court systems whose rules of civil procedure have an analog to FED. R. CIV. P. 60. For example, New York CPLR Rule 5015 is substantially similar to federal Rule 60 in that it allows "any interested person" to move the court that rendered the offending judgment to relieve the parties of that judgment for the same reasons as Rule 60. *See* N.Y. CIV. PRAC. L. & R. 5015(a) (Consol. 1990).

²³² Rule 60(b) states:

who was the victim of the perjury in the previous action was not a party to the present action, the court could require the United States Attorney to bring its finding of perjury to that party's attention. That party could then bring its action or motion in the same court that heard the previous action or in any other district court that was convenient, including the one in which the later action took place.²³³

Motions under Rule 60(b) are subject to a one year limitations period from the date of entry of the judgment, but some circuits have held that independent actions to reopen old judgments are not subject to any limitations period,²³⁴ except when required by justice through the doctrine of laches²³⁵ or statutes of limitations that arise from outside the rule.²³⁶ The Supreme Court has also held that no limitations period applies to a motion under Rule

(B) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, . . . or to set aside a judgment for fraud upon the court.

FED. R. CIV. P. 60(b). Note that when a party seeks to reopen a judgment under Rule 60(b), it must prove the misconduct of the opposing party by clear and convincing evidence. See *Square Construction Co. v. Washington Metro. Area Transit Auth.*, 657 F.2d 68, 71 (4th Cir. 1981).

²³³ See *Locklin v. Switzer Bros.*, 335 F.2d 331 (7th Cir.), *cert. denied*, 379 U.S. 962 (1964), *reh'g denied*, 380 U.S. 926 (1965). But see *Lapin v. Shulton, Inc.*, 333 F.2d 169 (9th Cir.), *cert. denied*, 379 U.S. 904 (1964) (holding that a new court should deny jurisdiction to hear such a case and remand to the prior court if the prior court is capable of rendering the relief requested).

²³⁴ See, e.g., *Kupferman v. Consolidated Research and Mfg. Corp.*, 459 F.2d 1072 (2d Cir. 1972) (applying Rule 60(b) to a ten-year-old judgment); *Chrysler Corp. v. Superior Dodge, Inc.*, 83 F.R.D. 179 (D. Md. 1979) (similar).

²³⁵ See *Crosby v. Mills*, 413 F.2d 1273 (10th Cir. 1969) (holding that only laches applies).

²³⁶ See *Bankers Mortgage Co. v. United States*, 423 F.2d 73 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970) (holding that laches and other statutes of limitations foreclosed reopening a 33-year-old judgment).

60(b)'s "any other reason" clause when reopening of the judgment is required "to accomplish justice."²³⁷

The only question is where the situation of perjury in the former action fits into Rule 60(b)'s classification. Perjury has been held to be intrinsic rather than extrinsic fraud, because perjury regarding an issue material to the action is intimately bound up with the substance of the action itself.²³⁸ At least one circuit has held that perjury does not constitute proper grounds for relief under Rule 60(b),²³⁹ but long-standing precedent and Rule 60(b) amendments that permit relief for intrinsic fraud indicate that such a holding is incorrect, and that perjury does afford a basis for relief under Rule 60(b).

In *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*,²⁴⁰ one of the parties had perpetrated a continuing scheme to defraud both its adversaries and the courts. The Court noted that while the policy of ensuring finality of judgment was nearly absolute, courts going back to pre-revolutionary England had made an exception for fraud discovered after the close of the action, and had permitted reopening of the judgment anytime after discovery of the fraud.²⁴¹ The Court went on to hold that the exception required proof of a scheme to defraud the courts and subvert the judicial system, which would be much easier if it could be shown that a party's attorney was somehow part of that scheme. The Court specifically noted that perjury committed by an isolated witness, without more, would not be sufficient to reopen a judgement.²⁴²

Viewed from the proper angle, this description precisely matches the situation sought to be covered by the "fast and loose" rationale for judicial estoppel.²⁴³ In that situation, a court is confronted with a party that had perjured itself in an earlier action and then sought to continue to defraud by preventing another adverse party from relying on the party's previous assertion. Any difference between this situation and the *Hazel* scheme is merely one of method. The advisory committee for the Federal Rules of Civil Procedure specifically cited *Hazel* in its notes to the 1946

²³⁷ See *Klapprott v. United States*, 335 U.S. 601, 609, 613-15 (1949).

²³⁸ See *Travelers Indem. Co. v. Gore*, 761 F.2d 1549 (11th Cir. 1985).

²³⁹ See *id.*

²⁴⁰ 322 U.S. 238 (1944).

²⁴¹ See *id.* at 244.

²⁴² See *id.* at 245-46.

²⁴³ See *supra* note 78 and accompanying text.

amendment to Rule 60(b), which modified the rule to cover both intrinsic and extrinsic fraud.²⁴⁴

That interpretation has been confirmed by recent cases finding perjury to be within one or more of Rule 60(b)'s categories. The Fifth Circuit recently held that evidence of perjury in the prior action is new evidence within the meaning of Rule 60(b)(2) because it was in the control of the perjuring party at all times and could not have been discovered by its opponent at the time of that trial. As such, it was grounds for a Rule 60(b)(2) motion, and by inference, for an independent action as well.²⁴⁵ The Eighth Circuit, on the other hand, held that proof of perjury in the former action establishes fraud on the court under Rule 60(b)(3); if a party can prove that the perjury deprived it of a full and fair opportunity to litigate, it can reopen the judgment under that section.²⁴⁶ Finally, perhaps in anticipation of inconsistent pleadings being used to establish perjury, the Tenth Circuit recently held that inconsistent testimony in a later action could provide grounds for a Rule 60(b)(3) motion, and by inference for an independent action, in the discretion of the trial judge.²⁴⁷ These cases illustrate that when a litigant has "played fast and loose" with the courts by perjuring himself in a previous action and then seeking to assert inconsistent positions, the Federal Rules of Civil Procedure and the Federal Rules of Evidence together provide a mechanism by which the truth can be told without the risk of two courts assuming inconsistent positions.

The idea that prior pleadings could be evidence against the pleader goes back centuries:

At common law the point has never been doubtful; the rule has always been that while admissions made in other suits are of course evidence, as being declarations against interest, and therefore presumably true, they are no more conclusive, or estoppels, than admissions made out of courts. In fact, the only

²⁴⁴ See FED. R. CIV. P. 60(b) advisory committee's note to the 1946 Amendment.

²⁴⁵ See *Washington v. Patlis*, 916 F.2d 1036, 1039 (5th Cir. 1990).

²⁴⁶ See *Paige v. Sandbulte*, 917 F.2d 1108, 1110-11 (8th Cir. 1990).

²⁴⁷ See *Anderson v. Dep't of Health and Human Serv.*, 907 F.2d 936, 952 (10th Cir. 1990). It has also been held that the misconduct complained of under Rule 60(b)(3) need not have altered the result of the previous action in order to warrant relief. See *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 924 (1st Cir. 1988). Rather, it must have "affected the substantial rights of the [aggrieved party]." *Id.* Thus, situations presenting opportunities to apply judicial estoppel present an even more compelling opportunity to apply Rule 60.

doubt has been as to whether they were admissible in evidence at all, when contained in pleadings at law, owing to the necessity under which a party often finds himself in his pleadings at law to make statements not because of his knowing them to be true, but in order to meet possible contingencies, or developments, in the case, with regard to which he has no information and yet is required to plead with positiveness of assertion.²⁴⁸

The federal courts have agreed for decades. *Parkinson* was decided on this issue; the court held that the inconsistent prior pleadings were admissible as evidence, but not necessarily conclusive, and could be "convincing, persuasive, or of little weight, according to the particular circumstances."²⁴⁹ The Third Circuit rendered a similar decision in *Giannone v. United States Steel Corp.*,²⁵⁰ and asked whether permitting the use of prior inconsistent statements as evidence would defeat the policies behind Rule 8(e)(2).²⁵¹

Strictly speaking, the Third Circuit was correct. Admitting the prior assertions as evidence against the pleader will tend to discourage pleading inconsistently and alternatively out of fears of future repercussions in other actions. Admitting prior assertions, however, will not implicate the major policy objection to judicial estoppel of absolutely foreclosing access to the truth, because under this scheme the prior assertions are admitted as presumptive statements of fact subject to rebuttal on good grounds by the party who made them. Indeed, only those actively planning the non-testimonial equivalent of perjury will be hurt and discouraged by the threat of admitting prior assertions, and those litigants and attorneys are precisely the targets of judicial estoppel; parties harboring good-faith doubts about what facts might ultimately be determined at trial should not fear future admissions of those same assertions, subject to rebuttal.

Federal courts have not veered from *Parkinson's* holding regarding the probative value of inconsistent prior assertions.²⁵²

²⁴⁸ *Farley v. Frost-Johnson Lumber Co.*, 133 La. 497, 542-543, 63 So. 122, 137 (1913).

²⁴⁹ *Parkinson v. California Co.*, 233 F.2d 432, 438 (10th Cir. 1956).

²⁵⁰ 238 F.2d 544 (3d Cir. 1956).

²⁵¹ See *id.* at 548. See also *Bertha Bldg. Corp. v. National Theatres Corp.*, 248 F.2d 833, 837 (2d Cir. 1957) (Hand, J., dissenting) (inconsistent pleadings admissible against pleader, but not as conclusive evidence), *cert. denied*, 356 U.S. 936 (1958).

²⁵² See, e.g., *In re Southwestern Bell Tel. Co.*, 535 F.2d 859, 861 (some probative value), *aff'd en banc*, 542 F.2d 297 (5th Cir. 1976), *rev'd on other grounds*, 430 U.S. 723, *reh'g denied*, 431 U.S. 975 (1977).

Later cases, however, have focused on the admission of pleadings under the Federal Rules of Evidence. The latest case to discuss this problem is *Dugan v. EMS Helicopters, Inc.*,²⁵³ coincidentally one of the cases in which the Tenth Circuit reaffirmed *Parkinson*. The *Dugan* Court noted first that, in general, where a plaintiff files different complaints against different defendants for the same injuries, each complaint is admissible as evidence against the other.²⁵⁴ The court noted the trend toward admitting prior inconsistent pleadings as substantive evidence pursuant to Federal Rule of Evidence 801(d)(2),²⁵⁵ and the use of inconsistent pleadings for impeachment purposes under Federal Rule of Evidence 613.²⁵⁶ The Tenth Circuit stressed, however, that only prior assertions that are directly contrary to current positions are admissible. This admonition is fully consistent with resolving doubts in favor of consistency.²⁵⁷ If no inconsistency exists, there is no reason for an estoppel and also no reason for admitting the prior assertions as evidence.

Although the foregoing discussion was grounded in the federal courts, the states have not been delinquent in this area. For example, Massachusetts specifically encourages the pleading system favored by this Comment and has not adopted judicial estoppel.²⁵⁸ Texas, while approving of judicial estoppel, also has a variant of this system, by means of its rules of evidence, which are similar to the federal rules.²⁵⁹ Thus, while the discussion of

²⁵³ 915 F.2d 1428 (10th Cir. 1990).

²⁵⁴ See *id.* at 1432.

²⁵⁵ The rule provides that the following statements are not hearsay:

(2) *Admission by party-opponent.* The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject,

FED. R. EVID. 801(d)(2). Prior pleadings will usually come in under FED. R. EVID. 801(d)(2)(B) or 801(d)(2)(C).

²⁵⁶ That rule provides as follows:

(A) EXAMINING WITNESS CONCERNING PRIOR STATEMENT. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

FED. R. EVID. 613 (a).

²⁵⁷ See *supra* notes 199-204 and accompanying text.

²⁵⁸ See MASS. GEN. L. ch. 231, § 87 (1985); *Brown v. Gerstein*, 17 Mass. App. Ct. 558, 568-69 n.19, 460 N.E.2d 1043, 1051 n.19 (1984).

²⁵⁹ See *Herd Corp. v. Triple "J" Inv., Inc.*, No. B14-86-506-CV, slip op. at 8 n.3

judicial estoppel's conflicts with systems encouraging inconsistent pleading applies to state systems similar to the federal rules, the suggested presumption of the validity of the prior assertion, subject to rebuttal, also applies to similar state systems.

The discussion so far has centered on ensuring that truth not be foreclosed based upon prior assertions. But judicial estoppel, at least in some jurisdictions,²⁶⁰ also seeks to protect the sanctity of the oath and to protect the judicial system itself, rather than the parties. This policy is strikingly similar to the one behind Rule 11.²⁶¹ Rule 11²⁶² now mandates sanctions against any lawyer who files a pleading not well grounded in fact.²⁶³ The rule specifically provides that if such a pleading is signed and filed, the court shall impose "appropriate" sanctions on the attorney, the party, or both, and may do this upon an opposing party's motion or *sua sponte*.²⁶⁴ The fact that the sanctions may be imposed on the court's own motion make this a very attractive substitute for judicial estoppel. The sanctions are almost entirely within the discretion of the judge and can include dismissing the case, payment of costs, and attorney's fees.²⁶⁵ Using Rule 11 to strike the pleadings, which is equivalent to dismissing the case if it is not possible to amend without asserting the sanctioned material, is not favored under the 1983 amendments to the rule.²⁶⁶ Rather, the Advisory Committee favored imposing such sanctions through Rules 8, 12, or 56.²⁶⁷ The use of summary judgment together with such other sanctions

(Tex. App. 14 Dist., Sept. 24, 1987).

²⁶⁰ See *supra* note 10 and accompanying text.

²⁶¹ See generally Note, *Plausible Pleadings*, *supra* note 157, at 630 (discussing the policies behind Rule 11 and its amendments, and proposing new interpretations of its dictates).

²⁶² For a discussion of Rule 11 as an estoppel device, see *City of Kingsport, Tenn. v. Steel and Roof Structure, Inc.*, 500 F.2d 617, 619-20 (6th Cir. 1974).

²⁶³ See Note, *Plausible Pleadings*, *supra* note 157, at 630 n.1; see also *Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, 111 S. Ct. 922, 933 (1991) (holding represented parties to an objective standard of reasonable pre-filing inquiry, especially with respect to facts under the control of the parties).

²⁶⁴ See Note, *Plausible Pleadings*, *supra* note 157, at 633 n.9. In fact, this was the genesis of *Business Guides*. The district court, having done its own research into the facts of the case, raised the prospect of Rule 11 sanctions *sua sponte* and referred the case to a magistrate for action. See *Business Guides*, 111 S. Ct. at 926.

²⁶⁵ See Note, *Plausible Pleadings*, *supra* note 157, at 644 n. 19.

²⁶⁶ See FED. R. CIV. P. 11 advisory committee's note to the 1983 Amendment.

²⁶⁷ See *id.*

as the court might deem appropriate directly parallels the bursting bubble presumption advocated in this Comment.²⁶⁸

Why sanctions? If a true purpose of judicial estoppel is to protect the integrity of the judicial system, then preventing the assertion of the inconsistent positions completes only half of the job and also hinders truth-finding. At most, the party's case is dismissed, and the attorney gets off scot-free. This is acceptable if there was no bad faith involved, but if there was bad faith, this result leaves the party and the attorney with no disincentive to try again. Rule 11 sanctions, however, are different, both because they act as potentially very strong deterrents and because they can be tailored to deter without blocking access to the truth.²⁶⁹ Sanctions are imposed to encourage parties to make more diligent inquiry into the facts when contemplating the assertion of an inconsistent position. Since most litigants must get into the courts via attorneys, this provides a far stronger method for protection of the judicial system than simply estopping the later assertions. Since parties and attorneys are held to the same standard, the effect of Rule 11 sanctions will most likely be even greater.²⁷⁰

The placing of the formulation of the sanctions almost completely within the discretion of the trial judge is consistent with the desire to protect the judicial system from abuse while still attempting to find the truth. The type of sanction used will vary according to the purpose of sanctioning the offending party or attorney and the facts of the case, since Rule 11 sanctions function both to deter and compensate.²⁷¹ As a deterrent, sanctions "may be a useful tool in vindicating the court's authority, reminding those who need reminding of the protocol, and ensuring orderliness of the judicial process,"²⁷² the first and last of which are very similar to some of the goals of judicial estoppel. As compensation, sanctions recognize that "playing fast and loose" with the courts hurts not only the

²⁶⁸ See *supra* notes 220-24 and accompanying text.

²⁶⁹ See Note, *Plausible Pleadings*, *supra* note 157, at 649 n. 94 (noting the flexibility built into the rule, and suggesting that deterrence is particularly valuable in cases in which an attorney repeatedly files non-meritorious claims already clearly precluded).

²⁷⁰ Cf. *Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, 111 S. Ct. 922, 935 (1991) (Kennedy, J., dissenting) (discussing the likely impact of the majority's holding).

²⁷¹ See *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 394 (1st Cir. 1990); see also *Business Guides*, 111 S. Ct. at 928 (discussing Rule 11's purpose of curbing litigation abuses).

²⁷² *Anderson*, 900 F.2d at 395.

judicial system, but the other parties as well.²⁷³ Judicial estoppel cannot compensate its user for the costs forced upon her by her opponent's misconduct, whereas Rule 11 is designed for just that purpose.²⁷⁴

In addition to Rule 11, federal judges also have an expansive inherent power to sanction litigants. The Supreme Court recently outlined that power in *Chambers v. Nasco, Inc.*,²⁷⁵ a case that involved pervasive litigation abuses. The Court first noted that it is a part of the inherent powers of a federal court to vacate its own judgment upon proof that it has been the victim of fraud.²⁷⁶ Moreover, a federal court can pursue its own investigation to determine whether it has been defrauded.²⁷⁷ The inherent power reaches a broader class of conduct than does Rule 11 and, when bad faith is present,²⁷⁸ it also includes conduct barred by Rule 11. Finally, the Court noted that sanctions under the inherent power, including the vacation of prior judgments, "may be imposed years after a judgment on the merits."²⁷⁹

The Court's language in *Chambers* suggests that in the type of case that judicial estoppel actually seeks to prevent, Rule 60²⁸⁰ might not even be necessary in order to correct the prior judgment. Indeed, since the original court could undertake its own examination into the fraud once aware of it, the later parties might not need to be involved at all. The inherent power to sanction is yet another way that a federal court may correct past mistakes and punish egregious behavior. But Justice White's reasoning in *Chambers*, that

²⁷³ See *id.*

²⁷⁴ While "Rule 11 is not a fee-shifting statute," *Business Guides*, 111 S. Ct. at 934 (citing *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2462 (1990)), the rule does shift the costs of the "discrete event" that violated its standards. See *id.* In *Business Guides*, the violation turned out to be the commencement of the action without reasonable inquiry into the facts, leading the district court to award the defendant its legal fees and expenses incurred in defending the improper action. See *id.* at 927. Based upon that analysis, a federal court faced with a litigant "playing fast and loose with the courts," as the plaintiff in *Business Guides* was, could award as sanctions the opposing party's costs of litigating to dismissal. Cf. *id.*

²⁷⁵ 59 U.S.L.W. 4595 (U.S. June 6, 1991) (No. 90-256).

²⁷⁶ See *id.* at 4598.

²⁷⁷ See *id.* Presumably, this is similar to a federal judge's ability to raise the possibility of Rule 11 sanctions *sua sponte*. See *supra* note 264 and accompanying text.

²⁷⁸ See 59 U.S.L.W. at 4599-600.

²⁷⁹ See *id.* at 4601 (emphasis added).

²⁸⁰ See *supra* notes 231-47 and accompanying text (discussing reopening prior judgments using Rule 60).

the inherent power to sanction is simply necessary for the federal courts to function,²⁸¹ probably applies to state courts as well.

CONCLUSION

Judicial estoppel was developed to meet the perceived needs of protecting the judicial system at a time when rules of pleading were strict and unforgiving. In those days it could be forgiven, and might even have been necessary. But when the rules of pleading changed to reflect modern times, the doctrine of judicial estoppel was no longer necessary to protect those interests. Moreover, the doctrine conflicts with the policies behind the changed rules of pleading and is capable of working great injustices on litigants. Some courts have recognized these problems and have refused to apply the rule; others stubbornly hold on to it. But modern rules of evidence and attorney/litigant sanctions provide far better methods of protecting the interests that judicial estoppel sought to protect, while promoting the deeper policies behind the modern systems of pleading. For those reasons, judicial estoppel is a policy whose time has come and gone, and it, like common law and code pleading, should be consigned to the history books in any jurisdiction whose pleading system substantially parallels the Federal Rules of Civil Procedure. Alternatively, a new defense could be added to the doctrine: that the party against whom the estoppel is asserted did not have a full and fair opportunity to litigate the issue underlying the positions it wishes to assert.²⁸² This may explain Montana's requirement that the party to be estopped must have had full knowledge of the facts at the time of the prior pleading,²⁸³ and Utah's requirement that the parties possess unequal knowledge of the facts.²⁸⁴ In doing so, however, a jurisdiction would run the risk of having judicial estoppel subsumed by collateral estoppel, as seems to have occurred in Idaho already.²⁸⁵

²⁸¹ See 59 U.S.L.W. at 4598-99.

²⁸² See *supra* notes 144, 222 and accompanying text.

²⁸³ See *Rowland v. Klie*, 223 Mont. 360, 367-68, 726 P.2d 310, 315-16 (1986).

²⁸⁴ See *Masters v. Worsley*, 777 P.2d 499, 503-04 (Ct. App. Utah 1989).

²⁸⁵ See *Rajspic v. Nationwide Mut. Ins. Co.*, 104 Idaho 662, 664 n.1, 662 P.2d 534, 536 n.1 (1983).

APPENDIX

The following table notes the rejection or acceptance of judicial estoppel by each state, and the criteria for use of judicial estoppel in those states that accept the doctrine.²⁸⁶

State	Judicial Estoppel	Prior Success	Reliance	Prejudice
Ala. ²⁸⁷	Yes	Unclear	Yes	Yes
Alaska ²⁸⁸	Yes	Yes	Yes	Yes
Ariz. ²⁸⁹	Yes	Yes	Yes	Unclear
Ark. ²⁹⁰	Yes	Unclear	Unclear	Unclear
Cal. ²⁹¹	Yes			Yes
Colo. ²⁹²	Unclear			
Conn. ²⁹³	No			
Del. ²⁹⁴	Yes			
D.C. ²⁹⁵	No			

²⁸⁶ A blank space indicates that the question has not been addressed in that state.

²⁸⁷ See *Hendricks v. Blake*, 291 Ala. 575, 580, 285 So.2d 82, 86 (1973) (holding that judicial estoppel should never be used offensively).

²⁸⁸ See *Jamison v. Consolidated Utilities, Inc.*, 576 P.2d 97, 101-03 (Alaska 1978) (holding that changed facts would constitute a defense).

²⁸⁹ See *Standage Ventures, Inc. v. State of Arizona*, 114 Ariz. 480, 483-484, 562 P.2d 360, 363-64 (1977) (declining to decide if identity of parties was required).

²⁹⁰ See *Muncrief v. Green*, 251 Ark. 580, 583-84, 473 S.W.2d 907, 900 (1971) (requiring that the parties be the same).

²⁹¹ See *Ng v. Hudson*, 75 Cal. App. 3d 250, 258, 142 Cal. Rptr. 69, 74-75 (1977). Although judicial estoppel is accepted in California, the requirements are still unclear.

²⁹² See *Waitkus v. Pomeroy*, 506 P.2d 392, 397 (Col. Ct. App. 1972). The court appears to have confused the doctrine with collateral estoppel because they cite Louisiana cases for the doctrine, and Louisiana no longer permits the use of the doctrine. See *infra* note 304 and accompanying text.

²⁹³ See *Rogers Investment Co. v. F.W. Woolworth Co.*, 161 Conn. 6, 10-11, 282 A.2d 882, 884-85 (1971) (holding that prior claims were admissible but could be explained away).

²⁹⁴ See *Kesterton v. American Casualty Co.*, No. 83 E-De-93, slip op. at 269, 276 (Del. Super. Ct. Aug. 15, 1988) (LEXIS, States library, Del file). The court, however, does not explain its requirements.

²⁹⁵ See *Plough, Inc. v. National Academy of Sciences*, 530 A.2d 1152, 1159 n.10

State	Judicial Estoppel	Prior Success	Reliance	Prejudice
Fla. ²⁹⁶	Yes	Yes	Yes	Yes
Ga.				
Haw. ²⁹⁷	Yes	Yes		Yes
Idaho ²⁹⁸	Yes	Yes	Yes	Yes
Ill. ²⁹⁹	Yes	Yes		
Ind. ³⁰⁰	Yes	Yes	Yes	Yes
Iowa ³⁰¹	Yes	Yes		
Kan. ³⁰²	Yes	Unclear	Yes	Unclear
Ky. ³⁰³	Yes			
La. ³⁰⁴	No			
Me. ³⁰⁵	Unclear			

(D.C. 1987) (accepting *Konstantinidis*).

²⁹⁶ See *Chase & Co. v. Little*, 116 Fla. 667, 671-72, 156 So. 609, 610-11 (1934) (requiring same parties and not allowing mistake or inadvertence defenses).

²⁹⁷ See *Rosa v. CWJ Contractors, Ltd.*, 4 Haw. App. 210, 218-20, 664 P.2d 745, 751-52 (1983).

²⁹⁸ See *Ross v. Ross*, 103 Idaho 406, 408-09, 648 P.2d 1119, 1121-22 (1982) (requiring same issues and parties). But see *Rajspic v. Nationwide Mutual Insurance Co.*, 104 Idaho 662, 664 n.1, 662 P.2d 534, 536 n.1 (1983) (saying that judicial estoppel is the same as collateral estoppel).

²⁹⁹ See *Finley v. Kesling*, 105 Ill. App. 3d 1, 8-10, 433 N.E.2d 1112, 1118-19 (1982).

³⁰⁰ See *Tobin v. McClellan*, 225 Ind. 335, 344-47, 73 N.E.2d 679, 684-85 (1947) (also stating that this was estoppel by conduct). The court required that the prior assertion have been "acted on by [the] court."

³⁰¹ See *Vennerberg Farms, Inc. v. IGF Insurance Co.*, 405 N.W.2d 810, 814 (Iowa 1987) (requiring an attempt by the party to mislead the court).

³⁰² See *McClintock v. McCall*, 214 Kan. 764, 766-67, 522 P.2d 343, 346 (1974) (requiring same parties).

³⁰³ See *Norrell v. Electric & Water Plant Board of the City of Frankfort*, 557 S.W.2d 900, 903 (Ky. Ct. App. 1977) (requiring same parties but not otherwise explaining requirements).

³⁰⁴ See *Doyle v. State Farm (Mutual) Insurance Co.*, 414 So.2d 763, 765 (La. 1982).

³⁰⁵ See *Begin v. Town of Sabattus*, 409 A.2d 1269, 1271-72 (Me. 1979) (criticizing a doctrine similar to judicial estoppel on the basis of a rule like FED. R. CIV. P. 8(e)(2)).

State	Judicial Estoppel	Prior Success	Reliance	Prejudice
Md. ³⁰⁶	Unclear			
Mass. ³⁰⁷	No			
Mich. ³⁰⁸	Yes	Yes		
Minn. ³⁰⁹	Yes	Yes	Yes	Yes
Miss. ³¹⁰	Yes			
Mo. ³¹¹	Unclear			
Mont. ³¹²	Yes			
Neb. ³¹³	Unclear			
Nev. ³¹⁴	Yes			
N.H.				
N.J. ³¹⁵	Yes	Yes		Yes

³⁰⁶ See *Messal v. Merlands Club Inc.*, 244 Md. 18, 29-31, 222 A.2d 627, 633-34 (1966) (requiring, at least, the same parties; may have been confused with res judicata).

³⁰⁷ See *Brown v. Gerstein*, 17 Mass. App. Ct. 558, 568 n.19, 460 N.E.2d 1043, 1051 n.19 (1984).

³⁰⁸ See *Lichon v. American Universal Ins. Co.*, 435 Mich. 408, 415-17, 459 N.W.2d 288, 293 (1990).

³⁰⁹ See *Minnesota State Board of Health by Lawson v. Brainerd*, 308 Minn 24, 28 n.1, 241 N.W.2d 624, 627 n.1 (1976) (appearing to apply only within "a single litigation").

³¹⁰ See *Hoover v. Mississippi*, 552 So.2d 834, 838 (Miss. 1989) (requiring same parties).

³¹¹ See *Edwards v. Durham*, 346 S.W.2d 90, 101 (Mo. 1961) (mentioning but not applying the doctrine). But see, *Bellinger v. Boatman's Nat'l Bank*, 779 S.W.2d 647, 650-51 (Mo. Ct. App. 1989) (stating that the doctrine applies to "facts stated under oath, during the course of a trial").

³¹² See *Rowland v. Klies*, 223 Mont. 360, 367-69, 726 P.2d 310, 315-16 (1986) (holding that pleadings, without court action, are enough to estop but requiring full knowledge of facts at time of pleading).

³¹³ The doctrine was mentioned in *Rosnick v. Dinsmore*, 235 Neb. 738, 751, 457 N.W.2d 793, 801 (1990). The Nebraska Supreme Court, however, appears to have been speaking of collateral estoppel. See *id.* at 752, 457 N.W.2d at 801.

³¹⁴ See *Sterling Builders, Inc. v. Fuhrman*, 80 Nev. 543, 547-48, 396 P.2d 850, 853 (1964) (holding that pleadings, without court actions, are enough to estop).

³¹⁵ See *Chattin v. Cape May Greene, Inc.*, 581 A.2d 91, 107-08 (N.J. Super. Ct.

State	Judicial Estoppel	Prior Success	Reliance	Prejudice
N.M. ³¹⁶	Yes	Yes	Yes	Yes
N.Y. ³¹⁷	Yes	Yes	No	
N.C.				
N.D.				
Ohio ³¹⁸	Yes	Yes		
Okla. ³¹⁹	Yes			
Or. ³²⁰	No			
Pa. ³²¹	Yes	Yes		
R.I. ³²²	Unclear			
S.C. ³²³	No			
S.D. ³²⁴	Yes			
Tenn. ³²⁵	Yes			
Tex. ³²⁶	Yes	Yes		Yes

1990).

³¹⁶ See *Salazar v. St. Vincent Hosp.*, 96 N.M. 409, 413-14, 631 P.2d 315, 319-20 (N.M. Ct. App. 1981) (may require same parties).

³¹⁷ See *Kimco of N.Y., Inc. v. Devon*, 558 N.Y.S.2d 630, 632 (N.Y. App. Div. 1990).

³¹⁸ See *Woodland Market Realty Co. v. City of Cleveland*, No. 35526, slip op. (Ohio Ct. App. April 7, 1977). The court required, however, that there have been only a prior determination by a court of competent jurisdiction, and did not mention inconsistent assertions. Thus it may have been discussing collateral estoppel.

³¹⁹ See *Panama Process, S.A. v. Cities Serv. Co.*, 796 P.2d 276, 286 (Okla. 1990).

³²⁰ See *Jarvis v. Indemnity Ins. Co. of North America*, 227 Or. 508, 515-18, 363 P.2d 740, 743-44 (1961) (citing *Parkinson* and adopting the use of the positions as evidence).

³²¹ See *Associated Hosp. Serv. v. Pustilnik*, 497 Pa. 221, 439 A.2d 1149, 1151-52 (1981).

³²² See *Gross v. Glazier*, 495 A.2d 672, 674-75 (R.I. 1985) (mentioning judicial estoppel).

³²³ See *MacFarlane v. Manly*, 274 S.C. 392, 395, 264 S.E.2d 838, 839-40 (1980).

³²⁴ See *Warren Supply Co. v. Duerr, Philey, Thorsheim Dev., Inc.*, 355 N.W.2d 838, 840-41 (S.D. 1984) (also applying the doctrine to settlements).

³²⁵ See *Sartain v. Dixie Coal & Iron Co.*, 150 Tenn. 633, 647, 653, 266 S.W. 313, 317 (1924).

³²⁶ See *Herd Corp. v. Triple "J" Investments, Inc.*, No. B14-86-506-CV, slip op. at

State	Judicial Estoppel	Prior Success	Reliance	Prejudice
Utah ³²⁷	Yes		Yes	Yes
Vt. ³²⁸	Unclear			
Va. ³²⁹	Yes		Yes	Yes
Wash. ³³⁰	Yes	Yes	Yes	Yes
W. Va.				
Wis. ³³¹	Yes			
Wyo. ³³²	Yes	No		

8 (Tex. Ct. App. Sept. 14, 1987).

³²⁷ See *Masters v. Worsley*, 777 P.2d 499, 503-04 (Utah Ct. App. 1989) (requiring that parties had unequal knowledge of facts).

³²⁸ See *Estate of Raedel*, 152 Vt. 478, 481 n.1, 568 A.2d 331, 332 n.1. (1989) (combining doctrine with collateral estoppel).

³²⁹ See *Maxey v. Doe*, 217 Va. 22, 25, 225 S.E.2d 359, 361 (1976) (also requiring knowledge of all options). *But see Ferebee v. Hungate*, 192 Va. 32, 35-36, 63 S.E.2d 761, 763-64 (1951) (requiring same parties); *Gilmer v. Brown*, 186 Va. 630, 636-37, 44 S.E.2d 16, 18-19 (1947) (holding that judicial estoppel was the same as res judicata).

³³⁰ See *Raymond v. Ingram*, 47 Wash. App. 781, 784-85, 737 P.2d 314, 316 (1987) (also requiring same parties).

³³¹ See *Jung v. Grundahl*, No. 90-0632, slip op. at 924 (Wisc. Ct. App. Oct. 31, 1990) (LEXIS, States library, Wisc. file) (applying the doctrine to appeals within the same case).

³³² See *Zwemmer v. Production Credit Assoc.*, 792 P.2d 245, 245 (Wyo. 1990).