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Reluctance Or Apathy? Examining Georgia's Continued Adherence to a Strict Mutuality Issue Preclusion Doctrine

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RELUCTANCE OR APATHY? EXAMINING GEORGIA'S CONTINUED ADHERENCE TO A STRICT MUTUALITY ISSUE PRECLUSION DOCTRINE

Boris W. Gautier*

ABSTRACT

The common law doctrine of issue preclusion, also known as collateral estoppel, prevents parties from relitigating an issue in subsequent lawsuits if a prior judgment already conclusively decided the issue. Issue preclusion traditionally required strict mutuality of parties; the first and second lawsuits had to involve the exact same litigants. Although the majority of jurisdictions now allow nonmutual issue preclusion, Georgia continues to enforce "identity of parties" as a necessary element of issue preclusion. Despite recently reaffirming this requirement, the Georgia Supreme Court has not thoroughly analyzed the merits of the rule.

This Note examines the evolution of issue preclusion and the mutuality element in federal and state courts, distinguishes offensive and defensive assertions of issue preclusion, contrasts Georgia with other jurisdictions, considers policy arguments, and explores why the Georgia Supreme Court has not addressed the nationwide trend towards allowing nonmutual issue preclusion. The Note argues for changing Georgia law to allow nonmutual issue preclusion in civil litigation and advises practitioners on practical avenues for achieving that goal.

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INTRODUCTION

Lawyers and politicians often argue that someone who had a chance to formally prove or disprove something should not receive "another bite at the apple."[1] The common law principle of issue preclusion, also known as collateral estoppel,[2] turns that maxim into a procedural rule.[3] Issue preclusion in civil cases "bars parties from relitigating issues of either fact or law that were adjudicated in an earlier proceeding."[4] Practically, this doctrine means that if a court decided an issue in one lawsuit, then parties in a second lawsuit do not need to relitigate the same issue.[5] Issue preclusion, unlike claim preclusion, is not necessarily case-dispositive but rather narrows the scope of the second suit by removing an issue from consideration.[6]

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1. *Second Bite of the Apple*, THE FREE DICTIONARY, https://idioms.thefreedictionary.com/second+bite+of+the+apple [https://perma.cc/A98Y-7YJS] (defining "second bite of the apple" as "a second chance or opportunity"). *See generally* Mark DeBofsky, *Court Gives Insurer Another Bite at the Apple*, DEBOFSKY (July 6, 2013), https://www.debofsky.com/articles/court-gives-insurer-another-bite-at-the-apple/ [https://perma.cc/59EG-CHW9]. At least one Georgia court also noted the policy disfavoring repeated chances when it held against allowing a statute of limitations exception because a party "chose not to present any evidence . . . and it is not entitled to another bite at the apple." Desalvo v. State, 683 S.E.2d 652, 653 (Ga. Ct. App. 2009) (citation omitted).

2. For the purposes of this Note, the author will generally use the more modern term "issue preclusion," except when quoting directly from case law. Notably, however, courts may also use the term "res judicata" to refer to both issue preclusion and claim preclusion. *See, e.g.*, Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc., No. 18-1086, slip op. at 6 (U.S. May 14, 2020). The U.S. Supreme Court explained the various terminologies by first clarifying that res judicata "now comprises two distinct doctrines regarding the preclusive effect of prior litigation." *Id.* These two doctrines are "issue preclusion (sometimes called collateral estoppel)" and "claim preclusion (sometimes itself called res judicata)." *Id.*

3. *See generally* 18 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4416 (3d ed. 2020).

4. Robb Evans & Assocs., LLC v. United States, 850 F.3d 24, 31 (1st Cir. 2017); *see also Lucky Brand Dungarees*, slip op. at 6 ("[I]ssue preclusion (sometimes called collateral estoppel), . . . precludes a party from relitigating an issue actually decided in a prior case and necessary to the judgment."). Application of issue preclusion in criminal cases falls beyond the scope of this Note.

5. RICHARD D. FREER, CIVIL PROCEDURE 571 (3d ed. 2012).

6. *Id.* One scholar provides a useful example of how issue preclusion works and how it is not case-dispositive:

> [S]uppose in the car accident involving Petra and Don that Petra had a passenger Paul. If Petra sues Don, and Don is found at fault in causing the accident in Petra's lawsuit, then collateral estoppel will prevent Don from relitigating the issue of fault when Paul sues him, even though Paul's legal claim is different from Petra's. Paul will, of course, still have to prove causation for his own injuries as well as damages.

Procedurally, a litigant may raise issue preclusion in a motion for summary judgment, another pleading, or in some circumstances, in a motion to dismiss.[7]

Traditionally, issue preclusion only applied if the first lawsuit and the second lawsuit both involved the same parties (or their privies) as direct adversaries to prevent parties from relitigating the same issue against one another over and over again.[8] However, federal courts and the majority of states have disavowed this strict mutuality standard and now allow a new litigant—a stranger to the prior action—to assert issue preclusion in the second lawsuit against an adversary that was a party to the first lawsuit.[9] Under this modern

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Michael H. Hoffheimer, *Nonmutual Collateral Estoppel in Mississippi*, 88 MISS. L.J. 521, 529 (2020).

7. 18 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 132.05 (3d ed. 2020). Issue preclusion is typically treated as an affirmative defense for purposes of burden of proof—the party raising issue preclusion must prove it, typically, by introducing the record of prior judgment. *Id.* Regardless of the procedural vehicle, the movant should raise issue preclusion before trial. *Id.* Like other affirmative defenses, a party may inadvertently waive the right to assert issue preclusion if the party does not raise it at the trial court level. *Id.*

8. *Id.* § 51:261 (issue preclusion may be asserted "if the party asserting issue preclusion was a party or in privity with a party to the prior action, such that it would have been bound had the earlier litigation reached the opposite result"); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. L. INST. 1982) (stating that issue preclusion applies "where the second action is between the same persons who were parties to the prior action, and who were adversaries"). Privity refers to when two persons or entities are closely aligned with regard to the relevant matters such that a judgment against one binds the other. FREER, *supra* note 3, at 608. Privies are essentially regarded as the same party for the purposes of the litigation; allowing privies to an original litigant to assert issue preclusion does not violate strict mutuality. Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 950 (1988) ("With a mutuality requirement, issue preclusion applies only between parties, *or those in privity with parties*, to the initial lawsuit." (emphasis added)). A privity analysis implicates constitutional due process concerns of whether preclusion may be asserted against someone who was not technically a party to the first lawsuit. FREER, *supra* note 5, at 606–17. In contrast, a mutuality analysis involves asking "[*b*]*y* (not against) whom can [issue] preclusion be asserted," and that question does not raise due process issues. *Id.* at 617. The U.S. Supreme Court in *Taylor v. Sturgell* laid out the requirements for privity, also known as "nonparty preclusion" in this context, and listed six categories of privies. *See* 553 U.S. 880, 893–95 (2008). Georgia law is less clear on the privity issue and may analyze it on a case-by-case basis. *See* Brown & Williamson Tobacco Corp. v. Gault, 627 S.E.2d 549, 552 (Ga. 2006) ('"[T]here is no definition of "privity" which can be automatically applied to all cases involving the doctrines of res judicata and collateral estoppel,' . . . since 'privity depends upon the circumstances.' . . . 'Privity may . . . be established if the party to the first suit represented the interests of the party to the second suit.'" (quoting Satsky v. Paramount Commc'ns, 7 F.3d 1464, 1468–69 (10th Cir. 1993))); *see also* ALR Oglethorpe, LLC v. Henderson, 783 S.E.2d 187, 192 (Ga. Ct. App. 2016); Dalton Paving & Constr., Inc. v. S. Green Constr. of Ga., Inc., 643 S.E.2d 754, 756 (Ga. Ct. App. 2007); Bennett v. Cotton, 536 S.E.2d 802, 804 (Ga. Ct. App. 2000); Olson v. Harveston, 276 S.E.2d 54, 65 (Ga. Ct. App. 1981).

9. FREER, *supra* note 5, at 618–31.

trend, a new *defendant* can use issue preclusion against a party to the first lawsuit (nonmutual defensive issue preclusion), and in some jurisdictions, a new *plaintiff* can also use issue preclusion against a party to the first lawsuit (nonmutual offensive issue preclusion).[10] In all cases, parties can only use issue preclusion against someone who was a party to the first lawsuit because of due process concerns.[11] Thus, the key question in application of mutuality doctrines is "[b]y (not against) whom can [issue] preclusion be asserted?"[12] A court's analysis will depend on whether a defendant or a plaintiff asserts issue preclusion.[13]

Although most states have followed the modern trend towards abandoning strict mutuality and at least allowing nonmutual defensive issue preclusion, the Georgia Supreme Court has not addressed the issue.[14] Despite a clear plea following a thorough analysis by the Georgia Court of Appeals, the Georgia Supreme Court declined to consider whether Georgia should join the vast majority of states and allow nonmutual defensive issue preclusion.[15] In Georgia, "collateral estoppel requires the identity of the parties or their privies in both actions."[16] In other words, Georgia is part of a

10. *See, e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329 (1979); Blonder-Tongue Lab'ys, Inc. v. Univ. of Ill. Found., 402 U.S. 313, 320–23 (1971); Douris v. Schweiker, 229 F. Supp. 2d 391, 399 (E.D. Pa. 2002).

11. WRIGHT & MILLER, *supra* note 3, § 4464 ("[C]ourts have adopted a rule that nonmutual issue preclusion is permitted unless it would be unfair. This fairness limitation does not apply to nonparties who would have been bound by the prior judgment . . . ."); *see also, e.g.*, Allen v. McCurry, 449 U.S. 90, 95 (1980) ("But one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." (quoting Montana v. United States, 440 U.S. 147, 153 (1979))).

12. FREER, *supra* note 5, at 617 (emphasis omitted).

13. *Id.*

14. *See infra* Section II.C.

15. *See generally* Wickliffe v. Wickliffe Co. (*Wickliffe I*), 489 S.E.2d 153 (Ga. Ct. App. 1997), *cert. denied*, No. S97C1859, 1998 Ga. LEXIS 185 (Ga. Jan. 5, 1998).

16. Waldroup v. Greene Cnty. Hosp. Auth., 463 S.E.2d 5, 5–8 (Ga. 1995); *see also* Sure, Inc. v. Premier Petroleum, Inc., 807 S.E.2d 19, 25 (Ga. Ct. App. 2017) ("The doctrine of collateral estoppel, also known as issue preclusion, prevents the re-litigation of an issue actually litigated and adjudicated on the merits between the same parties or their privies." (quoting York v. RES-GA LJY, LLC, 799 S.E.2d 235, 241 (Ga. 2017))). Georgia courts tend to use the term "collateral estoppel" rather than "issue preclusion." *See, e.g.*, *Waldroup*, 463 S.E.2d at 6; Body of Christ Overcoming Church of God, Inc. v. Brinson, 696 S.E.2d 667, 668–69 (Ga. 2010). Georgia courts also often confuse and intertwine the use

slimming minority of jurisdictions that still require strict mutuality of parties or their privies for issue preclusion to bar or merge an issue in a second lawsuit.[17]

Determining the proper scope of mutuality is not merely an academic exercise.[18] Preclusion law also implicates economic concerns for both individuals and industry.[19] For instance, if multiple corporate defendants must each separately litigate the same issue of liability for the same plaintiff's alleged injury, then they will need to expend resources to cover these duplicative litigation costs.[20] In contrast, under a nonmutual defensive preclusion regime, if a jury finds the plaintiff caused her own injuries, then each subsequent defendant can rely on that judgment and preclude the causation issue from relitigation at the second trial—potentially saving the company-defendant thousands of dollars in expenses such as the costs of experts, depositions, and attorney's fees.[21] Given Georgia's

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of the terms "collateral estoppel" and "res judicata" and the distinct elements of each doctrine. *See, e.g.*, Waggaman v. Franklin Life Ins. Co., 458 S.E.2d 826, 827 (Ga. 1995) (applying an issue preclusion analysis but referring to it as "res judicata" throughout the opinion); *see also, e.g.*, ALR Oglethorpe, LLC v. Henderson, 783 S.E.2d 187, 191 (Ga. Ct. App. 2016) ("The law of res judicata and collateral estoppel is somewhat confusing, primarily due to our failure to clearly and consistently distinguish the two separate doctrines."). The U.S. Supreme Court defined the term res judicata as encompassing both claim and issue preclusion. Taylor v. Sturgell, 553 U.S. 880, 892 (2008) ("The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as 'res judicata.'"). However, most hornbooks, black letter law treatises, and law school civil procedure casebooks separate the concepts and list res judicata as synonymous with claim preclusion and collateral estoppel as synonymous with issue preclusion. *See, e.g.*, A. BENJAMIN SPENCER, CIVIL PROCEDURE: A CONTEMPORARY APPROACH 1017–56 (5th ed. 2018).

17. *See* 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, § 3(a) (1970).

18. *See generally* Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193 (1992); Peter H. Huang, *Lawsuit Abandonment Options in Possibly Frivolous Litigation Games*, 23 REV. LITIG. 47 (2004); Daniel Klerman, *The Economics of Civil Procedure*, 11 ANN. REV. L. & SOC. SCI. 353 (2015).

19. *See generally* Bone, *supra* note 18; Huang, *supra* note 18; Klerman, *supra* note 18.

20. *Costs in Civil Lawsuits*, LAWYERS.COM, https://www.lawyers.com/legal-info/research/court-costs-in-civil-lawsuits.html [https://perma.cc/F9GF-CV7C] (Apr. 9, 2015). Unlike other countries, courts in the United States generally follow the aptly named "American Rule." John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1569 (1993). Under this rule, each litigant must pay his own legal fees regardless of the outcome of litigation. *Id.* In contrast, the "English Rule" allows a successful plaintiff to shift the cost of his attorney's fees to the losing defendant. *Id.*

21. MOORE ET AL., *supra* note 7, § 132.01 ¶ 3 (recognizing that issue preclusion "relieves parties of the cost and vexation of multiple lawsuits, prevents inconsistent decisions, encourages reliance on

growing economy and current policy directives favoring business development, the economic reasons for abandoning mutuality are especially relevant to the state.[22] By furthering the policies of predictability, finality, repose, and efficiency, nonmutual defensive issue preclusion promotes economic growth while still protecting due process and an injured plaintiff's first "bite of the apple."[23]

This Note examines the implications of Georgia's continuing use of this strict mutuality standard in civil suits. Part I of the Note provides background into the history of common law issue preclusion and the trend towards nonmutual defensive and nonmutual offensive applications in federal courts and other states, as well as the current status of Georgia law. Part II provides a discussion of policy reasons in favor of and in opposition to changing the mutuality standard, further analysis of Georgia law compared with other jurisdictions, and an examination of prior attempts by practitioners to raise the matter to the Georgia Supreme Court. Part III discusses why Georgia should adopt a nonmutual defensive issue preclusion standard and the best practical avenues to achieve that goal.

I. BACKGROUND

In addition to some form of mutuality or limited nonmutuality, the black letter law elements of issue preclusion include: (1) both actions involved an identical issue; (2) the issue was actually litigated and decided in the first action; (3) the parties in the first action had a full

adjudication by minimizing the possibility of inconsistent decisions, and conserves judicial resources"); s*ee also Costs in Civil Lawsuits*, *supra* note 20 (noting that litigation expenses can include filing fees and witness fees).

22. *Pro-Business Environment*, GA. DEP'T OF ECON. DEV., https://www.georgia.org/competitive-advantages/pro-business-environment [https://perma.cc/PAU4-G3DA]. Georgia has been named the number one state for business by multiple publications. *Id.* Georgia's current policy incentives to attract new businesses include low taxes, tax credits, and investment in infrastructure. *Id.* Georgia aims to attract Fortune 500 companies to the state through "favorable business conditions." *Id.*

23. Bone, *supra* note 18, at 229 (listing "judicial economy, repose, and decisional consistency" as policy reasons for issue preclusion); *see also* Edward D. Cavanagh, *Offensive Non-Mutual Issue Preclusion Revisited*, 38 REV. LITIG. 281, 287–88 (2019) (defending nonmutual defensive issue preclusion because "a litigant is entitled to one bite—and only one bite—of the apple").

and fair opportunity to litigate the issue; and (4) the first action was adjudicated as a valid final judgment on the merits.[24] Because of due process concerns, issue preclusion can only ever be asserted *against* a party to the first action; the Constitution affords each party its day in court.[25] Thus, if a party did not have an opportunity to litigate the issue, preclusion doctrines do not apply.[26] Mutuality—the final element of issue preclusion and the subject of this Note—involves which parties may assert issue preclusion.[27]

The mutuality element of issue preclusion has three general variations: strict mutuality, nonmutual defensive, and nonmutual offensive.[28] Historically, courts applied the strict mutuality standard (sometimes itself called "mutuality"), which requires that issue preclusion only be asserted by a litigant who was a party to the first case.[29] Nonmutual preclusion refers to scenarios where the party asserting issue preclusion in the second case was not a party to the

24. WRIGHT & MILLER, *supra* note 3. In contrast, "claim preclusion prevents parties from raising issues that could have been raised and decided in a prior action—even if they were not actually litigated." Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc., No. 18-1086, slip op. at 6 (U.S. May 14, 2020).

25. *See* Martin v. Wilks, 490 U.S. 755, 762 (1989) (recognizing that issue preclusion rules should comply with the "deep-rooted historic tradition that everyone should have his own day in court" (quoting WRIGHT & MILLER, *supra* note 3, § 4449)); *see also* U.S. CONST. amend. XIV. Despite this apparent constitutional protection, some commentators suggest that courts should expand issue preclusion and allow litigants to assert it even against some nonparties in cases when "the nonparty sues about the same set of events, asserts the same legal theories, seeks the same remedies, or shares the same interests in the outcome of the litigation as the plaintiff to the first suit" or when "the nonparty and the original plaintiff retain the same attorney or . . . the nonparty testified at the original trial." Bone, *supra* note 18, at 196.

26. *See generally* Taylor v. Sturgell, 553 U.S. 880 (2008). The *Taylor* court also recognized exceptions to this rule—circumstances where issue preclusion could be used against someone who was not a party to the first lawsuit. *Id.* "In a class action, for example, a person not named as a party may be bound by a judgment on the merits of the action, if she was adequately represented by a party who actively participated in the litigation." *Id.* at 884. The major exception, in federal courts and state courts, is when a nonparty was in privity with a party to the first suit. See *infra* Section II.B, for further discussion of this privity exception and how it is distinct from the mutuality requirement.

27. Cavanagh, *supra* note 23, at 296–97.

28. *See* Erichson, *supra* note 8, at 965–68.

29. WRIGHT & MILLER, *supra* note 3, § 4464 ("The traditional mutuality rule denied the benefits of preclusion to any nonparty who would not have been subject to the burdens of preclusion, but with gradually expanding exceptions for vicarious liability relationships. This traditional rule has been abandoned as to issue preclusion by federal courts and a continually increasing majority of state courts."); *see also, e.g.*, Fisher v. Jones, 844 S.W.2d 954, 958 (Ark. 1993) ("[T]he requirement of mutuality has been abandoned by most jurisdictions for collateral estoppel.").

first case.[30] Nonmutual defensive means that the defendant in the second case asserts issue preclusion.[31] In contrast, nonmutual offensive refers to the second-case plaintiff asserting issue preclusion.[32] Although virtually all American courts permit strictly mutual assertions of issue preclusion, whether a nonmutual litigant may assert issue preclusion varies by jurisdiction.[33]

A. Federal Law

The U.S. Supreme Court disavowed the strict mutuality standard in favor of allowing nonmutual defensive preclusion in the 1971 seminal civil procedure case of *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*.[34] The Court reaffirmed the abandonment of strict mutuality in *Parklane Hosiery Co. v. Shore* and further extended the doctrine of issue preclusion to allow for nonmutual offensive issue preclusion in cases where its application meets certain fairness factors.[35] Thus, under current federal jurisprudence, assuming the other elements are met, a new defendant, and in some cases a new plaintiff, to the second lawsuit may use issue preclusion to bar an issue from being relitigated against a party in the first lawsuit.[36]

30. *See generally* Blonder-Tongue Lab'ys, Inc. v. Univ. of Ill. Found., 402 U.S. 313 (1971); Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

31. *See generally Blonder-Tongue*, 402 U.S. 313; *Parklane*, 439 U.S. 322.

32. *See generally* WRIGHT & MILLER, *supra* note 3, § 4464.

33. *Id.*

34. 402 U.S. 313.

35. 439 U.S. at 331–33. The fairness factors are: (1) whether the defendant had similar incentive to vigorously defend and litigate the first lawsuit, including whether the defendants could foresee subsequent lawsuits; (2) whether courts have resolved the issue differently, leading to inconsistent prior judgments; and (3) whether there are different or new procedures in the second suit that could cause a different result. *Id.* The Court concluded that the *Parklane* plaintiffs could use estoppel offensively because, in light of the seriousness of the allegations, the defendants had similar incentive to litigate the first action, no other courts had ruled inconsistently with the resolution of the issue in the first action, and defendants could not use any new procedures in the second action. *Id.*

36. *See, e.g., id.*; *Blonder-Tongue*, 402 U.S. 313.

1. The Evolution of Federal Law

Before 1971, controlling federal court precedent generally required strict mutuality.[37] However, lower courts increasingly found ways to distinguish precedent and allow nonmutual defensive preclusion.[38] The U.S. Court of Appeals for the Third Circuit first affirmed defensive preclusion in 1950 when it held that a ship worker suing the United States for personal injuries under a negligence theory could not proceed to trial because the ship company and its crew were found not to be negligent for the same injuries in the worker's prior lawsuit.[39] Although the court arguably limited its holding to cases where respondeat superior would apply—the plaintiff was now asserting that the United States, not the ship company, was the principal—the majority opinion noted that "the countervailing consideration" was "lack of mutuality of estoppel."[40] The court noted

37. *See* RESTATEMENT (FIRST) OF JUDGMENTS § 93 illus. 10 (AM. L. INST. 1942) ("A brings an action against B for infringement of a patent. B defends on the ground that the alleged patent was void and obtains judgment. A brings an action for infringement of the same patent against C who seeks to interpose the judgment in favor of B as res judicata, but set[s] up no relation with B. On demurrer, judgment should be for A."); *see also* Triplett v. Lowell, 297 U.S. 638, 642 (1936). *See generally* Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111 (1912) (recognizing "a principle of general elementary law that the estoppel of a judgment must be mutual").

38. *See, e.g.*, Fletcher v. Evening Star Newspaper Co., 114 F.2d 582, 583 (D.C. Cir. 1940) ("Our previous decisions are not technically res judicata as between appellant and appellee, since the latter was not a party to any of the prior proceedings. But those determinations are conclusive against appellant, unless we are now to repudiate what we have done repeatedly and consistently whenever the issues involved in them have been raised."). Although the court in *Fletcher* used the oft-confused terminology of res judicata instead of collateral estoppel or issue preclusion, the court used a disbarment ruling, to which the defendant newspaper was not a party, to bar relitigation of whether the plaintiff was actually disbarred for purposes of his libel claim. *Id.*; *see also* Smith v. Hood, 396 F.2d 692, 693 (D.C. Cir. 1968). Although the court in *Smith* ultimately upheld the mutuality requirement as applied to the facts before it, it noted that "the doctrine of collateral estoppel may be in flux, with a trend towards barring relitigation of an issue by a one-time loser." *Id.* Courts also recognized an exception to the mutuality rule when the first lawsuit was a class action and the litigant asserting issue preclusion in the second action was not a party to the class action but was a member of the class. *Id.*

39. *See generally* Bruszewski v. United States, 181 F.2d 419 (3d Cir. 1950). Although the court in *Bruszewski* used the term "res judicata" throughout the opinion, the opinion made clear that the primary dispute involved whether the issue of negligence had already been decided. *Id.* In this case, the issue of negligence was case-dispositive, so issue preclusion and claim preclusion would have led to the same result. *Id.* Furthermore, the court consistently referred to "mutuality of estoppel" as its primary consideration. *Id.*

40. *Id.* at 421 ("The countervailing consideration urged here is lack of mutuality of estoppel."). The court could have reached the same conclusion under a privity analysis by finding that the United States and the ship company in the first lawsuit were in privity and there was mutuality, but the court

"the achievement of substantial justice rather than symmetry is the measure of the fairness" in preclusion cases, and that its holding supported "both orderliness and reasonable time saving in judicial administration."[41]

The *Blonder-Tongue* Court in 1971 seemed particularly persuaded by similar policy considerations in deciding whether a plaintiff could bring successive lawsuits for the same alleged wrong.[42] The Court noted the increasingly crowded dockets and the need for judicial efficiency.[43] Litigants should have incentives to assert and defend all of their claims at the first opportunity to avoid "the aura of the gaming table" that occurs when plaintiffs have numerous defendants against whom they could test different strategies and hope for more favorable outcomes.[44] The Court also considered the external consequences of requiring strict mutuality and found changing the rule would make economic sense.[45] A nonmutual defensive standard lowers overall litigation costs, presumably resulting in defendants

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commented that the two defendants may have been "beyond any definable categories of privity." *Id.* The concurring opinion would have explicitly narrowed the holding to apply only when the defendants in the first case and the second case were "sufficiently close." *Id.* at 423 (Goodrich, J., concurring).

41. *Id.* at 421. In a preview of the later U.S. Supreme Court decisions, the *Bruszewski* court emphasized that its decision did not result in any unfairness to the plaintiff. *Id.* The court dismissed arguments that allowing a lack of mutuality would make the law "asymmetrical." *Id.*

42. Blonder-Tongue Lab'ys, Inc. v. Univ. of Ill. Found., 402 U.S. 313, 328 (1971).

43. *Id.* The Court noted:

> [Other cases and authorities] connect erosion of the mutuality requirement to the goal of limiting relitigation of issues where that can be achieved without compromising fairness in particular cases. The courts have often discarded the rule while commenting on crowded dockets and long delays preceding trial. Authorities differ on whether the public interest in efficient judicial administration is a sufficient ground in and of itself for abandoning mutuality, but it is clear that more than crowded dockets is involved. . . . To the extent the defendant in the second suit may not win by asserting, without contradiction, that the plaintiff had fully and fairly, but unsuccessfully, litigated the same claim in the prior suit, the defendant's time and money are diverted from alternative uses—productive or otherwise—to relitigation of a decided issue.

Id.

44. *Id.* at 329 ("Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or [problems with the lower courts].").

45. *Id.* at 346–47. Again, the Court's analysis focused on the economic consequences of strict mutuality of patent cases. *Id.* However, the reasons the Court discussed in support of its conclusion—namely, the potential added costs to litigants to defend the same issues multiple times—can be extrapolated to apply to all lawsuits. *See infra* Part II.

allocating resources to other investments or projects instead.[46] The Court balanced those considerations with the traditionally understood arguments in favor of mutuality: fairness to litigants and due process.[47] The Court ultimately overruled precedent and held that civil defendants may assert issue preclusion without the mutuality requirement—with the important caveat and "safeguard" that the party against whom issue preclusion is asserted "had a full and fair opportunity to litigate."[48]

Because the underlying lawsuit in *Blonder-Tongue* involved patents, the Court primarily analyzed the policy considerations in the context of patent suits, but the same broad arguments apply to any assertion of nonmutual issue preclusion.[49] In fact, although the expressed holding from *Blonder-Tongue* arguably only applied to patent infringement cases, federal courts generally applied the rule broadly and allowed nonmutual defensive issue preclusion in non-patent-related lawsuits as well.[50] Lower courts cited *Blonder-Tongue* as a green light from the U.S. Supreme Court to abandon the mutuality doctrine altogether; its application was not limited to patent cases.[51] Within the federal court system, the Third

46. *Blonder-Tongue*, 402 U.S. at 329 ("To the extent the defendant in the second suit may not win by asserting [issue preclusion], the defendant's time and money are diverted from alternative uses—productive or otherwise—to relitigation of a decided issue.").

47. *Id.* at 328.

48. *Id.* at 329 ("[T]he requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard."); *id.* at 349–50 ("Thus, we conclude that [precedent] should be overruled to the extent it forecloses a plea of estoppel by one facing a charge of infringement of a patent that has once been declared invalid.").

49. *Id.* at 328.

50. *Id.* at 349–50; *see also, e.g.*, Cardillo v. Zyla, 486 F.2d 473, 475 (1st Cir. 1973) ("Mutuality of estoppel, once a requirement before there could be a preclusion of an issue by judgment, is no longer normally required." (citing *Blonder-Tongue*, 402 U.S. 313)); Clark v. Watchie, 513 F.2d 994, 997 (9th Cir. 1975) ("Under traditional collateral estoppel theory, the doctrine of mutuality of estoppel required that the party asserting the defense must have been a party to the earlier litigation. In [*Blonder-Tongue*], the Supreme Court criticized and rejected the doctrine of mutuality of estoppel. Thus, [the defendants] may assert the defense."). *But see* Katz v. Carte Blanche Corp., 496 F.2d 747, 771 (3d Cir. 1974) ("[I]t is at least questionable that the *Blonder-Tongue* case mandates a re-tailoring of estoppel law in non-patent cases . . . ."). The Court resolved this circuit split only a few years later in *Parklane*. *See generally* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

51. *See, e.g.*, Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840, 844 (3d Cir. 1974) (allowing a nonmutual defensive issue preclusion defense in a contract and Sherman Act case).

Circuit continued leading this evolution of law and acknowledged the "virtual obliteration of the mutuality doctrine in [the] Circuit" only three years after *Blonder-Tongue*.[52] The U.S. Supreme Court revisited the issue eight years later in *Parklane* and agreed with lower courts' interpretation of *Blonder-Tongue*—that the decision "strongly suggested" abandonment of mutuality in all civil litigation, not only patent cases.[53]

The *Parklane* Court confirmed that mutuality is no longer a requirement of issue preclusion in federal common law.[54] The Court then discussed the different considerations between allowing defensive preclusion and allowing offensive preclusion.[55] Under federal law, nonmutual defensive issue preclusion is now allowed as the default rule, whereas a plaintiff may only assert issue preclusion offensively in certain cases.[56] The Court explained the limitation on a plaintiff's assertion of nonmutual preclusion: "in cases where a plaintiff could easily have joined in the earlier action or where . . . the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel."[57] Offensive issue preclusion is unfair to the defendant and thus impermissible when, for example, the defendant had less incentive to defend itself in the first lawsuit, there are inconsistent prior decisions on the issue, or the second lawsuit allows the defendant more favorable procedures than the first lawsuit.[58]

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52. *Id.*

53. *Parklane*, 439 U.S. at 327–28 ("[T]he Court in *Blonder-Tongue* . . . abandoned the mutuality requirement, at least in cases where a patentee seeks to relitigate the validity of a patent after a federal court in a previous lawsuit has already declared it invalid. The 'broader question' before the Court, however, was 'whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue.' The Court strongly suggested a negative answer to that question." (quoting *Blonder-Tongue*, 402 U.S. at 328) (citation omitted)). In a later case, the Court limited nonmutual issue preclusion in litigation against the government. *See* United States v. Mendoza, 464 U.S. 154, 157–61 (1984).

54. *See generally Parklane*, 439 U.S. 322.

55. *Id.* at 329–32.

56. *Id.*

57. *Id.* at 331.

58. *Id.* at 330–31. The *Parklane* Court explained:

> If a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously, particularly if future suits are not foreseeable.

Not all *Parklane* Justices supported this further erosion of the mutuality requirement.[59] In his dissent, Justice Rehnquist discussed the Seventh Amendment implications of allowing offensive issue preclusion.[60] Rehnquist argued that if a plaintiff can preclude an issue using this procedural doctrine when the first case was a bench trial, then the defendant unconstitutionally loses his right to present that issue to a jury in the new lawsuit.[61] Rehnquist also opined that, regardless of the constitutionality, depriving defendants of a jury trial is always unfair.[62] Partially due to these concerns, many states have not permitted offensive use of issue preclusion at all.[63]

> Allowing offensive collateral estoppel may also be unfair to a defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant. Still another situation where it might be unfair to apply offensive estoppel is where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result.

Id. (citations omitted). In more recent cases, the Court clarified that procedural opportunities are unfair to the defendant—and should therefore preclude a claimant's offensive assertion of issue preclusion—only when the procedures in the first case were unfair to the defendant; fair but simply "different" procedures in the first lawsuit would not necessarily weigh this factor unfavorably towards defendants. B & B Hardware, Inc. v. Hargis Indus., 575 U.S. 138, 158 (2015) ("Rather than focusing on whether procedural differences exist—they often will—the correct inquiry is whether the procedures used in the first proceeding were fundamentally poor, cursory, or unfair."); *see also* Montana v. United States, 440 U.S. 147, 163–64 (1979) (holding the defendant was precluded from relitigating issues previously decided in a state court because the defendant did not allege "unfairness or inadequacy in the state procedures"). Using that reasoning, the Court in *B & B Hardware* held that issue preclusion may still be asserted when an administrative board decided the issue without allowing live witness testimony. 135 U.S. at 158 ("No one disputes that the TTAB and district courts use different procedures. Most notably, district courts feature live witnesses. Procedural differences, by themselves, however, do not defeat issue preclusion. Equity courts used different procedures than did law courts, but that did not bar issue preclusion."). Similarly, the *Parklane* defendants were bound by the factual findings of a regulatory agency, which did not allow jury trials. *Parklane*, 439 U.S. at 330–39.

59. *See generally Parklane*, 439 U.S. 322.

60. *Id.* at 337–56 (Rehnquist, J., dissenting).

61. *Id.* The Seventh Amendment states, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

62. *Parklane*, 439 U.S. at 351 (Rehnquist, J., dissenting) ("In my view, it is 'unfair' to apply offensive collateral estoppel where the party who is sought to be estopped has not had an opportunity to have the facts of his case determined by a jury.").

63. FREER, *supra* note 5, at 628–29 ("[A]pparently most states have not embraced nonmutual offensive issue preclusion."); *see also, e.g.*, Penn v. Iowa State Bd. of Regents, 577 N.W.2d 393, 399 (Iowa 1998) ("Issue preclusion does not require mutuality of parties if it is being invoked defensively against a party so connected to the former action as to be bound by that resolution."); Trinity Indus., Inc.

2. Choice of Law in Federal Courts

The aforementioned decisions only apply to cases decided under federal preclusion law.[64] When a litigant asserts issue preclusion, the court deciding the second case—either a state court or a federal court—must generally apply the preclusion law of the jurisdiction that decided the first case.[65] When the first case was decided in a federal court under federal question jurisdiction, then federal preclusion law applies.[66] When a federal court sitting in diversity

v. McKinnon Bridge Co., 77 S.W.3d 159, 185 (Tenn. Ct. App. 2001) ("In Tennessee the offensive use of collateral estoppel requires that the parties be identical in both actions. Without saying so specifically, however, Tennessee has not required party mutuality in applying defensive collateral estoppel." (citations omitted)), *abrogated by* Bowen *ex rel.* Doe v. Arnold, 502 S.W.3d 102 (Tenn. 2016).

64. FREER, *supra* note 5, at 639–51; *see also* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508–09 (2001) (noting that each state can develop its own preclusion law). Federal preclusion law—as outlined in *Blonder-Tongue* and *Parklane*, among other cases—is binding authority in federal courts when both the first and second lawsuits were in federal court on federal question jurisdiction. FREER, *supra* note 5, at 651; *see also* Heiser v. Woodruff, 327 U.S. 726, 733 (1946) ("It has been held in non-diversity cases, since *Erie v. Tompkins*, that the federal courts will apply their own rule of res judicata." (citations omitted)); Zdanok v. Glidden Co., Durkee Famous Foods Div., 327 F.2d 944, 956 (2d Cir. 1964) ("Since [both actions] present questions of federal law, we are free to follow our own conceptions as to the effect of the judgment in the former on the latter . . . ." (citations omitted)); Maher v. GSI Lumonics, Inc., 433 F.3d 123, 126 (1st Cir. 2005) ("[B]ecause the judgment in [the previous case] was rendered by a federal court exercising federal question jurisdiction, the applicability of res judicata is a matter of federal law." (citation omitted)). Similarly, state courts should apply federal preclusion law when the first action was in federal court under federal question jurisdiction. FREER, *supra* note 5, at 648. However, not all state courts consistently apply this rule. Erichson, *supra* note 8, at 1008 ("Of the 286 federal-state preclusion cases examined, the state court relied solely on its own state preclusion law in 169 cases (59%). The state court relied on federal preclusion law in [sixty-two] cases (22%). In an additional [thirty-six] cases (13%), the court appeared to rely on both its own and federal preclusion law.").

65. FREER, *supra* note 5, at 639–51. Issue preclusion can apply across jurisdictions and judicial systems. *See generally* Erichson, *supra* note 8. When the first lawsuit and the second lawsuit are in state courts of different states, the Full Faith and Credit Clause of the Constitution and the related federal statute support the rule that the court in the second suit must adhere to the preclusion law of the state that decided the first suit. U.S. CONST. art. IV; 28 U.S.C. § 1738; FREER, *supra* note 5, at 639–41. However, scholars disagree on the extent of the application of the other state's preclusion law in certain circumstances, including regarding whether mutuality is a core component of a state's preclusion law or rather a "minute detail" that should not apply in state-to-state preclusion. FREER, *supra* note 5, at 639–41. When a state court decides the first lawsuit and a federal court hears the second suit, that federal court generally should apply the state preclusion law of the first-lawsuit state. Allen v. McCurry, 449 U.S. 90, 96 (1980) ("Congress has specifically required all federal courts to give preclusive effect to state court judgments whenever the courts of the State from which the judgments emerged would do so . . . ." (citation omitted)).

66. Allan D. Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, 66 MICH. L. REV. 1723, 1739, 1745 (1968).

jurisdiction decided the first case, the court in the second case should follow the law of the state where that federal diversity court sits in accordance with choice of law doctrines.[67] The significance of this distinction emerges when examining the differing mutuality requirements between the states.[68]

B. Other States

The majority of states have mirrored federal courts and abandoned strict mutuality as a necessary element of issue preclusion.[69] In fact, some states began to question the mutuality dogma decades before the U.S. Supreme Court examined the issue.[70]

The modern trend towards allowing nonmutual preclusion arguably began with the influential 1942 California case *Bernhard v.*

67. *Semtek Int'l*, 531 U.S. at 508–09; *see also* Vestal, *supra* note 66, at 1739, 1745. Some earlier decisions left ambiguity about which forum's preclusion law applies and suggested the need for a case-by-case *Erie* Doctrine analysis. *See* Lynne Carol Fashions, Inc. v. Cranston Print Works Co., 453 F.2d 1177, 1181 (3d Cir. 1972) ("The question whether the federal court shall apply the state law of collateral estoppel is a close one, because of the tension between the 'outcome-determinative' test of *Guaranty Trust* and the relation to the state-created rights test of *Byrd*. Therefore, prudence indicates that the further analysis suggested by *Byrd* should also be explored."). The rule from *Semtek* clarified that a federal court judgment's preclusive effect should be analyzed under federal common law jurisprudence, but that the federal common law mandates use of state law when the federal court sat in diversity jurisdiction. *See generally Semtek Int'l*, 531 U.S. 497.

68. *See* Erichson, *supra* note 8, at 965–69. Issue preclusion generally applies even when another jurisdiction adjudicated the first lawsuit. *Id.* Further analysis of choice of law and issue preclusion between different states and court systems is beyond the scope of this Note. Importantly, however, "the most important [jurisdictional] split in preclusion law concerns mutuality." *Id.*

69. *See* Schopler, *supra* note 17, § 4(a); RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. L. INST. 1982).

70. *See, e.g.*, Atkinson v. White, 60 Me. 396, 401 (1872); Good Health Dairy Prods. Corp. v. Emery, 9 N.E.2d 758, 759 (N.Y. 1937). The early state cases were not necessarily suggesting the abandonment of the mutuality requirement per se; rather, courts carved out exceptions to mutuality. *See Good Health Dairy Prods.*, 9 N.E.2d at 759 ("An apparent exception to this rule of mutuality has been held to exist where the liability of the defendant is altogether dependent upon the culpability of one exonerated in a prior suit upon the same facts, when sued by the same plaintiff." (quoting Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 127–28 (1912))); Coca-Cola Co. v. Pepsi-Cola Co., 172 A. 260, 263 (Del. Super. Ct. 1934) (allowing a broad public policy exception to mutuality). Notably, the exception based on vicarious liability and indemnification was widely accepted. *See, e.g.*, Featherson v. Newburgh & C. Tpk. Co., 24 N.Y.S. 603, 605 (N.Y. Gen. Term 1893) ("The relation between [the defendant in the first case] and the [current] defendant was analogous to that of principal and agent, or principal and surety, or master and servant; and the rule in such cases is that a judgment in favor of the principal or the surety, upon a ground equally applicable to both, should be accepted as conclusive against the plaintiff's right of action." (citations omitted)).

Bank of America National Trust & Savings Ass'n.[71] In *Bernhard*, the California Supreme Court noted that many courts already applied broad exceptions to mutuality such as expanding the scope of privity and allowing nonmutual preclusion in cases of derivative liability or indemnity.[72] After a thorough survey of scholarly materials and prior cases, the *Bernhard* court found "no compelling reason" and "[n]o satisfactory rationalization" for the maintenance of the traditional mutuality requirement.[73] Instead, the court held that the rationale for permitting nonmutual defensive preclusion applies whether or not the defendants share a master–servant or agent–principal relationship: "It would be unjust to permit one who has had his day in court to reopen identical issues merely by switching adversaries."[74] Justice Traynor, writing for the California Supreme Court in a unanimous opinion, concluded that once a plaintiff has had a chance to litigate an issue, then that plaintiff should be bound by the resulting judgment,

71. 122 P.2d 892, 894–95 (Cal. 1942); *see also* Michael J. Waggoner, *Fifty Years of* Bernard v. Bank of America *Is Enough: Collateral Estoppel Should Require Mutuality but Res Judicata Should Not*, 12 REV. LITIG. 391, 392 (1993) ("The law of who may invoke collateral estoppel . . . has developed . . . for fifty years, starting with *Bernhard v. Bank of America*."). *See generally* Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine*, 9 STAN. L. REV. 281 (1957). This case has been so influential to the development of the law on this matter that the abandonment of mutuality is often referred to as the "*Bernhard* doctrine." *See, e.g.*, Steven P. Nonkes, *Reducing the Unfair Effects of Nonmutual Issue Preclusion Through Damages Limits*, 94 CORNELL L. REV. 1459, 1459 (2009). The U.S. Supreme Court cited *Bernhard* as persuasive authority in its landmark *Blonder-Tongue* case. Blonder-Tongue Lab'ys, Inc. v. Univ. of Ill. Found., 402 U.S. 313, 324 (1971).

72. *Bernhard*, 122 P.2d at 894–95. The court gave examples of derivative liability: "master and servant, principal and agent, and indemnitor and indemnitee." *Id.* at 895. In those types of tort cases, if a court found that either the master or the servant (or the principal or agent, employer or employee, etc.) did not negligently cause the plaintiff's injuries, then the plaintiff cannot relitigate the negligence issue by bringing a new suit against whichever party (either master or servant) that the plaintiff chose not to initially name in the first suit for the same alleged injuries. *Id.*

73. *Id.* at 892–95. The *Bernhard* case involved the estate of Clara Sather. *Id.* at 893. Before her death, Sather allowed Charles Cook to withdraw money from her bank account. *Id.* After her death, Cook and Sather's heirs disputed the status of the funds transferred to Cook. *Id.* The probate court held—over Sather's heirs' objections—that Cook received the funds as a gift; thus, a proper accounting of the estate should not include those funds. *Id.* Helen Bernhard, Sather's daughter, then filed a separate suit against the bank for transferring the funds to Cook. *Id.* The bank asserted a preclusion defense, citing the probate court's prior ruling regarding the funds. *Id.* at 893–94. Despite not being a party to the probate court case (i.e., despite a lack of mutuality), the bank won the case. *Id.* at 894.

74. *Id.* at 895 ("The cases justify this [derivative liability] exception on the ground that it would be unjust to permit one who has had his day in court to reopen identical issues by merely switching adversaries.").

regardless of any derivative liability or privity between defendants.[75] Courts throughout the country continue to cite this case as persuasive authority for the proposition of permitting nonmutual defensive issue preclusion.[76]

A majority of states now follow the *Bernhard* doctrine and the rule from *Blonder-Tongue* and allow nonmutual defensive issue preclusion.[77] A significant plurality of states allow both nonmutual defensive and nonmutual offensive issue preclusion in at least some circumstances.[78] Only a very few states have declined to change the

75. *Id.*

76. *See, e.g.*, Foster v. Plock, 394 P.3d 1119, 1123–24 (Colo. 2017) (recognizing that the "oft-cited" *Bernhard* case "has been universally understood and applied" as a case abandoning the mutuality requirement of issue preclusion). The Colorado Supreme Court in *Foster* also recognized a trend in early issue preclusion cases where courts used the term "res judicata" to mean both claim and issue preclusion, leading to confusion in how to correctly apply precedent. *Id.* In modern terminology, res judicata refers to claim preclusion, a similar but distinct doctrine from issue preclusion. *Id.* The court failed to find any jurisdiction that eliminated the mutuality requirement for claim preclusion. *Id.* at 1124–25.

77. *See, e.g.*, Chambers v. Ohio Dep't of Hum. Servs., 145 F.3d 793, 801 n.14 (6th Cir. 1998) ("In Ohio, the general rule is that mutuality of parties is a prerequisite to the offensive use of issue preclusion." (citing Goodson v. McDonough Power Equip., Inc., 443 N.E.2d 978 (Ohio 1983))); Doe v. Doe, 52 P.3d 255, 264–65 (Haw. 2002); Penn v. Iowa State Bd. of Regents, 577 N.W.2d 393, 399 (Iowa 1998) ("[I]ssue preclusion does not require mutuality of parties if it is being invoked defensively against a party so connected to the former action as to be bound by that resolution." (citing Brown v. Kassouf, 558 N.W.2d 161, 163 (Iowa 1997))); Rourke v. Amchem Prods., Inc., 863 A.2d 926, 938 (Md. 2004) ("[W]e have yet to formally embrace offensive non-mutual collateral estoppel."); Monat v. State Farm Ins. Co., 677 N.W.2d 843, 852 (Mich. 2004); McInnis & Assocs., Inc. v. Hall, 349 S.E.2d 552, 560 (N.C. 1986); Trinity Indus., Inc. v. McKinnon Bridge Co., 77 S.W.3d 159, 185 (Tenn. Ct. App. 2001) ("In Tennessee the offensive use of collateral estoppel requires that the parties be identical in both actions. Without saying so specifically, however, Tennessee has not required party mutuality in applying defensive collateral estoppel." (citations omitted)), *abrogated by* Bowen *ex rel.* Doe v. Arnold, 502 S.W.3d 102 (Tenn. 2016).

78. *See, e.g.*, Wetzel v. Ariz. State Real Est. Dep't, 727 P.2d 825, 828 (Ariz. Ct. App. 1986); Johnson v. Union Pac. R.R., 104 S.W.3d 745, 751 (Ark. 2003); Bassett v. State Bd. of Dental Exam'rs, 727 P.2d 864, 866 (Colo. App. 1986); Aetna Cas. & Sur. Co. v. Jones, 596 A.2d 414, 422–23 (Conn. 1991) ("[M]utuality of parties is no longer required to invoke collateral estoppel."); Messick v. Star Enter., 655 A.2d 1209, 1210 (Del. 1995); Mastrangelo v. Sandstrom, Inc., 55 P.3d 298, 303 (Idaho 2002); Herzog v. Lexington Twp., 657 N.E.2d 926, 930 (Ill. 1995); Tofany v. NBS Imaging Sys., Inc., 616 N.E.2d 1034, 1037–38 (Ind. 1993); Hossler v. Barry, 403 A.2d 762, 766 (Me. 1979) ("[T]he doctrine of mutuality of estoppel should no longer govern the application of collateral estoppel in the courts of this State."); Falgren v. State Bd. of Teaching, 545 N.W.2d 901, 907 (Minn. 1996); *In re* Caranchini, 956 S.W.2d 910, 914 (Mo. 1997); Cover v. Platte Valley Pub. Power & Irrigation Dist., 75 N.W.2d 661, 668 (Neb. 1956); Cutter v. Town of Durham, 411 A.2d 1120, 1121 (N.H. 1980); Silva v. State, 745 P.2d 380, 384 (N.M. 1987) ("[T]he doctrine of offensive collateral estoppel may be applied when a plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully regardless of whether plaintiff was privy to the prior action."); Koch v. Consol.

strict mutuality rule.[79] Alabama, Alaska, Florida, Georgia, North Dakota, and Virginia follow the strict mutuality standard.[80]

C. Georgia Law

Georgia courts usually do not use the term mutuality but instead use the synonymous phrase "identity of parties or their privies."[81]

Edison Co. of N.Y., 468 N.E.2d 1, 6 (N.Y. 1984); *In re* Est. of Ellis, 333 A.2d 728, 730–31 (Pa. 1975); Doe v. Doe, 551 S.E.2d 257, 259 (S.C. 2001); Scott v. City of Newport, 857 A.2d 317, 321 (Vt. 2004) ("[W]e have abandoned the doctrine of mutuality . . . ." (citations omitted)); Sumpter *ex rel.* Michelle T. v. Crozier, 495 N.W.2d 327, 335 (Wis. 1993); Tex. W. Oil & Gas Corp. v. First Interstate Bank of Casper, 743 P.2d 857, 864–65 (Wyo. 1987).

79. *See, e.g.*, Jones v. Blanton, 644 So. 2d 882, 886 (Ala. 1994) ("Although many courts, including the Federal courts, have dispensed with the mutuality requirement, it remains the law in Alabama."); Stogniew v. McQueen, 656 So. 2d 917, 919–20 (Fla. 1995) ("[W]e are unwilling to follow the lead of certain other states and of the federal courts in abandoning the requirements of mutuality in the application of collateral estoppel."); Hofsommer v. Hofsommer Excavating, Inc., 488 N.W.2d 380, 384 (N.D. 1992) ("For purposes of both res judicata and collateral estoppel in this state, only parties or their privies may take advantage of or be bound by the former judgment."); Scales v. Lewis, 541 S.E.2d 899, 901 (Va. 2001) ("[T]here also must be 'mutuality,' i.e., a litigant cannot invoke collateral estoppel unless he would have been bound had the litigation of the issue in the prior action reached the opposite result." (quoting Angstadt v. Atl. Mut. Ins. Co., 457 S.E.2d 86, 87 (Va. 1995))).

80. Erichson, *supra* note 8, at 966 ("A number of states cling to the traditional mutuality requirement. Alabama, Florida, Georgia, Kansas, Mississippi, North Dakota, and Virginia require mutuality." (footnotes omitted)); *see also* Cook Inlet Keeper v. State, 46 P.3d 957, 966 (Alaska 2002) (requiring mutuality for issue preclusion in Alaska). Although most sources cite Mississippi as among the states requiring strict mutuality, the matter may actually be unsettled. *See* Hoffheimer, *supra* note 6, at 524 ("Although some legal sources have claimed that Mississippi still requires mutuality, the Mississippi Supreme Court has expressly rejected mutuality as a precondition for collateral estoppel. At the same time, the Mississippi court's opinions are not entirely consistent in explaining whether nonmutual preclusion is encouraged or disfavored."). The Virginia Supreme Court acknowledged the modern trend but declined to adopt it and instead reaffirmed strict mutuality in 1987. Selected Risks Ins. Co. v. Dean, 355 S.E.2d 579, 581 (Va. 1987) ("We perceive no error, flagrant or otherwise, or mistake committed by the Court in 1980 in [*Norfolk & W. Ry. Co. v. Bailey Lumber Co.*, 272 S.E.2d 217 (Va. 1980)] when we declined to follow a 'trend' and abrogate the requirement of mutuality. Thus, we will follow our established precedent."). Similarly, the Florida Supreme Court was not convinced by the judicial efficiency and economic arguments in favor of abandoning the mutuality requirement. *Stogniew*, 656 So. 2d at 919–20 ("Further, we are unwilling to follow the lead of certain other states and of the federal courts in abandoning the requirements of mutuality in the application of collateral estoppel. . . . We are not convinced that any judicial economies which might be achieved by eliminating mutuality would be sufficient to affect our concerns over fairness for the litigants. We also note that many other courts continue to adhere to the doctrine of mutuality.").

81. *See, e.g.*, Nally v. Bartow Cnty. Grand Jurors, 633 S.E.2d 337, 339 (Ga. 2006) ("Collateral estoppel, like res judicata, requires identity of parties or privity."); Daniel v. Daniel, 596 S.E.2d 608, 611 (Ga. 2004) ("The collateral estoppel doctrine precludes the re-litigation of an issue previously adjudicated on the merits in an action between the same parties or their privies."); *see also* Schopler, *supra* note 17 ("The mutuality requirement is closely related to, and for all practical purposes about coextensive with, the requirement of identity of parties or privity. It has been said that the requirement

Current Georgia law requires "identity of parties or their privies" in the first and the second lawsuits for a party to use issue preclusion.[82] The remaining elements of issue preclusion in Georgia largely mirror federal courts and black letter law.[83] Issue preclusion in Georgia requires all of the following elements: (1) identity of issues, (2) actual litigation of the issue in the first action, (3) necessity of the issue to the outcome of the first action, and (4) the result of a final judgment on the merits by a court of competent jurisdiction in the first action.[84] Notably, however, Georgia courts often apply issue preclusion law inconsistently and confuse the proper elements.[85]

Although issue preclusion remains a common law doctrine, the legislature arguably codified some of its elements in a state statute providing that a judgment on an issue by a competent court binds the

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of identity of parties is commonly known as the requirement of mutuality."). Some scholars "have also recognized that at least theoretically, there is some difference between [identity of parties and mutuality], and that to the extent that they are divergent, the requirement of mutuality is broader." Schopler, *supra* note 17. However, for the purposes of this Note, the identity of parties element will be treated as the same as the strict mutuality requirement because the practical and policy considerations are identical, and Georgia courts have not distinguished the terms. *See infra* Section II.C.

82. Waldroup v. Greene Cnty. Hosp. Auth., 463 S.E.2d 5, 7 (Ga. 1995) ("Collateral estoppel precludes the re-adjudication of an issue that has previously been litigated and adjudicated on the merits in another action between the same parties or their privies."); Minnifield v. Wells Fargo Bank, N.A., 771 S.E.2d 188, 192 (Ga. Ct. App. 2015) ("In Georgia, mutual identity of parties is required for collateral estoppel, which means that there must be an identity of parties or their privies in both actions." (citations omitted)); Adams v. Adams, 738 F.3d 861, 865 (7th Cir. 2013) ("Under Georgia law, the doctrine of issue preclusion, also known as collateral estoppel, 'precludes the re-adjudication of an issue that has previously been litigated and adjudicated on the merits in another action between the same parties or their privies.'" (quoting Shields v. BellSouth Advert. & Publ'g Corp., 545 S.E.2d 898, 900 (Ga. 2001))); Karan, Inc. v. Auto-Owners Ins. Co., 629 S.E.2d 260, 262 (Ga. 2006) ("The related doctrine of collateral estoppel 'precludes the re-adjudication of an issue that has previously been litigated and adjudicated on the merits in another action between the same parties or their privies.'" (quoting *Waldroup*, 463 S.E.2d at 7)).

83. Cmty. State Bank v. Strong, 651 F.3d 1241, 1264 (11th Cir. 2011). The U.S. Court of Appeals for the Eleventh Circuit distilled the elements of issue preclusion in Georgia: "A party seeking to assert collateral estoppel under Georgia law must demonstrate that (1) an identical issue, (2) between identical parties, (3) was actually litigated and (4) necessarily decided, (5) on the merits, (6) in a final judgment, (7) by a court of competent jurisdiction." *Id.*

84. *Id.*

85. Morrison v. Morrison, 663 S.E.2d 714, 718 (Ga. 2008) ("Like other Georgia courts in the past, the superior court 'fail[ed] to clearly and consistently distinguish the two separate doctrines' of res judicata and collateral estoppel." (quoting Sorrells Constr. Co. v. Chandler Armentrout & Roebuck, 447 S.E.2d 101, 102 (Ga. Ct. App. 1994))).

parties to that judgment and their privies.[86] The statute, however, does not prevent the judiciary from expanding preclusion law to nonmutual applications.[87] The national trends notwithstanding, Georgia continues to uphold its status as a strict mutuality state.[88]

II. ANALYSIS

"If litigation were costless, both to the litigants and to society, it might be desirable never to allow collateral estoppel to preclude a new lawsuit. But as with most mortal endeavors, litigation is not so blessed."[89] This 1973 quotation from Judge Goldberg of the U.S. Court of Appeals for the Fifth Circuit encapsulates the necessary balancing of policy interests with fairness to litigants when applying issue preclusion law.[90] Although scholars have thoroughly opined on the merits of nonmutual defensive and offensive preclusion, Georgia practitioners and litigants continue to grapple with the paucity of applicable case law from the state's supreme court. Policy considerations favor mutuality law reform. However, likely due to apathy or inexplicable reluctance, the Georgia Supreme Court has

86. O.C.G.A. § 9-12-40 (2015 & Supp. 2020) ("A judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put in issue or which under the rules of law might have been put in issue in the cause wherein the judgment was rendered until the judgment is reversed or set aside."); *see also Morrison*, 663 S.E.2d at 719 (Benham, J., dissenting) (finding that the statute "codifies the doctrines of res judicata and collateral estoppel"). However, although the elements of collateral estoppel are similar, some Georgia courts have interpreted this statute as only defining res judicata. *See* Hardwick v. Williams, 613 S.E.2d 215, 217 (Ga. Ct. App. 2005) ("Under O.C.G.A. § 9-12-40 the principle of res judicata is defined as follows . . . ."). The fact that some Georgia courts use "res judicata" to encompass both issue and claim preclusion further complicates this situation. *See, e.g.*, Waggaman v. Franklin Life Ins. Co., 458 S.E.2d 826, 827 (Ga. 1995); ALR Oglethorpe, LLC v. Henderson, 783 S.E.2d 187, 191 (Ga. Ct. App. 2016). Regardless, most courts do not rely on this statute when applying the doctrine.

87. *Cf.* Blonder-Tongue Lab'ys, Inc. v. Univ. of Ill. Found., 402 U.S. 313, 328, 350 (1971). (establishing nonmutual defensive issue preclusion as part of federal common law without an explicit statutory basis).

88. RICHARD C. RUSKELL, DAVIS AND SHULMAN'S GEORGIA PRACTICE AND PROCEDURE § 27:5 (2019–2020 ed. 2019) ("The Georgia Supreme Court has remained consistent in requiring that the elements of collateral estoppel require identity of parties or their privies in both actions.").

89. Blumcraft of Pittsburgh v. Kawneer Co., 482 F.2d 542, 549 (5th Cir. 1973).

90. *Id.*

failed to even consider the merits—or lack thereof—of the state's current strict mutuality issue preclusion standard.

A. Policy Considerations Favor Abandoning Strict Mutuality

The policy reasons behind mutuality have been questioned for more than a century.[91] In 1843, Jeremy Bentham famously described mutuality as "a maxim which one would suppose to have found its way from the gaming-table to the bench."[92] Prevailing academic and economic considerations favor the current trend towards nonmutual preclusion.[93] State supreme courts have emphasized various rationales but have generally—with some notable exceptions—weighed policy in favor of mutuality reform.[94] Analyzing the policy considerations through case law of specific jurisdictions provides additional necessary context to the application of nonmutual preclusion.

1. Purposes of Issue Preclusion Generally

The traditionally understood policies underlying issue preclusion include finality of judgments, consistency of judgments, reliance on judgments, judicial economy, and repose.[95] Reliance, finality, and consistency are intertwined: when litigants know that issue preclusion applies to a judgment, they can safely rely on the finality of that judgment and need not worry about forthcoming inconsistent

91. *See* JEREMY BENTHAM, *Rationale of Judicial Evidence*, *in* 7 THE WORKS OF JEREMY BENTHAM 165, 171 (John Bowring ed., 1843).

92. *Id.* This quotation was cited in *Blonder-Tongue*, *Bernhard*, and other leading cases. *Blonder-Tongue*, 402 U.S. at 322–23; Bernhard v. Bank of Am. Nat'l Tr. & Sav. Ass'n, 122 P.2d 892, 895 (Cal. 1942). However, at least one scholar critiqued Bentham's analogy and suggested that courts should stop relying on it. *See generally* Waggoner, *supra* note 71.

93. *See, e.g.*, Cavanagh, *supra* note 23, at 286 ("[T]he standards developed in *Parklane* regarding offensive non-mutual issue preclusion and its progeny strike the proper balance . . . . [T]he current standards regarding issue preclusion are working, and any proposal to return to a mutuality regime would be an unfortunate step backward.").

94. *See* discussion *infra* Sections II.A.1–4.

95. MOORE ET AL., *supra* note 7, § 132.01 ¶ 3; *see also* Brian M. Vines, *A Doctrine of Faith and Credit*, 94 VA. L. REV. 247, 249 (2008) (recognizing "reliance, repose, and finality" as the "core values" of issue preclusion).

decisions on an issue.[96] Similarly, issue preclusion promotes repose by signaling to potential defendants that certain issues are settled and plaintiffs may not bring more claims based on those issues.[97] Judicial economy refers to the time and resources saved by courts when preclusion prevents relitigation of an issue.[98] In addition to saving taxpayers money, issue preclusion promotes the efficient use of court resources to hear other pending claims.[99] Nonmutual preclusion enhances these policies by broadening the scope of issue preclusion and allowing litigants to assert issue preclusion more often.[100]

2. Nonmutual Defensive vs. Nonmutual Offensive Policy Considerations

After the *Bernhard* decision, attorneys and judges debated whether the holding should apply to all assertions of nonmutual preclusion or only to defensive issue preclusion.[101] Justice Traynor's conclusion finding "no compelling reason" and "[n]o satisfactory rationalization" for maintaining mutuality makes sense as applied to the facts of the case (a defensive assertion),[102] but the policy

96. MOORE ET AL., *supra* note 7, § 132.01 ¶ 3. Promoting consistent decisions of an issue also promotes credibility of the court system and avoids judicial embarrassment resulting from inconsistent decisions of the same issue. Heyman v. Kline, 456 F.2d 123, 131 (2d Cir. 1972) (noting the court's concern for embarrassment if two or more judges reach different conclusions on the same question of fact).

97. *Repose*, BOUVIER LAW DICTIONARY (Stephen Michael Sheppard ed., 2012) ("Repose is rest, a time or state of relief and quietude. In law, repose is the laying to rest of an action or claim, usually at a given time or after a period has elapsed.").

98. MOORE ET AL., *supra* note 7, § 132.01 ¶ 3.

99. Schopler, *supra* note 17, § 2(a). By advancing this judicial efficiency, issue preclusion benefits the rights of other injured plaintiffs "who might [otherwise] have to wait to have their day in court because one litigant is allowed to litigate the same issue over and over again." *Id.* The policies underlying issue preclusion should be viewed not only through the lens of the affected parties to one specific case, but also from the perspective of "the right of society to have its courts render justice as inexpensively as possible." *Id.*

100. *Id.* (recognizing that abandoning mutuality equates to "extending the doctrine of collateral estoppel"); *see also* Cavanagh, *supra* note 23, at 298 ("[D]efensive non-mutual issue preclusion promote[s] the underlying goals of issue preclusion . . . .").

101. *See generally* Currie, *supra* note 71. With regards to federal courts, the U.S. Supreme Court settled the debate when it "gave its imprimatur to [Justice] Traynor's dramatic takedown of the mutuality rule in *Bernhard*." Cavanagh, *supra* note 23, at 282.

102. Bernhard v. Bank of Am. Nat'l Tr. & Sav. Ass'n, 122 P.2d 892, 894–95 (Cal. 1942).

considerations differ when plaintiffs assert issue preclusion offensively.[103]

In his frequently cited 1957 *Stanford Law Review* article, former University of Chicago Professor of Law Brainerd Currie examined the *Bernhard* doctrine and distinguished between offensive and defensive issue preclusion.[104] Currie illustrated the distinction using a hypothetical in which a train crash injures fifty passengers.[105] If one passenger sues the railroad for his injuries and the jury finds the railroad negligent, then the other forty-nine passengers could avail themselves of that judgment by asserting issue preclusion offensively.[106] Currie opined that this railroad scenario unfairly benefits plaintiffs.[107] If, however, in the same scenario the jury in the first case finds no negligence by the railroad-defendant, then the railroad could use that judgment to preclude future litigation of its negligence in the crash by asserting issue preclusion defensively.[108] Currie correctly noted that this latter situation (nonmutual defensive preclusion) does not implicate the same concerns of fairness because of plaintiffs' strategic advantages in civil litigation.[109] Plaintiffs typically have broad latitude for discretion in choosing when to file a claim and commence litigation, in which forum to file the claim, and with whom to join to their claim.[110] Currie concluded that the

103. Currie, *supra* note 71, at 308–09. For background on the *Bernhard* case, see discussion *supra* Section I.B.

104. Currie, *supra* note 71; *see also, e.g.*, Antonio Gidi, *Loneliness in the Crowd: Why Nobody Wants Opt-Out Class Members to Assert Offensive Issue Preclusion Against Class Defendants*, 66 SMU L. REV. 1, 7 (2013) (citing to Currie's article and recognizing the article as "popular" with academics researching issue preclusion). Currie later categorized Justice Traynor's opinion as "extirpat[ing] the mutuality requirement and put[ting] it to the torch." William Sam Byassee, *Collateral Estoppel Without Mutuality: Accepting the* Bernhard *Doctrine*, 35 VAND. L. REV. 1423, 1423 (1982) (quoting Brainerd Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25, 26 (1965)).

105. Currie, *supra* note 71, at 281–82.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 288 ("Plaintiffs possess the initiative—a priceless strategic advantage in litigation as in war.").

110. *Id.* ("Within broad limits, [plaintiffs] can determine the time when and the place where action is to be brought. Moreover, there is latitude for a considerable amount of collaboration between numbers of plaintiffs similarly situated . . . .").

Bernhard doctrine abandoning mutuality should only apply when defendants use issue preclusion defensively.[111]

Defensive issue preclusion encourages plaintiffs with injuries stemming from the same event, such as the hypothetical plaintiffs in the train crash example, to join together in one action, thus giving them a fair opportunity to fully litigate the issues.[112] If there are multiple potential defendants, then defensive preclusion would similarly incentivize a plaintiff to choose to join all defendants in one lawsuit.[113] This consolidation of claims and parties prevents duplicative use of courts' resources, and it allows defendants to divert their resources to more economically productive ends instead of squandering time and money to relitigate decided issues.[114]

In this sense, defensive issue preclusion alleviates the "aura of the gaming table" created by the traditional mutuality requirement.[115] Bentham's "gaming table" metaphor analogizes plaintiffs choosing new defendants with gamblers who may lose at one Blackjack table but can then try again with a new hand and have another chance to win.[116] Under strict mutuality, plaintiffs can advance some arguments against one defendant, lose, choose a new defendant—and perhaps even a new forum or judge—and then attempt new arguments to try and prevail against the new defendant on the exact same issue.[117] One

111. Currie, *supra* note 71, at 322.

112. Cavanagh, *supra* note 23, at 297–301. In contrast to invoking offensive issue preclusion (a "sword"), using issue preclusion defensively (a "shield") "promote[s] the underlying goals of issue preclusion—peace, efficiency, and consistency." *Id.* at 298–99.

113. *Id.* at 299–300.

114. *Id.* When a defendant must relitigate the same issue separately against new plaintiffs, "there is an arguable misallocation of resources." *Id.* at 299 (quoting Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329 (1979)). Additionally, "the defendant's time and money are diverted from alternative uses—productive or otherwise—to relitigation of a decided issue." *Id.* (quoting *Parklane*, 439 U.S. at 329).

115. *Id.* at 300 (quoting *Parklane*, 439 U.S. at 329).

116. BENTHAM, *supra* note 92, at 171.

117. Cavanagh, *supra* note 23, at 298–300. The article explains:

> And, still assuming that the issue was resolved correctly in the first suit, there is reason to be concerned about the plaintiff's allocation of resources. Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or "a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure."

Id. at 299–300 (quoting Blonder-Tongue Lab'ys, Inc. v. Univ. of Ill. Found., 402 U.S. 313, 329 (1971)).

single injury could give rise to unlimited claims as long as unrelated defendants exist.[118]

These clear injustices and inefficiencies are not as pronounced when applying nonmutual offensive issue preclusion. Indeed, some commentators argue that offensive preclusion actually lessens judicial economy because it incentivizes plaintiffs to "wait and see" the holding of a "test case" by another similarly situated plaintiff instead of joining the suit.[119] On the other hand, if the defendant knows that the result of the first plaintiff's trial will affect the results of other foreseeable claims arising out of the same factual issues, then the rule incentivizes the defendant to more zealously defend that first case in the same way that the defendant would defend against a claim by joint plaintiffs.[120]

Moreover, jurisdictions that allow nonmutual offensive issue preclusion recognize exceptions in cases where its application unfairly benefits the plaintiff at the expense of the defendant.[121] The U.S. Supreme Court in *Parklane* listed a series of factors that lower federal courts should consider in their discretionary application of nonmutual offensive preclusion, including whether the first case provided the defendant with the same procedural opportunities, whether the defendant had similar incentives to litigate the issue in

118. *Id.* at 299. For example, suppose a pedestrian suffers injuries when he is struck by a car while crossing a busy street. Suppose further that, under unambiguous state law, pedestrians do not have a cognizable claim for injuries suffered as a result of illegal jaywalking. The pedestrian then sues the driver of the car that hit him and loses at trial after the trier of fact finds that the pedestrian was jaywalking. Because of the hypothetical state law, the dispositive fact that the plaintiff crossed the street illegally prevents him from obtaining damages for his injuries from any potentially negligent party. However, in a strict mutuality state like Georgia, the pedestrian could now step back up to the "gaming table" and bring a new suit against another driver, the car manufacturer, the road designer, the city, or any other potential defendant, and he would have the right to relitigate the issue of whether he jaywalked. *Id.* The plaintiff may lose three lawsuits, but a favorable jury in the fourth suit could find that he was not jaywalking, and he could proceed to proving damages. *Id.*

119. *Id.* at 305 ("[O]ffensive non-mutual issue preclusion may encourage a 'wait and see' attitude by plaintiffs and proliferation of litigation." (quoting *Parklane*, 439 U.S. at 329–30)).

120. Erichson, *supra* note 8, at 950–52 ("If offensive nonmutual issue preclusion is allowed, a mass tort defendant—or any defendant facing a large number of lawsuits growing out of a single incident or related series of incidents—correctly perceives the first trial as a 'must win' situation."). This example illustrates "how preclusion law affects zealousness of advocacy." *Id.* at 952.

121. *See, e.g.*, *Parklane*, 439 U.S. at 328–30.

the first case, and whether the plaintiff could have easily joined the first suit.[122] The *Parklane* Court also referenced Professor Currie's railroad hypothetical when it held that a party could not use preclusion offensively in cases of prior inconsistent decisions.[123] Allowing nonmutual offensive issue preclusion with these qualifications serves the dual functions of promoting the underlying policy goals of issue preclusion while preserving due process and fairness to all parties.[124]

With regard to any assertion of issue preclusion—offensive or defensive—"the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard" against abuse and unfairness.[125] More broadly, the party asserting issue preclusion must also meet the other elements of issue preclusion, including proving that the contested issue was actually litigated and decided in the first action.[126] These other requirements provide additional safeguards against unfairness.[127]

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122. *Id.* at 328–31.

123. *Id.* at 330 ("Allowing offensive collateral estoppel may also be unfair to a defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant."). The Court explained that nonmutual offensive issue preclusion should not apply in circumstances like Currie's hypothetical, which the court paraphrased:

> In Professor Currie's familiar example, a railroad collision injures [fifty] passengers all of whom bring separate actions against the railroad. After the railroad wins the first [twenty-five] suits, a plaintiff wins in suit [twenty-six]. Professor Currie argues that offensive use of collateral estoppel should not be applied so as to allow plaintiffs [twenty-seven] through [fifty] automatically to recover.

Id. at 330 n.14.

124. *See generally* Cavanagh, *supra* note 23.

125. Blonder-Tongue Lab'ys, Inc. v. Univ. of Ill. Found., 402 U.S. 313, 329 (1971).

126. WRIGHT & MILLER, *supra* note 3.

127. Cavanagh, *supra* note 23, at 304. Although "federal courts, most state courts, and the drafters of the *Restatement*" recognize nonmutual issue preclusion, "a sizable number of skeptics are still unconvinced." Nonkes, *supra* note 71, at 1459. Commentators continue to propose novel ways for courts to maximize efficiency and fairness when applying issue preclusion, including "rules limiting the amount recoverable in damages by a plaintiff who relies upon offensive nonmutual issue preclusion to establish an element of the cause of action." *Id.*

3. The Maine Supreme Court Provides More than a Century of Sound Policy Analysis Supporting Nonmutual Preclusion

Examination of Maine's common law is worthy of its own Section because it provides a holistic case study and a blueprint for other states to follow. The Maine Supreme Court has provided perhaps the most thorough analysis of the policy rationales for and against maintaining strict mutuality.[128]

In the 1872 decision *Atkinson v. White*, the Maine Supreme Court explained that the mutuality requirement in the state originated from an ancient rule that prevented someone from acting both as a party and a witness in a case.[129] Adhering to the mutuality requirement prevented the unfair result of a party asserting issue preclusion when he had to testify in the first case and therefore could not qualify as an adverse party.[130] Because a statute had changed this party–witness rule, the court saw no reason to uphold strict mutuality and held that a party may assert nonmutual preclusion.[131]

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128. *See generally, e.g.*, Atkinson v. White, 60 Me. 396 (1872); Biddle & Smart Co. v. Burnham, 40 A. 669 (Me. 1898); Hossler v. Barry, 403 A.2d 762 (Me. 1979).

129. *Atkinson*, 60 Me. at 399–400.

130. *Id.* The court explained the historical reasons for mutuality:

> But if we hold that the old principle, that "estoppels must be mutual," is applicable to this case, ought we to be bound by it any longer?
>
> That law was adopted when parties could not be witnesses, and from a very tender care of suitors, lest by possibility injustice might be done. For it is said, and this appears to be the only reason on which the law is founded, that "if the adverse party was not also a party to the judgment offered in evidence, it may have been obtained upon his own testimony; in which case, to allow him to derive a benefit from it would be unjust."

Id. at 399.

131. *Id.* at 399–400. The court repeatedly questioned the reasons for continued adherence to the mutuality requirement in light of this change in witness rules:

> Since the statute, making parties and all interested persons witnesses, this foundation has been taken away. No danger of injustice from that source now exists; and the reason of the law having ceased, why should the law be retained? It should be remembered that this is not a question in which these parties alone have an interest. Other suitors, waiting for their turn should not be delayed by repeated trials of the same question, not required to secure justice. Public policy also requires that there should be an end of litigation. If this matter has been once adjudicated upon, even the defendants themselves cannot waive that adjudication if they would. It has become the law of the case, and binding upon all parties who have had an opportunity to be heard thereon.
>
> We can see no possible ground of suspicion even of injustice to the plaintiff in

The policy reasons that the *Atkinson* court articulated in 1872 still apply today.[132] The court noted that justice would be delayed by parties "waiting for their turn" and relitigating the same issue repeatedly.[133] Additionally, the court held that final judgments should stand as "binding upon all parties who have had an opportunity to be heard" and that "[p]ublic policy . . . requires that there should be an end of litigation."[134] Despite these well-articulated policy reasons, the Maine Supreme Court distinguished *Atkinson* when it revisited the mutuality issue in 1898 and held that "the rule requiring mutuality is too well established . . . to be lightly set aside."[135]

The Maine case study, however, does not end in the nineteenth century. After *Parklane* changed federal law in 1979, the plaintiff in *Hossler v. Barry* urged Maine to once again abandon mutuality.[136] True to form, the Maine Supreme Court thoroughly examined the available literature and analyzed the policy reasons favoring and opposing mutuality.[137] The predominant policy argument in favor of the strict mutuality standard focused on preserving the illusion of fairness through symmetry—because the first lawsuit did not bind the litigant asserting nonmutual preclusion, that litigant should not have the benefit of asserting the decision of the first suit to his advantage when his adversary could not use it against him.[138] As the court

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holding the former judgment against him conclusive.

Id.

132. *Id.*; *see also* discussion *supra* Section II.A.2.

133. *Atkinson*, 60 Me. at 400.

134. *Id.*

135. Biddle & Smart Co. v. Burnham, 40 A. 669, 671 (Me. 1898) ("We do not find that the suggestion of the court in [*Atkinson*] has ever been adopted, here or elsewhere, and it seems to us that the rule requiring mutuality is too well established by authority, and rests upon too substantial reasons, to be lightly set aside.").

136. Hossler v. Barry, 403 A.2d 762, 766 (Me. 1979) ("Rather, plaintiff urges the Court to abandon the doctrine because it 'does not comport with modern theories of jurisprudence.'").

137. *See id.* at 766–70.

138. *Id.* at 767 ("The doctrine was premised on the belief that it would be fundamentally unfair to allow a party who was an entire stranger to the first suit to use that judgment in a subsequent action since, as a stranger, the judgment in the first suit could not be used against him."). A party to the first lawsuit cannot assert issue preclusion against a new party (i.e., a stranger) in the second lawsuit because constitutional due process requirements mandate that each party must have at least one "opportunity to be heard." *Id.* at 767 n.5. The Third Circuit confronted—and disagreed with—a similar argument for maintaining "symmetry" in *Bruszewski v. United States*, 181 F.2d 419, 421 (3d Cir. 1950). *See supra*

pointed out, however, that view fails to explain why a party deserves more than one opportunity to litigate the same issue.[139] Rather, a rule allowing nonmutual defensive issue preclusion ensures that plaintiffs actually fully litigate their issue by obligating them to join all potential defendants in one lawsuit.[140] The *Hossler* opinion approvingly cited the *Atkinson* case, as well as *Bernhard*, *Blonder-Tongue*, and other authorities, to conclude that "there was no tenable reason" not to allow defensive issue preclusion.[141]

However, because the facts of the *Hossler* case involved a plaintiff attempting to assert issue preclusion against a stranger-defendant, the court also analyzed the more nuanced policy arguments regarding allowing offensive issue preclusion.[142] In contrast to defensive preclusion, offensive preclusion assertions by a new plaintiff do not necessarily encourage judicial economy because a plaintiff can theoretically use a wait-and-see approach.[143] If another similarly-situated plaintiff resolves the decisive issue, such as negligence, against the same defendant, then the new plaintiff can file a new suit and assert issue preclusion instead of joining the first lawsuit.[144] Despite these concerns, the court held that nonmutual offensive issue preclusion may be allowed on a case-by-case basis after a court applies *Parklane*-esque fairness factors to the factual circumstances.[145]

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notes 39–41 and accompanying text.

139. *Hossler*, 403 A.2d at 767 ("[W]hile every party was entitled to his day in court there was no tenable reason why a litigant should have more than one full and fair opportunity for judicial resolution of the same issue.").

140. *Id.* at 768 ("When used defensively, collateral estoppel encourages a plaintiff to join all potential defendants in a single action since if he sues and loses he will not be entitled to a second bite at the apple.").

141. *Id.*

142. *Id.* at 764, 768–70.

143. *Id.* at 768 ("The offensive use, by contrast, does not promote judicial economy since a plaintiff has every incentive to avoid suit until a prior plaintiff has obtained a judgment against the defendant.").

144. *Id.*

145. *Hossler*, 403 A.2d at 769 ("We are persuaded that the reasons justifying collateral estoppel would generally be advanced by permitting its use offensively on a case-by-case basis. . . . Many factors have been considered in determining whether the defendant has had a full and fair opportunity to litigate in the prior suit . . . ."). Although the court used this opportunity to articulate that the law now allows offensive issue preclusion, the court held that its use under the facts of this case would be unfair to the

4. States Choosing to Retain Mutuality Fail to Articulate Any Novel Rationales

Issue preclusion law has trended away from strict mutuality for many years.[146] However, even in light of modern trends, a few states have chosen to retain the mutuality element.[147]

In the aftermath of *Blonder-Tongue*, Florida appellate courts approvingly cited the U.S. Supreme Court's reasoning and began allowing nonmutual applications of issue preclusion.[148] A 1992 article in the Florida Bar Journal even applauded "the silent demise of the mutuality requirement" in the state.[149] Despite this apparent consensus, the Florida Supreme Court explicitly reaffirmed the traditional mutuality requirement in 1995 in *Stogniew v. McQueen*.[150] The court agreed with its reasoning in earlier cases that the judicial economy benefits of nonmutual defensive preclusion are overstated because allowing nonmutual defensive preclusion can lead to additional appeals by the plaintiff.[151] The court did not cite any statistics or other evidence to support that proposition.[152] As the court

defendant. *Id.* at 770. The court reasoned that the defendant "could not reasonably have foreseen either that the presiding Justice would abrogate a long-standing common-law rule or its reformulation on appeal in terms of a full and fair opportunity to litigate." *Id.*

146. WRIGHT & MILLER, *supra* note 3, § 4464.

147. *See* sources cited *supra* note 80.

148. Donald A. Blackwell, *The Silent Demise of the Mutuality Requirement in the Defensive Use of Collateral Estoppel*, 66. FLA. BAR J. 18, 18 (1992) ("[T]he Third and Second district courts of appeal have made it clear that, at long last, Florida courts have fully embraced the rule of *Blonder-Tongue* and its progeny permitting the defensive use of collateral estoppel in the absence of strict mutuality.").

149. *See generally id.*

150. 656 So. 2d 917 (Fla. 1995); *see also* Deric Zacca, *Florida's Position on Nonmutual Collateral Estoppel After* Stogniew, 52 U. MIAMI L. REV. 889, 889, 899 (1998).

151. *See Stogniew*, 656 So. 2d at 919–20 (first citing Trucking Emps. of N. Jersey Welfare Fund, Inc. v. Romano, 450 So. 2d 843 (Fla. 1984), *superseded by statute*, FLA. STAT. § 772.14 (1986), *as recognized in* Starr Tyme, Inc. v. Cohen, 659 So. 2d 1064 (Fla. 1995); and then citing Zeidwig v. Ward, 548 So. 2d 209 (Fla. 1989)). Under section 772.14, "Florida courts continue to require the mutuality of parties in deciding whether to give preclusive effect to a prior civil judgment. [But] Florida law does not require the mutuality of parties for criminal judgments." Far Out Prods., Inc. v. Oskar, 247 F.3d 986, 993 n.1 (9th Cir. 2001) (citations omitted). For a thorough discussion of mutuality and issue preclusion law in Florida, see Zacca, *supra* note 150.

152. *See generally Stogniew*, 656 So. 2d 917; *Romano*, 450 So. 2d 843.

hinted in a prior case, perhaps its true motivation was retaining support from the plaintiffs' bar.[153]

Virginia also examined the issue and opted to continue requiring mutuality.[154] The precedential decisions of the Virginia Supreme Court, however, only address and rebut arguments for offensive preclusion use.[155] The court concluded that because nonmutual offensive preclusion raises significant fairness concerns, the state should not adopt any modern mutuality principles.[156] Due to these holdings, Virginia remains a strict mutuality state even though the Virginia Supreme Court has not thoroughly addressed the meritorious arguments for allowing only defensive preclusion.[157]

B. Distinguishing Mutuality from Privity

Nonmutuality and privity are both ways for courts to allow nonparties—nonparties to the prior litigation—to assert issue preclusion.[158] Nonmutuality determines if a named party in one

153. *Romano*, 450 So. 2d at 846 ("[W]e are not convinced that the burden under which the plaintiffs' bar now labors is so onerous that defendants' rights should be compromised to ease it. Plaintiffs have been equal to proving all the elements of liability heretofore. To change the status quo risks prejudice to defendants which is not necessary to serve the ends of justice.").

154. Weinberger v. Tucker, 510 F.3d 486, 491 (4th Cir. 2007) ("[I]n Virginia, collateral estoppel requires a fourth element, mutuality.").

155. Norfolk & W. Ry. Co. v. Bailey Lumber Co., 272 S.E.2d 217, 220 (Va. 1980). *Norfolk* is the leading Virginia case on mutuality. *See generally id.* Because the party attempting to assert mutuality in that case was the plaintiff, the court addressed only the arguments for offensive mutuality. *Id.* at 220. Even though the court said that "the established rule is that collateral estoppel requires mutuality, . . . especially when the estoppel is used 'offensively,'" subsequent Virginia Supreme Court decisions reaffirmed that defensive issue preclusion was similarly not permitted. *Id.* at 219 (citations omitted); *see also* Rawlings v. Lopez, 591 S.E.2d 691, 692 (Va. 2004) ("In *Bailey*, this Court reaffirmed Virginia's adherence to the principle of mutuality . . . .").

156. *See Bailey*, 272 S.E.2d at 219–20.

157. *See Weinberger*, 510 F.3d at 491; *Rawlings*, 591 S.E.2d at 692; Angstadt v. Atl. Mut. Ins. Co., 457 S.E.2d 86, 87 (Va. 1995). Because all of these recent state supreme court cases involved the attempted use of offensive issue preclusion, the court has not recently been directly confronted with potentially applying preclusion defensively. *Cf. Weinberger*, 510 F.3d at 491; *Rawlings*, 591 S.E.2d at 692; *Angstadt*, 457 S.E.2d at 87. The court has not addressed many of the favorable arguments toward allowing defensive preclusion while still forbidding offensive uses. *See, e.g.*, *Weinberger*, 510 F.3d at 491; *Rawlings*, 591 S.E.2d at 692; *Angstadt*, 457 S.E.2d at 87. Nevertheless, these decisions make clear that current Virginia law requires mutuality for the assertion of issue preclusion either defensively or offensively. *See, e.g.*, *Weinberger*, 510 F.3d at 491; *Rawlings*, 591 S.E.2d at 692; *Angstadt*, 457 S.E.2d at 87.

158. *See* Bone, *supra* note 18, at 253.

lawsuit should have an opportunity to relitigate an issue in a second lawsuit.[159] Privity involves a nonparty having been deemed to have had an opportunity to litigate without actually having been named as a party in a prior lawsuit.[160] Privity often implicates constitutional due process concerns.[161]

Courts across jurisdictions have found privity between parties without much scrutiny, and many courts have used the finding of privity as a workaround to the mutuality requirement.[162] As one court stated: "Privity is essentially a shorthand statement that collateral estoppel is to be applied in a given case; there is no universally applicable definition of privity."[163]

In the 2008 case *Taylor v. Sturgell*, the U.S. Supreme Court, recognizing due process concerns, narrowed the definition of privity by limiting privity's application in preclusion cases to six specific categories of relationships between parties.[164] The Court rejected the "virtual representation" theory of privity that some lower courts had used to expand the notion of privity.[165] In rejecting virtual representation, the Court recognized that the lack of defined categories had given lower courts broad discretion to apply privity, which resulted in inconsistent decisions and erosion of due process

159. *See supra* Part I.

160. *See* Bone, *supra* note 18, at 226 n.120.

161. *See id.* at 236–37 & n.160.

162. *See, e.g.*, Lynch v. Glass, 119 Cal. Rptr. 139, 141–42 (Cal. Ct. App. 1975); *see also* Hoffheimer, *supra* note 6, at 524 ("To add to the confusion, a few opinions have formally approved of the need for identity of parties in dictum yet permitted nonmutual collateral estoppel by making unnecessary findings of privity.").

163. *Lynch*, 119 Cal. Rptr. at 141–42 (citations omitted).

164. 553 U.S. 880, 893–95 (2008). The Court held in *Taylor* that for a nonparty to a prior case to assert preclusion in a second case under a privity theory, the party against whom preclusion is asserted must either: (1) have agreed to be bound by the issues decided in the first case; (2) have a prior legal relationship such as succeeding ownership of property; (3) have been "adequately represented" in the first case (the Court gave the example of a class action); (4) have "assumed control" over the first case; (5) have a formal representative relationship with the party in the first case such as an agency relationship; or (6) be subject to certain statutes that ensure due process to the litigants. *Id.*

165. *Id.* at 895–901 ("Reaching beyond these six established categories, some lower courts have recognized a 'virtual representation' exception to the rule against nonparty preclusion.").

protections.[166] Before this decision, federal courts had essentially permitted nonparty preclusion on an unpredictable, ad hoc basis.[167]

Although the *Taylor* decision now binds federal courts, state courts continue to apply privity arbitrarily, and Georgia remains one of the biggest culprits.[168] The Georgia Supreme Court defined a privy as "one who is represented at trial and who is 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."[169] However, in the same case, the supreme court also said that "no definition of 'privity'" can apply equally to all issue preclusion cases and that "privity depends on the circumstances."[170]

This loose definition, coupled with its circumstantial qualification, results in problems similar to those in pre-*Taylor* federal courts: inconsistent decisions and overly broad discretionary authority.[171] For instance, the Georgia Supreme Court held that a mother seeking child support is not in privity with the child support agency also seeking recovery of the same child support payments, even though the agency "stands, to some degree, in the shoes of the party seeking support."[172] A few years later, the same court found privity between two people solely based on their similar interests "as residents and voters" of the same county.[173] One Georgia trial court explained the current rules as essentially permitting preclusion whenever the

166. *Id.*
167. *Id.*
168. *See infra* Section II.C.
169. Brown & Williamson Tobacco Corp. v. Gault, 627 S.E.2d 549, 551 (Ga. 2006) (quoting Butler v. Turner, 555 S.E.2d 427, 430 (Ga. 2001)).
170. *Id.* (quoting Satsky v. Paramount Commc'ns, 7 F.3d 1464, 1468–69 (10th Cir. 1993)).
171. *Id.*; *see also Taylor*, 553 U.S. at 891–907.
172. *Butler*, 555 S.E.2d at 430 ("While in a support proceeding, the [Department of Human Resources (DHR)] stands, to some degree, in the shoes of the party seeking support, it does not have a complete identity of interest." (citation omitted)); *see also* Dep't of Hum. Res. v. Fleeman, 439 S.E.2d 474, 475 (Ga. 1994) ("Because the child is not bound by the provisions of the divorce decree, collateral estoppel does not bar DHR in its claim under O.C.G.A. § 19-11-6(a) insofar as DHR is pursuing that claim on the child's behalf." (citations omitted)).
173. Lilly v. Heard, 761 S.E.2d 46, 50–51 (Ga. 2014).

party-to-be-estopped appears "substantially similar" to a party in the earlier lawsuit.[174]

Other cases further illustrate the reality that judges under a strict mutuality regime often stretch the bounds of privity to alleviate the burden of having to rehear the same issues.[175] One court described this dilemma bluntly: "We stand at a juncture, unwilling to embark in an exercise of 'metaphysical privity,' yet faced with the uncomforting thought that our prior decisions would possibly allow appellants to litigate an identical issue against countless future competitors without any res judicata or collateral estoppel effect."[176] Allowing nonmutual issue preclusion gives courts a tool to render efficient judgments without wading into the murky waters of privity law.

C. Georgia Supreme Court Decisions

Unlike other states' highest courts, the Georgia Supreme Court has not thoroughly addressed and analyzed the mutuality issue since the *Blonder-Tongue* and *Parklane* cases changed federal law.[177] Instead, every time the court hears an issue preclusion case, it simply restates

174. Plaintiff's Response to Auto-Owners Ins. Co.'s Motion in Limine at *2–3, Dolan v. Air Mechanix, LLC, No. STCV1003011, 2015 WL 13707576 (Ga. State Ct. Nov. 30, 2015) ("[C]ollateral estoppel and/or res judicata should not apply here. . . . [I]f the parties in the declaratory judgment and tort actions are not the same, or substantially similar in both actions, the doctrines do not apply.").

175. *See generally, e.g.*, Coffee Iron Works v. QORE, Inc., 744 S.E.2d 114 (Ga. 2013). In *Coffee Iron Works*, the court held that issue preclusion prevented a stockholder of the prior-case plaintiff corporation and bond guarantor of the prior-case plaintiff from relitigating issues. *Id.* at 118–19. The defendant moved for summary judgment and argued that the plaintiffs' privity with the plaintiffs in the prior case should preclude this new lawsuit. *Id.* at 117. Of course, if Georgia allowed nonmutual defensive issue preclusion, that would have been a clear winning argument for the defendants at the trial court level and the second case likely would not have even been brought, much less appealed. *See* Hoffheimer, *supra* note 6, at 573 (consolidating cases where courts "have reached the right result—rejecting mutuality in fact—but they have done so by making unnecessary (and arguably erroneous) findings of privity").

176. Black Hills Jewelry Mfg. Co. v. Felco Jewel Indus., Co., 336 N.W.2d 153, 158 (S.D. 1983).

177. *See generally* RUSKELL, *supra* note 88. As of November 16, 2020, WestLaw and LexisNexis searches for all Georgia Supreme Court cases since *Parklane* had not revealed any case including a discussion of the arguments for and against mutuality. The search results also indicated that the *Parklane* decision had only been cited by the Georgia Supreme Court on one occasion, in a criminal appeal, which was decided on other grounds. *See* Giddens v. State, 786 S.E.2d 659, 664 n.4 (Ga. 2016). This case is discussed further *infra*.

the traditional elements and enforces mutuality accordingly.[178] When defining the issue preclusion rule, Georgia courts most often cite *Waldroup v. Greene County Hospital Authority*, a 1995 Georgia Supreme Court case.[179] The *Waldroup* opinion clears up lower court confusion regarding the distinctions between claim and issue preclusion and lays out the elements of each defense, but the court's mutuality analysis ends there.[180] The discussion instead focuses on how to determine if an issue was actually litigated and decided.[181]

In *Norris v. Atlanta & West Point Railroad Co.*, the Georgia Supreme Court enforced mutuality when it repudiated a troubling new rule articulated by the court of appeals as the "doctrine of binding precedent."[182] The lower court had essentially redefined the concept of precedent by allowing a litigant to assert issue preclusion against a nonparty to the prior lawsuit.[183] The Georgia Supreme

178. *See generally, e.g.*, Body of Christ Overcoming Church of God v. Brinson, 696 S.E.2d 667 (Ga. 2010); Karan, Inc. v. Auto-Owners Ins. Co., 629 S.E.2d 260, 262 (Ga. 2006); *In re* T.M.G., 570 S.E.2d 327 (Ga. 2002); Morrison v. Morrison, 663 S.E.2d 714, 718 (Ga. 2008); Brock v. Yale Mortg. Corp., 700 S.E.2d 583 (Ga. 2010).

179. *See, e.g.*, Copelan v. Copelan, 755 S.E.2d 739, 740 (Ga. 2014); *In re* T.M.G., 570 S.E.2 at 329; Gwinnett Cnty. Bd. of Tax Assessors v. Gen. Elec. Cap. Comput. Servs., 538 S.E.2d 746, 748 (Ga. 2000); Eichenblatt v. Piedmont/Maple, LLC, 801 S.E.2d 616, 620 (Ga. Ct. App. 2017); Dove v. Ty Cobb Healthcare Sys., 729 S.E.2d 58, 61 (Ga. Ct. App. 2012); Carroll Anesthesia Assocs., P.C. v. Anesthecare, Inc., 507 S.E.2d 829, 833 (Ga. Ct. App. 1998). The cited passage—repeated in dozens of lower court opinions—reads as follows:

> Collateral estoppel precludes the re-adjudication of an issue that has previously been litigated and adjudicated on the merits in another action between the same parties or their privies. Like res judicata, collateral estoppel requires the identity of the parties or their privies in both actions. However, unlike res judicata, collateral estoppel does not require identity of the claim—so long as the issue was determined in the previous action and there is identity of the parties, that issue may not be re-litigated, even as part of a different claim. Furthermore, collateral estoppel only precludes those issues that actually were litigated and decided in the previous action, or that necessarily had to be decided in order for the previous judgment to have been rendered. Therefore, collateral estoppel does not necessarily bar an action merely because the judgment in the prior action was on the merits. Before collateral estoppel will bar consideration of an issue, that issue must actually have been decided.

Waldroup v. Greene Cnty. Hosp. Auth., 463 S.E.2d 5, 7–8 (Ga. 1995) (footnotes omitted).

180. *Waldroup*, 463 S.E.2d at 7–8.

181. *Id.*

182. 333 S.E.2d 835, 836 (Ga. 1985) ("We granted certiorari in this case to decide whether the 'doctrine of binding precedent' should be recognized in Georgia. We conclude that it should not.").

183. *Id.* at 837 ("As used by the Court of Appeals the 'doctrine' is a species of collateral estoppel in which no privity is required.").

Court reversed that decision and correctly noted that "due process requires that the one who has not had his day in court will not be barred by a prior adjudication."[184] The *Norris* court, however, did not take the opportunity to address the less obvious questions presented by issue preclusion assertions against a party who meets the day-in-court prerequisite.[185]

Precisely such an opportunity presented itself more overtly in *Nally v. Bartow County Grand Jurors*—a case whose factual underpinnings offered perhaps the most justifiable vehicle for mutuality reform.[186] In that case, the Georgia Supreme Court implicitly acknowledged the potential inefficiencies of the mutuality requirement of issue preclusion while simultaneously reaffirming the *Waldroup* rule that prohibits such preclusion.[187] In fact, the *Nally* court arguably affirmed a holding on nonmutual defensive issue preclusion grounds, albeit without saying so or declaring any new precedential rule.[188]

In its appellate brief asserting a preclusion defense, the defendant-appellee in *Nally* explicitly conceded that the parties in the separate suits were not identical (i.e., there was no mutuality).[189] The Georgia Supreme Court nevertheless affirmed the dismissals, reasoning that "[i]t is axiomatic that the same issue cannot be

184. *Id.* at 838.

185. *See id.* at 837–38.

186. 633 S.E.2d 337 (Ga. 2006). The facts of the *Nally* case illustrate how Georgia's mutuality rule can squander judicial resources and incentivize repetitive, often-frivolous litigation. *See id.* at 338–39. The plaintiff had filed three separate lawsuits seeking a declaration of his alleged right to present arguments to a grand jury as a private citizen. *Id.* at 338. He brought the first suit in 2002 against the district attorney; the second suit, in June 2005, against the Bartow County Grand Jury; and the third suit, in September 2005, against each of the individual members of the grand jury. *Id.* at 338–39. The trial court, relying on the prior dismissal on the merits of the 2002 suit, dismissed the two 2005 lawsuits on preclusion grounds. *Id.* at 339. The plaintiff then appealed to the Georgia Supreme Court. *Id.*

187. *Id.* at 339–40.

188. *Id.*

189. Brief of Appellees at 21, *Nally*, 633 S.E.2d 337 (No. S06A0487), 2005 GA S. Ct. Briefs LEXIS 77, at *37 ("The Appellant has not enumerated any additional facts or legal premise which would preclude the application of res judicata or estoppel by judg[]ment. While the member[s] of the panel were not specifically named as parties in [the prior case], the Appellant seeks the very same legal result. While the dance partners may be different, the same song plays on.").

relitigated ad infinitum."[190] In the very same paragraph, the court perplexingly explained its holding by quoting the prior case law, reaffirming that "[c]ollateral estoppel, like res judicata, requires identity of parties or privity."[191] However, the short opinion included no analysis of whether any of the defendants were in privity with one another.[192] The court instead justified its ruling on the basis that the adjudication of the issue had been "conclusively established" in the first lawsuit.[193] The court concluded that "the trial court correctly dismissed the complaint wherein [the plaintiff] had raised the identical claim for the third time."[194] Perhaps the justices felt no pressure to address mutuality in this case because the pro se plaintiff-appellant did not argue the point in his "handwritten motion" or briefs.[195] The *Nally* case remains a uniquely frustrating oddity in Georgia issue preclusion jurisprudence, and lower courts have not cited it as authority to apply nonmutual preclusion in other cases.

In *Brock v. Yale Mortgage Corp.*, the Georgia Supreme Court addressed a party's attempted assertion of nonmutual preclusion in a two-sentence footnote, simply stating that issue preclusion could not apply because the party asserting it "was neither a party nor in privity with a party in the divorce proceedings."[196] The court reflexively

190. *Nally*, 633 S.E.2d at 339 (quoting Johnson v. State, 612 S.E.2d 29, 32 (Ga. Ct. App. 2005)).

191. *Id.* at 339 (quoting Hardwick v. Williams, 613 S.E.2d 215 (Ga. 2005)).

192. *See id.* at 339–40.

193. *Id.* at 339.

194. *Id.*

195. *Id.* ("However, his handwritten motion contained in the record does not state any specific grounds . . . .").

196. 700 S.E.2d 583, 589 n.5 (Ga. 2010) (citing Waldroup v. Greene Cnty. Hosp. Auth., 463 S.E.2d 5 (Ga. 1995)). In the footnote, the court declined to further consider the defendant-appellee's attempted assertion beyond simply stating the following:

> Yale argues for the first time on appeal that Brock is collaterally estopped by the final judgment in the divorce proceedings from litigating whether Yale's security interest attaches to the entire property. Pretermitting its procedural default, collateral estoppel is inapplicable since Yale was neither a party nor in privity with a party in the divorce proceedings.

Id.

cited *Waldroup* and ended its analysis without any mention of the recent evolution of preclusion law.[197]

The closest thing to an analysis of nonmutual issue preclusion in the Georgia Supreme Court's published decisions also came in a footnote—in dicta—to a criminal appeal.[198] Without reference to the relevant Georgia case law, Justice Nahmias cited *Parklane* for the proposition that "collateral estoppel can apply both offensively and defensively in the civil context."[199] Justice Nahmias's footnote then cited cases from other jurisdictions regarding the application of offensive issue preclusion in criminal cases.[200] Notably, the court did not cite any of its own precedent regarding mutuality but rather focused on the constitutional applications of issue preclusion in the criminal context.[201] However, that dicta has not had any precedential value; lower courts continue to be bound by traditional issue preclusion elements in civil cases.[202]

D. Lower Courts in Georgia

Lower appellate and even trial courts in Georgia have recognized the potential absurdities of strict mutuality and have attempted to persuade the state supreme court justices to change the law.[203] These attempts have been unsuccessful.[204] To the extent the Georgia Supreme Court has heard those cases on appeal, it has not followed or even analyzed the reasoning.[205]

197. *Id.*

198. Giddens v. State, 786 S.E.2d 659, 664 n.4 (Ga. 2016).

199. *Id.* (citing Parklane Hosiery Co. v. Shore, 439 U.S. 322, 333–38 (1979)). The holding of the case ultimately does not disrupt the elements of issue preclusion under Georgia law. *Id.*

200. *Id.* ("[M]ost courts have refused to apply collateral estoppel offensively against the defendant in criminal cases." (first citing State v. Scarbrough, 181 S.W.3d 650, 655–57 (Tenn. 2005); and then citing United States v. Pelullo, 14 F.3d 881, 890–98 (3d Cir. 1994))).

201. *See id.*

202. *See* RUSKELL, *supra* note 88.

203. *See, e.g.*, *Wickliffe I*, 489 S.E.2d 153, 156 (Ga. Ct. App. 1997), *cert. denied*, No. S97C1859, 1998 Ga. LEXIS 185 (Ga. Jan. 5, 1998).

204. *See, e.g.*, Wickliffe Co. v. Wickliffe (*Wickliffe II*), No. S97C1859, 1998 Ga. LEXIS 185, at *185 (Ga. Jan. 5, 1998).

205. *See* discussion *supra* Section II.C.

1. Evolution of Mutuality Law in the Georgia Court of Appeals

Some courts initially tried to adopt the modern view of allowing nonmutual preclusion.[206] From 1984 to 1993, Georgia appellate courts began allowing litigants to assert issue preclusion even if they had not been parties to the first lawsuit that decided the issue.[207] This line of cases originated with the Georgia Court of Appeals case *Watts v. Lippitt.*[208] In a short opinion, the *Watts* court allowed the defendant to prevail on an issue preclusion defense "even though, strictly speaking, [the defendant] was not in privity with the defendants in [the prior] action."[209] The court cited the *American Jurisprudence* encyclopedia and federal cases as persuasive authority in its decision to adopt the "modern trend" of nonmutual issue preclusion.[210] Following that decision, other Georgia courts quoted that language and allowed litigants to assert issue preclusion both defensively and

206. *See Wickliffe I*, 489 S.E.2d at 155–56 (acknowledging a line of cases adopting the modern trend).

207. *See* Ervin v. Swift Adhesives, Inc., 430 S.E.2d 133, 134–35 (Ga. Ct. App. 1993) (affirming summary judgment for a chemical manufacturer defendant based on the defendant's assertion of nonmutual defensive issue preclusion because the defendant's liability had already been decided in the plaintiff's prior workers' compensation claim against her employer); Wilson v. Malcolm T. Gilliland, 402 S.E.2d 291, 293–94 (Ga. Ct. App. 1991) (allowing nonmutual offensive issue preclusion); *see also* Winters v. Pund, 346 S.E.2d 124, 127 (Ga. Ct. App. 1986) ("[I]n modern legal practice, the central issue in determining whether the doctrines of res judicata and collateral estoppel apply is whether the party against whom the plea is raised has had full opportunity to litigate the issues." (citing Watts v. Lippitt, 320 S.E.2d 581, 583 (Ga. Ct. App. 1984))).

208. 320 S.E.2d at 582–83; *see also Ervin*, 430 S.E.2d at 134 (quoting *Watts*, 320 S.E.2d at 582–83); *Wilson*, 402 S.E.2d at 293 (same); *Winters*, 346 S.E.2d at 127 (citing *Watts*, 320 S.E.2d at 583).

209. *Watts*, 320 S.E.2d at 582–83. *Watts* arguably stood for an even broader application of issue preclusion than allowed in other jurisdictions because the issue of the defendant's liability was decided by a release that plaintiffs executed related to settlement of their first lawsuit. *Id.*; *see also* MOORE ET AL., *supra* note 7, § 132.03 ("As a general rule, a fact established in prior litigation not by judicial resolution but by stipulation has not been actually litigated and therefore . . . is not deemed to be 'actually litigated . . . .'"). The plaintiffs in *Watts* were barred from bringing a subsequent medical malpractice claim against a physician who treated the plaintiff for an injury after a car crash because the executed release signed with the other driver—the defendant in the first action—prevented the plaintiffs from holding any other person or entity liable for any injury that may have been related to the crash. *Watts*, 320 S.E.2d at 582. The court explained that the plaintiffs had an opportunity to name the physician as a defendant in the first lawsuit, and therefore, "the plaintiffs have had a full and complete opportunity to litigate the applicability of the release [to the physician]." *Id.* at 583.

210. *Watts*, 320 S.E.2d at 583. The court cited 46 AM. JUR. 2D *Judgments* §§ 522, 523 (2020), and *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117, 122–23 (5th Cir. 1975), to apply the "modern trend." *Watts*, 320 S.E.2d at 583.

offensively.[211] However, during the same time period, other Georgia appellate courts continued to apply strict mutuality.[212]

The Georgia Court of Appeals resolved this discrepancy—in a nine-judge opinion without dissent—in the 1997 case *Wickliffe v. Wickliffe Co.*[213] The court found that the facts satisfied all other elements of issue preclusion, and the case necessarily turned on which mutuality doctrine applied.[214] To their credit, and unlike the Georgia Supreme Court, the judges addressed arguments in favor of adopting a nonmutuality standard.[215] The court also acknowledged the "modern trend," cited the *Second Restatement of Judgments*, and actually opined that "the modern trend regarding mutuality is perhaps the better position."[216] Ultimately, however, the *Wickliffe* court held that it was bound to follow the Georgia Supreme Court, and under that precedent, issue preclusion required identity of parties or

211. *See Ervin*, 430 S.E.2d at 134 (quoting *Watts*, 320 S.E.2d at 582–83); *Wilson*, 402 S.E.2d at 293 (same); *Winters*, 346 S.E.2d at 127 (citing *Watts*, 320 S.E.2d at 583). The full rule as stated by the *Watts* court read:

> The modern trend in applying the doctrines of res judicata and collateral estoppel is to confine the privity requirement to the party against whom the plea is asserted, so as to permit one who is not a party to the judgment to assert the judgment against a party who is bound by it, and thus to preclude relitigation by that party of issues which have been determined adversely to him in the prior action, even though if the issue had been decided in his favor in the prior action, he would not have been entitled to assert the prior adjudication in a subsequent action against a stranger to the judgment. The central question in determining whether the doctrines of res judicata and collateral estoppel apply is whether the party against whom the plea is raised has had a full opportunity to litigate the issue in question.

Watts, 320 S.E.2d at 582–83 (citations omitted).

212. *See* Toporek v. Zepp, 479 S.E.2d 759, 760 (Ga. Ct. App. 1996) (acknowledging that "in *Watts* we held that the privity requirement of collateral estoppel is confined to the party against whom the plea is asserted" but noting that "[t]his Court is bound by [Georgia Supreme Court holdings]" (citations omitted)); Miller v. Steelmaster Material Handling Corp., 478 S.E.2d 601, 603–04 (Ga. Ct. App. 1996) (declining to allow nonmutual preclusion and instead engaging in a privity analysis); Stiltjes v. Ridco Exterminating Co., 399 S.E.2d 708, 709 (1990) (same).

213. 489 S.E.2d 153, 155 (Ga. Ct. App. 1997), *cert. denied*, No. S97C1859, 1998 Ga. LEXIS 185 (Ga. Jan. 5, 1998).

214. *Id.* ("The underlying question[,] upon which this case turns, is whether the mutual identity of the parties is required for collateral estoppel.").

215. *See id.* at 155–56. "The current rule allows parties to relitigate issues they have already litigated and lost, straining judicial resources and creating the possibility of inconsistent results." *Id.* at 156.

216. *Id.* at 155–56 (first quoting *Ervin*, 430 S.E.2d at 134; then citing *Watts*, 320 S.E.2d at 582–83; then citing *Winters*, 346 S.E.2d at 127; then citing *Wilson*, 402 S.E.2d at 293; and then citing RESTATEMENT (SECOND) OF JUDGMENTS § 29 (AM. L. INST. 1982)).

privies—even though, as discussed *supra*, "the Supreme Court cases did not in fact turn on the identity of parties element."[217] In doing so, *Wickliffe* explicitly overruled the line of cases applying nonmutual preclusion.[218] The Georgia Court of Appeals continued, however, to directly ask the Georgia Supreme Court "to embrace the modern trend when it does directly address this issue."[219] Despite this unanimous opinion by the lower court, the Georgia Supreme Court denied certiorari.[220] More than a decade later, the court has yet to "directly address this issue."[221]

A few years after *Wickliffe*, one lower court attempted to distinguish the precedent by redefining and expanding the meaning of "party" in the context of the "identity of parties" element.[222] In *Edmondson v. Gilmore*, the Georgia Court of Appeals held that a litigant who was "not *technically*" a party to the first action may nevertheless preclude an issue decided in the first case because the

217. *Id.* at 156 ("[W]e are constrained to follow the Supreme Court and require that collateral estoppel requires identity of parties."); *see also* discussion *supra* Section II.C.

218. *Id.* ("Our decision necessitates that we overrule *Ervin*, [430 S.E.2d 133]; *Watts*, [320 S.E.2d 581]; *Winters*, [346 S.E.2d 124]; and *Wilson*, [402 S.E.2d 291]."). The court uses the term "overrule." *Id.* Although an appellate court generally cannot overrule itself, nine judges concurred in the *Wickliffe* decision, and no judges dissented. *Id.* at 157. Under Georgia Court of Appeals rules, "[p]rior decisions of the Court may be overruled by a single division of the Court after consultation with the other nondisqualified judges on the Court, provided the decision of the division is unanimous." GA. CT. APP. R. 33(a); *see also* Austin Martin Williams, *Researching Georgia Law (2015 Edition)*, 31 GA. ST. U. L. REV. 741, 746–47 (2015) ("A judgment concurred in by all the judges in a division will be binding on all other divisions. However, when the Court of Appeals sits as two divisions and a seventh judge, that court can overrule by majority concurrence a previous decision of one division. Moreover, a majority concurrence by the entire court will take precedent over any decision by a single division." (footnotes omitted)).

219. *Wickliffe I*, 489 S.E.2d at 156. The court commented:

> We encourage the Supreme Court to embrace the modern trend when it does directly address this issue. The current rule allows parties to relitigate issues they have already litigated and lost, straining judicial resources and creating the possibility of inconsistent results. Moreover, the Supreme Court has cited sections of the *Second Restatement of Judgments* dealing with collateral estoppel approvingly, . . . and the *Second Restatement* does not require mutuality before parties may be precluded from relitigating an issue they have already litigated and lost.

Id. (citations omitted).

220. *Wickliffe II*, No. S97C1859, 1998 Ga. LEXIS 185, at *185 (Jan. 5, 1998) ("The Supreme Court today denied the petition for certiorari in this case.").

221. *Wickliffe I*, 489 S.E.2d at 156; *see also* discussion *supra* Section II.C.

222. *See* Edmondson v. Gilmore, 554 S.E.2d 742, 745 (Ga. Ct. App. 2001), *vacated*, 583 S.E.2d 172 (Ga. Ct. App. 2003).

litigant had an opportunity to intervene in the earlier suit and had an interest in the outcome of the case.[223] The Georgia Supreme Court reversed and again unquestioningly upheld Georgia's mutuality doctrine.[224] The state supreme court reasoned that the two cases did not meet the identity of parties element due to lack of privity; the party asserting issue preclusion did not share the same legal right as the party in the previous case.[225]

2. Georgia Trial Courts

The mutuality requirement also continues to befuddle some of Georgia's trial courts. In 2014, one state court mistakenly held that "[t]he fact that the former and instant actions involve different plaintiffs does not bar application of issue preclusion in this case."[226] After the losing party pointed out the error, the court had to release a new opinion reversing its ruling and applying mutuality.[227] In her revised order, the trial judge commented that the state's current strict mutuality rule "strains judicial resources" and "creates the possibility of inconsistent results" but that she was nevertheless bound by Georgia Supreme Court precedent.[228]

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223. *Id.* ("We ascertain whether a person is a party 'exclusively by inspection of the record.' In so doing, we look for the existence of an adversarial relationship." (footnotes omitted)). Additionally, the court said that "[t]he term 'party' to an action includes all who are directly interested in the subject matter, and who have a right to make defense, control the pleadings, examine and cross-examine witnesses, and appeal from the judgment." *Id.* (quoting State Bar of Ga. v. Beazley, 350 S.E.2d 422, 425 (Ga. 1986)).

224. *In re* T.M.G., 570 S.E.2d 327, 329 (Ga. 2002) ("The Court of Appeals erred by concluding that the [two lawsuits] involved identical parties or their privies."). This case involved a sensitive child custody matter, and the court's reversal may have been partially motivated by the emotional factors. *See id.* at 328. Indeed, the Court of Appeals opinion noted the "irony of resolving so emotional a dispute on such a technical basis" and "the pain this decision will bring to the [losing party's] family." *Edmondson*, 554 S.E.2d at 746.

225. *See In re* T.M.G., 570 S.E.2d at 329–330.

226. Sadek v. Chowdhury (*Sadek I*), No. 13-C-07596-S5, 2014 WL 8764962, at *1 (Ga. State Ct. Dec. 4, 2014) (citation omitted), *vacated*, No. 13-C-07596-S5, 2015 WL 1973284 (Ga. State Ct. Jan. 12, 2015).

227. Sadek v. Chowdhury (*Sadek II*), No. 13-C-07596-S5, 2015 WL 1973284, at *1 (Ga. State Ct. Jan. 12, 2015).

228. *Id.*

Other Georgia trial courts have similarly recognized the policy arguments favoring nonmutuality.[229] In one case, the judge noted how "[j]udicial resources would indeed be conserved by not re-litigating this issue which has obviously been vigorously litigated and carefully considered by [the previous judge in the prior case]."[230] Although binding precedent forced the judge to apply mutuality, the judge strongly encouraged the defendant to appeal the decision and attempt to change the law, even telling the losing defendant that "the Court is inclined to grant a certificate of immediate review of this decision if requested."[231] The defendant, however, did not file an appeal, and the lack of subsequent appellate history suggests that the parties may have instead settled the case.[232]

E. Missed Opportunities by Georgia Litigants

Given established Georgia law, many litigants have failed to assert an issue preclusion defense and preserve it for appeal. Yet, many cases would have been excellent vehicles for advocating for a change in this Georgia common law rule.[233] Examining certain additional Georgia Supreme Court cases will illustrate the missed opportunities for Georgia litigants and practitioners—cases where counsel for one party could have attempted to argue for a change in Georgia preclusion law.

Miller v. Clayton County presented an opportunity for the plaintiffs' counsel to argue for nonmutual offensive issue

229. *See, e.g.*, Interfinancial Midtown Inc. v. Troutman Sanders, LLP, No. 2005CV102995, 2006 WL 4660190 (Ga. Super. Ct. Feb. 13, 2006).

230. *Id.*

231. *Id.* ("Despite all the valid reasons for granting [d]efendants' motion, under the currently existing Georgia law of collateral estoppel, the Court finds the motion must be [denied]. The facts of the instant case might present an opportunity for the appellate courts to re-examine the law of collateral estoppel in Georgia. With that in mind, and with the knowledge that undoubtedly much time and expense will be invested in preparing to prosecute and defend [p]laintiff's [c]ount II in the instant litigation, the Court is inclined to grant a certificate of immediate review of this decision if requested.").

232. *See id.*

233. *See generally* Coen v. CDC Software Corp., 816 S.E.2d 670 (Ga. 2018); Miller v. Clayton Cnty., 518 S.E.2d 402 (Ga. 1999).

preclusion.[234] The dispute centered on whether the plaintiffs, who were court reporters for Clayton County, qualified for certain additional retirement benefits under the county's compensation plan.[235] A separate court reporter-plaintiff had won a lawsuit against the same defendant on the exact same issue a few years prior and received the additional benefits.[236]

The plaintiffs' briefs to the court in *Miller* repeatedly mentioned this earlier case and argued that the issue had already been analyzed and decided.[237] The briefs laid a foundation for an issue preclusion argument but never actually mentioned the possibility of issue preclusion or cited any related case law or other authority.[238] The appellees' reply brief recognized the potential issue preclusion problem and even commented that the earlier case "admittedly raise[d] similar issues," but then it correctly noted the inapplicability of issue preclusion under current Georgia law due to lack of mutuality.[239] Per the facts as stated in the briefs, the case would likely

234. *See generally* Supplementary Brief of Appellants, *Miller*, 518 S.E.2d 402 (No. S99A0297), 1999 WL 33737053.

235. *See Miller*, 518 S.E.2d at 135–36.

236. Brief of Appellants at 12, *Miller*, 518 S.E.2d 402 (No. S99A0297), 1998 WL 34187903, at *12 ("In an identical case involving the Clayton County Pension Board (a party to this action), by a Clayton County court reporter (identical to the appellants here), the lower court ruled [in favor of the court reporter]."); *see also* Supplementary Brief of Appellants, *supra* note 234, at 2 ("[W]hen the facts are clear, the undisputed fact, as found by Judge Simmons in the companion case, is that [plaintiff-appellants] are, indeed, full-time . . . employees and are entitled to all of the benefits . . . .").

237. Brief of Appellants, *supra* note 236, at 12 ("In the [earlier] case, no appeal was ever prosecuted by the county, and it remains the law of that case and serves as authority for this Court to correct the trial court here so that [appellants] will also be in the same classification as [the plaintiff in the earlier case] . . . ."); Supplementary Brief of Appellants, *supra* note 234, at 1–7. The supplemental brief essentially begs the court to defer to the prior decision on the issue because the judge in that case "took . . . into account" all of the same facts and evidence, "addressed it all," and determined that the plaintiff in that case "was a covered county employee under the Plan." Supplementary Brief of Appellants, *supra* note 234, at 6.

238. Brief of Appellants, *supra* note 236, at 15 ("This question was squarely before Judge Simmons when he ruled in the [first] case, and his Order, both the original and on the Motion for Reconsideration, eloquently display[ed] the sound reasoning for this additional compensation . . . ."); Supplementary Brief of Appellants, *supra* note 234, at 1–7.

239. Brief of Appellees at 14–16, *Miller*, 518 S.E.2d 402 (No. S99A0297), 1999 WL 33737050, at *14–16. The appellees' brief noted that the appellant "relie[d] almost exclusively" on the earlier case and that the earlier case "admittedly raise[d] similar issues to those in the case at bar." *Id.* at 14. The appellees then argued that the prior case "does not bind this Court in any regard, nor did it bind the trial court." *Id.* In addition to similarly dismissing potential claim preclusion arguments, the appellees noted

have met all of the *Parklane* fairness factors for the application of nonmutual offensive preclusion.[240] The plaintiffs' attorneys could have urged the court to adopt the federal mutuality doctrine.[241] The plaintiff-appellants instead lost the case.[242]

The litigants in *Coen v. CDC Software Corp.* also had a chance to argue for a change in preclusion law.[243] However, the briefs from both the appellant and the appellee instead argued whether or not privity existed between the parties in the first and second lawsuits.[244] The court's opinion centered on a lengthy analysis of the "same causes of action" element of res judicata.[245] Based on the underlying facts, the appellee may have been able to prevail on an issue preclusion argument if he had argued for a change in the law.[246] Other litigants similarly tried, with some success, to expand the definition of privity to comply with the mutuality requirement.[247]

III. PROPOSAL

Georgia should consider following the national trend and allow nonmutual defensive applications of issue preclusion. Georgia can

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that "[t]he doctrine of collateral estoppel . . . applies only to issues that were actually decided in a previous suit, featuring the same parties." *Id.* at 15 (citation omitted). Here, the appellees continued, "[T]he parties to the case at bar are different from those in [the prior case;] the [prior case] cannot preclude this Court's review of any issues presented in the case at bar." *Id.* at 16.

240. Supplementary Brief of Appellants, *supra* note 234, at 1–7; *see also* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331–33 (1979). If this case had been decided under federal law and had plaintiffs' counsel asserted issue preclusion, the plaintiffs likely would have prevailed. *See Parklane*, 439 U.S. at 331–33.

241. *See Parklane*, 439 U.S. at 331–33.

242. *Miller*, 518 S.E.2d at 402 ("Because we find no error in the trial court's determination that for the purpose of these additional sums appellants are not employees under the County's pension ordinance, we affirm.").

243. 816 S.E.2d 670 (Ga. 2018).

244. Brief of Appellant Timothy F. Coen at 16–17, *Coen*, 816 S.E.2d 670 (No. S17G1375), 2017 WL 4221659, at *16–17. ("Here, there was no identity of the parties in the [c]ontract [c]ase and [t]ort [c]ase because the individual defendants named in the later [t]ort [c]ase were not in privity . . . ."); *see also* Brief of Appellees at 28–30, *Coen*, 816 S.E.2d 670 (No. S17G1375), 2017 WL 10128220, at *28–30.

245. *See Coen*, 816 S.E.2d at 673–76.

246. *See Parklane*, 439 U.S. at 331–33.

247. *See generally, e.g.*, Appellee's Brief in Response to the Brief of Appellants, Lilly v. Heard, 761 S.E.2d 46 (Ga. 2014) (No. S14A0433), 2013 WL 7018442.

recognize nonmutual defensive preclusion without necessarily allowing the offensive assertion of issue preclusion.[248] The latter doctrine remains controversial and could lead to additional litigation and confusion among lower state courts.[249] In contrast, policy justifications strongly support nonmutual defensive issue preclusion.[250] The traditional policy arguments have heightened salience in Georgia in light of recent economic incentives aimed at attracting new business to the state; this proposed reform is consistent with those goals.[251]

The need for change is particularly important for litigators and the state judiciary. In addition to alleviating crowded dockets and promoting judicial efficiency, broadening the scope of issue preclusion would lead to greater clarity and predictability in the law. Continued adherence to strict mutuality in Georgia has led to ever-expanding definitions of privity as courts in some cases recognize the absurdity of relitigating identical issues but remain bound to follow elements of issue preclusion as repeated by the Georgia Supreme Court.[252] These situations can also lead courts to grapple with challenging constitutional due process issues that could be avoided by the adoption of a common law doctrine emphatically endorsed by the U.S. Supreme Court and enshrined in federal court jurisprudence.[253] Conformity with the national consensus would also facilitate the duties of federal judges sitting in diversity, who are bound to follow state preclusion law, as well as out-of-state practitioners, who may not be familiar with the current particularities

248. *See* Schopler, *supra* note 17, § 4(c) ("[C]ourts are more inclined to permit the defensive, than the offensive, use of the doctrine of collateral estoppel.").

249. *See* discussion *supra* Section I.A.1.

250. *See supra* Section II.A.

251. *See* Matt Weeks, *Georgia Economy Still Riding Expansion Wave into 2019*, UGA TODAY (Dec. 6, 2018), https://news.uga.edu/economic-outlook-2019/ [https://perma.cc/3DT8-D8J9]; *Pro-Business Environment*, *supra* note 22.

252. *See supra* Section II.B.

253. *See* Camreta v. Greene, 563 U.S. 692, 705 (2011) (recognizing that courts generally prefer avoiding constitutional issues if possible). The Court commented: "a 'longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.'" *Id.* (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988)).

of Georgia law.[254] Similarly, implementing consistent mutuality doctrines across jurisdictions would benefit multijurisdictional litigators by allowing for greater predictability of future judgments.

The most natural solution for reforming Georgia mutuality law lies with convincing the Georgia Supreme Court to (1) take up the issue and assess its merits, and (2) change the elements of common law issue preclusion to allow nonmutual defensive assertion. Practitioners advocating for this judicial change in the law must remain cognizant of both the procedural hurdles and the policy arguments for reform. As an alternative solution, the state legislature may enact this proposed reform via statute by codifying nonmutual defensive issue preclusion as part of the state's Civil Practice Act.

A. Georgia-Specific Policy Considerations

Georgia's rapid population growth and increasingly crowded court dockets amplify the policy advantages of allowing nonmutual defensive issue preclusion.[255] Broadening the preclusion rule also fosters economic growth by reducing the costs of duplicative litigation.[256] Additionally, Georgia's current doctrine—at odds with the vast majority of other states and jurisdictions—reduces predictability and creates unnecessary confusion for practitioners and judges.[257]

1. Judicial Efficiency

Georgia courts increasingly face the problems of crowded civil dockets and lengthy delays in trial and hearing calendars, especially

254. *See supra* Section I.A.2; *see also* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508–09 (2001).

255. Michael E. Kanell, *Georgia Population Grew by 110,973 in a Year—7th Largest in the U.S.*, ATLANTA J.-CONST. (Dec. 20, 2016), https://www.ajc.com/business/georgia-population-grew-110-973-year-7th-largest/t4BpHTNVAwPoc08Xr60ajJ/ [https://perma.cc/9SXF-2AXA] ("Americans are increasingly on the move and a lot of them are coming to Georgia.").

256. MOORE ET AL., *supra* note 7, § 132.01 ¶ 3.

257. *See* Erichson, *supra* note 8, at 966.

in light of recent reductions to court budgets.[258] Crowded dockets and litigation delays result in overworked judges, stymied access to justice, and increased costs to both plaintiffs and defendants.[259] Georgia's ongoing population growth will likely perpetuate these problems in the coming years.[260]

Nonmutual defensive issue preclusion provides for quick adjudication of cases when case-dispositive issues, such as negligence or liability, have been previously litigated and decided.[261] Even when an already-decided issue is not case-dispositive, its preclusion allows the court to preserve valuable time and resources that would have been spent hearing arguments on duplicative motions, briefs, or presentations of facts at trial.[262] This increased efficiency also promotes the right to speedy trials and increases access to justice by allowing other pending cases to move to trial more quickly.[263]

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258. W. Anthony Jenkins, *Judicial Crossroads: The Journey Toward Judicial Reform*, MICH. BAR J., Mar. 2011, at 14, 15 (recognizing that Georgia faces "devastating budget cuts to its state court system"). The recent COVID-19 pandemic—ongoing at the time of this Note's publication—will likely amplify these problems, especially as courts begin tackling the growing backlog of cases. *See* Lindsey B. Mann & Alison A. Grounds, *Response to COVID-19: Litigation Impacts and Resources in Georgia*, TROUTMAN PEPPER: ARTICLES & PUBL'NS (Apr. 1, 2020), https://www.troutman.com/insights/response-to-covid-19-litigation-impacts-and-resources-in-georgia.html [https://perma.cc/5HAV-6FP3].

259. FULTON CNTY. SUPER. CT., BUSINESS COURT: 2014 ANNUAL REPORT 3 (2014), https://www.fultoncourt.org/business/Business_Court_2014_Annual_Report.pdf [https://perma.cc/NV93-STU5] ("Court delays not only increase costs for all litigants, but can negatively impact Georgia's economy." (citing THE WASH. ECON. GRP., THE ECONOMIC IMPACTS ON THE GEORGIA ECONOMY OF DELAYS IN GEORGIA'S STATE COURTS DUE TO RECENT REDUCTIONS IN FUNDING FOR THE JUDICIAL SYSTEM (2011))). Of course, issue preclusion reform alone cannot cure these larger problems, but judges and litigants would surely appreciate any potentially increased expeditiousness in resolving their disputes.

260. Kanell, *supra* note 255.

261. *See* WRIGHT & MILLER, *supra* note 3, § 4464. This adjudication often occurs via summary judgment motion. *Id.*

262. *Id.*

263. *See* Maryland *ex rel.* Gliedman v. Cap. Airlines, Inc., 267 F. Supp. 298, 304 (D. Md. 1967). In reaching its finding allowing nonmutual preclusion, the court explained its rationale:

> [T]he court has taken into account not only the right of society to have its courts render justice as inexpensively as possible and the right of each litigant to have his day in court, but also the rights of other litigants who might have to wait to have their day in court because one litigant is allowed to litigate the same issue over and over again.

Id.

2. Economic Growth and Industry Protectionism

Georgia policy makers repeatedly state their intentions of improving the state's economy by attracting new industry, reducing regulations, and promoting growth.[264] Economists have found that efficiency-focused court reform efforts positively affect economic growth and business development.[265] In contrast, delays in the judicial system can lead to lower wages, lower revenue, and stymied economic output.[266]

Nonmutual defensive issue preclusion would protect Georgia industry and business interests without any significant adverse impact on the rights of injured plaintiffs.[267] Small businesses, corporations, and other employers are more likely to be defendants in civil suits.[268] Allowing these defendants to assert issue preclusion when the plaintiff's grievance has already been adjudicated would reduce their litigation costs.[269] Companies may presumably then choose to

264. *Pro-Business Environment*, *supra* note 22.

265. *See* Jenkins, *supra* note 258, at 15. The findings of the State Bar of Georgia study included that "[t]he court system in Georgia is a key economic development foundation of the state . . . [and] efficient dispositions . . . [of lawsuits] impact Georgia's business and social climates." *Id.*

266. *Id.* ("Court delays due to lack of proper funding represent a 'dead weight' cost to the economy in terms of lost economic output, labor income, and fiscal revenues. Those delays also adversely impact other nonquantifiable measures of socioeconomic well being."). The State Bar study also concluded that "the economic impact of judicial underfunding in Georgia is between $337 million and $802 million." *Id.*

267. *See supra* Part II. For a counterargument, see Note, *Exposing the Extortion Gap: An Economic Analysis of the Rules of Collateral Estoppel*, 105 HARV. L. REV. 1940 (1992) (arguing that either a return to mutuality or, alternatively, allowing assertions of issue preclusion against a nonparty to the prior suit would yield the most economically efficient dispositions).

268. *See supra* Part II.

269. Blonder-Tongue Lab'ys, Inc. v. Univ. of Ill. Found., 402 U.S. 313, 328 (1971) ("To the extent the defendant in the second suit may not win by asserting [issue preclusion], . . . the defendant's time and money are diverted from alternative uses—productive or otherwise—to relitigation of a decided issue."). The United States has the highest costs of litigation per capita in the developed world; disavowing the antiquated mutuality standard would reduce those costs in Georgia. *U.S. Legal System Is World's Most Costly According to a New Study*, U.S. CHAMBER INST. FOR LEGAL REFORM (May 14, 2013), https://www.instituteforlegalreform.com/resource/us-legal-system-is-worlds-most-costly-according-to-a-new-study [https://perma.cc/EF3R-PYM4] ("Data shows that, as a percentage of its economy, the U.S. legal system costs over 150 percent more than the Eurozone average, and over 50 percent more than the United Kingdom.").

allocate their resources towards more productive ends such as increased hiring or greater innovation.[270]

3. Predictability and Cross-Jurisdictional Consistency

Scholars generally agree that predictability "is a defining feature of the rule of law."[271] Businesses also value predictability in the law because it serves to reduce compliance costs and ensure accurate financial planning, among other reasons.[272] Attorneys and advisors need clear and predictable procedural rules to effectively counsel clients and make appropriate strategic litigation decisions.[273] Strict mutuality undermines the rule of law because it can result in inconsistent verdicts on the same exact issue when the issue is subject to repeated litigation in various forums or by different attorneys.[274] These inconsistent verdicts severely impact the ability of attorneys to properly advise clients and the ability of businesses to predict litigation outcomes and make financial decisions accordingly.[275]

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270. *Blonder-Tongue*, 402 U.S. at 328 ("To the extent the defendant in the second suit may not win by asserting [issue preclusion], . . . the defendant's time and money are diverted from alternative uses—productive or otherwise—to relitigation of a decided issue.").

271. Kem Thompson Frost, *Predictability in the Law, Prized Yet Not Promoted: A Study in Judicial Priorities*, 67 BAYLOR L. REV. 48, 51 (2015). "Achieving predictability of outcomes within a jurisdiction and uniformity in the law across parallel jurisdictions helps assure consistency in judicial decisions, giving people a greater sense of certainty in the way courts will resolve disputes." *Id.*; *see also, e.g.*, Marcin Matczak, *Why Judicial Formalism Is Incompatible with the Rule of Law*, 31 CAN. J.L. & JURIS. 61, 63 (2018) (noting that "one of the main tenets of the rule of law [is] the predictability of court verdicts").

272. Byassesse, *supra* note 104, at 1426 ("[P]reclusion promotes public confidence in the legal system and permits interested parties to predict and plan future affairs based on the results obtained in a prior lawsuit. Knowing that subsequent litigation will not supersede these results, litigants may depend upon the rights and liabilities established previously in planning their future financial needs or business decisions." (footnotes omitted)). *See generally* Howard H. Stevenson & Milhnea C. Moldoveanu, *The Power of Predictability*, HARV. BUS. REV., July–Aug. 1995, at 140, https://hbr.org/1995/07/the-power-of-predictability [https://perma.cc/49JM-S6HZ].

273. Erichson, *supra* note 8, at 1013–14 ("Particularly in areas in which predictability matters, such as when litigators must make strategic decisions based on the anticipated effect of a judgment, we should prefer a simple rule to a more intricate or indeterminate one.").

274. *See supra* notes 115–18 and accompanying text (discussing the "gaming table" concerns with the mutuality requirement).

275. *See* Erichson, *supra* note 8, at 1013–14.

Georgia's continued adherence to a minority rule—at most, only six other states follow a similar strict mutuality doctrine—also lessens predictability of litigation outcomes on a more macro level by causing confusion and often unnecessary appeals, especially in multijurisdictional litigation.[276] When the first suit and the second suit were brought in separate jurisdictions, Georgia's incongruous doctrine forces courts to grapple with complex conflict of law and choice of law problems.[277] The increase in class actions, mass torts, and other multiforum litigation highlights the need for Georgia to change its law and conform with near-universally accepted mutuality rules.[278] As one scholar aptly described it, "Excessive procedural debate only tends to make courts burdened, lawyers rich, and everybody else confused."[279]

Indeed, lawyers and even judges have confused choice of law doctrines and incorrectly applied the wrong jurisdiction's issue preclusion law.[280] In most cases, citing another state's law (or federal law) regarding mutuality essentially amounts to a harmless error because most states allow nonmutual issue preclusion with similar requirements.[281] When Georgia litigants mistakenly proceed under that assumption, however, the misunderstanding can have severe consequences and result in unpredictable judgments.[282]

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276. *Id.* at 966 ("A number of states cling to the traditional mutuality requirement. Alabama, Florida, Georgia, Kansas, Mississippi, North Dakota, and Virginia require mutuality." (footnotes omitted)).

277. *Id* at 1016.

278. *Id.* at 1015 ("The need for a clear, reliable rule of interjurisdictional preclusion has grown with the phenomenal growth of multiparty, multiforum litigation. The unpredictability of choice of preclusion law and the tendency of many courts unthinkingly to apply their own preclusion law to other courts' judgments highlight the need for a clear rule.").

279. *Id.* at 1013.

280. *Id.* at 1015 ("[M]any courts unthinkingly [] apply their own preclusion law to other courts' judgments"). *See generally* QOS Networks Ltd. v. Warburg Pincus & Co., No. 02-1-5305-34, 2006 WL 4513580 (Ga. Super. Ct. Oct. 27, 2006) (applying Georgia issue preclusion law without discussion of choice of law doctrines when the first lawsuit was adjudicated by a New York court).

281. *See, e.g.*, Cmty. State Bank v. Strong, 651 F.3d 1241, 1272 n.20 (11th Cir. 2011) (explaining that prior cases "did not reach the question of which law to apply, because both Georgia and federal law required 'the actual litigation of the issue in question in the prior proceeding,' which was dispositive of the issue" (quoting Pleming v. Universal-Rundle Corp., 142 F.3d 1354, 1359 (11th Cir. 1998))). "Of course, it would make no difference in this case, because there is identity of parties." *Id*.

282. *See generally* Memorandum in Support of General Mills Inc.'s Motion to Dismiss the Complaint, CSX Transp., Inc. v. Gen. Mills, Inc. (*CSX Transp. I*), No. 1:14-CV-00201-TWT, 2015 WL

This concern is not hypothetical. In *CSX Transportation, Inc. v. General Mills, Inc.*, a case ultimately decided on appeal to the U.S. Court of Appeals for the Eleventh Circuit in 2017, the legal team for General Mills—experienced attorneys from a large Minnesota firm with the assistance of local counsel—filed a lengthy motion to dismiss, asserting an issue preclusion defense.[283] As it turns out, CSX Transportation (the plaintiff) had already litigated the same alleged negligence in an earlier proceeding against another party, and a jury unambiguously resolved the issue by finding that CSX's "sole negligence" caused the disputed accident and resulting injuries.[284] The otherwise well-written brief for General Mills thoroughly explained how all of the elements of issue preclusion were met under federal law, but the brief did not mention Georgia procedural law.[285] Presumably, based on their cited law, corporate counsel advised their client that they had a high likelihood of success on their motion to dismiss. In fact, the U.S. District Court for the Northern District of Georgia trial judge agreed with them and granted the motion to dismiss.[286]

On appeal, however, CSX correctly argued that, although the first lawsuit was decided in federal court, Georgia preclusion law applied because the court sat in diversity.[287] As a nonparty to the first suit,

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468682 (N.D. Ga. Feb. 3, 2015), 2014 WL 11191996.

283. *Id.* at 12–14.

284. *Id.* at 14–15.

285. *Id.* at 12–18.

286. *CSX Transp. I*, 2015 WL 468682, at *5; *see also* CSX Transp., Inc. v. Gen. Mills, Inc. (*CSX Transp. II*), No. 1:14-CV-201-TWT, 2015 WL 12856027, at *1 (N.D. Ga. Apr. 13, 2015) (denying CSX's motion for reconsideration of the court's order granting General Mills' motion to dismiss, but granting CSX's motion for leave to file an amended complaint), *rev'd and remanded*, 846 F.3d 1333 (11th Cir. 2017). In sum, the relevant initial procedural history of the case was as follows:

> The Plaintiff then filed a Motion for Reconsideration, or alternatively, Motion for Leave to File an Amended Complaint. It argued that this Court incorrectly applied federal collateral estoppel law, and not Georgia collateral estoppel law. The Court initially denied the Motion for Reconsideration, but granted the Motion for Leave to File an Amended Complaint, allowing the Plaintiff to file an amended complaint putting in issue the collateral estoppel question. However, on reconsideration, the Court later denied the Motion to Amend the Complaint.

CSX Transp., Inc. v. Gen. Mills, Inc. (*CSX Transp. IV*), No. 1:14-CV-201-TWT, 2017 WL 4472787, at *1 (N.D. Ga. Oct. 6, 2017) (footnotes omitted).

287. Reply Brief for Plaintiff-Appellant CSX Transportation, Inc. at 8–11, CSX Transp., Inc. v. Gen.

General Mills could not satisfy strict mutuality under Georgia law and therefore lost the appeal.[288] The success of the motion to dismiss hinged entirely on the mutuality element.[289] In fairness to the losing legal team, the governing precedent was not entirely clear at the time.[290] But that is precisely the point—Georgia clinging to strict mutuality leads to avoidable appeals and mistaken assumptions about the possible outcome of disputes.

The *CSX Transportation* example illustrates how congruent procedural rules across jurisdictions would minimize the consequences of potentially unclear and complex choice of law doctrines.[291] Federal issue preclusion law has largely remained consistent and relatively predictable for decades.[292] Changing Georgia law to allow nonmutual defensive issue preclusion provides the best and most practical avenue for achieving conformity and advancing the policy of predictability in this area. By simply adopting the federal common law elements, the Georgia Supreme Court would eliminate these burdens on litigants and streamline the disposition of issue preclusion defenses.[293]

B. How Practitioners Should Proceed

Practitioners should embrace the opportunity to challenge the current status quo in state law by asserting nonmutual application of

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Mills, Inc. (*CSX Transp. III*), 846 F.3d 1333 (11th Cir. 2017) (Nos. 15-12095, 15-14399), 2016 WL 2347265, at *8–11.

288. *See generally CSX Transp. III*, 846 F.3d 1333.

289. *Id.* at 1340.

290. *Id.*

291. *See generally id.*

292. *Id.*; *see also supra* Part II.

293. *Compare* WRIGHT & MILLER, *supra* note 3 (listing the black letter law elements of issue preclusion: (1) both actions involved an identical issue; (2) the issue was actually litigated and decided in the first action; (3) the parties in the first action had a full and fair opportunity to litigate the issue; (4) the first action was adjudicated as a valid final judgment on the merits; and (5) some form of mutuality or limited nonmutuality, including nonmutual defensive and conditional nonmutual offensive issue preclusion), *with* Cmty. State Bank v. Strong, 651 F.3d 1241, 1264 (11th Cir. 2011) ("A party seeking to assert collateral estoppel under Georgia law must demonstrate that (1) an identical issue, (2) between identical parties, (3) was actually litigated and (4) necessarily decided, (5) on the merits, (6) in a final judgment, (7) by a court of competent jurisdiction.").

issue preclusion in every possible case it could apply. Issue preclusion is an affirmative defense that courts generally cannot raise sua sponte.[294] Therefore, trial counsel must recognize potential preclusion defensives and raise them as early as possible.[295] Additionally, to preserve the arguments for appeal, parties should argue for changing preclusion law in their briefs at every stage of litigation.[296]

Thoroughly briefing the mutuality issue should be of paramount importance both when petitioning the Georgia Supreme Court for certiorari and when submitting briefs to the court after it grants certiorari. Unless practitioners force their hand, the justices may try to sidestep the mutuality issue and instead decide the case on other grounds, such as privity.[297]

When an attorney—most likely a defense counsel—has a case ripe for applying nonmutual defensive preclusion, the attorney should explicitly argue for a change in law (i.e., overruling *Waldroup*).[298] The briefs to the Georgia Supreme Court should include citations to *Blonder-Tongue* and *Parklane*, as well as to the leading cases in other jurisdictions and the other persuasive authorities mentioned

294. Haygood v. Head, 699 S.E.2d 588, 592 (Ga. Ct. App. 2010) ("[T]he trial court lacked authority to rule, sua sponte, on the merits of a collateral estoppel defense . . . . Collateral estoppel is an affirmative defense that must be pleaded and proved." (citations omitted)). *But see* Insituform Techs., LLC v. Cosmic TopHat, LLC, 959 F. Supp. 2d 1335, 1141 (N.D. Ga. 2013) ("[W]hen the prior decision was made by the same court, the court may apply preclusion principles sua sponte." (citing Shurick v. Boeing Co., 623 F.3d 1114, 1116 n.2 (11th Cir. 2010))).

295. *Haygood*, 699 S.E.2d at 592. The *Haygood* case illustrates the consequences of delay in raising an issue preclusion defense: the defendants lost their chance to assert the defense and ultimately lost the case. *Id.* ("As neither Head nor Larry Rogers raised a collateral estoppel defense prior to the time the trial court entered its dismissal orders, the trial court should not have considered the defense.").

296. *Cf. id.* The court of appeals did not consider the merits of issue preclusion because it was not properly raised at the trial court. *Id.*

297. The court has often used its ever-expanding definition of privity to allow parties to prevail on what should have been a nonmutual issue preclusion defense. *See, e.g.*, Lilly v. Heard, 761 S.E.2d 46, 50–51 (Ga. 2014) (finding privity between two parties for the purpose of issue preclusion based solely on the parties' "common interest" as "residents and voters" of the same county); Parker v. Parker, 594 S.E.2d 627, 629 (Ga. 2004). Although zealous advocacy may often require attorneys to argue for privity, they should not let a potentially winnable privity argument stop them from also urging the court to change the mutuality doctrine.

298. Waldroup v. Greene Cnty. Hosp. Auth., 463 S.E.2d 5, 7–8 (Ga. 1995); *see also supra* Section II.C.

throughout this Note.[299] Briefs to the court should also explain the policy justifications[300]—the economic arguments may carry great weight with the justices, especially if coupled with amicus briefs from influential groups such as the Georgia Chamber of Commerce.[301] Notably, Georgia courts have already acknowledged the importance of similar policy goals in other cases.[302]

The Georgia Supreme Court recognized the modern mutuality trends in a footnote and arguably already applied nonmutual defensive preclusion in *Nally*.[303] Although the facts in *Nally* were particularly conducive to arguing for a change in the law, the pro se plaintiff did not point out the mutuality requirement when defense counsel asserted issue preclusion.[304] Nevertheless, future practitioners with more resources should cite this case and note that the court has previously ignored the mutuality requirement to achieve its desired ends.[305]

Convincing the justices to apply the modern trends as a matter of state common law would not necessarily require changing minds but rather just explaining the importance of this relatively obscure

299. *See, e.g.*, *supra* Sections I.A–B. The Georgia Supreme Court has previously relied on U.S. Supreme Court precedent to decide state law civil claims when the federal courts provided helpful analysis. *See, e.g.*, Gwinnett Cnty. Bd. of Tax Assessors v. Gen. Elec. Cap. Comput. Servs., 538 S.E.2d 746, 748–49 (Ga. 2000).

300. *See supra* Section II.A.

301. *See* Kristal Dixon, *Christian Coomer Appointed to Ga. Court of Appeals*, PATCH (Sept. 15, 2018), https://patch.com/georgia/cartersville/christian-coomer-appointed-ga-court-appeals [https://perma.cc/3ZAS-7BZV] (noting that one judge "was appointed to the Court Reform Council by [Governor Nathan] Deal and was named the Georgia Chamber of Commerce's Legislator of the Year in 2017").

302. *See, e.g.*, Stott v. Mody, 572 S.E.2d 83, 86 (Ga. Ct. App. 2002) (affirming a summary judgment of preclusion based on finding of privity). In *Stott*, the Georgia Court of Appeals held:

> The fact that they lack a remedy . . . does not require this court to disregard established legal principles and allow them to relitigate the very issue already adjudicated . . . . This would be tantamount to creating "a framework under which a plaintiff could consciously design a legal strategy which would allow him two shots at the same target."

Id. (quoting McNeal v. Paine, Weber, Jackson & Curtis, Inc., 293 S.E.2d 331, 333 (Ga. 1982)). These very same arguments also apply to permitting nonmutual defensive issue preclusion.

303. *See supra* Section II.C; *see also* Nally v. Bartow Cnty. Grand Jurors, 633 S.E.2d 337, 339–40 (Ga. 2006).

304. *See Nally*, 633 S.E.2d at 338–39.

305. *See supra* Section II.C.

doctrinal reform.[306] In a 2020 case, the Georgia Supreme Court opined that "[t]he doctrine of collateral estoppel must be applied with 'realism and rationality' and not in a 'hypertechnical and archaic' manner."[307] Practitioners should cite this sentence and argue that strict mutuality is perhaps the most "archaic" and least "rational" aspect of Georgia's current collateral estoppel jurisprudence.[308] Although that case did not ultimately center on civil procedure, the court did rely heavily on U.S. Supreme Court decisions, which it could (and should) do again when changing issue preclusion law to conform with federal standards.[309]

In fact, the Georgia Supreme Court has approvingly cited decisions of the U.S. Supreme Court when deciding other issue preclusion cases.[310] In *Gwinnett County Board of Tax Assessors v. General Electric Capital Computer Services*, the Georgia Supreme Court ruled on the applicability of issue preclusion in certain tax cases.[311] The court commented that "[t]he Supreme Court of the United States has addressed the role of collateral estoppel in a tax dispute," and then devoted the next two paragraphs of its opinion to reviewing the relevant U.S. Supreme Court cases and their holdings.[312]

The justices have also looked to the *Restatement (Second) of Judgments* for guidance when clarifying other elements of issue preclusion.[313] In *Kent v. Kent*, the appellant's resourceful counsel pointed out the ambiguities of the "essential to the judgment" element of issue preclusion in appellate court precedent.[314] In its

306. *See supra* Section II.C.

307. Medina v. State, 844 S.E.2d 767, 773 (Ga. 2020) (quoting Ashe v. Swenson, 397 U.S. 436, 444 (1970)).

308. *Id.*

309. *Id.*

310. *See, e.g.*, Gwinnett Cnty. Bd. of Tax Assessors v. Gen. Elec. Cap. Comput. Servs., 538 S.E.2d 746, 748 (Ga. 2000).

311. *Id.* at 746–47.

312. *Id.* at 748–49.

313. *See, e.g.*, Kent v. Kent, 452 S.E.2d 764, 766 n.2 (Ga. 1995).

314. *Id.* ("The wife argues the second element, that the determination be essential to the judgment, is unnecessary. A number of cases from our court and the Court of Appeals state that collateral estoppel (or 'estoppel by judgment') applies to matters 'necessarily or actually decided.' . . . However, the question of whether the previously litigated issue was or was not essential to the earlier judgment did

analysis, the Georgia Supreme Court cited the *Restatement* and concluded, "[t]he correct rule, followed in some of our appellate decisions, . . . is that followed by the *Restatement*."[315] Of course, this same *Restatement* also endorses nonmutual defensive issue preclusion.[316]

Importantly, however, persuasive authority from other jurisdictions has not always carried the day for the Georgia Supreme Court justices.[317] In *Shields v. Bellsouth Advertising & Publishing Corp.*, the parties did not contest the mutuality element; rather, the appellant tried to persuade the court that issue preclusion should *not* apply to unemployment compensation decisions.[318] The appellant's brief heavily cited the *Restatement*, federal court decisions, and decisions from more than ten other states' highest courts.[319] All of those sources supported the appellant's public policy arguments.[320] Despite this apparent national consensus, the court ruled against the appellant.[321] And despite the appellant's lengthy brief detailing the viewpoints of other courts and legal scholars,[322] the court's opinion exclusively cited Georgia cases and did not address the public policy arguments.[323] This deviation from national consensus, however,

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not seem to be disputed in those cases." (citations omitted)). Practitioners should cite this passage and point out that most of the litigants in the court's earlier decisions similarly did not dispute the issue of whether mutuality applies. *See id.* (collecting cases where the issue of mutuality was not in dispute).

315. *Id.* (citations omitted); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. L. INST. 1982).

316. RESTATEMENT (SECOND) OF JUDGMENTS § 29 (AM. L. INST. 1982) ("A party who has had a full and fair opportunity to litigate an issue has been accorded the elements of due process. In the absence of circumstances suggesting the appropriateness of allowing him to relitigate the issue, there is no good reason for refusing to treat the issue as settled so far as he is concerned other than that of making the burden of litigation risk and expense symmetrical between him and his adversaries."); *see also* Hoffheimer, *supra* note 6, at 544 ("The *Restatement (Second) of Judgments* largely codifies the Supreme Court's approach in *Parklane Hosiery*.").

317. *See, e.g.*, Shields v. Bellsouth Advert. & Publ'g Corp., 545 S.E.2d 898, 898–99 (Ga. 2001).

318. Brief of Appellant Paul Shields at 3, 16, *Shields*, 545 S.E.2d 898 (No. 99-8307-HH), 2000 WL 34252049, at *3, *16. The Appellant argued that unemployment compensation proceedings do not provide a claimant a full and fair opportunity to litigate all issues related to his discharge. *Id.* at 3, 24–30.

319. *Id.* at 9–28.

320. *Id.*

321. *Shields*, 545 S.E.2d at 898–99.

322. *See* Brief of Appellant Paul Shields, *supra* note 318, at 9–28.

323. *Shields*, 545 S.E.2d at 900–01.

should not necessarily alarm proponents of nonmutual issue preclusion because the underlying policy goals implicitly advanced by the court's holding—broadening the scope of issue preclusion—are consistent with those of nonmutuality.[324] Regardless, the primary takeaway from the *Shields* case is that practitioners should not rely exclusively on persuasive authority from other jurisdictions, regardless of its breadth. Instead, appellate briefs should also include citations to prior Georgia case law such as *Wickliffe* and the line of appellate cases that began to abrogate mutuality before being overturned.[325]

C. The Legislative Alternative

Should the Georgia Supreme Court continue to resist changing the traditional mutuality doctrine, the Georgia General Assembly can codify nonmutual defensive preclusion in a statute. Indeed, some courts have relied on existing statutory authority when applying other elements of preclusion law.[326] The legislature could either amend that statute or enact a new one.

The legislature already expressed its preference for conformity with federal law in this area when it modeled the Georgia Civil Practice Act after the Federal Rules of Civil Procedure.[327] In fact, the legislature continues to update Georgia civil procedure statutes to

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324. *See generally id.* (applying issue preclusion to unemployment compensation decisions). The *Shields* rule broadens the scope of issue preclusion, and nonmutuality similarly increases the categories of litigants allowed to assert an issue preclusion defense. *Id.*

325. *See, e.g.*, *Wickliffe I*, 489 S.E.2d 153, 155–56 (Ga. Ct. App. 1997), *cert. denied*, No. S97C1859, 1998 Ga. LEXIS 185 (Ga. Jan. 5, 1998).

326. *See, e.g.*, Morrison v. Morrison, 663 S.E.2d 714, 719 (Ga. 2008) (Benham, J., dissenting) (finding that Georgia Code section 9-12-40 "codifies the doctrines of res judicata and collateral estoppel"); O.C.G.A. § 9-12-40 (2015 & Supp. 2020) ("A judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put in issue or which under the rules of law might have been put in issue in the cause wherein the judgment was rendered until the judgment is reversed or set aside.").

327. *See, e.g.*, Ashley Harris et al., *Civil Practice Act: Allow for Discretionary Appeal of Class Certification; Adopt Federal Rule of Civil Procedure 23 Pertaining to Class Actions; Amend Interest Amount on Judgments; Prohibit Third Voluntary Dismissal by Plaintiff; Permit Courts to Use Discretion in Declining Jurisdiction When Another Forum Is More Convenient; Change the Pre-Judgment Interest Rate; Provide for Vacation of an Arbitration Award Based Upon an Arbitrator's Manifest Disregard for the Law*, 20 GA. ST. U. L. REV. 28, 36 (2003).

match the federal standards.[328] These changes greatly simplify state court litigation for attorneys already familiar with the federal rules, which all law school students learn as part of the mandatory first-year curriculum. Although nonmutual issue preclusion is not codified in the federal rules, nothing prevents Georgia from amending the Civil Practice Act to further mirror established federal jurisprudence.

The Georgia legislature has not been shy in superseding common law.[329] The legislators passed a tort reform measure in 2005 and may take up the issue again in future sessions.[330] Although perhaps less politically salient, issue preclusion reform—specifically, allowing nonmutual defensive preclusion—serves many of the same ends as tort reform with much less controversy or potential inequity.[331]

CONCLUSION

Simply stated, when it comes to plaintiffs litigating an issue, the standard should be "one bite, everybody knows the rules."[332] Georgia's current precedent allows plaintiffs to have multiple "bites," and no one seems to know the rules.[333]

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328. *See id.*

329. Dave Williams, *Georgia Republicans Likely to Renew Push for Tort Reform*, ATLANTA BUS. CHRON. (Sept. 6, 2019, 5:45 AM), https://www.bizjournals.com/atlanta/news/2019/09/06/georgia-republicans-likely-to-renew-push-fortort.html [https://perma.cc/W6GE-5SRK].

330. Rachel Tobin Ramos, *Tort Reform Bill Passes General Assembly, Heads to Perdue*, ATLANTA BUS. CHRON., https://www.bizjournals.com/atlanta/stories/2005/02/14/daily9.html [https://perma.cc/G96A-3BBB] (Feb. 14, 2005, 5:10 PM). The Act capped noneconomic damages for medical malpractice claims at $350,000. *Id.* In 2010, the Georgia Supreme Court found that cap to be unconstitutional. Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 220 (Ga. 2010); *see also* Nigel Wright et al., *Tort Reform Unraveled – Georgia Supreme Court Finds Non-Economic Damages Caps to Be Unconstitutional*, LEXOLOGY (Mar. 26, 2010), https://www.lexology.com/library/detail.aspx?g=caf6cf52-5718-4c29-aa3a-c61518ec73f5 [https://perma.cc/77DP-M3FB]. Legislators have since "renewed their push for tort reform in a big way." Dave Williams, *Tort Reform Push Cranks Up in General Assembly*, SAVANNAH NOW (Mar. 1, 2020, 12:19 PM), https://www.savannahnow.com/news/20200301/tort-reform-push-cranks-up-in-general-assembly [https://perma.cc/NZK4-ZJPS].

331. *Compare* sources cited *supra* note 330, *with* discussion *supra* Section II.A

332. *Cf.* Barstool Sports, *One Bite with Davey Pageviews – Kiss My Slice with Special Guest Johnny Bananas*, YOUTUBE (Feb. 8, 2017), https://www.youtube.com/watch?v=qcENFGaz4VI (using the phrase "one bite, everybody knows the rules").

333. *See supra* Sections I.A.2, I.C, II.D, II.E, III.A.3.

In light of the overwhelming national trends and the policy considerations discussed throughout this Note, Georgia should confront the mutuality issue and allow litigants to assert issue preclusion defensively even if they lack mutuality. States began rethinking mutuality decades ago, and federal courts continue to follow the *Blonder-Tongue* rule.[334] Georgia should not continue to lag behind other states in this area of law by following an antiquated procedural rule of mutuality. Allowing nonmutual defensive issue preclusion would benefit the court system, litigants, and business interests. The time is now for the Georgia Supreme Court, or perhaps the legislature, to bring the state's issue preclusion law into the twenty-first century.

334. *See* cases cited *supra* note 50.