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ARTICLE

"CROSSING-OVER:” THE ISSUE-PRECLUSIVE EFFECTS OF A CIVIL/CRIMINAL ADJUDICATION UPON A PROCEEDING OF THE OPPOSITE CHARACTER*

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I. INTRODUCTION

This article is devoted to the previously unexplored issue in criminal litigation of using a favorable civil adjudication as defensive collateral estoppel in a criminal proceeding. Although a great deal of

* This article is respectfully dedicated to the memory of Earl W. Rogers.

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"[O]ffensive use of collateral estoppel occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party. Defensive use occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant." Parklane Hosiery v. Shore, 439 U.S. 322, 326 n.4 (1979).

The topic which is discussed in this article was considered, very briefly, in Vestal and Coughenour, Preclusion/Res Judicata Variables: Criminal Prosecutions, 19 Vand. L. Rev. 683, 699-701 (1966), and even more briefly in Note, 64 Harv. L. Rev. 1376, 1378 (1951).
attention has been devoted to the role which collateral estoppel plays in civil litigation, and some attention to its role in criminal litigation, almost no attention has been devoted to the role which collateral estoppel plays between civil and criminal proceedings.2

This article is concerned with that issue and with its potential as a tactical device in the representation of criminal defendants. The article begins by tracing the history and development of the related concepts of res judicata and collateral estoppel, then examines cases in which collateral estoppel has been asserted between civil and criminal proceedings, and ultimately articulates a proposal for utilizing "cross-over" collateral estoppel as a defensive strategem in criminal litigation.

This article is further divided into five sections: section II describes the historical evolution of the legal proposition that a validly entered judgment has issue-preclusive effects upon subsequent litigation involving the same factual issues; section III discusses the role which this proposition plays in the criminal law; section IV analyzes the phenomenon of "cross-over" issue preclusion; section V presents the aforementioned proposal; and section VI is a general conclusion summarizing the materials presented in the preceding sections.

II. ISSUE-PRECLUSIVE EFFECTS OF JUDGMENTS: "INTEREST REIPUBLICAE UT SIT FINIS LITIUM" 4

That the solemn and deliberate sentence of the law, pronounced by its appointed organs, upon a disputed fact or state

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2. "Collateral estoppel, or issue preclusion, is part of the concept of res judicata and serves to prevent parties from relitigating issues necessarily determined in a prior proceeding . . . . The doctrine is applied between judicial proceedings in four combinations—civil to civil, criminal to criminal, criminal to civil and civil to criminal." Gregory v. Commonwealth, 610 S.W.2d 598, 599 (Ky. 1980) (citations omitted). For the articles that have considered this issue, see supra note 1.

3. This is the author's term for instances in which a civil/criminal judgment has issue-precluding consequences for a criminal/civil proceeding. That is, "cross-over" estoppel is the phenomenon which is encountered whenever a civil judgment is asserted as collaterally estopping particular aspects of a criminal proceeding, or vice versa. This phrase is borrowed from the music industry, which uses it to refer to music which was originally intended to appeal to one audience (i.e., "country" music) but which unexpectedly charms another audience (i.e., the "pop" market) as well. So, too, can judgments "cross-over" from one niche into another.

4. "It concerns the state that there be an end of lawsuits." BLACK'S LAW DICTIONARY 951 (4th ed. 1968). The corresponding maxim for criminal prosecutions is usually quoted as "nemo bis punitur pro eodem delicto" or "nemo debet bis vexari pro eadem causa." Id. at 1189. Both alternatives convey the idea that "no one ought to be twice vexed for the same cause." See also United States v. Throckmorton, 98 U.S. 61, 65 (1878); Liddell v. Smith, 345 F.2d 491, 493 (7th Cir. 1965).
of facts, should be regarded as a final and conclusive determination of the question litigated, and should forever set the controversy at rest, is a rule common to all civilized systems of jurisprudence.\(^5\)

Although "common to all civilized systems of jurisprudence", the concept of issue preclusion differs markedly between legal systems.\(^6\) This section traces the historical evolution of the concept, outlines its essential terminological and conceptual distinctions; and describes the requirements which must be met before a judgment may have issue-preclusive consequences.

A. EVOLUTION OF "RES ADJUDICATA"

According to early Roman law administered by the praetor, the defending party was able to overcome a plaintiff’s accusation not

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5. II H. Black, A Treatise on the Law of Judgments 759 (2d ed. 1902) [hereinafter Black, Judgments].


7. "The term most commonly [used to refer to the issue-preclusive effects of judgments] is res judicata (or, as it sometimes appears, res adjudicata), meaning the 'thing' or 'matter adjudged.'" R. Casad, Res Judicata 3 (1976) [hereinafter Casad, Res Judicata]. See also Black's Law Dictionary 1470 (4th ed. 1968). The phrase is commonly used to refer to the issue-preclusive effects of civil judgments. However, as is discussed in more detail in Section III, infra, the concept applies with equal force to judgments entered in criminal prosecutions. This section will, however, discuss the principle in its commonly-understood form, as applied in civil litigation.

It is also useful to distinguish res judicata from certain other doctrines: Stare decisis is like res judicata in that "it concerns the controlling influence on later suits of a decision rendered in an earlier one." Casad, supra, at 6. However, it differs from res judicata, in that stare decisis is concerned with the general effects that are to be given to a particular interpretation of the law, whereas res judicata is concerned only with the effects which an interpretation has upon specific litigation. See id. at 6-8.

"Law of the case" is another doctrine that superficially resembles res judicata. Actually, however, law of the case is narrower than res judicata, since the ruling is binding only on the later conduct of the very case in which the ruling was made.

Basically, the 'law of the case' doctrine means that a question of law once resolved in the course of litigation will not be reconsidered at later stages in the same litigation, even if the point was erroneously decided. Id. at 9. See also Developments in the Law: Res Judicata, 65 Harv. L. Rev. 818, 822 (1952); Note, Law of the Case, 40 Colum. L. Rev. 268, 273-74 (1940); Note, Successive Appeals and the Law of the
only by a direct denial of the facts alleged to have occurred, but also by inducing the praetor to admit, based upon equitable grounds, certain defenses. The net result was not to render the action destroyed *ipso jure*, but to make it completely "ineffective through use of the exception. Ultimately, the exception avoided the cause of action.

For our purposes, the important exception to be remembered was the *exceptio rei judicatae*, or plea of former judgment. The term res judicata was granted any claims defense, or disputed question which had previously been explicitly ruled upon by the court or judge. Such a matter was determined *transit in rem judicatam*, and regarding the issues decided upon, was binding and conclusive upon the parties. That it could not later be denied or impeached by the parties was.

Case, 62 Harv. L. Rev. 286 (1948).

"Election of remedies" refers to the "rule that, as between the same parties, a plaintiff who chooses to pursue one of two remedies available for a single wrong is barred from suing on the other where the nature of the remedies is such that the plaintiff is entitled to recover on either but not both." Developments in the Law: Res Judicata, supra, at 823. See also Casad, supra, at 13-16.

Finally, there is a concept known as "judicial estoppel" or as the "preclusion of inconsistent positions." Casad, supra, at 16-17; Developments, supra, at 823-24.

That doctrine holds that one cannot allege facts in a pleading that are inconsistent with facts previously pleaded by him in a prior action. Usually application of the doctrine is limited to pleadings that were made under oath. It differs from the issue-precluding effects of res judicata in that it does not depend upon a judgment having been rendered in the prior action. It is the violation of the oath that seems to be the main justification for the doctrine, although sometimes different rationales are offered for it, and in some cases it has been applied even to pleadings that were not verified under oath. Casad, supra, at 16-17.

It is also important to keep in mind the fact that the phenomenon of issue preclusion is the product of compelling policy concerns rather than of the inherent infallibility of the adjudicatory process:

In the trenchant words of Professor Brainerd Currie, 'the first lesson one must learn on the subject of res judicata is that judicial findings must not be confused with absolute truth.' And so courts have repeatedly recognized that res judicata is not defeated by error in the initial judgment; the most famous observation may be that 'the res judicata renders white that which is black, and straight that which is crooked.'

declared in the maxim, *res judicata pro vertitate accipitur.*

The resulting exception was merely a plea by the defending party that the issues presented by the plaintiff had already been determined by the previous judgment and were no longer the subject of litigation. However, to produce such effort, the earlier judgment should have been upon the very same issue between the very same parties.

This principle, that in order to have preclusive effects a judgment should be upon the identical point and between the identical parties, was adopted early on in English law. However, English law already contained another, dissimilar principle by that time period.

Prior to the adoption of the Roman plea device, collateral estoppel, involving the binding force of previous determinations where the latter suit is based upon a different cause of action, evolved into English law from medieval Germany. There the preclusion was given effect through what was alleged and proved at trial, with the stress...
on the judgment. As a result, the common law record became the authoritative source for determining what issues were to be considered binding.

Based not on the judgment of the court, but rather on the statements of a party, this motion of preclusion was called an estoppel. Despite this, final judgment was required to grant the 'estopped by record' conclusive effect. Much confusion resulted from the different practices and efforts of these two doctrines, and it was not until pleading differences and the requirement that 'record' proof establish the estoppel were nullified that the Roman and Germanic doctrines came to be recognized as one common procedural device.11

11. Developments in the Law: Res Judicata, supra note 10, at 820-21. "In the Germanic practice, the preclusion bound not only the parties, but all those who had been present at the judicial assembly which heard the case, because those bystanders had a right to enter the proceedings." Id. at 820 n.4, citing A. Engelmann, History of Continental Civil Procedure 149 (Millar trans. 1927). See also 9 W. Holdsworth, A History of English Law 147-54 (3d ed. 1944). Since a final judgment was required before "estoppel by record" could be conclusive, the practice also came to be known as "estoppel by judgment", "despite its inaccuracy as a description of the source of the estoppel." Developments in the Law: Res Judicata, supra note 10, at 821 n.6. See also 9 W. Holdsworth, A History of English Law 150 (3d ed. 1944). The history of the terminology has been explained as follows:

[T]he word 'estoppel' only means stopped. You will find it explained by Coke in his Commentaries on Littleton (19th ed., 1832), vol. II, s. 667, 352a. It was brought over by the Normans. They used the old French 'estoupail.' That meant a bung or cork by which you stopped something from coming out. It was in common use in our courts when they carried on all their proceedings in Norman-French. Littleton writes in the law-French of his day (15th century) using the words 'pur ceo que le baron est estoppe a dire,' meaning that the husband is stopped from saying something.

From that simple origin there has been built up over the centuries in our law a big house with many rooms. It is the house called Estoppel. In Coke's time it was a small house with only three rooms. . . . But by our time we have so many rooms that we are apt to get confused between them. Estoppel per rem judicatem, issue estoppel . . . and goodness knows what else.


Holdsworth describes the modern concept of estoppel "as a rule of evidence that when, as between two parties to a litigation, certain facts are proved, no evidence to combat these facts can be received." 9 W. Holdsworth, A History of English Law 144 (1926), citing Low v. Bouverie, [1891] 3 Ch. at p. 105 per Bowen, L.J. Holdsworth continues stating that:

this view of the nature of an estoppel is essentially a modern view. It was not the view which prevailed when the doctrine of estoppel first made its appearance in the law. In the twelfth and thirteenth centuries cases were
In differentiating between the two, it was determined that estoppel by record was originally a true estoppel from the Germanic period, much the same as the later developed estoppel by deed or estoppel in pais. In its finest form, the basis of the doctrine was a party's inability to recede from the situation which he had previously created. The party was not allowed to contradict his previous allegations or admissions in the subsequent hearing. As a result, it is the method of recovery and the allegation upon that method that are given preclusive effect.

Next, when the Roman principle came to be accepted, the Germanic estoppel was not discarded, but each was forced to coexist, albeit with different functions. The Roman principle was used to preclude any new action with its basis upon the prior action, as well as preventing an unsuccessful defendant from altering the right previously adjudicated. However, if preclusion was sought against the same plaintiff from mentioning a different action against the same defendant, or the same defendant against the same plaintiff on a different claim, this could only be accomplished with the use of estoppel by record. The estoppel extended to every material issue decided previously, as well as all admissions throughout the pleadings. To be effective, it was necessary that a judgment be rendered to authenticate the estoppel. As a result, the doctrine of this judicata had an application, for all issues concerning the prior verdict and its preclusive effect upon the present action were governed by the self-contained principle of estoppel by record.12

decided, not by a process of reasoning from evidence offered to the court, but by modes of proof selected by the parties or ordered by the court. In those days the matters relied upon to create an estoppel were regarded as operating as modes of proof. . . . Probably the earliest way of proving one's case by means of an estoppel, and therefore the earliest form of estoppel, is that which is known as estoppel by matter of record; and it is a direct result of that machinery for the enrollment of pleas which was instituted in the twelfth century. . . . It was becoming clear that estoppels . . . depended ultimately on the words or acts of the parties; and since a trial was coming to be regarded as an adjudication upon the facts in issue by the light of the evidence offered, they were regarded as operating, not as modes of proof, but as conclusive presumptions which precluded the necessity of offering further evidence.

Id. at 144-46.
The processes by which the dominion of estoppel by record declined and was replaced by the concept of res judicata are far too

(1940); Casad, Res Judicata, supra note 7, at 19-20. Miller continues with the following observations on the role which the common law reserved for res judicata:

Outside of the common-law courts, the technical principle of estoppel by record found no recognition. And as that principle depended upon the system of pleading it could not in strictness apply even in a common-law court, where the previous proceedings invoked by a party had been had in other than a common-law court, or, if had in a common-law court, were of such a nature that no pleadings had been employed in their conduct. For the wide field thus existing, beyond the province of the common-law principle, the preclusive effect of the former proceedings, in respect of the premises of the decision as well as of the decision itself, necessarily depended upon what the courts conceived to be the operation of the principle of res judicata.

Holdsworth offers the following description of the early career of the doctrine of estoppel by record:

The general principle upon which estoppel by matter of record depends is that matters solemnly recorded by the king's court must be accepted as proof, so that no averment to contradict them can be received. This conclusive quality of the matters recorded by the king's court, and its absence in the case of matters transacted in other courts, was beginning to emerge in the early years of the twelfth century. It is said in the Leges Henrici Primi that a record of the king's court cannot be denied, though the judgments of other courts can be denied by men who were present and understood the plea; and the same distinction is drawn by Glanvil between the record of the king's court and the judgments of other courts. All matters recorded by the king's court, and authenticated by his seal were records, and were accorded the same conclusive effects.

This conclusive effect of the facts recorded by a court of record is abundantly illustrated in the reports, from the days of the earliest Year Books. In 1293 it was said that a judgment of the king's court could not be proved by the country, but only by the rolls—i.e., they were in themselves a proof which needed no other proof. In 1307 it was said that 'a thing which can be averred by the judgment and record of the court is not to be tried by an inquest'—i.e., the production of the record was so conclusive that there was no need for a further trial. In 1308-1309 a defendant to an assize of novel disseisin successfully pleaded a fine, and the record of a judgment in an assize of mort d'ancestor, between the same parties—'it was awarded by the Court that the plaintiff took nothing by his writ, for he showed no title of later date than the previous actions in which he had taken nothing.' In 1425 it was admitted that a fine, which showed that land had been conveyed by the ancestor of the plaintiff to the ancestor of the defendant, could be pleaded as an estoppel to an action by the plaintiff against the defendant for a trespass upon the same land.

Holdsworth suggests that "the reason given for this incontrovertability of matter of..."
complex to be described here.\textsuperscript{13} For the present discussion it suffices to state that, although estoppel by record was the prevailing concept in English law at the onset of the nineteenth century, by the close of that century it had "substantially merged" with the principle of res judicata.\textsuperscript{14} In civil law countries, "the important doctrine of res record, and for the estoppel which resulted from it" changed from the twelfth century until "[i]n Hynde's Case in 1591 the conclusiveness of matter of record was said to be 'for the avoiding of infiniteness which the law abhors.' " Id. at 149, citing Hynde's Case, 4 Co. Rep. at f. 71a.

This would seem to show that, with the change in men's ideas as to the nature of a trial, it was coming to be thought that this species of estoppel was based, not so much upon the idea that the production of the record is a mode of proof, but rather upon the idea, which was present to the mind of the Roman lawyers, that there ought to be a decent finality about the decisions of courts.

Id. at 149 (footnotes omitted). Holdsworth concludes that "the rules thus evolved, as restated and developed during the sixteenth and seventeenth centuries, are the basis of our modern law." Id. at 150.

13. For a description of this evolution, see Millar, 39 MICH. L. REV. at 239-253. See generally supra note 12.

14. 39 MICH. L. REV. at 251. According to Millar, by the end of the nineteenth century, "[t]he common-law principle of estoppel by record, although paid formal homage . . . had in reality, through supervening changes in procedure which . . . deprived it of its common-law mechanism, become a method of approach—and an extremely awkward one—to the application of the principle of res judicata." Id.

Writing in 1940, Millar described the contemporary English rule in the following terms:

\begin{quote}
[I]f the ground of decision becomes apparent either from the terms of the judgment itself, or by absolutely necessary illation from those terms, or becomes apparent from the judgment itself, taken in connection with the pleadings and other constituents of the record or, at least in cases where there are no pleadings, in connection with evidence \textit{aliunde}, it is to be considered as having been conclusively adjudicated, so as to bind the parties in a suit on a different cause of action. To such extent the property of res judicata attaches to the premises of the judgment.
\end{quote}

39 MICH. L. REV. at 252 (footnote omitted). The traditional common law rule did not permit the use of evidence \textit{aliunde} to establish the parameters of an estoppel by record. Id. at 252 n. 190; Sintzenick v. Lucas, 1 Esp. 43, 170 Eng. Rep. 274 (1793).

As noted in the text, the classic statement of the operation and effects of estoppel by record came in Lord Ellenborough's holding in Outram v. Morewood:

The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury; but the estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issues joined, solemnly found against them.

judicata has been adopted with its main features unchanged from the aspects they wore in the age of the Antonine jurists.\textsuperscript{15} That is, where the requested relief and the legal basis of the claim are identical to those adjudicated in a prior action between the parties, a second action is barred. However, when all of these requirements are not met, there is nothing outside of collateral estoppel preventing the relitigation of specific issues that were not included in the previous judgment.\textsuperscript{16}

Historically the American law of res judicata evolved quite differently than its English counterpart. In America, res judicata was not especially troubled by any requirement that there exist an identity of purpose or object between the two suits as a condition of conclusiveness.\textsuperscript{17} The leading treatise on the issue, Abraham Clark Freeman's \textit{A Treatise of the Law of Judgments},\textsuperscript{18} offers the following observations on the "American rule": "The only matter essential to making a former judgment on the merits conclusive between the same parties is, that the question to be determined in the second action is the same..."
question judicially settled in the first. Nearly all American cases have adopted the principle that a previous judgment is conclusive, if upon the exact point, even though the objectives of the two suits are different.

As Millar noted, the American law historically failed to differentiate between the common-law principle of estoppel by record and res judicata. As a result, a merger of the two principles developed under what is today the general rubric of ‘res judicata’. In practical terms, there is no reason to consider the two principles separately. Presently, the question of preclusion is not determined based solely on the grounds of decision, but more appropriately upon inquiring whether the point in issue had been the subject of issue in the earlier suit.

This “notion” found its clearest support in the Supreme Court’s decision in Cromwell v. County of Sac. After holding that, where a second suit is upon the same cause of action as the first, the judgment is conclusive as to every ground of claim or defense that was or might have been advanced, Justice Field went on to hold that:

where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. . . . [t]he inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.

In Cromwell, the Court did not adopt “the common-law principle of estoppel, for—to say nothing of the verbal imprecision in referring to the ‘estoppel of a judgment’—that principle recognized as conclusive not only the decided issues, but also, except as against attack by

19. II A. Freeman, A Treatise on the Law of Judgments 1418 (5th ed. 1925) [hereinafter Freeman, Judgments].
20. Id. at 1420.
22. Id.
23. 94 U.S. 351 (1876).
24. Id. at 353.
25. Id.
way of confession and avoidance, material admissions." 26 Eighteen years later, however, in Last Chance Mining Co. v. Tyler Mining Co., 27 the Court enlarged the holding of Cromwell v. County of Sac and recognized the conclusive effects of a material admission which occurred during the course of the pleadings. 28

Last Chance Mining involved the effect to be given a judgment by default. The Court held that such a judgment is just as binding upon the parties for all the issues necessary to support the result as a decision reached after answer and contest. The facts asserted by the complaint are taken to be true when the party fails to answer, and as a result, the court is permitted to base its determination upon the admission of these facts. 29 This holding is reminiscent of the old common-law doctrine of estoppel by record inasmuch as it defines the issue-preclusive effects of a particular adjudication in terms of the contents of the record produced thereby. 30 As such, the old distinction between res judicata and estoppel by record has survived in present law. 31

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27. 157 U.S. 683 (1895).
28. Millar, supra note 26, at 255.
29. 157 U.S. at 691. In Cromwell v. County of Sac, the Court had held that "a judgment by default only admits for the purposes of the action the legality of the demand or claim in suit: it does not make the allegations of the declaration or complaint evidence in an action upon a different claim." 94 U.S. at 353.
30. This concept survives today, in the American Law Institute's Restatement (Second) of Judgments, which presents the "general rule" on issue preclusion, and provides as follows: "Where an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Restatement (Second) of Judgments § 27 (1982).

Comment d to § 27 addresses the issue as to "[w]hen an issue is actually litigated":

When an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated within the meaning of the Section. An issue may be submitted and determined on a motion to dismiss for failure to state a claim, a motion for judgment on the pleading, a motion for summary judgment. . . . a motion for directed verdict, or their equivalents, as well as on a judgment entered on a verdict. A determination may be based on a failure of pleading or of proof as well as on the sustaining of the burden of proof.

Restatement (Second) of Judgments § 255 (1982).

31. See, e.g., Black's Law Dictionary (4th ed. 1968). Black's definitions provide a distinction between the terms "res judicata" and "estoppel". The former
The purpose of this discussion has not been, however, to offer a definitive treatment of the evolution and merger of these two doctrines, or even to offer a comprehensive treatment of the proposition that valid judgments have binding, preclusive effects upon subsequent litigation involving identical issues of fact. The purpose has been, instead, to provide the reader with some background with which to appreciate the peculiar complexities posed by the deceptively simple task of determining whether a particular issue has already been litigated and foreclosed.

As is apparent from the text above, the general concept of issue preclusion has existed in Western law for approximately two thousand years. And the concept that "litigation must have an end" is hardly problematic. What is problematic, however, is to determine what has actually been litigated and the effect it is to be given in a subsequent proceeding that may very well bear little resemblance to the original action. This dilemma has produced yet another dichotomy in this area of the law; namely, the distinction between "direct estoppel" and "collateral estoppel", distinctions which are discussed in the section immediately below.

B. BASIC DISTINCTIONS

Estoppel is used to refer to the conclusive effect that a prior judgment has on certain disputed issues. It is termed "direct estoppel" when the second suit is based upon a different claim or cause of action.

Since most second suit claims involving the identical cause of action as the first suit will have been entirely extinguished by the first

is defined as the "[r]ule that a final judgment or decree on [the] merits by [a] court of competent jurisdiction is conclusive of [the] rights of [the] parties or their privies in all later suits on points and matters determined in [the] former suit." Id. at 1470; the latter being defined as "[a] prior judgment between [the] same parties which is not strictly res judicata because [it is] based upon [a] different cause of action operates as an 'estoppel' only as to matters actually in issue or points controverted." Id. at 630. And Anglo-Indian law has provided two colorful descriptions of the distinctions between the two concepts:

In Casamally Jairbhai v. Ebrahaim, 36 Ind.L.R.Bomb. 214 (1911), it was said: 'Estoppel and res judicata are entirely different. Res judicata precludes a man from averring the same thing twice over in successive litigation, while estoppel prevents him saying one thing at one time and the opposite at another.' And in Nanabhai v. Keshavji & Co., 36 Ind.L.R.Bomb. 283 (1911), it was said 'Res judicata ousts the jurisdiction of the court while estoppel does no more than shut the mouth of a party.'

judgment, "direct estoppel" is much less frequent. As a result, the term "collateral estoppel" has all but displaced the other term and is commonly used to discuss the preclusive effect a prior determination will have regarding specific issues without discussing whether the second suit is based on a similar claim or not.32

"Direct estoppel" is also referred to as "claim preclusion", and is often considered to represent "true res judicata."33 It treats a judgment as the final determination between these same parties on this specific claim. Once the plaintiff prevails, his claim merges into his judgment, upon which no further relief on that claim will be afforded. Alternatively, if the defendant prevails, his victory acts as a bar to further action on this claim by the plaintiff. Under this ruling, all issues that were relevant to the same claim of these two parties, whether or not actually raised at trial, will be barred from further litigation.34

The Supreme Court has consistently used "res judicata" as a term encompassing the concepts of merger and bar, while distinguishing "collateral estoppel" as denoting a very different concept.35 The

32. CASAD, RES JUDICATA, supra note 7, at 4. See also Scott, Collateral Estoppel by Judgment, 56 HARV. L. REV. 1, 3 n. 5 (1942); Restatement (Second) of Judgments § 27 comment b (1982); In re Duncan, 713 F.2d 538, 541 (9th Cir. 1983); Napper v. Anderson, Henley, Shields, Bradford & Pritchard, 500 F.2d 634, 636 n.4 (5th Cir. 1974), cert. denied 423 U.S. 837 (1975).


35. The Court in Parklane Hosiery v. Shore, 439 U.S. 322 (1979), stated that:

Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action.

Court, like the lower courts and the Restatement (Second) of Judgments, has often used the doctrine of collateral estoppel to refer to "issue preclusion." Issue preclusion recognizes that issues litigated in one suit may have relevance in other suits. In order to minimize the amount of repetitious litigation, this doctrine bars the relitigation of issues actually adjudicated and essential to the judgment in a prior trial between the identical parties.

However, this doctrine is much more demanding, for it is not enough that some question of fact on law in a second suit was relevant to a prior suit between these same parties. The issue in dispute must actually have been litigated and necessary to the previous judgment in order for issue preclusion to take effect.

The term "collateral estoppel" was "invented" by the authors of the original Restatement of Judgments. The purposes and effects


37. Kaspar Wire Works, Inc. v. Leco Eng’g & Mach., Inc., 575 F.2d 530, 536 (5th Cir. 1978). See also supra note 30 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982)). RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1982) contains several exceptions to the general rule of issue preclusion. Section 28 provides that "[a]lthough an issue is actually litigated and determined by a valid and final judgment,... relitigation of the issue in a subsequent action between the parties is not precluded" in certain circumstances. The circumstances are (a) that the party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; (b) that the issue is one of law and the two actions are substantially unrelated or a new determination is warranted due to an intervening change in the applicable legal contest or otherwise to avoid inequitable administration of the laws; (c) that a new determination is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; (d) that the party against whom preclusion is sought had a significantly heavier burden of persuasion in the initial than in the subsequent action, or vice versa; and (e) that there is a clear and convincing need for a new determination of the issue because of the potential for an adverse impact on the public interest, because it was not foreseeable at the time of the initial action that the issue would arise in a subsequent action or because the party sought to be precluded did not have an adequate opportunity to obtain "a full and fair adjudication" of the issue in the initial action. RESTATEMENT (SECOND) OF
of the concept were easily described. In a subsequent action between the same parties involving a different claim, the second action is not extinguished by the previous decision despite the fact that some of the same questions were involved in the prior decision. However, those matters which were actually litigated and determined in the previous action cannot be relitigated and are said to be "collaterally estopped".

The estoppel does not rise from representations made by one party on which the other has relied, but from the principle that once a party has fought out an issue in litigation previously, he is precluded from doing it again. Collateral estoppel arises because the causes of action involved between the parties is said to be different even though some of the material issues may be the same. The estoppel does not rise from representations made by one party on which the other has relied, but from the principle that once a party has fought out an issue in litigation previously, he is precluded from doing it again. Collateral estoppel arises because the causes of action involved between the parties is said to be different even though some of the material issues may be the same. Scott also describes the reasons why this particular term was selected. He tells us:

It was with some hesitation that we determined to use the term 'collateral estoppel.' There is no doubt that the word estoppel is frequently used very loosely. . . . It seemed unwise, however, to invent a new terminology. . . . It seemed to us, therefore; that it was best to use it in bringing out the distinction between the effect of a judgment on the original cause of action, where it operates by way of merger or bar, and its effect upon other causes of action between the parties, where it is conclusive only as to matters actually litigated and determined by the judgment.

JUDGMENTS § 28 (1982).


Holdsworth describes a variation on this theme which prevailed under the common law doctrine of estoppel by record:

The . . . rule was well established in the fifteenth century . . . that 'a matter alleged that is neither traversable nor material shall not estoppe'. . . . Any statement in a pleading which was not material to the issue was a departure, so that it was only reasonable to hold that a statement in a record, which was immaterial to the issue before the court, could not create an estoppel.

9 W. Holdsworth, A History of English Law 152 (1926), quoting Coke's Commentaries on Littleton K 352b (1552-1634). A more recent commentator discusses this issue as it relates to the use of pleadings as admissions:

A basic problem which attends the use of written pleadings is uncertainty whether the evidence as it actually unfolds at trial will prove the case described in the pleadings. . . . The modern . . . system . . . use[s] . . . alternative and hypothetical forms of statement of claims and defenses, regardless of consistency. It can readily be appreciated that pleadings of this nature are directed primarily to giving notice and lack the essential character
As noted above, the general rule of collateral estoppel or issue preclusion is that once an issue has actually been litigated and determined by a valid and final judgment, and that determination is essential to the final judgment, the determination is then to be considered conclusive in a subsequent action between the identical parties, whether or not it's on the same claim. Of course, the conclusiveness of the judgment is subject to certain exceptions, paramount among which is the requirement that the adverse party must have had a "full and fair opportunity" to litigate the issue in the initial proceeding. As such, favorable preclusion effects were only available to one who would have been barred by an unfavorable decision as well. Known as the rule of mutuality, this rule established that a judgment was only binding on the parties involved and those persons in privity with them. As a rule, the previous judgment could

of an admission . . . Hence the decisions . . . deny them status as judicial admissions, and generally disallow them as evidential admissions. McCormick on Evidence § 265 (3d ed. 1984) (footnotes omitted). McCormick also discusses the problem of multiple, inconsistent pleadings under "the common law [system which] evolved the use of counts, each a complete separate statement of a different version of the same basic claim." Id. See also Hart v. Longfield, 7 Mod. 148, 87 Eng. Rep. 1156 (1703) (plaintiff should be stated as a different child in each count, "multiplying him as many times as there were counts").

40. See supra note 30.

41. Restatement (Second) of Judgments § 27 (1982); see also 1b J. Moore, Moore's Federal Practice ¶ 0.405[3], [4], (2d ed. 1984 rev.); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979). For an explanation of the types of issues, both legal and factual, to which collateral estoppel can attach, see Casad, Res Judicata, supra note 7, at 122-70.

Holdsworth describes another rule which prevailed under the common law doctrine of estoppel by record, namely, "that 'every estoppel ought to be reciprocal, that is, to bind both parties.' " 9 W. Holdsworth, A History of English Law 152 (1926) (footnote omitted), citing Coke's Commentaries on Littleton K 352a (1552-1634). Regarding the reciprocal nature of estoppel, Holdsworth continues that:

[i]t [reciprocity] is, as Coke points out, a direct result of the rule that the judgment . . . bound only the parties and privies; and this . . . is probably due to the fact that the record . . . was regarded as a conclusive proof of the matter in dispute, which must therefore bind both the parties to it.

Id. Holdsworth also discusses a peculiar corollary to this rule:

Considerations of obvious common sense are the basis of the rule, stated in a curious case of 1443, that if contradictory statements were produced, both of which would, if they had stood alone, have worked an estoppel, the matter was at large—or, as Coke put it, 'estoppel against estoppel both put the matter at large.'

Id. at 153 (footnotes omitted), quoting Coke's Commentaries on Littleton § 352b (1552-1634).

42. Restatement (Second) of Judgments § 28 (1982). See supra note 37.
only be utilized by the previous parties or those actually in privity with them.\(^3\) The rule was subject, however, to explicit expectations prompted by compelling need and circumstances that did not render nonmutual preclusion a requirement.\(^4\)

Eventually, the ever-increasing exceptions combined with widespread criticism to produce the rejection of the rule of mutuality, at least in the federal court system.\(^5\) The Restatement (Second) of Judgments also abandoned the rule:

A party precluded from relitigating an issue with an opposing party ... is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue.\(^6\)

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\(^3\) WRIGHT & MILLER, supra note 43, at § 4463 (1981) [hereinafter WRIGHT & MILLER]. See also 1B J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 0.411.[1] (2d ed. 1984); CASAD, RES JUDICATA, supra note 7, at 202-222.

Holdsworth traces this requirement to the era when estoppel by record prevailed:

It was, from a very early period, the accepted rule that only the parties to an action were estopped by a judgment in that action. This really follows from the primitive conception of the mode in which this species of estoppel operated. The record of an action between two parties operates as conclusive proof of the matters decided therein; but it cannot affect the rights of other persons who were not parties to the action. As against them it is no proof, and therefore no estoppel arises. But it soon became clear that a judgment in a real action, which decided a right to possession, must have a more extensive effect. ... It was held, therefore, that in an action in which the right to possession had come into question and had been decided, both privies and parties were bound; and that privies included, not only privies in blood, but privies in estate, such as feoffees or lessees, and privies in law, such as lords taking by escheat, and tenants in dower and by the courtesy. An estoppel, therefore, could be said to run with the land.

\(^4\) WRIGHT & MILLER, supra note 43, at § 4464. See Allen v. McCurry, 449 U.S. 90, 94-95 (1980). ("[T]he Court has eliminated the requirement of mutuality in applying collateral estoppel to bar relitigation of issues decided earlier in federal suits ... , and has allowed a litigant who was not a party to a federal case to use collateral estoppel 'offensively' in a new federal suit against the party who lost on the decided issue in the first case.") See also Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-29 (1979); Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313, 328-29 (1971).


\(^6\) RESTATEMENT (SECOND) OF JUDGMENTS ¶ 29 (1982). See also CASAD, RES JUDICATA, supra note 7, at 218-222. Section 29 also provides that, in determining whether a party should be allowed to relitigate an issue, consideration should be
The Supreme Court offered its final pronouncement on the issue in *Parklane Hosiery Co. v. Shore*. In that case Shore, the respondent, brought a stockholder’s class action suit alleging that the defendant had issued a materially false and misleading proxy statement. While this action was pending, the SEC filed suit alleging essentially the same complaint. After a four-day trial, the court entered a declaratory judgment that the proxy statement was in fact materially false and misleading. As a result, Shore moved for partial summary judgment in the initial action, claiming that Parklane was estopped from relitigating the issues that had previously been resolved in the SEC action. The district court denied the motion, holding that such an application of collateral estoppel would effectively deny Parklane their Seventh Amendment right to a jury trial.

The Second Circuit reversed, “holding that a party who has had issues of fact determined against him after a full and fair opportunity
given to the circumstances enumerated in § 28 and also to whether:

1. Treating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;
2. The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined;
3. The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;
4. The determination relied on a preclusive was itself inconsistent with another determination of the same issue;
5. The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding;
6. Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;
7. The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based;
8. Other compelling circumstances make it appropriate that the party be permitted to relitigate the issue.

Restatement (Second) of the Law, § 29 (1982). For the circumstances presented in § 28, see *supra* note 30.

48. *Id.* at 324-25. Shore’s action, the original action, had sought “damages, rescission of the merger and recovery of costs.” *Id.* at 324.
49. *Id.* at 325.
50. *Id.*
to litigate in a nonjury trial is collaterally estopped from obtaining a subsequent jury trial of these same issues of fact." The Supreme Court granted certiorari, asking the threshold question: "whether a litigant who was not a party to a prior judgment may nevertheless use that judgment 'offensively' to prevent a defendant from relitigating issues resolved in the earlier proceeding." The Court first considered the utility of the doctrine of mutuality. As stated previously, both collateral estoppel and res judicata promote the dual purposes of preventing litigants from being forced to relitigate identical issues with identical parties or their privy and preventing needless repetitive litigation. However, the doctrine of mutuality was used, until recently, to limit the scope of these doctrines by requiring both parties to be bound by the previous judgment before either party could use such judgment as an estoppel against the other party.

Presuming that it was unfair to allow a party to use a prior judgment for estoppel purposes when he himself would not have been bound, the doctrine of mutuality of parties allowed a losing litigant from a previous action the opportunity to relitigate the issues from the previous litigation with any new parties. This process was criticized, almost from its inception, for failing to recognize that a party who has never litigated an issue and one who has fully litigated and lost stand on different footing. Recognizing the criticism, the Court was willing to abandon the doctrine of mutuality (at least in patent cases) in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*.

In that earlier decision, the Court had held that the full and fair opportunity to litigate was a significant safeguard when determining whether an estoppel could be essential against the party. This was deemed more than a sufficient replacement for the doctrine of mutuality.

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51. *Id.* citing *Shore v. Parkland Hosiery Co.*, 565 F.2d 815 (2d Cir. 1979).
52. *Id.* at 326. For the distinction between "offensive" and "defensive" use of collateral estoppel, see supra note 1, quoting *Parklane Hosiery v. Shore*, 439 U.S. 322 (1979).
54. 402 U.S. at 329. In *Blonder-Tongue*, the Court explained its holding as follows:

In any lawsuit where a defendant, because of the mutuality principle, is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources. To the extent the defendant in the second suit may not win by asserting, without contradiction, that the plaintiff had fully
But *Parklane* differed from *Blonder-Tongue* in at least one important respect. *Blonder-Tongue* involved defensive use of collateral estoppel since the plaintiff was estopped from asserting a claim that he had previously lost against a different defendant. *Parklane*, on the other hand, involved offensive use of the doctrine since the plaintiff sought to estop the defendant from relitigating an issue which he had previously lost against a different plaintiff. In both situations, collateral estoppel was used against a party that had previously litigated the issue and lost. However, there are specific reasons why the two instances should be treated differently.\(^{55}\)

The first reason is that the offensive use of collateral estoppel may not promote judicial economy as effectively as does the defensive use. The defensive use forces the plaintiff to join all potential defendants in the first action by precluding the plaintiff from relitigating the same issues against a different adversary. However, offensive collateral estoppel is exactly opposite, for it allows the plaintiff to adopt a "wait and see" attitude since the plaintiff will be able to estop a defendant by using a previous judgment against him, whereas he himself will not be bound if the defendant prevails. As a result, offensive collateral estoppel will actually increase the amount of litigation since intervening in the first action would not amount to any gain for the plaintiff.\(^{56}\)

A second reason is the possibility of unfairness to a defendant. When a defendant is sued for small or nominal damages, he would have little incentive to defend the action vigorously. This is particularly true if a future suit regarding the same issue is not foreseeable.\(^{57}\) It would also be prejudicial to the defendant if the judgment relied upon as a basis for the estoppel was itself inconsistent with any previous

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\(^{55}\) Id. (citation omitted).

\(^{56}\) 439 U.S. at 329. See also Note, The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty, 35 GEO. WASH. L. REV. 1010 (1967).

\(^{57}\) Id. at 330. See also Berner v. British Commonwealth Pac. Airlines, 346 F.2d 532 (2d Cir. 1965) (offensive collateral estoppel denied when defendant did not appeal adverse decision awarding damages of \$35,000 and was later sued for over \$7 million).
judgments in which the defendant prevailed. And finally, it is foreseeable that the second action might afford the defendant some procedural opportunities that were unavailable in the first action which inevitably could lead to a different result.

Despite these arguments against the use of offensive collateral estoppel, the Court has not precluded the use of the doctrine, but has instead granted trial judges broad discretion in applying the doctrine. Generally, a trial judge should deny use of offensive collateral estoppel by a plaintiff where that party could have easily intervened in the previous action, or where, as discussed above, the use of the doctrine would be patently unfair to the defending party.

In Parklane, the Court finally rejected the doctrine of mutuality and adopted the following: collateral estoppel is available whenever the party against whom a particular determination is to be asserted was afforded a "full and fair opportunity" to defend in the prior proceeding. This issue will be considered in a rather different context in Section V, infra.

III. ISSUE PRECLUSION IN THE CRIMINAL LAW: THE DISTINCTION BETWEEN RES JUDICATA AND DOUBLE JEOPARDY

The Fifth Amendment to the United States Constitution embodies the "ancient [principle] that one should not be twice put in jeopardy

58. 439 U.S. at 330. The Court notes an example provided by Professor Currie: [A] railroad collision injures 50 passengers all of whom bring separate actions against the railroad. After the railroad wins the first 25 suits, a plaintiff wins in suit 26. Professor Currie argues that offensive use of collateral estoppel should not be applied so as to allow plaintiffs 27 through 50 automatically to recover. Id. at 331, n.14, citing Currie, Mutuality of Estoppel: Limits of the Bernhard Doctrine, 9 Stan. L. Rev. 281, 304 (1957).

59. 439 U.S. at 330-31. In a footnote, the Court indicates that this "problem is . . . particularly acute" when "the defendant . . . [is] forced to defend in an inconvenient forum and therefore [is] unable to engage in full scale discovery or call witnesses." Id. at n.15, citing RESTATEMENT (SECOND) OF JUDGMENTS § 88(2) Comment d (1982).

60. 439 U.S. at 331. In a note, the Court points out that: This is essentially the approach of [the Restatement (Second) of Judgments], § 88, which recognizes that "the distinct trend if not the clear weight of recent authority is to the effect that there is no intrinsic difference between 'offensive' as distinct from 'defensive' issue preclusion, although a stronger showing that the prior opportunity to litigate was adequate may be required in the former situation than the latter."

Id. at 331 n.16, quoting RESTATEMENT (SECOND) OF JUDGMENTS § 88, Reporter's Note at 99.
of life or limb for the same offense.'61 Although the two principles are superficially similar in their application, there are fundamental differences between the prohibition against double jeopardy and the doctrine of res judicata. For one, the safeguard of the double jeopardy rule is applicable only to a defendant in a criminal proceeding. Since

61. L. Levy, The Origins of the Fifth Amendment 36 (1968), quoting H. Hughes, The Reformation in England 158-59 (1950-54). See also Sigler, A History of Double Jeopardy, 7 Am. J. Legal Hist. 283 (1976). The amendment provides, in pertinent part, that "No person shall be held to answer for a capital, or otherwise infamous crime, unless a presentiment or indictment of a Grand Jury . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Supreme Court, in United States v. Wilson, 420 U.S. 332 (1975), stated that:

The history of the adoption of the Double Jeopardy Clause sheds some light on what the drafters thought [the principle] should mean. . . . At the time of the First Congress, only one State had a constitutional provision embodying anything resembling a prohibition against double jeopardy. In the course of their ratification proceedings, however, two other States suggested that a Double Jeopardy Clause be included among the first amendments to the Federal Constitution. Apparently attempting to accommodate these suggestions, James Madison added a ban against double jeopardy to the proposed version of the Bill of Rights that he presented to the House of Representatives in June 1789. Madison's provision read: 'No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense.' . . . Several members of the House challenged Madison's wording on the ground that it might be misconstrued to prevent a defendant from seeking a new trial on appeal of his conviction. . . . One of Madison's supporters assured the doubters that the proposed clause merely stated the current law, and that this protection for defendants was implicit in the language as it stood. Madison's wording survived the House, but in the Senate, his proposal was rejected in favor of the more traditional language employing the familiar concept of 'jeopardy.' . . .

Id. at 340-41 (citations and footnotes omitted). See also infra note 62. New Hampshire was the state whose constitution embodied a double jeopardy provision, although that provision did not bar a retrial after conviction. Id. at 340 n.7. This was not an issue that troubled Congress during its consideration of the measure that would become the double jeopardy clause of the Fifth Amendment:

From the brief report of the debate [on Madison's proposal] it appears that both sides agreed that a defendant could have a second trial after a conviction, but the Government could not have a new trial after an acquittal. Representative Sherman commented: 'If the [defendant] was acquitted on the first trial, he ought not be tried a second time; but if he was convicted on the first, and anything should appear to set the judgment aside, he was entitled to a second, which was certainly favorable to him.'

Id. at 341 n.9, quoting 1 Annals of Cong. 753 (1789). The Supreme Court has interpreted the double jeopardy clause to the contrary. See id. at 342-43; North Carolina v. Pearce, 395 U.S. 711, 717 (1969).
it is the placing of the defendant into jeopardy twice that is the harm to be cured, the provision is not applicable until the first jeopardy occurs. Jeopardy attaches either when the jury is sworn, for a jury trial, or when the first witness begins to testify, for a bench trial. After that point, the trial must continue until final judgment except in rare special circumstances. If it is discontinued over the objections of the defendant, in absence of special circumstances, the defendant is not subject to retrial. 62

62. 1B J. Moore, J. Lucas & T. Currier, Moore’s Federal Practice ¶ 0.418[2] (2d ed. 1984) [hereinafter Moore’s Federal Practice]. One such “special circumstance” is “manifest necessity” which includes “the death or incapacity of the judge or other exigencies beyond the control of the parties.” Casad, Res Judicata, supra note 7, at 11-12. Further, if a convicted defendant obtains a reversal on appeal, he may be prosecuted again, for the same offense, although if he is convicted a second time the punishment normally cannot exceed that to which he was sentenced upon the first conviction. If the first prosecution results in neither a conviction nor an acquittal, i.e., a ‘hung jury,’ it has generally been understood that a second prosecution for the same offense is not barred by the double jeopardy protection, although this seems anomalous. Id. at 11. See also Freeman, Judgments, supra note 19, at § 650.

The English concept of double jeopardy seems to have differed markedly from its American counterpart:

[I]t appears that in a criminal case of a serious nature there must be a trial in the technical sense to bar further proceedings for the same offense, the English not being as concerned as the American courts over jeopardy. . . .

[II]n The Queen v. Charlesworth, 1 B.&S. 461, 121 Eng. Rep. 786 (K.B. 1861) . . . a prosecution was [brought] for bribery. The jury had been empanelled and sworn, and eight witnesses produced on behalf of the prosecution, when a ninth witness refused to give evidence. The prosecution declined to proceed and requested that the jurors be discharged, which motion was granted over objection and a request of the defendant that the trial proceed so the jurors might render their verdict. In a subsequent proceeding for the same offense the defendant contended that he could not be again put in jeopardy. It was held that the second prosecution was not barred. The court said, at page 507: ‘. . . the only pleas known to the law of England to stay a man from being tried by an indictment or information are the pleas of autrefois acquit and autrefois convict, and it is clear that this statement of facts amounts to neither. It is said that a man is not to be twice tried, and is not a second time to put in jeopardy; and that applies equally to this case as to a case where a man has been convicted or acquitted. In that I cannot concur . . . When we talk of a man being twice tried, we mean a trial which proceeds to its legitimate and lawful conclusion by verdict; and when we speak of a man being twice put in jeopardy, we mean put in jeopardy by verdict of a jury; and he is not tried nor put in jeopardy until the verdict is given.’

Apparently, the common law rule prohibiting double jeopardy began as a counterpart in criminal cases of the general civil doctrine of judicial finality. Although the two doctrines are dissimilar, there

63. MOORE'S FEDERAL PRACTICE, supra note 62, at ¶ 0.418[2], citing Lugar, Criminal Law, Double Jeopardy and Res Judicata, 39 IOWA L. REV. 317, 319 (1954). See also Annot., 147 A.L.R. 991 (1943) and 12 ENCYCLOPEDIA OF THE LAWS OF ENGLAND, "Res Judicata" 690 (2d ed. 1906-1918)

In England this principle (nemo debet bis vexari) took form in the plea of 'res judicata' in civil suits and the pleas of 'autrefois acquit' and 'autrefois convict' in criminal prosecutions. Whether on the civil or criminal side, it was essential to the efficacy of the plea that a judgment had been rendered in the former action. There was no plea of 'double jeopardy' known to the common law, and no principle of the common law that anything short of conviction or acquittal in a criminal action was a bar to a second prosecution for the same offense.

It seems most likely that the framers of the constitutions that contain the phrase 'twice in jeopardy' used it with its common law meaning, viz., after conviction or acquittal. The courts, however, have given it a much broader meaning, and have held that a person is 'in jeopardy' as soon as a jury has been empaneled, or been sworn, or been 'charged' with the prisoner, and that after that the defendant cannot be tried again.

Administration of Criminal Law (Official Draft of Double Jeopardy with Commentaries, Introductory Note) (1935), quoted in Comment, Res Judicata in Criminal Cases, 27 TEX. L. REV. 231, 236 n.20 (1948) [hereinafter Comment, Res Judicata]. See also supra note 61. The Comment cites an English case which suggests "that there was a rule of practice at common law not to separate the jury until a verdict could be reached, and it is possible that the American constructions came from this." Id. (emphasis in original). The same source observes that the term "double jeopardy" "was practically unknown to the common law" as a plea. Id. at 236. The Supreme Court has commented, however, that "[e]xpressions of the principle can be found in English law from the time of the Year Books, and as early as the 15th century the English courts had begun to use the term 'jeopardy' in connection with the principle against multiple trials." United States v. Wilson, 420 U.S. 332, 340 n.5 (1975), citing Kirk, Jeopardy During the Period of the Year Books, 82 U. PA. L. REV. 602 (1934).

In addition, the common law pleas of autrefois acquit and autrefois convict were pleas in bar by which "the defendant shews, by matter extrinsic to the record, that the indictment is not maintainable." I T. STARKIE, A TREATISE ON CRIMINAL PLEADING 298 (1814).

Pleas alleging a prior conviction, 'autrefois convict' and pleas alleging a former acquittal, 'autrefois acquit,' were both based upon the 'universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once for the same offense.' An accused who proved either autrefois convict or autrefois acquit established an absolute bar to a prosecution based upon the same facts and the identical offense. Shellow & Brenner, Speaking Motions: Recognition of Summary Judgment in Federal Criminal Procedure, 107 F.R.D. 139, 148 (1985), quoting IV W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 335-36 (16th ed. 1825). In addition to the
are instances where the prohibition against double jeopardy would preclude a subsequent prosecution in many situations in which res judicata would accomplish the same result. They are not functionally similar in that a final judgment is a prerequisite for the use of res judicata or collateral estoppel, whereas it is not for the use of double jeopardy. Finally, although both the doctrines of double jeopardy or res judicata may be unavailable, collateral estoppel may require certain facts adjudged in one prosecution to be conclusively established in a subsequent prosecution involving a different offense.64

The relationship between double jeopardy and the "civil" principle of res judicata was the issue in United States v. Oppenheimer.65 In that case, Oppenheimer had been indicted for his involvement in a conspiracy to conceal assets from a trustee in bankruptcy.66 He argued that a previous adjudication of a former indictment for the same offense was barred by the one-year statute of limitations in the Bankruptcy Act.67

pleas of former conviction or acquittal, there were two other pleas in bar, i.e., the plea of autrefois attaint, which raised the bar of attaint by former judgment, "outlawry or . . . abjuration", and the plea of pardon. Shellow & Brenner, supra, at 148; see also IV BLACKSTONE, supra, at 336-37; I STARKIE, supra, at 313-15; 3 E. COKE, INSTITUTES 212-13 (6th ed. 1680); United States v. Wilson, 420 U.S. 332, 339-40 (1975). Coke apparently ascribed "the protection afforded by the principle of double jeopardy [to] . . . [these] . . . common-law pleas." 420 U.S. at 340.

The common law pleas in bar survived into American criminal pleading up until the promulgation of the Federal Rules of Criminal Procedure. See Shellow & Brenner, supra, at 149-57. At least one American court held that the double jeopardy provision of the Fifth Amendment is based upon the common law pleas of autrefois acquit and autrefois convict. See United States v. Sabella, 272 F.2d 206 (2d Cir. 1959); see also Benton v. Maryland, 395 U.S. 784 (1969) and Ex Rel. Lange, 18 Wall. (85 U.S.) 163 (1974). Another court held, however, that the plea of autrefois convict was a plea separate and distinct from a plea of double jeopardy. See Commonwealth ex rel. Papy v. Maroney, 417 Pa. 368, 207 A.2d 814 (1965). See also United States v. Wilson, 420 U.S. 332, 342 (1975).

66. Id. at 85.
67. Id. at 86. The adjudication had "since been held to be wrong in another case." Id., citing United States v. Rabinowitch, 238 U.S. 78 (1915). The issue
Oppenheimer ultimately prevailed upon his motion to quash the indictment.\textsuperscript{68} The government appealed, "treat[ing] the so-called motion to quash as a plea in bar," which in substance it was.\textsuperscript{69} The Supreme Court began by rejecting the argument which the government had advanced that the doctrine of res judicata does not exist for criminal cases except for the double jeopardy clause. The Court held that it cannot be the case that the safeguards of an individual in a criminal case are less than those protecting one from liability in debt. It cannot be that an acquittal based on the running of the statute of limitations is less of a protection from a subsequent trial than one on the grounds of innocence.\textsuperscript{70} The Court concluded by holding that:

[t]he safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the 5th Amendment was not intended to do away with what in the civil law is a fundamental principle of justice . . . in order, when a man once has been acquitted on the merits, to enable the government to prosecute him a second time.\textsuperscript{71}

\begin{itemize}
\item presented, therefore, was whether
\item an erroneous unappealed judgment that a criminal prosecution was barred by the statute of limitations . . . bar[red] a second prosecution for the same offense. There was no jeopardy, because the judgment was rendered on the pleadings before a jury had been empaneled. . . . [There was no] former acquittal in the usual sense, because there was no verdict. Nor [was] it characteristically collateral estoppel, because prosecution [was] for the same offense. It seem[ed], therefore, that it must be res judicata and it was so characterized by the Supreme Court.
\item Comment, \textit{Res Judicata}, supra note 63, at 232-33.
\item 68. 242 U.S. at 86.
\item 69. \textit{id., citing} United States v. Barber, 219 U.S. 72 (1911).
\item 70. 242 U.S. at 87.
\item 71. \textit{id.} at 88, \textit{citing} Jeter v. Hewitt, 22 How. 352, 364 (1859). In an earlier passage, the Court adopted
\item the statement of a judge of great experience in the criminal law: 'Where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, the adjudication . . . is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offense. . . . In this respect the criminal law is in unison with that which prevails in civil proceedings.'
\end{itemize}

242 U.S. at 88, \textit{quoting} J. Hawkins in Regina v. Miles, L.R. 24 Q.B. Div. 423, 431 (1916). The Court also cited Commonwealth v. Evans, 101 Mass. 25 (1869), in which a conviction for assault and battery was held conclusive of the unjustifiableness of the assault in a later prosecution for manslaughter. A subsequent case, \textit{Frank v.}
In many ways, the double jeopardy clause is much narrower than res judicata. Double jeopardy acts only to protect defendants, whereas collateral estoppel and res judicata operate in favor of either party. Second, if judgment is rendered prior to the attachment of jeopardy, then res judicata will still preclude a second prosecution. Finally, double jeopardy acts only to preclude a second prosecution for the same offense, whereas collateral estoppel precludes the relitigation of all the previous issues litigated between the same parties and those in privity.72

Oppenheimer "established that [the] prohibition against double jeopardy [contained] in the Fifth Amendment . . . does not supplant or abrogate the traditional doctrine of [res judicata] in criminal cases, but merely provides an additional protection for defendants accused of crime."73 A case decided some fifty years later, Ashe v. Swenson,74

Magnum, 237 U.S. 307 (1915), held that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties. The principle is as applicable to the decisions of criminal courts as to those of civil jurisdictions. Id. at 311. See also McLaren, The Doctrine of Res judicata as Applied to the Trial of Criminal Cases, 20 WASH. L. REV. 198 (1935).


74. 397 U.S. 436 (1970). A much earlier decision, Dunn v. United States, 284 U.S. 390, 393 (1932) had seemed to cast doubt upon the applicability of collateral estoppel in criminal proceedings:
Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment. . . . If separate indictment had been presented against the defendant . . . and separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as res judicata of the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold.
284 U.S. at 393 (citations omitted).
established that collateral estoppel is an aspect of the Fifth Amendment's protection against double jeopardy.\textsuperscript{75}

Ashe was tried and acquitted of armed robbery and the theft of a car.\textsuperscript{76} The trial resulted from an incident in which three or four masked men robbed six poker players.\textsuperscript{77} Ashe, who was accused of having been one of the masked men, was tried "on the charge of robbing Donald Knight, one of the participants in the poker game."\textsuperscript{78} Knight and three other poker players appeared as government witnesses, each testifying that an armed robbery had occurred and that personal property had been taken from each of them.\textsuperscript{79} There was, however, very little evidence that Ashe had been involved,\textsuperscript{80} and the jury found him "not guilty due to insufficient evidence."

Six weeks later, Ashe was again brought to trial, this time for the robbery of a different victim named Roberts. Ashe filed a motion to dismiss based on his previous acquittal in the Knight case. However, the motion was denied and the Roberts trial was conducted. Each of the witnesses was the same, but each had a much more clear idea that it was Ashe who was one of the robbers. Ashe was subsequently found guilty and sentenced to 35 years in prison.\textsuperscript{81} After the Missouri

\textsuperscript{75} 397 U.S. at 442-44.
\textsuperscript{76} 397 U.S. at 437-39.
\textsuperscript{77} The poker players were engaged in a game:
 in the home of John Gladson at Lee's Summit, Missouri. Suddenly three or four masked men, armed with a shotgun and pistols, broke into the basement and robbed each of the poker players of money and various articles of personal property. The robbers... then fled in a car belonging to one of the victims. ... Shortly thereafter, the stolen car was discovered in a field, and later that morning three men were arrested... while they were walking on a highway. [Ashe] was arrested... some distance away.
\textit{Id.} at 437-38. It was never clear whether there were three or four robbers. \textit{Id.} at 437.
\textsuperscript{78} \textit{Id.} at 438.
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} Two of the witnesses thought that there had been only three robbers... and could not identify [Ashe] as one of them. Another of the victims, who was [Ashe's] uncle by marriage, said that at the 'patrol station' he had positively identified each of the other three men accused of the holdup, but could say only that the petitioner's voice 'sounded very much like' that of one of the robbers. The fourth participant in the poker game did identify [Ashe], but only by his 'size and height, and his actions.'
\textit{Id.} at 438.
\textsuperscript{81} [T]wo witnesses who at the first trial had been wholly unable to identify [Ashe] as one of the robbers, now testified that his features, size, and mannerisms matched those of one of their assailants. Another witness who before had identified the petitioner only by his size and actions now also
courts rejected Ashe's argument that the conviction violated "his right not to be twice put in jeopardy," he brought a habeas corpus proceeding in the federal courts. The district court denied the writ and the Eighth Circuit affirmed, both finding themselves bound by the Supreme Court's decision in *Hoag v. New Jersey.*

In *Hoag,* the defendant was tried for robbing three men in a tavern. The evidence was clear that a robbery had occurred, but it was weak as to who committed the act. As a result, Hoag was acquitted. Hoag was then brought to trial a second time against a different victim, this time the jury finding him guilty.

When Hoag brought his appeal to the Supreme Court, his conviction was upheld. The court found it unnecessary to decide whether "collateral estoppel" is a due process requirement for state criminal trials because it found persuasive the state's argument that the previous acquittal did not give rise to an estoppel. The Court failed to approach the consideration of whether collateral estoppel is an ingredient of the Fifth Amendment guarantee against double jeopardy.

This was the issue presented in *Ashe v. Swenson.* The Court began its consideration of the issue by examining the concept of collateral estoppel. Although it is an awkward phrase, the court held it to play an extremely important role in our adversarial system of justice. Simply stated, the concept embodied the principle that once an issue of ultimate fact has once been determined in a valid end time judgment, that issue cannot further be litigated in a subsequent controversy. Furthermore, it has been part of the criminal justice system at least since the *Oppenheimer* decision. The Court found that federal case law has made it clear that the rule of collateral estoppel in criminal cases is not to be applied hypertechnically or with remembered him by the unusual sound of his voice. The State further refined its case at the second trial by declining to call one of the participants in the poker game whose identification testimony at the first trial had been conspicuously negative.

*Id.* at 440.

82. *Id.* at 440. See also *State v. Ashe,* 350 S.W.2d 768, 771 (Mo. 1963) and *State v. Ashe,* 403 S.W.2d 589 (Mo. 1967).

83. *Id.* at 440-41. See also *Ashe v. Swenson,* 289 F. Supp. 871, 873 (W.D. Mo.), aff'd 399 F.2d 40, 46 (8th Cir. 1968).


85. 397 U.S. at 441-42. See also 356 U.S. at 469-70.

86. *Id.* at 442.

87. *Id.* at 443.
the archaic approach of a 19th century pleading book, but should be applied with a realistic and rational purpose in mind.88

In doing this, it is up to the court to examine which issues were actually deliberated upon by the factfinder in the previous decision and determined whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. A test more technically restrictive would amount to a rejection of the doctrine in criminal proceedings.89 The Court applied this approach to the facts before it and found that the doctrine of collateral estoppel makes a "second prosecution for the robbery of Roberts wholly impermissible."90 The Court held that:

[T]he ultimate question to be determined, then, . . . is whether this established rule of federal law is embodied in the Fifth Amendment guarantee against double jeopardy. We do not hesitate to hold that it is. For whatever else that constitutional guarantee may embrace, it surely protects a man who has been acquitted from having to "run the gantlet" a second time.91

88. Id. at 444.
89. Id. at 444. The Court also notes that:
   'If a later court is permitted to state that the jury may have disbelieved substantial and uncontradicted evidence of the prosecution on a point the defendant did not contest, the possible multiplicity of prosecutions is staggering . . . . In fact, such a restrictive definition of 'determined' amounts simply to a rejection of collateral estoppel, since it is impossible to imagine a statutory offense in which the government has to prove only one element or issue to sustain a conviction.'
Id. at n.9, quoting Mayers and Yarborough, Bix Vexari: New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1, 38 (1960).

90. 397 U.S. at 445. The Court stated that:
   the record is utterly devoid of any indication that the first jury could rationally have found that an armed robbery had not occurred, or that Knight had not been a victim of that robbery. The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not.

Id.

91. Id. at 445-46 (citations and footnote omitted). Accord Collins v. Loisel, 262 U.S. 426 (1927). The Ashe court elaborated as follows:
   It is true, as this Court said in Hoag v. New Jersey, supra, that we have never squarely hold collateral estoppel to be a constitutional requirement. Until perhaps a century ago, few situations arose calling for its application. For at common law, and under early federal criminal statutes, offense categories were relatively few and distinct. A single course of criminal conduct was likely to yield but a single offense. . . . In more recent times,
Ashe v. Swenson not only established that collateral estoppel is an aspect of the protections embodied in the Fifth Amendment's prohibition against double jeopardy, it also illustrates the difficulty in applying collateral estoppel when the judgment in question is a general acquittal: Since collateral estoppel has a preclusive effect on only those issues that were ultimately determined by the previous judgment, and since a judgment of acquittal is usually based on a general verdict of not guilty, it is often difficult to determine precisely what issues were ultimately determined by the factfinder in a general judgment of acquittal.92

This difficulty, which is an issue that will be considered in Section IV, infra, arises from the fact that American criminal law, like its English counterpart,93 does not differentiate between "not guilty"

with the advent of specificity in draftsmanship and the extraordinary proliferation of overlapping and related statutory offenses, it became possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transactionote ... As the number of statutory offenses multiplied, the potential for unfair and abusive reprosecutions became far more pronounced. ... The federal courts soon recognized the need to prevent such abuses through the doctrine of collateral estoppel, and it became a safeguard firmly embedded in federal law. 397 U.S. at 445 n.10 (citations omitted). See also Comment, Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee, 65 YALE. L.J. 339, 342 (1956).

Chief Justice Burger dissented, for reasons which are apparent in the following passage:

The collateral-estoppel concept—originally a product only of civil litigation—is a strange mutant as it is transformed to control this criminal case. In civil cases the doctrine was justified as conserving judicial resources as well as those of the parties to the actions and additionally as providing the finality needed to plan for the future. ... Very properly, in criminal cases, finality and conservation of private, public, and judicial resources are lesser values than in civil litigation. 397 U.S. at 464 (Burger, C.J., dissenting).

Justices Brennan, Douglas and Marshall joined in a special concurrence, the thesis of which was that Ashe's second prosecution was barred under principles of double jeopardy as representing a second prosecution for the "same offense." See 397 U.S. at 448-61.

92. MOORE'S FEDERAL PRACTICE, supra note 62, at ¶ 0.418[2].

93. English law, however, apparently includes "the doctrine that estoppels do not bind the Crown, though it may take advantage of them." Comment, Res Judicata, supra note 63, at 236 (footnote omitted).

There is one exception to the rule that estoppels ... bind both parties, and that is in the case of the Crown; for it appears ... that the king is not bound by estoppels, though he can take advantage of them. Everest & Strode, The Law of Estoppel 8 (3d ed. 1923). In the Queen v. Deline, 10 Mod. 198,
and "guilt not proven." Scottish law allows jurors to return one of three verdicts, i.e., "guilty", "not guilty" or "not proven." A verdict of "not proven" means that "the guilt of the accused is not made out, though his innocence is not clear."  

Lacking this distinction, American criminal law is reluctant to extend issue-preclusive effects to general judgments of acquittal, *Ashe v. Swenson* notwithstanding. But that is not an issue with which this article is concerned. It is sufficient for the purposes of this article that the Supreme Court has recognized that both res judicata and collateral estoppel apply in criminal proceedings as well as in civil litigation. However, this recognition gives rise to a corollary issue, namely, what effect is to be given to a civil judgment in a criminal proceeding and vice versa?

IV. "CROSS-OVER" COLLATERAL ESTOPPEL: ISSUE PRECLUSION IN A PROCEEDING OF THE OPPOSITE CHARACTER

This section examines a relatively unusual and almost unrecognized legal phenomenon, namely, instances in which a judgment entered by a civil/criminal court is asserted as precluding the litigation

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*Id.* at 236 n.21. It appears that at least one treatise has indicated that "The King is... bound by estoppels arising out of criminal proceedings, as he is necessarily a party to them." *Id.* at 237, quoting EVEREST & STRODE, THE LAW OF ESTOPPEL 8 (3d ed. 1923). This statement, however, has been questioned as "conjectural" and as being based upon two cases which represent "doubtful authority." See *id.* ("One involves an unusual fact situation, and the other concerns the use of the ancient writ of *melius inquirendum*; both cases are rather old, and significantly no other authority is cited.") See also *Stoughter's Case*, 8 Co. Rep. 168a, 77 Eng. Rep. 728 (K.B. 1610); Attorney General v. Norstedt, 3 Price 97, 146 Eng. Rep. 203 (Ex. 1816).

94. See, e.g., BLACK'S LAW DICTIONARY 1209 (4th ed. 1968).

95. *Id.*


[A] previous judgment is conclusive only as to those matters which were in fact in issue and actually or necessarily adjudicated. Thus an acquittal of the charge of seduction does not adjudicate the question of sexual intercourse although that was one of the issues in the case, since the acquittal might have been due to the failure to establish other facts essential to a conviction.  

*Freeman, Judgments,* *supra* note 19, at § 648.
of issue pending before a criminal/civil court. The author will refer to this phenomenon as "cross-over" collateral estoppel. 97

A. GENERAL PRINCIPLES

Generally a judgment in a criminal action is not determinative of any issue in a later civil proceeding other than the fact of its rendition, nor is a civil judgment binding on a party to a later criminal action. In the typical case, collateral estoppel does not apply because the parties to the two actions are not identical, and because different degrees of proof are required in the two proceedings. 98

* * * * * * *

The record of a conviction or of an acquittal is not, according to a decided preponderance of authority, conclusive.

97. Although the preceding discussion has often used the terms res judicata and collateral estoppel interchangeably, as denoting the general notion that judgments have preclusive effects, the succeeding discussion will be concerned only with the concept of collateral estoppel. This is, of course, necessitated by the fact that there can be no true "res judicata" between civil and criminal proceedings given that the technical term "res judicata" signifies "claim preclusion" rather than the issue preclusion which is indicates by use of the term collateral estoppel. Since the causes of action, or "claims", necessarily differ between the civil and criminal law, there can be no such phenomenon as "cross-over res judicata." This is true despite the fact that certain of the cases which are discussed in this section insist on referring to a civil judgment as being "res judicata" in a criminal prosecution and vice versa. See, e.g., 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4474 (1981):

Claim preclusion does not extend from criminal prosecutions to civil actions. Our traditional division between civil and criminal procedure does not contemplate any opportunity for joining any civil claim with the criminal prosecution. Thus it is manifest that a different claim or cause of action is involved in a subsequent civil action between private parties, or in an action brought by the criminal defendant against the government.

Id. (footnotes omitted).

of the facts on which it is based in any civil action, nor, ordinarily, is it even evidence of such facts.99

* * * * * * * *

A judgment in a civil case must generally be excluded from evidence in a criminal prosecution, because the parties are not the same, and were they the same, it would be improper to receive a judgment in a civil case as evidence of the commission of a crime of which the defendant is accused, for the reason that such judgment may be founded on a mere preponderance of evidence not sufficient to satisfy the jury beyond a reasonable doubt.100

These quotations represent the traditional wisdom on "cross-over" collateral estoppel, a wisdom which denied that such a phenomenon existed.101 A careful reading of the passages reveals that their repudiation of the concept is based upon certain assumptions: (1) that a judgment cannot be offered as evidence in a dissimilar proceeding; (2) that the parties are not identical in the two proceedings; (3) that a civil judgment is being offered in a criminal proceeding in order to

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99. FREEMAN, JUDGMENTS, supra note 19, at § 653 (footnotes omitted). See also BLACK, JUDGMENTS, supra note 5, at § 529:
Since the parties to a criminal prosecution and those in a civil suit are necessarily different, and as the objects and results of the two proceedings and the rules of evidence which apply to them respectively are equally diverse, it follows that the judgment in the former cannot be used by way of estoppel in the later, save for the single purpose of proving its own existence, if that becomes a relevant fact.

Id. at § 529.

100. FREEMAN, JUDGMENTS, supra note 19, at § 658 (footnote omitted). See also Developments in the Law: Res Judicata, supra note 10, at 880, which states that:
When a civil judgment is offered as evidence to prove any issue in a criminal proceeding, it is excluded by all courts and its admission has been held prejudicial. This result seems proper in view of the severe consequences of a criminal conviction as opposed to an adverse civil judgment and the greater degree of proof needed to sustain a criminal conviction.


101. For more modern perspectives on this issue, see 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4474 (1981) [hereinafter WRIGHT & MILLER]. MOORE'S FEDERAL PRACTICE, supra note 62, at ¶ 0.418[1]. Both treatises caption their respective discussions as treating of the preclusive effect of a criminal judgment in a subsequent civil proceeding, although MOORE'S FEDERAL PRACTICE does address the converse situation in a brief paragraph which is discussed in the text above. See infra note 122 and accompanying text.
establish the defendant's guilt or some aspect thereof; and (4) that differing standards of proof absolutely preclude "crossing-over." But what if these assumptions do not hold—is "crossing-over" still an impossibility?

The first assumption has been partially altered by Rule 803(22) of the Federal Rules of Evidence, which provides that, with limited exceptions, a final judgment adjudging the defendant guilty of a crime punishable either by death or by imprisonment for a term greater than one year, is not excluded by the hearsay rule for the purpose of proving a fact necessary to sustain the judgment. The Advisory Committee Note explains that Rule 803(22) does not concern itself with the substantive effect of the former judgment as a bar or an estoppel where, under the doctrine of res judicata, the former judgment is conclusive. Where res judicata is not applicable, Rule 803(22) allows into evidence judgments of felony convictions for what they are worth.

Most commentators agree that although a judgment of conviction is technically hearsay, "since it is based on the opinion of twelve persons who have not been cross-examined and have no personal

102. In addition to these assumptions and/or arguments against "crossing-over", the argument has also been made that civil judgments cannot be introduced against a criminal defendant because to do so could violate his right not to testify against himself and could violate his right to confront adversarial witnesses. See, e.g., Developments in the Law: Res Judicata, supra note 10, at 879. See also 46 Am Jur 2d Judgments §§ 615-620 (1969).

103. The Federal Rules of Evidence provide in part that:
The following [is] not excluded by the hearsay rule . . . Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

Fed. R. Evid. 803(22).

104. Fed. R. Evid. 803(22) advisory committee's note.

105. 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(22)[01] (1985) [hereinafter Weinstein's Evidence]. See also Note, Use of Record of Criminal Conviction in Subsequent Civil Action Arising from the Same Facts as the Prosecution, 64 Mich. L. Rev. 702, 703 (1966). Fed. R. Evid. 803(22) advisory committee's note continues as follows: "This is the direction of the decisions, Annot., 18 A.L.R.2d 1287, 1299, which manifest an increasing reluctance to reject in toto the validity of the laws factfinding processes outside the confines of res judicata and collateral estoppel."
knowledge of the underlying facts,"'106 the hearsay objection is really only a "purely technical obstacle to admission of judgments."'107 And there is also the fact "that certified records of a conviction would be eligible for admission under the public records exception of the hearsay rule."'108

One treatise criticizes the traditional argument against admitting evidence of prior convictions. The argument rests on the observation that the parties in the prior proceeding usually differ from those in the subsequent action, resulting in a lack of mutuality of parties. As a result, admission into evidence of prior convictions would undermine the common law maxim that a third party should not be prejudiced by a transaction between two others. The treatise states that this conclusion is ill-focused. The treatise suggests that in determining whether the hearsay rule should be given effect, the correct concern “is not the party's opportunity to have been present at the official investigation but rather whether the investigation provided adequate assurance of reliability."'109 Although arguments against the admissibility of prior judgments in subsequent proceedings have been overcome in one respect, Rule 803(22) is not without limits. The rule encompasses only prior criminal judgments—with limited exceptions, civil judgments are inadmissible as evidence because the lower burden of proof in a civil proceeding renders a civil judgment less reliable than a judgment in a criminal proceeding.'110

106. Id. at ¶ 803(22)[01], quoting Note, Judgments as Evidence, 46 IOWA L. REV. 400, 402 (1961).
107. Id.
108. WEINSTEIN'S EVIDENCE, supra note 105, ¶ 803(22)[01], citing MCCORMICK, EVIDENCE § 318 at 738-39 (2d ed. 1972). The public records exception is contained in FED. R. EVID. 803(8), and excepts from hearsay objection the "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies."
109. WEINSTEIN'S EVIDENCE, supra note 105, ¶ 803(22)[01] at 803-350, quoting MCCORMICK, EVIDENCE § 318 at 739 (2d ed. 1972). The maxim in question is "res inter alios acta alteri nocere non debet." WEINSTEIN'S EVIDENCE, supra note 105, ¶ 803(22)[01] at 803-350 n.7. Other reasons offered for excluding judgments of conviction have been "that criminal defendants do not always get a fair trial because of lack of opportunity for discovery, which might alter the outcome of the civil action" and "a distrust of judgments rendered by juries."
110. WEINSTEIN'S EVIDENCE, supra note 105, at ¶ 803(22)[01] (footnotes
Therefore, Rule 803(22) has at least partially abrogated the objection that judgments are not admissible as evidence in dissimilar proceedings. Of course, this is not the issue that is presently under consideration. It is necessary to distinguish, as many early commentators failed to do, between the use of a judgment as evidence and the use of a judgment as issue preclusion. Whatever the merits of the first alternative, this article will argue that there is no obstacle to the use of a judgment as issue preclusion in a similar or dissimilar proceeding.

In this regard, it is necessary to note that "[t]he doctrine of collateral estoppel is applicable not merely to questions of fact but also to questions of law." Even if one assumes that the "differing standards of proof" argument has some validity with regard to the use of judgments as evidence in dissimilar proceedings, this argument is far less applicable when the judgment is being offered as an adjudication upon a question of law.

omitted). Fed. R. Evid. 803(23) excepts from hearsay objection "[j]udgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation."

111. See, e.g., McCormick on Evidence § 318 (3d ed. 1984), which states: Where the doctrines of res judicata or collateral estoppel, or in modern terminology claim preclusion or issue preclusion, make the determinations in the first case binding in the second . . . the judgment in the first case is not only admissible in the second, but it is as a matter of substantive law conclusive against the party. If neither res judicata nor collateral estoppel applies, however, the courts have traditionally been unwilling to admit judgments in previous cases. The judgments have been regarded as hearsay and not within any exception to the hearsay rule.

Id., citing 5 J. Wigmore, Evidence § 1671a (J. Chadbourn rev. 1974).


113. Rulings on pure questions of law may have some binding effect upon the parties in later litigation by virtue of the doctrine of stare decisis or that of 'the law of the case.' However, even where those doctrines have no application, parties may be precluded from relitigating particular questions of law through the operation of direct or collateral estoppel.

Rulings on questions of law are seldom made in the abstract. Nearly always questions of law are decided with reference to particular facts . . . But a ruling embodying the application of undisputed legal standards to admitted facts . . . is . . . a ruling on a question of law. Such a ruling may at the same time establish one of the ultimate facts of the controversy. . . . If the legal significance of the same set of historical facts should again become a matter of dispute between the parties, the principles of issue preclusion should normally apply . . .

Casad, Res Judicata, supra note 7, at 125-26 (citations omitted).
Although the original *Restatement of Judgments* chose not to address the issue, the *Restatement (Second) of Judgments*, at least in part, recognizes the possibility of "cross-over" collateral estoppel. Generally, the *Restatement (Second) of Judgments* would give issues determined in a prior *criminal* judgment preclusive effect in favor of the government in a subsequent *civil* proceeding between the government and the same defendant, or between the government and a third person whose claim is derived from the defendant’s suit. As well, issues determined in a successful *criminal* prosecution are preclusive in favor of a third person in a *civil* action against the same defendant or against persons having certain relationships with the defendant. As the foregoing discussion illustrates, the *Restatement (Second) of Judgments* acknowledges not only "cross-over" collateral estoppel, but also rejects the mutuality requirement. The drafters noted that "long before the mutuality rule was repudiated in civil cases, well reasoned decision had extended the rule of preclusion to operate in favor of third persons where the first action is criminal and the second is civil." This means, of course, that a "lack of identity between the parties" in two dissimilar proceedings is no longer an objection to the application of "cross-over" collateral estoppel between the two.

The *Restatement (Second) of Judgments* does not address the issue-preclusive effects of a civil judgment upon a subsequent criminal proceeding. Certain commentators concede that this is an acceptable

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114. The *Restatement of Judgments* does deal with the effect of judgments rendered in civil actions. However, it does not deal with the effect of a judgment in a criminal proceeding, nor does it deal with the effect of a judgment in a civil case upon subsequent criminal proceedings. See *Restatement of Judgments* scope note at 2 (1942).


116. *Id.* at § 85(2)(b).

117. *Id.* at § 85(2)(a).

118. *Id.* at § 85(2)(b).

119. *Restatement (Second) of Judgments* § 85 comment e (1982) ("Judgment for prosecution: preclusion in favor of third party"). See also *id.* at comment f ("Judgment for prosecution: preclusion against thirty party").

120. See also BLACK, *JUDGMENTS*, supra note 5 at § 529. "[I]t may happen that the parties are the same in the two actions, civil and criminal; and here, the main reason of rule [against "crossing-over"] being taken away, the rule itself will not always apply." *Id.*

121. *Restatement (Second) of Judgments*, reporter's note at 3 (1982): "The preclusive effect in a subsequent criminal prosecution of a prior civil judgment against the government is outside the scope of this Restatement." *Id.*, citing United States v. Baltimore & Ohio R.R. Co., 244 U.S. 1170 (1913); Yates v. United States, 354
practice. That issue is considered in more detail in Section IV(D), infra. That section also returns to the arguments which have been adduced against the permissibility of "cross-over" collateral estoppel, and assesses their viability in present-day law.

Before venturing such an assessment it is necessary to examine the decisional law in this area. As noted above, collateral estoppel appears in four guises, "civil to civil, criminal to criminal, criminal to civil and civil to criminal." The first two categories having been considered and, presenting no difficulties in conceptualization or application, it is now necessary to consider the problematic categories, i.e., "criminal to civil" and "civil to criminal."

B. CRIMINAL TO CIVIL

The application of a criminal judgment as issue preclusion in a subsequent civil proceeding is generally considered to be far less

U.S. 298 (1957); United States v. Mumford, Fed. Sec. L. Rep. (CCH) ¶ 97,648 (4th Cir. Oct. 2, 1980); Commonwealth v. 707 Main Corp., 371 Mass. 374, 357 N.E.2d 753 (1976). See infra Section IV(B) or (C) for a discussion of each of the cases cited above.

122. See, e.g., MOORE'S FEDERAL PRACTICE, supra note 62, at ¶ 0.418[1], which states that:

[B]ecause of the different standards of proof, a judgment of civil liability is not conclusive of any issue in a criminal trial, and its admission as evidence is error prejudicial to the defendant. In the converse situation, it is arguable, however, that the same rationale should make a civil judgment on the merits, that a defendant is not civilly liable, conclusive in his favor in a subsequent criminal proceeding as to the issues adjudicated in the civil suit.

Id. (footnotes omitted). Another commentator suggests that:

Instances in which issues litigated in a civil action will be accorded preclusive effect in a later criminal suit are rare indeed. If the state was not a party to the civil action, it cannot be bound by anything adjudicated in it. And even where mutuality has been abandoned, the state will not be able to claim the benefit of issues decided in an earlier civil suit to establish any part of the crime because of the different standard of proof. Occasionally the state will initiate a civil action against a defendant, and, after losing, prosecute the defendant for a crime involving some of the same facts. In such a case, it can be argued that the defendant should be able to rely upon the civil judgment as conclusive on the common issue. Failure of the state to establish its case under the 'preponderance of the evidence' standard of the civil law, would indicate clearly that the criminal standard, of 'beyond a reasonable doubt' could not be met. Cases actually holding this, however, are hard to find.

CASAD, RES JUDICATA, supra note 7, at 261-62. It is useful to note that Casad was writing in 1976, four years before the RESTATEMENT (SECOND) OF JUDGMENTS appeared and abrogated the requirement of mutuality.

123. Gregory v. Commonwealth, 610 S.W.2d 598, 599 (Ky. 1980) (citations omitted). See also supra note 2.
problematic than the application of a civil judgment as issue preclusion in a subsequent criminal proceeding.\textsuperscript{124} The extent to which a judgment in a criminal proceeding is available as collateral estoppel in a civil proceeding is a function of several issues: (1) whether the judgment was a judgment of acquittal or of conviction; (2) whether, if the judgment was of conviction, it resulted from an adjudication on the merits or a plea; and (3) whether preclusion is being asserted by the government or by the defendant.\textsuperscript{125}

1. \textit{Acquittal v. Conviction}

Issue preclusion in a civil action that follows a criminal conviction has emerged only in recent years. The traditional rule was that the conviction was irrelevant in any subsequent civil action. This rule gave way to decisions that permitted the conviction to be offered in evidence. Evidentiary use of the conviction has in turn been transformed into preclusion.\textsuperscript{126}

Perhaps the leading decision on this issue is \textit{Emich Motors Corp. v. General Motors Corp.}\textsuperscript{127} The action was brought by Emich Motors, a former Chevrolet dealer, in federal district court for the Northern District of Illinois pursuant to the Clayton Act, alleging conspiracy in restraint of trade.\textsuperscript{128} Prior to this action, defendant General Motors Corporation had been convicted in an Indiana federal district court of conspiracy in restraint of trade.\textsuperscript{129} At trial, the Illinois federal district court allowed into evidence the prior criminal indictment, verdict, and judgment.\textsuperscript{130}

\begin{footnotesize}

\textsuperscript{124} See, e.g., \textit{Developments in the Law: Res Judicata, supra} note 10, at 878-80; \textit{Wright & Miller, supra} note 102, at § 4474; \textit{Moore's Federal Practice, supra} note 62, at ¶ 0.418[1]. "There is . . . a growing tendency to admit a prior conviction for a serious criminal offense in a civil action." \textit{McCormick on Evidence} § 318 (3d ed. 1984).

\textsuperscript{125} Constraints of space and of the reader's patience militate against going into the issue of third-party assertion of a criminal judgment as "cross-over" estoppel, especially since the \textit{Restatement (Second) of Judgments} considers this issue in some detail. \textit{See supra} note 116 and accompanying text. \textit{See also} \textit{Moore's Federal Practice, supra} note 62, at ¶ 0.418[1]; \textit{Wright & Miller, supra} note 102, at § 4474.

\textsuperscript{126} \textit{Wright & Miller, supra} note 102, at § 4474.

\textsuperscript{127} 340 U.S. 558 (1951).

\textsuperscript{128} 340 U.S. at 559-60.

\textsuperscript{129} \textit{Id.}

\textsuperscript{130} \textit{Id.} This evidence was permitted pursuant to § 5 of the Clayton Act, which provides in part: A final judgment . . . rendered in any criminal prosecution . . . under the antitrust laws to the effect that a defendant has violated such laws shall be
\end{footnotesize}
The Seventh Circuit Court of Appeals reversed the district court’s verdict for plaintiffs, in part on the ground that the lower court erred in allowing the jury to consider the evidence adduced from the prior criminal action. The Court of Appeals reasoned that the judgment was prima facie evidence of a conspiracy only, and that the record in the preceding criminal action should not have been exhibited to the jury.

The Supreme Court granted certiorari to consider the effect to be given to a conviction in this situation. After considering the history and purposes of the Clayton Act, the Court concluded that the general doctrine of estoppel governed the proper evidentiary use of a prior conviction. The Court acknowledged the preclusive impact of a prior criminal conviction in favor of the Government in a subsequent civil proceeding, but further remarked that “such estoppel extends only to questions distinctly put in issue and directly determined in the criminal prosecution... In the case of a criminal conviction based on a jury verdict of guilty, issues which were essential to the verdict must be regarded as having been determined by the judgment.” The problem is, of course, to determine exactly “what matters were adjudicated in the antecedent suit”, particularly when

prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto.

Id. at 559-60 (footnote omitted), quoting 15 U.S.C. § 1, 26 Stat. 209, ch. 647 (July 2, 1890).

131. Id. at 560, citing Emich Motors Corp. v. General Motors Corp., 181 F.2d 70 (7th Cir. 1950), rev’d 340 U.S. 558, reh’g denied 341 U.S. 906 (1951).

132. Id. at 556.

133. Id.

134. Id. at 568. The Court found that, by enacting § 5 of the Clayton Act, “Congress intended to confer, subject only to a defendant’s enjoyment of its day in court against a new party, as large an advantage as the estoppel doctrine would afford had the Government brought suit.” Id.

135. Id. at 568. It is unclear whether the Court was referring to the relatively new concept of “collateral estoppel” as adopted in the original Restatement of Judgments, or to the historical concept of “estoppel by record.” See generally supra Section II.

136. Id. at 568-69 (citations omitted). For the proposition that a conviction can work an estoppel in favor of the government in a subsequent proceeding, the Court cited United States v. Greater N.Y. Live Poultry Chamber of Commerce, 53 F.2d 518 (S.D.N.Y. 1931), aff’d sub. nom. Local 167, I.B.T. v. United States, 291 U.S. 293 (1934); Farley v. Patterson, 166 App. Div. 358, 152 N.Y.S. 59 (1915); and Freeman, Judgments, supra note 19, at § 657.
the "antecedent suit" culminated in a general verdict of conviction.\footnote{137 Id. at 569.}

After considering the problems presented by such a verdict, the \textit{Emich} court held that the prior criminal judgment was prima facie evidence of more than the general conspiracy. It was also evidence of the means by which the GM dealers were coerced. In addition to introducing the prior judgment as evidence of the existence of a conspiracy, it was necessary for the plaintiff to introduce evidence of the means by which the conspiracy was effectuated in order to show that the same means had been employed against plaintiff, and thus that plaintiff had been injured by the conspiracy. From this reasoning, the Court determined that the Court of Appeals erred in holding that the judgment was only prima facie evidence of a conspiracy.\footnote{138 Id. at 570-571.}

The Court further held that "[w]hat issues were decided by the former . . . litigation is . . . a question of law as to which the court must instruct the jury."\footnote{139 Id. at 571.} The Court found that "it is the task of the trial judge to make clear to the jury the issues that were determined against the defendant in the prior suit."\footnote{140 Id.} The trial judge is to discharge this task by carefully examining the record in the prior proceeding "to determine the issues decided by the judgment", and is then to "reconstruct that case" in his instructions to the jury and "explain [to them] the scope and effect of the former judgment on the case at trial."\footnote{141 Id. at 5712-72.}

have followed the anti-trust statutes in according preclusive effects to criminal judgments of conviction which are offered in civil proceedings. McCormick comments upon the reasons for the increase in popularity:


The holding in Emich was anticipated by the Court's decision in International Brotherhood of Teamsters v. United States, 291 U.S. 293 (1934), in which the Court found that a judgment in a criminal case "conclusively established in favor of the United States and against those who were found guilty that within the period covered by the indictment the latter were parties to the conspiracy charged." 291 U.S. at 298. The holding came in a civil injunction suit for violation of the Sherman Act; the civil suit followed an earlier criminal conviction for conspiracy to restrain and monopolize interstate commerce. See id. at 295-6.

The oddest decision in this area may very well be Johnson v. Girdwood, 7 Misc. Rep. 651, 28 N.Y. Supp. 151 (N.Y. Comm. Pl. 1894), aff'd 143 N.Y. 660, 39 N.E. 21 (1894), which held that a judgment of conviction in a criminal court of one who was innocent of the crime charged does not bar a civil action against the person who maliciously procured the conviction.

And there is a curious subset of decisions, primarily older state court decisions, which hold that a criminal conviction may be admitted in a subsequent civil proceeding if the civil proceeding is the convicted defendant's attempt "to take advantage of rights growing out of the criminal act" or to "profit" from his crime. See, e.g., Connecticut Fire Ins. Co. v. Ferrara, 277 F.2d 388 (8th Cir. 1960). See also Mineo v. Eureka Sec. Fire & Marine Ins. Co., 182 Pa. Super. 75, 125 A.2d 612, 616 (1956); Eagle Star & British Dominions Ins. Co. v. Heller, 149 Va. 82, 140 S.E. 314, 57 A.L.R. 490 (1927); Austin v. United States, 125 F.2d 816 (7th Cir. 1942); Rosenberger v. Northwestern Mut. Life Ins. Co., 176 F. Supp. 379 (D. Kanote 1959); Sovereign Camp. W.O.W. v. Gunn, 227 Ala. 400, 150 So. 491 (1933); Fidelity-Phenix Fire Ins. Co. of New York v. Murphy, 226 Ala. 226, 146 So. 387 (1933); North River Ins. Co. of City of New York v. Miletello, 100 Colo. 343, 67 P.2d 625 (1937), aff'd 104 Colo. 28, 88 P.2d 567; Lillie v. Modern Woodsmen of Am., 89 Neb. 1, 130 N.W. 1004 (1911); Goodwin v. Continental Cas. Co., 175 Okla. 469, 53 P.2d 241 (1935). The majority of these cases involve attempts to recover upon insurance policies, the benefits of which issue upon death or destruction by fire, and the usual holding is that the convicted killer/arsonist cannot profit by his own misdeeds. See McCormick on Evidence § 318 (3d ed. 1984).

143. See, e.g., 18 U.S.C. § 1964(d) (1982), which states that: "A final judgment or decree rendered in favor the United States in any criminal proceeding brought under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States." Id.
In these situations, the party against whom the judgment is offered was generally the defendant in the criminal case and therefore had not only the opportunity but also the motive to defend fully. In addition, because of the heavy burden of proof in criminal cases, a judgment in such a situation represents significantly more reliable evidence than a judgment in a civil case.\textsuperscript{144}

Acquittals are not accorded equal effect. The classic decisions on this issue are \textit{Wilkes v. Dinsman}\textsuperscript{145} and \textit{Helvering v. Mitchell}.\textsuperscript{146}

\textit{Wilkes} involved an action brought against a commanding naval officer by a marine who alleged, among other things, assault and battery and false imprisonment.\textsuperscript{147} While on an exploring expedition in the Pacific Ocean, the plaintiff's enlistment expired.\textsuperscript{148} Legislation provided that in such instances the commanding officer was to provide the enlistee with transportation back to the states.\textsuperscript{149} The plaintiff claimed his discharge and refused to perform further service, whereupon the defendant allegedly repeatedly flogged and imprisoned the plaintiff.\textsuperscript{150} Upon return to the United States, the plaintiff brought suit against the commanding officer. In the meantime, a court-martial had been brought against the same commanding officer, one of the charges being based upon the same occurrences involved in the civil suit. In the court-martial proceeding the officer was acquitted.

The civil trial court excluded this acquittal from evidence, the jury found the defendant guilty,\textsuperscript{151} and the defendant appealed, in

\textsuperscript{144}. McCormick on Evidence § 318 (3d ed. 1984). McCormick also notes that "some courts . . . hold that the judgment is conclusive proof that the party committed the relevant acts with the state of mind required for criminal liability." \textit{Id.}, citing Eagle, Star & British Dominions Ins. Co. v. Heller, 149 Va. 82, 140 S.E. 314 (1927).
\textsuperscript{145}. 48 U.S. (7 How.) 89 (1849).
\textsuperscript{146}. 303 U.S. 391 (1938).
\textsuperscript{147}. 48 U.S. (7 How.) at 89.
\textsuperscript{148}. \textit{Id.} at 89-92.
\textsuperscript{149}. \textit{Id.} at 90.
\textsuperscript{150}. \textit{Id.} at 92-93. The full particulars are presented at a subsequent point in the opinion:
[That] the said Wilkes did refuse to give [Dinsman and three other "private marines"] their discharges . . . [and] did cause them . . . to be put in double irons . . . to be confined . . . at a place infested with verminote . . . and inflicted on them one dozen lashes each; that he again confined them . . . [and] inflicted on them another dozen lashes each; that after this system of lashing and confinement, for the preservation of their lives, the said marines were compelled, against the terms of their enlistment and against their free will, to do duty in the squadron, under the command of said Wilkes.
\textit{Id.} at 97.
\textsuperscript{151}. \textit{Id.} at 91-92.
part on grounds that the trial court erred in excluding the prior acquittal from evidence.\textsuperscript{152}

Affirming the lower court, the Supreme Court first observed that the acquittal would bar subsequent indictments for the same offenses, and that prior criminal acquittals had been deemed to bar subsequent civil suits where the plaintiff in the civil suit is also the prosecutor in the court-martial proceeding. The Court determined, however, that under the circumstances the court-martial proceedings were not conclusive on the plaintiff, since the plaintiff had been neither the prosecutor nor a complainant in the prior action.\textsuperscript{153}

The Court considered this same issue approximately ninety years later, in \textit{Helvering v. Mitchell}.\textsuperscript{154} Earlier, Mitchell had been indicted under a provision of the Revenue Act which made it a criminal offense to willfully try to evade any tax.\textsuperscript{155} The first court had charged Mitchell with the willful attempt to evade an income tax of $728,000.\textsuperscript{156} Mitchell was acquitted on all counts.\textsuperscript{157} In \textit{Helvering v. Mitchell}, the Commissioner found that Mitchell had fraudulently deducted alleged losses, and alleged a deficiency of $728,000, the same item that had been involved in the prior indictment.\textsuperscript{158} The Commissioner also assessed a fifty percent fraud penalty.\textsuperscript{159}

The Court of Appeals held that the prior acquittal was not res judicata barring the deficiency assessment.\textsuperscript{160} However, the court found that the fifty percent fraud penalty, which was not involved in the prior indictment, was barred by Mitchell's earlier acquittal.\textsuperscript{161}

The Supreme Court disagreed, holding that the difference between the proof burdens in criminal and civil cases rendered res judicata inapplicable.\textsuperscript{162} The Court stated that the prior acquittal was

\begin{thebibliography}{9}
\item \textsuperscript{152} Id. at 96-97.
\item \textsuperscript{153} Id. at 123-24.
\item \textsuperscript{154} 303 U.S. 391 (1938).
\item \textsuperscript{155} Id. at 396, \textit{quoting} the Revenue Act of 1928 § 46(b).
\item \textsuperscript{156} 303 U.S. at 396.
\item \textsuperscript{157} Id.
\item \textsuperscript{158} Id.
\item \textsuperscript{159} Id. at 395.
\item \textsuperscript{160} Id.
\item \textsuperscript{161} Id. at 396. In reaching this result, the Court of Appeals found that the Supreme Court's decisions in \textit{Coffey v. United States}, 116 U.S. 436 (1886) and in \textit{United States v. La Franca}, 282 U.S. 568 required it to reach this result. \textit{See infra} text accompanying notes 165-171 for discussion of \textit{Coffey}.
\item \textsuperscript{162} 303 U.S. at 397. The Court also drew a distinction between subsequent civil actions which were "remedial" in character and those which were "punitive" in nature, holding that "[w]here the objective of the subsequent action . . . is punish-
simply a determination that the proof was insufficient to overcome all reasonable doubt of guilt.\textsuperscript{163} The Court asserted: "That acquittal on a criminal charge is not a bar to a civil action by the Government . . . arising out of the same facts on which the criminal proceeding was based has long been settled."\textsuperscript{164}

This assertion ignored \textit{Coffey v. United States},\textsuperscript{165} a case many considered to be a decision holding to the contrary.\textsuperscript{166} \textit{Coffey} involved a forfeiture action, brought by the United States pursuant to various provisions of the internal revenue laws to seize brandy and distillery equipment. Coffey appealed from the jury's general verdict for the United States on grounds that he had already been acquitted of violating those provisions in a prior proceeding.

The Supreme Court was of the opinion that such a judgment of acquittal was a bar to the subsequent suit. The Court noted that one of the penalties for violating the relevant statute was forfeiture of the distiller's equipment, and that the proceeding to enforce this forfeiture had to be a civil proceeding \textit{in rem}. The Court asserted that an acquittal in a criminal action instituted by the United States was conclusive as to the defendant in a subsequent civil trial brought by the United States "where . . . the existence of the same act or fact is the matter in issue, as the cause for forfeiture" in the later civil action.\textsuperscript{167} If the Court had gone this far and no farther, then \textit{Coffey} would merely have been interpreted as standing for the proposition that no forfeiture action can proceed absent an adjudication that an individual has.

\textsuperscript{163} 303 U.S. at 397.
\textsuperscript{164} \textit{Id.}
\textsuperscript{165} \textit{Coffey v. United States}, 116 U.S. 436 (1886).
\textsuperscript{166} \textit{Id.}
\textsuperscript{167} \textit{Id.} at 442-43.
committed the criminal conduct which provides the occasion for the forfeiture proceeding.\textsuperscript{168}

The Court acknowledged that one rationale for not allowing the criminal acquittal to have a preclusive effect in a later civil suit was that in the original criminal action guilt had to be proven beyond a reasonable doubt, and that on the same evidence in a subsequent civil suit the United States might prevail under the preponderance of the evidence standard. The Court declared that nevertheless, the fact remained that following the acquittal in the criminal action there could be no new criminal action, and that a subsequent civil action would amount to the same thing, the only difference being in the consequences to the claimant following an adverse judgment.\textsuperscript{169}

This dicta does not appear to have influenced the course of the law, as courts continued to hold that an acquittal in a criminal case was not a bar to a subsequent civil action.\textsuperscript{170} It did, however, rather confuse the law in this area, at least until subsequent decisions clarified the perhaps unintentionally sweeping language included in the foregoing discussion.\textsuperscript{171}

\textsuperscript{168} As an example 18 U.S.C. § 1963 is a civil proceeding which authorizes the forfeiture of property used in, or acquired through, racketeering activities. See also 21 U.S.C. § 853.

\textsuperscript{169} Coffey, 116 U.S. at 443.


\textsuperscript{171} And one should be merciful that the decision went no further: Whether a conviction on an indictment under section 3257 could be availed of as conclusive evidence, in law, for a condemnation, in a subsequent suit \textit{in rem} under that section, and whether a judgment of forfeiture in a suit \textit{in rem} under it would be conclusive evidence, in law, for a conviction on a subsequent indictment under it, are questions not now presented.

116 U.S. at 443-44. The Court did hold, however, that:

[when an acquittal . . . is pleaded . . . by the same defendant, in an action against him by an individual, the rule [of preclusion] does not apply, for the reason that the parties are not the same; and often for the additional reason that a certain intent must be proved to support the indictment. 
\textit{Id.} at 443. The \textit{Coffey} Court, therefore, rejected the proposition that differing standards of proof precludes "cross-over" estoppel, at least where an acquittal is concerned, but whole-heartedly adopted the doctrine of mutuality.

As to the effects which \textit{Coffey} had upon subsequent decisions, see United States v. Burch, 294 F.2d 1 (5th Cir. 1961). In deciding whether an acquittal represented collateral estoppel barring a forfeiture proceeding under 26 U.S.C. § 7302, the \textit{Burch} court began by holding that "[a]s to the issues raised, it does not constitute an
The Supreme Court clarified the holding in *Coffey* in a recent decision involving the problem of forfeiture. In *One Lot Emerald Cut Stones v. United States*, the defendant entered the United States without declaring emeralds to the U.S. Customs Service. He was tried and acquitted of smuggling articles into the country with the intent to defraud the United States. The government then brought a forfeiture proceeding. Relying on *Coffey*, the district court held that the civil proceeding was barred by collateral estoppel. The Circuit Court reversed, and the Supreme Court granted certiorari. The Court observed that in the criminal prosecution the government faced the burden not only of proving the act of illegal importation, but also of proving an intent to defraud. On the other hand, in a forfeiture proceeding the government would only have to prove that the article was brought into the country without a declaration having been made—no proof of intent would be required. Therefore a criminal acquittal would not be determinative of whether the property was brought into the country illegally. The Court then distinguished *Coffey* noting that a finding of intent was necessary in the forfeiture proceeding as well as in the prior criminal prosecution.

adjudication on the preponderance-of-the-evidence test which applied in civil proceedings." 294 F.2d at 3. The court then included the following comments in an omitted footnote:

The doubt begins at this precise point. And its source is *Coffey v. United States*, 1886, 116 U.S. 436, which held a criminal acquittal ... conclusive in a later forfeiture in rem action. [omitted quotation from *Coffey* regarding the irrelevance of the differing burdens of proof and the conclusiveness of the adjudication] ... 

While this case has never been expressly overruled, this statement is difficult to resolve with the decision in Helvering v. Mitchell [quoting that holding as to the importance of the differing burdens of proof] ... 294 F.2d at 3 n.2. The *Burch* court resolved its doubts against *Coffey* and held that the acquittal did not bar the forfeiture proceeding. *Id.* at 4-7. Aside from other considerations, the court found that the precise issue had not been adjudicated in the prior proceeding. But throughout the opinion, the court continues its criticism of *Coffey*. See, e.g., *id.* at 4 ("The *Coffey* decision has been the subject of a great deal of controversy, and no little criticism"). *Id.* at 5 ("[T]he language in *Coffey* seems absolutely irreconcilable with later decisions").

173. 409 U.S. at 232-33.
174. *Id.* at 234 (footnotes omitted). See also supra note 181. The Court explicitly indicated that it was not deciding "whether an acquittal under § 545 bars a forfeiture under § 545." *Id.* at 233 n.3.
175. *Id.* at 235 n.5. See also supra note 178.
Having reconciled its holding in *Coffey*, the Court then apparently proceeded to refute the *Coffey* decision by stating that the different burdens of proof in criminal and civil proceedings precluded a cross-over application of collateral estoppel. Since a criminal acquittal might represent nothing more than a determination that the evidence was insufficient to overcome all reasonable doubt of guilt, such an acquittal would not comprise an adjudication of the issues where the burden of proof is by a preponderance of the evidence.\textsuperscript{176}

Aside from the forfeiture context, in which there may be some necessary relation between a criminal adjudication and the permissibility of the forfeiture proceeding, the decisions uniformly hold that an acquittal does not preclude a subsequent civil proceeding arising out of the same nucleus of operative facts.\textsuperscript{177} This rule is premised upon the theory that while proof in a criminal prosecution may be inadequate to establish guilt beyond a reasonable doubt, that same proof may suffice to support a civil judgment.\textsuperscript{178} Another rationale is

\textsuperscript{176} Id. at 235 (citations omitted), quoting Helvering v. Mitchell, 303 U.S. 391, 397 (1938).


\textsuperscript{178} Moore's Federal Practice, supra note 62, at ¶ 0.418[1]. In Royal
that the issues may not be identical in the civil and criminal proceedings. 179

2. Adjudication v. Plea

Under the preponderant view a plea of guilty is admissible as evidence in a civil action, as a judicial admission against interest, even when the proffer of proof is made by a stranger to the prosecution, and even though the plea was withdrawn and a judgment of conviction did not eventuate. And, further, the generally accepted rule is that a judgment of conviction, based on a plea of guilty, is conclusive in a civil suit between the same parties of all the issues that would have been determined by a conviction after a contested trial. 180

Guilty pleas are almost always held to be conclusive in subsequent civil proceedings arising from the sequence of events that produced the plea 181 although there are considerations militating to the contrary. The primary consideration in this regard is that the plea may represent factors other than the defendant’s guilt of the matters charged against him. When a prior criminal action results in a guilty plea, the case is

Exch. Assur. v. Fraylon, 228 F.2d 351 (4th Cir. 1955), the court suggested that an acquittal could be admissible in a subsequent civil proceeding if it is based upon a finding of insufficient evidence to go to the jury.

179. See, e.g., Stone v. United States, 167 U.S. 178, 188 (1897). Lack of identity of issues, of course, precludes the operation of collateral estoppel in any proceeding, whether or not it involves the phenomenon of “crossing-over.” See supra Section II.

180. Moore’s Federal Practice, supra note 62, at (qar) 0.418[1] (footnotes omitted). Fed. R. Evid. 410 provides, of course, that a withdrawn guilty plea is not admissible “in any civil or criminal proceeding . . . against the defendant who made the plea or was a participant in the plea discussions” except (a) when another statement made in the course of the same plea or the same plea discussions has been admitted “and the statement ought in fairness be considered contemporaneously with it” or (b) in a criminal proceeding for perjury or false statement if the statement was made under oath, on the record and in the presence of counsel. The rule also applied to pleas of nolo contendere. See also McCormick on Evidence § 265 (3d ed. 1984).

not fully presented, and as a result the issues are not brought into the controversy. A guilty plea may merely reflect the defendant's decision that payment of a fine is preferable to litigation. The concern for fairness to civil litigants, coupled with a desire to expedite the administration of criminal justice, bars the use of issue preclusion against a person who first pleads guilty in a criminal action, and then seeks to defend against a civil suit.\(^{182}\)

These concerns notwithstanding, guilty pleas continue to be regarded as conclusive of all issues implicated in the offense(s) to which the plea was entered.\(^{183}\) A different rule prevails for nolo contendere pleas.

Under Rule 410 of the *Federal Rules of Evidence*, nolo contendere pleas cannot be admitted into evidence in any civil or criminal proceeding except under very limited circumstances.\(^{184}\) Nolo contendere

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[i]t the supposedly precluded party should be able to show relevant facts concerning the criminal prosecution. If the guilty plea represented a desire on the part of the defendant to avoid the time and expense of a criminal defense because of ill health, then perhaps the court should deny preclusive effect.


184. *See supra* note 180. FED. R. CRIM. P. 11(b) advisory committee's note
pleas are expressly authorized by Rule 11(b) of the Federal Rules of Criminal Procedure, and have been an historic feature of American criminal law.  

The general rule is that nolo contendere pleas do not have issue-preclusive effects. Such an admission is limited to the purpose for which it was made, and therefore does not have collateral estoppel force in a subsequent civil suit.  

Tempo Trucking and Transfer Corp. v. Dickson illustrates the language which is typically encountered whenever a litigant seeks to use a nolo contendere plea as collateral estoppel. It states that numerous courts have distinguished between a conviction following a plea of guilty or not guilty, and a conviction following a plea of nolo contendere. The latter does not involve an express admission of guilt, and thus the defendant should not be precluded from denying the facts that formed the basis of his earlier plea in a later civil proceeding.  

While the nolo contendere plea would appear to be a convenient way for a defendant to circumvent the preclusive effects which would result from a guilty plea, it is subject to certain practical constraints. Unless provided for by statute, the plea is unavailable for capital offenses. In addition, some states limit the plea to misdemeanors.

(1974 amendment), which authorizes such pleas, makes it clear that the Committee was aware of this aspect of the plea: "Unlike a plea of guilty, [a nolo contendere plea] cannot be used against a defendant as an admission in a subsequent criminal or civil case." Id., citing 4 J. Wigmore, Evidence § 1066(4) (3d ed. 1940 & Supp. 1970); see also Fed. R. Evid. 802(22).

185. See Fed. R. Crim. P. 11 advisory committee note ("The plea of nolo contendere has always existed in the Federal courts"); Fed. R. Crim. P. 11 committee note for the 1966 Amendment. The "nolo" plea is also known as a "non vult contendere" or "non vult" plea. See Black's Law Dictionary 1205 (4th ed. 1968); McCormick on Evidence § 265 (3d ed. 1984). The nonvult plea has the same consequences and effects as the nolo contendere plea. See McCormick supra, at § 265. See also United States v. Washington, 341 F.2d 277 (3d Cir. 1965), cert. denied, 382 U.S. 850, reh'g denied, 382 U.S. 993 (1966).


188. 405 F. Supp. at 517. See also Tseung Chu v. Cornell, 247 F.2d 929 (9th Cir. 1957), cert. denied 355 U.S. 892 (1958).
Finally, acceptance of the plea is discretionary. In exercising this discretion, one factor a court might consider is whether the defendant who offers the plea is likely to be confronted with a civil suit which involves the same issues. While it may be that a judge in a criminal prosecution should hesitate to accept a plea of nolo contendere where the plain objective is to avoid issue preclusion in a subsequent civil suit, the propriety of a criminal court weighing factors outside the scope of the criminal prosecution in deciding whether or not to accept the plea is questionable.  

3. Government v. Defendant

The proposition that a criminal judgment can be asserted as collateral estoppel in a civil proceeding gives rise to four logical possibilities as to the type of assertion which can ensue: (1) a defendant can assert a judgment of acquittal; (2) a defendant can assert a judgment of conviction; (3) the government can assert a judgment of conviction; and/or (4) the government can assert a judgment of acquittal: Pragmatically, of course, the most likely alternatives are (a) that the defendant is asserting his acquittal of criminal charges which arose out of the same transaction that is at issue in a civil proceeding, and (b) that the government is asserting the defendant's conviction of criminal charges which arose out of the same transaction that is at issue in a civil proceeding.

189. Vestal & Coughenour, Preclusion/Res Judicata Variables: Criminal Prosecutions, 19 Vand. L. Rev. 783 714-15 (1966) (footnotes omitted). See also Hayden, The Plea of Nolo Contendere, 25 Md. L. Rev. 227 (1965). The federal rules provide that: “[a] defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.” Fed. R. Crim. P. 11(b). The commentary explains that: A defendant who desires to plead nolo contendere will commonly want to avoid pleading guilty because of the plea of guilt can be introduced as an admission in subsequent civil litigation. The prosecution may oppose the plea... because it wants a definite resolution of the defendant's guilt or innocence either for correctional purposes or for reasons of subsequent litigation... Under subdivision (b)... the balancing of the interests is left to the trial judge, who is mandated to take into account the larger public interest in the effective administration of justice.

Fed. R. Crim. P. 11(b) advisory committee note (1974 amendment). The 1974 amendment added the provision that the court, in deciding whether to permit the plea, shall consider the views of the prosecution, the defense and the larger public interest in the administration of criminal justice. Id. See also United States v. Faucette, 223 F. Supp. 199 (S.D.N.Y. 1963).
These alternatives, of course, represent what one might refer to as the "typical" instances of this type of "cross-over" collateral estoppel. They comport with the dictates of common sense and of logic because the parties are remaining on the "right" sides: The defendant is seeking to exploit his acquittal in order to avoid civil liability, and the government is seeking to exploit the defendant's conviction in order to arrive at that same type of liability. And these are the possibilities which have been implicit in the discussion contained in Sections IV(B)(1) and (2), supra.

As noted above, preclusion is almost never allowed when a former criminal defendant is asserting that his acquittal of criminal charges estops the plaintiff in a civil suit from relitigating issues necessarily involved in the criminal proceeding. This results from the "differing burdens of proof" proposition, i.e., that the acquittal merely shows that the government did not discharge its burden of proving guilt beyond a reasonable doubt. The government's failure, so the theory goes, does not mean that a civil litigant cannot prevail under the lesser preponderance of the evidence standard.

The argument would seem inapplicable where an alibi or insanity forms the basis of true acquittal. Courts which hold these to be affirmative defenses may require a criminal defendant to prove such defense by a preponderance of the evidence. In that event, the standard for proving the same issue in a subsequent civil action would be identical, and the "differing-standards-of-proof" argument against preclusion would not apply. Thus, where an acquittal is based upon an alibi or insanity defense, such defense may merit some preclusive force. The state, in subsequent civil litigation, is bound by the prior determination based on a preponderance of the evidence. There is also the possibility that the defendant, or the government, for that matter, can find themselves bound by the doctrine of judicial estoppel from asserting positions inconsistent with those which they took in the original action.

190. For a general discussion of these two types of preclusive assertion, see Vestal & Coughenour, Preclusion/Res Judicata Variables: Criminal Prosecutions, 19 VAND. L. REV. 683, 701-08 (1966).
191. See supra Section IV(B)(1).
194. See 19 VAND. L. REV. at 703 n.76.
Conversely, as was also demonstrated above, a judgment of conviction is almost always given preclusive effect in a subsequent civil proceeding which arises from the facts which were at issue in the prior proceeding.195 This, too, is a function of the "differing standards of proof" rationale, although the rationale becomes much more attenuated when the conviction is the result of a guilty plea.196 And it is possible that this practice has an effect upon the decision to plead or to litigate guilt or innocence.197

These two alternatives constitute the decisional law of "criminal to civil" issue preclusion. That is, the reported cases consistently involve instances in which either the government is asserting the preclusive effects of a conviction, or the defendant is asserting the preclusive effects of an acquittal. The residual categories, i.e., defendant asserting the preclusive effects of a conviction and the government asserting the preclusive effects of an acquittal, appear neither in the decisional law nor in the scholarly commentary on this subject.

Although at first glance they offend both logic and common sense, since who can imagine that any litigant would attempt to rely upon a decision which he had lost, the residual categories may not be as impracticable as they first appear. If a defendant can substantiate an alibi defense by prevailing in a criminal prosecution, can he not attempt to rely upon a conviction to the same effect? That is, assume that a criminal defendant has been tried and convicted of robbing the Acme Bank in Hospitable, Kansas between 1:00 and 1:35 on the afternoon of Tuesday, March 11, 1985. Assume, further, that a civil suit has been filed against this same defendant. The gravamen of the civil suit is that at 1:20 on the afternoon of Tuesday, March 11, 1985, the defendant was involved in a traffic accident in Locus, Missouri. The civil suit seeks damages for what is alleged to have been the defendant's negligence in causing this accident.

195. See supra Section IV(B)(1), (2).
196. See supra Section IV(B)(2).
197. If a criminal defendant knows that the finding in the criminal prosecution may have some preclusive effect in subsequent civil litigation, his attitude toward the criminal proceeding may be changed. The criminal defendant is engaged in a weighing process. He must decide whether to plead guilty or to defend. . . . In an automobile accident case, where the criminal charge might result in a fine and short jail sentence, the possibility of preclusion in a civil action involving thousands of dollars may be a crucial consideration. The defendant may choose to litigate fully the criminal charge because of the potential liability where he otherwise would plead guilty to avoid a costly trial and the concomitant publicity.

Could not the defendant assert his criminal conviction as collaterally estopping the civil plaintiff from alleging that he was in Missouri on the date and time alleged? Although the civil suit does not arise out of the same facts that were at issue in the criminal prosecution, the criminal prosecution did determine an issue which is central to the civil suit, namely, the defendant’s whereabouts at 1:20 p.m. on Tuesday, March 11, 1985. Since this adjudication was made under the heightened beyond a reasonable doubt standard of proof, it would appear that the determination should preclude the civil plaintiff from proceeding with his action.\textsuperscript{198}

The final residual category, i.e., the government’s asserting a judgment of acquittal, is far more difficult to conceptualize. The most likely example would seem to be an instance in which a defendant has been tried and acquitted, and is bringing a civil action for damages allegedly resulting from the prosecution. The civil action could be for constitutional violations, such as an improper search and seizure, or for allegations of prosecutorial vindictiveness in initiating the criminal proceeding.

It is conceivable that the government could assert the judgment of acquittal as precluding civil liability, either insofar as it might suggest that the government’s investigatory conduct was acceptable or to the extent that the acquittal might indicate that the prosecution was not the result of improper motives or tactics.\textsuperscript{199} Such an assertion

\textsuperscript{198} This, of course, would not have been possible under the doctrine of mutuality. See supra Section II. It should, however, be perfectly acceptable under the \textit{Restatement (Second) of Judgments}, since the issue of the defendant’s whereabouts was fully litigated in the original, criminal proceeding. See \textit{Restatement (Second) of Judgments} § 27-29 (1982). This is not, of course, a possibility which has been included in the Second Restatement’s provision in the effect of a criminal judgment in a subsequent civil action. See \textit{id.} at § 85; see also supra Section IV(A).

\textsuperscript{199} The only case which the author has found that even approaches this example is Church of Scientology of Cal. v. Linberg, 529 F. Supp. 945 (C.D. Cal. 1981). The church brought an action seeking damages and an injunction pursuant to Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) for alleged violations of First and Fourth Amendment rights in connection with a search and seizure operation conducted by the Federal Bureau of Investigation. 529 F. Supp. at 948. The search and seizure was undertaken pursuant to an investigation that led to criminal indictments and the conviction of various members of the plaintiff church. \textit{id.} at 949-51.

The church filed petitions under the \textit{Fed. R. Crim. P.} seeking the return and suppression of property seized in the search. \textit{id.} at 949. The judge to whom the petitions were assigned upheld the validity and execution of the warrants involved in the search. \textit{id.}

Members of the church were then indicted and convicted based upon materials which had been seized in the search that had been at issue in the Rule 41(e) petitions.
would be analogous to a defendant's asserting that an alibi defense or other matters had been adjudicated by a judgment of acquittal. Unfortunately, however, the example seems to be highly unlikely and even vaguely nonsensical.

There is a spectrum of views on the question of whether "civil to criminal" issue preclusion ought to be permissible. This spectrum results from the tendency to afford differing degrees of importance to "standard of proof" and "identical parties" considerations. One view proposes that issues litigated and necessary to the outcome of a civil proceeding ought to be precluded from litigation in a subsequent criminal proceeding when the same person is defendant in both proceedings, and the civil court found, for the defendant. The rationale for this view is that the civil judgment for the defendant, in light of the heavier burden of proof in a criminal proceeding, implies that the state will be unable to meet the burden of proof for those issues litigated in the civil proceeding. A second view focuses entirely on the identity of the parties. This view argues that "civil to criminal" preclusion would give rise to collusion between potential criminal defendants and civil plaintiffs in order to manipulate a civil finding in the defendant's favor which would have preclusive effect in a subsequent criminal proceeding. A third view meshes the first two

Id. Afterwards, the church pursued the Bivens action, seeking damages for what it still maintained was an improper search and seizure. See id. at 948-51. In that action, the government argued that the earlier determination on the Rule 41(e) petitions collaterally estopped the church from proceeding with the Bivens action. Id. at 960-61. The court before whom the Bivens proceeding was brought declined to give preclusive effect to the prior determination on the Rule 41(e) petitions, in part because of a lack of privity between the criminal defendants and the church, and in part because it found that the issue had not been properly adjudicated in the prior proceeding. Id. at 960-65.

200. Moore's Federal Practice, supra note 62, at § 0.418[1].
201. Id. Moore's also states that:
[B]ecause of the different standards of proof, a judgment of civil liability is not conclusive of any issue in a criminal trial, and its admission as evidence is error prejudicial to the defendant. In the converse situation, it is arguable, however, that the same rationale should make a civil judgment on the merits, that a defendant is not civilly liable, conclusive in his favor in a subsequent criminal prosecution as to the issues adjudicated in the civil suit.

Id. (notes omitted).

202. See Note, Res Judicata—What Judgments are Conclusive—Criminal Conviction on Plea of Guilty Is Conclusive of Same Issues in Subsequent Civil Suit, 64 Harvard L. Rev. 1376 (1951). This article argues:
that since the state has a greater burden of proof in criminal proceedings,
views by supporting the preclusion in a subsequent criminal proceeding of issues litigated in a civil proceeding to which the government was a party. 203

These divergent views as to the permissibility of "civil to criminal" issue preclusion reflect certain implicit assumptions as to the nature and circumstances of the civil actions. 204 This author will argue that, even if one assumes that the presence of these assumptions yields the consequences postulated in the views articulated above, there are situations in which these assumptions do not hold and in which "civil to criminal" preclusion is proper. 205

To understand why this argument succeeds, it is necessary to examine decisions in cases involving the issue of "civil to criminal" preclusion. Curiously, these cases have received almost no attention in the literature on res judicata and issue preclusion. 206

a civil determination for defendant should bar subsequent prosecution based on the facts alleged in the civil complaint... However, where a civil issue has been resolved in favor of a private party, to give the civil determination conclusive effect would present the danger of collusive civil suits instituted solely to provide a bar to prosecution.

Id. at 1378 (citations omitted).


204. These and other discussions of the issue generally assume (a) that the adjudication in the civil action is being asserted against a criminal defendant, and (b) that the civil adjudication involved the issue of the defendant's guilt or innocence or, more properly, his responsibility for the acts at issue in the criminal proceeding. The discussions also tend to assume that the parties were not identical in the two proceedings, but with the demise of the doctrine of mutuality this has ceased to be a compelling consideration. See supra Section II.

205. See infra Section V.

206. There is an annotation that deals with the "admissibility in criminal prosecution[s] of adjudication[s] or judgment[s] in civil case[s] or procedure[s]." 87 A.L.R. 1258. The annotation is not, however, concerned with the issue-preclusive effects of such judgments but is, instead, concerned only with the admissibility of such judgments under applicable rules of evidence. See supra Section 1. For the treatment which the issue has received in scholarly articles and general treatises, see the sources which provided the quotations considered above. One article suggests that:

it may be possible for the defendant to claim preclusion as to an issue litigated and decided in [a civil] suit. The circumstances in which this might occur are rather restricted since it is the government that has the burden of proof in the criminal action . . . . On the other hand, the defendant may be interested in establishing alibi, insanity or some other defense and may wish to claim preclusion as to such matter arising from an earlier civil action.
a. Supreme Court Cases

The case which is most often cited for the proposition that civil judgments can have preclusive effects in criminal proceedings is *Yates v. United States*\(^{207}\), which resulted from a prosecution under the Smith Act. The Smith Act became law in 1940 and made it unlawful to "knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence."\(^{208}\)

The *Yates* defendants were convicted of conspiring to violate the Act\(^{209}\) and appealed to the Ninth Circuit, which affirmed the convictions.\(^{210}\) The Supreme Court granted certiorari to review the petitioners' contentions that their convictions were unsound in any of several respects.\(^{211}\) One petitioner argued that "in *Schneiderman v. United States*, 320 U.S. 118, a denaturalization proceeding in which he was the prevailing party, this Court made determinations favorable to him which [were] conclusive in this proceeding under the doctrine of collateral estoppel."\(^{212}\)

The Court held that it was "in agreement with petitioner that the doctrine of collateral estoppel is not made inapplicable by the fact that this is a criminal case, whereas the prior proceedings were civil in character."\(^{213}\) But the Court rejected Schneiderman's argument involving the government. This would seem to be reasonable.

Vestal & Coughenour, Preclusion/Res Judicata Variables: Criminal Prosecution, 19 VAND. L. REV. 683, 700 (1966). For the treatment which the issue of sanity has received in this regard, see State v. Bott, 310 Minn. 331, 246 N.W.2d 48 (1976) and Gregory v. Kentucky, 610 S.W.2d 598 (Ky. 1980), both of which are discussed infra in Section IV(B)(3).

\(^{207}\). 354 U.S. 298 (1957).

\(^{208}\). Act of June 28, 1940, § 2(a)(1) and (3), 54 Stat. 670, 671, 18 U.S.C. §§ 371, 2385, quoted in 354 U.S. 298, 301 n.1. The act also made it unlawful to print, publish or distribute written materials advocating such activities and/or to organize any society or group of persons dedicated to the realization of such ends. See id.

\(^{209}\). The defendants were accused of conspiring to advocate and propagate the teachings of the Communist Party, and of organizing "units of the Party in California and elsewhere." 354 U.S. at 301-02.

\(^{210}\). Id. at 302, citing *Yates v. United States*, 225 F.2d 146 (1955).

\(^{211}\). 354 U.S. at 303. The petitioners argued that the evidence was insufficient, that the two lower courts erroneously construed the term "organize" as used in the Act, that the trial court's instructions erred in excluding the issue of "incitement to action" and that one petitioner's conviction was precluded by the Court's decision in *Schneiderman v. United States*, 320 U.S. 118 (1943), under the doctrine of collateral estoppel. Id.

\(^{212}\). Id. at 335.

\(^{213}\). Id. at 335, citing United States v. Oppenheimer, 242 U.S. 85 (1916).
because it found that the issues involved in the present proceeding had not been conclusively adjudicated in the earlier denaturalization proceeding.\textsuperscript{214} This means that, although the Court's statement is favorable enough, \textit{Yates} did not actually involve the determination that a civil adjudication can have a preclusive effect in a criminal proceeding.

A much earlier and almost unknown decision did reach this issue. In \textit{United States v. Baltimore \& Ohio Railroad Company},\textsuperscript{215} the United States sought reversal of a judgment which discharged the defendant from prosecution under an indictment alleging failure to alter a bridge according to an order by the Secretary of War.\textsuperscript{216}

The bridge had been completed in 1871, and was in full compliance with the law then in effect.\textsuperscript{217} On October 29, 1904, the United States initiated an action against Baltimore \& Ohio Railroad Company.\textsuperscript{218} The essence of the complaint was that the railroad company "owned, operated and controlled" the aforementioned bridge, and that the bridge was "wholly inadequate to accommodate the present commerce of the Ohio river . . . and constituted a serious and dangerous obstruction to . . . navigation."\textsuperscript{219} It sought injunctive relief and specifically requested that "the said railroad company be required within a reasonable time to remove the same or replace same with such a bridge as shall conform to existing law."\textsuperscript{220} A judgment for the defendant was entered on February 27, 1905, and the government promptly appealed the matter to the court of appeals.\textsuperscript{221}

\textsuperscript{214.} \textit{Id.} at 336-38. Schneiderman had argued that the earlier proceeding had determined that the teaching of Marxism-Leninism was not necessarily the advocacy of the violent overthrow of the government, that it was reasonable to conclude that the Communist Party desired to achieve its goal of socialism through peaceful means, that it could not be presumed that membership in the Communist Party meant that Schneiderman adopted an illegal interpretation of Marxist doctrine and that absent proof of overt acts that he personally adopted a "reprehensible interpretation" of these matters, the government had failed to discharge its burden of proof on the criminal offense with which he was charged. \textit{Id.} at 335.

\textsuperscript{215.} 229 U.S. 242 (1913).

\textsuperscript{216.} \textit{Id.} at 245.

\textsuperscript{217.} \textit{Id.} The law was an Act of July 14, 12 Stat., ch. 167 p. 569 (1862).

\textsuperscript{218.} 229 U.S. at 245-46. There were also two other defendants, "the Parkersburg Branch Railroad Company . . . [and] John W. Davis, its receiver." \textit{Id.} at 246.

\textsuperscript{219.} \textit{Id.} at 246.

\textsuperscript{220.} \textit{Id.} at 247.

\textsuperscript{221.} The motion for a permanent injunction was prayed for in the [complaint] was heard. . . and was decided on February 4, 1905, in an opinion by District Judge Jackson. The injunction was refused. It was held that the construction of the bridge under the authority conferred by the act of 1862
court affirmed the decision of the lower court.\textsuperscript{222} Nine months after the circuit court's decision, the Secretary of War gave the railroad company a notice, and the company's failure to obey that notice gave rise to an indictment.\textsuperscript{223} The notice said that the bridge was an "unreasonable obstruction" to navigation and ordered the removal of a pier and the conversion of two "spans . . . into one channel span."\textsuperscript{224}

The railroad company refused to comply, the government returned an indictment for the refusal, and the case was tried to a jury which was instructed to find for the defendant.\textsuperscript{225} The court based its directed verdict on the hypothesis that the equity cause judicially determined the defendant's right to maintain the bridge in its then current condition.\textsuperscript{226} The court entered a judgment "discharging the railroad company from further prosecution", and the government appealed to the Supreme Court.\textsuperscript{227}

The Court began by determining that the equity cause plainly presented the issues of the Secretary of War's jurisdiction over the bridge and the government's right to enforce its order that the bridge be altered.\textsuperscript{228} Based upon this determination, the Court held that "the decree in the equity cause was properly held to be res judicata as to the facts averred in the indictment," and decisive as to the issue of the applicability of the act of 1899 to the bridge.\textsuperscript{229}

The holding is a perfect example of civil to criminal "cross-over" collateral estoppel, but it has been undiscovered and unused since it was handed down. None of the scholarly articles or treatises which consider the issue of "civil to criminal" preclusion have ever considered it, and it does not appear to have been cited in any subsequent decisions.\textsuperscript{230}

Another Supreme Court decision addressed a proposition which represents a residual premise of the proposal presented in Section V.

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created a vested right to the use of the bridge of which the defendants could not be deprived.
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\textit{Id.} at 248-49.

\textsuperscript{222} \textit{Id.} at 250, \textit{citing} U.S. v. Parkersburg Branch Co., 143 F. 224 (1906).

\textsuperscript{223} \textit{Id.}

\textsuperscript{224} \textit{Id.}

\textsuperscript{225} \textit{Id.} at 245.

\textsuperscript{226} \textit{Id.} at 251.

\textsuperscript{227} \textit{Id.}

\textsuperscript{228} \textit{Id.} at 253.

\textsuperscript{229} \textit{Id.} at 253-54.

\textsuperscript{230} \textsc{Shepherd's United States Citations} show no entries for this decision, which seems to indicate that it has been overlooked throughout the seventy-odd years that have elapsed since it issued.
The decision in *McKinney v. Alabama*, 231 involved the use of civil adjudications of obscenity in criminal prosecutions.

Chester McKinney "was convicted of selling material which had been judicially declared obscene." 232 The declaration came in a civil proceeding undertaken pursuant to an Alabama statute permitting prosecutors to seek an adjudication of the obscenity of any "matter" brought into their districts. 233 The prosecutor for McKinney's district initiated such an action and, on February 26, 1970, the Circuit Court found the four magazines which were the subject matter of the suit to be obscene. 234

Officers from the State Attorney General's office went to McKinney's bookstore to deliver the Attorney General's letter informing McKinney of the decree and telling him which magazine had been found to be obscene. 235 Three weeks later the officers returned to the bookstore and purchased a copy of one of the magazines "which had been specified in the . . . decree and listed in the letter delivered to" McKinney. 236

McKinney was indicted, tried and convicted of violating Alabama law by selling "mailable matter known . . . to have been judicially found to be obscene." 237 At his trial, he argued in defense that the magazine was not obscene and that the obscenity question ought to be determined by the jury. 238 The trial court refused to submit the question to the jury because it found that the issue had been determined by the civil proceeding. 239

232. 424 U.S. at 670.
233. *Id.* at 670 n.1, quoting Ala. Code Tit. 14, ch. 64A, § 374(5) (Supp. 1973) (repealed 1977). The statute provided that "the solicitor for any judicial circuit or county solicitor" could initiate an action to determine the obscenity of any "mailable matter" that was being brought into his district for "sale or commercial distribution." Ala. Code Tit. 14, ch. 64A, § 374(5) (Supp. 1973) (repealed 1977).
234. 424 U.S. at 671.
235. *Id.* at 672.
236. *Id.* The magazine was "New Directions" and it was devoted to portraying nude men and women in a variety of exotic postures. McKinney v. State, 292 Ala. 484, 296 So.2d 228 (1974). Justice Faulkner, who wrote the opinion in which the Alabama Supreme Court disposed of McKinney's appeal, was moved to offer the following comments on "New Directions" subject-matter: "After review of pictures of these grotesque nudes, a person of reasonable sensibilities will conclude that it is no wonder God made man and woman to wear clothes. Without them some are the most unattractive animals in His kingdom." 296 So. 2d at 229. Not surprisingly, the court affirmed the conviction.
238. 424 U.S. at 673.
239. *Id.* The trial court instructed the jurors that "they need only decide whether
McKinney appealed to the Alabama Supreme Court, which affirmed the conviction. The Supreme Court granted review and held that the Alabama procedures violated McKinney's First and Fourteenth Amendment rights "insofar as they precluded him from litigating the obscenity . . . of New Directions as a defense to his criminal prosecution." The holding was based upon the fact that McKinney had not been a party to the civil proceeding.

Although the Court condemned Alabama's ex parte procedure, it did not find civil proceedings to be an unacceptable means for procuring obscenity determinations. The best statement of the position which the Court took on this issue appears in a concurring opinion authored by Justice Brennan. Although arguing that the Alabama law was facially unconstitutional, Justice Brennan agreed with the majority's position on civil obscenity adjudications and their role in criminal prosecutions:

I fully agree . . . that a State may not make any civil proceeding binding in a criminal proceeding involving an

[McKinney] had sold material judicially declared to be obscene. The jury returned a verdict of guilty." Id.

241. 424 U.S. at 673.
242. Id. at 676. The Court found that although there were parties who were named as "respondents" in the civil proceeding, McKinney was neither named as a respondent nor "in privity" with any of the named respondents. Id. at 675. Referring to the effect of these respondents upon McKinney's rights, the Court said that:

[t]hose who are accorded an opportunity to be heard in a judicial proceeding established for determining the extent of their rights are properly bound by its outcome, either because they chose not to contest the State's claim or because they chose to do so and lost.

But it does not follow that a decision reached in the such proceedings should conclusively determine the First Amendment rights of others. Non-parties like petitioner may assess quite differently the strength of their constitutional claims and may . . . have very different views regarding the desirability of disseminating particular materials.

Id. at 676. McKinney was never notified of the pendency of the civil proceeding and therefore did not make a decision "not to contest the State's claim." Id. at 674. Indeed, it appears that he did not even stock "New Directions" at the time that proceeding commenced. Id. at n.3.

243. "[W]e need not condemn civil proceedings in general . . . to conclude that this procedure fails to meet the standards required where First Amendment interests are at stake." Id. at 676, citing Paris Adult Theatre I v. Salton, 413 U.S. 49 (1973). See also id. 677-79 (Blackmun, J., concurring).
244. Id. at 678-92. Justice Marshall joined in the opinion, and Justice Stewart joined in all but one section of the opinion. Id. at 692.
245. Id. at 678-89.
individual who was not a party to and who did not receive notice of the civil proceeding. Moreover, a State cannot use the result in a civil proceeding to bind a criminal defendant on any element of a crime as a matter of collateral estoppel. However, I do not think the Constitution prohibits a State from making it a crime to disseminate material which was judicially determined to be obscene beyond a reasonable doubt in a prior civil proceeding in which the accused participated. In such a case, the State will still be proving every element of the crime at the criminal trial. 246

Implicit in McKinney is the proposition that if material was determined to be obscene in a civil proceeding in which a particular individual appeared and participated, then the determination collaterally estops that individual from contesting the issue in a subsequent criminal proceeding. McKinney follows the Baltimore & Ohio decision in recognizing that civil adjudications can have issue preclusive effects in criminal proceedings, although the McKinney Court was concerned with issue preclusion as asserted by the prosecution and against the defendant. 247

b. Other Federal Cases

In United States v. Mumford, 248 John Mumford was convicted of mail fraud, securities fraud, illegal interstate securities transporta-

246. Id. at 689 n.5 (emphasis in original). Justice Brennan would require, however, that the determination have been made “beyond a reasonable doubt at a proceeding in which the accused was a party and of which he received adequate notice.” Id. at 689. While the majority opinion expressed no position as to the burden of proof necessary in such proceedings, Justice Brennan felt that “the hazards to First Amendment freedoms inhering in the regulation of obscenity require that even in such a civil proceeding, the State comply with the more exacting standard of proof beyond a reasonable doubt.” Id. at 683-84. Both Justices Marshall and Stewart joined in this aspect of Justice Brennan’s concurrence.

247. The Baltimore & Ohio decision is never cited in McKinney, despite the fact that both cases were concerned with the same general issue, i.e., the phenomenon of estoppel that “crosses over” from civil litigation into criminal proceedings. The approval of such a phenomenon is implicit in McKinney’s holding that the Alabama procedure violated McKinney’s constitutional rights because he was not allowed to be present and participate in the proceedings at which the obscenity determination was made. This holding gives rise to a residual proposition, namely, that the Alabama procedure for civil adjudication would have been constitutionally permissible if it had included the opportunity to participate in such proceedings.

248. 630 F.2d 1023 (4th Cir. 1980).
tion and giving a false statement to a United States agency. Mumford appealed his conviction arguing, in part, that an "earlier trial on . . . charges brought by the SEC barred his criminal trial on the ground of res judicata or collateral estoppel." 

The criminal indictment against Mumford was returned in October of 1978. In December of 1977, the SEC initiated an action for injunctive relief against Mumford as the result of his alleged violations of various securities laws. The district court dismissed the claim for injunctive relief on the grounds that "the SEC had failed to prove that he [Mumford] had either violated or was likely to violate securities laws." This dismissal was the basis of Mumford's argument that his criminal conviction was precluded by the decision in the civil suit.

The Fourth Circuit began by noting that the res judicata argument presented a rarely heard and difficult issue. This is due to the fact that the government, having lost its case in civil court, is unlikely to institute criminal proceeding where it must prove a harder case. However, the court went on to point out that only one circuit had actually banned the government from trying again at the criminal level. The court found that res judicata did not apply "since the two proceedings [did] not present the same cause of action." The court also noted the distinction between res judicata and collateral estoppel stating:

249. Id. at 1025.
250. Id. at 1027.
251. Id. at 1025.
252. Id. at 1026. The Fourth Circuit affirmed the dismissal. SEC v. Mumford, 618 F.2d 104 (4th Cir. 1980).
253. 630 F.2d at 1026.
254. Id. at 1027, citing Dranow v. United States, 307 F.2d 545 (8th Cir. 1962). See infra notes 279-295 and accompanying text, wherein the Dranow decision is more fully considered. The court's observation, of course, completely overlooks the Baltimore & Ohio decision.
255. 630 F.2d at 1027.
256. Id. The court found that res judicata applies only "when the two proceedings present the same cause of action", and held that the divergence between the SEC's equitable proceeding and a criminal prosecution precluded the application of the doctrine. Id.
257. Id. For the proposition that collateral estoppel "crosses over" from civil to criminal proceedings, the court cited Yates v. United States, 354 U.S. (1956) and Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).
Unlike *res judicata*, . . . collateral estoppel may be applicable when the first cause of action was civil and the second is criminal. . . . Collateral estoppel precludes the relitigation of issues actually litigated which were necessary to the outcome of the first action. . . . Mumford argues that collateral estoppel bars relitigation of the question of his past criminal conduct since the order dismissing the SEC civil action stated that the evidence ‘falls short of that necessary to find that he . . . had willfully violated any of the SEC laws.’

This language notwithstanding, the court rejected Mumford’s argument as to collateral estoppel. The court reasoned that the civil court “did not intend to reach the merits of the charges” but simply evaluated the need for injunctive relief as a measure for preventing future violations of the SEC laws.

The Tenth Circuit was confronted with a similar argument in *United States v. Jensen*. Jensen was convicted of “violat[ing] . . . 15 U.S.C. § 77q(a) by committing fraud in the sale of certain securities.” Jensen appealed, arguing “collateral estoppel (from a civil case involving nine of [his] allegedly defrauded investors).”

Jensen was the principal and sole owner of Associated Underwriters which was formed to serve as a brokerage firm. In the

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258. 630 F.2d at 1027.
259. *Id.* at 1027-28.
260. *Id.* An earlier portion of the opinion says that the SEC complaint alleged that the defendants, including Mumford, “had violated, were violating and were likely to continue to violate various securities laws.” *Id.* at 1026. It would seem, therefore, that the court necessarily considered Mumford’s past activities in holding that the government had failed to prove that an injunction was necessary to prevent his committing future violations. It may be, however, that the Mumford court was operating on the assumption that the lower court’s dismissal of the injunction complaint was the equivalent of an acquittal on a criminal charge, i.e., because it represented a determination that the allegation was “not proven”, it could not have issue preclusive consequences.

The Ninth Circuit reached a similar result in *Harris v. United States*, 261 F.2d 792 (9th Cir. 1958). In *Harris*, the defendant apparently sought to introduce “findings in a civil case between other parties and on other issues” relating to the issues involved in the criminal prosecution. 261 F.2d at 796. The appellate court held that the trial court properly excluded the “findings” since “[t]hese findings were not res judicata as to any defendant. The issue in a criminal case is entirely different in any event.” *Id.*

261. 608 F.2d 1349 (10th Cir. 1979).
262. *Id.*
263. *Id.* at 1352. For a description of Jensen’s alleged scheme to defraud investors, see *id.* at 1352-53.
264. *Id.* at 1352.
criminal proceeding, the government alleged that Jensen defrauded
his investors by representing to them that their investments would be
"risk free" when the nature of the investments assured that they
were anything but risk free, and by selling what he knew was worthless
stock to them at "high prices." 265

On appeal, Jensen argued that in the trial of the indictment
returned against him, two issues had already been decided in an earlier
case, and the government, therefore, should not have been permitted
to litigate those issues. 266 The prior case to which Jensen referred was
a bankruptcy hearing in which the parties actually substantively
adverse to Associated Underwriters were the investors who eventually
became the claimants in the present case. 267 Since the SEC was involved
in the bankruptcy hearing only in that it initiated the liquidation
proceedings, the government contended that estoppel was not appro-
propriate in the criminal case on the grounds that neither party to the
criminal action was a party to the civil action. 268

Although the court found that Jensen’s nonparty status in the
prior litigation did not foreclose the possibility of collateral estoppel,
it held that the doctrine was unavailable "because the government
was not a party to the prior case in the sense that it had a full and
fair opportunity to litigate the issues now sought to be used against
it." 269 The court found that the SEC had been only "a nominal
plaintiff" in the earlier proceeding, and that "the government had no
real interest in whether the investors or the SIPC ‘won’ ” in that
proceeding. 270

At least one case was presented with the question as to whether
a settlement in a civil action can have issue-preclusive effects upon a
subsequent civil proceeding. 271 Unfortunately, the Second Circuit dis-

265. Id. at 1353-54.
266. Id. at 1355.
267. Id. at 1355.
268. Id.
269. Id. at 1355. The court began by noting that "'[r]ecent Supreme Court cases
have substantially eliminated the mutuality doctrine’", and then went on to apply the
test that has been developed as a substitute for that doctrine, i.e., whether or not a
party has had a "full and fair opportunity" to litigate the issue for which preclusion
is sought. See id. Also see generally supra section II.
270. Id. at 1355.
overlook appellant’s claim that the settlement of a civil suit, brought by members of
the Union against him and based upon the same factual issues here litigated,
constitutes a collateral estoppel against this criminal prosecution brought by the
United States.” 576 F.2d at 976 n.2.
posed of the issue with a simple statement to the effect that "[t]he law . . . is contrary." This outcome would seem to be correct, given that settlements and consent judgments are usually not accorded preclusive effects in subsequent civil litigation.

The Seventh Circuit used the "differing burdens of proof" argument to reject "cross-over" preclusion in United States v. Konovsky, although other considerations may have been at work as well. Konovsky, who was the Superintendent of Police in Cicero, Illinois, was convicted of conspiring to "deprive Negro inhabitants of certain rights, privileges and immunities secured to them by the Constitution of the United States."

One of the counts against Konovsky charged that he and his co-defendants violated the civil rights of a gentleman named Harvey Evans Clark, Jr. by denying Mr. Clark the right to enter and occupy an apartment which he rented in the town of Cicero. The government introduced into evidence a temporary injunction issued by a civil court against Konovsky and others not involved in the criminal suit which prohibited their interference with Clark's right to enjoy the use of the apartment. The government contended that the order was admissible, not as proof of violation of the law by the defendants . . . but, as a circumstance in the light of which the conduct of the defendants should be evaluated.

The Seventh Circuit disagreed holding that the difference in standards of proof prevents "civil to criminal" res judicata, and an instruction to the jury that the civil decree not be used as evidence of guilt would not vitiate the jury's natural tendency to follow the civil court's finding.


273. See, e.g., CASAD, RES JUDICATA, supra note 7, at 150, 159. The theory is that a judgment arrived at through any means other than litigation does not represent an "adjudication" of the underlying issue(s) and cannot, therefore, be given preclusive effect.

274. 202 F.2d 721 (7th Cir. 1953).


277. Id. at 726. The trial court admitted the order and so instructed the jury. The government's theory was that, because Konovsky and his co-defendants had stationed a "detail" around Clark's apartment building to keep him out and had withdrawn the "detail" after the injunction issued, the withdrawal "was in the nature of an admission" of wrongdoing. Id.

278. Id.

279. Id. at 726-27, citing Helvering v. Mitchell, 303 U.S. 391, 397 (1938), and
Konovsky is, therefore, distinguishable insofar as it involved (a) an evidentiary use of a civil judgment, and (b) the possibility that the civil judgment was being used, or was inadvertently used, as conclusive evidence that the defendants’ guilt had already been determined in a civil proceeding. And there is also the fact that, in accordance with the subsequent holding in McKinney v. State, the defendants had not participated in the civil proceeding and had not had a “full and fair opportunity” to litigate the issues involved therein.

In Dranow v. United States the Eighth Circuit recognized that a civil judgment can represent collateral estoppel in a subsequent


280. 296 So. 2d 228 (Ala. 1974).

281. Indeed, only Konovsky was even technically a party to that proceeding. His co-defendants were not named in the civil suit. 202 F.2d at 727.

For a similar conclusion, see United States v. Satuloff Brothers, 79 F.2d 846 (2d Cir. 1935). Satuloff involved a conviction for violating “§ 1 of the Elkins Act, as amended by Act June 29, 1906,” in that the defendants unlawfully solicited a rebate in the sum of $896.19 from a railroad company by filing “a false claim for the loss of part of a carload of turkeys while in transportation in interstate commerce.” 79 F.2d at 847. The defendants were officers and agents of a corporation. Id. Prior to the institution of criminal proceedings, the corporation obtained a judgment against the railroad in a civil action. Id. at 848. The judgment was for the loss of “18 barrels of turkey”, said barrels having comprised part of a larger shipment of “dressed pultry.” Id. at 847-48. The criminal proceedings involved those same barrels, the accusation being that the defendants “surreptitiously removed” the barrels from a railroad car and then submitted a false claim for their loss. Id. at 847.

The Second Circuit began by noting that “the issues were such that the verdict for the appellant corporation in the civil action and judgment against the appellants in this criminal action could not both be predicated upon true facts.” Id. at 848. But the court held that the civil judgment was not conclusive of the matters at issue in the criminal prosecution (a) because the government was not a party thereto and could not, therefore, be bound by the decision therein, and (b) because “the quantum of proof required in one case is different from that required in another.” Id. at 848-49. The court noted that there was authority to the contrary, id. at 849, but held that “the weight of reason ... [was] with the authorities excluding the judgment.” Id. at 849.

Although the discussion is structured in terms of the civil judgment’s admissibility both as evidence and as “a bar to the prosecution on the theory of res adjudicata”, it emphasizes the first issue almost to the exclusion of the latter. And the opinion cites almost no authority for the proposition that civil judgments cannot “cross over”, while noting that a number of decisions had held to the contrary. Id. at 849, citing State v. Faulk, 30 La. Ann. 831; Commonwealth v. Harkins, 128 Mass. 79; People v. Kenyon, 93 Mich. 19, 52 N.W. 1033, 1034 (1892); People v. Parker, 355 Ill. 258, 189 N.E. 352 (1934).

For a similar holding, see United States v. Beery, 678 F.2d 856 (10th Cir. 1982), appeal after remand 752 F.2d 499, cert. denied 105 S. Ct. 2141 (1985).

282. 307 F.2d 545 (8th Cir. 1962).
CROSS-OVER ESTOPPEL

criminal proceeding, although it declined to find that the principle required the reversal of the conviction that was before it. Benjamin Dranow was convicted of multiple counts of mail fraud, wire fraud and "bankruptcy offenses in violation of 18 U.S.C. § 152." He appealed arguing, in part, that the trial court erred in denying his motion to dismiss the indictment as "barred by the doctrine of res judicata and collateral estoppel." In 1952 Dranow became "a concessionaire or fur purchasing agent" for the John W. Thomas Company and, in that capacity, "caused fictitious, fraudulent merchandise inventories and false accounts receivable totaling around $449,000.00 . . . to be entered in the records of the . . . Company" for the years 1952, 1953, and 1954. These false entries remained on the Company's books until 1958, Dranow having purchased all of the stock of the company in 1956. These and other machinations attributed to Dranow caused the company's financial health to deteriorate to the point at which "an 'arrangement' proceeding in bankruptcy became necessary and . . . was instituted in January 1958." In his appeal from his criminal conviction, which was based upon these same machinations, Dranow argued that the questions at issue in the bankruptcy proceeding were identical to the charges in the indictment and that the bankruptcy proceeding, therefore, provided a "final and adversary examination . . . into all acts and conduct of the defendant for the very time at issue in the case at bar." Dranow contended that since the issues in the bankruptcy and in the criminal prosecution were identical and since the lower court entered an order confirming the bankruptcy proceeding, the factual issues alleged by the government in the criminal proceeding had already been determined in Dranow's favor in the bankruptcy proceeding. Therefore, Dranow concluded, the trial court erred when it denied his motion to dismiss the indictment as barred by collateral estoppel and res judicata.

The Eighth Circuit began by agreeing that "[t]here can be no doubt about the proposition that res judicata and collateral estoppel

283. Id. at 548.
284. Id. at 556, quoting from Dranow's appellate brief.
285. Id. at 554.
286. Id.
287. Id. at 555.
288. Id. at 556.
289. Id.
290. Id.
are applicable in a criminal action though a prior proceeding was civil in character. But the court found that the proposition is subject to the qualification" that both actions are based upon the same facts and both have as their object, 'punishment' and that "[w]here the object of the prior civil action and subsequent criminal action is not 'punishment', res judicata is inapplicable."

The court then found that, because the bankruptcy proceedings were not "punitive" in nature, neither res judicata nor collateral estoppel applied. The court found that the problem caused by the fact that the nature of the two proceedings were different was compounded by the fact that the plaintiffs in each suit were not the same or reasonably related. In reaching this result, the Dranow court relied upon decisions which had held that civil judgments are not res judicata precluding the institution of criminal proceedings. These decisions, and Dranow, err in ignoring the distinct concept of issue preclusion, the concept that civil proceedings can adjudicate issues which are thereby precluded from being relitigated in a subse-

291. Id.
292. Id.
293. Id. This statement is followed by a "cf." citation to Helvering v. Mitchell, 303 U.S. 391 (1938); United States ex rel. Marcus v. Hess, 318 U.S. 537 (1943); Murray & Sorenson, Inc. v. United States, 207 F.2d 119, 122, 42 A.L.R.2d 628 (1st Cir. 1953); Annot., 42 A.L.R.2d 634, 636.
295. Id. at 557, quoting Blodgett v. United States, 161 F.2d 47, 53 (8th cir. 1947), and citing United States ex rel. Hatfield v. Guay, 11 F. Supp. 806, 810 (D.N.H. 1935). Hatfield was an action for habeas corpus, the purpose of which was to avoid extradition to Canada for trial on criminal charges. 11 F. Supp. at 807. In the course of ruling on the petitioner's petition, the district court found that an earlier proceeding, a civil proceeding in Canada in which the petitioner falsely prevailed upon a complaint for damages, did not represent res judicata barring the initiation of criminal proceedings arising out of the same incident. Id. at 808-10.

Both the civil and criminal proceedings involved a claim which the petitioner had submitted in which he asserted that he was entitled to be recompensed for property which he owned and which had been destroyed in the course of the first World War. Id. at 809. The New Hampshire district court rejected his argument and found that res judicata did not apply because the Canadian proceedings had not been criminal in nature: Therefore, "it cannot be said that Hatfield has been in jeopardy in any former action." Id. at 810. This, of course, was a determination based solely upon double jeopardy as a variant of res judicata and id not reach the issue as to whether the doctrine of collateral estoppel could bar the subsequent criminal proceedings.

296. See Dranow, supra note 282, at 557.
quent criminal proceeding. Instead, they focus exclusively upon the concept of res judicata, or claim preclusion, which they also seem to confuse with double jeopardy. It is this confusion which is responsible for the concern that both actions be "punitive" in character, and it is this confusion which prompted the Dranow court's holding that criminal proceedings can only be barred by a civil judgment if the judgment was entered in an action the intent and purpose of which was punishment.

297. For a discussion of the distinctions, see supra Sections II and III.

298. The author has not undertaken to determine whether it is possible that a civil proceeding can trigger double jeopardy proceedings so long as its aim and purpose was "punitive" in character. The decisions which address this issue appear to construe civil proceedings for the forfeiture of property alleged to have been involved in criminal activity and for the collection of fines and other penalties as civil actions that can have some claim-preclusive effect upon criminal proceedings. Since, however, such proceedings generally commence after a criminal proceeding has concluded with a conviction, it is difficult to see what practical utility such a doctrine might have, assuming that it is conceptually viable.

299. 424 A.2d 113 (D.C. 1980).

300. 424 A.2d at 116. In a passage preceding these statements, the court of appeals held that "[c]ollateral estoppel may apply to sequential criminal as well as sequential civil litigation," and notes that collateral estoppel "has been applied on the basis of a prior criminal conviction to a subsequent civil action." Id. The court then proceeded to consider whether the reverse is possible. See infra text accompanying notes 301-306.

301. Id. at 115.

302. Id. at 115. In addition to the issues addressed here, the appeal, which was brought by the government after the lower court granted Ms. Lima's motion to suppress the blouse as the result of an improper search, also involved the issue as to whether fourth Amendment protections apply to searches conducted by private security guards. The court of appeals held that they do not. Id.
In the civil action, the jury returned a verdict for Ms. Lima based, in part, on her contention that the store security officer converted the blouse Ms. Lima was accused of stealing. Ms. Lima argued that the jury on the civil action conclusively determined the ownership of the blouse, as is implied by the award for damages for conversion, and that the government, therefore, should be estopped from relitigating the issue of ownership.

The court of appeals rejected the argument because the government had not been a party to the civil proceeding and, therefore, had not had "a full and fair opportunity" to litigate the matter. In dicta, the court noted that "[p]reclusion from litigating the issue would... 'deprive the state of its day in court and could present the danger of collusive civil suits instituted solely to provide a bar to prosecution.'"

Other decisions have refused to allow a civil judgment to preclude the determination of issues involved in a criminal proceeding when those issues were never adjudicated in the civil proceeding. Thus, in **Gregory v. Kentucky**, the Kentucky Supreme Court held that a determination in a civil dependency proceeding did not foreclose inquiry into the same area in a subsequent criminal proceeding.

The criminal proceeding resulted from charges that Jerry Clifford Gregory had sodomized "his sons, both of whom were under three years of age at the time of the alleged incidents." After being tried and convicted, Gregory appealed, arguing that since a prior depend-

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303. *Id.* Although this statement is not explained in the opinion, it appears that Ms. Lima sued Lord & Taylor, claiming, among other things, that the private security officer who arrested her for shoplifting improperly and unlawfully abscended with the blouse which she was alleged to have stolen. The opinion does reveal that the officer "recovered" the blouse from Ms. Lima’s purse. *Id.*

304. *Id.* at 115-16. Although he court of appeals did not address this issue, there would seem to be a question as to whether Ms. Lima’s civil judgment could collaterally estop the government from proceeding with a proceeding which it had won before the civil proceeding ever commenced. It would seem more logical to conclude that the judgment in the criminal proceeding could have been asserted as precluding the relitigation of the ownership of the blouse in the civil proceeding. *Id.* Once again, this ignores the fact that there had been a criminal adjudication that preceded the commencement of the civil proceedings, so that the government *had* had a "full and fair opportunity" to litigate the issue, and had prevailed.


307. 610 S.W.2d 598 (Ky. 1980).

308. *Id.* at 599.
ency proceeding found that he did not have deviate sexual intercourse with his children, the state should have been collaterally estopped from being tried on the sodomy issue.\textsuperscript{309}

The Kentucky Supreme Court began by recognizing that the doctrine of "issue preclusion" can apply when a prior proceeding was civil and the subsequent proceeding is criminal in nature.\textsuperscript{310} "Nevertheless, the doctrine makes conclusive in subsequent proceedings only determinations of fact . . . that were essential to the decision."\textsuperscript{311} The court then found that the determination in the dependency proceeding did not determine issues of fact which were essential to the sodomy charges, and rejected Gregory's argument.\textsuperscript{312}

In \textit{State v. Bott},\textsuperscript{313} the Supreme Court of Minnesota reached a similar conclusion concerning the use of a civil adjudication to establish a defendant's mental state at the time he committed a crime. In \textit{Bott} the Minnesota Supreme Court held that a determination in a commitment proceeding did not resolve the issue of criminal intent, since "[t]he issue in the commitment proceedings was only whether defendant was mentally ill and required hospitalization for his own welfare or the protection of society, and the decision of that issue does not estop the state from litigating whether at the time the defendant shot Gaulke he knew his act was wrong."\textsuperscript{314}

309. \textit{Id.}


311. \textit{Id.}, \textit{quoting} 354 U.S. at 336.

312. \textit{Id.} at 600. In the dependency proceeding, the court found that the best interests of the children would be served by committing them to the care of the Department for Human Resources, notwithstanding the fact that it also found that there was an "absence of medical evidence indicating that [the boys] were subjected to sexual abuse." \textit{Id.} That court also found that Gregory "did not subject them to deviate sexual intercourse." \textit{Id.} The Kentucky Supreme Court found, however, that "[t]he real effect of these findings is not that Gregory did not sodomize his children but that the judge was not persuaded by the evidence that he had sodomized them." \textit{Id.}


314. 310 Minn. at 333, 246 N.W.2d at 19. The defendant had been committed to a mental institution after he had shot and killed his neighbor. \textit{Id.} He remained in the institution for several months and until the court determined in a rehearing that there was insufficient evidence to warrant continuing the commitment. \textit{Id. See generally} Mangus \textit{v. Western Cas. & Surety Co.}, 41 Colo. App. 217, 585 P.2d 304 (1978).

In a similar case, Lovedahl \textit{v. State}, 242 F. Supp. 938 (E.D.N.C. 1965), the court held that "a civil action . . . is not controlling upon any criminal determination of mental ability to determine right from wrong, or as to the factual situation
A New York court reached a different conclusion in \textit{People v. Klein},\textsuperscript{315} which presented the issue as to whether findings in an arbitration proceeding can preclude the determination of issues involved in a criminal proceeding. The defendants, William Overton and Laura Klein, were charged with grand larceny and the falsifying of business records.\textsuperscript{316} The indictment charged that they stole an amount in excess of $1,500 from a psychiatric center and that they caused false entries to be recorded in the books of the psychiatric center.\textsuperscript{317} The accusation was that Ms. Klein submitted time and attendance sheets showing that she was working at the psychiatric center when she was actually attending nursing classes elsewhere.\textsuperscript{318}

Prior to the return of the indictment, these matters came to the attention of the hospital's administrative staff, and an arbitration proceeding was commenced against each defendant.\textsuperscript{319} The proceedings resulted from discipline notices which had been served on Overton and Klein.\textsuperscript{320} These discipline notices were concerned with precisely surrounding the commission of a crime.' 242 F. Supp. at 944. Cecil Lovedahl pled guilty and was sentenced for the murder of Cecil Shular; Shular was a family friend whom Lovedahl shot one afternoon when the latter was "highly intoxicated." Id. at 941-43. Lovedahl then filed a petition for writ of habeas corpus, alleging that he was mentally incompetent at the time of the commission of the offense and at the time he entered his guilty plea. Id. at 939-44.

The district court reviewed the record in the matter and held that Lovedahl had been competent at the time he pled and at the time the crime was committed. Id. at 939-47. One issue involved a civil action which

\begin{quote}
the widow of the deceased . . . [had] successfully pursued . . . before a jury, and against the insurance carrier of the deceased, to recover benefits under a double indemnity clause for accidental death . . . . It was determined by the jury in that action that death was by accidental means. An important issue in the case was . . . proving that [Lovedahl] was highly intoxicated and incapable of making a clear and sane judgment as to his course of conduct at the time the rifle was fired, thereby resulting in the accidental death of Cecil Shular.
\end{quote}

Id. at 944. As is apparent from the passage quoted in an earlier paragraph, the district court held that the civil judgment was not controlling in a criminal proceeding. Additionally, there is the fact, once again, that the criminal conviction preceded the civil judgment by a period of two years. See id. at 939, 944. See also Bennett v. State, 100 Ga. App. 211, 110 S.E.2d 598, 599 (1959) (not error to refuse to admit evidence of civil suit to establish that defendant was not intoxicated while operating a motor vehicle).

\textsuperscript{315} 96 Misc. 2d 692, 410 N.Y.S.2d 12 (Sup. Ct. 1978).
\textsuperscript{316} Id. at 693, 410 N.Y.S.2d at 13.
\textsuperscript{317} Id.
\textsuperscript{318} Id.
\textsuperscript{319} Id. at 694, 410 N.Y.S.2d at 13.
\textsuperscript{320} Id.
the same conduct that would be at issue in the criminal proceeding.\textsuperscript{321} After convening a hearing at which "many witnesses" testified, the arbitrator issued a report in which he found that neither Overton nor Klein had been guilty of "conspiracy to steal from and defraud the state."\textsuperscript{322}

Sometime thereafter, the indictment was returned and Overton and Klein faced criminal charges.\textsuperscript{323} Prior to trial, the defendants filed a motion to dismiss the indictment, arguing that the "prior determination in [the] arbitration proceeding is determinative of a critical factual issue in this case, thereby precluding a successful prosecution."\textsuperscript{324} The New York Supreme Court for Suffolk County agreed and dismissed the indictment.\textsuperscript{325}

In holding that the arbitrator's findings were conclusive of the issue in the criminal action, the court reasoned that since the "preponderance of the evidence" test used in the arbitration proceedings was not met, it would be impossible to jump the "beyond a reasonable doubt" hurdle required in the criminal action.\textsuperscript{326} More importantly, the court concluded:

The issue tried at arbitration was not collateral but directly related to the question of guilt or innocence. The outcome of the criminal charges herein... turn[] upon... labor practices previously litigated by the persons most familiar with them.

The court concludes that the People are estopped from relitigating the time and attendance issues, and the findings of the arbitrator are determinative of the issue of wrongful taking.\textsuperscript{327}

\textsuperscript{321. Id.}

\textsuperscript{322. Id., quoting from the arbitrator's report. The arbitrator found, for example, that "the evidence strongly supports the probability that Ms. Klein worked her time as claimed, rather than the opposite." Id.}

\textsuperscript{323. Id. at 694, 410 N.Y.S.2d at 16.}

\textsuperscript{324. Id. at 693, 410 N.Y.S.2d at 12-13. In referring to the motion, the New York Supreme Court said that the defendants "seek to add a new dimension to the doctrine of collateral estoppel as applied to criminal cases." Id.}

\textsuperscript{325. Id. at 693, 410 N.Y.S.2d at 13.}

\textsuperscript{326. Id. at 693, 410 N.Y.S.2d at 15.}

\textsuperscript{327. Id. (emphasis added). In an earlier portion of the opinion, the court concluded that there was no barrier to collateral estoppel given that the two proceedings involved identical issues and identical parties. 96 Misc. 2d at 693, 410 N.Y.S.2d at 15-16. Since the psychiatric center was a state hospital, the state was also a party to the arbitration proceeding and, apparently, had a "full and fair opportunity" to litigate the issues involved therein. See id.}
The Massachusetts Supreme Court reached a different result in a case that was decided the same year as McKinney and that also involved the use of civil proceedings in obscenity adjudications. Commonwealth v. 707 Main Corporation was an appeal from the denial of motions to dismiss an indictment and/or for a directed verdict of not guilty on the charges contained therein. The motions were based in part upon the contention that criminal proceedings against the defendant were collaterally estopped by prior civil proceedings.

Massachusetts had a statute granting its Superior Courts the "jurisdiction 'to enjoin the dissemination of any matter which is obscene.' " In a proceeding initiated under this civil statute, the court refused to enjoin the defendants from showing "Deep Throat" due to the plaintiff's failure to prove that the movie was obscene. The government appealed the ruling and while that matter was on appeal, the defendant was indicted for violating the Massachusetts criminal obscenity statute.

After its motions to dismiss and for directed verdict were denied, the defendant was convicted of violating the statute. The defendant appealed its conviction arguing that the trial court erred in denying its motions. The Massachusetts Supreme Court disagreed, holding that

the Legislature, [in] making [obscenity] enforcement through concurrent use of civil and criminal proceedings available to

329. 371 Mass. at 375, 357 N.E.2d at 755-56.
330. Id.
331. Id., quoting MASS. GEN. L. ANN., ch. 272, § 30 (West 1970). Massachusetts also had a law that "provide[d] for [the use of civil] proceeding[s] to adjudicate the obscenity of books, but not other materials." Id., quoting MASS. GEN. L. ANN., ch. 272, § 28C (West 1970). The statute also established criminal penalties for the dissemination or possession of "any matter which is obscene, knowing it to be obscene." Id. at § 29.
333. MASS. GEN. L. ANN., ch. 272, § 29 (West 1970). See also supra note 331.
334. 371 Mass. at 375, 357 N.E.2d at 754.
335. Id.
prosecutors, did not intend that the first proceeding to reach judgment would estop further action in the second proceeding. Such an estoppel effect would make concurrent proceedings meaningless. 336

The conclusion was that recognizing the issue-preclusive consequences of civil proceedings would do violence to enforcement scheme contained in the Massachusetts obscenity statutes. This construction appears, however, to be at odds with the plain language of the statutes in question, at least one of which explicitly refers to the fact that favorable decisions in civil proceedings preclude the institution of criminal proceedings based upon the same subject-matter. 337

In a decision involving the validity of certain search warrants, a California court recognized that the decision of a civil court can bind a criminal court that is confronted with the same issue. 338 In June of 1963, five search warrants were issued authorizing the search of the respective premises of H. Edward Scofield and Doctor Everett W. DeLong. 339 Five months later, an indictment was returned which

336. 371 Mass. at 376, 357 N.E.2d at 757. In an earlier portion of the opinion, the court discussed the purpose and effect of civil injunctive proceedings under Mass. Gen. L. Ann. § 30, and held out the possibility that estoppel could result therefrom:

In this case public officials used the two types of enforcement proceedings [i.e., civil injunctive and criminal prosecution] concurrently. The same acts . . . formed the bases for both proceedings. Thus, the defendants' reliance on the civil judgment in its favor played no role in its allegedly criminal conduct . . . .

3. If one reads § 30 as precluding the application . . . of the doctrine of collateral estoppel in a subsequent criminal suit, the civil defendant may be substantially misled on the subject of his potential criminal liability because the Commonwealth elected to use a § 30 proceeding as a primary enforcement tool. We need not decide here whether we might find estoppel in a case where the Commonwealth tried and failed to obtain an injunction and thereafter, while appeal of an unfavorable result was pending, proceeded with criminal prosecution for alleged dissemination, after the date of the civil decision, of the same allegedly obscene matter. The problem is one that could be avoided easily by postponement of the criminal trial until the civil appeal is decided.

357 N.E.2d 753, 757 n.3 (1976) (emphasis added). In addition to affirming the defendant's criminal convictions, the court also reversed the civil judgment in which the lower court had held that the state "had failed to prove that the matter was obscene." 371 Mass. at 375, 357 N.E.2d at 753.


339. Id. at 819, 249 C.A.2d at 728.
charged Scofield and DeLong with conspiracy and with substantive fraud counts.\textsuperscript{340}

Scofield, DeLong and several other concerned individuals unsuccessfully moved to suppress the search warrants that had led to the indictment.\textsuperscript{341} After their motion was denied, they instituted a civil proceeding for a writ of mandate, "seeking . . . review of the [earlier] orders and . . . an order . . . grant[ing] the motion to quash the search warrants."\textsuperscript{342} Judge Wapner,\textsuperscript{343} to whom the proceeding was assigned, held "extensive hearings" on the matter and denied the petition for the writ of mandate.\textsuperscript{344} The petitioners unsuccessfully sought to have the decision reversed by the California Court of Appeals and the California Supreme Court.\textsuperscript{345}

When this failed, Scofield filed a pretrial document entitled "Notice of Motion to Suppress the Evidence and to Dismiss the Indictment."\textsuperscript{346} This document was filed with the court before whom the criminal indictment was pending and, on May 10, 1965, that court "granted the motion to suppress the evidence obtained as a result of the searches based on the [June, 1963] search warrants."\textsuperscript{347} This court found that the affidavits in support of the request for the issuance of the search warrants were based upon "legal conclusions" and were, therefore, insufficient;\textsuperscript{348} "[t]his in spite of the findings of Judge Wapner and the judgment previously made and entered."\textsuperscript{349}

The prosecution appealed and the California Court of Appeals reversed the decision granting the motion to suppress insofar as it involved Scofield and DeLong.\textsuperscript{350} The appellate court found that "[t]he decision of Judge Wapner was binding . . . until such time as [it was] overturned."\textsuperscript{351} The court held that Scofield and DeLong had a "full and fair opportunity" to litigate the matter before Judge

\begin{itemize}
\item \textsuperscript{340} Id.
\item \textsuperscript{341} Id.
\item \textsuperscript{342} Id.
\item \textsuperscript{343} The author is convinced, but has been unable to confirm her conviction, that this is the same Judge Wapner who would later gain fame on the "People's Court."
\item \textsuperscript{344} 249 Cal. 2d at 728-29, 57 Cal. Rptr. at 819-21.
\item \textsuperscript{345} Id. at 729, 57 Cal. Rptr. at 821.
\item \textsuperscript{346} Id.
\item \textsuperscript{347} Id.
\item \textsuperscript{348} Id.
\item \textsuperscript{349} Id.
\item \textsuperscript{350} Id. at 732, 57 Cal. Rptr. at 824.
\item \textsuperscript{351} Id. at 729, 57 Cal. Rptr. at 822.
\end{itemize}
Wapner, whose decision was binding upon the superior court before whom the criminal indictment was pending, and thereby recognized the permissibility of "civil to criminal" issue preclusion.352

A New Jersey court recognized the phenomenon in Washington Township v. Gould,353 in which the defendant, Gould, who operated a trailer park, was convicted of violating a township zoning ordinance by unlawfully expanding his trailer park, a nonconforming use under the ordinance.354 After the Appellate Division affirmed the conviction, Gould appealed to the New Jersey Supreme Court.355

Approximately two weeks after the ordinance had been adopted, on July 11, 1957, the Township commenced a civil action "seeking to restrain [Gould] from operating his trailer park in violation of the ordinance."356 Gould answered and "counterclaimed for a declaratory judgment that the ordinance was unconstitutional".357 After hearing arguments, the court held that the ordinance was "not invalid" and the parties entered into a consent judgment disposing of the action.358

"About a year later, . . . the Township’s building inspector filed a complaint . . . charging that . . . the defendant violated the zoning ordinance . . . by extending a nonconforming use . . . by increasing the number of trailer coach spaces . . . and by installing . . . more . . . trailer coaches."359 After a hearing, the municipal court found Gould guilty and imposed a fine of twenty-five dollars.360 Gould appealed to the county court, which held a trial de novo and rejected Gould’s argument that the ordinance was unconstitutional.361 The court found that "there is an estoppel by judgment, [and] that the defendant here is bound by the terms of that judgment."362

352. Id. at 728-29, 57 Cal. Rptr. at 822-29. The court was also concerned about the fact that sanctioning Scofield’s and DeLong’s actions would directly encourage “forum shopping, since if one judge should deny relief, defendants would try another and another judge until finally they found one who would grant what they were seeking.” Id. at 728, 57 Cal. Rptr. at 822.
354. Id. at 529, 189 A.2d at 698.
355. Id.
356. Id. The ordinance “totally excluded trailer parks from” the Township. Id.
357. Id.
358. Id. The consent judgment provided, in part, that the trailer park “shall henceforth be treated and considered as non-conforming use under the presently existing zone ordinance of the Township of Washington.” Id.
359. Id. at 530, 189 A.2d at 699.
360. Id.
361. Id.
362. Id.
Gould subsequently sought review by the Appellate Division and the New Jersey Supreme Court, both of which affirmed his conviction.\textsuperscript{363} Gould argued that:

as the present case involves an alleged violation of a zoning ordinance it is essentially criminal in nature; that the [declaratory] judgment having been rendered in a civil action is 'inadmissible as proof of any facts determined by such judgment' in a subsequent criminal proceeding; and that the county court erred in 'finding that the judgment in the former acted as an estoppel in the latter.'\textsuperscript{364}

The New Jersey Supreme Court rejected both the argument and the cases cited in support thereof:

Those cases are inapplicable. In both, a civil judgment had been entered against the defendant based on a resolution of factual issues. In a later criminal proceeding, the judgment was held inadmissible as proof of facts relating to the issue of guilty, because of the higher degree of proof required in a criminal proceeding from that upon which the civil judgment was based. In the present case, the question of the ordinance's constitutionality does not relate to the issue of the defendant's guilt which must be proven beyond a reasonable doubt; rather it arises by way of affirmative defense and the defendant has the burden of overcoming the presumption of constitutionality by showing clearly that the ordinance is arbitrary or unreasonable. . . . Hence, there was no difference between the two proceedings in the degree of proof required on the issue of the ordinance's constitutionality.\textsuperscript{365}

Other decisions, however, have held that a civil judgment cannot be utilized to preclude a criminal defendant from litigating an issue that is central to the government's case against him.\textsuperscript{366} One example,
Helms v. State,\textsuperscript{367} involved a defendant who was indicted for “assault with intent to murder one Cy English, by shooting him with a pistol.”\textsuperscript{368} During the cross-examination of the defendant, “he was questioned as to whether or not Cy English, the alleged assaulted party, had signed a release in [a] civil suit filed by him against the [defendant], [and] growing out of the same incident as [the] prosecution.”\textsuperscript{369}

Lawton v. State, 152 Fla. 821, 13 So. 2d 211 (1943); People v. Barker, 29 C.A.2d Supp. 766, 77 P.2d 321 (1938); Green v. State, 204 Ind. 349, 184 N.E. 183 (1933); State v. Thompson, 333 Mo. 1069, 64 S.W.2d 277 (1933); State v. Ruthkowski, 180 Minn. 378, 230 N.W. 818 (1930); Jay v. State, 15 Ala. App. 255, 73 So. 137 (1916), cert. denied, Ex rel. Jay, 198 Ala. 691, 73 So. 1000 (1916); Wingrove v. Central Penn. Tract. Co., 237 Pa. 549, 85 A. 850 (1912); Ireland v. State, 99 Ark. 32, 136 S.W. 947 (1911). Most of these cases predicate their holdings upon the “differing burdens of proof” rationale. See, e.g., People v. Barker: “If [a civil] judgment should be held as the basis of res judicata or estoppel in a subsequent criminal prosecution, the practical effect would be to annul the rule that in criminal prosecutions the state must establish the defendant’s guilt beyond a reasonable doubt.” 29 C.A.2d Supp. at 769, 77 P.2d at 323, quoting State v. Weil, 83 S.C. 478, 65 S.E. 634, 26 L.R.A., N.S. 461, 463 (1909). As must be apparent from this passage, Barker, and indeed all the above-cited cases, involved an attempt by the government to introduce a civil judgment adverse to the defendant as establishing an essential element of the crime with which he was charged.

Ruthkowski ties the rule to an additional requirement; “[A] judgment rendered against a defendant in a civil suit, begun after the commission of the crime for which he is on trial, is inadmissible to establish an essential ingredient or fact of the crime.” 180 Minn. at 380, 230 N.W.2d at 819.


When the case was called for trial, [Arnold] filed a motion for continuance on the ground that there was then pending a civil action involving the ownership of the cow which [he] was accused of stealing. This motion has no merit. It has been a consistent rule in this State that the judgment of a civil court is not binding upon a criminal court and vice versa. The judgment finally rendered in the civil action would not be evidence in the trial of this case.

148 Tex. Crim. App. at ____ , 186 S.W.2d at 998. Of course, the court also held that members of a state cattlemen’s association were not disqualified as “private prosecutors” to pass upon Arnold’s guilt, either as grand or petit jurors, despite the fact that they funded an association the purpose of which was the investigation and prosecution of cattle theft. See id. at ____ , 186 S.W.2d at 997.

367. 35 Ala. App. 187, 45 So. 2d 170, cert. denied, 253 Ala. 467, 45 So. 2d 171 (1950).

368. Id. at 188, 45 So. 2d at 170.

369. Id.
Helms was convicted and then appealed, arguing that the references to the civil suit and the settlement thereof represented prejudicial error. The Alabama Court of Appeals agreed. The court found that "a judgment gained in a civil suit is not admissible against the defendant in a criminal prosecution growing out of the same transaction," and concluded that the rule applies with equal force to settlements in civil actions:

It would rationally appear that if a judgment obtained in a civil proceeding is inadmissible in a subsequent criminal prosecution, where at least the civil judgment was obtained after hearing and judicial supervision, then certainly a settlement in the civil cause, made without the protection of trial safeguards, and perhaps merely to get rid of the worry of a pending suit, cannot be said to have any probative value in determining the issues of the criminal prosecution. It further cannot be denied that evidence of the settlement of the civil suit . . . would ordinarily tend to influence the mind of a juror in the criminal prosecution to the prejudice of the defendant.

Three years earlier, the Alabama Court of Appeals held that a civil adjudication foreclosed the reconsideration of issues involved therein in a criminal prosecution arising out of the same set of facts. The case, Terry v. State, involved an automobile accident-related prosecution for violation of a statute providing that "[a]ny person who unlawfully, wantonly, or maliciously kills, disables, disfigures, destroys, or injures any animal, or article or commodity of value, the property of another" was subject, upon conviction, to be fined and imprisoned in the county jail, or sentenced to hard labor, for "not more than six months."

Both the prosecution and a prior civil suit arose from the following facts:

[John Terry] was driving [his father's] automobile along a paved highway about nine o'clock at night. There were four other male persons in the car. As they traveled northward, at

370. Id.
371. Id. at 189, 45 So. 2d at 171.
372. Id.
373. Id. See also United States v. Capanegro, 576 F.2d 973, 976 (2d Cir. 1978), discussed supra in Section IV(B)(2).
374. 33 Ala. App. 75, 31 So. 2d 105, cert. denied, 249 Ala. 304, 31 So. 2d 107 (1947).
375. Id.
a moderate rate of speed, and had reached a vantage point of about 200 yards, they first observed the lights from [Mrs. Ray's] car, which was headed in a southern direction. When they had proceeded about 50 yards, the driver saw that the car ahead was stopped, but its exact location on the highway could not at that time be determined, primarily because the beams from its head and spot lights were extended at an angle to the direction of the road. When [Terry's] car came within 15 or 20 yards of the parked car, the glaring light rays from the latter blinded [him]. He steered further to the right, off the paved surface of the road, and the collision occurred. It is undisputed . . . that [Mrs. Ray's] car was parked on the left side, . . . and was positioned so that its right wheels were approximately three or four feet from the left edge of the road pavement.376

John Terry's father instituted the civil suit against Mrs. Ray, seeking to recover for the damages which his car sustained in the collision.377 The jury found for Terry and awarded damages; Mrs. Ray appealed to the Alabama Court of Appeals, which affirmed the award.378 Sometime thereafter, John Terry was charged with violating the criminal statute quoted above.379 He was tried and convicted, and appealed to the Alabama Court of Appeals, arguing that his innocence had already been established in the civil proceeding.380 The Court of Appeals agreed:

In the [civil] case, . . . it was definitely held and determined that the accident or collision, the basis of this prosecution, was due to the negligence of Mrs. Ray . . . by unlawfully parking her automobile on the left side of the highway. . . . In the case at bar we are constrained to hold likewise, and this results in the reversal of the judgment of the lower court from which this appeal was taken.381

377. Id.
378. 28 So. 2d at 918.
379. 33 Ala. App. at 77, 31 So. 2d at 105.
380. Id. Actually, Terry was convicted twice, first in a county court and then in a jury trial held in the local circuit court.
381. Id. In omitted portions of the above-quoted passage, the Court of Appeals recites the circumstances as established by the evidence in Ray v. Terry and as described in the passage from that opinion which was earlier quoted in the text.
Possibly the strongest holding in favor of "civil to criminal" preclusion came in *People v. Parker.*\(^{382}\) "On the third day of January, 1931, [Parker] was indicted in the criminal court of Cook county [and] charged with larceny as bailee, . . . with . . . embezzlement and . . . with larceny."\(^{383}\) Parker waived a jury and was tried by the court, which found him guilty of embezzlement.\(^{384}\) "The count upon which the defendant was found guilty charged that he, as agent in the employ of the North American Trust Company, (formerly named Iroquois Trust Company,) embezzled the sum of $349,000 which . . . had come into his possession . . . by virtue of such employment."\(^{385}\)

The facts in the case were lengthy and involved, but essentially involved allegations that Parker took unlawful advantage of the position which he held with "the Guaranteed Reserve System" (hereinafter referred to as the Reserve System).\(^{386}\) The Reserve System was incorporated as a Delaware corporation on May 26, 1924.\(^{387}\) It was a "personal service corporation" and, although he was not one of the original incorporators, "Parker apparently owned and controlled the Reserve System, and he apparently was the dominating factor in the . . . company from the spring of 1926 through 1930."\(^{388}\)

The Reserve System engaged in business dealings with another entity, the North American Trust Company.\(^{389}\) John J. Bailey was a director of the North American Trust Company until 1929, when he became chief executive officer.\(^{390}\) A rivalry seems to have developed between Bailey and Parker, and in 1929 "a violent quarrel broke out between Parker . . . and Bailey . . . [in which] Parker accused Bailey . . . of defrauding investors of the . . . company."\(^{391}\) Bailey made

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\(^{382}\) 335 Ill. 258, 189 N.E. 352 (1934).

\(^{383}\) *Id.* at 259-60, 189 N.E. at 353.

\(^{384}\) *Id.* at 260, 189 N.E. at 353.

\(^{385}\) *Id.*

\(^{386}\) *Id.*

\(^{387}\) *Id.* at 261, 189 N.E. at 353.

\(^{388}\) *Id.* at 261-62, 189 N.E. at 354. "The Reserve System . . . was exclusively engaged in perfecting plans for the raising of capital and for the sale of trust funds by trust companies." *Id.* at 262, 189 N.E.2d at 354.

\(^{389}\) *Id.* at 262-65, 189 N.E. at 354-55.

\(^{390}\) *Id.* at 266, 189 N.E. at 355.

\(^{391}\) *Id.* at 274, 189 N.E. at 358.
similar allegations against Parker and in September of 1929 Bailey filed a lawsuit the purpose of which was to obtain an accounting from Parker.\textsuperscript{392} Bailey alleged that Parker "had appropriated large sums of money from the . . . [North American Trust Company] for his own purpose."\textsuperscript{393}

On March 7, 1932, the chancery court issued a decision in Bailey's civil action.\textsuperscript{394} The court found "that it appeared from [an] accounting that Parker was not then indebted or in any way liable to the North American Trust Company, but, on the contrary, the trust company was indebted to Parker in the sum of approximately $3000."\textsuperscript{395} The criminal prosecution was based upon the allegations that were made in Bailey's civil suit.\textsuperscript{396}

As noted above, an indictment was returned in 1931, and Parker was convicted of embezzlement in a bench trial.\textsuperscript{397} He appealed to the Illinois Supreme Court, which reversed the conviction:

\begin{quote}
The original suit . . . was filed long before the present indictment was returned. An accounting was demanded by the bill in behalf of the trust company from the Reserve System and the defendant. A certified public accountant was employed . . . . The books were audited, the account stated and no appeal prosecuted from the accountant's findings. The circuit court of Cook county proceeded to a hearing in that cause and rendered a final decree during the pendency of the case at bar against the defendant. That decree is in full force and effect. The circuit court had jurisdiction of the parties and the subject matter . . . . That decree specifically found that the Reserve System was not indebted to the North American Trust Company and the defendant was not indebted to the trust company, but, on the contrary, the trust company was indebted both to the Reserve System and to the defendant. That decree cannot be attacked collaterally in this proceeding. It is conclusive as to the matters adjudicated by the decree, one of which adjudications was the very accounts at issue in the proceeding here.\textsuperscript{398}
\end{quote}

\begin{flushright}
392. \textit{Id.} at 276, 189 N.E. at 359.
393. \textit{Id.} Parker's position with the Reserve System, and that company's dealings with the North American Trust Company, made it conceivable that he could have misappropriated monies belonging to the latter. \textit{Id.} at 260-80, 189 N.E. at 354-61.
394. \textit{Id.} at 280, 189 N.E. at 361.
395. \textit{Id.} at 281, 189 N.E. at 361.
396. \textit{Id.} at 288, 189 N.E. at 363.
397. \textit{Id.} at 260, 189 N.E. at 353.
398. \textit{Id.} at 288, 189 N.E. at 364. \textit{See also} People v. Cryan, 128 Misc. 358, 205
V. "CROSS-OVER" COLLATERAL ESTOPPEL: AN ANALYSIS AND A PROPOSAL

This section critiques conventional wisdom on "crossing-over" and outlines a proposal for employing this often-overlooked concept in representing those against whom criminal charges are pending or against whom charges are likely to be filed.

A. GENERAL ASSUMPTIONS: EXCEPTIONS AND LIMITATIONS

Condemnations of "cross-over" estoppel are predicated upon several generally and uncritically accepted assumptions. These assumptions are: (1) that the parties to the two proceedings are not identical; (2) that the different burdens of proof involved in civil and criminal proceedings preclude "miscegenative" estoppel; (3) that estoppel is barred by a failure to litigate the issues that are involved in the second proceeding; and (4) that a prior judgment of whichever character is inadmissible as evidence in a second proceeding of a dissimilar character.

But do these assumptions support a blanket condemnation of the phenomenon? Two of the assumptions imply the existence of converse propositions, i.e., that "crossing-over" is permissible (a) whenever the parties in the two proceedings are identical, and (b) whenever the issue involved in the second proceeding was fully litigated and determined in the first proceeding. Although "differing burdens of proof" is a favorite rationale for condemning "crossing-over", it, too, is not without exception.

1. Identity of Parties

The first assumption is an artifact from the era when the doctrine of mutuality reigned. But that doctrine has been rejected

N.Y.S. 852 (1924), which states:

It is quite clear that the principle of res adjudicata applies, irrespective of whether the criminal prosecution or civil action is first tried . . . . The term res adjudicata is a rule of evidence which holds that a fact which has once been adjudicated or determined by a court of competent jurisdiction must be accepted by the same parties as true in every other court.

128 Misc. at ___, 205 N.Y.S. at 854-55.

399. The discussion discards the fourth assumption, i.e., that adjudications are not admissible as evidence in subsequent proceedings of a dissimilar character, because this article is not concerned with the evidentiary use of civil and/or criminal judgments. The assumption is included in the listing above as a reminder of the confusion that often exists in this area. See, e.g., FREEMAN, JUDGMENTS, supra note 19, at § 653 ("Judgments in Criminal Cases as Evidence in Civil") and § 658 ("Judgments in Civil Cases as Evidence in Penal and Criminal Actions").

400. See generally supra Section IV.

401. See supra Section II.
in favor of a new test. The new test grants preclusive effect whenever the party against whom a judgment is asserted had a "full and fair opportunity" to litigate the issue in the original proceeding. This means that whenever a criminal adjudication is offered as collaterally estopping litigation of an issue involved in a civil proceeding, or vice versa, preclusion will be available as long as the party against whom the adjudication is asserted enjoyed a "full and fair opportunity" to litigate the issue in the original proceeding. The identity of the parties is irrelevant.

This proposition is evident in several of the decisions considered in Section IV(B), supra. Those decisions considered the preclusive effects of criminal convictions resulting from a jury verdicts of guilty or guilty pleas. The courts recognized that the dispositive issue with regard to preclusion is whether the issue was fully litigated in the criminal proceeding.

If the issue is essential for determining guilt or innocence, courts assume that the existence and availability of criminal sanctions provide an incentive sufficient to ensure that the matter was "fully and fairly" litigated, so that it is reasonable to allow an adverse determination to preclude the relitigation of what has already been decided. This also assumes that the party against whom preclusion is asserted was a defendant in the earlier proceeding.402

Although the rationale is not logically applicable to convictions based upon guilty pleas since there was no formal "adjudication" of

402. The state cannot, of course, use issue preclusion to establish any points in a prosecution against one who never had a 'day in court' on those issues. A judgment convicting one defendant of a particular crime would not even establish the fact that the crime was committed in a later prosecution of an accessory, or accomplice, or co-conspirator. Some courts have held, similarly, that a judgment of acquittal cannot be used to preclude issues in favor of a different defendant in a later prosecution... Other courts, however, have allowed the assertion of issue preclusion by the defendant in such cases. ... With the demise of the mutuality doctrine generally ... it has been suggested that any accused ... should be able to invoke the issue-preclusion effect of a prior criminal judgment to which he was not a party in the same way that a non-party might invoke the issue-preclusion effect of a civil judgment.

CASAD, RES JUDICATA, supra note 7, at 254-55. In Casad's scenario, a judgment of acquittal is being asserted against one who was a party to the earlier proceeding and who had the necessary incentive to "fully and fairly" litigate the issues therein, namely, the government. But no such rationale holds when the issue is asserting a criminal conviction against one who was not involved in the proceeding at which the conviction was obtained.
issues, the courts have elected to treat plea-convictions as functional equivalents of adjudicated convictions. The practice may be predicated upon the assumption that an analogue of adversarial adjudication occurs in negotiating plea bargains, so that it is reasonable to assume that such a bargain reflects actual conduct.

Acquittals have no similar effect. They cannot be asserted as establishing any of the issues involved in a particular prosecution. This rule results from the presumption that acquittals are more likely to reflect a failure of proof, the equivalent of the Scottish verdict of "not proven", than a definitive adjudication of innocence. Since special verdicts of degrees of innocence do not exist, acquittals are denied preclusive consequences.

More difficult issues arise in the opposite situation, i.e., when a civil adjudication is asserted as estopping the litigation of issues involved in a criminal proceeding. If the parties to the two proceedings are identical, then there is no reason to deny preclusion. If the government was a party to the civil proceeding, then one must assume that it "fully and fairly" litigated the issues in that proceeding and that there is, therefore, no obstacle to preclusion.

But what if the government was not a party to the civil proceeding? Can the judgment still be asserted in a criminal proceeding arising out of the same operative set of facts? Resolution of this question is more difficult, and requires an idiosyncratic, case-by-case analysis.

In two decisions discussed above, Terry v. State and People v. Parker, the government was not a party to a civil suit arising from the same facts that eventually produced a criminal prosecution. Both Terry and Parker were convicted despite the fact that they prevailed in the civil suit. State appellate courts reversed the convictions, holding that the civil judgments conclusively established facts inconsistent with a finding of guilt.

Terry and Parker notwithstanding, should the courts formulate a categorical principle to the effect that civil adjudications can have preclusive consequences for criminal prosecutions even when the government was not a party to the civil proceeding? A categorical rule could only encourage "collusive suits instituted solely to provide

403. See supra Section IV(B).
404. See supra Section IV(B).
405. See supra notes 374-81 and accompanying text.
406. See supra notes 382-98 and accompanying text.
407. See supra Section IV(B)(3).
a bar to prosecution," 408 a result that is not only inconsistent with the concept of policies that are responsible for the recognition of issue preclusion, but is also antithetical to the conclusions reached in this article. However, making preclusion dependent upon an independent judicial determination as to whether issues were "fully and fairly" determined in a civil proceeding should effectively discourage collusive civil suits. 409 If the government was a party to the civil proceeding, then this determination can ignore the possibility of collusion and concentrate upon whether a particular issue was actually litigated in that proceeding.

2. Differing Burdens of Proof

The "differing burdens of proof" involved in the civil and criminal proceedings is the most popular excuse for rejecting "cross-over" estoppel. Unfortunately, the excuse is often invoked ritualistically, with no explanation as to why its factors necessarily ban "crossing-over."

a. Criminal To Civil

Whenever a criminal judgment is asserted as having preclusive consequences for a civil proceeding, the permissibility of "crossing-over" will depend upon the nature of the judgment. If it is a conviction based upon a jury verdict, then there is no obstacle; the verdict represents as adjudication of guilt "beyond a reasonable doubt." Since the matters essential to that verdict have been established "beyond a reasonable doubt," there is no logical impediment to holding that they conclude these matters for a civil proceeding. 410

If the judgment is an acquittal, preclusion is barred because the judgment may establish nothing more than the failure of government's

408. Note, Res Judicata—What Judgments are Conclusive, 64 HARV. L. REV. 1376, 1378 (1951), discussed in MOORE'S FEDERAL PRACTICE, supra note 62 at ¶ 0.418[1].
409. This principle is derived from Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951). See supra Section IV(B) for discussion of the Emich case. In Emich the Supreme Court held that, in determining whether and to what extent a criminal adjudication should be accorded preclusive effect in a subsequent civil proceeding, the trial judge must examine the record in the criminal proceeding to ascertain the issues adjudicated thereby. See 340 U.S. at 571-73.
410. This occurs whenever a criminal judgment is followed by forfeiture proceeding to recovery money and/or property involved in, or associated with, the commission of the crime in question. In these proceedings, the accused's commission of that crime is not a matter that can be relitigated and the adjudication of guilt is taken as determining all facts essential thereto.
proof. But the government’s failure does not mean that a civil litigant cannot prevail under a less rigorous standard of proof. That being the case, preclusion is not available.411

b. Civil To Criminal

Whenever a civil judgment is asserted as precluding litigation in a criminal proceeding, the immediate conclusion is that the less-demanding civil standard of proof prevents such an assertion. This is the typical conclusion in decisions confronting this issue.

The conclusion is logically unassailable, for if it were otherwise then the government could institute a civil proceeding, obtain an adjudication against the defendant under the “preponderance of the evidence” standard and then present this judgment as establishing at least certain of the issues required for finding that the defendant was criminally liable for the same conduct. Tolerating this practice would deny the accused his right to be convicted by proof “beyond a reasonable doubt,”412 which is why it is universally condemned.

But what if the government institutes a proceeding the purpose of which is to establish the defendant’s civil liability based upon a certain set of circumstances, and the trier of fact finds for the defendant? Does this finding preclude relitigation of criminal liability arising from those same circumstances? It would seem so. Having failed to establish the existence of certain facts by a “preponderance of the evidence,” how can the government hope to establish their existence “beyond a reasonable doubt?”

No cases seem to have confronted this issue, but the conclusion is unimpeachable in its logic: Preclusion is denied to criminal acquittals because it is conceivable that they establish no more than a failure of proof at the heightened, criminal standard. One cannot infer a similar failure under the civil burden, since that burden is less demanding. But when there is a failure of proof under the more relaxed standard, is it not reasonable to infer a similar failure under the more vigorous requirements of the criminal standard? Is it not reasonable to accord preclusion based upon that inference?

According preclusion in this circumstance is supported by at least one of the cases examined in Section IV. People v. Klein involved an

411. Convictions by pleas of guilty are not adjudications and should not be accorded preclusive effect. Certainly, they do not represent findings “beyond a reasonable doubt.” See supra Section V(A)(1), which suggests that the preclusive effects accorded such judgments result from policy considerations and tradition rather than reasoned doctrines of res judicata.

412. See, e.g., W. LAFAVE & A. SCOTT, JR., CRIMINAL LAW § 1.8 (2d ed. 1986).
arbitration proceeding to which the government of the state of New York was a party; the arbitration resulted from allegations that two individuals had defrauded their employer, a New York state hospital.\(^4\) Having prevailed in the arbitration, the two were indicted on charges arising from these same allegations.\(^4\) The trial court dismissed the indictment because it found that the arbitration had conclusively adjudicated the matters implicated in the indictment in the defendant's favor.\(^4\)

*Klein* suggests that the government's failure in a civil proceeding can be used to bar the imposition of criminal liability arising from matters at issue in the original proceeding. If an individual, a potential criminal defendant, institutes a civil action against the government and prevails, will this have a similar effect?

The answer depends upon the issue litigated: If it is an issue of fact, then the outcome should be the same as when the government instituted a proceeding and lost. The inquiry in both instances is whether, having failed under the "preponderance of the evidence" standard, the government will be permitted an attempt to prevail under the "beyond a reasonable doubt standard."

Both *Terry* and *Parker* gave preclusive effect to factual adjudications resulting from the civil standard.\(^4\) Each adjudication absolved its defendant of civil liability for acts which became the predicate for a criminal indictment. The government was not a party to either proceeding which meant (a) that it bore no responsibility for the failure of proof, and (b) that it had not enjoyed an opportunity to "fully and fairly" litigate the issues involved therein. Nevertheless, the *Terry* and *Parker* courts found that criminal liability was precluded by the civil adjudication.

Although *Terry* and *Parker* did not require the government's presence in the original proceeding, the preferred rule should include such a requirement if only to discourage collusive litigation. But when is "the government" present? Is "the government" present whenever any of its agencies are parties to a particular action, or must there be some sort of institutional commitment before "the government's" presence will be recognized? It is conceivable, for example, that "the government" could argue that because a civil action was undertaken by an agency that did not have access to the investigative resources

\(^{413}\) See 96 Misc. 2d at 694, 410 N.Y.S.2d at 13.

\(^{414}\) Id.

\(^{415}\) Id.

\(^{416}\) See *supra* notes 374-98 and accompanying text.
of its criminal instrumentalities, the latter should not be precluded by the former's failure.

This argument illustrates the tenuousness inherent in the proposition that preclusion can be accorded whenever "the government" was a party to the original proceeding. The fatal irresolution is the identity of "the government." When will the failure of an office of consumer affairs estop the state's attorney from instituting criminal proceedings against the party who prevailed?

Is it fair to assume an identity of interests and free exchange of information among the disparate entities of federal, state and local governments? Presumably, estoppel is "level-specific," so that the federal government is precluded only by its own failures, the states by theirs, and so on. Unfortunately, the permutations within these categories are beyond the scope of this paper, and must be left for another day.

What if the issue adjudicated was an issue of law? Is there any obstacle to according preclusive effect to such an adjudication?

This was the issue in United States v. Baltimore & Ohio R.R. Co. and Washington Township v. Gould. Both held that a civil declaration as to the effect of a particular enactment was binding in a subsequent criminal proceeding. When the civil adjudication is concerned with a declaration of applicable law, there can be no obstacle to preclusion because burdens of proof are not the dispositive consideration.

It is conceivable that the declaration may be limited in its applicability either in terms of issues or parties affected, and so may not be isomorphic with the matters implicated in the criminal proceeding. But when this is the case, the denial of preclusion is the result of situation-specific considerations and not from the peculiar intricacies of adjudicative estoppel.

3. Identity of Issues

The final excuse given for rejecting "cross-over" estoppel is that a particular issue was not fully litigated and determined in the earlier

417. It may very well be that this assumption will not hold, and that parties to proceedings of the nature hypothesized above will have to ensure that they are not the objects of the unwanted attentions of various government entities, each of which is bent upon imposing its own characteristic variety of liability for identical activities. One tactic would be to join other government agencies as parties to the civil suit. This device could limit the individual's exposure to actions instituted by various governmental agencies, as when federal, state and local entities all believe that they have claims against a certain party.

418. 229 U.S. 242 (1913). See also supra notes 215-30 and accompanying text.

proceeding. This is not a principle with which one can quarrel, since it derives from the ultimate rationale for recognizing res judicata and collateral estoppel, i.e., the elimination of redundant litigation. If an issue has never been litigated, there can be no redundancy and, necessarily, no estoppel.

The difficulty lies in determining when a particular issue has been litigated. This question, the resolution of which is beyond the scope of this article, can become dreadfully complex when it arises in the context of civil-to-civil or criminal-to-criminal litigation. In these instances, the inquiry focuses on the correlations of two, generally related concepts, whether they be civil causes of action or criminal charges. But in "crossing-over," the "causes of action" are radically dissimilar and arise from very different conceptions of individual liability.

4. The Unconscious Assumption

There is a final, unspoken assumption that inheres in discussions of "crossing-over." This assumption is that the original civil litigation was a serendipitous occurrence. No commentator has suggested that a civil action might be a deliberate, calculated measure intended to generate an adjudication that can be asserted to bar criminal prosecution or some aspect thereof. Such an action would not be a "collusive suit." It would be a direct attack on an issue that is likely to be dispositive of a criminal prosecution, should one ensue. The attack is mounted against the government, which ensures an unbiased adversarialism sufficient to support preclusive consequences.

VI. Conclusion

This article has analyzed a concept which the author has denominated as "cross-over" collateral estoppel: "Cross-over" collateral estoppel refers to the situation that arises whenever an adjudication is asserted as collaterally estopping the litigation of issues involved in a proceeding of the opposite character. Although the situation arises with relative rarity, "cross-over" collateral estoppel is a recognized,
viable legal concept that can have significant consequences for the conduct of civil and criminal litigation.

This article has explored this concept in several sections. Sections I and II have offered a brief introduction to "cross-over" estoppel and have described the historical evolution of the legal proposition that a validly-entered judgment has issue-preclusive effects upon subsequent litigation involving identical factual issues. Section III has examined the role which issue preclusion, or collateral estoppel, plays in the criminal law, while Section IV has analyzed the peculiar phenomenon of collateral estoppel which "crosses over" from civil to criminal litigation, and vice versa.

Section V has offered a critique of the general assumptions that are responsible for the concept's relative obscurity, specifically: (1) differences in the identities of the parties; (2) different burdens of proof between civil and criminal proceedings; (3) failure, in the initial proceeding, to litigate the specific issues involved in the second proceeding; and (4) the fact that a prior judgment of one character (civil or criminal) is not admissible as evidence in a second proceeding of a dissimilar character. This section, and the article, concludes by arguing that these assumptions should not support a blanket prohibition against "cross-over" estoppel. Rather, the conventional wisdom as to the disutility of the concept must be rejected, to be replaced with a more analytical approach to the specific virtues which the concept can exhibit in an appropriate context.