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**REBALANCING FAIRNESS AND EFFICIENCY: THE  
OFFENSIVE USE OF COLLATERAL ESTOPPEL  
IN § 1983 ACTIONS**

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INTRODUCTION

Two of the American legal system's core principles, fairness and efficiency, often come into direct conflict.<sup>1</sup> The system must be fair and just to parties,

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but it must also necessarily focus on efficiency. In an increasingly litigious society,<sup>2</sup> with more lawsuits arising each year, courts must find ways to resolve issues as quickly and as fairly as possible. To this end, the common law tradition has long held through *res judicata*<sup>3</sup> and collateral estoppel<sup>4</sup> that it is inefficient to allow a party to retry a legal claim or issue respectively, that has already been tried and decided. While these principles promote efficiency, there is also an important constraint in applying *res judicata* and collateral estoppel: fairness. Our society and judicial system must weigh any attempt to promote efficiency, which may deprive a party of an opportunity to litigate a claim or issue, against principles of fairness.<sup>5</sup> Before a court bars a claim under *res judicata* or an issue under collateral estoppel, the party asserting the claim or issue must have had a full and fair opportunity to have his or her cause heard by a court of competent jurisdiction.<sup>6</sup> Thus, our legal system balances these competing interests by ensuring that for every claim or issue, everyone is entitled to one day in court.

This raises the question of what it means to have one's day in court. Usually there is a clear answer to this question. However, sometimes two actions arise that cannot be brought together even where the same facts and issues are determinative. To illustrate this dilemma, consider a police officer who seizes evidence in violation of the Fourth Amendment.<sup>7</sup> In this hypothetical, an officer searches a man's house without probable cause or a warrant but finds damning evidence. A prosecutor then brings a case based only on the evidence found. Yet, because the search clearly violated the Constitution,<sup>8</sup> the criminal court holds that the exclusionary rule applies and

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<sup>1</sup> See FED. R. CIV. P. 1 ("These rules . . . shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."); Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1218 (2008) ("We want the judicial system to be open to claimants, but if the doors of justice are opened too wide, then means are needed for intercepting those cases that, in hindsight, ought not to have been welcomed in the first place.").

<sup>2</sup> See George F. Will, *Litigation Nation*, WASH. POST, Jan. 11, 2009, at B7.

<sup>3</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 17 (1982) (stating general rules for effects of former adjudication). The term "*res judicata*" generally encompasses all types of preclusion, but also particularly describes claim preclusion. BLACK'S LAW DICTIONARY 1425 (9th ed. 2009). This Note employs its limited meaning.

<sup>4</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 27 (stating general rules for issue preclusion). Courts and academics sometimes alternatively describe collateral estoppel as issue preclusion. *Id.* § 27 cmt. b (designating collateral estoppel as preclusion when second action is brought on a different claim than claim litigated in the first action).

<sup>5</sup> See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329-31 (1979).

<sup>6</sup> See RESTATEMENT (SECOND) OF JUDGMENTS §§ 18-19, 29.

<sup>7</sup> U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .").

<sup>8</sup> See *id.*

the state cannot use the evidence in the criminal prosecution.<sup>9</sup> The state appeals the criminal court's decision, loses, and has no choice but to drop all charges. This whole process takes a year, while the criminal defendant sits in jail.

In response, the criminal defendant believes that his constitutional rights have been violated and decides to sue the police officer under 42 U.S.C. § 1983.<sup>10</sup> Should the court in this civil trial expend resources reexamining the constitutionality of the police officer's search? Surely, a system only concerned with efficiency would recognize that the criminal trial squarely and validly decided this issue and would not waste time allowing the police officer an opportunity to relitigate it.

However, under § 1983, where the police officer is sued personally,<sup>11</sup> if fairness to the officer is the overriding concern, he should have every opportunity to defend his actions and protect his property. He should be able to make any and all arguments to establish that the search did not violate the Constitution. This civil trial is completely distinct from the criminal trial and the holding from the previous trial should have no relevance in this case. Furthermore, the police officer was not a party to the previous trial, and only the state and criminal defendant litigated the issue of the propriety and constitutionality of the search. For all of these reasons, the police officer will claim that he has not yet had his day in court.<sup>12</sup>

This Note deals with the type of situation described above and highlights the intersection of fairness and efficiency found in these cases, asking when a court should uphold a plaintiff's use of a holding from an earlier criminal decision to bar relitigation of that issue in the civil defense of a § 1983 claim. In other words, when is offensive collateral estoppel appropriate in § 1983 actions?

Under traditional rules of privity, courts would afford this police officer the opportunity to relitigate the constitutionality of the search, even if the police officer substantially controlled the original litigation or if the state that litigated the criminal trial indemnifies the officer in the civil suit. These traditional rules fail the test for efficiency, because relitigating an already decided issue wastes time and resources. Regarding justice, if the police officer was sufficiently associated with the state in the first trial so that he was in essence a

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<sup>9</sup> See *Mapp v. Ohio*, 367 U.S. 643, 657-58 (1961) (mandating the exclusionary rule for evidence seized in violation of the Fourth Amendment for state criminal cases).

<sup>10</sup> 42 U.S.C. § 1983 (2006) allows for a civil suit against a state actor who, acting under color of law, violates any rights secured by the constitution or laws of the United States.

<sup>11</sup> See *infra* Part II.

<sup>12</sup> For similar facts, see *Gentile v. Bauder*, 718 So. 2d 781, 782-83 (Fla. 1998). A comparable preclusion argument has also been ventured. See *Callahan v. Millard County*, No. 2:04-CV-00952, 2006 WL 1409130, at \*1-\*6 (D. Utah May 18, 2006), *aff'd in part, rev'd in part* 494 F.3d 891 (10th Cir. 2007), *rev'd on qualified immunity grounds sub nom.* *Pearson v. Callahan*, 129 S. Ct. 808 (2009).

party to it, or if the state is connected to the officer in the civil trial in a way that unites their interests, then there is no injustice because the state, in effect, represented the officer's interests. This Note argues that, in situations where applying the holding of a criminal court decision promotes the overarching goals of efficiency and fairness, courts should apply collateral estoppel in order to prevent relitigation of a question of constitutionality in a subsequent § 1983 case.

Part I of this Note examines the history and application of collateral estoppel in the American legal system, while focusing on offensive mutual and offensive non-mutual collateral estoppel. Part I discusses when the concepts of privity and virtual representation substitute for actually having a "day in court." Part II analyzes the history and application of § 1983 through the lens of the illegal search hypothetical described above. Part III focuses on previous Supreme Court discussions of the intersection of preclusion and § 1983 – particularly in the defensive arena. Part IV and the Appendices provide a fifty-state survey of collateral estoppel rules, including an analysis of mutuality requirements and privity discussions. Finally, Part V addresses previous uses of offensive collateral estoppel in § 1983 actions by recognizing three categories of cases and analyzing the appropriateness of an expanded view of the doctrine in certain situations, particularly regarding the hypothetical mentioned above.

#### I. THE DOCTRINE OF COLLATERAL ESTOPPEL

Any discussion of collateral estoppel must first start with the companion doctrine of res judicata, otherwise known as claim preclusion.<sup>13</sup> This common law doctrine bars a party from litigating previously decided claims. For res judicata to apply, the new lawsuit must involve the same claim, transaction, or occurrence; include the same parties; and have a prior valid final judgment on the merits, as well as the ability to raise the new claim during the first proceeding.<sup>14</sup> If all of these conditions exist, a claimant cannot bring a second suit nor raise any new defenses.<sup>15</sup>

Collateral estoppel, or issue preclusion, is similar to res judicata, except that instead of barring an entire claim, it only bars a previously litigated issue.

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<sup>13</sup> See *supra* note 3 and accompanying text. At times, these two doctrines together are called res judicata, however for the purposes of this Note, res judicata refers only to claim preclusion.

<sup>14</sup> *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876) (explaining the classical formulation for application of res judicata: "[T]he judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose").

<sup>15</sup> Lawrence B. Solum, *Claim Preclusion and Res Judicata*, in 18 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 131.01 (3d ed. 2009).

Different jurisdictions have different requirements for the application of collateral estoppel, although almost all require that the issue be “actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment.”<sup>16</sup> Collateral estoppel is a relatively new doctrine. The Supreme Court only condoned the use of collateral estoppel in the federal judiciary system in the late 1800s.<sup>17</sup> Since then, every state has followed suit.<sup>18</sup> Accordingly, collateral estoppel can apply to a claim as long as the first decision comes from any court of competent jurisdiction, whether it is in the federal or in a state system.<sup>19</sup>

Jurists have proffered many justifications for collateral estoppel. The first Justice Harlan argued that collateral estoppel

secure[s] the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.<sup>20</sup>

Justice Thurgood Marshall also remarked that collateral estoppel limits expenses for litigants, because it “conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.”<sup>21</sup> These justifications primarily concern the maximization of both the credibility and the efficiency of the judicial system.

In addition, the use of collateral estoppel implicates fairness issues. As mentioned above, each and every litigant is entitled to a day in court. To ensure this basic right to be heard, courts do not apply collateral estoppel when it would be inequitable or contrary to the interests of fairness and justice.<sup>22</sup> Considerations include whether there was a sufficient incentive to fully litigate the claim,<sup>23</sup> whether there was a different burden of proof in the preceding

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<sup>16</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

<sup>17</sup> *S. Pac. R.R. Co. v. United States*, 168 U.S. 1, 48-49 (1897).

<sup>18</sup> See *infra* Part IV and Appendix A.

<sup>19</sup> 28 U.S.C. § 1738 (2006) (“The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories . . .”).

<sup>20</sup> *S. Pac. R.R.*, 168 U.S. at 49.

<sup>21</sup> *Montana v. United States*, 440 U.S. 147, 153-54 (1979).

<sup>22</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1982) (describing situations where, even though the requirements are otherwise met, collateral estoppel does not apply for reasons such as avoiding “inequitable administration of the laws” and giving a party the chance to be heard where she “did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action”).

<sup>23</sup> See *Salida Sch. Dist. R-32-J v. Morrison*, 732 P.2d 1160, 1166-67 (Colo. 1987) (denying preclusive effect to a holding of liability for back pay in a subsequent employment

action,<sup>24</sup> whether the holding resulted from substantially different or insufficient procedures,<sup>25</sup> and other general interests of equity and fairness.<sup>26</sup> The final requirement in determining fairness is whether the party estopped from litigating the issue had a previous opportunity to do so; this Note discusses this requirement further below.<sup>27</sup>

For the purposes of this discussion, it is helpful to clarify different applications of collateral estoppel. There are two distinctions or classifications relevant to this conversation: first, between offensive and defensive collateral estoppel,<sup>28</sup> and second, between mutual and nonmutual collateral estoppel.<sup>29</sup>

In the federal system and in many states, courts allow both offensive and defensive collateral estoppel.<sup>30</sup> To illustrate, it is useful to reference the oft-cited hypothetical presented by Professor Brainerd Currie:

An express train speeds through the night. Suddenly, as it enters a curve, the locomotive leaves the rails, followed by half a dozen tumbling

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reinstatement claim because of the decreased incentive to litigate back pay in first action). *But see* *United States v. U.S. Currency in the Amount of \$119,984.00, More or Less*, 304 F.3d 165, 175-76 (2d Cir. 2002) (holding that where government had multiple incentives, its decision not to litigate an issue fully did not prohibit the court from barring subsequent litigation as the incentives were not mutually exclusive).

<sup>24</sup> *See* *O'Neill v. Merrill Lynch, Pierce, Fenner & Smith*, 654 F. Supp. 347, 353 (N.D. Ill. 1987) (“A difference in the burden of proof applied to two actions precludes the application of collateral estoppel to the issues in the case, unless the burden in the second action is more stringent for the [estopped party] than in the first.”); *In re Guardianship & Custody of Julian P.H.*, 675 N.Y.S.2d 848, 851 (N.Y. Fam. Ct. 1998) (applying collateral estoppel in a second action with a lower standard of proof than in the prior action).

<sup>25</sup> *See* *Henriksen v. Gleason*, 643 N.W.2d 652, 656 (Neb. 2002) (“[C]ollateral estoppel should not apply when a new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them.”).

<sup>26</sup> *See* *Siegel v. Time Warner, Inc.*, 496 F. Supp. 2d 1111, 1127 (C.D. Cal. 2007) (denying preclusive effect of a prior holding because it was decided over sixty years ago and relying on that holding would threaten the reliability of the judgment in the present case).

<sup>27</sup> *See infra* notes 43-50 and accompanying text (describing situations in which a party is bound to the holding of a case that he or she was not an original party to that promotes efficiency without offending principles of fairness).

<sup>28</sup> *See* RESTATEMENT (SECOND) OF JUDGMENTS § 29 cmt. d (1982) (demonstrating that offensive preclusion is invoked “in connection with establishing liability of the defendant in the second action” and that defensive preclusion is “invoked to resist recovery by the plaintiff in the second action”).

<sup>29</sup> *Id.* at reporter’s note (describing the mutuality rule of preclusion as “[t]he proposition that a non-party cannot be bound by a judgment, unless he is represented by a party or has interests that are derivative from a party . . . .”); BLACK’S LAW DICTIONARY *supra* note 3, at 298 (defining nonmutual collateral estoppel as “[e]stoppel asserted . . . by a nonparty to an earlier action to prevent a party to that earlier action from relitigating an issue determined against it”).

<sup>30</sup> *See* *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329 (1979).

passenger cars. Fifty passengers are injured. Fifty actions for personal injuries are filed against the railroad – some in California courts, some in federal courts in California, some in other state and federal courts. The first of these to be reached for trial is in a California court. A full trial is had on the issue of the railroad's negligence, and the result is a verdict and judgment for the plaintiff. The judgment becomes final. What is the status of the forty-nine remaining actions?<sup>31</sup>

Here, if the subsequent forty-nine plaintiffs attempt to use this holding to prevent the railroad from relitigating the issue of negligence, it is an example of offensive collateral estoppel. Further, if the first plaintiff sued the railroad for personal injuries, succeeded, and then sued the railroad a second time for damages to personal property,<sup>32</sup> reliance on the original finding of negligence would be an example of offensive collateral estoppel. Alternatively, if the railroad prevailed in the first suit, and sought to use this determination of the issue to defeat all other potential plaintiffs, it would be using collateral estoppel defensively.

The second classification of collateral estoppel involves the question of mutuality. Mutual collateral estoppel involves the same parties in the second suit as in the first. On the other hand, a new party seeking to use a holding from a lawsuit to which she was not a party invokes nonmutual collateral estoppel. Thus, referring back to Professor Currie's example, when passengers two through fifty sue the railroad and attempt to use the finding from the first passenger's lawsuit, such efforts are nonmutual. Conversely, in the hypothetical where a plaintiff first sues the railroad for personal injuries and then sues the same defendant again in a second action concerning damage to personal property using a holding from the first lawsuit, the collateral estoppel is mutual.

Although a sizable number of jurisdictions require mutuality as a precondition for applying collateral estoppel, federal courts and thirty-two states allow nonmutual collateral estoppel.<sup>33</sup> Those jurisdictions which allow nonmutual collateral estoppel, and particularly nonmutual offensive collateral estoppel, impose additional requirements beyond those that must otherwise be satisfied before a court can apply collateral estoppel. The Supreme Court outlined these additional requirements for federal courts in *Parklane Hosiery Co. v. Shore*.<sup>34</sup> The overarching principle in *Parklane Hosiery* is to give courts broad discretion to ensure that applying nonmutual offensive collateral estoppel is fair.<sup>35</sup> Judges should consider whether the current plaintiff could

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<sup>31</sup> Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 281 (1957).

<sup>32</sup> We assume momentarily that this suit is not barred by *res judicata*, though it likely is.

<sup>33</sup> See *infra* Appendix B.

<sup>34</sup> 439 U.S. 322, 329-33 (1979).

<sup>35</sup> *Id.* at 331.

easily have joined the earlier action,<sup>36</sup> whether the defendant had sufficient motivation to litigate the issue in the first suit,<sup>37</sup> whether the relevant holding is inconsistent with other previous holdings,<sup>38</sup> and whether a change in procedure now available might have affected the previous outcome.<sup>39</sup> However, this is not a rigid test, and judges should still use discretion in applying collateral estoppel to ensure both fairness and efficiency.<sup>40</sup>

This construct sets the parameters for the application of nonmutual collateral estoppel. If, in Professor Currie's example, the railroad successfully defended against the first plaintiff, it could never use that holding against the subsequent plaintiffs. These plaintiffs never had an opportunity to litigate the issue, and thus nonmutual collateral estoppel would not apply against them.

A gray area between mutual and nonmutual collateral estoppel appears when estoppel is sought against the party in the second action who was in privity with a party to the first action.<sup>41</sup> Put differently, "[u]nder the concept of privity, a non-party to an action nonetheless may be bound by the issues [previously] decided there if [the non-party] substantially controls, or is represented by, a party to the action."<sup>42</sup>

A related exception, recently discussed by the Supreme Court in *Taylor v. Sturgell* is virtual representation.<sup>43</sup> There, the Court listed six general exceptions to the rule that a party is not bound by a case's holding to which it was not a party. The first exception states that the agreement is valid if a party agrees to be bound by a judgment.<sup>44</sup> For instance if a party contractually agrees to honor a judgment to which he is not a party, the judgment and the contract are binding. The Court's second exception involves "a variety of pre-existing substantive legal relationship[s] between the person to be bound and a party to the judgment," such as privity.<sup>45</sup> The third involves situations, such as class action suits, where a party to the first suit substantially represented a nonparty's interests.<sup>46</sup> The Court's fourth exception states that a nonparty is bound by a previous holding if she controlled the litigation that rendered the

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 330.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 331.

<sup>40</sup> *Id.*

<sup>41</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 41 (1982).

<sup>42</sup> *United States v. Bonilla Romero*, 836 F.2d 39, 43 (1st Cir. 1987). For further discussion of privity, see *infra* Part IV and Appendix C.

<sup>43</sup> *Taylor v. Sturgell*, 128 S. Ct. 2161, 2170-73 (2008).

<sup>44</sup> *Id.* at 2172.

<sup>45</sup> *Id.* (internal quotations omitted).

<sup>46</sup> *Id.* at 2172-73.

judgment.<sup>47</sup> Fifth, “a party bound by a judgment may not avoid its preclusive force by relitigating through a proxy.”<sup>48</sup> The final enumerated exception allows for statutorily created schemes that prohibit relitigation of an issue, such as in cases of bankruptcy and probate decisions.<sup>49</sup> In any of these situations, and others not described here,<sup>50</sup> a nonparty to an action may be bound by its holdings, even though she was not a formal party to the action, because the nonparty was virtually and adequately represented. Therefore, applying the previous judgment or holding promotes efficiency and is not unfair or unjust.

## II. ELEMENTS OF AN ACTION UNDER 42 U.S.C. § 1983

Congress first passed 42 U.S.C. § 1983 as part of the Civil Rights Act of 1871.<sup>51</sup> Congress has amended the statute since, and it currently reads:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.<sup>52</sup>

Congress passed the statute under its Fourteenth Amendment enforcement powers in response to concerns after the Civil War that states and state actors were not sufficiently protecting constitutional liberties of all citizens.<sup>53</sup> In essence, § 1983 allows an individual to sue state actors who, under color of state law, deprive that individual of rights secured by the Constitution or laws

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<sup>47</sup> *Id.* at 2173 (characterizing the nonparty as having “assume[d] control” which equates to the nonparty having her day in court even though she was not a formal party (quoting *Montana v. United States*, 440 U.S. 147, 154 (1979))).

<sup>48</sup> *Id.* at 2173.

<sup>49</sup> *Id.*

<sup>50</sup> *See id.* (discussing other definitions of virtual representation and disagreements among the circuits of the United States Court of Appeals).

<sup>51</sup> Civil Rights Act, ch. 22, 17 Stat. 13 (1871) (enforcing provisions of the Fourteenth Amendment of the United States Constitution).

<sup>52</sup> 42 U.S.C. § 1983 (2006).

<sup>53</sup> *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (discussing the legislative history of § 1983 and explaining its purpose to “interpose the federal courts between the States and the people, as guardians of the people’s federal rights”).

of the United States. This allows the criminal defendant in our original hypothetical<sup>54</sup> to sue the police officer who wrongfully seized evidence from his home without a warrant. While remedies under § 1983 could include injunctive relief, our plaintiff would likely only seek monetary relief. Thus, this statute creates no additional rights, but rather provides a remedy for violations of otherwise existing ones.<sup>55</sup>

In more extreme situations, § 1983 remedies go beyond compensation for damages incurred and allow for punitive damages.<sup>56</sup> The Supreme Court has held that “reckless or callous disregard for the plaintiff’s rights, as well as intentional violations of federal law, should be sufficient to trigger a jury’s consideration of the appropriateness of punitive damages.”<sup>57</sup> Nonetheless, there is never an entitlement to punitive damages.<sup>58</sup> Rather, only when the finder of fact deems the situation at hand appropriate may it award these additional damages, which go beyond compensation in an attempt to punish and deter.<sup>59</sup> Courts have taken various approaches to non-violent Fourth Amendment violations, such as the one in our hypothetical.<sup>60</sup> For example, if our § 1983 plaintiff could show that the police officer intentionally violated the Fourth Amendment in conducting the search and callously disregarded the plaintiff’s rights, then a jury could appropriately award punitive damages.<sup>61</sup>

A successful § 1983 plaintiff is also entitled to reasonable attorneys’ fees<sup>62</sup> and only for elements of a suit in which he prevailed.<sup>63</sup> Courts will determine whether a plaintiff was successful by looking at whether there is a “material alteration of the legal relationship of the parties.”<sup>64</sup> Put differently, a nominal victor who is able to show a violation of his rights but is unable to establish

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<sup>54</sup> See *supra* notes 7-12 and accompanying text.

<sup>55</sup> *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979) (“Even if claimants are correct in asserting that § 1983 provides a cause of action for all federal statutory claims, it remains true that one cannot go into court and claim a ‘violation of § 1983’ – for § 1983 by itself does not protect anyone against anything.”).

<sup>56</sup> *Smith v. Wade*, 461 U.S. 30, 35-36 (1983).

<sup>57</sup> *Id.* at 51.

<sup>58</sup> *Id.* at 52.

<sup>59</sup> *Id.*

<sup>60</sup> See *Mendez-Matos v. Municipality of Guaynabo*, 557 F.3d 36, 47-56 (1st Cir. 2009) (discussing different scenarios where punitive damages were awarded under § 1983 for Fourth Amendment violations).

<sup>61</sup> See *supra* note 57 and accompanying text.

<sup>62</sup> 42 U.S.C. § 1988(b) (2006). While the statute states, “the court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee as part of the costs,” *id.*, this has been interpreted to include only prevailing plaintiffs and not defendants. *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 790-91 (1989) (explaining that fees are awarded when a prevailing party has “succeeded on any significant claim affording it some of the relief sought”).

<sup>63</sup> See *supra* note 62.

<sup>64</sup> *Tex. State Teachers*, 489 U.S. at 792-93.

damages would not be entitled to attorneys' fees.<sup>65</sup> If our hypothetical plaintiff prevailed in his § 1983 claim against the police officer and further proved an intentional violation of the Fourth Amendment, the officer would be liable for attorneys' fees as well.

From the other side's perspective, certain defendants are entitled to immunity under § 1983. The application of these immunities reflects a functional approach in which the relevant inquiry for determining whether a defendant is immune from § 1983 damages depends on the type of action she performed and not her title.<sup>66</sup> Thus, those acting as judges have absolute immunity in § 1983 actions.<sup>67</sup> This includes judges presiding over cases as well as non-judges acting in a judicial capacity.<sup>68</sup> Prosecutors<sup>69</sup> and legislators<sup>70</sup> also have absolute immunity in § 1983 damages claims. In contrast, police officers<sup>71</sup> and other types of state actors<sup>72</sup> have a qualified immunity against monetary damages. Conversely, when injunctive relief is involved, legislators have absolute immunity,<sup>73</sup> while judges,<sup>74</sup> prosecutors,<sup>75</sup> and police have no immunity. Further, courts can award attorneys' fees against prosecutors and police for a successful injunction claim,<sup>76</sup> but never

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<sup>65</sup> *Id.* at 792 (“[A] technical victory may be so insignificant . . . as to be insufficient to support prevailing party status.”).

<sup>66</sup> MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES 9-11 (4th ed. Supp. 2008); *see also* *Forrester v. White*, 484 U.S. 219, 229 (1988).

<sup>67</sup> *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967) (granting judges immunity “from liability for damages for acts committed within their judicial jurisdiction”).

<sup>68</sup> *See Cleavinger v. Saxner*, 474 U.S. 193, 200 (1985) (providing immunity to federal hearing examiner and administrative law judge, because they “perform functions closely associated with the judicial process”). *But see Forrester*, 484 U.S. at 227-29 (denying judicial immunity to a judge for demoting an employee as he was acting in an administrative rather than judicial function).

<sup>69</sup> *Imbler v. Pachtman*, 424 U.S. 409, 427-28 (1976).

<sup>70</sup> *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998).

<sup>71</sup> *Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987).

<sup>72</sup> *See Harlow v. Fitzgerald*, 457 U.S. 800, 813-14 (1982) (discussing qualified immunity for presidential advisors).

<sup>73</sup> *See Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501 (1975).

<sup>74</sup> *Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984) (“We conclude that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity.”). This holding was limited when § 1983 was amended to include that “in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.” 42 U.S.C. § 1983 (2006). Likewise, the attorneys' fees statute, § 1988, was amended so that judges were never liable for attorneys' fees.

<sup>75</sup> *See Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 736-37 (1980).

<sup>76</sup> *See* 42 U.S.C. § 1988(b); *Hutto v. Finney*, 437 U.S. 678, 691-92 (1978).

against a defendant acting in a judicial capacity.<sup>77</sup> In order to overcome the police officer's qualified immunity for damages in our hypothetical, the § 1983 plaintiff would have to show that the officer's conduct "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known."<sup>78</sup> If the civil plaintiff cannot meet this standard, the officer is immune from damages.

In certain situations, individuals can also bring a § 1983 action against a municipality.<sup>79</sup> A municipality can be a § 1983 defendant if it enacted an unconstitutional ordinance or custom,<sup>80</sup> if an individual within the municipal government has the final authority regarding an issue and enacts or enforces an unconstitutional rule,<sup>81</sup> if an individual within the municipal government has final authority in one instance and sets a one-time policy that violates another's constitutional rights,<sup>82</sup> if there is a general failure to train<sup>83</sup> or screen<sup>84</sup> employees, or if any one of its policies is itself constitutional but results in an unconstitutional violation.<sup>85</sup> In general, states are shielded from suit by the Eleventh Amendment and are never considered a person under § 1983. Thus our hypothetical civil plaintiff could sue the police officer's employer-municipality under § 1983 if any of a variety of conditions were met. If the Fourth Amendment violation resulted from a general failure to train the police officer, then the municipality would be liable under § 1983. Alternatively, liability would ensue if the person with final authority for supervising officers in the municipality had established a policy to perform these types of searches without warrants or instructed the police officer in this particular case to enter the plaintiff's home without a warrant.

While § 1983 only addresses constitutional violations by state actors, the Supreme Court recognized a parallel action for federal actors in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.<sup>86</sup> Courts have treated *Bivens* as creating a parallel claim for plaintiffs to bring against federal

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<sup>77</sup> See *supra* note 74.

<sup>78</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

<sup>79</sup> *Monell v. Dep't of Soc. Servs. of the City of N.Y.*, 436 U.S. 658, 690 (1978). For an in-depth discussion of the issue, see generally Jack M. Beermann, *Municipal Responsibility for Constitutional Torts*, 48 DEPAUL L. REV. 627 (1999).

<sup>80</sup> See *Monell*, 436 U.S. at 690-91 (allowing § 1983 actions against local governments where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers").

<sup>81</sup> This was the actual case in *Monell*. See Beermann, *supra* note 79, at 652 n.127.

<sup>82</sup> *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986).

<sup>83</sup> *City of Canton v. Harris*, 489 U.S. 378, 380 (1989).

<sup>84</sup> *Bd. of the County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 409-11 (1997).

<sup>85</sup> See Beermann, *supra* note 79, at 654.

<sup>86</sup> 403 U.S. 388, 397 (1971).

actors instead of state actors.<sup>87</sup> Therefore, if our hypothetical dealt with a federal law enforcement agent instead of a local police officer, then our criminal defendant, having no grounds to bring a § 1983 claim, could have brought his civil damages claim under *Bivens*.

### III. PREVIOUS INTERSECTIONS OF § 1983 AND PRECLUSION

Before the Supreme Court discussed the intersection of § 1983 and *res judicata* or collateral estoppel, it addressed the role of preclusion in a habeas corpus case, observing:

Principles of *res judicata* are, of course, not wholly applicable to habeas corpus proceedings. . . . Hence, a state prisoner . . . who has been denied relief in the state courts is not precluded from seeking habeas relief on the same claims in federal court. On the other hand, *res judicata* has been held [by various circuit courts] to be fully applicable to a civil rights action brought under § 1983.<sup>88</sup>

On six occasions, the Supreme Court has closely analyzed the intersection of § 1983 and preclusion, addressing both *res judicata* and collateral estoppel,<sup>89</sup> and has given it brief mention on many more. An analysis of these cases informs the subsequent discussion of the offensive use of collateral estoppel in § 1983 cases, a topic the Court has not yet broached.

#### A. *Allen v. McCurry*

*Allen v. McCurry*<sup>90</sup> was the Supreme Court's first in-depth analysis of the relationship between collateral estoppel and § 1983 actions. There, the civil plaintiff McCurry was arrested and convicted of a drug offense after police officers searched his home and found heroin.<sup>91</sup> At his state criminal trial, McCurry unsuccessfully attempted to suppress certain evidence under the Fourth Amendment, but the criminal court determined that the seizure was constitutional.<sup>92</sup> His subsequent conviction was later affirmed on appeal.<sup>93</sup>

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<sup>87</sup> See *Wilkie v. Robbins*, 127 S. Ct. 2588, 2618 (2007) (Ginsburg, J., dissenting) (“Thirty-six years ago, the Court created the *Bivens* remedy. In doing so, it assured that federal officials would be subject to the same constraints as state officials in dealing with the fundamental rights of the people who dwell in this land.”).

<sup>88</sup> *Preiser v. Rodriguez*, 411 U.S. 475, 497 (1973) (citations omitted).

<sup>89</sup> See generally *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005); *Univ. of Tenn. v. Elliott*, 478 U.S. 788 (1986); *McDonald v. City of West Branch*, 466 U.S. 284 (1984); *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75 (1984); *Haring v. Prosise*, 462 U.S. 306 (1983); *Allen v. McCurry*, 449 U.S. 90 (1980). The Court also considered the role of preclusion in Title VII cases in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982).

<sup>90</sup> 449 U.S. 90, 91 (1980).

<sup>91</sup> *Id.* at 91-92.

<sup>92</sup> *Id.* at 91.

McCurry then initiated a § 1983 action against the police officers claiming that their search and seizure of his home was unconstitutional under the Fourth Amendment.<sup>94</sup>

*Allen v. McCurry* examined the intersection between § 1983 and 28 U.S.C. § 1738.<sup>95</sup> Title 28 U.S.C. § 1738 declares that state “judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.”<sup>96</sup> McCurry argued that § 1983 superseded this rule.<sup>97</sup> He claimed that, by enacting § 1983, Congress created an opportunity to litigate constitutional claims in federal courts and that allowing a state court’s determination of a constitutional issue to control the results in a § 1983 claim contravened the effect and intent of § 1983.<sup>98</sup> Additionally, McCurry was unable to choose the forum in which to litigate this issue, as he was compelled to raise it during his involuntary state criminal proceeding.<sup>99</sup>

In a six to three decision, the Court held that collateral estoppel could bar McCurry from relitigating the question of whether the search was constitutional because a court of competent jurisdiction had already decided the issue after McCurry had a full opportunity to litigate it.<sup>100</sup> In reaching this decision, the Court rejected the argument that “every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises.”<sup>101</sup> The Court clearly stated that 28 U.S.C. § 1738 applied to § 1983 actions and barred litigation of constitutional issues already decided in a state court proceeding.<sup>102</sup> The Court thus sanctioned defensive collateral estoppel in a § 1983 case where the plaintiff previously litigated in an involuntary criminal trial and lost.

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 92.

<sup>95</sup> *Id.* at 96-105.

<sup>96</sup> 28 U.S.C. § 1738 (2006).

<sup>97</sup> Brief of Respondent at 36, *Allen v. McCurry*, 449 U.S. 90 (1980) (No. 79-935).

<sup>98</sup> *Id.*

<sup>99</sup> *Allen*, 449 U.S. at 112-15 (Blackmun, J., dissenting) (arguing that only if a party voluntarily submits his federal claims for decision in a state court and these claims are litigated and decided there, should that party be precluded from returning to District Court).

<sup>100</sup> *Id.* at 105. *But see id.* at 93 n.2 (majority opinion) (noting McCurry’s argument that even if collateral estoppel applied, his claim could potentially continue).

<sup>101</sup> *Id.* at 103.

<sup>102</sup> *Id.* at 98 (“[T]he legislative history of § 1983 does not in any clear way suggest that Congress intended to repeal or restrict the traditional doctrines of preclusion.”).

B. Haring v. Prorise

Two and a half years after *Allen v. McCurry*, the Court unanimously decided *Haring v. Prorise*.<sup>103</sup> There, Prorise, a criminal defendant, pled guilty to possession of a controlled substance.<sup>104</sup> Subsequently, he initiated a § 1983 action against certain police officers, challenging the constitutionality of the search that discovered the illegal substance.<sup>105</sup> The Supreme Court held that Prorise's § 1983 claim could go forward.<sup>106</sup> In reaching this decision, the Court first cited *Allen* for the principle that 28 U.S.C. § 1738 only affords state holdings the preclusive effect that the state would give them, and only when the estopped party had a "full and fair opportunity to litigate the [constitutional] claim or issue decided by the first court."<sup>107</sup> The Court then determined that the law in Virginia, the state where Prorise pled guilty, would not preclude the subsequent § 1983 action.<sup>108</sup> Accordingly, the Court rejected the officers' contention that Prorise had an earlier opportunity to litigate his claim during the criminal trial and that he waived this opportunity by pleading guilty.<sup>109</sup>

C. Migra v. Warren City School District Board of Education

The Court further developed its analysis of the intersection of the § 1983 and preclusion doctrines in *Migra v. Warren City School District Board of Education*.<sup>110</sup> Migra, the plaintiff, was a supervisor of elementary education for the Warren City School District.<sup>111</sup> The Board of Education voted to offer her a new contract, but rescinded the offer after she accepted.<sup>112</sup> Migra brought suit in state court against the Board as a whole and three members individually for "breach of contract by the Board, and wrongful interference by the individual [board] members with [Migra]'s contract of employment."<sup>113</sup> After winning the breach of contract claim and dropping the wrongful interference claim, Migra brought a § 1983 suit against the Board of Education, its members, and the Superintendent of Schools, alleging that the defendants' actions violated her First Amendment rights.<sup>114</sup> The District Court

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<sup>103</sup> 462 U.S. 306 (1983).

<sup>104</sup> *Id.* at 308.

<sup>105</sup> *Id.* at 309.

<sup>106</sup> *Id.* at 323.

<sup>107</sup> *Id.* at 313 (citing *Allen*, 449 U.S. at 96, 101 (internal quotation marks omitted)).

<sup>108</sup> *Id.* at 316.

<sup>109</sup> *Id.* at 321-22 (rejecting a comparison to a federal habeas claim which is waived with a guilty plea).

<sup>110</sup> 465 U.S. 75 (1984).

<sup>111</sup> *Id.* at 77.

<sup>112</sup> *Id.* at 78.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 78-80.

granted the defendants summary judgment on the basis of res judicata, holding that Migra lost her right to bring this case because she should have brought her § 1983 claim in her earlier state court action.<sup>115</sup>

The Supreme Court reaffirmed that 28 U.S.C. § 1738 requires a state court judgment to be given the same weight as the state would afford it in a subsequent federal action.<sup>116</sup> In addition, the Court recognized that the holdings in *Allen* and *Haring* dealt with collateral estoppel, not res judicata.<sup>117</sup> In *Migra*, the Court explicitly extended this principle to include res judicata as well.<sup>118</sup> If a state's judicial system would prohibit litigation of an issue as barred by res judicata because the opportunity to litigate already existed and was waived, then the claim is also barred from being litigated in the federal system.<sup>119</sup> In contrast, if a state court would not hear the federal claim, then the subsequent federal suit could go forward.<sup>120</sup> Here, *Migra* followed the former scenario, as the state court was willing and able to adjudicate the § 1983 claim. Yet, the Migra forsook this opportunity, and her federal suit could not proceed.<sup>121</sup>

D. *The Preclusive Effect of Non-Judicial Decisions: McDonald v. City of West Branch and University of Tennessee v. Elliott.*

Having established the principle that federal courts should afford state court decisions the same preclusive effect that those states would require, the Supreme Court next turned to the question of how to treat arbitration and agency adjudicatory decisions. In *McDonald v. City of West Branch*,<sup>122</sup> the Court addressed a situation resulting from a police officer's discharge.<sup>123</sup> Subsequent to his discharge, the officer filed a grievance pursuant to the procedures in his union's collective-bargaining agreement.<sup>124</sup> The case eventually resulted in arbitration, where the arbitrator found just cause for the officer's dismissal.<sup>125</sup> In reviewing the dispute, the Court held that "[a]rbitration is not a 'judicial proceeding' and, therefore, § 1738 does not apply to arbitration awards" and, as a result, federal courts are not required to

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<sup>115</sup> *Id.* at 80.

<sup>116</sup> *Id.* at 81.

<sup>117</sup> *Id.* at 83 ("The Court in *Allen* left open the possibility, however, that the preclusive effect of a state-court judgment might be different as to a federal issue that a § 1983 litigant could have raised but did not raise in the earlier state-court proceeding.").

<sup>118</sup> *Id.* at 85.

<sup>119</sup> *See id.*

<sup>120</sup> *See id.* at 84-85.

<sup>121</sup> *Id.* at 84.

<sup>122</sup> 466 U.S. 284 (1984).

<sup>123</sup> *Id.* at 285-86.

<sup>124</sup> *Id.* at 286.

<sup>125</sup> *Id.*

give preclusive effect to arbitration decisions.<sup>126</sup> Ultimately, the Supreme Court declined to exercise its discretion to extend preclusion to the arbitral situation, holding that “a federal court should not afford *res judicata* or collateral-estoppel effect to an award in an arbitration proceeding brought pursuant to the terms of a collective-bargaining agreement.”<sup>127</sup>

In *University of Tennessee v. Elliott*,<sup>128</sup> the Supreme Court affirmed the principle that unreviewed agency decisions, similar to arbitration decisions, do not fall under 28 U.S.C § 1738 and thus, are not automatically to be given preclusive effect.<sup>129</sup> In contrast to arbitration proceedings, the Supreme Court nonetheless found it prudent “that when a state agency ‘acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate,’ . . . federal courts must give the agency’s factfinding the same preclusive effect to which it would be entitled in the State’s courts.”<sup>130</sup> The Court rested its opinion on previous decisions giving preclusive effect to agency decisions,<sup>131</sup> outside of the § 1983 context, as well as to “the value of federalism.”<sup>132</sup>

#### E. *San Remo Hotel, L.P. v. City of San Francisco*

The most recent Supreme Court decision dealing with preclusion in a § 1983 case, *San Remo Hotel, L.P. v. City of San Francisco*,<sup>133</sup> focused on a very narrow issue: whether federal courts should disregard § 1738 when dealing with federal takings claims that have been previously litigated in state court.<sup>134</sup>

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<sup>126</sup> *Id.* at 288.

<sup>127</sup> *Id.* at 292. The Court discussed four reasons for this holding: (1) because the arbitrator’s experience deals with the laws of a particular field and not the laws of the United States, *id.* at 290 (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974)); (2) because the arbitrator’s authority is narrowly limited by contract and might not extend to § 1983 claims, *id.*, 466 U.S. at 290-91; (3) because in arbitrations resulting from collective-bargaining agreements, usually the interests of the union take precedence over those of the individual employee, *id.* at 291; and (4) because judicial fact finding tends to be more extensive than the arbitral approach, *id.*

<sup>128</sup> 478 U.S. 788 (1986).

<sup>129</sup> *Id.* at 794.

<sup>130</sup> *Id.* at 799 (quoting *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966)).

<sup>131</sup> *Id.* at 797-98 (citing *Utah Constr. & Mining* at 421-22 and *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461 (1982)) (suggesting that “giving preclusive effect to administrative factfinding serves the value underlying general principles of collateral estoppel: enforcing repose,” which includes avoiding unnecessary costs and repetitive litigation).

<sup>132</sup> *Id.* at 798.

<sup>133</sup> 545 U.S. 323 (2005).

<sup>134</sup> *Id.* at 337. For more background on takings claims, see Ann K. Wooster, Annotation, *What Constitutes Taking of Property Requiring Compensation Under Takings Clause of Fifth Amendment to United States Constitution – Supreme Court Cases*, 10 A.L.R. FED. 2D

A party is required to pursue all state remedies before bringing a federal takings claim.<sup>135</sup> In *San Remo Hotel*, the § 1983 plaintiff argued that an exception to the typical rules of preclusion in takings claims should apply because the procedure for bringing a takings claim forced constitutional claims to first be heard by a state court.<sup>136</sup> In rejecting this argument, the Court articulated several reasons.<sup>137</sup> Among them was this case's similarity to the situation in *Allen*: even though the plaintiff had no actual choice of forum, he had an opportunity to have his argument heard.<sup>138</sup> The Court also discussed its inability to create exceptions to § 1738 without explicit Congressional authorization.<sup>139</sup> As a result, the rules of preclusion continue to apply in § 1983 cases; and if a takings claim plaintiff was denied compensation after seeking it in a state court the state court judgment would, under § 1738, bar relitigation of the claim in a federal court.<sup>140</sup>

To date, the Supreme Court has not articulated any broad sweeping exceptions to § 1738 in a § 1983 claim. Accordingly, federal courts are required to give state court decisions and agency adjudicatory decisions the same preclusive effects that the state itself would give them. With this principle in mind, this Note begins the discussion of the offensive use of collateral estoppel in § 1983 actions, a discussion that the Court has yet to enter.

#### IV. STATE RULES ON COLLATERAL ESTOPPEL

Because of 28 U.S.C. § 1738, *Migra*, and the other Supreme Court cases mentioned above, any discussion of the offensive use of collateral estoppel must include an analysis of the different collateral estoppel rules across the United States.<sup>141</sup> Every state recognizes some form of collateral estoppel.<sup>142</sup>

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231 (2006) (stating that a takings claim arises when the state takes property from an individual without providing just compensation).

<sup>135</sup> *San Remo Hotel*, 545 U.S. at 338 ("Federal courts . . . are not free to disregard 28 U.S.C. § 1738 simply to guarantee that all takings plaintiffs can have their day in federal court.").

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 342.

<sup>138</sup> *Id.* at 344.

<sup>139</sup> *Id.* at 344-45.

<sup>140</sup> *See id.* at 345 (applying the "normal assumption that the weighty interests in finality and comity trump the interest in giving losing litigants access to an additional appellate tribunal").

<sup>141</sup> Many of the cases cited in this section were found in, or were cited in cases found in, E.H. Schopler, Annotation, *Mutuality of Estoppel as Prerequisite of Availability of Doctrine of Collateral Estoppel to a Stranger to the Judgment*, 31 A.L.R.3d 1044 (1970). While this article offered much assistance, all mistakes are of course my own.

<sup>142</sup> *See infra* notes 146-149 and Appendix A (providing collateral estoppel rules and cases decided in each state).

While each state articulates its precise requirements for application of the doctrine differently, there are some general ways to group their approaches. The underlying framework for the various approaches is the Restatement (Second) of Judgments, which lists four requirements for application of collateral estoppel.<sup>143</sup> The requirements are: (1) that the issue in the new action is identical to the issue in the previous action, (2) that the issue was actually litigated in a court of competent jurisdiction, (3) that the party was being estopped from litigating the issue in the new action,<sup>144</sup> and (4) that the previous judgment required this issue to be decided.<sup>145</sup> States have different ways of articulating these requirements,<sup>146</sup> but include some or all of them in their definitions of collateral estoppel and what must be established before its application. Specifically, twenty-five states and the District of Columbia require a party seeking collateral estoppel to fulfill all four of these conditions while the other twenty-five states do not articulate the Restatement's fourth requirement, that the holding was necessary for the judgment, in their preconditions for applying collateral estoppel.<sup>147</sup> Further, some states articulate an additional requirement that the estopped party was the losing litigant in the previous case.<sup>148</sup> Additionally, at least three states explicitly mandate that their courts consider fairness in applying collateral estoppel.<sup>149</sup>

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<sup>143</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

<sup>144</sup> Some states also require mutuality – that the party seeking estoppel be a party to the prior action. See *infra* note 151 for a survey of whether each state allows offensive nonmutual collateral estoppel.

<sup>145</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 27.

<sup>146</sup> When discussing whether litigation is valid, states use a number of different metrics including: that the issue was actually litigated, that the issue was resolved by a final judgment on the merits, that the first litigation offered a full and fair opportunity for the estopped party to be heard, that a court of competent jurisdiction presided over the action, and that the estopped party lost the previous action. When discussing the fourth issue, states describe the issue as necessary to the prior judgment or material and relevant to the prior action's disposition. See *infra* Appendix A for the different requirements for collateral estoppel in each state.

<sup>147</sup> See *infra* Appendix A .

<sup>148</sup> See, e.g., *Moore v. Commonwealth*, 954 S.W.2d 317, 319 (Ky. 1997); *In re Brauer*, 890 N.E.2d 847, 857 (Mass. 2008); *Whitley v. Commonwealth*, 538 S.E.2d 296, 299 (Va. 2000).

<sup>149</sup> These states are Vermont, Washington, and Wisconsin. See, e.g., *Trickett v. Ochs*, 838 A.2d 66, 70 (Vt. 2003); *State v. Harrison*, 61 P.3d 1104, 1109 (Wash. 2003); *Mrozek v. Intra Fin. Corp.*, 699 N.W.2d 54, 61-62 (Wis. 2005) (“[T]he circuit court must . . . conduct a fairness analysis to determine whether it is fundamentally fair to employ issue preclusion given the circumstances of the particular case at hand.”). Wisconsin offers factors to consider in determining whether application of collateral estoppel is fair. The circuit court considers the following factors:

(1) whether the party against whom preclusion is sought could have obtained review of the judgment; (2) whether the question is one of law that involves two distinct claims or intervening contextual shifts in the law; (3) whether there are apt to be significant

As discussed above, in 1979, the Supreme Court decided in *Parklane Hosiery* that it would allow offensive nonmutual collateral estoppel in federal courts.<sup>150</sup> Today, thirty-three states and Washington, D.C. allow offensive nonmutual estoppel, while seventeen states do not.<sup>151</sup> Moreover, *Migra*'s holding indicates that federal courts applying the preclusive effect of a state court decision to a § 1983 action must determine the preclusive effect the state court would give to the decision and apply that effect.<sup>152</sup> Typically, this involves a non-party to the first litigation bringing a new suit against the previous loser. This scenario contrasts to our hypothetical where the criminal defendant seeks to estop the police officer who only implicitly appears to be a non-party to the prior suit. While a § 1983 plaintiff could attempt to use nonmutual offensive collateral estoppel in other fact patterns,<sup>153</sup> a much more frequent use of the doctrine would be mutual offensive collateral estoppel through privity. For example, in the context of our hypothetical, the criminal defendant could estop the police officer from arguing that the search was constitutional because the police officer was in privity with the state in the criminal proceeding.

The general definition of privity is "[t]he connection or relationship between two parties, each having a legally recognized interest in the same subject matter (such as a transaction, proceeding, or piece of property)."<sup>154</sup> More specifically, each state offers its own definition of privity. Ten states offer some general idea that privity exists when there is a substantial identity between parties<sup>155</sup> and analyze privity on a case-by-case basis.<sup>156</sup> All but seventeen of the other states not only include this general rule but also require: (1) some traditional notions of privity,<sup>157</sup> (2) participation by the second party

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differences in the quality or extensiveness of the two proceedings such that relitigation of the issue is warranted; (4) whether the burden of persuasion has shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; and (5) whether matters of public policy or individual circumstances would render the application of issue preclusion fundamentally unfair, including whether the party against whom preclusion is sought had an inadequate opportunity or incentive to obtain a full and fair adjudication of the issue in the initial litigation.

*Id.*

<sup>150</sup> See *supra* notes 34-39 and accompanying text.

<sup>151</sup> See *infra* Appendix B.

<sup>152</sup> See *supra* notes 110-121 and accompanying text.

<sup>153</sup> See *infra* notes 167-186 and accompanying text.

<sup>154</sup> BLACK'S LAW DICTIONARY, *supra* note 3, at 1237.

<sup>155</sup> I include in this category states that do not define privity explicitly but merely acknowledge its existence and make a case-by-case analysis, states that define a second party to be in privity with the first when it represents the same legal right, and those that define it as a substantial identity between the parties. See *infra* Appendix C.

<sup>156</sup> See *infra* Appendix C.

<sup>157</sup> Some of these definitions of privity include: privity in blood, estate, or law; having a mutual or successive relationship to the same legal rights; those bound by the previous

in the first litigation,<sup>158</sup> or (3) an identity of interests between the first party and the second party.<sup>159</sup> Of these states, two list all of these requirements, and twenty-two others have some combination of them.<sup>160</sup> Of the other seventeen states that do not allow for a general inquiry into privity, only one requires all three, while the others articulate a standard mandating either the first, the third, or both.<sup>161</sup>

In inquiring whether our hypothetical police officer is in privity with the state for purposes of applying collateral estoppel, the plaintiff's most likely path of success would be in states that inquire whether there is a substantial identity between the parties and examine privity on a case-by-case basis. In general, courts do not consider an employee in privity with her employer;<sup>162</sup> however, a state could find a sufficient identity of interests between the police officer and the state with regard to a particular prosecution such that finding privity would be appropriate. This discussion continues in Part V.

This analysis of state rules admittedly has been painted with broad strokes. Nonetheless, it is through this framework that the following analysis of the offensive use of collateral estoppel in § 1983 actions will proceed.

#### V. POSSIBILITIES FOR THE OFFENSIVE USE OF COLLATERAL ESTOPPEL IN § 1983 ACTIONS

Courts have appropriately applied offensive collateral estoppel in § 1983 actions under certain circumstances. As discussed above, states do not have a uniform approach to issues of collateral estoppel, mutuality, or privity – all of which are relevant considerations when offensive collateral estoppel is sought in a federal civil rights action. Thus, examination of a situation where a state court judgment would bar relitigation of an issue in a subsequent § 1983 case must start with an investigation of the applicable state's preclusion rules.

##### A. *Current Usage of Offensive Collateral Estoppel in § 1983 Cases*

Let us recall the earlier hypothetical. A person sues a police officer for violating his Fourth Amendment right to be free from illegal searches and wants to rely on an earlier criminal court decision, suppressing the evidence and finding a constitutional violation, to prevent relitigation of the issue in a

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judgment; and a working or functional relationship between the parties. *See infra* Appendix C.

<sup>158</sup> This includes both parties that controlled the litigation and those that had a reasonable opportunity to be heard and/or appeal the litigation.

<sup>159</sup> Depending on the jurisdiction, this can either be interests actually litigated or just a general identity of interest between the parties.

<sup>160</sup> *See infra* Appendix C.

<sup>161</sup> *See infra* Appendix C.

<sup>162</sup> *See* *Cherry v. AIG Sun Am. Life Assurance Co.*, No. 1:07-CV-923-MEF, 2008 WL 508428, at \*2 n.3 (M.D. Ala. Feb. 21, 2008).

subsequent § 1983 damages case.<sup>163</sup> The civil plaintiff was obviously a party to the earlier lawsuit; however, if he claims that the defendant was not a party to the original suit, then he effectively concedes that the defendant did not have his day in court. No state enforces a previous judgment against a total stranger to the litigation.<sup>164</sup> Thus, in order for the plaintiff to succeed, he would have to establish that the police officer was an actual party in the criminal proceeding, a privy to the losing party in the criminal proceeding, or was virtually represented by a party in the criminal proceeding.

The state, and not the police officer, likely litigated the earlier trial, and thus the police officer was not a party to the lawsuit. Under current privity analyses in which no privity between the officer and the state would be found, it is unlikely that this plaintiff would succeed in precluding relitigation of whether the search was constitutional.<sup>165</sup> There are, however, three types of situations in which courts have applied offensive collateral estoppel in the § 1983 context: (1) where a previous action existed between the § 1983 parties but was limited in scope, (2) where the § 1983 defendant was criminally convicted of committing the same offense as the underlying complaint in the civil action, and (3) where a municipal policy, statute, or ordinance was previously found unconstitutional and then applied to the instant § 1983 plaintiff.

In the first of these situations, there was a previous administrative proceeding or state action between the same parties but limited in scope, so that the first adjudicatory body has limited jurisdiction and cannot hear § 1983 claims. In such situations, the § 1983 plaintiff can use the previous adjudication's holdings in his subsequent § 1983 litigation. Unlike the § 1983 plaintiff in *Migra v. Warren City School District Board of Education* who lost her opportunity to bring a subsequent federal action, the plaintiff in these situations is not barred from bringing the second action because the § 1983 claim could not be heard in the earlier proceeding.<sup>166</sup>

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<sup>163</sup> See *supra* notes 7-12 and accompanying text.

<sup>164</sup> The only apparent exception to this principle is through the idea of precedent or *stare decisis*. If a court determined that a particular type of action violated a constitutional right, even in a criminal case, then that legal determination has full weight as a legal precedent in subsequent judicial actions. This is related, but theoretically distinct from issues of preclusion. The criminal court determination, in our hypothetical, that this officer's action was unconstitutional would not prevent relitigation of the issue of whether the police officer acted in the accused manner, but simply whether those actions were unconstitutional. If the court in the civil trial afforded the criminal court collateral estoppel effect, then no question would remain whether the officer violated the plaintiff's constitutional rights – the entire issue of the constitutional violation would be binding. While this might be a distinction without a difference, these are sufficiently separate concepts to merit focusing only on collateral estoppel here.

<sup>165</sup> See *supra* note 162 and accompanying text (suggesting that courts generally do not consider an employee in privity with her employer).

<sup>166</sup> See *supra* notes 110-121 and accompanying text.

This type of situation arises in a number of fact patterns. The first area involves employment disputes. An employee can bring a § 1983 suit if he is employed by a state agency and then loses his job because of a constitutional violation. In New Jersey, for example, the Office of Administrative Law, a state agency, can exercise its judicial function to review education employment termination decisions.<sup>167</sup> Even if the plaintiff receives damages or an injunction in the primary action, damages for a constitutional violation may still be appropriate under § 1983.<sup>168</sup> Thus, if that agency renders a decision finding the termination unconstitutional and if that determination would be given preclusive effect by the state, then offensive collateral estoppel can be used in a subsequent § 1983 action to bar relitigation of certain issues between the terminated employee and any parties or their privies in the administrative proceeding.<sup>169</sup> This type of collateral estoppel application does not require any consideration of mutuality because the plaintiff was a party to the prior administrative action. Furthermore, there is no unfairness or injustice in allowing the plaintiff to bring the § 1983 claim in the second action, as he was unable to do so in the initial administrative hearing due to the limited scope of the proceedings. Based on *Migra* and *McDonald*, defensive collateral estoppel would likewise be appropriate; if the administrative agency found against the plaintiff, then the § 1983 defendant could use the previous holding in the subsequent action.<sup>170</sup>

Another similar scenario involves a party challenging a zoning board's decision. In Ohio, for example, if a zoning board denies a request to build, the property owner can appeal this decision to the courts.<sup>171</sup> If the court finds that both the zoning board's decision and the statute it relied upon were unconstitutional, the builder can use that finding in a subsequent § 1983 action against the zoning board to establish that the board "deprived [the land owner] of property without due process of law" – the § 1983 action's constitutional issue.<sup>172</sup> Such an approach would only succeed where the plaintiff could not raise § 1983 claims in an appeal of the zoning board decision. If she could raise these claims and did not, then *res judicata* would bar the subsequent § 1983 action.<sup>173</sup>

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<sup>167</sup> See *Farley v. N. Bergen Twp. Bd. of Educ.*, 705 F. Supp. 223, 225 (D.N.J. 1989).

<sup>168</sup> *Id.* at 227.

<sup>169</sup> In New Jersey, this would include any issues necessarily decided in the arbitration hearing. *Matter of Estate of Dawson*, 641 A.2d 1026, 1034-35 (N.J. 1994). For an example, see *Farley*, 705 F. Supp. at 228-29 (finding that a demoted educator who prevailed in administrative proceeding could use earlier findings to preclude Board of Education from relitigating "the factual issues concerning the circumstances surrounding" the demotion).

<sup>170</sup> See *supra* notes 110-121, 122-127 and accompanying text.

<sup>171</sup> See, e.g., *Negin v. City of Mentor*, 601 F. Supp. 1502, 1503 (N.D. Ohio 1985).

<sup>172</sup> *Id.* at 1505.

<sup>173</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 19 (1982).

Offensive collateral estoppel also arises in the arbitration context. While an arbitration holding is not sufficient to preclude relitigation of an issue,<sup>174</sup> a judicial determination reversing an arbitrator for substantive reasons can be. In New York, a Native American prison guard was suspended and then terminated because he refused to cut his hair citing his religious beliefs.<sup>175</sup> An arbitrator found that the guard failed to follow orders and that the Department of Correctional Services legitimately dismissed him.<sup>176</sup> The state judicial system, both at the trial and appellate levels, reversed the arbitrator and recognized that the Constitution protected the guard's right to wear long hair on the basis of his religious beliefs.<sup>177</sup> The United States District Court afforded these decisions collateral estoppel effect and barred relitigation of the constitutionality question in a subsequent § 1983 action for damages between the guard and the prison.<sup>178</sup> The earlier state action did not bar the entire suit under *res judicata* because of the narrow scope of the state judicial action and the guard's inability to bring a § 1983 action in that proceeding.

Another application of collateral estoppel that falls under this general umbrella of previous actions limited in scope is found in jurisdictions that recognize nonmutual offensive collateral estoppel. It can arise when, for example, a police board charged with reviewing officers' conduct disciplines an officer for misconduct while on the job.<sup>179</sup> If this discipline occurs because the officer physically abused a criminal suspect, that suspect may subsequently be able to use the police board's decision against the officer.<sup>180</sup> As with the previous two examples, this § 1983 plaintiff is not barred from litigating due to *res judicata*, as he was not a party to the earlier proceeding; conversely, the officer is bound by the previous holding because he had a full and fair opportunity to litigate the issue in his earlier disciplinary hearing.

This application overlaps with the second category of cases that can subsequently result in offensive collateral estoppel in § 1983 actions – when the civil defendant was previously convicted of committing the crime that forms the basis of the § 1983 action. If, for example, a police officer sexually assaults an arrestee and the officer is convicted of rape, the arrestee can use that holding against the police officer in her subsequent § 1983 claim to prevent relitigation of the question of whether the assault occurred.<sup>181</sup> This

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<sup>174</sup> See *supra* notes 122-127 and accompanying text.

<sup>175</sup> *Rourke v. N.Y. State Dept. of Corr. Serv.*, 915 F. Supp. 525, 532 (N.D.N.Y. 1995).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 532-33.

<sup>178</sup> *Id.* at 535-36.

<sup>179</sup> See *Wilson v. City of Chicago*, 900 F. Supp. 1015, 1019 (N.D. Ill. 1995).

<sup>180</sup> See *id.* at 1026-29.

<sup>181</sup> See *Parker v. Williams*, 855 F.2d 763, 774-75 (11th Cir. 1988), *rev'd in part*, 862 F.2d 1471, 1481 (11th Cir. 1989), *overruled on other grounds by Turquitt v. Jefferson County, Ala.*, 137 F.3d 1285, 1292 (11th Cir. 1998).

application of nonmutual offensive collateral estoppel can only occur in jurisdictions that do not require mutuality.<sup>182</sup>

The third category of cases arises when a previous party or class successfully challenged a statute, rule, ordinance, or policy on constitutional grounds. When a state actor then applies the same policy toward a new party, that party can preclude relitigation of its constitutionality. In another New York haircut case,<sup>183</sup> a class of Rastafarian inmates sought an injunction under § 1983 that challenged a Department of Correctional Services (“DOCS”) policy requiring haircuts upon entering prison.<sup>184</sup> In two other cases, DOCS litigated the haircut issue, and both times the courts found the haircut requirement unconstitutional.<sup>185</sup> When the Rastafarian inmates brought their claims, the previous decisions barred DOCS from relitigating the question of the constitutionality of the haircut requirement.<sup>186</sup>

This third approach is very similar to cases in which courts rely on precedent. Insofar as a court refuses to reconsider a question of law or a question of how law applies to a particular set of facts, it is applying precedent or *stare decisis*.<sup>187</sup> This third type of scenario, in essence, involves purely legal decisions. Hypothetically, if the Virginia legislature enacted a statute today prohibiting interracial marriage, subsequently, two individuals of different races who wished to marry could sue for an injunction under § 1983, claiming that the prohibition violated the Fourteenth Amendment based on *Loving v. Virginia*.<sup>188</sup> In this federal § 1983 action between these prospective spouses and the relevant officers of Virginia, the court would have two possible approaches in responding to this issue. It could find that Virginia already had

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<sup>182</sup> For another case in this category, see *Czajkowski v. City of Chicago*, 810 F. Supp. 1428, 1434 (N.D. Ill. 1992) (allowing a woman who sued her police officer husband and others under § 1983 to preclude husband from relitigating the factual question of domestic abuse, as it was decided in a previous criminal trial that he was guilty of battery against her).

<sup>183</sup> See *supra* notes 175-178 and accompanying text.

<sup>184</sup> *Benjamin v. Coughlin*, 905 F.2d 571, 573-74 (2d Cir. 1990).

<sup>185</sup> *People v. Lewis*, 502 N.E.2d 988, 989 (N.Y. 1986); *Overton v. Coughlin*, 520 N.Y.S.2d 32, 34 (N.Y. App. Div. 1987).

<sup>186</sup> *Benjamin*, 905 F.2d at 576.

<sup>187</sup> For more on the distinction between collateral estoppel and precedent or *stare decisis*, see Hiroshi Motomura, *Using Judgments as Evidence*, 70 MINN. L. REV. 979, 1021 (1986) (“[A]s long as issues arise in the murky area between questions of law appropriate for collateral estoppel and other ‘unmixed’ questions of law appropriate for *stare decisis*, courts will continue to view *stare decisis* as one means of using a prior judgment against a nonparty when collateral estoppel is unavailable.”). The Supreme Court has held that a state cannot use precedent to deprive a citizen of due process. *Richards v. Jefferson County*, 517 U.S. 793, 805 (1996) (allowing a party to relitigate constitutional question when it had “neither notice of, nor sufficient representation in” prior litigation because not doing so would implicate federal due process concerns).

<sup>188</sup> 388 U.S. 1, 12 (1967) (denying effect to a Virginia statute prohibiting interracial marriage based on the Fourteenth Amendment).

an opportunity to litigate the constitutionality of this statute and, therefore, deny relitigation of the issue based on collateral estoppel. Alternatively, the court could hear the issue and decide that the statute was unconstitutional based on stare decisis and the precedential value of *Loving*. While the actual outcome is identical – the parties can get married – the procedural approach is slightly different. Sometimes, courts can validly apply offensive collateral estoppel or precedent. This is particularly true when the state in question has litigated the constitutionality of the statute, and the same statute’s application is again raised in a second suit. In contrast, factual determinations are not precedential, and plaintiffs can only use collateral estoppel, and not precedent, to establish the existence of certain facts.<sup>189</sup>

This section has discussed three established arenas for the offensive use of collateral estoppel in § 1983 actions: a previous limited action between the two parties, a criminal case against the § 1983 defendant, and a previous challenge of an unconstitutional policy. Certainly there are also areas where the application of offensive collateral estoppel in a § 1983 action is inappropriate. Issues of privity and fairness often emerge in the justification for denying issue preclusion. In one case out of the District of Rhode Island that reached the First Circuit of the United States Court of Appeals,<sup>190</sup> a woman brought a § 1983 action against various state officials for entering her property without a warrant and seizing her illegally-kept pet raccoon.<sup>191</sup> In the § 1983 plaintiff’s previous criminal misdemeanor trial, the court suppressed the evidence that she kept a pet raccoon due to the officer’s improper search.<sup>192</sup> As a result, the state abandoned criminal charges.<sup>193</sup> The First Circuit denied the § 1983 plaintiff’s request to use offensive collateral estoppel against the state actors, as they were not a party to her criminal prosecution under Rhode Island law.<sup>194</sup>

Courts also properly weigh the general fairness considerations that always apply to collateral estoppel.<sup>195</sup> For example, if two courts render competing factual determinations regarding the same issue, a court in the third suit should give neither determination collateral estoppel effect.<sup>196</sup> Additionally, if the current plaintiff had the opportunity to join a previous suit but did not do so in

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<sup>189</sup> See *Richards*, 517 U.S. at 805 (“A state court’s freedom to rely on prior precedent in rejecting a litigant’s claims does not afford it similar freedom to bind a litigant to a prior judgment to which he was not a party.”).

<sup>190</sup> *Bilida v. McCleod*, 211 F.3d 166 (1st Cir. 2000).

<sup>191</sup> *Id.* at 169.

<sup>192</sup> *Id.* at 169-70.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 170-71. The court recognized that “most [Rhode Island] precedent indicates that individual state officials are not bound, in their individual capacities, by determinations adverse to the state in prior criminal cases.” *Id.* at 170.

<sup>195</sup> See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329-31 (1979) (arguing that offensive use of collateral estoppel “may be unfair to a defendant”).

<sup>196</sup> See, e.g., *Wiggins v. Rhode Island*, 326 F. Supp. 2d 297, 307-08 (D.R.I. 2004).

the hope of later being able to apply collateral estoppel, then a court should deny the doctrine's application.<sup>197</sup>

B. *Expanding the Effect of Collateral Estoppel*

Under the current state of the law, there is another class of cases that are not given preclusive effect in subsequent § 1983 actions, but arguably should be. This area is within the first type of cases described above – those that involve a previous limited action between the current § 1983 parties. Returning to our hypothetical of the police officer and the illegal search, it would be inappropriate for a court to bar him from litigating the constitutionality of the search if he were not involved with the criminal litigation at all.<sup>198</sup> Here, the lack of privity aligns with principles of fairness and efficiency. What is not as clear, however, is whether a court should allow the officer to relitigate the issue if he was intimately involved with or substantially controlled the criminal litigation.<sup>199</sup> If courts should utilize collateral estoppel as a way to promote efficiency, fairness, and justice, then these should be the primary concerns rather than technical standards of privity. When the relationship between an officer and an actual party is sufficiently significant during the original suit, then their unity of interest and identity as a single party should continue for preclusion purposes during the civil action.

Allowing parties one, and only one, opportunity to litigate an issue enhances both efficiency and fairness. Thus, if the police officer litigated the issue, refusing to apply collateral estoppel would be neither efficient nor fair. Some states have law concerning privity that could act to bar a state actor from subsequently litigating an issue based on privity with the state in a previous criminal proceeding. In Arkansas, for example, courts have held in some instances that an employer-employee or principal-agent relationship is sufficient to find privity for purposes of res judicata.<sup>200</sup> Courts have not yet extended this principle to collateral estoppel or to a § 1983 action; however, it might be appropriate in the right circumstances.

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<sup>197</sup> See, e.g., *Polk v. Montgomery County*, 782 F.2d 1196, 1202 (4th Cir. 1986).

<sup>198</sup> This is especially true, as it would violate his Fifth Amendment constitutional due process rights. *Parklane Hosiery*, 439 U.S. at 327 n.7 (“It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard.”).

<sup>199</sup> I am reminded of the image of a sheriff sitting next to a prosecutor throughout a criminal trial, outlining strategy and controlling the litigation. See, e.g., *MY COUSIN VINNY* (Twentieth Century Fox 1992) (portraying a criminal trial where Sheriff Dean Farley investigated the alleged crime, sat next to and consulted with District Attorney Jim Trotter, III at trial, and testified as a key witness).

<sup>200</sup> *Jayel Corp. v. Cochran*, 234 S.W.3d 278, 282-84 (Ark. 2006) (citing examples of relationships that the court found to support privity for purposes of res judicata).

Along this line and as mentioned earlier, the Supreme Court recently discussed the idea of virtual representation in *Taylor v. Sturgell*.<sup>201</sup> This is a parallel concept to privity, but the *Taylor* analysis is especially useful for articulating a standard to determine privity for collateral estoppel in general and in § 1983 actions, in particular. There, the Court discussed six types of circumstances in which virtual representation exists. The fourth and most relevant of these states:

[A] nonparty is bound by a judgment if he “assume[d] control” over the litigation in which that judgment was rendered. Because such a person has had “the opportunity to present proofs and argument,” he has already “had his day in court” even though he was not a formal party to the litigation.<sup>202</sup>

This standard could encompass our hypothetical police officer. In this type of situation, courts should apply collateral estoppel, thus promoting fairness and efficiency. Therefore, when defining the scope of privity and virtual representation in a § 1983 action, courts should consider the *Taylor* test.

The argument for extending privity to encompass the employer-employee relationship is further supported when the employer, or in the context of our § 1983 hypothetical, the state, indemnifies the employee or police officer.<sup>203</sup> Indemnification by the state is a widespread practice and is viewed as an essential benefit to police officers.<sup>204</sup> Without it, the argument goes, the police could not vigorously protect society.<sup>205</sup> However, the act of indemnifying the officer changes the equation: even though the police officer is the nominal § 1983 defendant, there is now substantial identity between the officer and the state. Indemnification therefore supports a subsequent finding of privity and the ultimate application of offensive collateral estoppel. In our hypothetical, the state vigorously litigated the constitutionality of the search in the criminal trial and it will be responsible for paying any subsequent § 1983 damages as

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<sup>201</sup> 128 S. Ct. 2161, 2172-74 (2008) (discussing virtual representation); see *supra* notes 43-50 and accompanying text.

<sup>202</sup> *Taylor*, 128 S. Ct. at 2173 (citations omitted).

<sup>203</sup> See David F. Hamilton, *The Importance and Overuse of Policy and Custom Claims: A View from One Trench*, 48 DEPAUL L. REV. 723, 730-31 (1999) (“[A] commitment by the local government to indemnify the individual defendants certainly offers a way for the defendants to maintain a united front against the plaintiff.”); Martin A. Schwartz, *Should Juries Be Informed That Municipality Will Indemnify Officer’s § 1983 Liability for Constitutional Wrongdoing?*, 86 IOWA L. REV. 1209, 1216-24 (2001) (discussing indemnification of compensatory and punitive damages in § 1983 actions); Peter Cassat, Comment, *Statutory Indemnification in Section 1983 Actions Based on Police Misconduct: Choosing a Forum*, 1988 WIS. L. REV. 605, 608-12 (discussing the Wisconsin governmental indemnification statute and its coverage of police officers).

<sup>204</sup> Schwartz, *supra* note 203, at 1218-19.

<sup>205</sup> *Id.* (suggesting that indemnification is necessary for the state to recruit talented officers and to encourage them to protect the public zealously).

well because the state indemnifies the officer. Thus, giving the state, in essence, a second opportunity to litigate the question of the constitutionality of the search in the civil action is fundamentally unfair to the criminal defendant and would invert the underlying goals of collateral estoppel. Allowing issue preclusion in this type of scenario would promote efficiency, fairness, and justice where the police officer's search violated the Fourth Amendment, where the state subsequently and unsuccessfully defended his actions in the criminal trial, and where the state indemnifies him. Here the officer's interests and the state's interests are united twice – both at the criminal trial and at the civil trial. When these united interests and actions exist, courts should recognize the singularity of party and should afford the criminal decision collateral estoppel effect.

There is, at least, one practical flaw with this analysis. Some states, such as Illinois, require indemnification, but only for compensatory, and not punitive, damages.<sup>206</sup> In such situations, using indemnification as the basis of collateral estoppel application results in procedural complexities. Under this argument, a court could only give the facts, previously determined in the criminal litigation, collateral estoppel effect for a determination of compensatory damages, not for punitive damages. However, this has the potential for confusing juries. One inefficient solution would be to separate trials for questions of compensatory and punitive damages.<sup>207</sup>

The practice of indemnification of state actors to allow criminal court decisions collateral estoppel effect in subsequent civil actions might not ultimately help criminal defendants with their constitutional claims. Although indemnification is usually identified as benefitting the state actor, now a civil defendant, it certainly also may allow the plaintiff to reach into a deep pocket to be compensated.<sup>208</sup> Thus, a determination to apply collateral estoppel when state actors have been indemnified might ultimately encourage states not to indemnify their police officers, thereby significantly decreasing the availability of remedies for § 1983 plaintiffs. Requests by the police for alternative protection in the form of increased compensation would counteract this. Thus in theory, the salary versus indemnification balance could remain constant; officers would ultimately receive the same protection whether through salary increases or indemnification. Regardless, other factors might come into play and could negatively impact recovery of § 1983 awards.

It is also important to remember that the use of collateral estoppel should not, in theory at least, affect the substantive determination of the constitutional issues in § 1983 cases. If an issue has been determined in a criminal case,

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<sup>206</sup> Hamilton, *supra* note 203, at 730. The question of indemnification is typically a local issue, although some states set baseline standards. *See id.* at 730-31.

<sup>207</sup> *Cf. id.* at 731-32 (discussing bifurcation in trials where both a municipality and individuals are defendants).

<sup>208</sup> Schwartz, *supra* note 203, at 1218-19 (“[I]ndemnification enhances enforcement by insuring that the defendant officer is able to compensate the § 1983 claimant.”).

assuming the same or lower burden of proof, one should expect it to be decided the same way again in the civil trial. While this is not always true, cases in theory should usually result in similar damage awards and any increase would be offset because the waste associated with unnecessary relitigation of already-decided issues is eliminated. Implementing this use of collateral estoppel would promote efficiency, and would probably not significantly increase costs for states that are already indemnifying their state actors.

Another potential result of this application of collateral estoppel is an increase in settlement agreements. Perhaps as many as sixty percent of all cases are settled,<sup>209</sup> and the prospect of relitigation of issues is always a gamble. If all a plaintiff has to litigate is damages, settlement figures might increase over the amount that a plaintiff could negotiate for should he have to litigate the question of liability as well.

There is another issue to consider if states were to extend privity as between the interests of the police officer and the state in our hypothetical situation. The question of privity in collateral estoppel determinations involves state as well as federal law, and there are constitutional constraints on a state's ability to extend privity.<sup>210</sup> If due process concerns lead a court when deciding whether a non-party can relitigate an issue, then privity becomes a constitutional concern. As a constitutional matter, the ultimate authority for determining the scope of the protections provided under the federal Constitution rests with the United States Supreme Court, and not the state courts.<sup>211</sup> Thus, if a state adjusted its privity rules to find that a police officer is a privy of the state in a criminal action, the Supreme Court still must ensure that this definition does not violate applicable due process considerations.

The Court's decision in *Taylor* may in fact quell any constitutional concerns. As discussed above, one of the definitions of virtual representation encompasses a potential police officer-prosecution relationship. The Court presumably had constitutional issues in mind, and thus, this definition articulates a standard that does not violate due process and serves the competing interests of efficiency and fairness. This reading of privity, if in line with virtual representation as defined by *Taylor*, will not implicate the officer's constitutional rights.

If our police officer violated the Fourth Amendment, substantially controlled the criminal litigation, influenced strategy, testified for the prosecution, and in essence functioned as a representative of the state, a court should consider him in privity with the state for purposes of a subsequent §

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<sup>209</sup> Blanca Fromm, *Bringing Settlement Out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663, 664 (2001).

<sup>210</sup> *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979) (acknowledging due process concerns with binding someone to a judgment to which he was a stranger).

<sup>211</sup> See *Ableman v. Booth*, 62 U.S. (21 How.) 506, 518 (1859). Of course, states do interpret the federal constitution. Nonetheless, ultimate authority for interpretation rests with the federal judiciary.

1983 action, without any need to consider the question of indemnification. In that case, he was aligned closely enough with the state during the criminal proceeding to be virtually represented by the state or in privity with the state. Indemnification ties these two parties together during the civil trial, further supporting their identity as a singular entity. While this situation is admittedly not the reality in all cases courts should not ignore this possibility and the appropriateness of collateral estoppel in such an officer's civil trial.

There are other similar scenarios where collateral estoppel should apply. In New York, for example, in an emergency action to remove a child from her parents' custody, a caseworker for the children's protection agency usually signs the petition as a representative of the agency<sup>212</sup> and as a "party acquainted with the facts."<sup>213</sup> For argument's sake, we will assume that the caseworker removes the child. Then she brings the emergency action and, in the course of that action, provides the state's attorney with all its data. She then reviews and signs the petition and directs the litigation. If the family court finds there was no cause to remove the child, could that court reasonably find the caseworker a party to the action? Or, perhaps find her in privity with a party to the action? More appropriately, could the parents and child bring a § 1983 action, sustain the claim that the agency virtually represented the caseworker, and thus argue that she should be bound by the judgment of the family court? Based on *Taylor*, this family court holding, if appropriately appealed and affirmed as is required in New York,<sup>214</sup> should have collateral estoppel effect in a subsequent § 1983 action against the caseworker.<sup>215</sup>

These examples could go on and on. In certain situations, when a court finds that a constitutional violation occurred in an action where a § 1983 claim could not be brought, the wronged party should be able to use collateral estoppel to preclude relitigation of the violation in a subsequent § 1983 action. This use is especially appropriate when the civil defendant sufficiently controlled the litigation in the primary action, when the civil defendant was sufficiently connected to the original litigant through privity, and especially when the party that controlled the primary litigation is sufficiently indemnifying the civil defendant.

In these circumstances, it is not unfair or unjust to apply collateral estoppel. Even though traditional privity rules would otherwise forbid it, courts should

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<sup>212</sup> The agency is still technically the party to the suit. N.Y. FAM. CT. ACT § 1032 (McKinney 1999) (providing that a child protective agency or a person on the court's direction may originate a proceeding under the article).

<sup>213</sup> N.Y. C.P.L.R. § 3020(d) (McKinney 1991).

<sup>214</sup> *Ryan v. N.Y. Tel. Co.*, 467 N.E.2d 487, 491 (N.Y. 1984) (discussing the "actual extent of litigation" as one test measuring whether a collaterally estopped party had a full and fair opportunity to litigate).

<sup>215</sup> For similar facts, see First Amended Complaint at 3-11, *Demtchenko v. Tuffarelli*, No. 08 CV 00861 (PKC) (S.D.N.Y. April 28, 2008) (alleging an illegal seizure of a child from his home).

consider the broader goals of efficiency and justice and should apply offensive collateral estoppel.

#### CONCLUSION

Forty-two U.S.C. § 1983 protects civil and constitutional rights. Along with *Bivens* actions, it allows private enforcement of the legal code that guides all government officials in the United States. These actions exist to remedy wrongs caused by government actors violating these important federal rights. They ensure that those who violate the public trust and the rights of this country's citizens cannot cloak their actions under color of law.

Many of these wrongs are committed in the context of the criminal justice system. When actors in that system ignore citizens' rights and the legal system later recognizes the improper deprivation of those rights, such determinations are a step toward resolution and restitution. When a court holds that a person is not criminally liable because a state violated his constitutional rights, or when a state agency finds that a person should not have lost her job because of her race, these conclusions should apply when the wronged individual seeks the appropriate remedy. For a system that is truly equitable and balanced, however, society needs to temper the impulse to protect the rights of those wronged by recognizing the importance of treating the accused wrongdoer fairly. The civil justice system created by § 1983, and furthered by *Bivens*, is charged with ensuring that the rights of the civil defendant are not sacrificed for the rights of the plaintiff.

This Note outlines a subtle, but important, shift from the previous approach to the offensive use of collateral estoppel in actions arising under 42 U.S.C. § 1983. Courts should recognize the competing interests of fairness and efficiency and, in appropriate circumstances, should expand the notion of privity and virtual representation in § 1983 actions. The judiciary should not limit its focus to the traditional doctrinal limitations of privity as applied to collateral estoppel, but instead should consider the broader notions of fairness and efficiency that collateral estoppel traditionally protect.

## APPENDIX A: SURVEY OF STATE REQUIREMENTS FOR COLLATERAL ESTOPPEL

The Restatement (Second) of Judgments lists four requirements that are to be met before collateral estoppel is applied.<sup>216</sup> They are: (1) that the issue in the new action is identical to the issue in the previous action, (2) that the issue is actually litigated in a court of competent jurisdiction (3) by the party being estopped from litigating the issue in the new action, and (4) the previous judgment required this issue to be decided.<sup>217</sup>

The following twenty-six jurisdictions require all four of these factors to be met:

<i>Jurisdiction</i>	<i>Exemplary Case</i>
Alabama	Martin v. Reed, 480 So. 2d 1180, 1182 (Ala. 1985).
Arizona	Maricopa-Stanfield Irrigation & Drainage Dist. v. Robertson, 123 P.3d 1122, 1228-29 (Ariz. 2005).
Arkansas	Bradley Ventures, Inc. v. Farm Bureau Mut. Ins. Co. of Ark., 264 S.W.3d 485, 490 (Ark. 2007).
Colorado	Indus. Comm'n of the State of Colo. v. Moffat County Sch. Dist. RE No. 1, 732 P.2d 616, 619-20 (Colo. 1987) (“Collateral estoppel bars relitigation of an issue determined at a prior proceeding if (1) the issue precluded is identical to an issue actually litigated and necessarily adjudicated in the prior proceeding; (2) the party against whom estoppel is sought was a party to or was in privity with a party to the prior proceeding; (3) there was a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.”).
Connecticut	R & R Pool & Patio, Inc. v. Zoning Bd. of Appeals of the Town of Ridgefield, 778 A.2d 61, 68-69 (Conn. 2001).
Delaware	W. Coast Mgmt. & Capital, LLC v. Carrier Access Corp., 914 A.2d 636, 643 (Del. Ch. 2006).
District of Columbia	Wash. Med. Ctr., Inc. v. Holle, 573 A.2d 1269, 1283 (D.C. 1990).
Florida	State v. McBride, 848 So. 2d 287, 290-91 (Fla. 2003).

<sup>216</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

<sup>217</sup> *Id.*; see *supra* notes 143-145 and accompanying text (discussing the underlying framework of approaches to collateral estoppel in the Restatement (Second) of Judgments).

Hawaii	Bremer v. Weeks, 85 P.3d 150, 161 (Haw. 2004).
Idaho	Lohman v. Flynn, 78 P.3d 379, 386 (Idaho 2003).
Illinois	People v. Jones, 797 N.E.2d 640, 650 (Ill. 2003) (“The party seeking to invoke collateral estoppel must show that: (1) the issue was raised and litigated in a previous proceeding; (2) that the determination of the issue was a critical and necessary part of the final judgment in a prior trial; and (3) the issue sought to be precluded in a later trial is the same one decided in the previous trial.”).
Iowa	Penn v. Iowa St. Bd. of Regents, 577 N.W.2d 393, 398 (Iowa 1998).
Kansas	Regency Park, LP v. City of Topeka, 981 P.2d 256, 265 (Kan. 1999).
Kentucky	Moore v. Commonwealth, 954 S.W.2d 317, 319 (Ky. 1997).
Louisiana	Stroscher v. Stroscher, 845 So. 2d 518, 525 (La. Ct. App. 2003).
Massachusetts	<i>In re Brauer</i> , 890 N.E.2d 847, 857 (Mass. 2008) (“For the doctrine to apply, there must be an identity of issues, a finding adverse to the party against whom it is being asserted, and a judgment by a court or tribunal of competent jurisdiction. A defendant must also have a full and fair opportunity to litigate the issue in the first action. Further, the determination of the issues for which preclusion is sought must have been essential to the underlying judgment. The fact finder is afforded wide discretion in deciding whether collateral estoppel should be applied in a particular case.” (citations and internal quotation marks omitted)).
Michigan	Monat v. State Farm Ins. Co., 677 N.W.2d 843, 845-46 (Mich. 2004).
Mississippi	Mayor of Ocean Springs v. Homebuilders Ass’n of Miss., Inc., 932 So. 2d 44, 59 (Miss. 2006).
Nevada	Five Star Capital Corp. v. Ruby, 194 P.3d 709, 713 (Nev. 2008).
New Jersey	Matter of Estate of Dawson, 641 A.2d 1026, 1034-35 (N.J. 1994).
New Mexico	Shovelin v. Cent. N.M. Elec. Coop., Inc., 850 P.2d 996, 1000 (N.M. 1993).

New York	Beuchel v. Bain, 766 N.E.2d 914, 919 (N.Y. 2001) (“Two requirements must be met before collateral estoppel can be invoked. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling . . .”).
North Carolina	King v. Grindstaff, 200 S.E.2d 799, 806 (N.C. 1973) (“Having decided that the parties are the same, we must next determine whether another requirement for the application of collateral estoppel – identity of issues – is present. In determining whether collateral estoppel is applicable to specific issues, certain requirements must be met: (1) The issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.”).
Oklahoma	Deloney v. Downey, 944 P.2d 312, 318 (Okla. 1997).
Oregon	Barackman v. Anderson, 109 P.3d 370, 372 (Or. 2005).
Virginia	Whitley v. Commonwealth, 538 S.E.2d 296, 299 (Va. 2000).

The following twenty-five states do not articulate the Restatement’s fourth requirement – that the holding was necessary for the judgment – in their preconditions for collateral estoppel:

<i>Jurisdiction</i>	<i>Exemplary Case</i>
Alaska	Murray v. Feight, 741 P.2d 1148, 1153 (Alaska 1987).
California	People v. Barragan, 83 P.3d 480, 492 (Cal. 2004) (“The prerequisite elements for applying the doctrine to either an entire cause of action or one or more issues are the same: (1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding.” (citation and internal quotation marks omitted)).

- Georgia Daniel v. Daniel, 596 S.E.2d 608, 611 (Ga. 2004).
- Indiana *In re* L.B., 889 N.E.2d 326, 333 (Ind. Ct. App. 2008) (“When . . . a party argues that the claim preclusion component of *res judicata* applies, four factors must be present, namely: (1) the former judgment must have been rendered by a court of competent jurisdiction; (2) the former judgment must have been rendered on the merits; (3) the matter now in issue was, or could have been, determined in the prior action; and (4) the controversy adjudicated in the former action must have been between parties to the present suit or their privies.”).
- Maine Macomber v. MacQuinn-Tweedie, 834 A.2d 131, 139 (Me. 2003).
- Maryland Colandrea v. Wilde Lake Cmty. Ass’n, 761 A.2d 899, 909 (Md. 2000) (“[There is] a four-part test, which must be satisfied in order for the doctrine of collateral estoppel to be applicable: 1. Was the issue decided in the prior adjudication identical with the one presented in the action in question? 2. Was there a final judgment on the merits? 3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? 4. Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?”).
- Minnesota Busch v. Comm’r of Revenue, 713 N.W.2d 337, 342 (Minn. 2006).
- Missouri James v. Paul, 49 S.W.3d 678, 682 (Mo. 2001).
- Montana Stanley L. & Carolyn M. Watkins Trust v. Lacosta, 92 P.3d 620, 626 (Mont. 2004).
- Nebraska R.W. v. Schrein, 642 N.W.2d 505, 511 (Neb. 2002).
- New Hampshire Stewart v. Bader, 907 A.2d 931, 937 (N.H. 2006).
- North Dakota Hofsommer v. Hofsommer Excavating, Inc., 488 N.W.2d 380, 384 (N.D. 1992).
- Ohio Thompson v. Wing, 637 N.E.2d 917, 923 (Ohio 1994).
- Pennsylvania Murphy v. Duquesne Univ. of the Holy Ghost, 777 A.2d 418, 435 (Pa. 2001) (“Collateral estoppel applies when the issue decided in the prior adjudication was identical with the one presented in the later action; there was a final judgment on the merits; the party against whom the

- plea is asserted was a party or in privity with a party to the prior adjudication; and the party against whom it is asserted has had a full and fair opportunity to litigate the issue in question in the prior adjudication.”).
- Rhode Island      State v. Santiago, 847 A.2d 252, 254 (R.I. 2004).
- South Carolina      Zurcher v. Bilton, 666 S.E.2d 224, 226 (S.C. 2008).
- South Dakota      Grand State Prop., Inc. v. Woods, Fuller, Shultz, & Smith, P.C., 556 N.W.2d 84, 87 (S.D. 1996).
- Tennessee      Beaty v. McGraw, 15 S.W.3d 819, 824-25 (Tenn. Ct. App. 1998).
- Texas      State v. Aguilar, 947 S.W.2d 257, 259-60 (Tex. Crim. App. 1997).
- Utah      *In re* Gen. Determination of the Rights to the Use of All the Water, Both Surface and Underground, Within the Drainage Area of Utah Lake and Jordan River, 982 P.2d 65, 70 (Utah 1999).
- Vermont      Trickett v. Ochs, 838 A.2d 66, 70 (Vt. 2003).
- Washington      State v. Harrison, 61 P.3d 1104, 1109 (Wash. 2003).
- West Virginia      Neiswonger v. Hennessey, 601 S.E.2d 69, 72-73 (W.Va. 2004).
- Wisconsin      Mrozek v. Intra Fin. Corp., 699 N.W.2d 54, 61 (Wis. 2005).
- Wyoming      Befumo v. Johnson, 119 P.3d 936, 945 (Wyo. 2005) (“Four factors also must be satisfied in determining whether a claim is barred by collateral estoppel: (1) whether the issue decided in the prior adjudication was identical to the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.”).

APPENDIX B: SURVEY OF WHETHER STATES ALLOW OFFENSIVE NONMUTUAL  
COLLATERAL ESTOPPEL

The following thirty-four jurisdictions permit offensive nonmutual estoppel:

<i>Jurisdiction</i>	<i>Exemplary Case</i>
Alaska	Briggs v. Newton, 984 P.2d 1113, 1120 (Alaska 1999).
Arkansas	Johnson v. Union Pac. R.R., 104 S.W.3d 745, 751 (Ark. 2003).
California	Vandenberg v. Superior Court, 982 P.2d 229, 237 (Cal. 1999) (“Instead, in its collateral estoppel aspect, the doctrine may also preclude a party to prior litigation from redispensing <i>issues</i> therein decided against him, even when those issues bear on different claims raised in a later case. Moreover, because the estoppel need not be mutual, it is not necessary that the earlier and later proceedings involve the identical parties or their privies. Only the party <i>against whom</i> the doctrine is invoked must be bound by the prior proceeding.”).
Colorado	Pomeroy v. Waitkus, 517 P.2d 396, 399 (Colo. 1973).
Connecticut	Aetna Cas. & Sur. Co. v. Jones, 596 A.2d 414, 424 (Conn. 1991).
Delaware	Columbia Cas. Co. v. Playtex FP, Inc., 584 A.2d 1214, 1217 (Del. 1991).
District of Columbia	Modiri v. 1342 Rest. Group, Inc., 904 A.2d 391, 394 (D.C. 2006).
Hawaii	Exotics Hawaii-Kona, Inc. v. E.I. Dupont De Nemours & Co., 90 P.3d 250, 263 (Haw. 2004).
Idaho	Anderson v. City of Pocatello, 731 P.2d 171, 179 (Idaho 1986).
Illinois	Herzog v. Lexington Twp., 657 N.E.2d 926, 930 (Ill. 1995) (“[This] court has stated that ‘circuit courts must have broad discretion to ensure that application of offensive collateral estoppel is not fundamentally unfair to the defendant, even though the threshold requirements for collateral estoppel are otherwise satisfied.’” (citation omitted)).
Indiana	Kimberlin v. DeLong, 637 N.E.2d 121, 125 (Ind. 1994);

- Stephens v. State, 874 N.E.2d 1027, 1031 (Ind. Ct. App. 2007).
- Iowa Fischer v. City of Sioux City, 654 N.W.2d 544, 547 (Iowa 2002).
- Kentucky Moore v. Commonwealth, 954 S.W.2d 317, 319 (Ky. 1997).
- Maine Hossler v. Barry, 403 A.2d 762, 766 (Me. 1979).
- Massachusetts Commonwealth v. Stephens, 885 N.E.2d 785, 791 (Mass. 2008) (“The common-law doctrine of collateral estoppel is designed to ‘relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.’ Historically, mutuality of the parties was required in order for collateral estoppel to apply, a requirement now abandoned in civil cases. In criminal cases, however, the doctrine of collateral estoppel generally has continued to apply only where there is mutuality of the parties.” (citations omitted)).
- Minnesota Aufderhar v. Data Dispatch, Inc., 452 N.W.2d 648, 650 (Minn. 1990).
- Mississippi Marcum v. Miss. Valley Gas Co., 672 So. 2d 730, 733 (Miss. 1996).
- Missouri James v. Paul, 49 S.W.3d 678, 685 n.5 (Mo. 2001).
- Nebraska Peterson v. Neb. Natural Gas Co., 281 N.W.2d 525, 527 (Neb. 1979).
- New Hampshire Cutter v. Town of Durham, 411 A.2d 1120, 1121 (N.H. 1980).
- New Jersey State v. Gonzalez, 380 A.2d 1128, 1133 (N.J. 1977).
- New Mexico Silva v. State, 745 P.2d 380, 384 (N.M. 1987).
- New York B. R. DeWitt, Inc. v. Hall, 225 N.E.2d 195, 198 (N.Y. 1967) (“To recapitulate, we are saying that the ‘doctrine of mutuality’ is a dead letter.”).
- Oregon Bahler v. Fletcher, 474 P.2d 329, 332 (Or. 1970).
- Pennsylvania Shaffer v. Smith, 673 A.2d 872, 874 (Pa. 1996).
- Rhode Island Providence Teachers Union, Local 958 v. McGovern, 319 A.2d 358, 361 (R.I. 1974).

South Carolina	Graham v. State Farm Fire and Cas. Ins. Co., 287 S.E.2d 495, 496 (S.C. 1982) (“The modern trend is to disregard the privity requirement in applying estoppel by judgment. In determining the defense of collateral estoppel notwithstanding a lack of privity, the courts have taken into consideration: whether the doctrine is used offensively or defensively, and whether the party adversely affected had a full and fair opportunity to litigate the relevant issue effectively in the prior action. (The South Carolina Supreme Court has recognized estoppel by judgment without privity . . . .)” (citations omitted)).
Texas	Eagle Props., Ltd. v. Scharbauer, 807 S.W.2d 714, 721 (Tex. 1990).
Utah	Int’l Res. v. Dunfield, 599 P.2d 515, 517 (Utah 1979).
Vermont	Trepanier v. Getting Organized, Inc., 583 A.2d 583, 587 (Vt. 1990).
Washington	State v. Mullin-Coston, 95 P.3d 321, 342 (Wash. 2004).
West Virginia	Walden v. Hoke, 429 S.E.2d 504, 508 (W. Va. 1993).
Wisconsin	Michelle T. v. Crozier, 495 N.W.2d 327, 331 (Wis. 1993).
Wyoming	Tex. W. Oil & Gas Corp. v. First Interstate Bank of Casper, 743 P.2d 857, 864-65 (Wyo. 1987).

The following seventeen states do not allow offensive nonmutual collateral estoppel:

<i>Jurisdiction</i>	<i>Exemplary Case</i>
Alabama	<i>Ex Parte</i> Flexible Prods. Co., 915 So. 2d 34, 45 (Ala. 2005).
Arizona	Wetzel v. Ariz. State Real Estate Dept., 727 P.2d 825, 828 (Ariz. 1986).
Florida	Cook v. State, 921 So. 2d 631, 635 (Fla. Dist. Ct. App. 2005) (“Notwithstanding the federal decisions in which collateral estoppel has been applied despite the absence of mutuality of parties, the rule in Florida has been – with limited exceptions – that collateral estoppel only applies when the identical issue has been litigated between the same parties or their privies.” (citations and

- internal quotation marks omitted)).
- Georgia      Wickliffe v. Wickliffe Co., 489 S.E.2d 153, 155 (Ga. App. 1997).
- Kansas      Kan. Pub. Employees Ret. Sys. v. Reimer & Koger Assocs., Inc., 941 P.2d 1321, 1344 (Kan. 1997).
- Louisiana    Williams v. City of Marksville, 839 So. 2d 1129, 1132 (La. Ct. App. 2003).
- Maryland    Rourke v. Amchem Prods., Inc., 863 A.2d 926, 938 (Md. 2004) (“This Court has gone so far as to recognize defensive nonmutual collateral estoppel, at least where the party sought to be bound by the existing judgment had a full and fair opportunity to litigate the issues in question. We have acknowledged, however, that ‘there are many situations where application of the doctrine of nonmutual collateral estoppel would be manifestly unfair,’ and we have yet to formally embrace offensive nonmutual collateral estoppel.” (citations omitted)).
- Michigan     Lichon v. Am. Universal Ins. Co., 459 N.W.2d 288, 289 (Mich. 1990) (“The doctrine of mutuality of estoppel requires that in order for a party to estop an adversary from relitigating an issue that party must also have been a party, or a privy to a party, in the previous action. . . . Although there is a trend in modern law to abolish the requirement of mutuality, this Court reaffirmed its commitment to that doctrine in 1971 . . . . Mutuality of estoppel remains the law in this jurisdiction . . . .” (footnote omitted)).
- Montana     Wallace v. Goldberg, 231 P. 56, 59 (Mont. 1925).
- Nevada      Five Star Capital Corp. v. Ruby, 194 P.3d 709, 713-14 (Nev. 2008).
- North Carolina    U.S. Cold Storage, Inc. v. City of Lumberton, 576 S.E.2d 415, 417-18 (N.C. Ct. App. 2003).
- North Dakota    Hofsommer v. Hofsommer Excavating, Inc., 488 N.W.2d 380, 384 (N.D. 1992) (“Historically, collateral estoppel was limited by the principle of mutuality . . . . Although the principle of mutuality has been abandoned in numerous jurisdictions, this court has applied the mutuality rule as a prerequisite to the application of collateral estoppel.” (citation omitted)).

- Ohio O'Nesti v. DeBartolo Realty Corp., 862 N.E.2d 803, 806 (Ohio 2007).
- Oklahoma Salazar v. City of Oklahoma City, 976 P.2d 1056, 1060-61 (Okla. 1999).
- South Dakota Black Hills Jewelry Mfg. Co. v. Felco Jewel Indus., Inc., 336 N.W.2d 153, 159 (S.D. 1983).
- Tennessee Beaty v. McGraw, 15 S.W.3d 819, 825 (Tenn. Ct. App. 1998).
- Virginia TransDulles Ctr., Inc. v. Sharma, 472 S.E.2d 274, 275 (Va. 1996).

## APPENDIX C: SURVEY OF STATE DEFINITIONS OF PRIVACY

Each state offers its own definition of privity. The following ten states only generally stipulate that privity exists when there is a substantial identity between parties, and analyze privity on a case-by-case basis:

<i>Jurisdiction</i>	<i>Exemplary Case</i>
Arkansas	Parker v. Perry, 131 S.W.3d 338, 344 (Ark. 2003).
Hawaii	Matter of Herbert M. Dowsett Trust, 791 P.2d 398, 402 (Haw. Ct. App. 1990).
Maryland	FWB Bank v. Richman, 731 A.2d 916, 930 (Md. 1999).
Mississippi	Little v. V & G Welding Supply, Inc., 704 So. 2d 1336, 1339 (Miss. 1997) (“Privity is . . . a broad concept, which requires us to look to the surrounding circumstances to determine whether claim preclusion is justified.” (citations and internal quotation marks omitted)).
New Hampshire	Daigle v. City of Portsmouth, 534 A.2d 689, 694 (N.H. 1987).
New York	Beuchel v. Bain, 766 N.E.2d 914, 920 (N.Y. 2001) (“In the context of collateral estoppel, privity does not have a single well-defined meaning. Rather, privity is an amorphous concept not easy of application . . . and includes those who are successors to a property interest, those who control an action although not formal parties to it, those whose interests are represented by a party to the action, and [those who are] coparties to a prior action.” (citations and internal quotation marks omitted)).
Vermont	Pomfret Farms Ltd. P’ship v. Pomfret Assocs., 811 A.2d 655, 660 (Vt. 2002).
Virginia	State Farm Fire & Cas. Co. v. Mabry, 497 S.E.2d 844, 846 (Va. 1998) (“Privity requires that a party’s interest be ‘so identical’ with another ‘that he represents the same legal right.’ Whether privity exists ‘requires a careful examination of the circumstances of each case.’” (citations omitted)).
Washington	Feature Realty, Inc. v. Kirkpatrick & Lockhart Preston Gates Ellis, LLP, 164 P.3d 500, 505 (Wash. 2007).
West Virginia	State v. Miller, 459 S.E.2d 114, 124 (W. Va. 1995).

Twenty-four other jurisdictions include this general rule and require: (1) some of the traditional notions of privity, (2) participation by the second party in the first litigation, or (3) the second party having an identity of interests with the first party. Of these jurisdictions, the following two list all of these requirements:

<i>Jurisdiction</i>	<i>Exemplary Case</i>
District of Columbia	<i>Modiri v. 1342 Rest. Group, Inc.</i> , 904 A.2d 391, 396-97 (D.C. 2006) (“A privity is one so identified in interest with a party to the former litigation that he or she represents precisely the same legal right in respect to the subject matter of the case. The ‘orthodox categories’ of privies are those who control an action although not parties to it . . . ; those whose interests are represented by a party to the action . . . ; [and] successors in interest. . . . [T]he three types of ‘sufficiently close’ relationships that establish privity as 1) a successor to a party’s property interest; 2) a nonparty that controlled the original suit; and 3) a nonparty whose interests were represented in the original suit.” (citations, footnotes, and internal quotation marks omitted)).
Minnesota	<i>Margo-Kraft Distrib., Inc. v. Minneapolis Gas Co.</i> , 200 N.W.2d 45, 47-48 (Minn. 1972) (“There is no prevailing definition of privity which can be automatically applied . . . so we must carefully examine the circumstance of each case. Although there is no precise test of ‘privity,’ . . . [t]hose in privity would include . . . ‘those who control an action although not parties to it . . . ; those whose interests are represented by a party to the action . . . ; successors in interest to those having derivative claims . . . .’” (citations omitted)).

The following twenty-two states allow for a general inquiry into privity and also have some combination of the three above-mentioned requirements:

<i>Jurisdiction</i>	<i>Exemplary Case</i>
Alaska	<i>Holmberg v. State, Div. of Risk Mgmt.</i> , 796 P.2d 823, 827-28 (Alaska 1990).
Arizona	<i>Hall v. Lalli</i> , 977 P.2d 776, 779 (Ariz. 1999).
California	<i>Clemmer v. Hartford Ins. Co.</i> , 587 P.2d 1098, 1102 (Cal. 1978) (“In the context of collateral estoppel, due process requires that the party to be estopped must have had an

- identity or community of interest with, and adequate representation by, the losing party in the first action as well as that the circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication.”).
- Colorado      S.O.V. v. People in Interest of M.C., 914 P.2d 355, 360 (Colo. 1996).
- Connecticut    Mazziotti v. Allstate Ins. Co., 695 A.2d 1010, 1017 (Conn. 1997).
- Georgia        Brown & Williamson Tobacco Corp. v. Gault, 627 S.E.2d 549, 551 (Ga. 2006).
- Illinois        Ill. Non-Profit Mgmt. Ass’n v. Human Serv. Ctr. of S. Metro-East, 884 N.E.2d 700, 721 (Ill. App. Ct. 2008) (“Privity exists between two parties who adequately represent the same legal interests. It is the identity of interest that controls in determining privity, not the nominal identity of the parties. A nonparty may be bound under privity if his interests are so closely aligned to those of a party that the party is the virtual representative of the nonparty. However, where a party has no standing to bring a cause of action on behalf of another party, either individually or derivatively, it also must be said to lack privity with the other party because it cannot adequately represent the other party’s legal interests.” (citations and internal quotation marks omitted)).
- Indiana        Bartle v. Health Quest Realty VII, 768 N.E.2d 912, 918 (Ind. Ct. App. 2002).
- Maine          Tungate v. Gardner, 797 A.2d 738, 741 (Me. 2002).
- Massachusetts    Sarvis v. Boston Safe Deposit & Trust Co., 711 N.E.2d 911, 922-23 (Mass. App. Ct. 1999) (“[When a] record . . . does not show ‘sufficient legal identity’ between [parties] . . . , who were not parties in the prior action, as would establish his representation of their interests on the present claims for purposes of res judicata [then there is no privity].” (citations omitted)).
- Michigan        Adair v. State, 680 N.W.2d 386, 396 (Mich. 2004).
- New Jersey     Zirger v. Gen. Accident Ins. Co., 676 A.2d 1065, 1071 (N.J. 1996).
- North Dakota    Hofsommer v. Hofsommer Excavating, Inc., 488 N.W.2d

	380, 384 (N.D. 1992).
Ohio	O'Nesti v. DeBartolo Realty Corp., 862 N.E.2d 803, 806 (Ohio 2007) ("Privity was formerly found to exist only when a person succeeded to the interest of a party or had the right to control the proceedings or make a defense in the original proceeding. An interest in the result of and active participation in the original lawsuit may also establish privity. Individuals who raise identical legal claims and seek identical rather than individually tailored results may be in privity. This court has since stated that privity is a somewhat amorphous concept in the context of claim preclusion. A 'mutuality of interest, including an identity of desired result,' might also support a finding of privity." (citations omitted)).
Oklahoma	Hildebrand v. Gray, 866 P.2d 447, 450-51 (Okla. Civ. App. 1993).
Pennsylvania	Ammon v. McCloskey, 655 A.2d 549, 554 (Pa. Super. Ct. 1995).
Rhode Island	Commercial Union Ins. Co. v. Pelchat, 727 A.2d 676, 680 (R.I. 1999).
South Carolina	Wade v. Berkeley County, 498 S.E.2d 684, 687 (S.C. Ct. App. 1998).
South Dakota	Sodak Distrib. Co. v. Wayne, 93 N.W.2d 791, 795 (S.D. 1958).
Texas	Amstadt v. U.S. Brass Corp., 919 S.W.2d 644, 653 (Tex. 1996).
Utah	Bringham Young Univ. v. Tremco Consultants, Inc., 110 P.3d 678, 687 (Utah 2005).
Wisconsin	Pasko v. City of Milwaukee, 643 N.W.2d 72, 78 (Wis. 2002).

Of the other seventeen states that do not allow for a general inquiry into privity, only Oregon requires: (1) some of the traditional notions of privity, (2) participation by the second party in the first litigation, or (3) the second party having an identity of interests with the first party:

<i>Jurisdiction</i>	<i>Exemplary Case</i>
Oregon	State Farm Fire & Cas. Co. v. Reuter, 700 P.2d 236, 240 (Or. 1985) ("Individuals in privity with named parties include those who control an action though not a party to

it; those whose interests are represented by a party to the action; and successors in interest to those having derivative claims.’ ‘Privity,’ in a collateral estoppel context, is a chameleon-like term. The editors of the first Restatement of Judgments (1942) invoked the term to describe an idea, ‘the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties.’” (citations omitted)).

The following five jurisdictions articulate a standard mandating only that some of the traditional notes of privity are met:

<i>Jurisdiction</i>	<i>Exemplary Case</i>
Idaho	Foster v. City of Anthony, 841 P.2d 413, 418 (Idaho 1992).
Montana	Tisher v. Norwest Capital Mgmt. & Trust Co., 859 P.2d 984, 988 (Mont. 1993) (“[W]e have defined privies as those who are so connected with the parties in estate or in blood or in law as to be identified with them in interest and, consequently, to be affected with them by litigation; examples are lessor and lessee, heir and ancestor, executor and testator.”).
Nevada	Paradise Palms Cmty. Ass’n v. Paradise Homes, 505 P.2d 596, 599 (Nev. 1973) (“A privy is one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase.”).
New Mexico	Rex, Inc. v. Manufactured Hous. Comm. of N.M., 892 P.2d 947, 954 (N.M. 1995).
North Carolina	Whitacre P’ship v. Biosignia, Inc., 591 S.E.2d 870, 893 (N.C. 2004) (“[T]he prevailing definition in our cases, at least in the context of res judicata and collateral estoppel, is that privity ‘denotes a mutual or successive relationship to the same rights of property.’” (citations omitted)).

The following two jurisdictions only require the second party to have an identity of interests with the first party:

<i>Jurisdiction</i>	<i>Exemplary Case</i>
Louisiana	Greer v. State, 616 So. 2d 811, 815 (La. Ct. App. 1993) (“Identity of the parties does not mean the parties must be

the same physical or material parties, but they must appear in the suit in the same quality or capacity.”).

Nebraska *Risor v. Nebraska Boiler*, 744 N.W.2d 693, 699 (Neb. 2008) (“Privity requires, at a minimum, a substantial identity between the issues in controversy and a showing that the parties in the two actions are really and substantially in interest the same.”).

The following nine jurisdictions require some of the traditional notions of privity and that the second party has an identity of interests with the first party:

<i>Jurisdiction</i>	<i>Exemplary Case</i>
Alabama	<i>Leon C. Baker, P.C. v. Merrill Lynch, Pierce, Fenner &amp; Smith, Inc.</i> , 821 So. 2d 158, 165 (Ala. 2001) (“Privity is often deemed, however, to arise from (1) the relationship of one who is privy in blood, estate, or law; (2) the mutual or successive relationship to the same rights of property; [or] (3) an identity of interest in the subject matter of litigation.” (citations and internal quotation marks omitted)).
Delaware	<i>Foltz v. Pullman, Inc.</i> 319 A.2d 38, 41 (Del. Super. Ct. 1974).
Florida	<i>Cook v. State</i> , 921 So. 2d 631, 635 (Fla. Dist. Ct. App. 2005).
Iowa	<i>Hunter v. City of Des Moines</i> , 300 N.W.2d 121, 123 n.3 (Iowa 1981).
Kansas	<i>Wells v. David</i> , 603 P.2d 180, 183 (Kan. 1979).
Kentucky	<i>Waddell v. Stevenson</i> , 683 S.W.2d 955, 958 (Ky. Ct. App. 1984) (“Privity connotes those who are in law so connected with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right.” (citations and internal quotation marks omitted)).
Missouri	<i>Wilkes v. St. Paul Fire &amp; Marine Ins. Co.</i> , 92 S.W.3d 116, 121 (Mo. Ct. App. 2002).
Tennessee	<i>State ex rel. Cihlar v. Crawford</i> , 39 S.W.3d 172, 180 (Tenn. Ct. App. 2000).
Wyoming	<i>Worman v. Carver</i> , 44 P.3d 82, 89 (Wyo. 2002) (“Privity exists when there is a close or significant relationship between the party and the nonparty. When a nonparty's interests are sufficiently represented by a party, the nonparty

is considered to be a privy, and the preclusive effects of res judicata and collateral estoppel will apply to bar a subsequent action by a nonparty. . . . [W]hen the nonparty's claims derive from the claims asserted by the party, the nonparty will be bound by the prior judgment against the party." (citations omitted)).