Vanderbilt Law Review

Volume 19
Issue 3 *Issue 3 - June 1966*

Article 4

6-1966

Preclusion/Res Judicata Variables: Criminal Prosecutions

Allen D. Vestal

John C. Coughenour

Preclusion/Res Judicata Variables: Criminal Prosecutions

Allen D. Vestal[*] and *John C. Coughenour*[**]

Continuing his series of articles on preclusion/res judicata variables, Professor Vestal here discusses the application of issue preclusion to criminal prosecutions. He analyzes and weighs the effect of several variables, and concludes that these are the ones which should be considered by the courts in determining the preclusive effect of earlier judgments.

I. Preclusion: General Principles

The concept of res judicata/preclusion is presently well established in the law. Civil courts have been invoking this bifurcated doctrine for a great number of years, using both the bar against relitigation of a claim—merger or bar or claim preclusion—and the bar against relitigation of an issue—collateral estoppel or issue preclusion.[1]

In criminal litigation, similar doctrines have been invoked. Double jeopardy has precluded a second prosecution of an individual because of a single group of operative facts. This is parallel to claim preclusion which bars relitigation of a claim. When sequential prosecutions for different crimes occur there has been a bar against relitigation of a specific issue.[2] This is issue preclusion. Issue preclusion has also been invoked where civil and criminal proceedings are involved serially. With some frequency the courts have been willing to use preclusion/res judicata where the precluding judgment is criminal and the precluded litigation is civil. On the other hand, where a civil action is followed by a criminal prosecution, the courts have been more reluctant to use preclusion/res judicata. Since it is true that res judicata/preclusion is available in both criminal and civil litigation, there would seem to be no reason to bar the application of the doctrine

[*] Professor, College of Law, University of Iowa.
[**] Senior, College of Law, University of Iowa.

1. This article is a continuation of a series. See Vestal, *Preclusion/Res Judicata Variables: Adjudicating Bodies*, 54 Geo. L.J. 857 (1966); Vestal, *Preclusion/Res Judicata Variables: Nature of the Controversy*, 1965 Wash. U.L.Q. 158; Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 Iowa L. Rev. 27 (1964); Vestal, *Rationale of Preclusion*, 9 St. Louis U.L.J. 29 (1964); Vestal, *The Constitution and Preclusion/Res Judicata*, 62 Mich. L. Rev. 33 (1963).

2. See, *e.g.*, Sealfon v. United States, 332 U.S. 575 (1948); United States v. Oppenheimer, 242 U.S. 85 (1916); Harris v. State, 193 Ga. 109, 17 S.E.2d 573 (1941). See generally Lugar, *Criminal Law, Double Jeopardy and Res Judicata*, 39 Iowa L. Rev. 317 (1954).

simply because the initial litigation was in one court—criminal or civil—and the subsequent contest was in the other. The rationale underlying preclusion generally supports its application regardless of the type of litigation involved.

This article shall deal only with the matter of issue preclusion. Double jeopardy and claim preclusion are not within the scope of this treatment.[3]

It is helpful, in understanding the doctrine, to note its source. With very few exceptions,[4] this is a product of judgments handed down by courts. From the very early days of the common-law courts, there has been a reluctance to allow relitigation of matters once litigated. Early decisions involved civil cases,[5] criminal cases,[6] and claimed preclusion arising from a case in one court—criminal or civil—being asserted in the other.[7] The courts have developed and refined the doctrine so that

3. For an excellent discussion of double jeopardy, see Lugar, *supra* note 2. Two recent articles dealing with the complexities of double jeopardy are Note, *Double Jeopardy and the Doctrine of Manifest Necessity*, 20 N.Y.U. INTRA. L. REV. 189 (1965) and Comment, *Double Jeopardy, Multiple Prosecution, and Multiple Punishment: A Comparative Analysis*, 50 CALIF. L. REV. 853 (1962).

4. Louisiana and California have statutory provisions dealing with res judicata. The Louisiana statute reads as follows: "The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties; and, formed by them against each other to the same quality." LA. CIV. CODE art. 2286 (1952). The California statute provides: "A final judgment of any other tribunal of a foreign country jurisdiction, according to the laws of such country, to pronounce the judgment, shall have the same effect as in the country where rendered, and also the same effect as final judgments rendered in this state." CAL. CIV. PROC. CODE § 1915 (1961). It is interesting to note that India also has a statute dealing with preclusion. See INDIA CIV. PROC. CODE § 11 (1954).

5. Kenn's Case, 7 Co. Rep. 42, 77 Eng. Rep. 474 (K.B. 1607) (divorce action binding on persons not parties to the divorce proceeding); Bunting v. Lepingwell, 2 Co. Rep. 29, 76 Eng. Rep. 950 (K.B. 1585) (person not party to first adjudication bound by the judgment handed down). Blackham's Case, 1 Salkeld 290, 91 Eng. Rep. 257 (K.B. 1711) involved an action of trover. It was urged that a prior adjudication in probate was conclusive. The court said: "A matter which has been directly determined by their sentence cannot be gainsaid: Their sentence is conclusive in such cases, and no evidence shall be admitted to prove the contrary; but that is to be intended only in the point directly tried; otherwise it is if a collateral matter be collected or inferred from their sentence, as in this case . . . ." See also Clews v. Bathurst, 2 Strange 960, 93 Eng. Rep. 968 (K.B. 1734) and Dacosta v. Villa Real, 2 Strange 889, 93 Eng. Rep. 919 (K.B. 1734).

6. Rex v. Parish of St. Pancras, Peake 286, 170 Eng. Rep. 158 (N.P. 1794); see also King v. Matthews, 5 Price 202, 146 Eng. Rep. 582 (Ex. 1797) (condemnation of boat held conclusive in *scire facias* on a bond); Attorney General v. Wakefield, 5 Price 202, 146 Eng. Rep. 582 (Ex. 1797) (condemnation held conclusive on information against defendant).

7. In Boyle v. Boyle, 3 Mod. 164, 87 Eng. Rep. 106 (K.B. 1688) a man convicted of bigamy in marrying a woman and adjudged to be burned in the hand, brought an action in the spiritual court *causa jactitationis maritagii* against the same woman. It was held that the criminal adjudication was conclusive on issue of the bigamous nature of claimed marriage. Dominus Rex v. Vincent, 1 Strange 481, 91 Eng. Rep. 648 (K.B. 1721) ("Indictment for forging a will relating to personal estate; and on the

now it is well understood in its general meaning.[8] Since this is a judge-made doctrine, however, the courts apparently are more willing to formulate new applications and to expand its scope.[9]

Within the past few years it has been argued that the doctrine of res judicata/preclusion bears some constitutional imprimatur. The Supreme Court of the United States, when faced with the matter, refused to decide the question. Rather, the Court stated: "Despite its wide employment, we entertain grave doubts whether collateral estoppel [issue preclusion] can be regarded as a constitutional requirement. Certainly this Court has never so held. However, we need not decide that question. . . ."[10] Nevertheless, the constitutional argument is being asserted before the courts,[11] and there remains the possibility that the courts may in the future view preclusion as constitutionally based. Issue preclusion is almost universally accepted among common-law courts.[12] Should some court irrationally reject the doctrine, it might well be that the constitutional argument would become extremely attractive to the United States Supreme Court.

A. *Issue Decided in First Proceeding*

Issue preclusion exists as to those precise issues which have been raised and adjudicated in an earlier proceeding. It is not enough that a similar problem has arisen or that a related question was faced and decided. Issue preclusion can exist only if the precise issue has been previously litigated.[13] One of the most difficult problems, there-

trial a forgery was proved, but the defendaut producing a probate, that was held to be conclusive evidence in support of the will."). The courts, however, refused to follow this case. Rex v. Buttery, Russ. & Ry. 342, 168 Eng. Rep. 836 (C.C. 1818), also citing Rex v. Cibson, a decision in 1802 by Lord Ellenborough, iu which the argument of the prior adjudication was urged and rejected and "the prisoner was convicted and executed." See also Scott v. Shearmau, 2 Black. W. 977, 96 Eng. Rep. 575 (K.B. 1775) (coudemnation held conclusive in aetion of trespass brought against Custom-house officers).

8. See generally RESTATEMENT, JUDGMENTS §§ 41-55, 61-72 (1942). It is interesting to note, however, that the RESTATEMENT excluded the subject matter of this article from its scope. The Scope Note of the RESTATEMENT states: "The Restatemeut of this subject deals with the effect of judgments rendered in civil actions. It does not deal with the effect of a judgment in a criminal proceeding upon a subsequent civil action or crimiual proceeding, nor does it deal with the effect of a judgment in a civil action upon subscqueut criminal proceedings."

9. See Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 IOWA L. REV. 27, 76 (1964).

10. Hoag v. New Jersey, 356 U.S. 464, 471 (1958).

11. *Ibid.*; People v. Barnes, 49 Cal. Rptr. 470 (Dist. Ct. App. 1966); People v. Rosoto, 58 Cal.2d 304, 373 P.2d 867, 23 Cal. Rptr. 779 (1962).

12. *But see* LA. CIV. CODE art. 2286 (1952), which has been interpreted to prevent issue preclusion. See Shell Oil Co. v. Texas Cas Transmission Corp. 176 So. 2d 692 (La. Ct. App. 1964). See also New Orleans & N.E.R.R. v. Gable, 172 So. 2d 421 (Miss. 1965).

13. See Vestal, *Preclusion/Res Judicata Variables: Nature of the Controversy*, 1965 WASH. U.L.Q. 158, 159-71.

fore, is the determination of the precise issues established in the first proceeding.

When the first proceeding is a civil suit, it may be relatively easy to decide the issues that have been presented and litigated. If those issues were tried to a court, there may be findings of fact and conclusions of law which will be extremely helpful.[14] If the matter was tried to a jury, there may be interrogatories to the jury,[15] or a special verdict,[16] which will be determinative on the issue question. On the other hand, if the jury returned a general verdict, it may be rather difficult to determine the precise issues tricd and decided.

When the first proceeding is a criminal prosecution and the jury has returned a verdict of guilty or the court has found the defendant guilty, it may be possible to determine the facts which have been established. The established facts are those facts necessary to establish a case against the defendant. But where a number of issues are involved and a general verdict is returned, it is difficult to determine which specific issues have been established. The Supreme Court of the United States has stated:

> The difficult problem, of course, is to determine what matters were adjudicated in the antecedent suit. A general verdict of the jury or judgment of the court without special findings does not indicate which of the means charged in the indictment were found to have been used in effectuating the conspiracy. And since all of the acts charged need not be proved for conviction . . . such a verdict does not establish that defendants used all of the means charged or any particular one. Under these circumstances what was decided by the criminal judgment must be determined by the trial judge hearing the treble-damage suit, upon an examination of the record, including the pleadings, the evidence submitted, the instructions under which the jury arrived at its verdict, and any opinions of the courts.[17]

The court, after further discussion,[18] concluded:

14. See FED. R. CIV. P. 52(a).
15. See FED. R. CIV. P. 49(b).
16. See FED. R. CIV. P. 49(a).
17. Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 569 (1951).
18. The court said: "What issues were decided by the former Government litigation is, of course, a question of law as to which the court must instruct the jury. 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, and to limit to those issues the effect of that judgment as evidence in the present action. As to the manner in which such explanation should be made, no mechanical rule can be laid down to control the trial judge, who must take into account the circumstances of each case. He must be free to exercise 'a well-established range of judicial discretion.' Nardone v. United States, 308 U.S. 338, 342 (1939). He is not precluded from resorting to such portions of the record, including the pleadings and judgment, in the antecedent case as he may find necessary or appropriate to use in presenting to the jury a clear picture of the issues decided there and relevant to the case on trial." Emich Motors Corp. v. General Motors Corp., *supra* note 17, at 571-72.

> In summary the trial judge should (1) examine the record of the antecedent case to determine the issues decided by the judgment; (2) in his instructions to the jury reconstruct that case in the manner and to the extent he deems necessary to acquaint the jury fully with the issues determined therein; and (3) explain the scope and effect of the former judgment on the case at trial. The court may, in the interest of clarity, so inform the jury at the time the judgment in the prior action is offered in evidence; or he may so instruct at a later time if, in his discretion, the ends of justice will be served.[19]

If the record is such that it is impossible to ascertain the issues on which there should be issue preclusion, the person claiming preclusion has the burden of getting additional information which might help in making this determination. In *Basista v. Weir*,[20] a civil rights case, the Court of Appeals for the Third Circuit noted that even if the doctrine of collateral estoppel/issue preclusion might be applicable, the record of the earlier criminal prosecution was so insufficient that it was impossible to make any ruling on the matter.[21] The court then continued, "the transcript of the proceedings of Basista's trial before the Court of Quarter Sessions was not admitted in evidence and therefore there could be no collateral estoppel . . . . Perhaps with patient endeavor at the new trial a sufficient and adequate record . . . may be developed."[22] The duty would seem to fall on the litigant claiming preclusion to establish a record sufficient to show that the first court's decision rested on an adjudication of the issue on which preclusion is claimed. Absent a record showing that the issue was decided, and absent a sufficient showing by the party claiming preclusion, the court has no choice but to hold that there is no preclusion.

When the first proceeding is a criminal prosecution with a jury verdict for the defendant, it is very difficult to determine which issues were faced and decided. It may be that the jury has simply determined that the state has been unable to prove one necessary element of the crime beyond a reasonable doubt. On the other hand, the prosecution may have turned on a single fact in issue, such as the ownership of property; and finding of innocence means that this one issue has not been proved beyond a reasonable doubt. It may be that the defendant has relied on an alibi exclusively. If so, an acquittal means that the alibi has been established. This

19. *Id.* at 572.

20. 340 F.2d 74 (3d Cir. 1965).

21. The court said: "Putting aside any question as to the mutuality of parties . . . , and assuming *arguendo* that the doctrine of collateral estoppel would be available in actions arising under the Civil Rights Act under consideration in the circumstances at bar, we have not been furnished with a sufficient record of the proceedings of the Allegheny County Court of Quarter Sessions before which Basista was convicted of assault and battery upon the police officers . . . ." *Id.* at 81.

22. *Id.* at 81.

might have some preclusive effect in subsequent adjudications.[23] For example, if the defendant has controverted the assertion of the state and has also relied on an alibi, a jury verdict for the defendant will make it extremely difficult to determine what has been established in the criminal prosecution.[24]

In every prosecution in which there is a trial, proof of the state's charge and proof of the claimed defense, such as alibi, are elements to be considered. If there is a finding of not guilty, can it be said that the alibi stands established, or has the state merely been unable to prove its case beyond a reasonable doubt? Later claims by the defendant that the alibi has been established would be highly questionable.

B. *Incentive To Litigate*

One of the recurring problems which appears in this area of preclusion concerns the judgments of inferior courts.[25] It may be highly questionable whether an adjudication by a justice of the peace of the criminal charge of running a stop light should be preclusive in a subsequent suit for personal injuries involving thousands of dollars. When the entire matter is considered, it would seem reasonable to conclude that issue preclusion should flow only from adjudications which are significant for the litigants. Only then will there be the incentive to litigate fully. This would mean that criminal prosecutions for anything less than a felony should probably not have preclusive effect.[26]

---

23. See note 71 *infra* and accompanying text.

24. It is difficult to ascertain whether a general jury verdict of "not guilty" decides the issue of alibi. This can be seen in the case of State v. Feinzilber, 76 Nev. 142, 350 P.2d 399 (1960), wherein the court said: "Respondent on appeal argues in effect that, by reason of his defense of alibi, on the robbery charge, the jury's verdict acquitting him on that charge is res judicata as to the second charge. We find nothing in the record to substantiate this contention. Defendant was on trial before the jury on the charge of robbery. The fact that the jury returned a verdict of not guilty does not indicate that such verdict was based upon its recognition of, or giving credence to, the defense of alibi. Just as persuasively it may be said that the jury was not satisfied that the prosecution had established each of the essential elements of the crime of robbery beyond a reasonable doubt." *Id.* at 148, 350 P.2d at 403.

25. See generally Vestal, *Preclusion/Res Judicata Variables: Adjudicating Bodies*, 54 GEO. L.J. 857 (1966).

26. In Hurtt v. Stirone, 206 A.2d 624 (Pa. 1965) the Pennsylvania Supreme Court, by way of dictum, said: "In so deciding, we recognize a valid existing distinction in cases involving the record of conviction of relatively minor matters such as traffic violations, lesser misdemeanors, and matters of like import. Especially in traffic violations, expediency and convenience, rather than guilt, often control the defendant's 'trial technique.' In such cases, it is not obvious that the defendant has taken advantage of his day in court, and it would be unreasonable and unrealistic to say he waived that right as to a matter (civil liability), which was probably not within contemplation at the time of the conviction." *Id.* at 627.

C. *Parties Precluded*

Our jurisprudence is based upon an adversary system in which each individual is entitled to his own day in court. A person cannot lose under our system because of the judgment rendered against someone else. It is true that a person can be represented in litigation by someone else—as in a class suit—or have his interests so closely intertwined with a litigant[27] that a judgment may have preclusive effect against the absent person. These, however, are exceptions. Normally, a person is precluded as to an issue only if he has had an opportunity and an incentive to litigate.[28] This then, is a common thread which runs through all of the cases under examination.

The application of this rule is found in a recent federal habeas corpus case. The petitioner, on a plea of guilty, had been sentenced to life imprisonment for murder in 1946. Shortly after the criminal proceeding, the widow of the deceased brought an action against an insurance company to recover double indemnity for the death of her husband. The widow claimed that the death had occurred by accidental means in that the petitioner was "highly intoxicated and incapable of making a clear and sane judgment" at the time he fired the rifle. The jury determined that the death was caused by accidental means. In the subsequent habeas corpus action, the federal district court noted: "The Court takes judicial notice of the fact that the civil action in 1948 is not controlling upon any criminal determination of mental ability to determine right from wrong, or as to the factual situation surrounding the commission of a crime."[29] The court's determination, of course, was correct since neither party in the habeas corpus action was a party to the civil suit concerning the insurance policy. Although it might be true that the fact issue was the same, a non-party to the proceeding cannot be precluded because of the prior adjudication.

It should be understood that the refusal to invoke preclusion simply assures a person of an opportunity to litigate the issue. It has nothing to do with the question of which individuals can take advantage of the doctrine. Although some courts insist on mutuality of preclusiveness, the better view is that a party can claim preclusion even though preclusion could not be claimed against him.[30]

27. See Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 IOWA L. REV. 27, 59-66 (1964).

28. An examination of early decisions involving res judicata/preclusion reveals that the English courts, when the doctrine was in the formative stages, were not too concerned about extending preclusion beyond those who participated in the first proceedings. See, for example, cases cited in footnotes 5, 6 and 7 *supra*.

29. Lovedahl v. North Carolina, 242 F. Supp. 938, 944 (E.D.N.C. 1965).

30. See generally Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 IOWA L. REV. 27, 44-46 (1964).

D. *Sanctity of Criminal Determination*

It is entirely possible that, in the past, one consideration militating against the application of preclusion in serial litigation—criminal and civil—has been a general dissatisfaction with criminal proceedings. Because of a feeling that there was something suspect about criminal proceedings, some courts may have been reluctant to carry criminal adjudication through preclusion into the civil proceedings. In view of the low standards which existed at one time in the criminal courts and in the proceedings leading up to the criminal trial, this attitude might have been reasonable. However, the Supreme Court of the United States, and the highest courts of a number of the states, recently have measurably raised the standards of criminal justice.[31] This movement has given criminal justice some added respectability. Perhaps now civil courts will be more willing to recognize the propriety of proceedings in criminal courts and will be more willing to give preclusive effect to adjudications in criminal prosecutions.

II. POSSIBLE SITUATIONS WHERE CRIMINAL PROSECUTION INVOLVED

A number of variations are possible in sequential litigation involving at least one criminal prosecution: (1) Party acquitted in criminal prosecution; criminal action then commenced raising issue litigated in earlier criminal prosecution. (2) Party convicted in criminal prosecution; criminal action then commenced raising issue litigated in earlier criminal prosecution. (3) Party wins in civil action; criminal action then commenced against winning party in civil action raising issue litigated in civil action. (4) Party loses in civil action; criminal action then commenced against losing party in civil action raising issues litigated in civil action. (5) Party acquitted in criminal prosecution; civil action then commenced raising issue litigated in criminal prosecution. (6) Party convicted in criminal prosecution; civil action then commenced raising issue litigated in criminal prosecution. These situations are discussed below.

III. CRIMINAL PROSECUTION FOLLOWED BY SECOND CRIMINAL PROSECUTION

Issue preclusion may be asserted where there is a criminal prosecution followed by a second criminal prosecution. This includes the first two of the possible situations posed above. A court may state

31. See Escobedo v. Illinois, 378 U.S. 478 (1964); Malloy v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); People v. Dorado, 62 Cal. 2d 114, 40 Cal. Rptr. 264, 394 P.2d 952 (1964); State v. Neely, 239 Ore. 487, 395 P.2d 557 (1964).

that an issue is not open to litigation in the second prosecution because of the decision in the first prosecution. This is issue preclusion. Issue preclusion is to be distinguished from double jeopardy in which a man is put in jeopardy a second time for the same offense for which he had been earlier tried.[32] The double jeopardy concept involves the idea of an offense and the totality of the event; it is an approximation of claim preclusion—bar or merger. When the preclusion only encompasses an issue within the controversy, however, it is traditionally called collateral estoppel, or issue preclusion.[33]

Where both actions are criminal prosecutions, issue preclusion can be urged either on behalf of the state or on behalf of the defendant. It is desirable to examine this possibility first from the point of view of the defendant claiming preclusion from earlier acquittal, and then from the point of view of the state claiming preclusion from an earlier conviction.

A. *Preclusion Claimed by Defendant*

One of the initial problems faced in deciding the preclusive effect to be given to an acquittal in a subsequent criminal prosecution is that of ascertaining when there is an acquittal. It would seem that an acquittal with preclusive effect exists only after a defendant has been subjected to a criminal prosecution involving jeopardy. As has been noted recently:

> The preliminary hearing is not a trial in the sense the accused has been put in jeopardy nor is the discharge from custody upon failure of proof at a preliminary examination *res judicata* on the district attorney any more than a bind over for trial is *res judicata* of the defendant's guilt . . . . The doctrine of *res judicata* is not applicable to preliminary examination.[34]

Where a complaint was dismissed, the court, following the same general idea, stated:

> Defendant contends . . . that his previous *dismissal* . . . is *res judicata* as to his constitutional rights. This argument has been answered in *People v. Van Eyk* . . . wherein it was stated: "The untenable contention is made by defendant that, in view of the order setting aside the information in the action charging him with possession of narcotics, the doctrine of *res judicata* is available to establish that the evidence introduced against him here, which is the same as that involved in the prior action, was illegally obtained." *Section 999* of the Penal Code provides, "An order to set aside an indictment or information as provided in this chapter, is no bar to a future prosecution for the same offense." In *People v. Prewitt*, . . . where a magistrate

32. See generally Lugar, *supra* note 2.
33. See articles cited note 1 *supra*.
34. Tell v. Wolke, 21 Wis. 2d 613, 124 N.W.2d 655 (1963).

> at a preliminary hearing had dismissed a complaint, determining that the evidence was illegally obtained, we held, citing section 999, that *res judicata* does not apply in a subsequent prosecution.[35]

It would seem that anything short of an actual trial, wherein the defendant was put in jeopardy, followed by an acquittal would not have preclusive effect for the defendant. When there has been, in truth, an acquittal in the first prosecution, then there is a possibility that there may be preclusive effect given to the first judgment.

People v. Cornier[36] involved a claim of res judicata preclusion arising supposedly from an earlier prosecution in which the defendant was acquitted. The first prosecution was for driving without a license; the second was for operation of a motor vehicle while intoxicated. The court stated:

> The record clearly establishes that the question of whether or not the defendant was operating an auotombile was distinctly put in issue and was determined by the trial court and cannot be relitigated. While it is true, as heretofore stated, that double jeopardy does not attach in this case, nevertheless the rule of collateral estoppel would be a bar to the prosecution.[37]

In all such cases it must be remembered that one of the real difficulties in any such claim of preclusion is in determining the precise issues adjudicated in the first prosecution.[38] The Supreme Court recently was faced with the claim that an acquittal in prosecution I was preclusive in prosecution II. The Court acknowledged the argument of the defendant in the following terms:

> Petitioner further contends that his conviction was constitutionally barred by 'collateral estoppel.' His position is that because the sole disputed issue in the earlier trial related to his identifieation as a participant in the Gay's Tavern robberies, the verdict of acquittal there must necessarily be taken as having resolved that issue in his favor. The doctrine of collateral estoppel, so the argument runs, is grounded in consideration of basic fairness to litigants, and thus for a State to decline to apply the rule in favor of a criminal defendant deprives him of due process. Accordingly, it is claimed that New Jersey could not relitigate the issue of petitioner's 'identity,' and is thus precluded from convicting him of robbing Yager.[39]

The Court, however, held that preclusive effect would not be given to the acquittal in the first prosecution because the state court had held

35. 26 Cal. Rptr. 152 (Dist. Ct. App. 1963).
36. 42 Misc. 2d 963, 249 N.Y.S.2d 521 (Sup. Ct. 1964).
37. *Id.* at 969, 249 N.Y.S.2d at 528.
38. See notes 13-23 *supra* and accompanying text.
39. Hoag v. New Jersey, 356 U.S. 464, 470 (1958).

that "the trial of the first three indictments involved several questions, not just [petitioner's] identity, and there is no way of knowing upon which question the jury's verdict turned."[40] The Supreme Court indicated that it was bound in this situation by the decision in the state court.[41] Thus, there was no preclusion on an issue. Nonetheless, the Court acknowledged the "wide employment" of the concept of issue preclusion in criminal cases.[42]

In *Sealfon v. United States*,[43] the Court applied issue preclusion in a criminal prosecution following an earlier prosecution in which the defendant was acquitted. It held that an acquittal on a conspiracy charge precluded a subsequent prosecution for the commission of the substantive offense. The Court said:

> It has long been recognized that the commission of the substantive offense and a conspirarcy to commit it are separate and distinct offenses. . . . Thus, with some exceptions, one may be prosecuted for both crimes. . . . But *res judicata* may be a defense in a second prosecution. That doctrine applies to criminal as well as civil proceedings . . . and operates to conclude those matters in issue which the verdict determined though the offenses be different. . . .[44]

The Court examined the factual charges in the first and second prosecutions and concluded that ". . . the prior verdict is a determination that petitioner, who concededly wrote and sent the letter, did not do so pursuant to an agreement with Greenberg to defraud. So interpreted, the earlier verdict precludes a later conviction of the substantive offense."[45]

In recent years the courts of New York have been willing to apply the doctrine of issue preclusion where successive criminal prosecutions are involved and where an acquittal was obtained in the first. In *People v. Walker*[46] the defendant had been acquitted of a charge of disorderly conduct. The state then decided to prosecute for obstructing an officer. Both charges arose out of the same factual situation. In holding that the state could not prosecute on the second charge, the court noted:

> The difficulty here comes not by way of double jeopardy but on a kindred theory, namely that the prior adjudication of the facts in issue is binding in all subsequent prosecutions.

40. *Id.* at 471.
41. *Ibid.*
42. *Ibid.*
43. 332 U.S. 575 (1948).
44. *Id.* at 578.
45. *Id.* at 580.
46. 25 Misc. 2d 942, 212 N.Y.S.2d 936 (Dist. Ct. 1960).

> The record on the prior trial has been placed before me.
>
> I find that the legality of the arrest was in issue as well as the general resistance of the defendant, including his tantrums and struggling with the officer. The reversal by Judge Widlitz was 'on the law and on the facts.' This constituted an adjudication of those factual issues in favor of the defendant. In criminal, as in civil cases, those facts may not be again litigated.
>
> It therefore follows that the prosecution is foreclosed from litigating the essential issues framed by the information, namely the legality of the arrest and the justification of the general resistance by the defendant and the information must be dismissed.[47]

A similar situation arose in *People v. Litt-Chinitz, Inc.*[48] where the defendant in prosecution I had been charged with a crime under a statute governing going-out-of-business sales. The statute involved advertisements in newspapers in addition to the sale itself. After the defendant had been acquitted on charges in connection with certain sales, he was prosecuted in connection with additional sales involving the same newspaper advertisements. The court, indicating that the advertisement "is an integral part of the offense," found that the advertisement was the same for all offenses. It then concluded: "By the decisions [in the first prosecutions] acquitting the defendant, the prosecution is 'collaterally-estopped' from asserting that the advertisements [fall under the statute]."[49]

Recently the courts have demonstrated a great willingness to apply preclusion *against* a party who has had the opportunity and incentive to litigate the matter. Where the first prosecution has resulted in an acquittal, any issue preclusion would run against the government involved in the first prosecution. However, it would not be reasonable to hold that a government, not involved in the first prosecution, could be precluded by the proceeding. A government is entitled to its day in court against the alleged criminal. It should not be subject to issue preclusion because another government has been unsuccessful in prosecuting the defendant.

Courts generally are reluctant to force an individual to answer a criminal charge a second time. Double jeopardy is one barrier against this retrial;[50] issue preclusion or collateral estoppel is the effective adjunct preventing harassment. This important consideration is reflected in *State v. Little*,[51] a prosecution for the sale of

47. *Id.* at 944, 212 N.Y.S.2d at 938.

48. 38 Misc. 2d 864, 239 N.Y.S.2d 58 (Sup. Ct. 1963).

49. *Id.* at 868, 239 N.Y.S.2d at 61-62. The precedential value of this decision is somewhat undercut because the court held that it would have reversed the lower court on the merits regardless of the preclusion argument. *Id.* at 871, 239 N.Y.S.2d at 65-67.

50. See generally Lugar, *supra* note 2.

51. 87 Ariz. 295, 350 P.2d 756 (1960).

narcotics, wherein the prosecutor attempted to introduce evidence of an earlier alleged sale of narcotics in order to show a plan or scheme. The defendant, who had been acquitted of the charge of selling narcotics at the earlier trial, objected, claiming that the prior acquittal should bar the introduction of such evidence. The court barred the use of such evidence, stating:

> Here, the instant action is between the same parties as were involved in the prior action in which defendant was acquitted, but relates to an offense committed on a separate occasion, and, consequently, is for a different cause of action. Accordingly, the prior acquittal operates as a bar only as to issues actually litigated and determined in the first action. As the issue determined by the jury in the first action was whether defendant was guilty of selling narcotics illegally on the date there in issue, the general verdict of acquittal in that action would seem to bar introduction in the present action of any evidence tending to show the criminality of the earlier alleged sale.[52]

Recognizing that it is difficult to determine the exact matter decided by the judgment of acquittal, the court continued:

> We do not agree, however, that the effect of the prior acquittal should be determined by a strict application of the rules of res judicata or collateral estoppel. Although a verdict of acquittal may not necessarily mean that the jury found that the prior sale did not in fact take place, such a finding is a possible and indeed reasonable inference to be drawn from the verdict. Further, the relevance of the alleged prior sale as part of a plan or scheme may be doubted in the absence of proof of criminality of that prior sale. Thus, if the acquittal is based on an implied finding that the product sold was not sufficiently proved to be a narcotic or that defendant did not know that it was such, the sale could not reasonably be part of a plan knowingly to sell narcotics unless the jury in the instant action is permitted to find, contrary to the finding of the jury in the first action, that the defendant illegally and knowingly sold what was in fact a narcotic.[53]

The court then concluded that evidence concerning the earlier event should not be admitted on broader grounds. It considered the introduction of evidence of other crimes as a general proposition and concluded: "The fact of an acquittal, we feel, when added to the tendency of such evidence to prove the defendant's bad character and criminal propensities, lowers the scale to the side of inadmissibility of such evidence."[54] The court also noted that the allowance of such evidence regarding the earlier crime would, in fact, force the defendant to refute the charge for a second time. It concluded: "A

52. *Id.* at 305, 350 P.2d at 762.
53. *Id.* at 305, 350 P.2d at 762-63.
54. *Id.* at 307, 350 P.2d at 763.

verdict of acquittal should relieve the defendant from having to answer again, at the price of conviction for that crime or another, evidence which amounts to a charge of a crime of which he has been acquitted."[55]

The desire to protect defendants from harassment re-enforces the desire of the court to husband the time of the judiciary and militates in favor of the rule of issue preclusion. On the other hand, the difficulty in determining the decided issues[56] operates to circumscribe the application of the concept of issue preclusion.

B. *Acquittal Followed by Perjury Prosecution*

One recurring situation involving a criminal acquittal followed by a second prosecution with identical fact issues is a perjury prosecution because of statements made in the first trial. Typically the defendant is tried, testifies and is acquitted. The government then decides to prosecute him for perjury in the first trial. The defendant then asserts preclusion, claiming that his acquittal has the effect of determining that the defendant was testifying truthfully in the first proceeding.

In *People v. Houseman*,[57] the defendant was convicted of perjury committed in a prior prosecution in which he was acquitted. He then appealed claiming that there was res judicata/preclusion "of the matter contained in the indictment." In rejecting the argument, the court stated:

> The appellant contends that the issue of the verity of the records was adjudicated in the former municipal court trial and that the state is therefore estopped from prosecution under the charges in the indictment. The respondent replies that the charges there made related to the defendant's failure to keep records required by the State Narcotic Act, and that in finding the defendant not guilty of those charges it was not necessary for the jury to pass upon the truth or falsity of his testimony; that the jury may have disbelieved the testimony of the narcotic officers and may have acquitted the defendant for that reason; that it may have believed that the defendant was unjustly prosecuted because of the pending civil litigation involving the same subject matter. The theory that when a jury acquits a defendant in a criminal proceeding it thereby finds to be true that testimony of all witnesses called upon his behalf is not supported by reason or the common knowledge of mankind. Though there is some conflict in the authorities upon the question of whether the doctrine of res judicata applies in a criminal proceeding of this nature the great weight of authority is that it has no application.[58]

55. *Id.* at 307, 350 P.2d at 764.
56. See notes 13-24 *supra* and accompanying text.
57. 44 Cal. App. 2d 619, 112 P.2d 944 (Dist. Ct. App. 1941).
58. *Id.* at 623, 112 P.2d at 946-47.

Two of the clearest statements of the rationale underlying this idea are found in older decisions of the Supreme Courts of Illinois and Alabama. The latter court stated:

> The doctrine of res judicata springs out of and is founded upon the principle of estoppel. It rests upon the principle of public policy that there should be an end to litigation—the maxim is, *'Interest reipublicae ut sit finis litium.'* Keeping in view the basic principle and underlying reason —public policy—it is obvious that while public policy on the one hand demands an end of litigation, and hence puts forward the doctrine of res judicata, yet, on the other, it is manifest that every interest of public policy demands that perjury be not shielded by artificial refinements and narrow technicalities, for perjury strikes at the very administration of the law and holds the courts up to contempt if they allow the perjurer to go unwhipt of justice. In other words, while public policy on the one hand creates the doctrine of res judicata, it also, on the other, requires that perjurers be brought to trial. It would be a monstrous doctrine to hold that a person could go into a court of justice and by perjured testimony secure an acquittal, and because acquitted he could not be tried for his perjury; this would be putting a premium upon perjury and allowing a scoundrel to take advantage of his own wrong. Public policy does not guarantee immunity to criminals, and that is just what we are asked to do in extending the doctrine of res judicata to perjury.[59]

The Illinois court echoed the same idea stating:

> Justice cannot be administered through a system of courts unless there can be some assurance that the finding of the court is based upon testimony truthfully given. Any rule which tends to encourage the giving of false testimony threatens the peaceable and commendable settlement of controversies by the courts. The general proposition that one can escape punishment for perjury because he succeeded in inducing a jury to credit his false testimony is supported neither by authority nor by reason. If he could, then it follows that the law encourages parties—particularly defendants in criminal cases—to perjure themselves. . . . An accused's immunity from punishment for crime must not be made to depend upon the accomplishment of his acquittal in one prosecution by committing the crime for which he claims immunity.[60]

This result would seem to be eminently desirable. The testimony by the defendant in almost every case is but part of the total picture. Typically, the defendant is not the only witness. The state will have witnesses, and usually the defense will call persons other than the defendant to testify. With all of these variables, it is not reasonable to say that an acquittal establishes the truthfulness of the defendant's testimony. The interest of the state in the truthfulness of testimony

59. Jay v. State, 15 Ala. App. 255, 261, 73 So. 137, 139 (Ct. App. 1916).
60. People v. Niles, 300 Ill. 458, 463-64, 133 N.E. 252, 254 (1921).

given in a criminal trial is great indeed—so great that a trial for perjury should not be precluded by an acquittal which may have been obtained by false testimony.

More remotely, it has been urged that the acquittal of a defendant in the first prosecution bars the prosecution of any witness of the defense for perjury. The same reasoning would seem to apply to witnesses for the defendant as to the defendant himself. Since the defendant is not protected by the judgment of acquittal, it follows that the witnesses for the defendant are likewise not protected.

C. *Preclusion Claimed by the Government*

Although the cases are not very numerous, it would seem completely reasonable to hold that preclusive effect can be given to a conviction in a prosecution so that the matter cannot be relitigated in a subsequent prosecution.

Suppose a defendant is charged with stealing a horse. His defense is that the horse belongs to him—that he bought it on September 16, 1960, from X. If the defendant is convicted of stealing the horse, this would seem to establish that he did not buy it from X on that particular date. If the same defendant is charged a second time with stealing the same horse at a later time and defends on the ground that he bought the horse on September 16, 1960, it would seem that he is precluded by the first conviction. He cannot relitigate the matter of the alleged purchase of the horse from X. There would seem to be nothing surprising or unfair about this application of preclusion. The defendant has had his day in court and the fact has been adjudicated against him.

This concept of preclusion was applied in *State v. Sargood*,[61] where the court stated:

> The court received in evidence the record of the respondent's conviction on the charge of poisoning the colts, held that it was conclusive proof of the fact, and excluded testimony offered by the respondent to show the contrary; to all of which the respondent excepted. These rulings were correct. With some exceptions not material here, a judgment in a criminal case is admissible and conclusive evidence in another criminal case against the same defendant as to any fact determined by the judgment.[62]

In view of the willingness of the courts to apply the concepts of preclusion more broadly, a court may well hold that one governmental body can take advantage of a determination made in a criminal prosecution by another government. This is entirely consistent with

61. 80 Vt. 412, 68 Atl. 51 (1907).
62. *Ibid.*

the eroding away of the requirement of identity of parties which has been occurring in the last decade or so. The proper question is whether the precluded party has had the incentive and opportunity to litigate. If so, he is properly precluded by the adjudication.

A state, in the second proceeding, may be able to claim preclusion because of the conviction of the defendant in the prosecution brought by the federal government. After all the defendant has had his day in court on the matter; he has had the incentive to litigate, and the issue has been determined against him. This does not deprive the defendant of anything, for preclusive effect can be given a judgment only after the court has made a final determination in the matter.

IV. Civil Action Followed By Criminal Prosecution

Serial litigation may occur where the civil action is tried first, and then a criminal proceeding follows involving the same factual issue. An example might be a civil suit arising from an automobile accident where it is claimed that the defendant is liable because he was intoxicated at the time of the accident. A judgment either for or against the defendant might theoretically have some preclusive effect on a subsequent prosecution of the defendant for operating a motor vehicle while intoxicated. Ordinarily, a determination concerning an issue in the civil action will not be preclusive against the defendant in the subsequent criminal action because of the different standards of proof required in the criminal prosecution. It is unreasonable to hold that a determination made on the basis of the preponderance of the evidence could be preclusive against a defendant in a criminal action where matters generally must be proved beyond a reasonable doubt.[63]

As a statement of a general rule, this would seem to be reasonable. Under some circumstances, however, an adjudication in a civil action may be preclusive against the defendant in a criminal prosecution. The case of *Township of Washington v. Gould*[64] is such an exception. In the civil action the question of the constitutionality of a statute was put in issue, and it was decided that the statute was constitutional. In a subsequent criminal prosecution when the question of constitutionality arose—the defendant having been a party in the earlier civil action—the court stated:

> 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

63. See 2 Freeman, Judgments § 648 (5th ed. 1925).
64. 39 N.J. 527, 189 A.2d 697 (1963).

> 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.[65]

The court, therefore, held that there was preclusion arising from the civil action. This same reasoning could be applied in the case of alibi or insanity of the defendant if proof is required only in terms of a preponderance of the evidence rather than beyond a reasonable doubt. Thus, the civil judgment might be preclusive against the defendant in the criminal prosecution.

The other side of the coin is where the defendant in the criminal prosecution is claiming that some preclusive effect should be given to the decision in the civil action. Normally this would not be true because the state would not have been a party to the earlier civil action, and it would not be reasonable to hold preclusion against a party (the government), who was not involved in the first proceeding. Normally, preclusion can be asserted only against a party who has had the opportunity to litigate the issue.

Where the prosecuting government has been a party to the earlier civil action, it may be possible for the defendant to claim preclusion as to an issue litigated and decided in that 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; it is the government which is interested in establishing, by proof, certain allegations. 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 involving the government. This would seem to be reasonable.[66] As the Supreme Court of the United States has stated:

> We are 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 . . . . Nor need we quarrel with petitioner's premise that the standard of proof applicable in denaturalization cases is at least no greater than that applicable in criminal proceedings . . . . We assume, without deciding, that substantially the same standards of proof are applicable in the two types of cases.[67]

Although this statement was clearly dicta and not necessary for the

65. *Id.* at 535, 189 A.2d at 701.

66. Additionally, in the first proceeding it may have been that a fact has been adjudged between the government and the defendant. The doctrine of inconsistent positions might apply to this situation and prevent the government from claiming the opposite in the criminal prosecution. See Vestal, *Rationale of Preclusion*, 9 ST. LOUIS U.L.J. 29, 39 (1964).

67. Yates v. United States, 354 U.S. 298, 335-36 (1957) (dictum).

decision, the language cannot be overlooked. The Court is suggesting that a fact adjudication in a civil proceeding, where the government is a party, in favor of an individual may be preclusive against the government in a subsequent criminal proceeding.

V. Criminal Prosecution Followed by Civil Action

A. *Effect of Acquittal on Subsequent Civil Action*

When the first suit is a criminal prosecution resulting in an acquittal, the courts almost unanimously hold that there should be no preclusive effect given the acquittal in a subsequent civil action.[68] A recent case, which arose in Maryland, will serve to illustrate the application of this rule. In *United States v. Burns*,[69] the government brought an interpleader action to determine the distribution of the proceeds of a National Service Life Insurance policy. The widow of the insured had been acquitted of the murder of her husband on the theory of self-defense. In the interpleader action it was held that the acquittal was not preclusive, and the theory of self-defense which was accepted in the first suit was rejected. Despite the acquittal, the court found that the wife murdered her husband and was not entitled to the insurance proceeds.[70]

Although this result seems unduly harsh and illogical at first glance, there is a valid explanation which justifies it. In criminal actions the burden of proof is "beyond a reasonable doubt," while in civil actions the burden is proof by "a preponderance of the evidence." Therefore, an acquittal in the former action serves to show only that the government did not prove beyond a reasonable doubt that the defendant committed the crime. This does not mean that the more lenient civil burden of preponderance of the evidence could not have been satisfied. Therefore, a party in a subsequent civil action should not be precluded from attempting to prove an issue by a preponderance of evidence merely because the government did not support the burden of proof beyond a reasonable doubt.

Although this difference in burden of proof would seem to dictate generally against giving preclusive effect to acquittals, some cases have decided to the contrary. For example, a recent Iowa case held that the state was precluded, in a suit in equity to condemn liquor as a nuisance, by an acquittal of the same defendant on a charge of

68. See, *e.g.*, Hodoh v. United States, 153 F. Supp. 822 (N.D. Ohio 1957); Chief of Fire Dep't v. Sutherland Apts., Inc., 346 Mass. 685, 195 N.E.2d 536 (1964); Shatz v. American Sur. Co. of N.Y., 295 S.W.2d 809 (Ct. App. Ky. 1956).

69. 103 F. Supp. 690 (D. Md.), *aff'd*, 200 F.2d 106 (4th Cir. 1952).

70. *Ibid.*

selling or possessing the same liquor.[71] The court said:

> The verdict of 'not guilty' was an adjudication that [defendant] . . . did not sell, offer or keep for sale, possess and/or transport the alcoholic liquor which plaintiff now seeks to have condemned [in a proceeding in equity]. Are we justified in saying, in this case where it is sought to have the liquor condemned, that the verdict of the jury means nothing? The State of Iowa was the plaintiff in the criminal case and the verdict and adjudication went against it . . . We cannot say the verdict of the jury was not a determination of everything it purports to determine. . . . The jury held [defendant] . . . was not guilty. In view of that verdict, we hold the court was in error in ordering the liquor condemned.[72]

Although the court was correct in deciding that the government had an opportunity to litigate this issue in the first proceeding, the analysis stopped too soon. The court failed to take cognizance of the differing burdens of proof in criminal and civil actions. The fact that the government could not prove defendant's guilt of the criminal charge beyond a reasonable doubt does not mean that the same facts might not be proved by a preponderance of the evidence. For this reason, the case seems to be incorrect.[73]

There are, however, valid exceptions to this reasoning. The burden-of-proof explanation for the denial of preclusion in the acquittal-civil action situation would not seem to apply, in some states, to an acquittal based upon alibi or insanity. Some courts hold that these are affirmative defenses which the criminal defendant must prove by a preponderance of the evidence.[74] An acquittal which can be shown to have been based upon a defense of insanity or alibi might be a holding that the defendant proved this issue by a preponderance of the evidence. Therefore, when, in a subsequent civil action, the same issue is raised and the standard of proof is the same, the differing-standards-of-proof argument cannot be used to deny preclusion.[75] These defenses which were asserted and established as the basis for

71. State *ex rel.* Hanrahan v. Miller, 250 Iowa 1358, 96 N.W.2d 474 (1959).

72. *Id.* at 1362-63, 96 N.W.2d at 477.

73. It must be noted that on rehearing the Iowa court clearly recognized that it was going against the decided weight of authority. The court discussed the differing burdens of proof between criminal and civil actions, and still gave preclusive effect to the acquittal. State *ex rel.* Hanrahan v. Miller, 250 Iowa 1369, 98 N.W.2d 859 (1959). It seems that this only compounds the error.

The precedential effect of this decision is somewhat limited, since the parties to both proceedings were identical. It is to be doubted that the Iowa court would give preclusive effect to an acquittal if the parties in the second action were not identical.

74. See State v. Stump, 254 Iowa 1181, 119 N.W.2d 210 (1963) (alibi); Commonwealth v. Gates, 392 Pa. 557, 141 A.2d 219 (1958) (alibi); WIGMORE, EVIDENCE § 2501 (3d ed. 1940) (insanity); *Id.* at § 2512 (alibi and other defenses).

75. Of course, there may be a problem of separating the defense from a general jury verdict of acquittal. See note 23 *supra* and accompanying text.

an acquittal, may have some preclusive effect. The state, in subsequent civil litigation is bound by the prior determination based on a preponderance of the evidence.[76]

The aquittal-civil action situation also raises the "parties" question.[77] In the acquittal, the parties were the state and the criminal defendant. In the civil action, the parties may be a stranger to the criminal action and the acquitted defendant who seeks to derive preclusive effect from the acquittal. If the supposedly-precluded party was not present in the criminal action and had no opportunity to refute the acquitted party's defense, he should not be precluded from relitigating those issues. Freeman has said of this situation:

> One who has been damaged by some criminal act of another has a claim for remuneration, independent of the right of the public to proceed against the offender, and to inflict the penalty prescribed by law. This right to compensation in damages ought not to be, and is not, dependent on the success or failure of the prosecution conducted by the people. If it were, the party most injured would be prejudiced by a proceeding to which he was not a party, and which he had no power to control.[78]

This reasoning is sound when applied to the acquittal-civil action situation. As has been indicated,[79] preclusion should apply only against an individual who has had the opportunity and the incentive to litigate the issue in the earlier action.

Therefore, it seems that when an acquittal is followed by a civil action, the acquittal normally will be given no preclusive effect. The acquittal definitely has no preclusive effect against a stranger to the criminal proceeding.[80] Since he did not participate therein, he cannot

76. Furthermore, the defendant in the criminal action may find that he is bound by the criminal proceeding determination because of the doctrine of preclusion against inconsistent positions. See Vestal, *Rationale of Preclusion,* 9 St. Louis U.L.J. 29, 39 (1964).

77. See notes 27-30 *supra* and accompanying text.

78. 2 Freeman, Judgments § 654 (5th ed. 1925). It is interesting to note that in this section Freeman was talking about the preclusive effect of both acquittals and convictions. He stated that: "This right to compensation in damages ought not to be, and is not, dependent on the success or failure of the prosecution conducted by the people. If it were, the party most injured would be prejudiced by a proceeding to which he was not a party, and which he had no power to control." *Ibid.* This reasoning is faulty when applied to a conviction, for there the party most prejudiced by the proceeding, the convicted defendant, had every opportunity and incentive to litigate the issues fully.

79. See notes 27-30 *supra* and accompanying text.

80. Of course, this "parties" reason would not apply when the acquittal is followed by a civil action brought by the government, for the parties would have been the same in both actions. Consequently, the party to be prejudiced by preclusion had full opportunity and incentive to litigate the issues. However, the difference in burden of proof between criminal and civil actions should be sufficient reason to deny preclusive effect.

be bound. There is also generally no preclusive effect given to the acquittal vis-a-vis the government in the subsequent civil action because of the differing burdens of proof. The exceptions, concerning the defenses of alibi and insanity, in which the burden of proof may be a preponderance of the evidence, exist and should be recognized although they may not occur with any frequency. In these exceptional situations, the government may find itself bound.

B. *Effect of Conviction on Subsequent Civil Action*

Preclusion may possibly arise where there is a conviction in a criminal prosecution followed by a civil action [supposedly] involving an identical fact issue. It may be urged that a convicted defendant is precluded in the civil action because of the decision in the criminal prosecution.

An example of this would be the situation where a person is charged with operating a motor vehicle while intoxicated and is convicted. When civil litigation occurs concerning the accident out of which the criminal charge arose, the question of preclusion arises. Could a plaintiff claim that the issue of intoxication is already established by the prior criminal conviction? When faced with such a situation, the subsequent civil court can do one of several things. Evidence of the conviction may be excluded, admitted, or admitted as conclusive of the facts determined therein.

1. *Conviction Excluded.*—Traditionally, the courts have held that a conviction is not admissible in a civil action to prove issues determined in the criminal prosecution.[81] In some instances this inadmissibility is statutory in origin. For example, many states have statutes which make convictions for violations of motor vehicle laws inadmissible in civil actions.[82] However, even in the absence of such statutes, the preponderance of authority has been to the effect that convictions are inadmissible in subsequent civil actions.[83] These courts cite such reasons as the lack of mutuality of estoppel and the differences in the rules of evidence and procedure in civil and criminal actions.[84]

2. *Conviction Admitted.*—Many courts have held that although a

81. See, *e.g.*, Brown v. Moyle, 133 Colo. 29, 290 P.2d 1105 (1955); Smith v. New Dixie Lines, Inc., 201 Va. 466, 111 S.E.2d 434 (1959); Interstate Dry Goods Stores v. Williamson, 91 W. Va. 156, 112 S.E. 301 (1922). See also 2 FREEMAN, JUDGMENTS § 653 (5th ed. 1925); WIGMORE, EVIDENCE §§ 1346, 1671(a) (3d ed. 1940).

82. See, *e.g.*, ARK. STAT. ANN. § 75-1011 (1957); IOWA CODE § 321.489 (1962); MINN. STAT. § 169.94 (1961).

83. See authorities cited note 1 *supra*.

84. See Dimmick v. Follis, 123 Ind. App. 701, 111 N.E.2d 486 (1953) (dictum); Smith v. New Dixie Lines, Inc., *supra* note 81; Interstate Dry Goods Stores v. Williamson, *supra* note 81; 2 FREEMAN, JUDGMENTS § 654 (5th ed. 1925); WIGMORE, EVIDENCE § 1671(a) (3d ed. 1940).

conviction is inadmissible, if the conviction is based upon a plea of guilty it will be admitted in a civil action.[85] These courts reason that since a plea of guilty is a declaration against interest, there should be no objection to its admissibility.[86] It has been said, however, that this is not true in the instance of a plea *nolo contendre,* for the purpose of such a plea is to limit the use of the conviction in subsequent civil action.[87] The Model Code of Evidence went further and adopted the position that a conviction based upon either a plea of guilty or not guilty should be admissible to prove the facts decided therein in a subsequent civil action.[88] The Uniform Rules of Evidence adopted the same position by declaring that a conviction should be admissible as an exception to the hearsay rule.[89] Despite the urging of the Model Code and the Uniform Rules, only a few courts have allowed the admission of convictions to prove the facts decided.[90] The rule has been codified however, in section 5 of the Clayton Act.[91] That section provides that a conviction under the antitrust laws will be prima facie evidence in a subsequent suit brought under the antitrust laws against the same defendant "as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto . . . ."[92] Therefore, since civil actions can be brought under the antitrust laws, a prior conviction can be admitted in the civil action as prima facie evidence if the matter sought to be proven by the conviction would have been precluded in an action between the same defendant and the government.[93]

3. *Conviction Preclusive.*—The strongest effect which a civil court can give to an earlier conviction is to hold that it is preclusive upon all matters which were determined therein. Few courts have so held when the subsequent civil action includes a party who was a stranger to the criminal proceeding.[94] However, there are several cases in which the federal courts have given preclusive effect to a conviction

85. See, *e.g.,* Dunham v. Pannell, 263 F.2d 725 (5th Cir. 1959); Dimmick v. Follis, *supra* note 84; Book v. Datema, 256 Iowa 1330, 131 N.W.2d 470 (1964).

86. Authorities cited note 85 *supra.*

87. See notes 133-38 *infra* and accompanying text.

88. MODEL CODE OF EVIDENCE rule 521 (1942).

89. UNIFORM RULES OF EVIDENCE 63 (20). However, the applicability of this rule is limited to convictions for felonies.

90. See Davis v. Aetna Life Ins. Co., 279 F.2d 304 (9th Cir. 1960); Harlow v. Dick, 245 S.W.2d 616 (Ky. Ct. App. 1952); Greenberg v. Winchell, 136 N.Y.S.2d 877 (Sup. Ct.), *appeal dismissed,* 1 App. Div. 2d 1008, 154 N.Y.S.2d 835 (1st Dep't 1956); Alders v. Grow, 75 N.Y.S.2d 647 (Sup. Ct. 1947).

91. 69 Stat. 283 (1955), 15 U.S.C. § 16 (1964).

92. *Ibid.*

93. For an example of the application of this section, see Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951).

94. See note 81 *supra* and accompanying text.

obtained by the federal government in a later civil action brought by that government. Typical cases are those wherein the federal government obtains a conviction for willful evasion of income tax, and then sues in a civil action for a penalty, unpaid taxes or interest.[95]

The landmark case in this area is *Tomlinson v. Lafkowitz*,[96] which held that a criminal conviction for "willful evasion of income tax" precluded the convicted party from relitigating the issue of "fraud" in a subsequent civil action. In so holding, the court said: "We therefore find that the issue of the existence of a fraudulent intent is foreclosed by collateral estoppel arising from Sidney's conviction under section 145(b)."[97]

In *Moore v. United States*,[98] which had a similar factual situation, the Court of Appeals for the Fourth Circuit said:

> We reject as without substance the argument that the application of collateral estoppel deprives the taxpayer of his right to judicial review. The rationale of the doctrine of estoppel by judgment is that a competent tribunal has already given the question at issue full judicial review. Furthermore, the first proceeding being criminal in nature, it follows that the burden of proof met by the Government there was more exacting that than that required of it in this civil case.
>
> We therefore hold that this taxpayer is collaterally estopped to deny that he was guilty of fraud during the years in question.[99]

Thus, since the *Lefkowitz* decision, there seems to be little doubt that the federal courts will apply the doctrine of collateral estoppel in civil actions involving the issue of tax fraud where the same defendant was convicted earlier for willful evasion of income tax.[100]

Another case having the "government-government" element is *Local 167, Int'l Bhd. of Teamsters v. United States*.[101] That case involved a civil injunction suit for violation of the Sherman Act. The suit had

95. This type of case still involves the criminal-civil situation, even though the second suit seeks to enforce a penalty. It was held in Helvering v. Mitchell, 303 U.S. 391 (1938), that the 50% addition to tax following a deficiency due to fraud was remedial in nature, and not punitive.

96. 334 F.2d 262 (5th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965).

97. *Id.* at 266.

98. P-H 1965 FED. TAX SERV. (16 Am. Fed. Tax R.2d 6058) (4th Cir. 1965).

99. *Id.* at 6061. It has been argued that convictions in criminal tax cases are easier to obtain than recoveries in civil tax cases, and that, therefore, the conviction should not be determinative of any issues decided therein. See Balter, *A Ten Year Review of Fraud Prosecutions*, N.Y.U. 19TH INST. ON FED. TAX 1125, 1135-136 (1961); Gordon, *Income Tax Penalties*, 5 TAX L. REV. 138, 187-88 (1950); Nessen, *The Line Between Negligence and Civil Fraud: The Operation of Two Penalty Provisions Against Underpaying Taxpayers*, N.Y.U. 20TH INST. ON FED. TAX 1117, 1131, 1134 (1962).

100. See also Ames v. Commissioner, P-H 1965 FED. TAX SERV. (16 Am. Fed. Tax R.2d 6061) (4th Cir. 1965).

101. 291 U.S. 293 (1934).

been preceded by a criminal conviction of the same defendants for conspiracy to restrain and monopolize interstate commerce. In holding that the defendants were precluded from denying the conspiracy, the Supreme Court said:

> The judgment in the 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. The complaint in this suit includes the allegations on which that prosecution was based. The defendants in this suit who had been there convicted could not require proof of what had been duly adjudged between the parties.[102]

Other cases where convictions of federal crimes have been held preclusive in subsequent civil actions brought by the government against the same defendant include: conviction for conspiracy to defraud the United States Government followed by a civil suit under the False Claims Act;[103] conviction for violation of the federal Marihuana Tax Act followed by a civil suit for forfeiture of an automobile used in that crime;[104] conviction for attempt to bribe a military officer followed by a civil action under the Surplus Property Act to recover liquidated damages for the bribe;[105] and conviction for failure to pay a federal wagering tax followed by a civil action to collect the tax plus penalties.[106]

It is important to note that one of the primary problems—identity of parties—which has discouraged other courts from giving preclusive effect to criminal judgments is absent when the government brings successive criminal and civil actions against the same defendant because the parties to both suits are identical. When a conviction is followed by a civil action brought by a stranger to the criminal action, many states have seized upon the lack of identity of parties and have denied preclusive effect because of the consequent failure of mutuality of estoppel.[107] However, these same courts have given additional reasons for their refusal to extend preclusion to include criminal convictions. Among these reasons are the differences in procedure and rules of evidence in criminal and civil cases.[108] The only difference between the cases before these courts and the cases before the federal courts which have applied preclusion is the lack of

102. *Id.* at 298.
103. See United States v. Salvatore, 140 F. Supp. 470 (E.D. Pa. 1956); United States v. American Precision Products Corp., 115 F. Supp. 823 (D.N.J. 1953).
104. United States v. Gramling, 180 F.2d 498 (5th Cir. 1950).
105. United States v. Schneider, 139 F. Supp. 826 (S.D. N.Y. 1956).
106. O'Neill v. United States, 198 F. Supp. 367 (D.C.N.Y. 1961).
107. See cases cited note 81 *supra.*
108. *Ibid.*

identity of parties. It seems clear that the federal courts have rejected the arguments of difference in procedure and rules of evidence.

Furthermore, this distinction between the federal court decisions and the state court decisions—lack of identity of parties—is not sufficient reason to deny preclusion to a conviction when a stranger to the criminal proceeding brings a civil action against the convicted party. The identity-of-parties doctrine is correct to the extent that it requires identity of the *precluded* party in both actions. Beyond that, there seems to be no reason to limit the application of collateral estoppel because the party seeking preclusion was not a party to the first action.[109] If the precluded party had the opportunity and incentive to litigate the issue in a prior action, there seems to be no reason why he should be allowed to relitigate it. Consequently, the doctrine of issue preclusion/collateral estoppel should be as applicable to suits brought against a convicted party by a stranger to the criminal action as it is to a civil action brought against a convicted party by the same government which prosecuted the criminal action. Despite this reasoning, most courts which are willing to hold a conviction preclusive in a subsequent civil action involving a third party, are willing to do so only if the convicted party is attempting to benefit from his criminal wrongdoing in the civil action.

4. *Limitation of Preclusion to Cases Where Convicted Party Seeks To Benefit from His Crime.*—Two typical situations in which a convicted party might seek to benefit from his crime are those involving the application of so-called slayer's acts and those involving arson. In the slayer-act situation, a party who has been convicted of murdering a person whose life has been insured seeks to recover as the beneficiary under a life insurance policy. In the arson situation a party seeks to recover the proceeds of fire insurance on the property which he has been convicted of intentionally burning.

Generally speaking, there are two types of slayer's acts. One type speaks in terms of a "convicted" killer being unable to benefit by his wrong, and the other prevents "one who kills" from taking from the deceased's estate.

Where the statute uses the term "conviction," there should be little question of preclusion in a subsequent civil action by the killer. The conviction is merely evidence of the fulfillment of a requirement of the statute. A good example of such a holding is the case of *Rosenburger v. Northwestern Mutual Life Insurance Co.*[110] That case involved the application of the Kansas slayer's act which provided:

109. See Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 IOWA L. REV. 27 (1964).

110. 182 F. Supp. 633 (D. Kans. 1960).

"No person who shall be convicted of feloniously killing, or procuring the killing of, another person shall inherit or take by will or otherwise from such other person any portion of his estate.[111] Plaintiff, who had been convicted of killing the insured, sought to recover as beneficiary of the policy upon decedent's life. The court said: "In a civil action wherein [the slayer's act] . . . may have application, the only inquiry for the court is whether the party seeking property through the decedent was *convicted* of feloniously killing the decedent. The issue of feloniousness of the act has been closed to further inquiry . . . ."[112] The court went on to say: "[If] the person has been criminally convicted of feloniously killing the decedent, he is precluded by legislative mandate from benefiting from his act."[113] Since the conviction merely shows satisfaction of a statutory prerequisite, namely conviction, there should be no problem in finding preclusive effect under such a statute.

The problem is not so simple when the statute speaks in terms of "No slayer shall . . ." inherit. In that situation, a prior conviction less clearly places the killer within the terms of the statute. It could be argued that the issue of whether or not the convicted party was a "slayer" should be retriable in the subsequent civil action. However, this argument loses its persuasiveness when we consider the fact that the precluded party had every incentive and opportunity to litigate the issue of whether he killed the decedent and that it was found beyond a reasonable doubt that he had done so.

A case in point is *In re Kravitz's Estate*,[114] in which the Pennsylvania Supreme Court applied their slayer's act, providing that no "slayer" should inherit.[115] The court said:

> The interpretation of the slayer's act advocated by appellant, namely, that after a conviction of murder and judgment and sentence thereon—proved not as in civil cases by a fair preponderance of evidence, but by evidence beyond a reasonable doubt—the issue of 'murder' and of the 'guilt or innocence' of the convicted slayer can be relitigated anew by a jury . . . in a civil action . . . would make a mockery of the law and of justice.[116]

The court there applied the doctrine of issue preclusion and held that

111. *Id.* at 634.
112. *Ibid.*
113. *Id.* at 635. Another similar case is State *ex rel.* Zempel v. Twitchell, 59 Wash. 2d 419, 367 P.2d 985 (1962). In that case, a sheriff who had been convicted of willfully permitting a house of prostitution was precluded from relitigating the issue of his guilt in a quo warranto proceeding. A statute provided that the office of sheriff would be deemed vacated upon "conviction."
114. 418 Pa. 319, 211 A.2d 443 (1965).
115. *Id.* at 322, 211 A.2d at 445.
116. *Id.* at 328, 211 A.2d at 448.

the convicted party could not retry his guilt or innocence in the slaying of the insured.[117]

Another situation in which a convicted party attempts to benefit from his wrong arises when a convicted arsonist sues to recover the proceeds of a fire insurance policy on the property which he has been convicted of burning. A landmark case in this area is *Eagle Star Insurance Co. v. Heller*,[118] in which the Supreme Court of Virginia held that the convicted arsonist could not recover the proceeds of a fire insurance policy. However, the court clearly limited its holding to the situation where a convicted party is attempting to reap the benefit of his wrong in a subsequent civil action. The opinion expressly distinguished cases such as those in which a third party sues the convicted criminal for damages arising out of the crime. The court said:

> The precedents and the rules of exclusion which have been derived therefrom, which the trial court followed, have generally arisen in cases where one claiming to be injured by the criminal act of another had brought a tort action against the alleged wrongdoer for redress of that injury, most frequently in actions for personal injury—assault and battery. This, however, is not such a case. Here the plaintiff who brings this action has committed a felony, and seeks to recover the fruit of his own crime.[119]

117. It is interesting to note that the Pennsylvania statute read: "The record of his conviction of having participated in the wilful and unlawful killing of the decedent shall be *admissible in evidence* against a claimant of property in any civil action arising under this act." *Id.* at 322, 211 A.2d at 445 (Emphasis added.) The Pennsylvania court went beyond the statute, and held that the conviction was not only admissible, but was conclusive. This is the same result that had been obtained *prior* to the enactment of the statute. See Griefer's Estate, 333 Pa. 278, 5 A.2d 118 (1939).

118. 149 Va. 82, 140 S.E. 314 (1927).

119. *Id.* at 105, 140 S.E. at 321. Although the court thus limited the application of its decision to suits wherein a convicted party seeks to reap the benefits of his crime, there is ample language in the opinion which would be just as applicable to suits by third parties against the convicted criminal for damages arising out of the crime. For example, the court said: "[I]t should be remembered that the plaintiff in error, Heller, was a party to the criminal case, that he there had the fullest opportunity to make all of his defenses, that the identical question which he has reopened in this case was solemnly adjudicated in that case, and that it was there found beyond a reasonable doubt that he had burned his property for the purpose of collecting the insurance from this insurance company. Therefore, he should not be permitted again to raise that question by this collateral attack upon this judgment and thus to avoid its legal and logical consequences." *Id.* at 104, 140 S.E. at 321. The court went on to say: "We confess our inabilty to perceive, however, why the accused person himself should not be held either as bound or affected by the result of the prosecution, if adverse to him. He has had his day in court, with the opportunity to produce his witnesses, to examine and cross-examine the witnesses for the prosecution, and to appeal from the jndgment. So that the chief reason for holding that the plaintiff in the civil case is not bound by the prosecution fails as to the defendant, who has once litigated the identical question and had it adversely decided under conditions most favorable to himself—that is, in a prosecution in which he could not have been convicted unless the decisive fact, his guilt, had been shown beyond a reasonable doubt." *Id.* at 89, 140 S.E. at 316.

This same "benefit" limitation was reiterated by the Virginia court thirty-one years after the *Eagle Star* case when it refused to apply preclusion in a tort action because the convicted party was not attempting to benefit from his wrong.[120]

5. *A Broader Theory of Preclusion.*—A better-reasoned opinion would not rely upon the "benefit" analysis. Equally cogent reasons are available to preclude an arsonist from relitigating the issue of his guilt, but which would not be limited in application to the situation where the convicted party seeks to benefit from his wrong. If the convicted party has had every opportunity and incentive to litigate the issue of his guilt, and has had it decided against him so as to satisfy a burden of proof beyond a reasonable doubt, he should not be allowed to relitigate this same issue in a later civil action.

This reasoning, which would apply to both the "benefit" cases and those in which a third party sues the convicted criminal, can be seen in a series of Pennsylvania cases. These cases illustrate the application of the "benefit" limitation, subsequent rejection of that theory, and acceptance of a broader theory of preclusion applying to convictions whether or not the element of benefit is present. In *Mineo v. Eureka Insurance Co.*,[121] the Supreme Court of Pennsylvania held that a convicted arsonist could not recover the proceeds of a fire insurance policy in a later civil action.[122] The court distinguished cases which held a defendant's conviction in a criminal assault and battery case inadmissible in a civil action for damages, and therefore limited the application of *Mineo* to cases where a criminal seeks to benefit from his wrong.[123] Then, in *Pennsylvania Turnpike Com-*

120. Aetna Cas. & Sur. Co. v. Anderson, 200 Va. 385, 105 S.E.2d 869 (1958). See also Smith v. New Dixie Lines, Inc., *supra* note 81.

121. 182 Pa. Super. 75, 125 A.2d 612 (1956).

122. *Ibid.*

123. *Ibid.* However, the court used language which would justify giving preclusive effect to subsequent civil actions whether or not the benefit element was involved. The court said: "This case does not present a question which in our opinion can properly be disposed of by the application of some technical rule of evidence, such as a ruling that the first conviction is hearsay when admitted in the civil action. It is a question which turns upon the principle of estoppel. It is a matter of public policy. It is a matter of recognizing a judgment of a court." *Id.* at 85, 125 A.2d at 617. Other equally broad language can be found in the opinion, such as: "The insureds have had their day in court with the opportunity to produce their witnesses, to examine and cross-examine witnesses and to appeal from the judgment and to be acquitted unless the evidence established their guilt beyond a reasonable doubt. To now permit them to recover for the loss which they have been convicted of fraudulently causing would be against public policy. It would tend to destroy the confidence of the public in the efficiency of the courts; it would stir up litigation that would reopen tried issues; it would impress the public with the belief that the results of trials of the gravest nature were so uncertain that the innocent could not escape condemnation; and it would convince the public that the courts themselves have no confidence in the judicial processes." *Id.* at 85-86, 125 A.2d at 617-18.

mission v. United States Fidelity & Guaranty Co.,[124] the *Mineo* case was distinguished by the trial court on the ground that there the wrongdoer was taking an affirmative action to profit from his wrong. The court held that preclusive effect could not be given to a conviction for extortion in a subsequent civil action against the extorter for damages resulting from the crime. On appeal, this holding was reversed; and the court applied preclusion despite the absence of the "benefit" factor, thereby broadening the principle of preclusion.[125]

Two years later, the Pennsylvania court in *Hurtt v. Stirone*[126] again gave preclusive effect to a conviction in which the element of "benefit" was absent. The court said:

> The defendant was presented with more than ample opportunity to overcome the charges lodged against him while he was swathed in a cloak of presumed innocence. His case was presented to a federal grand jury [sic] which found him guilty of extortion beyond a reasonable doubt, upon the same facts which are now urged as the basis for his civil liability. To now hold that the effect of those jury determinations is *nil* not only would be to fly in the face of reason, but also would be a general indictment of the whole American jury system. We are not now prepared to say that the mere technical effect of the doctrines of res judicata and collateral estoppel regarding identity of parties is sufficient to overcome the policy which requires us to give conclusive effect to the prior conviction herein.[127]

The Pennsylvania court seems to have abandoned the limitation it formerly placed upon the preclusive effect of convictions in later civil actions, for it no longer requires that the convicted party be attempting to benefit from his crime in the civil litigation.

California has also refused to limit the application of preclusion to civil actions wherein the convicted party seeks to benefit from his wrong. In *Teitelbaum Furs, Inc. v. Dominion Insurance Co.*,[128] the California Supreme Court precluded insured corporations from recovering against theft insurers when the president of the corporations had been convicted of theft and the corporations were alter egos of the convicted party. The court said that the conviction precluded the corporations from relitigating the issue of whether the loss came within a clause excluding from coverage losses intentionally caused by the insured. Although the case clearly involved a factual situation which called for no more than a theory of preclusion limited to actions wherein the convicted party seeks to benefit from his crime,

124. 80 Dauph. 224 (Pa. C.P. 1961).
125. Turnpike Comm'n v. United States Fid. & Guar. Co., 412 Pa. 222, 194 A.2d 423 (1963).
126. 206 A.2d 624 (Pa. 1965).
127. *Id.* at 626.
128. 58 Cal. 2d 601, 375 P.2d 439 (1962).

the court did not mention the benefit element. Rather, a broader theory of preclusion, equally as applicable to civil actions brought *against* the convicted party, was applied.[129] The court thus impliedly rejected the "benefit" limitation.

This implication is also found in *Newman v. Larson*,[130] another recent California case. There it was held that a conviction for assault with a dangerous weapon precluded the convicted assaulter from relitigating the issue of his guilt in a subsequent civil action for damages arising from the crime. The application of issue preclusion resulted in an award of 25,000 dollars to the plaintiff. Certainly, the California court was not applying a theory of preclusion which was limited to actions in which the convicted party tries to benefit from his wrong, for that element was absent in this case.

Although some courts are only willing to give preclusive effect to a conviction if the convicted criminal seeks to reap the benefit from his crime, other courts are willing to go beyond this limitation. Even though the public policy behind the "benefit" analysis seems quite sound, there are other persuasive reasons for applying issue preclusion beyond this limitation.

6. *Problems Under the Broader Theory.*—If one accepts the premise that preclusion may be extended beyond the benefit theory to every situation in which the precluded party has had the incentive and opportunity to litigate, there are several relevant variables which must be considered. The precluded issue must be identical to an issue necessarily litigated and decided against the convicted party in the criminal action.[131] It is also necessary to examine the type of court involved because this is another variable which may affect the preclusive effect to be given the conviction.[132] The decisions of some courts of special or limited competency perhaps should not be entitled to preclusive effect. Another aspect of the criminal proceeding which should be examined before giving preclusive effect to the conviction is the plea entered by the criminal defendant. If the plea was *nolo contendere*, perhaps no preclusive effect should be given to the judgment in a later action.

The plea of *nolo contendere* is similar to a plea of guilty, but it is

129. *Ibid.* The court said: "[Defendant] was afforded a full opportunity to litigate the issue of his guilt with all the safeguards afforded the criminal defendant, and since he was charged with felonies punishable in the state prison . . . , he had every motive to make as vigorous and effective a defense as possible. Under these circumstances, we hold that any issue necessarily decided in a prior criminal proceeding is conclusively determined as to the parties if it is involved in a subsequent civil action." *Id.* at 606-07, 375 P.2d at 441-42.

130. 225 Cal. App. 2d 22, 36 Cal. Rptr. 883 (Dist. Ct. App. 1964).

131. See notes 13-24 *supra* and accompanying text.

132. See note 25 *supra*, and accompanying text.

generally used to limit the collateral effects of any admissions made by the plea in the instant prosecution. It combines the benefit of a guilty plea—avoidance of the time and expense of defending—with the benefits of a plea of not guilty—avoidance of the collateral effects of an admission of guilt. The *nolo contendere* plea is available in many states,[133] and it is expressly provided for in the Federal Rules of Criminal Procedure.[134] Such a plea probably should defeat the preclusive effect of the conviction since its purpose is to prevent adverse collateral effects upon the defendant.[135] A similar result has arisen in Clayton Act prosecutions, where a conviction upon a *nolo contendere* plea has been construed to be a "consent judgment" within the provision of the Clayton Act which denies preclusive effect to consent judgments.[136]

Although the *nolo contendere* plea would seem to be a good way for a defendant to avoid preclusive effects arising from a prosecution which he does not wish to defend, its availability is limited. Absent a statute, the plea is never available for capital offenses; and, in some states, the plea is limited to misdemeanors.[137] In addition, the court always has discretion to accept or reject the plea.[138] One element which might affect this discretion is the fact that the criminal defendant who wishes to use the plea is likely to be faced with a civil action involving the same issues. Perhaps the judge of the criminal action should be reluctant to accept a plea of *nolo contendere* if the obvious purpose of the plea is to avoid preclusion in a later civil action. On the other hand, there is some question whether it is proper for the criminal court to consider factors beyond the criminal

133. See generally Hayden, *The Plea of Nolo Contendere*, 25 MD. L. REV. 227 (1965). See also CALIF. PEN. CODE § 190.1 (1960). *But see* IOWA CODE § 777.11 (1962).

134. FED. R. CRIM. P. 11. The notes of the advisory committee on the rules contain the following statement: "The plea of nolo contendere has always existed in the federal courts. . . . While at times criticized as theoretically lacking in logical basis, experience has shown that it performs a useful function from a practical standpoint." *Id.* at n.2.

135. Hayden, *supra* note 133, at 227-28. There is no real authority for the proposition that a plea of *nolo contendere* will deny the preclusive effect of a conviction in a later civil action brought against the criminal by a stranger to the conviction. Only two states have applied collateral estoppel in such a situation, see notes 125-30 *supra* and accompanying text, and the *nolo contendere*/collateral estoppel problem has not yet arisen in those states. However, there appears to be no real distinction between those cases and the other cases in which it has been held that a *nolo* plea will prevent adverse collateral effects, such as the plea being considered an admission against interest. See State *ex rel.* Woods v. Thrower, 272 Ala. 344, 131 So. 2d 420 (1961); Commonwealth *ex rel.* Warner v. Warner, 156 Pa. Super. 465, 40 A.2d 886 (1945); Teslovich v. Fireman's Fund Ins. Co., 110 Pa. Super. 245, 168 Atl. 354 (1933).

136. 38 Stat. 730 (1914), *as amended*, 15 U.S.C. § 16(a) (1963). See Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366 (D. Minn. 1939).

137. See Note, Hayden, *supra* note 133, at 228-29; 52 CALIF. L. REV. 408, 410 (1964).

138. See FED. R. CRIM. P. 11; 5 MOORE, FEDERAL PRACTICE ¶ 11.07.

prosecution in exercising its discretion to accept or reject the plea.

If the plea in the criminal action was "guilty," rather than *"nolo contendere,"* a conviction upon that plea normally will be given preclusive effect,[139] but 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,[140] then perhaps the court should deny preclusive effect. At any rate, it would seem reasonable to allow the convicted party to attempt to explain the circumstances surrounding his plea of guilty before preclusive effect is given to a conviction obtained upon it.[141]

Another aspect of the conviction which may be inquired into before affording it preclusive effect is the possibility that it might be subject to collateral attack. Justice Traynor referred to this problem in the *Teitelbaum Furs* case when he said:

> It should be noted, however, that a criminal judgment that is subject to collateral attack on the ground, for example, that it was obtained through the knowing use of perjured testimony . . . or suppression of evidence . . . or that has been in effect set aside by a pardon based on the defendant's innocence. . . , is not res judicata in a subsequent action.[142]

The Pennsylvania Supreme Court, in *Hurtt v. Stirone*,[143] also stressed that, if the conviction is to be entitled to preclusive effect, it must not have been procured by "fraud, perjury, or some other error sufficient to upset [the conviction]."[144]

One recurring problem involves the situation where a conviction has been obtained in a prosecution and the defendant wishes to obtain a re-examination of the conviction through the use of the civil remedy

139. The Tax Court feels there is no question that preclusive effect can be given to a conviction obtained upon a plea of guilty. It has said: "It is not material that Arctic's conviction was based upon a guilty plea, because for purposes of applying the doctrine of collateral estoppel . . . there is no difference between a judgment of conviction based upon such a plea and a judgment of conviction rendered after a trial on the merits." Arctic Ice Cream Co. v. Commissioner, 43 T.C. 68, 75 (1964).

140. See, *e.g.*, Joe Yopp, 21 P-H Tax Ct. Mem. 545 (1962). *Cf.* United States *ex rel.* Carroll v. Murphy, 334 F.2d 65 (2d Cir. 1964).

141. Justice Traynor would not go so far. He has said: "When a plea of guilty has been entered in the prior action, no issues have been 'drawn into controversy' by a 'full presentation' of the case. It may reflect only a compromise or a belief that paying a fine is more advantageous than litigation. Considerations of fairness to civil litigants and regard for the expeditious administration of criminal justice . . . combine to prohibit the application of collateral estoppel against a party who, having pleaded guilty to a criminal charge, seeks for the first time to litigate his cause in a civil action." Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal. 2d 601, 605-06, 375 P.2d 439, 441 (1962) (dictum).

142. *Id.* at 607, 375 P.2d at 442 (dictum).

143. *Supra* note 126.

144. *Id.* at 626.

of habeas corpus. Superficially, this seems to be a situation which has been discussed earlier, that is, a criminal conviction followed by a civil suit in which it is claimed that certain matters cannot be relitigated. However, it must be recognized that in habeas corpus proceedings the courts are dealing with issues of the highest importance—the constitutional rights of the parties. The attitude of the courts toward such rights has been clearly revealed by the Supreme Court of the United States when it stated that "res judicata is inapplicable in habeas corpus proceedings."[145] This same attitude has been reflected in the decisions of state courts. Recently, a California court, when ruling on a petition for habeas corpus wherein there was some question about a violation of the provision against double jeopardy, stated: "The constitutional mandate is positive, and is a fundamental part of the 'Bill of Rights.' 'No person,' says the Constitution, 'shall be twice put in jeopardy for the same offense.' Art. 1, § 13. Stare decisis and res judicata must here yield."[146] The courts have consistently held that a factual adjudication in a criminal proceeding cannot suffice in a habeas corpus proceeding when the same factual issue is again put in litigation. The subsequent proceeding requires a re-examination of the evidence, and there must be an independent factual determination.[147] The courts are, and should be, primarily interested in the rights of the petitoner; thus, the doctrine of preclusion must give way before the superior interests being asserted by the petitioner.

In summary, before granting preclusive effect to a conviction, the following questions may be considered by the civil court: (1) identity of issues; (2) the relative competency of the adjudicating bodies; (3) the nature of the plea—whether not guilty, guilty, or *nolo contendere;* and (4) the susceptibility of the conviction to collateral attack. Also, it must be remembered that a conviction cannot estop the convicted party from relitigating the issues decided therein in a habeas corpus proceeding.

VI. PRECLUSION AS NORM: EFFECT ON PROSECUTION IN FIRST PROCEEDING

The present trend seems to be toward an acceptance of preclusion when applied in civil litigation subsequent to criminal prosecutions.

145. Fay v. Noia, 372 U.S. 391 (1963).

146. Application of McNeer, 173 Cal. App. 2d 530, 533, 343 P.2d 304, 306 (D. Ct. App. 1959).

147. See Haynes v. Washington, 373 U.S. 503 (1963); United States *ex rel.* Carrol v. Murphy, *supra* note 140; Lovedahl v. North Carolina, 242 F. Supp. 938 (E.D.N.C. 1965).

One of the factors which must be considered by the courts is the effect which this trend will have upon criminal prosecutions.

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. If he decides to defend, he must then determine how much effort to put into his defense. Since preclusive effect should be given only to findings in serious crimes, it might be questioned how much the additional element of possible preclusion will weigh in the thinking of the defendant. 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.

Does the injection of such a variable—possible preclusion—then become socially undesirable because of such possible ramifications. Clearly, some defendants will defend when, absent possible preclusion, they would plead guilty. It would seem that such cases would arise only infrequently; the more common situation would be that in which the defendant intended to litigate the matter fully, and the preclusive effect would not be a factor affecting his decision.

Admittedly, giving preclusive effect to criminal prosecutions will occasionally result in additional litigation, as where the criminal defendant decides to defend because of possible preclusion, and is acquitted, but the civil action is carried through anyway. The criminal trial is an increment attributable to the giving of preclusive effect. On the other side of the scale preclusion can save much time by avoiding retrial of factual issues which have been fully litigated in criminal prosecutions where the defendant has been found guilty. In balance, it would seem that society will be best served by providing for preclusion. This is especially true if the doctrine of preclusion is accompanied by the proviso that the defendant can explain his plea of guilty in the criminal prosecution to show that there was no intent to admit the facts and that the plea was entered because of other determinative factors. It would seem to be entirely reasonable to allow the supposedly precluded party to explain, in the second proceeding, why he entered a plea of guilty in the first proceeding.[148]

148. If it is felt that the granting of preclusive effect might have an adverse affect upon criminal prosecutions, then it might be desirable to mitigate the impact by allowing an adjudication in the prosecution which would have no preclusive effect. By agreement of the state and the defendant, it might be stipulated that a plea of guilty

VII. SUMMARY

During the past decade or so the courts in civil litigation have evidenced a greater willingness to apply the concept of preclusion/res judicata. In serial criminal prosecutions, there has been a marked willingness to apply issue preclusion. Difficulty, however, has arisen where both criminal and civil courts are involved in the claim of preclusion—that is, where there is a claim of preclusion in the civil action and the earlier proceeding was a criminal prosecution, or where there is a claim of preclusion in a prosecution and the earlier litigation was a civil suit. The legal profession should be able to formulate rational rules for preclusion so that there will be some understanding of the law being applied.

The primary inquiry is whether there was an opportunity and an incentive to litigate the issue fully. If these have been present, then it would follow that preclusive effect can be given to the earlier decision. Second is the problem of identifying the precise issue faced and settled in the first proceeding. This is a troublesome matter and in many cases it may be impossible to determine the precise issue adjudicated. If this is true, then there can be no preclusive effect given to the earlier decision.[149] Third is the problem of recognizing the standards of proof required in civil and criminal proceedings. Although this factor may be controlling in deciding whether there is preclusion, it is a variable which lends itself to easy and clear application; thus it should not be too troublesome. Fourth, there are certain overriding societal considerations which apply in some of the situations. The interest of society in the constitutional values protected by habeas corpus is such an interest.[150] When such interests are involved, the idea of preclusion may be forced to give way. Fifth, in the application of preclusion, the rights of individuals must be protected. All of this is simply to say that the problems involved in the situations under consideration lend themselves to analysis and factoring. Once the variables are identified, considered, and evaluated, the application or rejection of the doctrine of preclusion

was being entered only with the understanding that the finding was not to be used in a subsequent civil suit. See discussion of *nolo contendere, supra* at 133-37. The idea of limiting the impact of one suit on a subsequent suit is found in IOWA R.C.P. 128 which provides: "Any admission made by a party pursuant to such request [for admission] is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceedings." Allowing the state to control the preclusive affect of a criminal prosecution would seem to be subject to some criticism. Moreover, to allow an agreement negating preclusion disregards the underlying purpose and the great interest of society in the doctrine.

149. See notes 13-24 *supra* and accompanying text.

150. See notes 145-47 *supra* and accompanying text.

becomes a relatively easy matter. If one believes in the essential worth of the concept of preclusion—to save the time of the courts, to preserve the prestige of the courts, and to prevent the harrassment of litigants—then the time spent in analyzing the variables and applying the doctrine of preclusion is time well spent.