Civil Procedure: Reviving Mutuality: Restricting the Application of Defensive Collateral Estoppel in Minnesota DWI Proceedings—State v Lemmer

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# Civil Procedure: Reviving Mutuality: Restricting the Application of Defensive Collateral Estoppel in Minnesota DWI Proceedings—State v. Lemmer

Wyatt Partridge†

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I. INTRODUCTION

In Minnesota, the evolutions of the related common law doctrines res judicata and collateral estoppel have produced a magnitude of complex interpretive challenges for Minnesota courts. The dilemma has generated serious discussion within the judiciary and the needless encroachment by the legislature within the province of regulating judicial procedure exacerbated this dilemma. Minnesota recently attempted to resolve this dispute, redefining the relationship between judicial procedure and the legislature by outlining a more detailed blueprint by which to apply collateral estoppel.

The doctrine of collateral estoppel exists to bar “a party from relitigating an issue determined against that party in an earlier action, even if the second action differs significantly from the first one.” In essence, “collateral estoppel stands for the principle of issue preclusion.” The doctrine seeks to avoid duplicative litigation, achieve consistency of judgments, preserve the public trust, and conserve resources by protecting past litigants from the adverse consequences of relitigation. While a party to the prior action is absolutely barred from relitigating the same issue, authority is split as to whether the doctrine estops the party’s privies. Since the early nineteenth century, proponents of collateral estoppel urged that prior rulings also bar privies from relitigation; recalling Jeremy Bentham, who called the requirement of mutuality “illogical and ill-founded.”

1. BLACK’S LAW DICTIONARY 279 (8th ed. 2004) (defining the various specific types of collateral estoppel, but generally explaining collateral estoppel as being applicable even when the second action differs from the first).


4. 50 C.J.S. JUDGMENTS § 831 (2008) (outlining the requirements for determining which parties will be bound for the purposes of collateral estoppel by a prior ruling, and recognizing that there is not a definitive answer to whether privies should be bound by such rulings).

The Minnesota Supreme Court recently addressed the degree of privity required between state agencies to bind a party for the purposes of collateral estoppel in driving while intoxicated (DWI) proceedings in *State v. Lemmer.* In Minnesota, an arrest for DWI results in a civil implied consent hearing against the Commissioner of Public Safety and a criminal DWI prosecution by the state. In 2002, the state legislature enacted subdivision (3)(g) to section 169A.53 of the Minnesota Statutes, precluding defensive collateral estoppel against the state in the criminal proceeding based on rulings made in district court during the implied consent hearing. The *Lemmer* case arrived before the Minnesota Supreme Court in 2007, arising from a dispute over an order by the court of appeals that upheld the constitutionality of section 169A.53(3)(g), which permits the state to relitigate issues previously determined in Lemmer’s implied consent hearing. The court affirmed that the two state agencies involved in DWI proceedings were not in privity and remanded Lemmer’s case to trial.

This note begins by presenting a brief history of issue preclusion before proceeding to discuss the evolution of the privity requirements under collateral estoppel in Minnesota DWI cases. It then examines the *Lemmer* case to understand why the Minnesota Supreme Court determined that collateral estoppel did not apply. Finally, this note concludes with an analysis of public policy concerns to illustrate some potential ways that the *Lemmer* decision may impede judicial efficiency and debase public trust in the judiciary.

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7. *Id.* at 654. There are two proceedings resultant to DWI arrests in Minnesota: first, there is the civil action for driver’s license revocation; and second, the criminal prosecution. See Minn. Stat. §§ 169A.50–53 (2006).
8. *Lemmer*, 736 N.W.2d at 655–56 (explaining that the legislature abrogated the decision reached in *State v. Victorsen*, 627 N.W.2d 655 (Minn. Ct. App. 2001)). The legislation was created when Minnesota Statute section 169A.53(3)(g) was adopted on April 4, 2002, making clear that the implied consent hearing no longer gives rise to collateral estoppel in criminal prosecutions. See Act of Apr. 4, 2002, ch. 314, § 1 subdiv. 3(g), 2002 Minn. Laws 509–11 (codified as amended at Minn. Stat. § 169A.53(3)(g)). The significance of this passage is in the fact that the court recognized that the legislature deliberately challenged what the court ruled a procedural mechanism, illustrating that the court allowed the legislature to involve itself in the distinct province of the judiciary.
10. *Id.* at 663.
II. EVOLUTION OF COLLATERAL ESTOPPEL IN MINNESOTA

A. Early Common Law Roots

“Collateral estoppel has long been an important part of Anglo-American common law.”\textsuperscript{11} The doctrine is believed to stem from the Roman principle of res judicata\textsuperscript{12} and Germanic ideas of equity, holding that parties of past litigation were estopped from relitigating previously decided issues.\textsuperscript{13} Prior to the adoption of collateral estoppel by English courts, the structure of the writ system encouraged duplicative litigation by offering nominally different causes of action to be applied to the same facts.\textsuperscript{14} Protective mechanisms aimed at preventing the harms of duplicative suits progressed and became incorporated into the fabric of the English common law system, ultimately taking shape as the doctrine of “estoppel by record” first cited in 1803 by the King’s Bench in \textit{Outram v. Morewood}.\textsuperscript{15} This type of estoppel was later adopted by the United States Supreme Court in \textit{Hopkins v. Lee} in 1821.\textsuperscript{16} Civil proceedings in the American courts first recognized the expansion of the doctrine to privies of prior litigants in 1876, as


\textsuperscript{13} Charles William Hendricks, \textit{100 Years of Double Jeopardy Erosion: Collateral Estoppel Made Extinct}, 48 Drake L. Rev. 379, 391–92 (2000) (posing that the roots of collateral estoppel share some history with the Roman ideas of res judicata, but that the specific feature of collateral estoppel evolved from “Germanic origins.” The article then discusses the evolution of the doctrine in the criminal arena under the provisions of the 5th Amendment of the United States Constitution).


\textsuperscript{15} Hendricks, \textit{supra} note 13, at 391 (citing the British adoption of civil collateral estoppel in \textit{Outram v. Morewood}, 102 Eng. Rep. 630, 633 (K.B. 1803)).

\textsuperscript{16} Hopkins v. Lee, 19 U.S. 109, 113 (1821). An early discussion of collateral estoppel declaring a litigant may not take the same issue to another venue to relitigate a “fact which has been directly tried, and decided by a Court of competent jurisdiction, cannot be contested again between the same parties . . . .” \textit{Id.}
acknowledged in *Cromwell v. County of Sac*.\(^\text{17}\)

Over time, the doctrine of collateral estoppel developed in the American common law and was recorded in the *Restatement (First) of Judgments* in 1942, where it was written that any fact actually litigated to finality would be conclusive in subsequent litigation between the parties.\(^\text{18}\) The *Restatement (Second) of Judgments* expanded this concept to include prior conclusions made on the law as well.\(^\text{19}\) Each state is free to determine the application of common law nuances, but “all states have adopted the common law doctrines of res judicata and collateral estoppel in some form.”\(^\text{20}\)

**B. Minnesota and the Mutuality Requirement**

Minnesota’s modern common law understanding of the doctrine explains that previous decisions are conclusive in subsequent actions when a party can demonstrate that “(1) [the] issue is identical to one in prior adjudication; (2) there is a final judgment on the merits; (3) [the] estopped party [is the same] party or in privity with [the] party to prior adjudication; and (4) [the] estopped party was given full and fair opportunity to be heard on adjudicated issue.”\(^\text{21}\)

Despite a nominal commitment to the generally understood principles of collateral estoppel, Minnesota lastingly adhered to the rule that findings made at DWI implied consent hearings did not collaterally estop prosecutors from relitigating the same issues during the later criminal prosecution.\(^\text{22}\) This facilitated DWI proceedings that resembled the early “doctrine of mutuality of the parties,” which originally functioned to exclusively restrict collateral

\(^{17}\) Hendricks, *supra* note 13, at 391 (attributing the inception of applying civil collateral estoppel against privies of prior litigants as well as to the prior adjudicated parties to *Cromwell v. County of Sac*, 94 U.S. 351, 353 (1876)).

\(^{18}\) *Restatement (First) of Judgments* § 68(1) (1942).

\(^{19}\) *Restatement (Second) of Judgments* § 27 (1982).


estoppel for use against persons who were named as parties in the prior litigation. 23

Jurisdictions who had once maintained this historical limitation upon defensive collateral estoppel realized the attendant costs, and sought to strengthen estoppel by broadening its scope by “rejection[] of the mutuality requirement.” 24 Many jurisdictions rejected mutuality, endorsing the California Supreme Court’s 1942 “landmark” rejection of the doctrine of mutuality in Bernhard v. Bank of America National Trust and Savings Association. 25 The rejection of mutuality attained even greater status in 1971, when the United States Supreme Court expressly rejected mutuality in Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation. 26 The Court agreed that the doctrine of mutuality was undergoing a “fundamental change” because “an increasing number of courts have rejected the principle as unsound.” 27 Although the language used by the Court indicates that it may not have intended for this rejection of mutuality to be universally applied beyond the sphere of patent and trademark litigation, “the federal courts embraced the Supreme Court’s approach and applied it to a variety of cases.” 28 Following the federal system’s lead, “[m]any but not all state

23. Donald L. Catlett, Charles D. Moreland & Janet M. Thompson, Collateral Estoppel in Criminal Cases: How and Where Does It Apply?, 62 J. Mo. B. 370, 370 (Nov.-Dec., 2006) (explaining that judgments evolved under the doctrine to estop litigants who were in privity with the prior party subsequent to the more limited earlier understandings of the doctrine that required a strict showing of mutuality of the parties).

24. Id.

25. Jean F. Rydstrom, Annotation, Federal or State Law as Governing in Matters of Res Judicata and Collateral Estoppel in Federal Tort Claims Act Suit, 49 A.L.R. FED. 326 (1980) (citing Bernhard v. Bank of Am. Nat’l Trust & Sav. Ass’n, 122 P.2d 892 (Cal. 1942)) (because most states have abandoned the mutuality of estoppel, and because most federal courts defer to state law on the issue, it can be said that most jurisdictions abandoned mutuality).

26. 402 U.S. 313 (1971). This was an early case that dealt with the framework for collateral estoppel. It did not address the same kind of collateral estoppel that was being discussed in the Lemmer case. It should be noted that while Lemmer was asking the court to acknowledge that defensive collateral estoppel should apply to his DWI case, Blonder-Tongue is discussing the fact that collateral estoppel may also be used offensively, that is, to preclude a defendant from suing a plaintiff who had previously won in a final disposition of an identical claim by a similarly situated defendant. This case is cited for the proposition that mutuality was being abandoned and that expansion is applicable regardless of which type of collateral estoppel the court applies.

27. Id. at 327. See also Hartt, supra note 3, at 211.

courts have rejected the mutuality requirement. It would not be until 1990 that Minnesota’s conceptualization of collateral estoppel would expressly abandon the doctrine of mutuality.

As the judiciary recognized “the erosion of the mutuality doctrine, the courts expanded the application of collateral estoppel.” More specifically, the evolution of the aforementioned doctrines illustrates a general trend towards establishing a more unrestrained recognition of privity between related litigants. This expansive approach was declared over thirty years ago when the court posited the federal majority rule was that “[a] person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative.”

C. Minnesota Mutuality in DWI Proceedings

1. State v. Juarez

One of the earlier Minnesota cases in the chain of case law preceding Lemmer was the 1984 case State v. Juarez. Juarez was factually similar to Lemmer in that Commissioner of Public Safety represented the state at the implied consent hearing. Juarez argued that there was no reasonable basis to give him a breathalyzer test during a traffic stop. At the implied consent hearing, the district court agreed, dismissing the case. The City of Burnsville represented the state at the subsequent criminal trial. In that proceeding, Juarez was able to collaterally estop the
prosecution from introducing evidence collected during the stop.\footnote{38}{Id.}

The state appealed and the Minnesota Court of Appeals reviewed the applicability of collateral estoppel in this instance.\footnote{39}{Id.} The court applied \textit{State v. House}\footnote{40}{State v. House, 291 Minn. 424, 192 N.W.2d 93 (1971).} for the proposition that the Commissioner of Public Safety is not the same party as the City of Burnsville and is therefore free to relitigate the evidentiary rulings of the implied consent hearing.\footnote{41}{Juarez, 345 N.W. 2d at 802.} The issue was remanded, leaving the Minnesota rule clear that collateral estoppel may not apply between these government agencies.\footnote{42}{Id. at 803.}

2. \textit{State v. Victorsen}

In 2001, Minnesota seemed to change its position, aligning itself more closely to the modern majority opinion when the Minnesota Court of Appeals ruled on \textit{State v. Victorsen}.\footnote{43}{State v. Victorsen, 627 N.W.2d 655, 661 (Minn. Ct. App. 2001) (speaking to the idea that collateral estoppel would apply because there was privity between the Commissioner of Public Safety and the State of Minnesota, thereby overruling the previous leading Minnesota case, which had established that privity did not exist between the agencies); \textit{cf. Juarez,} 345 N.W.2d at 802.} Rejecting the State’s arguments that it did not have fair notice to participate,\footnote{44}{Victorsen, 627 N.W.2d at 662–63.} the court found that the Commissioner of Public Safety and the State of Minnesota were in privity for the purposes of DWI prosecution and that findings made in the civil implied consent action would bind in district court during the subsequent criminal prosecution.\footnote{45}{Id. at 661 (recognizing privity between two state agencies based on the fact that the state is the real party at interest).} This opinion was also in line with other jurisdictions regarding the notion that determinations made in the civil action may be binding during a subsequent criminal action.\footnote{46}{See Debra E. Wax, Annotation, \textit{Doctrine of Res Judicata or Collateral Estoppel as Barring Relitigation in State Criminal Proceedings of Issues Previously Decided in Administrative Proceedings}, 30 A.L.R. 4th 856 (1984) (discussing that most jurisdictions recognize the application of collateral estoppel in criminal proceedings, whether the prior action be civil or administrative).}

This shift toward a more liberal privity requirement was short-lived; Minnesota almost immediately reverted towards mutuality when the Minnesota legislature “acted purposefully to abrogate the
holding in *Victorsen* by enacting section 169A.53(3)(g) during the following legislative session in April of 2002. This statutory amendment precluded a defendant from invoking collateral estoppel during a criminal prosecution on any ruling made at the implied-consent hearing.

In November of 2005, the legislature’s power to enact a statute governing collateral estoppel was successfully challenged in *State v. Brunclik*, when the constitutionality of section 169A.53(3)(g) was called into question. The Goodhue County court hearing the argument held that the statute violated the separation of powers doctrine by allowing the legislature to amend court procedures and issued an injunction against all state agencies, precluding them from enforcing section 169A.53(3)(g).

**D. The Effect of Lemmer on Collateral Estoppel**

All of the aforementioned constitutional conclusions were validated when the district court, initially hearing Ronald Lemmer’s criminal case, dismissed the charges against Lemmer based on the civil ruling. During the state’s appeal, the Minnesota Court of Appeals held that the *Brunclik* injunction was sufficiently preserved for review by reference in the trial court record. The court then reexamined its authority to issue an injunction overturning the constitutionality of legislative modification to collateral estoppel.

During the appeal, the question that would determine the application of collateral estoppel in Minnesota became whether or not the district court erred in adopting the *Brunclik* injunction previously issued by the Goodhue County court. The appellate court focused on distinguishing between the substantive and the procedural nature of collateral estoppel, reasoning that only

48. *See Minn. Stat. § 169A.53(3)(g).*
49. *State v. Lemmer*, 736 N.W.2d 650, 655–56 (Minn. 2007). The court writes that the enactment of section 169A.53(3)(g) was done to abrogate the *Victorsen* ruling. *Id.* at 655.
50. *Id.* at 654 (discussing State v. Brunclik, No. T8-04-1705 (Minn. Dist. Ct., Nov. 8, 2005)).
51. *Id.* at 656.
52. *Lemmer*, 716 N.W.2d at 661.
53. *Id.* at 661.
54. *Id.* at 663–64.
55. *Id.* at 661–62.
substantive law was within the legislature’s scope of constitutional authority, and thereby not subject to the judiciary striking it down.\textsuperscript{56} The Minnesota Court of Appeals ultimately determined to align itself with “the federal courts, including the Eighth Circuit, [which] have arrived at near unanimity... concluding that it is substantive.”\textsuperscript{57} It was this finding that led the court to conclude that the legislature could mandate the use of collateral estoppel and that section 169A.53(3)(g) was in fact constitutional.\textsuperscript{58} Having so held, the appellate court reversed the earlier decision as clear error on the part of the district court for wrongfully determining that section 169A.53(3)(g) was procedural and thereby unconstitutional.\textsuperscript{59} Lemmer was remanded for rehearing.\textsuperscript{60}

Confusion resulted from the contradictory understandings encompassed within these holdings, creating a fundamental rift in the interpretation of collateral estoppel in Minnesota. The disparity between the \textit{Brunclik} injunction and the \textit{Lemmer} appeal resulted in the creation of legislative authority to deny collateral estoppel, raising still more questions about the separation of powers between the state legislature and the judiciary. It was on these questions that Lemmer again appealed, and in 2007, the Minnesota Supreme Court attended to whether the legislature held the constitutional authority to dictate the application of collateral estoppel and whether the two state agencies were in privity.\textsuperscript{61}

III. The \textit{Lemmer} Case

A. Factual Background

On June 4, 2005, the Scott County Sheriff’s department was in pursuit of a suspect who had reportedly fled the scene of an automobile accident to the residence of Ronald Lemmer.\textsuperscript{62} The suspect took Lemmer’s boat with Lemmer as his passenger.\textsuperscript{63} The suspect was arrested, and Lemmer began driving the boat back to his home.\textsuperscript{64} During Lemmer’s operation of the boat, the Deputy

\textsuperscript{56} Id.
\textsuperscript{57} Id. at 662.
\textsuperscript{58} Id. at 663.
\textsuperscript{59} Id. at 660.
\textsuperscript{60} Id. at 664.
\textsuperscript{61} See State v. Lemmer, 736 N.W.2d 650 (Minn. 2007).
\textsuperscript{62} Id. at 653.
\textsuperscript{63} Id.
\textsuperscript{64} Id.
Sherriff stopped Lemmer, boarded the boat, reportedly observed Lemmer’s intoxication and arrested Lemmer for operation of a motor vehicle while intoxicated. Lemmer was charged with a third-degree DWI.

At his implied consent hearing against the Commissioner of Public Safety, the district court overturned the revocation of Lemmer’s driver’s license because the evidence against Lemmer had been obtained during an unconstitutional stop for which there had been no “particularized and objective basis.” The state later tried Lemmer on criminal DWI charges and Lemmer moved to dismiss them on the theory that the doctrine of collateral estoppel precluded the state from relitigating the evidentiary findings made in his civil hearing.

B. Procedural Posture of Lemmer

The district court agreed that the relitigation of the evidentiary ruling made at the implied consent hearing was unconstitutional because the legislature’s enactment of section 169A.53(3)(g) was a regulation of judicial procedure, and thereby a violation of the separation of powers doctrine. The court dismissed the criminal charges against Lemmer and the state appealed.

C. An Appeal for Comity

Lemmer argued that an appeal should not be granted because the state was collaterally attacking the judicially created law contained in the Brunclik order, but the court of appeals agreed with the state that the statute is constitutional despite the Brunclik

65. Id.
66. Id. at 653. Motorboats are motor vehicles under Minnesota law. Minn. Stat. § 169A.03 subdiv. 15. The state charged Lemmer with DWI for operating a motor vehicle with a blood alcohol concentration over .10 under Minnesota Statute section 169A.20 subdivision 1. Lemmer, 736 N.W.2d at 653. Because Lemmer had a prior DWI conviction, he was charged with third degree misdemeanor DWI for the presence of an “aggravating factor” under Minnesota Statute section 169A.26. Id.
67. Lemmer, 736 N.W.2d at 653. Lemmer was not stopped legally under Minnesota Constitution article I, section 10, which requires a “particularized and objective basis” to stop the operator of a motor vehicle. Id. at 659. See also Minn. Const. art. I, § 10.
68. Lemmer, 736 N.W.2d at 654.
69. Id.
The court of appeals was able to reach this decision because it held that the doctrine of collateral estoppel was substantive rather than procedural, therefore within the sphere that the legislature has power to regulate. To make this connection, the appellate court relied upon an outcome-determinative test to conclude that the application of collateral estoppel was substantive law. The court writes, “if the law is outcome determinative—if it will influence the outcome of the case—then it is substantive and not merely procedural.” To use the words “outcome determinative” in this expansive sense would definitely fulfill the substantive standard because reversing the decision of a district court will always clearly influence the outcome of the case. As if there were anything that would not meet this incredibly broad application of the test, the court of appeals went on to determine that the Lemmer court had not actually relied on the injunction during his criminal trial anyway. Rather, the appellate court noted that the district court had merely taken the existence of the injunction under advisement and applied it when ruling on the case. As if there were anything that would not meet this incredibly broad application of the test, the court of appeals went on to determine that the Lemmer court had not actually relied on the injunction during his criminal trial anyway. Rather, the appellate court noted that the district court had merely taken the injunction under advisement in reaching its decision.

The court of appeals goes on to say that regardless of whether this statute is constitutional, the district court may put aside any concerns of constitutionality to uphold the statute as a matter of comity. The courts must “exercise great restraint prior to striking down a statute as unconstitutional....” This restraint is the result of respect for the co-equal branches of government and a tendency

71. Id. at 654. Lemmer moved to strike the state’s argument that the district court erred in ruling Minnesota Statute § 169A.53 subdiv. 3(g) unconstitutional because the attack “constituted an impermissible collateral attack on the injunction issued in Brunclik.” Id. The state supreme court ruled that Lemmer failed to seek enforcement of the injunction at the district court level. Id. at 656. Instead, the district court took the existence of the injunction under advisement and applied it when ruling on the case. Id. Therefore, the state was not challenging the Brunclik injunction, but rather was challenging whether Brunclik properly supported the district court’s decision. Id. at 654.

72. See Lemmer, 716 N.W.2d at 662–64.

73. Id. at 662. The outcome-determinative test is a system used to determine whether a rule is substantive or procedural. Id. The federal courts typically employ this test to discern if federal courts should follow state or federal rules on the grounds that these courts are within the scope of appropriate authority granted to the judiciary. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

74. Lemmer, 716 N.W.2d at 662 (citing Hanna v. Plumer, 380 U.S. 460, 465–69 (1965)).

75. Lemmer, 736 N.W.2d at 656.

76. Id.

77. See Lemmer, 716 N.W.2d at 663–64.

78. Id. at 662. See also State v. Willis, 332 N.W. 2d 180, 184 (Minn. 1980).
to grant comity to statutes that do not present a clear invasion of another branch’s authority. The effect of the court of appeals’s reversal was to preclude Lemmer from asserting collateral estoppel; the case was remanded to district court for new trial. Lemmer appealed this ruling to the Minnesota Supreme Court.

D. Lemmer at the Supreme Court of Minnesota

The outcome of the Lemmer decision by the Minnesota Supreme Court turned on whether collateral estoppel applies between the state agencies as parties in privity. The supreme court began its analysis by first resolving the issues that were central to Lemmer’s first appeal, namely, whether the denial of collateral estoppel in DWI proceedings was within the scope of the legislature’s authority. The court writes “[t]he judicial branch governs procedural matters, while the creation of substantive law is a legislative function.” The court clarifies this understanding by analogizing collateral estoppel to an evidentiary ruling, something that is purely procedural and does not create a substantive change in the law. After correctly applying the substantive law analysis, the court continues by overturning the appellate court finding on the ruling regarding collateral estoppel, “conclud[ing] that collateral estoppel is not substantive in function.” Holding that the application of collateral estoppel is a determination to be made by the judicial branch, the court next considered whether or not

79. See Lemmer, 716 N.W.2d at 662–64.
80. Id. at 664.
81. See Lemmer, 736 N.W.2d at 656.
82. See generally id.
83. See id. at 657.
84. Id. (citing State v. Johnson, 514 N.W.2d 551, 554 (Minn. 1994)). The Johnson court determined that the application of collateral estoppel was not for the legislature because it is strictly procedural in that “[collateral estoppel] neither creates a new cause of action nor deprives defendant of any defense on the merits.” Johnson, 514 N.W.2d at 555 (quoting Strauch v. Superior Court, 107 Cal. App. 3d 45, 49 (Ct. App. 1980)).
85. See Lemmer, 736 N.W.2d at 658.
86. Id. The court elaborates that collateral estoppel is procedural only and analogous to an evidentiary ruling and strictly for the consideration of the judiciary. Id. This is not yet codified in article III, section 1 of the Minnesota Constitution. This section of the constitution still reflects the court of appeals ruling in State v. Lemmer, 716 N.W.2d 657 (Minn. Ct. App. 2006), aff’d, 736 N.W.2d 650 (Minn. 2007) (affirming denial of collateral estoppel, but overruling the appellate court on the issue of collateral estoppel being a concern of the legislature).
collateral estoppel should apply in Lemmer’s case. The Minnesota Supreme Court recites the occasions when collateral estoppel can be applied: (1) the issue was identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

The court concedes that the first two elements are met, but the issues of sameness or privity and full opportunity to be heard are not. This was held in large part because the agencies are not the same—or in privity—and they direct authoritative roles so distinct from one another that collateral estoppel would interfere with their authority to accomplish their respective duties.

The court also focuses a lot of attention on the fact that the agencies are represented by different legal counsel, and thereby not well-represented at the respective proceedings to constitute full and fair opportunity. The court also reasons that each party must be motivated by self-interest, have controlling participation and the right to appeal to constitute full and fair opportunity to be heard. The Minnesota Supreme Court adopted the privity reasoning of the lower court and narrowly affirmed the court of appeals judgment by a 4-3 split.

The essence of the Lemmer decision is to deny collateral

88. Id. at 659.
89. Id. at 659–63.
90. See id. at 661. Applying preclusion would interfere with the proper allocation of authority between state agencies or officials. See State v. Fritz, 527 A.2d 1157, 1166 (Conn. 1987) (holding that a Connecticut state agency administrative ruling did not estop the state from relitigating the same issue in a criminal court). See also State v. Miller, 459 S.E.2d 114, 125 (W. Va. 1995) (holding that a ruling made during a West Virginia administrative employee grievance hearing did not estop the state from relitigating the same issue for criminal purposes). See also RESTAURATION (SECOND) OF JUDGMENTS § 36, cmt. f (1982).
91. Lemmer, 736 N.W.2d at 661. The statutes establishing the roles of county attorney and the attorney general, respectively, separate the situations in which each has jurisdiction and sets forth that each can only be involved in the proceedings of the other by permission. MINN. STAT. § 388.051 (2006); MINN. STAT. § 8.06 (2006).
92. Lemmer, 736 N.W.2d at 661 (citing Kaiser v. N. States Power Co., 353 N.W.2d 899, 904 (Minn. 1984); Ramsey v. Stevens, 283 N.W.2d 918, 924 (Minn. 1979)).
93. Lemmer, 736 N.W.2d at 657.
estoppel in DWI proceedings because: 1) the commissioner of public safety serves an authoritative role distinctly different from that of the state to establish privity; 2) each agency is represented by different legal counsel; and 3) each agency lacked the full and fair opportunity to control the litigation in the other’s suit.  

IV. DISASSEMBLING THE LEMMER DECISION

A. Introduction

At its heart, Lemmer is a debate as to whether the elements of collateral estoppel are satisfied by the relationships between the parties in the present case. The first step in understanding the court’s refusal to apply collateral estoppel to Lemmer’s case is to note that estoppel is held as a judicial procedural rule. Despite this attention to constitutional issues, the central focus of Lemmer is how to apply the rule of collateral estoppel, and not whether the court has the authority to apply the rule. The court ultimately reaches the conclusion that collateral estoppel is inapplicable because privity did not exist between the Commissioner of Public Safety and the state during this DWI proceeding. This conclusion, however, seems difficult to rectify with “[t]he general rule... that a government official is considered to be in privity with his or her governmental employer... since the suit is in essence really against the government.”

Minnesota explicitly abandoned the requirement of strict mutuality, but its refusal to apply collateral estoppel in the instant case seems an unjust return to allowing “one who has had his day in court to reopen identical issues by merely switching adversaries.”

94.  Id. at 660–63.
95.  Id. at 657 (citing State v. Lindsey, 632 N.W.2d 652, 658–59 (Minn. 2001)).
96.  Id.
97.  47 AM. JUR. 2D JUDGMENTS § 623 (2008) (noting that this general rule only applies when the official is involved in the litigation in their official capacity).
98.  Aufderhar v. Data Dispatch, Inc., 452 N.W.2d 648, 650 (Minn. 1990) (discussing that strangers to the prior action may be affected by the ruling even without a showing of strict identity). See also Ellis v. Minneapolis Comm’n on Civil Rights, 319 N.W.2d 702, 704 (Minn. 1982) (setting forth the requirements for a defendant who was not a party to earlier proceedings to claim collateral estoppel).
99.  Bernhard v. Bank of Am. Nat. Trust & Sav. Ass’n., 122 P.2d 892, 895 (Cal. 1942). Justice Traynor, writing for a unanimous court in a landmark opinion, expressly noted the abandonment of strict mutuality based on the thought that “[n]o satisfactory rationalization has been advanced for the requirement of
The following analyzes the privity and interrelationships of state agencies to understand the wall that Minnesota constructed to separate the respective civil and criminal tracks in DWI proceedings.

B. The Conflicting Functions of Government Agency?

The majority’s first justification for denying collateral estoppel is the determination that the state and the Commissioner of Public Safety have important differences in authority and are therefore not in privity. The general rule is to the contrary, but finding that different authoritative functions exist between government agencies is one justifiable rationale for an exception to the rule otherwise holding government agencies to be in privity with one another. Cases that depart from the general rule finding privity between government officials are based in large part on the thought that the unique responsibilities of the respective agencies are not represented at each proceeding and that consolidation may interfere with each government official’s “proper allocation of authority.”

The majority draws much of its support for this conclusion through the premises cited to in State v. House, State v. Miller, and State v. Fritz. These cases are marshaled in support of the notion that privity does not exist because despite litigating similar questions, one involved state agency is not able to pursue the

100. State v. Lemmer, 736 N.W.2d 650, 661 (Minn. 2007). Government agencies are generally estopped from relitigating identical issues, but “exceptions may be warranted if there are important differences in the authority of the respective agencies.” 18A CHARLES ALAN WRIGHT & ARTHUR D. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1006 (2d. ed. 2002).

101. See 47 A M. JUR. 2D JUDGMENTS § 623 (noting that governments and governmental agencies and their officers are in privity with one another).

102. 18A WRIGHT, supra note 100, § 1006.

103. 50 C.J.S. J UDGMENTS § 869 (2008). Discussing this exception, the article cites Juan C. v. Cortines, 89 N.Y.2d 659 (1997). This case is cited in support of the proposition that a school administrator could relitigate an evidentiary suppression in an effort to suspend a student through the administration’s unique authority to protect other students and therefore was not in privity with the city attorney, who was responsible for prosecuting the delinquency action. Id.

104. Lemmer, 736 N.W.2d at 660 (citing State v. House, 291 Minn. 424, 425, 192 N.W.2d 93, 94–95 (1971); State v. Fritz, 527 A.2d 1157, 1165 (Conn. 1987); State v. Miller, 459 S.E.2d 114, 124 (W. Va. 1995)).
determination of guilt or innocence during the administrative proceeding. While the referenced cases do speak to the state agencies’ ability to fulfill their authoritative goals, the more genuine focus of those cases is the procedural divergence between a criminal court and an administrative hearing.

1. State v. House

In ruling on the DWI proceeding State v. House, the Minnesota Supreme Court held that an attorney representing the state in a DWI criminal prosecution did not have the authority to make a plea bargain that would dismiss the penalties of a subsequent implied consent proceeding. The court explains that the state has authority to act in criminal proceedings, but “has no authority to act in civil cases.” Rather, it is the Commissioner of Public Safety who is authorized by the state of Minnesota to act in the civil cases. Before moving on to discuss privity, the Minnesota Supreme Court asserted these points of law from House to reject Lemmer’s argument that the commissioner and the district attorney were the same party.

The first reason that House is inapplicable in the present case is that although subdivision 1(c) of the Minnesota Statutes section 388.051 does authorize the Commissioner of Public Safety to represent the state at the civil case, the statute also clearly authorizes the attorney general to represent the state at a civil matter by request of the Commissioner. This essentially affords the state the option of having either of its designated attorneys direct the civil case, illustrating that any lack of authority cannot be describing “authority” in the statutory sense.

105. Lemmer, 736 N.W.2d at 660 (citing Fritz, 527 A.2d at 1165; Miller, 459 S.E.2d at 124) (using the cases to reiterate the proposition that just because parties are interested in same facts they are not necessarily in privity).
106. Id. at 660. The majority relies on Miller and Fritz for the proposition that government agencies may not be in privity simply for having the same goals in the proceeding. Id. at 660–61. The dissent argues this is an incorrect marshalling of Fritz and Miller because “the probable cause determination in Lemmer’s implied consent proceeding . . . [was] made de novo by a judge, not an administrative officer.” Id. at 671 (Hansen, J., dissenting).
107. House, 291 Minn. at 425, 192 N.W.2d at 95.
108. Id.
109. Lemmer, 736 N.W.2d at 660.
110. Id.
111. Id. at 660–61.
112. Minn. Stat. § 388.051 subdiv. 1(c).
Furthermore, the denial of privity in *House* was made regarding an analysis of a distinguishably different point of law. The very narrow authoritative question that *House* turned on was whether allowing the attorney at the criminal case to waive part of the civil penalty interfered with the Department of Public Safety’s express and solitary authority to later impose its sanctions on driver’s licensure. The *House* court analyzed this more specific issue and only stated in dicta that the parties were not the same.\(^{113}\)

This question of authority is irrelevant to the resolution of *Lemmer’s* case, which turned on collateral estoppel being applied on a complete and final evidentiary ruling, not the anticipatory waiver of other parties’ rights. Employing *House* for this proposition is insufficient to distinguish the parties in *Lemmer* because the parties shared the same goal and rights: attempting to get the evidence admitted. *House* was essentially a ruling that one party could not act to affect a right that was specifically reserved to the other party.\(^{114}\) However, this does very little to distinguish the parties’ authority in *Lemmer*, because the right to litigate evidentiary rulings is not exclusively reserved to either party.

2. State v. Fritz

After determining that the state and the Commissioner were not the same party, the court then addressed the reasons why they are also not in privity. The *Fritz* court speaks to the differences in procedure that exist between a criminal trial and the findings of the administrative review by the Connecticut Department of Consumer Protection.\(^{115}\) The court writes that “the state’s interest in having guilt or innocence determined is not adequately served in an administrative proceeding because... the state’s attorney has no control over the timing, substance or litigation of charges lodged against the defendant by the department of consumer protection.”\(^{116}\) This notion highlights one of the fundamental misapplications of the rule, which is the presumption that the authority of review by the Connecticut Department of Consumer

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113. *Lemmer*, 736 N.W.2d at 668 (discussing the contradictory classification of parties in *House*, stating “[b]ecause it was unnecessary in *House* to decide whether the parties were identical, any statements we made about the relationship between the parties was necessarily dicta.”).
116. *Id.*
Protection is sufficiently analogous to a Minnesota implied consent hearing. This is a substantial component in the logic supporting Minnesota’s conclusion that privity does not exist between the state and the Commissioner, but the holding in Fritz is based more so on the difference in venue than the differing authoritative roles of the parties.

The apparent problem in relying on the Fritz case arises from the notion that the case refused to find privity because of the unfairness to the state’s ability to perform its authoritative functions of “investigation and prosecution of criminal matters” without relitigating facts that had previously been ruled on under administrative review by the Connecticut Department of Consumer Protection. The Fritz court held that the rulings of an administrative proceeding would not invoke the protection of collateral estoppel in a subsequent criminal action because to hold contrarily would interfere with the state’s duty to investigate and prosecute criminal activity.

For this reason, Fritz is not sufficiently analogous to Lemmer in that the Fritz court describes only the divergence between the state’s role in a criminal proceeding vis-à-vis a quasi-judicial administrative review, devoid of civil or criminal procedural rules and further devoid of a state-appointed attorney participation. Without these safeguards in place, a government attorney may not be afforded a venue that would properly ensure that the government could achieve its authoritative purpose. However, because the Lemmer case was conducted under the procedural rules of a district court and under the direction of a government attorney, it is difficult to find the deficiencies of procedure that enabled the Fritz court to deny privity.

3. State v. Miller

State v. Miller is another case relied on by the majority that speaks to the pursuits of state agency interests at a quasi-judicial administrative proceeding as they differ from the subsequent criminal proceeding. In Miller, the West Virginia Department of Health and Human Services was represented by the state Attorney

107. Lemmer, 736 N.W.2d at 662.
108. Fritz, 527 A.2d at 1167.
109. Id.
110. Id.
General, illustrating a situation more analogous to the instant case than Fritz for exemplifying a scenario in which the state agencies were formally represented as parties in both the civil and the criminal proceedings.\footnote{Id. at 127.} Despite this similarity to Lemmer—the fact that the state was a party to both proceedings—the Miller court focused a substantial fraction of the opinion on the notion that the authoritative roles were frustrated by procedural differences that exist between quasi-judicial rulings and those of a criminal court.\footnote{Id. at 123.}

The court explains that for collateral estoppel to apply, the “prior decision must be rendered pursuant to the agency’s adjudicatory authority and the procedures employed by the agency must be substantially similar to those used in a court.”\footnote{Id. (citing to syllabus point two in the case of Vest v. Bd. of Educ. of County of Nicholas, 455 S.E.2d 781 (W.Va. 1995) for the proposition that “[f]or issue or claim preclusion to attach to quasi-judicial determinations of administrative agencies, at least where there is no statutory authority directing otherwise, prior decision must be rendered pursuant to agency’s adjudicatory authority and procedures employed by agency must be substantially similar to those used in court; in addition, identically of the issues litigated is a key component to application of administrative res judicata or collateral estoppel.”) This proposition is quoted herein to highlight the difference in the comparisons being made in Miller to that of Lemmer. Miller was an examination of the similarity between proceedings under the rules an administrative agency to a court, not between the comparison of two different sets of court rules as in Lemmer.} The court further concludes that “the Grievance Board has no authority to resolve a criminal matter.”\footnote{Id. at 123.} Application of this logic to Lemmer seems an unmerited expansion of the West Virginia approach because both actions convened against Mr. Lemmer were in district court, where the authority and procedures are incontestably similar to “those used in a court.” In addition to the obvious procedural differences between a district court and an agency hearing, the reasoning of the Miller court should not have been extended to Lemmer because it cannot be said that the county attorney or the presiding district court judge who administered Lemmer’s preceding civil case lacked the authority to resolve criminal matters or the unfair procedural disadvantages that were present in Miller.

The majority’s reliance upon Miller for similar arguments seems less misplaced than in Fritz, but it still relies on arguments founded upon the divergences in procedure and venue. The prior ruling in Lemmer was not made before an administrative body in a...
regulatory capacity; it was in fact made in district court.\textsuperscript{126} In an apparent effort to evade “differences in the quality or extensiveness of the procedures followed in two courts,”\textsuperscript{127} the Minnesota Supreme Court relies on \textit{Miller} and \textit{Fritz} to avoid unfairly disadvantaging state prosecutors. However, in doing so, it mislabeled these differences in venue to enable the district court to contradict a judgment made by the same court. The \textit{Fritz} case acknowledges the risk of this specific danger, warning that “the same court must not be allowed to reach conflicting rulings.”\textsuperscript{128}

Rulings of this nature seem to have become even more difficult to rely on in light of very recent developments in Minnesota case-law. In September 2008, in the case \textit{Friends of Riverfront v. City of Minneapolis},\textsuperscript{129} the Minnesota Court of Appeals said of finding collateral estoppel, “[w]e do not apply the doctrine rigidly, and our focus is on whether the application would work an injustice.”\textsuperscript{130} The court goes on to write that the administrative ruling will stand for the purposes of collateral estoppel where “the administrative body acted in a quasi-judicial capacity.”\textsuperscript{131} Finding that the administrative agency was acting in a quasi-judicial capacity, the court of appeals held that the party desiring to sue was defensively estopped by the ruling of the prior administrative hearing.\textsuperscript{132} An argument like this from the court of appeals does significant damage to the theories of varied authority and unfair procedural divergence within an administrative proceeding that the Minnesota Supreme Court stated would not serve as a basis for Lemmer’s invocation of collateral estoppel.

C. Full and Fair Opportunity

1. Different Attorneys

The majority’s next argument posits that the parties are not in privity because they are represented by different attorneys\textsuperscript{133} whose

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\item \textsuperscript{126} State v. Lemmer, 736 N.W.2d 650, 660 (Minn. 2007).
\item \textsuperscript{127} See State v. Miller, 459 S.E.2d 114, 121 (W. Va. 1995) (quoting \textsc{Restatement (Second) of Judgments} § 28(3) (1980)).
\item \textsuperscript{128} State v. Fritz, 527 A.2d 1157, 1165 (Conn. 1987).
\item \textsuperscript{129} 751 N.W.2d 586 (Minn. Ct. App. 2008).
\item \textsuperscript{130} \textit{Id.} at 589–90.
\item \textsuperscript{131} \textit{Id.} at 590.
\item \textsuperscript{132} \textit{Id.}
\item \textsuperscript{133} State v. Lemmer, 736 N.W.2d 650, 662 (Minn. 2007) (noting that despite the fact that a county attorney may request the assistance of the attorney general,
respective levels of participation are “unclear.”

Clarity, however, readily presents itself in the statutes controlling the manner by which the government agencies choose their legal representation. The state is free to designate its attorneys as it wishes and the statutes are very clear: no statute prohibits the county attorney or the attorney general from appearing at either the criminal prosecution or the implied consent hearing. The fundamental bases that the majority utilizes in determining the lack of privity between the attorneys are the issues of self-interest and the right to appeal.

Amidst its discussion of the extent to which the lawyers’ relationship affects a finding of privity, the court relied on quoting the 1940 United States Supreme Court holding of Sunshine Anthracite Coal v. Adkins. The court writes that the distinguishing feature of a lawyer’s relationship to another party is “whether or not in the earlier litigation the representative of the [government] had authority to represent its interests in a final adjudication of the issue in controversy.” The Lemmer court mistakenly continues its analysis on this issue to determine that there was no privity because the attorney in the later proceeding was not afforded the full opportunity to litigate the issue. In Lemmer, the earlier proceeding was the implied consent hearing, in which the district attorney achieved a valid and final adjudication of the issue in controversy, and therefore under Sunshine, was in privity with all other subordinate representatives of that government as it relates to that issue.

the attorney general plays a very limited role in criminal prosecutions, and only assists at the request of the county attorney or the governor. See Minn. Stat. § 8.01 (2006).

134. Lemmer, 736 N.W.2d at 663.
135. See Minn. Stat. § 8.01 (the attorney general may act as alternative counsel in the implied consent proceeding); Minn. Stat. § 169A.53 subdiv. 3(b) (permitting representation by attorney general during the DWI prosecution, showing that together, these statutes explicitly state that either of the concerned attorneys is free to attend and represent the state agency at either of the proceedings in question).
136. Minn. Stat. §§ 8.01, 169A.53 subdiv. 3(b).
137. Lemmer, 736 N.W.2d at 661.
138. Id. (citing Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 403 (1940)).
139. Id. (citing Sunshine, 310 U.S. at 403).
140. Id. at 660–61.
141. Sunshine, 310 U.S. at 402–03. “[The Commission] represented the United States in that determination and the delegation of that power to the
Beyond misinterpreting this United States Supreme Court holding, the Lemmer court also disregards Minnesota’s preceding trend in finding privity between the attorneys who manage DWI cases. In 1984, Minnesota acknowledged that criminal and civil proceedings and punishments were administered under significant differences that made it unfair for the county attorney and the attorney general to have to participate in the litigation of the other. However, the court of appeals reversed this determination in 2001, holding that “over time, these differences have blurred considerably in ways most closely bearing on the question of privity.” The reversal of this notion led not only to Minnesota being out of line with many other jurisdictions, but also left Commission was valid, as we have said. That suit therefore bound the United States, as well as the appellant. Where a suit binds the United States, it binds its subordinate officials.” Id. at 403 (explaining that rulings that are adjudged against the government, or a commissioner of a subordinate agency, will be binding upon the government and its subordinate agents).

143. State v. Juarez, 345 N.W.2d 801, 803 (Minn. Ct. App. 1984). The Juarez court initially found the state and the county attorney were not in privity because of the “essential differences” between civil and criminal proceedings that they normally handled. Id. These notions that supported the absence of privity between the governmental actors were considered good law until being overruled by Victorsen. Victorsen, 627 N.W.2d at 661.
144. Victorsen, 627 N.W.2d at 661.
145. See Briggs v. State, 732 P.2d 1078 (Alaska 1987) (interests of the Department of Public Safety were sufficiently represented since the issues were fully litigated by another representative of the state); Shackleton v. Dep’t of Motor Vehicles, 119 Cal. Rptr. 921 (Ct. App. 1975) (holding that parties to the proceedings were the same and the doctrine of collateral estoppel applied to the issue of whether the stop was valid and motorist successfully defended the criminal charges by showing the arrest was unlawful and sought to preclude that issue in the license revocation proceeding); State v. Lemmer, 736 N.W.2d 650, 670 (Minn. 2007) (Hanson, J., dissenting) (“holding that the Oakland County Prosecutor and the Michigan Department of Social Services are both creatures of the same sovereign, so that the judgment in the administrative proceeding that the department failed to prove facts necessary to terminate benefits precluded proof of welfare fraud in the criminal proceeding”) (citing People v. Watt, 320 N.W.2d 333, 336 (Mich. Ct. App. 1982)); Lemmer, 736 N.W.2d at 670 (Hanson, J., dissenting) (“holding that the Department of Social and Health Services, which had determined in a dependency proceeding that Williams had not intentionally received overpayments, was in privity with the county prosecutor of the welfare fraud crime because both ‘represent the State.’”) (citing State v. Williams, 937 P.2d 1052, 1057 (Wash. 1997)); State v. Summers, 513 S.E.2d 575, 578 (N.C. Ct. App. 1999) (noting that privity must be determined by examining the substantial relationships of rights between the parties and not merely on the basis of each party differing in name), aff’d, 528 S.E.2d 17 (N.C. 2000). See also Brower v. Killens, 472 S.E.2d 33 (N.C. Ct. App. 1996) (holding that the department of motor vehicles was fully protected in the criminal case where the interests of the state
Minnesota subject to the previously recognized risks of the “institutionalization of a process whereby duplicative proceedings are frequent with inconsistent outcomes a distinct possibility.”

2. Self-Interest

Another blurred distinction is that which speaks to the self-interest to participate under the increasing reliance that both attorneys have upon each other to implement the emergent penalties attached to DWIs. The Lemmer court writes that the state had a “lack of interest in the outcome of the hearing.” This asserted lack of interest does not accurately describe the fact that the Commissioner of Public Safety can now use prior criminal convictions as ammunition for “lengthening the duration of administrative license revocations.” Conversely, “[p]enalty enhancements are now available to criminal prosecutors by virtue of license revocations pursuant to the implied consent statute.”

This evolution allows both prosecutors in the DWI suits to charge penalties of greater degree based on the prior outcomes the other agency achieves against defendants, and conversely rests the effective prosecution of their desired case on the successful results obtained by the other agency.

It is settled that the party in interest is the party “entitled under the substantive law to enforce the right sued upon and who generally, but not necessarily, benefits from the action’s final outcome.” These criteria are clearly satisfied by the interests of

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146. Victorsen, 627 N.W.2d at 662.
147. State v. Lemmer, 736 N.W.2d 650, 663 (Minn. 2007).
148. Victorsen, 627 N.W.2d at 661.
149. Id.
150. See id.
151. BLACK’S LAW DICTIONARY 279 (8th ed. 2004).
the parties in *Lemmer* because the state and the commissioner benefit from a successful outcome in the other’s prior suit.152 The United States Supreme Court stated the principle more specifically, positing that it is unfair and burdensome for the system to allow a party with knowledge of a judgment’s potentially adverse effects to take a “wait-and-see” attitude about the outcome of the prior suit before determining that the party wants to relitigate in the event of a loss.153

Viewing the incentives of each party through the lens of the aforementioned evolutions in prosecuting Minnesota DWI cases, this “symbiotic” relationship154 alone should sufficiently overcome the *Lemmer* majority’s determination that any self-interest did not motivate the attorneys representing the state agency. The dissenting opinion also notes that the other competing interests between the attorneys are irrelevant because both agencies had authority to represent the state’s agenda.155 The court should have agreed that the two attorneys were aware that they stood to benefit from the action of the other and that both also realized that failure to participate could cost them the ability to further prosecute issues resolved adversely to their goals.156 Beyond these apparent shared interests, other courts have found privity due to common interest because both attorneys in this situation are appointed to serve in the common representation of state citizens and pursue the

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152. *Victorsen*, 627 N.W.2d at 662.
153. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979). The court expands the reasoning of the *Blonder-Tongue* decision to further abandon the requirement of mutuality and allow offensive issues preclusion as long as each party is adequately represented at the first action. *Id.* at 331. Following this rule, issue preclusion can be used by a person who was not a party to the original suit. *Id.* The Supreme Court discusses the situations in which application of non-mutual issue preclusion is fair. One of the factors to consider is whether the estopped party’s interests were adequately represented in the first adjudication. *Id.* at 330. The court goes on to say that one consideration in determining the adequacy of the interests that are being represented is whether the party being estopped could have joined and had the incentive to join the prior action. *Id.* The court writes that part of the unfairness to defendants in requiring mutuality is that “potential plaintiffs will have everything to gain and nothing to lose by not intervening in the first action.” *Id.*
154. *Victorsen*, 627 N.W.2d at 662.
155. *State v. Lemmer*, 736 N.W.2d 650, 666 (Minn. 2007). If the Commissioner had authority to represent the state in the implied consent proceeding, the interests of the state were represented. *See* *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402–03 (1940).
156. *See Lemmer*, 736 N.W.2d at 663.
overarching objective of making the roadways safer. The increased interdependence in prosecutions makes it difficult to imagine why in 2007 the Minnesota Supreme Court reverted to resting its argument on this separation of attorney interests that had previously been called “a fictional construct.” The failure of the state to communicate in an effort to aggregate the prosecution of these identical interests wastes judicial resources and congests dockets to cut against the public trust in our courts. Most importantly, subjecting defendants to this type of unpredictability results in “the potential for inconsistency... [which] is among the most objectionable results of the present system.”

3. Notice to the Parties and the Right to Appeal

The last primary argument on which the court relies in determining that collateral estoppel should not be applied is that the state was denied a full and fair opportunity to be heard at the implied consent proceeding based on notice and appeal. However, this reliance appears unfounded because the state was notified of its opportunity to attend the implied consent hearing, and no statute bars either attorney from participating in either

157. See, e.g., State v. Summers, 513 S.E.2d 575 (N.C. Ct. App. 1999) (noting that regardless of the particular issues in DWI cases that are charged, the real interest of both the DMV and the State is to keep unsafe drivers off of the roads). State v. Williams, 667 N.E.2d 932, 936 (Ohio 1996) (“The state acts through its various agencies and entities, and the Bureau of Motor Vehicles is an agency of the state. We conclude that the state of Ohio is the real party in interest in both proceedings and the requirement of privity as an element of issue preclusion is satisfied.”).

158. Victorsen, 627 N.W.2d at 661–62. See, e.g., Minn. Stat. § 169A.52 subdiv. 4 (increasing duration of administrative license revocations with prior license revocation); Minn. Stat. §§ 169A.25–26 (elevating severity of DWI offenses to a gross misdemeanor if the offender had a driving-while-impaired violation within the past ten years under section 169A.095); Minn. Stat. § 169A.275 (increasing the mandatory penalties for each prior driving-while-impaired violation that a single defendant receives within a ten-year period); Minn. Stat. § 169A.28 (providing for mandatory consecutive sentences if the person has prior driving-while-impaired violations); Minn. Stat. § 169A.31 (elevating severity of alcohol-related bus driving offenses to a gross misdemeanor if the offender had a prior license revocation within the past ten years).

159. Lemmer, 736 N.W.2d at 664–65 (Hanson, J., dissenting).

160. Victorsen, 627 N.W.2d at 662.

161. Lemmer, 736 N.W.2d at 663.

162. Id.
proceeding.\textsuperscript{163} As the dissent obviates, when a prosecutor is given notice and an opportunity to participate in a hearing, that prosecutor, at a later hearing, will be estopped from opposing the binding effect of an order resulting from the earlier hearing.\textsuperscript{164}

The state prosecutor cannot claim to have been relying in good faith upon section 169A.53.3(g)\textsuperscript{165} because the statute was overturned by the \textit{Brunclik} injunction.\textsuperscript{166} Furthermore, the state was entirely aware that the issues addressed in implied consent proceedings are sometimes identical to those addressed in DWI prosecutions and could be handled by either attorney who is notified to appear.\textsuperscript{167} The state forwent its right to appeal the judgment when it disregarded the notice of its opportunity to litigate a subject in which it had incentive to participate. This failure to cooperate costs each department the resources consumed by relitigation of the issues that could have been decided together in one joint action.\textsuperscript{168}

D. Where Is the Brunclik Injunction?

This policy discussion also emphasizes that the Supreme Court of Minnesota, reviewing this case de novo, refused to hear the argument over the \textit{Brunclik} injunction because it was not raised at trial.\textsuperscript{169} The court “may not base its decision on matters outside the record on appeal, and that matters not produced and received in evidence below may not be considered.”\textsuperscript{170} However, evidence was received below; it was “evident that the district court was aware of

\begin{itemize}
\item[163] See \textit{Id.} at 654 (observing that “[t]he district court took \textit{Brunclik} into consideration and issued an order adopting the reasoning of \textit{Brunclik} and dismissing the charges against Lemmer.”).
\item[164] \textit{Id.} at 665 n.7.
\item[165] See \textit{id.} at 659.
\item[166] See \textit{id.} at 654.
\item[167] \textit{Id.} at 655 (discussing the exact similarity of the issues presented in both cases, noting that MINN. STAT. § 169A.20 subdiv. 1 controls the criminal DWI elements that determine whether the defendant operated or had physical control of any motor vehicle, was under the influence of alcohol, and had an alcohol concentration of 0.08 or more). The court held also that MINN. STAT. § 169A.52 subdiv. 4 determines the exact same issue of whether an individual is operating or in physical control of a motor vehicle. \textit{Id.}
\item[169] \textit{Lemmer}, 736 N.W.2d at 656.
\end{itemize}
the *Brunclik* decision. The supreme court’s failure to apply judicially created law regarding collateral estoppel was based on the thought that the district court was aware of the *Brunclik* decision, but the record does not indicate that Lemmer sought to enforce the *Brunclik* injunction. The fact that the court was aware of this injunction should have also precluded the statute from being allowed to stand as a matter of comity, which is an option of the judiciary only in situations where the judiciary’s authority will not be in conflict with the statute. Refusing to apply this injunction is essentially a failure by the court to uphold its prior understanding of the separation of powers and a forfeiture of the judiciary’s right to mandate its own procedures. This further corrodes the public trust, allowing a seemingly applicable rule of procedure to be ignored to produce immeasurably inconsistent results.

E. *Why Isn’t This Double Jeopardy?*

The obvious response to the majority’s argument is to conclude that this ruling sacrifices the constitutionally guaranteed rights under the Fifth Amendment, which guarantees protection against “‘a second prosecution for the same offense after acquittal... [or] conviction. And it protects against multiple punishments for the same offense.’” The doctrine can be subtly distinguished from res judicata based claims in that collateral estoppel bars relitigation of facts, while double jeopardy bars prosecuting “conduct identical and/or similar to conduct for which he had already been prosecuted.” The Supreme Court has held that two mechanisms overlap to the degree that “[t]he question is no longer whether collateral estoppel is a requirement of due process, but whether it is a part of the Fifth Amendment’s guarantee against

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171. *Lemmer*, 736 N.W.2d at 656.
172. *Id.* at 656.
173. See *State v. Lindsey*, 632 N.W.2d 652, 659 (Minn. 2001). The court noted that it has “occasionally permitted a statute to stand as a matter of comity, even where the legislature has encroached somewhat upon a judicial function, so long as the statute does not conflict with this court’s inherent authority to make the final decision.” *Id.* at n.2.
175. *United States v. Rogers*, 960 F.2d 1501, 1506 (10th Cir. 1992) (noting that the government is collaterally estopped from prosecuting defendant for issues that had been resolved adversely to the government in a prior civil suit).
double jeopardy.... We do not hesitate to hold that it is.”

The critical test set forth by the Supreme Court to distinguish the situations in which double jeopardy can be implicated is one that examines “what conduct the State will prove, not the evidence the State will use to prove that conduct.”\(^\text{177}\) Because the aspects of the conduct that the state must prove in the instant case are identical in both the criminal and the civil suits, the resolution of the double jeopardy argument must necessarily look beyond the *Lemmer* opinion, which did not directly address double jeopardy.

One possible justification for a court’s reliance upon the presumption that double jeopardy was inapplicable can be found in the *Miller* case discussed previously. *Miller* argues that double jeopardy cannot be invoked when the desired civil punishment “has not been recognized as a criminal sanction.”\(^\text{178}\) The Supreme Court has also addressed this distinction by explaining that “the only proscription... is that the Government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the Government whole.”\(^\text{179}\) In determining whether a second penalty is part of an effort to make the government whole, “the defendant is entitled to an accounting of the Government’s damages and costs to determine if the penalty sought in fact constitutes a second punishment.”\(^\text{180}\)

In the instant case and in many DWI cases, the government cannot assert any actual damages; therefore, almost any civil penalty would meet the Supreme Court definition of double jeopardy punishment. In light of the fact that “implied consents have become means to enhance the charges and to impose mandatory/consecutive penalties,”\(^\text{181}\) a strong case could have been presented on Lemmer’s behalf that the prosecution of his conduct by way of the illegally obtained evidence was in fact double jeopardy. While the issue of collateral estoppel in future cases that involve multiple government agencies seems unpredictable by

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178. State v. Miller, 459 S.E.2d 114, 123 n.14 (W. Va. 1995) (discussing that courts have never considered imposition of civil penalties, specifically termination of employment, as a criminal sanction).
180. Id. at 449.
Lemmer, future defendants should argue that this type of relitigation is barred from being prosecuted based on conduct under the Fifth Amendment rather than by the common law doctrine of collateral estoppel as applied to evidentiary rulings.

V. CONCLUSION

In Minnesota, the doctrine of collateral estoppel reflects common law principles evolving to protect vital safeguards of individual liberties and reducing the constantly escalating stress upon judicial resources.\(^{182}\) The Lemmer decision establishes the rule that the Commissioner of Public Safety and his state employer are not in privity, defying the general rule of privity between government agencies and denying the application of collateral estoppel.\(^{183}\) This certainly ensures the state will be fully heard in both the civil and criminal proceedings of a DWI, but at what cost to the judiciary and the individual defendant? It is axiomatic that the inequity and confusion caused by this failure to apply collateral estoppel will challenge the reliability of our courts, amplify the cost of litigation,\(^{184}\) and predict an uncertain future for an “essential part of the Constitution’s prohibition against double jeopardy.”\(^{185}\)


\(^{183}\) See 47 AM. JUR. 2D JUDGMENTS § 623 (2008) (stating general understanding of privity between state and officials).

\(^{184}\) See, e.g., Ill. Farmers, 647 N.W.2d at 560.

\(^{185}\) Ashe v. Swenson, 397 U.S. at 448 (Black, J., concurring) (noting the importance of collateral estoppel as it relates to the similar protections against being tried twice for the same conduct under the Fifth Amendment of the United States Constitution).