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Administrative Collateral Estoppel in California: A Critical Evaluation of People v. Sims

by

THOMAS F. CROSBY, JR.*

The cross-use of collateral estoppel in administrative and judicial proceedings is an often poorly understood subject. Through this device, a litigant may be able to employ an administrative determination to preclude relitigation of an issue in a subsequent legal action. People v. Sims, a six-to-one ruling of the California Supreme Court authored by then Chief Justice Rose Bird in 1982, considerably extended the possible uses of administrative preclusion and was arguably one of the most significant decisions of her tenure. Oddly, it has drawn very little scholarly attention. Specifically, Sims holds collateral estoppel may be applied in a

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The author gratefully acknowledges the comments and suggestions of Professor Douglas Leslie of the University of Virginia School of Law and the inspiration of Professor Daniel Meador, Director of the Graduate Program for Judges at the same institution, as well as the helpful criticism of my own staff at the California Court of Appeal, Fourth District, Division Three, particularly Kim Dunning, Esq.

1. 32 Cal. 3d 468, 651 P.2d 321, 186 Cal. Rptr. 77 (1982).
2. It was also arguably one of the least significant. And because, as explained anon, the holding purports to be very narrow, it may be avoided easily even in its own specific context. Because of its cloudy procedural posture with respect to the finality of the underlying administrative decision, the Sims case may not have merited supreme court review at all. Nevertheless, Sims overrules precedent that rather severely restricted the application of administrative preclusion. Empire Star Mines Co. v. Cal. Employment Comm'n, 28 Cal. 2d 33, 48, 168 P.2d 686, 695 (1946), rev'd, 32 Cal. 3d 468, 479-80, 651 P.2d 321, 328, 186 Cal. Rptr. 77, 84 (1982). For that reason alone it surely will be considered the leading California case on the subject until it receives judicial or legislative revision.
3. Sims has not gone unnoticed in legal literature entirely, but it has been treated mostly in a reportorial manner. See, e.g., Sherwood, Evaluation of Administrative Collateral Estoppel, 6 CAL. LAW. 33 (June 1986); The California Supreme Court Survey, A Review of Decisions,
welfare fraud prosecution after a former determination of the same entitlement question in favor of the recipient/defendant in a "fair hearing" at the Department of Social Services (DSS). The case was a shocker for criminal practitioners, especially prosecutors, and for welfare administrators and hearing officers as well.

Since its appearance almost six years ago, Sims has received an uneasy reception in the legislature and the appellate courts of California. Judges have adopted the Sims rationale in some similar situations but not in others, and collateral estoppel has been specifically eliminated by the legislature in at least two instances in response to Sims. But Sims itself has not been overturned.

Sims poses a serious navigational hazard to litigants attempting to chart a safe course through parallel, or potentially successive, administrative and judicial proceedings. This Article argues that the case was decided wrongly for this and a number of other reasons and concludes Sims' rule should be confined to relatively minor matters when the benefits of administrative preclusion might outweigh its numerous disadvantages.

In section I, the Article discusses issue preclusion principles in general, explaining res judicata, collateral estoppel and the law of the case. Section II examines People v. Sims and its rationale, exploring its relationship to previous federal and California cases and the use of administrative collateral estoppel in criminal cases. Section III describes out the Sims' test and discusses the difficulties involved with each prong of the test. Section IV examines the claim of the Sims majority that its rule is based on sound public policy. This Article suggests that the Sims decision does not serve public policy because it 1) creates an unforeseeable bar to potential litigants who are deemed to be in privity with a party in the first action; and 2) ignores the hardship the decision imposes on agencies that are subjected to intensified litigation of seemingly minor matters because of the potentially significant effect of agency decisions in other arenas. Section V discusses the legislative and judicial responses to Sims. Section VI examines the effect of Sims on administrative procedures, using the California Department of Vehicles' drunk driver "refusal" hearing as an example. Finally, section VII proposes several ways that the

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4. Sims, 32 Cal. 3d at 489-90, 651 P.2d at 334-35, 186 Cal. Rptr. at 90.
effect of the *Sims* rule might be contained. For example, barring the use of administrative collateral estoppel in serious criminal cases could lessen agency litigation. Denying preclusive effect to issues decided by agencies that do not enjoy constitutionally authorized judicial power—at least in matters involving substantial rights or damages—would preserve the right to a jury trial, prevent unfair surprise, and avoid the perpetuation of unjust results in cases where serious consequences might ensue for the estopped party.

I. Preclusion Principles

Our legal structure contains many overlapping layers of dispute resolution systems. State and federal courts as well as various state and federal agencies may have the jurisdiction to become involved in a number of controversies arising out of the same factual matrix. Of necessity, the law has developed devices to prevent endless relitigation of causes and issues in parallel or successive proceedings. Some of them, such as the doctrine of full faith and credit and the principle that no accused may be placed twice in jeopardy, are long-standing and constitutionally based. Others, such as res judicata and collateral estoppel, essentially are court-created tools of judicial economy designed to put a finality to litigation and to avoid inconsistent results.

A final determination of an action on the merits is res judicata (or merger and bar) and precludes relitigation between the same parties on that cause of action or any allegation or defense that was or might have been presented in an earlier suit. A first judgment for the defendant may bar any ensuing effort by the plaintiff to relitigate the same cause of action. An initial judgment for the plaintiff can merge with a subsequent claim and prevent its assertion in the later proceeding.

If the second suit involves a different cause of action, merger and bar do not apply. The first judgment, however, may be entitled to limited recognition under the rubric of collateral estoppel and thus foreclose relitigation of any matter previously tried and decided. In other words,

10. There is an important distinction between the offensive and defensive use of collateral estoppel. In contrast to defensive use of the doctrine, offensive preclusion generally is applied sparingly. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329-31 (1979). Because *Sims* is a
merger and bar preclude subsequent claims; collateral estoppel does the same with respect to issues already resolved.11

Both can be applied to administrative adjudications, whether the second tribunal is another agency or a court.12 Decades ago Professor Davis stated:

The key to a sound solution of problems of res judicata in administrative law is recognition that the traditional principle of res judicata as developed in the judicial system should be fully applicable to some administrative action, that the principle should not be at all applicable to other administrative action, and that much administrative action should be subject to a qualified or relaxed set of rules.13

Before Sims California law gave preclusive effect to the administrative determinations of agencies exercising constitutionally authorized judicial power.14 But even in that context, the state supreme court had not employed the rule previously in a criminal case.15
Related to res judicata and collateral estoppel is the "law of the case" rule.\textsuperscript{16} It is also a doctrine of longstanding and continues to be applied today.\textsuperscript{17} Using the appropriate preclusion label, res judicata versus law of the case, is not simply a matter of form over substance. Unjust results usually do not affect the decision to apply collateral estoppel or res judicata under California law.\textsuperscript{18} Unjust results do merit consideration, however, when law of the case is at issue:

[The doctrine of law of the case which has been recognized as being harsh is merely a rule of procedure and does not go to the power of the court. It will not be adhered to where its application will result in an unjust decision. The principal ground for making an exception to the doctrine of law of the case is an intervening or contemporaneous change in the law.\textsuperscript{19}]

\textsuperscript{16} The closeness of the two preclusive devices can be illustrated by the facts of City and County of San Francisco v. United Ass'n of Journeymen, 42 Cal. 3d 810, 812, 726 P.2d 538, 539, 230 Cal. Rptr. 856, 857 (1986). There the superior court issued a preliminary injunction to enjoin a public employees' strike, an appealable order, and the court of appeal affirmed in a published opinion. City and County of San Francisco v. Evankovich, 69 Cal. App. 3d 41, 56, 137 Cal. Rptr. 883, 893 (1977). The city then filed a second action against the union to recover its damages; and, based on Evankovich, the trial court directed the verdict on liability. The city recovered $4,080,000.

The damage award was appealed. While the appeal was pending, the supreme court undercut the Evankovich decision and upheld the right of most public employees to strike. County Sanitation Dist. No. 2 v. Los Angeles County Employee's Ass'n. 38 Cal. 3d 564, 587, 699 P.2d 835, 849, 214 Cal. Rptr. 424, 438, cert. denied, 474 U.S. 995 (1985).

The court of appeal affirmed the award of damages in the second suit based on collateral estoppel, notwithstanding the erroneous decision in the first appeal. \textit{Compare} Hollywood Circle Inc. v Dep't of Alcoholic Beverage Control, 55 Cal. 2d 728, 733, 361 P.2d 712, 715, 13 Cal. Rptr. 104, 107 (1979) (a final judgment is res judicata even though contrary to statute where the court has jurisdiction) \textit{with} Slater v. Blackwood, 15 Cal. 3d 791, 796-97, 543 P.2d 593, 596, 126 Cal. Rptr. 225, 227-28 (1975) (res judicata is not proper where the earlier decision is based on law later overturned). If the damage award had been obtained on the original complaint, however, the law of the case doctrine, not collateral estoppel, would have been at issue. (The supreme court ultimately reversed on an unrelated point. \textit{United Ass'n of Journeymen}, 42 Cal. 3d at 813, 726 P.2d at 540, 230 Cal. Rptr. at 858.)

\textsuperscript{17} Once an appellate court has relied on a particular rule of law to decide a matter, that principle becomes the "law of the case." With several qualifications, it applies in all subsequent proceedings in the cause, even if a court later determines that the rule is wrong. The qualifications are "that the point of law involved must have been necessary to the prior decision, that the matter must have been actually presented and determined by the court, and that application of the doctrine will not result in an unjust decision." Pigeon Point Ranch, Inc. v. Perot, 69 Cal. 2d 227, 231, 379 P.2d 321, 322, 28 Cal. Rptr. 865, 866 (1963).


\textsuperscript{19} Clemente v. State, 40 Cal. 3d 202, 212, 707 P.2d 818, 823, 219 Cal. Rptr. 445, 450 (1985) (citations omitted). A more liberal treatment of law of the case problems is somewhat defensible. It might be highly impractical to allow every concluded proceeding to begin anew after a change in the law, but the burden would be far less in a relatively few pending cases.

Even the legislature on rare occasions extends an opportunity to relitigate matters long since final. \textit{See} \textit{CAL. CIV. CODE} § 5124 (West Supp. 1985) (repealed 1983) (authorizing re-
II. People v. Sims

People v. Sims and the decisions it discusses provide an excellent vehicle for an examination of the various preclusion doctrines. As will appear, courts have considerable difficulty in applying them and, oddly, often greater trouble in simply identifying the preclusion device appropriate to the case at hand. It is first necessary, however, to examine the legal odyssey of a mother on public assistance from an informal fair hearing in a local welfare office to the Supreme Court of California. The unlikely outcome of that pilgrimage may affect many litigants in the future in a virtually endless variety of contexts. That it has not done so already, if indeed that is the case, may be more attributable to the California Bar's failure to appreciate Sims' potential applications than any other explanation.

A. The Facts of Sims

In April of 1978, the Social Services Department of Sonoma County (SSDSC) notified June Leora Lopes Sims that it intended to reduce her future grants in order to recoup alleged overpayments. The SSDSC claimed Sims had failed to disclose that her children's stepfather, Charles Sims, was both employed and living with her from December 1976 to April 1978. As a result, the SSDSC charged she received excess benefits of $5,395 in Aid to Families With Dependent Children and $1,144 in food stamps. In August 1978 she requested a fair hearing to challenge the decision pursuant to California Welfare and Institutions Code section 10950.21 Meanwhile, Sims was charged with felony welfare fraud under opening of final judgment of dissolution to allow recapture of military pension benefits, notwithstanding res judicata or rules relating to finality of judgments); see also In re Marriage of Barnes, 43 Cal. 3d 1371, 1377, 743 P.2d 915, 918, 240 Cal. Rptr. 855, 858, (1987) (holding California law of finality of judgments does not preclude retroactive effect of legislative changes to California community property law); In re Marriage of Doud, 181 Cal. App. 3d 510, 518, 521-22, 226 Cal. Rptr. 423, 425, 427-28 (1986) (holding California legislature may modify the division of military benefits upon dissolution of marriage in a manner consistent with federal law).

20. Sims uses a more convenient abbreviation for the local welfare agency, "County." But one of the key questions before the court was whether the county district attorney was in privity with that agency. The nomenclature selected in Sims suggests the answer, although both are ultimately found to be representatives of the state, not the county. Since the decision is highly vulnerable to criticism on this point, a neutral, though less stylistic, rubric is employed here.

21. The section's numbers are initially transposed to "19050" in the Sims opinion. 32 Cal. 3d at 473, 651 P.2d at 324, 186 Cal. Rptr. at 80. They are given correctly later. Id. at 479, 651 P.2d at 328, 186 Cal. Rptr. at 84. In 1978 § 10950 provided in part that "any applicant for or recipient of public social services . . . dissatisfied with any action of the county department relating to his application for or receipt of public social services . . . shall, in person
section 11483 of the California Welfare and Institutions Code and a misdemeanor, fraudulently obtaining food stamps in violation of former Welfare and Institutions Code section 18910.22 Sims was held to answer after a preliminary hearing on the complaint, and the district attorney filed an information alleging the same offenses on September 25, 1978, in superior court. Sims was arraigned on October 12.23

When her fair hearing to challenge the SSDSC decision took place on November 29, 1978, the criminal matter still was unresolved.24 A DSS hearing officer presided at the fair hearing. As will appear, the fair hearing process is designed to be relaxed and informal, with few procedural rules. The SSDSC, claiming the pending criminal charges divested DSS of jurisdiction, refused to participate. After Sims presented a copy of the investigative report prepared by the SSDSC and the testimony of


23. Sims, 32 Cal. 3d at 473, 657 P.2d at 324, 186 Cal. Rptr. at 80.

24. Because the prosecution proceeded by complaint and information, Sims had a preliminary hearing, or the opportunity to have one, before the fair hearing occurred. CAL. PENAL CODE § 859b (West 1980 & Supp. 1988). Apparently it was not argued that the decision to bind her over to superior court might have collaterally estopped her at the fair hearing despite the lesser burden of proof at a probable cause hearing. With respect to the limited issue preclusive effect of the rulings at preliminary hearings on subsequent criminal proceedings, see People v. Uhlemann, 9 Cal. 3d 662, 667-68, 511 P.2d 609, 612, 108 Cal. Rptr. 657, 660 (1973); People v. Prewitt, 52 Cal. 2d 330, 339-40, 341 P.2d 1, 6 (1959); People v. Ortiviz, 74 Cal. App. 3d 537, 540-42, 141 Cal. Rptr. 483, 484-85 (1977).

Charles Sims denying cohabitation during the period alleged, the hearing officer determined a silent SSDSC had not met its burden of proof and overruled the proposed grant reduction. This finding was adopted by the Director of the DSS on February 7, 1979; the SSDSC did not seek a rehearing or judicial review.

Sims then brought a common-law motion to dismiss the information, in part contending that the decision at the fair hearing collaterally estopped the criminal prosecution. The motion was granted, and the district attorney appealed. The cause ultimately was decided by the California Supreme Court in 1982.

B. The Rationale of Sims

Initially, three issues faced the Sims court: 1) whether agency decisions ever could be given preclusive effect in a court of law; 2) what types of agencies could render decisions with preclusive effect; and 3) whether an agency determination could collaterally estop a criminal prosecution.

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25. Sims, 32 Cal. 3d at 474, 651 P.2d at 324, 186 Cal. Rptr. at 80.

26. Id. DSS fair hearing procedures are outlined in the California Welfare and Institutions Code. At the time of Sims' hearing, they provided the following: A request for hearing was to be filed within one year. Cal. Welf. & Inst. Code § 10951 (West 1980). The hearing was then required to commence within 45 days on at least 10 days notice. Id. § 10952 (West 1980) (amended 1982). Hearing officers could be referees employed by the DSS, the director, personally, or a designated assistant; or administrative law judges. Id. § 10953 (West 1980) (amended 1986). The hearing was to be informal, encouraging free and open discussion unconstrained by rules of procedure or evidence applicable in a trial. Id. § 10955 (West 1980).

Referees were to prepare a proposed decision to be approved by the chief referee of the DSS and filed with the director within 75 days. Id. § 10958 (West 1980) (amended 1981). Within 30 days of receipt of the proposed decision the director could adopt it, decide the matter himself with or without new evidence, or order a rehearing. Failure to act was deemed an acceptance of the proposed decision. Id. § 10959 (West 1980) (amended 1986). The applicant or recipient could request a rehearing within 30 days of the finality of the decision, and the director had to act on the request no earlier than five and no later than 15 days after. If the director did not do so, the rehearing was automatically denied. Id. at § 10960 (West 1980) (amended 1986).

If the determination was in favor of the applicant or recipient, payment of arrearages was required regardless of present need. Id. at § 10961 (West 1980) (amended 1986). The parties could seek judicial review of questions of law in the matter by a petition for writ of mandate filed within one year after receiving notice of the director's action. No filing fee was required, and a prevailing applicant or recipient could obtain attorney's fees and costs. Id. at § 10962 (West 1980).

Essentially the same rules apply today, although the recipient must now petition within 90 days for a fair hearing, Id. at § 10951 (West 1980) (amended 1979), and hearing officers must be attorneys, unless the director—who need not be an attorney—elects to conduct the hearing personally. Id. at §§ 10953, 10953.5 (West Supp. 1988).

27. Sims, 32 Cal. 3d at 474, 325 P.2d at 325, 186 Cal. Rptr. at 80.
(1) Sims' Support for Administrative Collateral Estoppel

In her majority opinion, Chief Justice Bird first considers whether an administrative decision may ever collaterally estop a party in the courthouse. In dealing with this issue, the Sims majority discusses only two cases: Hollywood Circle, Inc. v. Department of Alcoholic Beverage Control28 and City & County of San Francisco v. Leung Fai Wah Ang.29 Hollywood Circle did not deal with collateral estoppel, although the chief justice asserts “Hollywood Circle involved the application of res judicata principles in the context of successive proceedings before the same administrative agency . . . .”30 Moreover, the estopping decision in Hollywood Circle was not an administrative determination but a subsequently disapproved opinion of the court of appeal affirming a superior court judgment upholding an agency's action.31

There are two other interrelated difficulties with the court's reliance on Hollywood Circle. First, Hollywood Circle is an example of the unjust perpetuation of a legal error; a case many would argue was decided wrongly.32 Second, the Hollywood Circle analysis should have turned on the “law of the case” doctrine,33 not res judicata, administrative or otherwise. And if it had, the outcome might have been different.

The facts of Hollywood Circle were as follows: Plaintiff was denied the right to appeal the loss of his on-sale liquor license to the Alcoholic Beverage Control Appeals Board because his mailed notice of appeal was held to be untimely. He filed a petition in mandate to require the Board to consider his appeal, relying on a section of the California Code of Civil Procedure that allowed additional time for mailed service. Both the trial court and the court of appeal found the statute inapplicable.34

A year later the supreme court expressly disapproved the court of appeal's opinion in an unrelated case.35 The Hollywood Circle plaintiff

30. Sims, 32 Cal. 3d at 478, 651 P.2d at 327, 186 Cal. Rptr. at 83.
32. The point is discussed further below. See infra notes 169-86 and accompanying text. But see, e.g., Spilker v. Hankin, 188 F.2d 35 (D.C. Cir. 1951) (res judicata should not be used when the policy behind it would not be served); Adams v. Pearson, 411 Ill. 431, 443, 104 N.E.2d 267, 273 (1952) (refusing to apply res judicata when the result would be inequitable and underlying policies to protect a defendant from harassment and the public from multiple litigation are not fostered).
33. See supra notes 16-19 and accompanying text.
34. Hollywood Circle, 55 Cal. 2d at 729-30, 361 P.2d at 713-14, 13 Cal. Rptr. at 105-06.
then filed an “Application for Relief from Erroneous Dismissal of Appeal.” Presumably this application was filed in the original cause and under the same case number. When relief was denied, he brought a new petition in mandate; and the supreme court, over the vigorous dissent of two justices, reversed the court of appeal’s unanimous refusal to apply res judicata based on its previous decision.

The court of appeal was correct in rejecting the application of res judicata, but it could have applied law of the case. Although the plaintiff made two separate trips through the appellate courts in Hollywood Circle, the attempt to perfect the administrative appeal was essentially one continuous cause with an identical objective in the same underlying case. As the Hollywood Circle dissent argued, the appeal could have been treated as still pending since it had been erroneously rejected at the outset. Despite its res judicata discussion, Hollywood Circle is a legitimate relative only of law of the case decisions. Its place in Sims’ family tree is less deserved.

Following its discussion of Hollywood Circle, the Sims majority cites City & County of San Francisco v. Leung Fai Wah Ang in support of its conclusion that agency decisions may be used for collateral estoppel purposes at the courthouse. The court is on somewhat firmer ground here. In Leung Fai Wah Ang the court of appeal did hold a decision by a city board of permit appeals collaterally estopped the city in a subsequent nuisance action to abate an activity previously approved by the board under the city’s zoning laws. While the result in Leung Fai Wah Ang was unassailable, the court of appeal’s use of res judicata was probably unnecessary. Leung Fai Wah Ang should have prevailed easily on an ordinary equitable estoppel defense. Equitable estoppel may preclude a

37. Id. at 736, 361 P.2d at 717, 13 Cal. Rptr. at 109.
38. Id. at 733-36, 361 P.2d at 715-17, 13 Cal. Rptr. at 107-09 (Schauer, J., dissenting).
40. Sims, 32 Cal. 3d at 478, 651 P.2d at 327, 186 Cal. Rptr. at 83.
41. 97 Cal. App. 3d at 680, 159 Cal. Rptr. at 60. Leung Fai Wah Ang is itself a curious opinion in at least one respect: it cites Hollywood Circle for the proposition that even acts “in excess of jurisdiction” can be subject to res judicata. Id. at 678, 159 Cal. Rptr. at 58. But then it purports to distinguish its own decision in City and County of San Francisco v. Padilla, 23 Cal. App. 3d 388, 100 Cal. Rptr. 223 (1972), on the basis that in the first proceeding Padilla was granted a variance “expressly forbidden by law.” Leung Fai Wah Ang, 97 Cal. App. 3d at 681, 159 Cal. Rptr. at 60 (emphasis in original). It seems an act “in excess of jurisdiction” would always be void, but an act “expressly forbidden by law” might not be if it was merely a decisional error. See Freedom Newspapers, Inc. v. Superior Court, 186 Cal. App. 3d 1102, 1107-08, 231 Cal. Rptr. 189, 191-92 (1986).
42. When a government entity by words or conduct has induced a citizen to believe a particular thing to be true and to act upon that belief, it will not be permitted to contradict the
government agency from changing its position once a citizen has relied detrimentally on an earlier determination.

After this brief discussion of California law on the preliminary issue of administrative collateral estoppel, Sims turns for "appropriate guidance" to the United States Supreme Court to determine whether the trial court was correct in using collateral estoppel in the case at hand.\footnote{Sims, 32 Cal. 3d at 479, 651 P.2d at 327, 186 Cal. Rptr. at 83.} In \textit{United States v. Utah Construction & Mining Co.},\footnote{384 U.S. 394 (1966).} the Court stated in dictum, "Occasionally courts have used language to the effect that \textit{res judicata} principles do not apply to administrative proceedings, but such language is certainly too broad."\footnote{Id. at 421-22 (footnotes omitted).} The Court went on to say that collateral estoppel may be applied to administrative decisions "[w]hen an administrative agency is acting in a judicial capacity and resolves [the same] disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate . . . ."\footnote{Id. at 422.} As will appear, although this test is similar to that previously used in California, it is not identical. Sims' discussion, however, implies the federal standard has been adopted in California.\footnote{See infra notes 109-35 and accompanying text.}

Chief Justice Bird considers each of the \textit{Utah Construction} standards and finds them all satisfied. The first requirement—that the agency act in a judicial capacity—is examined in the following section. The second and third requirements, whether disputed issues are identical and opportunity to litigate, are akin to elements of the California rule and are reviewed in section III as part of the analysis of Sims' application of the California requirements.\footnote{Sims, 32 Cal. 3d at 478, 651 P.2d at 327, 186 Cal. Rptr. at 83.}

\textbf{(2) The Judicial Capacity of an Agency}

The federal requirement that the agency must act in a judicial capacity historically has been a California requirement as well.\footnote{Sims, 32 Cal. 3d at 479-81 n.8, 651 P.2d at 328 n.8, 186 Cal. Rptr. at 84 n.8; Empire July 1989] ADMINISTRATIVE COLLATERAL ESTOPPEL 917
mulation of the state rule *Sims* uses, however, is not drawn from administrative preclusion cases and, as a consequence, does not specifically include this element. Nonetheless, the literal language of the California Constitution and a previous decision of the court, *Empire Star Mines Co. v. California Employment Commissions*,\(^5\) posed a formidable barrier to the use of collateral estoppel in *Sims* on this point.

Article III, section 3 of the California Constitution declares, "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."\(^5\)\(^1\) Article VI, section 1 provides, "The judicial power of this State is vested in the Supreme Court, courts of appeal, superior courts, municipal courts, and justice courts."\(^5\)\(^2\) Since administrative agencies are part of the executive branch, only those of constitutional origin with a grant of limited judicial powers, such as the Public Utilities Commission,\(^5\)\(^3\) or those created with judicial powers by the legislature pursuant to a specific constitutional authorization, such as the Agricultural Labor Relations Board,\(^5\)\(^4\) may act in a judicial capacity. The DSS is not one of these exceptional agencies.

The court brushes aside this constitutional argument in a footnote, however, observing "that the fact that statewide and local administrative agencies are prohibited from exercising 'judicial power' by the California Constitution does not mean that agency proceedings and determinations may never be judicial in nature."\(^5\)\(^5\) This unexplained and exceedingly opaque "distinction," says the court, "was not recognized by *Empire Star Mines* . . . , upon which the People rely for the proposition that collateral

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Star Mines Co. v. Cal. Employment Comm'n, 28 Cal. 2d 33, 48, 168 P.2d 686, 695 (1946). It is doubtful, however, that the federal and state definitions of "judicial capacity" before *Sims* would have coincided. As *Sims* implies, the *Empire Star Mines* formulation was formal and certain: "For the defense of res judicata to operate as an estoppel there must be a judgment rendered by a court of competent jurisdiction." *Empire Star Mines*, 28 Cal. 2d at 48, 168 P.2d at 695 (emphasis added). The federal rule, however, was functional and subject to case-by-case scrutiny:

> [Language to the effect that res judicata principles do not apply to administrative proceedings . . . is certainly too broad. When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, . . . res judicata [applies].

*Utah Construction*, 384 U.S. at 421-22.

50. 28 Cal. 2d 33, 168 P.2d 686 (1946), rev'd. 32 Cal. 3d 468, 479-80 n.8, 651 P.2d 321, 328 n.8, 186 Cal. Rptr. 77, 84 n.8 (1982).

51. *Id.* art. III, § 3.

52. *Id.* art. IV, § 1.

53. *Id.* art. XII, § 6.

54. *Id.* art. XIV, § 1.

55. *Sims*, 32 Cal. 3d at 479-80 n.8, 651 P.2d at 328 n.8, 186 Cal. Rptr. at 84 n.8.
estoppel is not applicable to administrative agency decisions."\[56\] The Sims opinion correctly explains that "Empire Star Mines . . . found a decision of the California Employment Commission not to be binding in a subsequent court proceeding because the commission did not exercise 'judicial power' under the Constitution."\[57\] Nonetheless, the court effortlessly sweeps that holding aside: "The analysis of Empire Star Mines is inconsistent with that conducted in Hollywood Circle, Utah Construction, and the instant case. So that the law is free from ambiguity in this area Empire Star Mines is overruled to the extent that it conflicts with this opinion."\[58\]

In claiming the support of Hollywood Circle and Utah Construction to reject Empire Star Mines, Sims reaches considerably, particularly with respect to Hollywood Circle. That case should have turned on judicial, and not administrative, preclusion.\[59\] Moreover, the underlying administrative proceeding in Hollywood Circle was itself adjudicatory in nature. Like the Public Utilities Commission and the Workers' Compensation Appeals Board, the Alcoholic Beverage Control Appeals Board (the administrative agency involved in Hollywood Circle) exercises judicial power under a specific constitutional grant,\[60\] and a different type of preclusion at that: law of the case.

In Utah Construction, the United States Supreme Court merely suggested that the Court of Claims was bound by the factual determinations of the Board of Contract Appeals.\[61\] The Board was empowered to make those final determinations both by contract and statute.\[62\] The DSS and Sims, however, had no agreement that the fair hearing result would be binding in any subsequent proceeding, much less a felony prosecution; and no statute would have permitted the SSDSC to make such an agreement in any event. Additionally, the DSS factual findings are specifically not conclusive upon judicial review of an agency determination. The California Supreme Court has held that decisions involving welfare enti-

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56. Id.
57. Id.
58. Id.
59. See supra text accompanying note 31.
60. CAL. CONST. art. XX, § 22; Louis Stores, Inc. v. Dep't of Alcoholic Beverage Control, 57 Cal. 2d 749, 756-57, 371 P.2d 758, 761, 22 Cal. Rptr. 14, 17 (1962).
62. The Court explained, "Should the contractor be dissatisfied with the administrative decision and bring ... suit ..., the finality accorded administrative fact finding by the disputes clause is limited by the provisions of the Wunderlich Act of 1954 which directs that such a decision 'shall be final and conclusive ...' [with certain narrow exceptions]." Id.
tlements are subject to the exercise of independent judgment by the superior court.  

Although the collateral estoppel discussion in Utah Construction was dictum, the United States Supreme Court generally has adhered to the tests stated there and has recognized their application to administrative determinations that are functionally adjudicative. The Court's apparent preference for substance over form, however, has not been entirely consistent. One of the cases Utah Construction cited with approval is Goldstein v. Doft, in which collateral estoppel effect was given to the decision of an arbitrator. Yet the Court unanimously rejected a similar notion later in Alexander v. Gardner-Denver Co. There, the question was whether an arbitrator's decision under a collective bargaining agreement could collaterally estop a federal civil rights action. Holding it could not, the Court explained that arbitration, at least of the type under review, was not the equivalent of a judicial proceeding for purposes of collateral estoppel. The Alexander Court noted that labor arbitrators might be unfamiliar with civil rights law; arbitration records are less complete; the usual rules of evidence are inapplicable; "discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable;" and the judiciary is primarily responsible for resolution of statutory and constitutional issues. Alexander may be sui generis, however, because of the strong federal interest in civil


69. Id. at 52-54.

70. Id. at 57-58. In closing, the Court did approve the use of the arbitral decision in evidence, to be "accorded such weight as the court deems appropriate." Id. at 60. No precedent is cited for this "mini-use" of the result of the first proceeding, but the idea seems fair enough. The Sims court does not consider this far less drastic alternative.
rights enforcement. As the Court stated, "Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII."  

Much of the Alexander Court's analysis seems applicable to the situation in Sims. The protection of individual and public rights is at the heart of the criminal law. The state's interest in enforcing its criminal law is surely on a plane with its interest in upholding the civil rights of its citizens. To allow the finding of a single hearing officer—after an abbreviated, uncontested hearing—to estop the traditional prerogatives of the district attorney and the criminal justice system seems unsound for the reasons expressed in Alexander. It is difficult to defend preclusion of a public prosecution by means of a decision obtained in an informal, closed-door proceeding handled by a different agency with different goals and priorities.

(3) Preclusion in Criminal Cases

The Sims majority laconically announces that previous supreme court decisions pose no "absolute bar" to the application of collateral estoppel in a criminal prosecution. Literally, that is true because stare decisis never presents an "absolute bar" to a state supreme court in resolving a pure question of state law. Nevertheless, the court had to overrule more than Empire Star Mines to reach its conclusion. The court of appeal rejected similar arguments only two years earlier in People v. Demery, which involved an appeal from a criminal conviction inconsistent with a previous agency determination in the defendant's favor. Additionally, equivalent arguments were rejected only a year before that in People v. LaMotte, in the specific context of a welfare fraud prosecution.

In Demery, physician Leroy William Demery had been convicted of illegally prescribing controlled substances in violation of the California Health and Safety Code. On appeal he claimed he was deprived of the effective assistance of counsel because his attorney failed to argue that his previous exoneration on the same allegations by the State Board of Medical Quality Assurance collaterally estopped the criminal proceeding from

71. Arbitration preclusion appears to be quite vigorous in other types of disputes. Shell, supra note 11, at 673.
72. Alexander, 415 U.S. at 56.
73. Sims, 32 Cal. 3d at 477, 651 P.2d at 327, 186 Cal. Rptr at 82.
relitigating those charges. Demery urged that result was required by the supreme court's decision in People v. Taylor, which held a criminal prosecution predicated on vicarious liability could be collaterally estopped by the acquittal of the principal actor. That case provided:

(1) the issue necessarily decided at the previous trial is identical to the one . . . sought to be relitigated; . . . (2) the previous trial resulted in a final judgment on the merits; and . . . (3) the party against whom collateral estoppel is assessed was a party or in privity with a party at the prior trial.

The court of appeal did not suggest several of the most obvious responses to Demery's attack on his counsel's failure to conjure this then novel defense. First, Empire Star Mines should have barred the use of collateral estoppel because the Board of Medical Quality Assurance does not exercise judicial powers under the California Constitution. Additionally, no California authority supported the notion that a criminal prosecution could be collaterally estopped by a former action in the civil or administrative arena. Moreover, the court of appeal recently had rejected the assertion of collateral estoppel in a similar case because the district attorney is not in privity with state administrative agencies.

Instead, after noting Taylor carefully emphasized the "limited nature of its ruling," the Demery court rebuffed Demery's argument on the

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77. 12 Cal. 3d 686, 117 Cal. Rptr. 70, 527 P.2d 622 (1974); see also People v. Superior Court (Jackson) 44 Cal. App. 3d 494, 500-01, 118 Cal. Rptr. 702, 705-06 (1975) (collateral estoppel is to be applied to bar litigation of an issue in a criminal matter only if the requirements historically associated with the civil doctrine of collateral estoppel are met).

78. Taylor, 12 Cal. 3d at 691, 527 P.2d at 625, 117 Cal. Rptr. at 73 (citing Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal. 2d 601, 604, 375 P.2d 439, 440, 25 Cal. Rptr. 559, 560 (1962), cert. denied, 372 U.S. 966 (1963)) (plaintiff corporation whose principal owner was convicted of arson was collaterally estopped from pursuing fire insurance company in a civil action); Bernhard v. Bank of Am., 19 Cal. 2d 807, 122 P.2d 892 (1942) (dispensing with "mutuality of estoppel," the so-called privity requirement for party asserting collateral estoppel previously held necessary).


80. Sims, 32 Cal. 3d at 483, 186 Cal. Rptr. at 86, 651 P.2d at 330. Had he done so, Demery's attorney would not have been the first to make the argument. The contention had been raised earlier in People v. LaMotte, 92 Cal. App. 3d 604, 608, 155 Cal. Rptr. 5, 8 (1979), but Demery's lawyer most certainly was unaware of that case. It is reasonably clear the LaMotte decision had not appeared before the commencement of Dr. Demery's trial, although it was published a year before the court of appeal decided Demery. Curiously, the Demery opinion does not refer to LaMotte in disposing of the ineffective assistance of counsel claim.

81. LaMotte, 92 Cal. App. 3d at 608, 155 Cal. Rptr. at 8.
merits. First, the court reasoned that the administrative hearing was not a "trial" of the type contemplated in Taylor because its purpose was "policing licensing requirements rather than making a determination of criminal guilt or innocence." The court also observed "the standards of admissibility of evidence differ and the objectives sought are not identical." In addition, the court emphasized that article I, section 16 of the California Constitution confers a right to a jury trial on the prosecution, as well as on the defendant and that the application of collateral estoppel would frustrate this right.

a. The Differing Objectives of Parallel Proceedings

The differing objectives of two parallel or successive proceedings have not been considered of particular importance in much of the issue preclusion lore, and neither the Taylor nor the Utah Construction formula includes that factor. But rather than disapprove Demery on the point, Sims seemingly accepts the court of appeal's licensing versus guilt-or-innocence rationale. The Sims court simply finds the facts in Demery distinguishable: "Here . . . the function of the DSS fair hearing was virtually identical to that of the criminal trial." Both courts' conclusions are debatable.

The purpose behind the Sims welfare fraud prosecution was, presumably, to punish her and deter others. If a prison sentence was not to be imposed, restitution as a condition of probation undoubtedly would

82. Demery, 104 Cal. App. 3d at 561, 163 Cal. Rptr. at 821. It is interesting, if only coincidental perhaps, that Sims follows the same cautious path.
83. Id. This determination could be viewed as a rejection of the "acting in a judicial capacity" element under the Utah Construction standard. The court failed to note however that its conclusion was then compelled by the formal judicial capacity formulation of Empire Star Mines.
84. Id.
85. Id. Although Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), employed very similar reasoning, Demery did not cite it for the point.
86. Demery, 104 Cal. App. 3d at 561, 163 Cal. Rptr. at 821.
88. Sims, 32 Cal. 3d at 483 n.13, 651 P.2d at 330 n.13, 186 Cal. Rptr. at 86 n.13.
89. Sims, 32 Cal. 3d at 488, 651 P.2d at 333, 186 Cal Rptr. at 89.
have been included in any judgment against her; but recovery of public funds was not likely to have figured prominently in the district attorney's charging decision. The cost of the prosecution of welfare fraud in general may well exceed the total amount of restitution collected from convicted recipients. The more serious offenders usually will go to prison and pay nothing; and less serious offenders by definition yield little.

Fair hearings, on the other hand, are designed to be informal, inexpensive, and speedy means of resolving entitlement disputes and recouping public funds. In Sims' case the hearing dealt solely with whether she should be required to make restitution by means of a set-off against her continuing grant. Although that might have involved an indirect "punishment," the hearing officer had no ability to imprison, fine, or stigmatize her. And if a determination against her had become known widely, no deterrent effect on welfare recipients as a group reasonably could have been anticipated. Restitution is not strong medicine against thievery.

In Demery the purpose of the prosecution may have been punishment and deterrence. But a criminal conviction can trigger a license revocation by the Board of Medical Quality Assurance as well. The loss of a medical license would be a severe sanction to any physician, regardless of the forum making the original determination of culpability. And, whether couched in terms of discipline or punishment, the ultimate goal of both proceedings against Dr. Demery was to stop him from illegally dispensing drugs and to protect the public.

One of the mysteries of the Sims opinion is the court's election not to disapprove the Demery decision's conclusion that a marked difference in purpose attended the two proceedings against the physician—or to at least dismiss the conclusion as irrelevant. If difference in purpose, which is not officially part of either the federal or state test, is important, there is no principled rationale to explain why Sims was entitled to the cloak of collateral estoppel and Demery was not.

Justice Kaus' dissent in Sims notes that "there are many administrative bodies which in the course of their ordinary duties frequently pass on factual disputes concerning conduct that may also be the subject of a criminal prosecution." He strongly attacks the majority's attempt to distinguish Demery with respect to the objectives of these parallel proceedings:

Professional licensing boards, prison disciplinary panels, local school boards the State Personnel Board, labor relations boards and the like

90. Id. at 495, 651 P.2d at 338, 186 Cal. Rptr. at 93 (Kaus, J., dissenting).
91. Id. at 493, 651 P.2d at 336, 186 Cal. Rptr. at 92, (Kaus, J., dissenting).
may all have occasion to determine ... whether or not an individual committed alleged misconduct. ... [T]he Legislature surely did not contemplate that the administrative decision would be routinely conclusive on the ultimate issue of an individual's guilt or innocence of criminal charges relating to the same factual incident. ... [A]ls Demery recognizes, the significant differences in both the jurisdiction and the purposes of the administrative and criminal proceedings compel the conclusion that the administrative decision is not binding in a subsequent criminal prosecution.92

By merely distinguishing Demery, the Sims majority could be understood to append "similarity of purpose" to the California test. It therefore sets two lines of authority in motion with a murky point of demarcation between them. Trial judges in future cases may have to evaluate the respective goals of overlapping administrative and judicial proceedings. The task will require comparing the case at hand to the virtually identical scenarios of Sims and Demery, an exercise unlikely to lead to consistent or predictable results. Additionally, judges will not be able to rely on the second and third explanations given by the Demery court for refusing to apply collateral estoppel, differing evidentiary procedures and the right to a jury trial: they are not viable after Sims, if indeed they ever were.

b. The Differing Evidentiary Procedures of Agencies and Courts

The Sims opinion specifically fails to address the Demery court's concern with the significant disparity between the rules of evidence employed in an administrative forum and those used in the superior court. To the extent that procedural niceties weigh in the comparison, however, (and admittedly they usually do not count for much in preclusion lore) Demery had a better argument than did Sims for the application of administrative collateral estoppel. A medical disciplinary proceeding is a far more formal and deliberate affair than a welfare fair hearing. The former is controlled by the California Government Code, which sets out a highly structured procedure, including, for example, the provision of an administrative law judge who must be an attorney admitted to practice for at least five years; the requirement of a verified statement of the accusation with factual specificity; the right to demur or object to the accusation as indefinite or uncertain; and a structured system of discovery.93

92. Id. 651 P.2d at 336-37, 186 Cal. Rptr. at 92 (Kaus, J., dissenting) (emphasis in original).

93. CAL. BUS. & PROF. CODE §§ 2360, 2364 (West 1985); CAL. GOV'T CODE §§ 11500, 11521 (West 1980). Unlike the formal procedure applicable in a felony trial, at the DSS a radically different format pertains: "The hearing shall be ... impartial and informal ... in order to encourage free and open discussion by participants. All testimony shall be submitted.
Welfare fair hearings are exempt from the scheme of the California Government Code. The Attorney General represents the Board of Medical Quality Assurance in medical disciplinary proceedings; but in fair hearings, at least prior to Sims, the SSDSC generally was not represented by a lawyer, much less a prosecutor who might take care to protect the state's position in a potential or companion criminal matter.

The Sims majority, however, clearly is not impressed with this particular difficulty. The court concedes the informal nature of the welfare hearing but states, "this difference does not preclude a finding that the DSS was acting in a 'judicial capacity.'" The court supports its conclusion by an imperfect analogy to those agencies which exercise judicial power under specific constitutional grants. Those decisions presumably would be entitled to preclusive effect for that reason alone: "Collateral estoppel effect is given to final decisions of constitutional agencies such as the Workers' Compensation Appeals Board . . . and the Public Utilities Commission even though [their] proceedings . . . are not conducted according to judicial rules of evidence." According to the court, the correct test is "whether the different standard for admitting evidence at the fair hearing deprived the parties of a fair adversary proceeding in which they could fully litigate the issue of respondent's fraud." This implies that if the administrative decision was achieved via a process that can inspire some confidence in the result, it should be respected in a subsequent judicial proceeding. The court, however, seems to have forgotten that the SSDSC chose not to participate in the hearing at all. For that reason, the outcome may have been entirely suspect.

In the cases arising from agencies exercising judicial powers, the 1953 case of French v. Rishell provides precedent to support the Sims majority's lack of interest in procedural niceties: " [I]t is obviously not necessary that the same rules of law, practice or evidence should prevail in both tribunals. The attempt to impose any such limitation would defeat the whole purpose of [res judicata] . . . .'" But Sims' considera-
tion of evidentiary procedures seems beside the point in light of the preclusion standards it adopts from *Taylor* and *Utah Construction*. *Demery* must be considered entirely spurious authority on that question.

c. Prosecution’s Right to a Jury Trial

The *Demery* court’s conclusion that application of collateral estoppel would unconstitutionally deprive the prosecution of the right to a jury trial is also extremely suspect.\(^{101}\) If the court were correct on that ground, administrative collateral estoppel would be possible only when no right to a jury exists in a subsequent court proceeding.\(^{102}\) *Sims* rejects this holding out of hand, but its reasoning is dubious.

Because California Penal Code section 1118.1 allows the trial judge to order a binding acquittal before submission of a cause to a jury, the court surmises the prosecution’s right to a jury determination is not absolute and concludes that “any right to a jury trial possessed by the state is only a right to submit to a jury issues of fact which are triable.”\(^{103}\) Even before *Sims*, collateral estoppel was applied without regard to jury trial

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\(^{102}\) *Sims*, 32 Cal. 3d at 481, 484, 651 P.2d at 329, 331, 186 Cal. Rptr. at 84, 86. But *Western Air Lines* dealt with a proceeding before the Public Utilities Commission. And there the supreme court specifically noted, “That [the Public Utilities Commission] also possesses judicial powers may not be questioned.” 42 Cal. 2d at 630, 638, 268 P.2d at 728.

\(^{103}\) See U.S. CONST. amend 7 ("In suits at common law... the right of trial by jury shall be preserved, and no fact tried by a jury shall otherwise be re-examined in any Court of the United States, than according to the rules of the common law.").
Because summary judgment procedures long have been held constitutional in California, the supreme court’s rationale seems intuitively correct in this instance. Still, there is a troublesome aspect to the court’s logic. If California Penal Code section 1118.1 is an exception to the prosecutor’s constitutional right to a jury trial, how could the legislature amend the state Constitution by mere passage of a statute?

The court’s analogy is also dubious on the merits. A superior court judge’s finding in a criminal jury trial is not comparable to a ruling by the Director of DSS. At the time of the Sims decision, neither the Director nor the referee was required to be an attorney; the hearings were, and still are, informal with virtually no rules of evidence; and the Director may, but is not required to, follow the referee’s recommendation. Moreover, unlike a court-ordered acquittal for lack of sufficient evidence, the fair hearing decision in Sims’ favor was probably based, in whole or in part, on the failure of the SSDSC to participate at all. Finally, a constitutional right to a jury trial should not be cast aside so lightly. If the burden of proof at fair hearings was changed to proof beyond a reasonable doubt, could defendants be denied a jury trial in a criminal prosecution by use of the same logic? The answer certainly must be negative. But the reason is not apparent in light of Sims’ treatment of the jury trial issue, and Justice Kaus implies the majority’s opinion leads in that direction.

104. See, e.g., People v. Reeves, 250 Cal. App. 2d 490, 493-94, 58 Cal. Rptr. 517, 519-20 (1967). In People v. James, 189 Cal. App. 2d 14, 15-16, 10 Cal. Rptr. 809, 810 (1961), two defendants accused of conspiring to commit forgery were convicted by a jury. The trial court granted one defendant’s motion for new trial and denied the second defendant’s motion. The court of appeal held it was error to deny the second defendant’s motion because it is not possible to conspire alone. The decision is questionable; the granting of a new trial motion is not the equivalent of an acquittal, and there is no requirement that alleged co-conspirators be tried together. See People v. Howard, 44 Cal. 3d 375, 412, 749 P.2d 279, 300, 243 Cal. Rptr. 842, 863 (1988).


107. See supra note 26 and accompanying text.

108. "[T]he Legislature surely did not contemplate that the administrative decision would be routinely conclusive on the ultimate issue of an individual's guilt or innocence of criminal charges relating to the same factual incident." Sims, 32 Cal. 3d at 493, 651 P.2d at 337, 186 Cal. Rptr. at 92 (Kaus, J., dissenting) (emphasis in original). Justice Kaus also notes the majority’s holding means a fair hearing is now “in effect . . . the first stage of the criminal prosecution . . . ." Id. at 494, 651 P.2d at 337, 186 Cal. Rptr. at 93 (Kaus, J., dissenting).
III. The Sims Test

After bypassing Demery and acknowledging that "this court has not before given an administrative agency's determination binding effect on a subsequent criminal proceeding,"109 Sims goes on to do just that. After broadly determining that an administrative agency's finding could be given collateral estoppel effect in a criminal case, it adopts the tripartite test set out in Taylor to determine the specific cases when collateral estoppel may be applied: identicalness of issues actually litigated; final judgment on the merits; and identicalness of, or privity with, the party to be estopped.110 Sims is not clear whether this is the entire test, but it is certainly part of it. This is the heart of the Sims decision and the portion that probably most distressed prosecutors, for the court's conclusion on each of these requirements is suspect.

A. Issues "Actually Litigated"

The Sims majority begins its "actually litigated" discussion by stating, "[i]t is implicit in . . . [Taylor's] three-prong test that only issues actually litigated in the initial action may be precluded from the second proceeding under the collateral estoppel doctrine."111 Because the SSDSC refused to participate, it is a difficult question whether Sims' fair hearing actually was litigated. Referring to the Restatement (Second) of Judgments, however, the court swiftly disposes of the matter:112 "An issue is actually litigated [when it] is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined..."
A determination may be based on a failure of... proof..."113 The court finds the cohabitation issue was raised by the request for the fair hearing and the matter was submitted and determined on the merits by the DSS.

The court's analysis, however, is too facile. The balance of the Restatement paragraph the majority cites suggests another possible interpretation of the "actually litigated" requirement: issues can be "determined on a motion to dismiss for failure to state a claim, ... judgment on the pleadings, ... summary judgment ..., directed verdict ..., as well as ... judgment entered on a verdict. A determination may be based on a failure of pleading or ... proof [or] ... on the sustaining of the burden of proof."114 From this, it would appear the Restatement is describing dispositions of contested proceedings on the merits of an overwhelming case, not defaults of the sort that arguably occurred in Sims. Moreover, beneath the caption "issues not actually litigated," the Restatement notes, "A judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action."115 The reason is the stakes may not be worth the effort or the expense to litigate, or the forum may be inconvenient.116

With the possible exception of Sims, the law of California is generally in accord with the Restatement. For example, in one of the leading cases on the subject, the supreme court stated, "A plea of guilty is admissible in a subsequent civil action on the independent ground that it is an admission. It would not serve the policy underlying collateral estoppel, however, to make such a plea conclusive."117 In at least one instance, the "not actually litigated" rule was applied in the case of a misdemeanor conviction based on a contested adjudication because the desire for expediency in the proceeding may have diminished the reliability of the outcome.118

Later decisions, however, have permitted the use of collateral estoppel when the misdemeanor criminal trial was defended vigorously before

113. Sims, 32 Cal. 3d at 484, 651 P.2d at 331, 186 Cal. Rptr. at 87 (emphasis supplied by the court) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment d (1982)).
114. RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment d (1982).
115. Id. comment e.
116. Id.
a jury with the defendant’s (or a privy’s) full participation.\textsuperscript{119} The explanation given in \textit{Mueller v. J.C. Penney Co.}\textsuperscript{120} makes perfect sense; but its holding appears contrary to \textit{Sims’} “opportunity” to litigate rationale: “The party sought to be estopped must have had a fair opportunity to pursue his or her claim the first time. This includes a consideration of the incentive to litigate in the first action.”\textsuperscript{121} The defect in \textit{Sims’} treatment of the “actually litigated” problem appears to be that it substitutes an opportunity for the actuality. That reading of \textit{Sims}, assuming it is correct, represents a considerable extension of the reach of the collateral estoppel net. The SSDSC did not litigate at all, of course; and as the \textit{Mueller} court concludes, “‘[t]he analysis should be made on a case-by-case basis with the court looking at the actions taken to defend the case and not at the potential penalties.’”\textsuperscript{122}

The Restatement warns, “In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated. Therefore, the rule of this Section does not apply with respect to any issue in a subsequent action.”\textsuperscript{123} The rationale for the rule, as given by the Restatement, was seemingly applicable in \textit{Sims}:

The interests of conserving judicial resources, of maintaining consistency, and of avoiding oppression or harassment of the adverse party are less compelling when the issue on which preclusion is sought has not actually been litigated before. And if preclusive effect were given to issues not litigated, the result might serve to discourage compromise, to decrease the likelihood that the issues in an action would be narrowed by stipulation, and thus to intensify litigation.\textsuperscript{124}


\textsuperscript{120.} 173 Cal. App. 3d 713, 219 Cal. Rptr. 272 (1985).

\textsuperscript{121.} \textit{Id.} at 720, 219 Cal. Rptr. at 278 (citations omitted).

\textsuperscript{122.} \textit{Id.} at 720-21, 219 Cal. Rptr. at 278 (quoting Crowall, 118 Wis. 2d at 126, 346 N.W.2d at 331).

\textsuperscript{123.} \textit{Restatement (Second) of Judgments} § 27 comment e (1982).

\textsuperscript{124.} \textit{Id.} In fairness to the \textit{Sims} majority, it should be noted that the “opportunity to litigate” question has baffled courts of appeal in other contexts. Courts have disagreed whether an order granting a motion that finally resolves a pending action constitutes a sufficient “opportunity to litigate” such that the first action will bar a subsequent action. All courts focus, however, on whether the subsequent action raises issues identical to those of the prior action. \textit{See} Barker v. Hull, 191 Cal. App. 3d 221, 226, 236 Cal. Rptr. 285, 288-89 (1987); Rohrbasser v. Lederer, 179 Cal. App. 3d 290, 297, 224 Cal. Rptr. 791, 794 (1986); Rose v.
The counterargument is, of course, that the SSDSC did not withdraw its restitution letter and Sims consequently was entitled to a hearing and a determination. The question in Sims was not the validity of the fair hearing outcome, but whether a finding based on such a flawed record should be given conclusive effect in a far more serious judicial proceeding. Justice Kaus' dissent on this point is compelling:

Since the county did not appeal the administrative decision, it is, of course, bound by the terms of that ruling. Thus, the county is obligated to refund any restitution payments defendant made pursuant to the agency's directions and to rescind its administrative "Notice of Action." At the same time, however, because the county did not "actually litigate" the fraud question in the administrative proceeding, the majority has simply disregarded the well-established contours of the collateral estoppel doctrine in holding that the People are precluded from proving defendant's guilt in this separate "cause of action"—the criminal prosecution.125

The SSDSC's decision to cast its lot with the criminal prosecution worked an economy at the fair hearing, contributed to reversal of Sims' restitution order to her advantage, and effectively allowed her to either escape restitution altogether or face it only upon conviction in a proceeding in which her adversary would have to prove the cohabitation allegation beyond a reasonable doubt. There was no corresponding disadvantage to Sims beyond that of a small time investment. She apparently had no attorney at the fair hearing, although that is not clear from the court's opinion, and, as a welfare recipient, she would almost certainly have been entitled to appointed counsel in the criminal proceeding.126

Although not discussed by the Sims majority, the California Supreme Court, in the case of In re Dennis B.127 took a very different position in a related area. To prevent harassment of the accused, California Penal Code section 654 generally precludes successive prosecutions for different crimes arising out of the same transaction,128 whatever the

125. Sims, 32 Cal. 3d at 491-92, 651 P.2d at 336, 186 Cal. Rptr. at 91 (Kaus, J., dissenting).
126. CAL. PENAL CODE § 987 et. seq. (West 1985). It is conceivable that a wealthy individual might commit welfare fraud and not be eligible for appointed counsel, of course.
127. 18 Cal. 3d 687, 557 P.2d 514, 135 Cal. Rptr. 82 (1976).
128. CAL. PENAL CODE § 654 (West 1985). If, for example, the victim dies after the defendant is convicted of assault, prosecution for homicide is not precluded. People v. Breland, 243 Cal. App. 2d 644, 650, 52 Cal. Rptr. 696, 760 (1966). That did not occur in Dennis B.
outcome of the first prosecution. Dennis B. was accused successively of an unsafe lane change, an infraction, and vehicular manslaughter, a misdemeanor, arising out of the same accident. He was tried, convicted, and fined $10 on the first charge and sought to preclude prosecution of the second per section 654.129

The parties in both prosecutions were identical, as was the driving error underlying each charge. The supreme court, however, denied section 654 preclusion giving reasons strikingly similar to those Justice Kaus expresses in his Sims dissent.130 First, although technically the responsibility of the district attorney, the routine prosecution of traffic tickets was essentially a police matter. The only evidence that the district attorney's office was aware of the unsafe lane change prosecution was its issuance of subpoenas for the trial, a routine clerical function.131 Second, the traffic ticket prosecution was de minimis and offered little threat of harassment. As was the case with the Sims' fair hearing, "an infraction[, the unsafe lane change,] is not punishable by confinement, and generally no stigma is attached thereto."132 Third, "the state's substantial interest in maintaining the summary nature of minor motor vehicle violation proceedings would be impaired by requiring the prosecution to ascertain for each infraction the possibility of further criminal proceedings."133 Finally, "[t]here is an undeniable state interest in prosecuting serious misdemeanors and felonies. To permit defendant to be prosecuted only for a minor motor vehicle code infraction when his alleged crime was actually manslaughter 'would operate with gross unfairness to the state.' "134

From a practical and public policy perspective, Sims and In re Dennis B. appear irreconcilable. True, there are considerably more traffic trials than welfare fair hearings, but at least a district attorney's office could computerize its own files to discover and coordinate parallel filings. The Sims decision, on the other hand, assumes the office of the district

129. Dennis B., 18 Cal. 3d at 690, 557 P.2d at 516, 135 Cal. Rptr. at 84.
131. Dennis B., 18 Cal. 3d at 693, 557 P.2d at 518, 135 Cal. Rptr. at 86. In People v. Bas, 194 Cal. App. 3d 878, 882, 241 Cal. Rptr. 299, 301 (1987), however, the court of appeal held a felony prosecution was barred after the defendant pleaded guilty to misdemeanor violations arising out of the same incident. The misdemeanor pleas were entered at the preliminary hearing on the felony charges with the concurrence of the prosecutor after defense counsel openly announced he would claim convictions on the lesser offenses would bar further prosecution.
132. Dennis B., 18 Cal. 3d at 694-95, 557 P.2d at 519, 135 Cal. Rptr. at 87.
133. Id. at 695, 557 P.2d at 520, 135 Cal. Rptr. at 88.
134. Id. at 696, 557 P.2d at 520, 135 Cal. Rptr. at 88 (quoting State v. Currie, 41 N.J. 531, 543, 197 A.2d 678, 685 (1945)).
attorney can somehow monitor proceedings in various other agencies of which it will generally not have a reasonable opportunity to inform itself, much less control. Moreover, although only a "serious misdemeanor" was at stake in Dennis B. that prosecution was not affected by a previous judicial determination. In Sims, on the other hand, a felony prosecution was precluded by a decision after an informal administrative proceeding.135

B. Final Determination on the Merits

Collateral estoppel cannot apply to determinations not yet final for the very obvious reason that they might be changed, causing chain-reaction chaos in parallel proceedings that have adopted the interlocutory judgments of other adjudicators. As suggested above, it is likely the fair hearing decision in Sims was "on the merits" only in the sense that a default judgment is considered to be on the merits. The facts given in Sims, however, are probably inadequate to resolve the issue either way.

An important feature of administrative adjudication is that agency decisions are often subject to revision, reconsideration, or judicial review for considerable periods of time.136 The Sims opinion tacitly concedes the trial court's application of collateral estoppel was not proper because it came during the SSDSC's one year period to seek mandamus review in the superior court.137 The court is not receptive to Sims' claim that the cause should be considered final as of the date the director adopted the hearing officer's decision: "[I]t is a well established rule that only judgments which are free from direct attack are final and may not be relitigated."138 Nevertheless, the court narrowly avoids this difficulty by noting a fact probably beyond the appellate record. The year in which to file the petition had lapsed with no mandamus relief having been sought. Thus, because no petition had been filed the court finds it unnecessary to determine whether the decision might have become final any earlier.139

135. Sims, 32 Cal. 3d at 490, 651 P.2d at 334-35, 186 Cal. Rptr. at 90. An interesting question the court did not reach in Dennis B. was whether trial of the infraction precluded relitigation of the fact of the unsafe lane change. A jury trial was not available in either proceeding, and the burden of proof was the same in both. It is clear the juvenile court referee was aware of the conviction. 18 Cal. 3d at 697 n.7, 557 P.2d at 521 n.7, 135 Cal. Rptr. at 89 n.7. But it does not appear he made an independent finding on the issue. It would seem the reasons given by the supreme court for denying Penal Code section 654 preclusion would apply to a prosecution attempt to invoke collateral estoppel there or under similar circumstances, for example, in cases such as Sims.
136. See e.g., CAL. WELF. & INST. CODE § 10962 (West 1980).
137. Sims, 32 Cal. 3d at 486, 651 P.2d at 332, 186 Cal. Rptr. at 88.
138. Id. at 486, 651 P.2d at 332, 186 Cal. Rptr. at 88.
139. Id.
Reading between the lines, the court apparently seizes upon the only avenue legally available to avoid the finality problem. Yet, in its treatment of the finality issue, the court virtually guarantees no welfare recipient who prevails at a fair hearing will ever be able to seek refuge from a determined prosecutor via collateral estoppel. Most prosecutions will commence, as in *Sims*, when the evidence of overpayment comes to light, that is, at or about the time of the fair hearing. Therefore, a prosecutor faced with a collateral estoppel attack only need persuade the county welfare agency to seek judicial review in order to avoid administrative finality. That usually will provide a leeway of two or three years to conclude a parallel criminal prosecution.

If the defendant is convicted, he or she also may appeal. An appellate court entertaining both the criminal and the administrative appeals would be faced with an interesting dilemma: does the appeal decided first control? If the cases are consolidated and both judgments would ordinarily be affirmed, as perhaps would have been the case in *Sims*, does one supersede the other? For example does the conviction supersede because of the higher burden of proof? Once the parallel proceedings have cleared the fact finding level, perhaps the better rule is that they should each proceed on the merits without regard to the other, notwithstanding the possibility of inconsistent determinations.

140. Finality is one of the greatest impediments to the use of administrative collateral estoppel in general. As one commentator observed, "Many agencies have procedures for reconsidering or modifying final decisions. If a court gives collateral estoppel effect to the agency's findings before reconsideration is completed, the court's decision may not comport with the agency's final decision on reconsideration." Note, *The Collateral Estoppel Effect of Administrative Agency Actions in Federal Civil Litigation*, 46 GEO. WASH. L. REV. 65, 75 (1977) (authored by Eric N. Macey).

141. If the recipient is unsuccessful at the fair hearing, now the first stage of the criminal proceeding in Justice Kaus' view, (see supra note 108) should the prosecution be abated per the abstention doctrine pending the statutorily authorized judicial review of the fair hearing? See, e.g., Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619, 629 (1986); Note, supra note 63, at 1507-08.

142. CAL. CIV. PROC. CODE § 909 (West 1980 & Supp. 1988) would permit an appellate court to take evidence itself in the mandamus proceeding and reverse the director on its own factual findings. It provides in part, "In all [nonjury trials], the reviewing court may make factual determinations contrary to those made by the trial court. The factual determinations may be based on the evidence adduced before the trial court either with or without the taking of evidence by the reviewing court." *Id.* The section is apparently unknown to most practitioners, however, and is rarely used in situations in which it would seemingly be fully applicable. See, e.g., Shamblin v. Brattain, 44 Cal. 3d 474, 479, 749 P.2d 339, 341-42, 243 Cal. Rptr. 902, 905 (1988) (appellate courts should defer to trial court factual findings even on review of motions heard on declarations); *In re Elise K.*, 33 Cal. 3d 138, 149-51, 654 P.2d 253, 261-62, 187 Cal. Rptr. 483, 491-92 (1982) (Bird, C.J., concurring) (It is the province of the trial court to resolve questions of fact and of the appellate court to decide questions of law).

143. See, e.g., NLRB v. Deena Artware, 198 F.2d 645, 650 (6th Cir. 1952), cert. denied,
Although one of the important purposes of collateral estoppel is the avoidance of inconsistent results, in the *Sims* scenario, an inconsistency would be perfectly defensible because one of the parties refused to participate in the fair hearing. Even had the cause been fully litigated, inconsistent results would have been easily explainable in *Sims* based on the informality of the fair hearing procedure and the lack of attorney participation.

C. Privity of the Parties

As noted above, collateral estoppel generally can apply only against a party or someone in privity with a party. The rationale is obvious. It is one thing to lose on the merits; it is quite another to lose because someone who may have had less reason to pursue a claim involving the same issue, and over whom you have no control or influence, has already lost on the merits.

In an identical context only three years before *Sims*, the court of appeal in *People v. LaMotte* found no privity between county prosecutors and welfare representatives.144 The court stated, “Appellant combines the Santa Cruz District Attorney and its Welfare Department as the ‘party’ to be estopped. This position ignores the fact that the People of the State of California and not the County of Santa Cruz or its district attorney are the plaintiff in the criminal case.”145

In *Sims* the supreme court responds to *LaMotte* in two ways. First, it decides that the court of appeal’s analysis was too “simplistic,”146 and uses a circular reply, itself deserving a harsher label. Quoting from another court of appeal opinion, the court states, “’Privity is essentially a shorthand statement that collateral estoppel is to be applied in a given case; there is no universally applicable definition of privity.’ ”147 Second, the court indicates that the county prosecutor and the welfare department were in privity: “At fair hearings, the county welfare department [also] acts as the ‘agent’ of the state.”148 The court points out that the

145. *Id.*
146. *Sims*, 32 Cal. 3d at 486, 651 P.2d at 332, 186 Cal. Rptr. at 88.
147. *Id.* at 486, 651 P.2d at 332-33, 186 Cal. Rptr. at 88 (quoting Lynch v. Glass, 44 Cal. App. 3d 943, 947, 119 Cal. Rptr. 139, 141-42 (1975)).
148. *Id.* at 487, 651 P.2d at 333, 186 Cal. Rptr. at 89 (footnote omitted); *but see* Clemmer v. Hartford Ins. Co., 22 Cal. 3d 865, 873-77, 587 P.2d 1098, 1101-04. 151 Cal. Rptr. 285, 288-90 (1978) (doctrine of collateral estoppel did not preclude plaintiffs from litigating the issue of whether defendant’s insured, previously convicted of second degree murder in the death of plaintiffs’ decedent, acted willfully, even though conviction would so estop the insured).
DSS supervises every phase of the administration of welfare and social services and, quoting Lerner v. Los Angeles City Board of Education, adds, "the courts have held that the agents of the same government are in privity with each other, since they represent not their own rights but the rights of the government."149

Lerner, however, is entirely distinguishable. The Lerner court noted, "Not only does the city board here serve as an agency of the state but... the city board occupied a totally dependent and subordinate position to the state board, basing its decisions entirely upon the state board's [action]..."150 In other words, the agencies in Lerner were part of the same hierarchy; and the lower was obviously an agent of the higher. This was not, of course, the case in Sims.

The Lerner analogy is also imperfect for several other reasons. It may be that the DSS and the SSDSC are in privity, although they play entirely different roles in the fair hearing procedure; but the real question is whether either is in privity with the district attorney. It hardly can be said the DSS is the alter ego of the People of the State of California in a criminal prosecution or even that it has a similar interest. The DSS supplies the hearing officer, and its director makes the final determination.151 Thus, the director of the DSS is an adjudicator in fair hearings, not an advocate. The local welfare agency, here the SSDSC, has the role of advocate. By contrast, a county prosecutor, although he does appear on behalf of the state, is under the supervision of the attorney general in felony matters.152 The attorney general, however, never acts in a judicial capacity.

Additionally, the relationship between the attorney general and a county prosecutor differs from that between the DSS and a county welfare agency. The DSS exercises considerably less control over local agencies than the attorney general can over county prosecutors. The DSS may not arbitrarily intervene in the affairs of local agencies: "If the director believes that a county is substantially failing to comply with any provision of [the California Welfare and Institutions Code] or any regula-

149. Sims, 32 Cal. 3d at 487, 651 P.2d at 333, 186 Cal. Rptr. at 89 (quoting Lerner v. Los Angeles City Bd. of Educ., 59 Cal. 2d 382, 398, 380 P.2d 97, 106, 29 Cal. Rptr. 657, 666 (1963)); see also Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 402-04 (1940) (holding that there is privity between different officers of the United States government with respect to a given party).


151. CAL. WELF. & INST. CODE §§ 10953, 10959 (West 1980).

152. CAL. GOV'T CODE § 12550 (West 1980) gives the Attorney General "direct supervision over the district attorneys of the several counties of the State and [he] may... assist any district attorney in the discharge of his duties, and may, where he deems it necessary, take full charge of any investigation or prosecution of violations of law..."
tion . . . and the director determines that formal action may be necessary to secure compliance, he or she shall inform the county welfare director and the board of supervisors . . . .”153 Thereafter, unlike the attorney general dealing with a recalcitrant county attorney,154 the director must seek compliance by an action for injunctive relief or order the county to appear at a hearing before the State Social Services Advisory Board. Only then may the director take action similar to that peremptorily available to the Attorney General, and even then the director’s action is subject to judicial review.155

Although Sims also relies on a “close association” between the SSDSC and the district attorney “in investigating and controlling welfare fraud,”156 it is by no means certain the same is true in all, or even most, of the other counties in the state. Moreover, the court points to no procedure authorizing a district attorney to supervise a welfare agency’s handling of a fair hearing.157 As one commentator defined it, “[p]rivity exists [when] a nonparty has a sufficient interest in, participation in, or control of the prior litigation to make the determination in that litigation binding on him.”158 If the nonparty in Sims is viewed as the district attorney, rather than the state itself, it is doubtful that this standard is met.

The more expansive view of privity espoused in Sims parallels the federal rule, which focuses on the issue litigated, rather than the interests of the governmental agencies involved. For example, in Sunshine Anthracite Coal Co. v. Adkins, a judgment in an action between a company and the National Bituminous Coal Commission as to the nature of the coal the company produced was held to preclude relitigation of the same issue in a subsequent suit brought by the Collector of Internal Revenue.159 The United States Supreme Court determined federal officers are in privity for purposes of collateral estoppel when the public representative in the first action was authorized to represent the government “in a final adjudication of the issue in controversy.”160 By contrast, in United

154. See supra note 152 and accompanying text.
156. Sims, 32 Cal. 3d at 487, 651 P.2d at 333, 186 Cal. Rptr. at 89.
157. Justice Kaus’ dissent also appears to assume some power on the district attorney’s part to exercise such control, however. Id. at 493-94, 651 P.2d at 336-37, 186 Cal. Rptr. at 93 (Kaus, J., dissenting).
158. Note, supra note 140, at 80 (citing 1B J. Moore, Moore’s Federal Practice ¶ 0.411[1] (2d ed. 1974)).
159. 310 U.S. 381, 402-03 (1940).
160. Id. at 403.
States v. RCA\textsuperscript{161} the Court held an FCC licensing decision did not estop an antitrust action based on the acquisition of a television station because the FCC was not chartered for the purpose of enforcing antitrust policy; that is, the same issues were not before the two agencies involved.\textsuperscript{162}

Since the SSDSC was authorized to litigate the question of overpayments to Sims, it appears application of the federal privity rule in \textit{Sunshine Anthracite Coal} would have supported the use of collateral estoppel.\textsuperscript{163} If the federal test were applied broadly in California, however, that could lead to the use of collateral estoppel in a wide variety of criminal cases involving previous administrative determinations from the Department of Motor Vehicles, the Department of Real Estate, and other agencies and licensing boards. As Justice Kaus notes, the legislature hardly could have envisioned that scenario in creating these administrative bodies and authorizing their adjudicatory functions.\textsuperscript{164}

IV. \textit{Sims’} Conclusion and Public Policy

\textit{Sims} concludes with an exercise in self-congratulation. The court declares its opinion furthers the public policy underpinnings of collateral estoppel by promoting judicial economy, avoiding inconsistent results, protecting the sanctity of the fair hearing process, and preventing harassment of welfare recipients.\textsuperscript{165} The court also discovers overriding legislative preference for resolving welfare fraud cases outside the criminal justice system and suggests its holding conforms to that preference.\textsuperscript{166}

\textsuperscript{161} 358 U.S. 334 (1959).

\textsuperscript{162} \textit{Id.} at 352; \textit{See Note, Res J udicata and Administrative Jurisdiction—A Proposal for Resolving Conflicts Between Agencies with Overlapping Jurisdiction, 35 GEO. WASH. L. REV. 1056, 1057-58 (1967) (authored by Carol P. Kelley and Mary Margaret Milner).}

\textsuperscript{163} \textit{See also} Univ. of Tenn. v. Elliott, 478 U.S. 788, 789 (1986) (where the parties had an opportunity to litigate the issues, findings of fact by a state agency acting in a judicial capacity are entitled to the same preclusive effect in federal court as they would have in state court).

\textsuperscript{164} \textit{Sims,} 32 Cal. 3d at 493, 651 P.2d at 337, 186 Cal. Rptr. at 92 (Kaus, J., dissenting).

\textsuperscript{165} \textit{Id.} at 488-89, 651 P.2d at 334, 186 Cal. Rptr. at 89-90.

\textsuperscript{166} \textit{Id.} at 475, 651 P.2d at 325, 186 Cal. Rptr. at 81. This contention must have frustrated prosecutors. The legislature provided specific penal statutes for \textit{Sims’} alleged misconduct. \textit{CAL. WELF. \\& INST. CODE} § 11483 (West 1980); \textit{CAL. WELF. \\& INST. CODE} § 18910 (West 1980) (repealed 1979). They were presumably enacted for a purpose. \textit{Sims’} dubious rationale springs from People v. McGee, 19 Cal. 3d 948, 568 P.2d 382, 140 Cal. Rptr. 657 (1977), interpreting a legislative provision (\textit{CAL. WELF. \\& INST. CODE} § 11483 (West 1980))—subsequently considerably narrowed in scope to very minor cases—requiring a demand for restitution before the commencement of a criminal prosecution. The statute did not preclude prosecution even if restitution was made, however, and the \textit{McGee} court noted, “We do not mean to suggest, of course, that the Legislature viewed welfare fraud as a nonserious crime . . . .” 19 Cal. 3d at 965, 568 P.2d at 391, 140 Cal. Rptr. at 666; \textit{see also} People v. Jordan, 86 Cal. App. 3d 529, 536-37, 150 Cal. Rptr. 334, 338 (1978) (information properly
In its efforts to serve the public policy concerns of collateral estoppel, however, the court dismisses some equally important considerations. Perhaps the strongest objections to the use of collateral estoppel in any setting are injustice, surprise, potential perpetuation of an earlier error, and untoward effects on the original tribunal. None of these factors is given appropriate consideration by the *Sims* majority, although all are present when one examines the history of the litigation and its probable impact. Specifically, the use of collateral estoppel in *Sims* was unfair and, in view of *Empire Star Mines*, was not readily foreseeable by the county litigants. The *Sims* majority simply ignores Justice Kaus' warning concerning the potential hardship on the DSS and other similar agencies who might have their streamlined informal proceedings turned into arenas for the indirect resolution of causes far more significant than they were designed to accommodate.

A. Injustice and the Perpetuation of Legal Error

*Sims* ignores (and thereby casts doubt on) well established authority barring the use of collateral estoppel on the grounds of unfairness. Although not part of the *Sims* and *Utah Construction* standards, fairness historically has played a part in the better reasoned collateral estoppel cases, even those involving only defensive preclusion. As the United States Supreme Court stated, "[N]o one set of facts, no one collection of words or phrases, will provide an automatic formula for proper rulings on estoppel pleas. In the end, [the] decision will necessarily rest on the trial courts' sense of justice and equity." The *Sims* result was unjust because the case against Sims never was presented anywhere. The SSDSC thought the criminal prosecution preempted the fair hearing, perceiving the matter exactly backward as it

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167. Even where a vigorous application of collateral estoppel would tend to cause an early termination of litigation, other persuasive reasons can be found for not applying it. Of primary import is the doctrine that each person shall be accorded his full day in court. Additional factors include both the difficulty of foreseeing the possible significance in future cases of matters being currently litigated and recognition that social and legislative policies in certain areas of substantive law tend to make flexibility of decision more desirable than merely ending litigation.


turned out; and the criminal prosecution was barred by collateral estoppel. The state (viz. the taxpayers) never had a day in either forum.

Assuming the DSS made the correct determination, that Sims had not cohabited while receiving welfare, the still birth of the criminal prosecution is not so difficult to accept. Hopefully, there truly was nothing to gain in proceeding with her criminal trial. But what if the fair hearing result was wrong? Collateral estoppel is strong legal medicine because, like full faith and credit, res judicata, and even law of the case, it can preclude relitigation of an issue even when the earlier decision was clearly erroneous. That was the situation in Hollywood Circle. Whether legally compelled or not, the result was highly unjust. Although Sims did not involve the perpetuation of an error of law via collateral estoppel, a brief exposition of California law on the point is useful background to understand the implications of the decision.

The leading texts on the subject, the Restatement (Second) of Judgments and Professor Davis’ treatise on administrative law, advocate a flexible approach. The Restatement suggests the second forum should consider whether

"the prior determination was plainly wrong or . . . [whether] new evidence [is] available. . . . Further, it is unnecessary . . . [to show] . . . that the evidence could not have been discovered with due diligence; the question is not whether a prior determination should be set aside but whether it should be . . . treated as conclusive for further purposes."  

Professor Davis concludes collateral estoppel should be “qualified or relaxed to whatever extent is desirable for making it a proper and useful tool for administrative justice.” He also notes circumstances in which preclusion should not be permitted because of the potential impact on third persons or the public interest.

When relitigation is requested because of a change in legal interpretation, the case for allowing preclusion may be even more compelling. Generally, it makes sense to deny relitigation after a law is amended for

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171. See supra notes 30-38 and accompanying text.

172. RESTATEMENT (SECOND) OF JUDGMENTS § 29 comment j (1982).

173. 2 K. C. DAVIS, supra note 13, § 18.03, at 559.

reasons of policy or preference by the legislature or the courts. A contrary rule would be extremely costly and a disincentive to legal reform. But when the initial decision is subsequently discovered to be erroneous under existing law, preclusion serves to perpetuate an injustice that is difficult to justify in the name of judicial economy.

For example, in Slater v. Blackwood175 a minor whose first personal injury action was nonsuited and affirmed on appeal based on the guest statute sought to relitigate the question after the supreme court declared the law unconstitutional. The court rejected the second action, finding the doctrine of discretionary refusal to apply res judicata to be of doubtful validity and specifically "inapplicable where . . . the only possible basis for its implementation is . . . a change in law following the original judgment."176 Unfortunately, the court appears to have confused changes in the law with legal errors. A declaration of unconstitutionality is more than a change in the law; it also reveals a declaration that previous holdings reaching contrary conclusions were decided wrongly. In Slater,177 however, the court ignored any such distinction in Draconian language. It stated the rule that "final judgments, even erroneous ones, are a bar to further proceedings . . . is necessary to the well-ordered functioning of the judicial process. It should not be impaired for the benefit of particular plaintiffs, regardless of the sympathy their plight might arouse in an individual case."178 Justice cried out, however, for the

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177. Slater also notes agency decisions may collaterally estop courts and vice versa, citing an earlier decision to that effect, whether or not the first decision was correct. 15 Cal. 3d at 797, 543 P.2d at 596, 126 Cal. Rptr. at 228 (citing Busick v. Workmens' Compensation Appeals Bd., 7 Cal. 3d 967, 975, 500 P.2d 1386, 1392-93, 104 Cal. Rptr. 42, 48 (1972). In Busick a superior court judgment was given binding effect on the Workmen's Compensation Appeals Board. The supreme court in that case made it abundantly clear the decision of either forum would bind the other: "We recognize that the two tribunals in which petitioner sought relief have concurrent jurisdiction [but] only to determine jurisdiction . . . [T]he tribunal first assuming jurisdiction retains it to the exclusion of all other tribunals in which the action might have been initiated." 7 Cal. 3d at 976, 500 P.2d at 1393, 104 Cal. Rptr. at 49 (citing Scott v. Indus. Accident Comm'n, 46 Cal. 2d 76, 81, 293 P.2d 18, 21 (1956); Jones v. Brown, 13 Cal. App. 3d 513, 521, 89 Cal. Rptr. 651, 655-56 (1970)).
178. 15 Cal. 3d at 797, 543 P.2d at 596, 126 Cal. Rptr. at 228 (emphasis added) (citations omitted).
Slater court to allow relitigation of those cases in which minors were involved. This is so because minors may generally bring tort action during the period of their minority or up until one year thereafter. Penalizing minors whose well-meaning guardians brought suit prematurely borders on the aberrational. Those cases involving adults, with a few additional exceptions, would have been precluded by California's one-year statute of limitations for personal injury claims. 179

Still, it may be too early to scatter the ashes of the notion that a court may reject preclusion when injustice will result, at least where the earlier error is merely one of law. Without mentioning Slater or Hollywood Circle, the supreme court in Consumers Lobby Against Monopolies v. Public Utilities Commission stated, "[W]hen the issue is a question of law rather than of fact, the prior determination is not conclusive either if injustice would result or if the public interest requires that relitigation not be foreclosed." 180 The court cited two cases for this proposition, both of which predated Slater but were not noted there. 181 Later, however, the supreme court, in an opinion by the author of Consumers Lobby, followed Slater and Hollywood Circle on the point. 182 Although cited and not specifically overruled, Consumers Lobby was apparently questioned by the supreme court. 183 The continuing refusal of the court to adopt a consistent position in this and numerous other issues in the preclusion field is both puzzling and a source of unnecessary litigation. 184

179. CAL. CIV. PROC. CODE § 340 (West 1982).
180. 25 Cal. 3d 891, 902, 603 P.2d 41, 47, 160 Cal. Rptr. 124, 130.
181. Id. at 902, 603 P.2d at 47, 160 Cal. Rptr. at 130. City of Los Angeles v. City of San Fernando, 14 Cal. 3d 199, 230, 537 P.2d 1250, 1273, 123 Cal. Rptr. 1, 24 (1975); Louis Stores, Inc. v. Dep't of Alcoholic Beverage Control, 57 Cal. 2d 749, 757, 371 P.2d 758, 762, 22 Cal. Rptr. 14, 18 (1962).
183. Id. at 656, 612 P.2d at 973, 165 Cal. Rptr. at 883.
The rule of *Consumers Lobby*, although greatly preferable to that of *Slater*, is itself harsher than that of other, perhaps more enlightened jurisdictions. Many courts and commentators have adopted the flexible approach advocated by Professor Davis and the Restatement of Judgments.\footnote{See Commissioner v. Sunnen, 333 U.S. 591, 597-99 (1948); Title v. INS, 322 F.2d 21, 23-24 (9th Cir. 1963); Note, supra note 140, at 69.} It appears most would permit considerable trial court discretion whether the issue is one of fact or law, although discretion to correct errors of law is generally thought to be broader.\footnote{See Rutherford v. State, 188 Cal. App. 3d 1267, 1284, 233 Cal. Rptr. 781, 790 (1987); Tar Land Villas Owners' Ass'n v. Atlantic Beach, 64 N.C. App. 239, 245, 307 S.E.2d 181, 185-86 (1983); RESTATEMENT (SECOND) OF JUDGMENTS § 28(2) & reporter's note at 286 (1982).} Collateral estoppel and its cousins are judicial creations. To create suffocating rules to be rigidly enforced is undesirable in light of the certainty of unanticipated future events. Concepts designed to promote justice and avoid duplication need not be couched in absolute terms in order to accomplish their goals in a high percentage of cases. Law itself is little more than a study of exceptions to rules.

**B. The Element of Surprise**

Another troublesome aspect of the *Sims* opinion is lack of foreseeability, or "the element of surprise." The application of collateral estoppel to the decision of a hearing officer after an uncontested proceeding before an agency constitutionally prohibited from exercising judicial power—particularly when the county litigant was not officially subject to the control of the district attorney—would not have been expected by many.\footnote{People v. Sims, 32 Cal. 3d 468, 651 P.2d 321, 186 Cal. Rptr. 77 (1982).} Most would have anticipated a judicial reaction along the lines of *Empire Star Mines* or the *Demery* and *LaMotte* decisions.\footnote{Empire Star Mines Co. v. Cal. Employment Comm'n, 28 Cal. 2d 33, 168 P.2d 686 (1946) (doctrine of res judicata is unavailable in connection with administrative proceedings); People v. Demery, 104 Cal. App. 3d 548, 163 Cal. Rptr. 816 (1980) (defendant's successful litigation in an administrative hearing does not bar subsequent criminal prosecution); People v. LaMotte, 92 Cal. App. 3d 604, 155 Cal. Rptr. 5 (1979) (that a claim raises an issue within the expertise of an administrative agency does not affect the primary jurisdiction of the California judiciary).} *Sims'* failure to consider the element of surprise is not unique. Many issue preclusion cases ignore the question of whether litigants should have expected an initial determination would bind them at other
times and places,\textsuperscript{189} and it is not part of either the federal or California test. But many commentators and a number of jurists, including Learned Hand, have argued foreseeability should be a major consideration in preclusion cases.\textsuperscript{190} Judge Hand noted, "Were the law to be recast, it would . . . be a pertinent inquiry whether the conclusiveness . . . of facts decided . . . might not properly be limited to future controversies which could be thought reasonably in prospect when the first suit was tried."\textsuperscript{191} Although the criminal prosecution in \textit{Sims} was already underway when the fair hearing was held,\textsuperscript{192} the application of collateral estoppel after the SSDSC declined to litigate was not readily foreseeable.

In \textit{Lewis v. International Business Machines Corp.,}\textsuperscript{193} a case similar to \textit{Sims}, the district judge considered lack of foreseeability to be an important concern. \textit{Lewis} was a wrongful discharge diversity action in which the law of Oregon was applicable. The plaintiff applied for state unemployment benefits, and IBM demanded a hearing to challenge the application. The hearing was conducted in two sessions, the first in Nevada and the second in Oregon. Only a maximum benefit of $1,612 was at stake; and Lewis, who had since moved to Nevada, did not attend the hearing in Oregon and was not represented by counsel or anyone else. His claim was denied. When he brought his district court action seeking $500,000 in damages, IBM moved for summary judgment on collateral estoppel grounds.\textsuperscript{194}

The court noted that Oregon at one time did not apply collateral estoppel to agency adjudications, but presently did.\textsuperscript{195} Nevertheless, IBM's motion was denied. First, the district judge reasoned the plaintiff lacked a serious incentive to litigate his unemployment insurance claim because of the small amount of money involved. Consequently it would be unfair to apply collateral estoppel.\textsuperscript{196} Second, the judge in \textit{Lewis

\begin{itemize}
  \item \textsuperscript{189} See \textit{People v. Taylor}, 12 Cal. 3d 686, 527 P.2d 622, 117 Cal. Rptr. 70 (1974); see also Bernhard v. Bank of Am., 19 Cal. 2d 807, 122 P.2d 892 (1942).
  \item \textsuperscript{190} "When according estoppel effect to agency findings would foster harsh, unforeseeable effects, the court should invoke the judicially recognized principle of applying collateral estoppel flexibly to avoid injustice." Note, \textit{supra} note 140, at 83-84; Polasky, \textit{supra} note 167, at 221; \textit{Grandview Dairy v. Jones}, 157 F.2d 5 (2d cir. 1946), \textit{cert. denied}, 329 U.S. 787 (1946); K.C. \textit{DAVIS, ADMINISTRATIVE LAW} 608 (1951).
  \item \textsuperscript{191} \textit{Evergreens v. Nunan}, 141 F.2d 927, 929 (2d Cir. 1944), \textit{cert. denied}, 323 U.S. 720 (1944).
  \item \textsuperscript{192} \textit{See supra} note 24 and accompanying text.
  \item \textsuperscript{193} 393 F. Supp. 305 (D. Or. 1974).
  \item \textsuperscript{194} \textit{Id.} at 305-07.
  \item \textsuperscript{195} \textit{Id.} at 307 (citing \textit{Willamette View Manor v. Peet}, 252 Or. 142, 143, 448 P.2d 546, 547 (1968)).
  \item \textsuperscript{196} \textit{Id.} at 309-10. The same was true in \textit{Sims}, of course, although the reasons were different. The SSDSC also had no incentive to litigate because it believed the felony prosecution
\end{itemize}
found no evidence suggesting the plaintiff could have anticipated the application of collateral estoppel: "The novelty of the issue presented demonstrates that prior Oregon ... law provides [that] ... information in a claim file is confidential and only for use in connection with the claim. This statement might suggest that information regarding employment proceedings and their outcome could not be used in a civil action." A similar system of confidentiality is in place for welfare files in California. Before Sims few prosecutors would have anticipated the use of collateral estoppel based on a fair hearing determination. It is unlikely, or at least was unlikely, that the district attorney's office even would have been aware of scheduled fair hearings. In addition, a number of welfare fraud cases probably are not uncovered until the fair hearing stage or later. Thus, even after Sims, prosecutors may be taken by surprise.

Worse, unlike plaintiffs such as Lewis, the district attorney is legally powerless to protect against the application of collateral estoppel. When, as in Sims, the two proceedings are of greatly disproportionate importance, it is doubtful a public prosecutor's office should ever be bound by an administrative determination arising in a forum in which it could not participate.

C. Effects on the Original Tribunal

Unfairness and lack of foreseeability or surprise are accompanied in the Sims rule by a failure to recognize the potential hardship to the agencies involved. As Justice Kaus notes in Sims, and the supreme court itself did in Dennis B., the spurious use of preclusion in more serious subsequent litigation is undesirable because it may result in various untoward effects on a first tribunal hearing over a relatively minor matter. Like Justice Kaus, the judge in Lewis was concerned with the impact a finding of collateral estoppel might have on the agency itself:

The average hearing lasts forty-five minutes. The referees who conduct the hearings are not necessarily lawyers. Over six thousand hearings were conducted during the fiscal year 1972-73. The State anticipates that a decision in favor of Defendants would cause an increase in representation by counsel in Employment Division hearings with a resulting increase in the length and complexity of the hearings. Current Employment Division staffing levels would be inadequate to divested DSS of jurisdiction to proceed with the fair hearing. Sims. 32 Cal. 3d at 474, 651 P.2d at 325, 186 Cal. Rptr at 80.

197. Lewis, 393 F. Supp. at 309.
198. CAL. WELF. & INST. CODE § 10850 (West 1980).
199. See Sims, 32 Cal. 3d at 494, 651 P.2d at 337-38, 186 Cal. Rptr. at 93 (Kaus, J., dissenting).
handle this burden. In the absence of clear authority from the state courts, this Court will not inflict the hardship that could result by making a state agency's hearings legal battlegrounds for the indirect resolution of claims involving amounts substantially larger than the agency was designed to process.201

In Sims the California Supreme Court did give that "clear authority."

V. Legislative and Judicial Responses to Sims

The impact of Sims has not come primarily in welfare fair hearings,202 but in other administrative areas. For example, with Sims’ disapproval of the Empire Star Mines203 decision, many parties to Unemployment Insurance Appeals Board hearings began to anticipate potential use of collateral estoppel in wrongful discharge actions.204 As a result, in some cases hearings are designed to be brief and informal, like those at the DSS and unemployment compensation hearings in Oregon, took on the aspects of a full-blown trial.205


202. People v. Shultz, 151 Cal. App. 3d 714, 718, 199 Cal. Rptr. 33, 35 (1984), determined collateral estoppel could not be raised on an appeal after a plea of nolo contendere where the defense did not assert the doctrine in the trial court. Sims appeared while that appeal was pending. But the court of appeal in People v. Meyer, 183 Cal. App. 3d 1150, 1158-59, 228 Cal. Rptr. 635, 639 (1986), allowed the appeal after a guilty plea where the issue was raised in the trial court. The court of appeal in People v. Rodriguez, 160 Cal. App. 3d 650, 654 n.1, 206 Cal. Rptr. 79, 82 (1984), stated Sims should not be applied retroactively.

In Meyer, 183 Cal. App. 3d at 1165-66, 228 Cal. Rptr. at 644-45, Rodriguez, 160 Cal. App. 3d at 654, 206 Cal. Rptr. at 81-82, and People v. Wilson, 169 Cal. App. 3d 1149, 1156, 215 Cal. Rptr. 694, 698 (1985), the court of appeal distinguished Sims because the issues determined at the fair hearings were not identical to those before the courts. Finally, Madrid v. McMahon, 183 Cal. App. 3d 151, 156-57, 228 Cal. Rptr. 14, 18 (1986), held a welfare fraud defendant had no right to compel a fair hearing when the county did not elect to attempt recovery of the overpayment. Thus, if reported decisions are any gauge, Sims does not appear to have affected welfare fraud prosecutions appreciably. What it may have done to fair hearing procedures would be of interest, however. If any investigation of that question has been done, research has failed to reveal it.

203. Sims, 32 Cal. 3d at 479-80 n.8, 651 P.2d at 328 n.8, 186 Cal. Rptr. at 84 n.8; Empire Star Mines Co. v. Cal. Emp. Comm’n, 28 Cal. 2d 33, 168 P.2d 686 (1946).

204. In 1968, the court of appeal had refused to give res judicata effect to a determination of the Cal. Unemployment Insurance Appeals Board because that agency did not exercise judicial power. Pratt v. Local 683, 260 Cal. App. 2d 545, 562, 67 Cal. Rptr. 483, 494 (1968).

205. Increasingly, parties to unemployment proceedings are arguing that findings by the Appeals Board are binding in subsequent civil suits. This puts employers at a disadvantage in these suits because they tend to treat prior UI hearings informally; and because the standards of evidence are less rigorous in a UI hearing than in a formal civil proceeding. Employers are thereby placed at a disadvantage when UI proceedings and decisions are determined to be conclusive in subsequent civil suits. This has resulted in increased UI Appeals Board delays and costs, as employers are
Under the leadership of the California Chamber of Commerce, employers' groups, stung by the draining legal fees generated in these struggles to obtain a collateral estoppel advantage in an administrative forum, sought assistance in the legislature.\textsuperscript{206} Their effort achieved an ironic success. Less than three weeks after the Governor signed Assembly Bill 3950, which enacted California Unemployment Insurance Code section 1960,\textsuperscript{207} precluding the use of unemployment compensation decisions in other tribunals,\textsuperscript{208} the court of appeal held:

The issue before the administrative law judge was whether Robinson had committed the kind of "misconduct" which would prohibit an award of unemployment compensation. In unemployment compensation proceedings, the word "misconduct" is limited to "... conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee ......". In other words, mere poor performance cannot be equated with "misconduct." Consequently the administrative law judge's finding did not preclude [the employer] from showing [in a sub-

\textsuperscript{206} The proposed statutory exemption was also supported by the California Manufacturers Association, California Hospital Association, California Taxpayers Association, Sears Merchandise Group, Northrop Corporation, and Helpmates Company. It was opposed by the California Teamsters Public Affairs Council, California Trial Lawyers Association, State Labor Federation, and the Administrative Law Judges Committee of the Los Angeles County Bar Association. Assem. Com. on Fin. & Ins., Unemp. Disab. Ins. sub. com., report on Assem. Bill 3950 (Apr. 28, 1986) (on file at the Hastings Law Journal). Why employers did not simply rein in their counsel instead of approaching the legislature is a puzzling question.

\textsuperscript{207} It provides:

\textsuperscript{208} The legislature had acted similarly—and more concisely—previously. \textsuperscript{1256.7} This statute provides in part, "Findings of fact and law by the director shall not collaterally estop adjudication of the issue of sexual harassment in another forum." \textit{Id.} See Alexander v. Gardner-Denver Co., 415 U.S. 36, 52-54 (1974).
sequent wrongful termination action] that Robinson was discharged solely for poor performance. 209

Although the opinion had no reason to, and did not, deal with an employer's potential defensive use of an administrative determination of misconduct, there is seemingly no reason why that would not be appropriate under the Sims rationale. By definition the standard of misconduct required to justify denial of unemployment benefits would always support discharge of an employee. Thus, apparently confused by the legal terrain and spurred on by employers who may have been victimized by their own attorneys' enthusiasm for the Unemployment Compensation Appeals Board as a new source of billable hours, the employers' lobby shot itself in the foot. It accomplished an elimination of a legal tool only the employer could wield under the Sims rationale. 210

The court of appeal, however, declined to follow Sims in one such case. 211 The issue in Mahon v. Safeco Title Insurance Co. was whether section 1960 applied to pending wrongful discharge actions when the unemployment compensation decision was final before the effective date of the statute. 212 The employer argued "it justifiably relied upon the . . . expectation that the [Board] determination would be given collateral estoppel effect in vigorously litigating the [compensation] claim in the administrative forum. The theory of justification is that after People v. Sims . . . at common law the [Board] determination would have been entitled to collateral estoppel effect." 213

The court rejected the contention, partly on the grounds that Sims would not be applicable in any event. It gave the following reasons for its decision: (1) minimal stakes are involved at the administrative hearing; (2) different remedies are available in the two proceedings; (3) a party might be "sandbagged" by use of collateral estoppel under these circumstances; and (4) deployment of greater resources in the adminis-


211. Mahon v. Safeco Title Ins. Co., 199 Cal. App. 3d 616, 245 Cal. Rptr. 103 (1988) (employer is prevented from using collateral estoppel to bar employee's wrongful discharge claim that had been decided against the employee in a prior administrative hearing).

212. Id. at 618-19, 245 Cal. Rptr. at 104.

213. Id. at 621, 245 Cal. Rptr. at 106.
trative forum would bring delay to a system designed to be speedy. These points have merit; but they were essentially ignored by the *Sims* majority.

**VI. A Practical Example of Current Administrative Preclusion Problems**

As mentioned above, the impact of *Sims* on the criminal prosecution of welfare fraud has been minimal, at least as far as the appellate reports reveal. Recipient-defendants have not found it easy to meet the *Sims* criteria. And *Sims* has been contained, both by the legislature and by the court of appeal, in an area in which it did cause difficulty, Unemployment Compensation Appeals Board decisions. Moreover, administrative preclusion has been asserted with little success in a number of other contexts since *Sims*. The agency with perhaps the greatest number of administrative adjudications paralleled by criminal prosecutions is the Department of Motor Vehicles (DMV). There is a constant overlap, for example, in judicial and administrative proceedings against drunk drivers who have refused chemical tests. The DMV is charged with the enforcement of the implied consent law, which mandates an automatic license suspension for persons lawfully arrested for driving under the influence of alcohol who refuse to submit to a blood-alcohol test. DMV "refusal hearings" are informal affairs in which the referee also acts as the prosecutor. The DMV referee is not an administrative law judge and need not be, and rarely, if ever, is an attorney; the referee's findings are only advisory to the Director. Additionally, the DMV, like the DSS, does not enjoy judicial power under the California Constitution.

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214. *Id.* at 622-23, 245 Cal. Rptr. at 106-07.
215. *See supra* note 202 and accompanying text.
216. *See supra* section V.
More frequently than in the case of welfare fair hearings, the same factors that triggered the implied consent hearing will almost always lead to a parallel criminal action. The district attorney, however, plays no official role in the administrative proceeding and may be unaware of its existence. Also, there is typically very little communication between the DMV and the district attorney respecting their mutual caseload.

The issues of the lawfulness of the arrest and of whether there was an actual refusal to submit to a chemical test are critical in both the DMV refusal hearings and the prosecution of drinking motorists. Consequently, considerable debate raged in the courts of appeal, even before Sims, as to whether an initial determination of those questions in favor of the arrestee would be accorded collateral estoppel effect. One view, echoing the reasoning of People v. LaMotte, rejected the application of collateral estoppel in the context of a drunk driving prosecution: "[T]he doctrine of collateral estoppel [cannot] apply to proceedings under Vehicle Code section 13353. The DMV in its role of controlling the licensing of drivers is not in privity with the prosecutor in a criminal proceeding . . . . The DMV has no power to control the criminal proceedings [or] intervene . . . ." 222

In Shackelton v. Department of Motor Vehicles, however, the court of appeal upheld judicial preclusion of the DMV. Specifically, it decided a municipal court's ruling in a suppression hearing in favor of the defendant motorist bound the DMV on the issue of the lawfulness of

1986) (explaining that the administrative adjudication program is being replaced with court adjudication of traffic matters).


223. 46 Cal. App. 3d 327, 119 Cal. Rptr. 921 (1975). Shackelton was authored by Acting Presiding Justice Jackson, the author of People v. Demery, 104 Cal. App. 3d 548, 163 Cal. Rptr. 814 (1980), the case in which collateral estoppel effect was denied to a finding of the Board of Medical Quality Assurance in the subsequent prosecution of a physician.
the arrest in an implied consent hearing.\textsuperscript{224} The \textit{Shackelton} rule appears ascendant in the wake of \textit{Sims}.\textsuperscript{225}

Still, one suspects that even in DMV and municipal court proceedings, the area where collateral estoppel currently is invoked most often in the administrative/criminal prosecution context, the use of the doctrine is relatively infrequent and haphazard, depending to a great extent on the sophistication of the counsel involved. For example, there appear to be no published cases in which a first finding of the DMV has been urged to estop at a subsequent criminal trial or suppression hearing,\textsuperscript{226} although a recent decision strongly implies it would.\textsuperscript{227} Moreover, no cases have been published in which the state has sought to use the first result offensively in either forum.

There are probably practical explanations in each instance. Because so few motorists prevail at refusal hearings on a finding of an unlawful arrest, the opportunities to assert collateral estoppel against the district


\textsuperscript{225} \textit{See Buttimer v. Alexis}, 146 Cal. App. 3d 754, 760, 194 Cal. Rptr. 603, 606 (1983): DMV may have no control over the actions of the [d]istrict [a]ttorney[;] however, the district attorney represents the State of California in criminal matters, and DMV represents the interests of the State of California in its hearings. . . . [T]he state . . . is the real party in interest in both proceedings and the requirement of privity as an element of collateral estoppel is satisfied.

Also, in \textit{Vary v. Forrest}, 201 Cal. App. 3d 1506, 1514, 247 Cal. Rptr. 873, 878 (1988), Justice Work, in a concurring opinion, noted the cases have found privity between the district attorney and DMV only where the court made legal findings necessary for its judgment. Privity is rejected if the court's findings relate only to issues not necessary to a determination of guilt or innocence; \textit{but see} Pawlowski v. Pierce 202 Cal. App. 3d 692, 696-99, 249 Cal. Rptr. 49, 50-52 (1988) (acquittal of defendant in a prosecution for willful refusal did not estop DMV from reaching a contrary conclusion because the issues in the two proceedings were not identical).

\textsuperscript{226} The court of appeal did apply collateral estoppel in such a situation in 1987, but the California Supreme Court ordered the opinion depublished. \textit{Gonzalez v. Municipal Court}, formerly at 196 Cal. App. 3d 331, 242 Cal. Rptr. 60, 66 (1987).

\textsuperscript{227} \textit{Buttimer}, 146 Cal. App. 3d at 760, 194 Cal. Rptr. at 606 ("Here the District attorney . . . and the County . . . are 'sufficiently close' to warrant applying collateral estoppel.")
attorney are likely to be few. Also, the bureaucracies involved may have remained as oblivious to the possible offensive use of collateral estoppel as they usually are to each other's activities.

Communications between the DMV and the district attorney, however, may improve. In addition to a license suspension at the DMV, the legislature also recently elevated a refusal to take a chemical test to an enhancement of the crime of driving under the influence itself, which requires, inter alia, a mandatory 48-hour jail sentence upon conviction.\textsuperscript{228} Thus, each forum will now litigate whether there was a refusal in addition to the issue, in some cases, of the lawfulness of the arrest. The statutory change may tend to intensify litigation in both places. For now, however, the impact of \textit{Sims} on DMV hearings and drunk driving prosecutions probably is not particularly significant; and the benefits of issue preclusion in that setting may well be worth whatever there is. When the stakes are relatively small, the \textit{Sims} rule might be a salutary economy for everyone involved.

\textbf{VII. Proposals for Limiting the Scope of Administrative Collateral Estoppel}

Use of administrative collateral estoppel will not necessarily be salutary in felony cases or "serious misdemeanors," such as vehicular manslaughter\textsuperscript{229} and violations of occupational safety rules. In other matters, even sporadic application of preclusion may do considerable harm. For example, dispensing drugs unlawfully,\textsuperscript{230} embezzling from a client, or committing a fraud involving real property, are offenses that may trigger a spurious disciplinary decision favorable to the professional and insulate a crooked physician, lawyer, or real estate broker from the reach of the criminal law. Erroneous state personnel hearing decisions might do the same for employees who turn out to merit prosecution based on the same alleged misconduct.

Consistency, economy, and avoidance of harassment are not worth such a jarring intrusion into the public prosecutor's traditional monopoly on the litigation of criminal causes. A county district attorney generally is not aware of the proceedings before the myriad adjudicative agencies on the state level; and, although he may have influence in some cases, he

\textsuperscript{228} CAL. VEH. CODE § 23159 (West Supp. 1988).


\textsuperscript{230} If People v. Demery, 104 Cal. App. 3d 548, 163 Cal. Rptr. 816 (1980) survives \textit{Sims}, physicians alone, perhaps, will be treated differently.
has no right to control the handling of any of them. In this respect issue
preclusion may lead to inaccurate and inconsistent outcomes. The legis-
lature should consider the following proposals to properly contain it.

One method to limit the doctrine's application would be to bar the
use of collateral estoppel in serious criminal cases. For example, those in
which the potential period of incarceration exceeds six months might be
a reasonable cut-off point. The defense, perhaps, should be allowed to
offer proof of a favorable administrative result in evidence. This solu-
tion might lessen litigation at the agency level, while giving some recog-
nition to a determination favoring the citizen. Because the hearing
officers both present the case and recommend the disposition to the direc-
tor of the DMV, their neutrality is suspect and thus the hearing results
should not be usable by the criminal prosecutor. In the important cases,
this proposal also would preserve the prosecution's right to a jury trial,
eliminate the possibility of surprise, and avoid the perpetuation and mag-
nification of unjust results.

In civil litigation, administrative preclusion should be permitted
with respect to agencies exercising judicial power under the California
Constitution, both as to matters of law and fact. It would be an improve-
ment, however, to except those cases in which the agency's legal interpre-
tation is clearly erroneous. Errors of law should be stamped out, not
perpetuated.

Administrative adjudications of agencies not granted judicial power
under the constitution or via a constitutional legislative authorization,
such as the DSS, should not be treated in the same manner in civil litiga-
tion. One suspects their procedures and rules of evidence are often so
streamlined for the sake of expediency that outcomes may not be reliable
in many instances. Additionally, in these proceedings there may be little
incentive to litigate because only a minor sum or controversy is at stake;
the hearing officer or department head making the ultimate resolution
may not be an attorney; preclusion may not be reasonably foreseeable in
light of the difficulty in predicting which agency decisions are affected by
Sims; and in many cases use of collateral estoppel would have a detri-
mental effect on the agency itself by creating a false incentive to litigate.

The legislature might also consider the following proposals with re-
spect to preclusion asserted after adjudications by agencies without con-
stitutionally based judicial power. California could return to the rule of
Empire Star Mines, that is, overturn Sims, or at least specifically enumer-
ate the agencies to which the Sims holding might apply. If preclusion in

the superior court is permitted after a decision of any such agency, at a minimum courts should be authorized to reject administrative determinations not supported by substantial evidence in the record and those founded upon errors of law, as well as those in which so little was at stake it is unlikely a complete presentation would have been made by the parties. The latter could be accomplished by defining categories of minimums based on the relief pursued in the first proceeding. If money was sought, did the amount exceed, for example, $25,000, the current jurisdictional limit of the municipal court? Also, was a license suspended or revoked, or only restricted?

Finally, the legislature might decide preclusion should be rejected when based on any proceeding in which the losing party was not represented by counsel or the hearing officer was not an attorney. It makes little sense to preclude serious litigation, particularly a felony prosecution, by means of a decision obtained without the participation of a single lawyer, much less the district attorney. Unfortunately, that was exactly what occurred in Sims.

Conclusion

Sims is a polished and well-crafted decision in many ways. It breaks considerable new ground, notwithstanding its own disclaimers to the contrary. Unfortunately, it reaches a wrong result and misinterprets the law of collateral estoppel. Consequently, the opinion is a spurious beacon that may cause the vessels of many worthy lawsuits to founder on the rocks of a false harbor. The legislature should consider whether, and in what form, it should be allowed to stand.
