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The Issue-Preclusive Effect of a Verdict of Not Guilty by Reason of Insanity on a Subsequent Prosecution for Related Offense

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COMMENTS

THE ISSUE-PRECLUSIVE EFFECT OF A VERDICT OF NOT GUILTY BY REASON OF INSANITY ON A SUBSEQUENT PROSECUTION FOR A RELATED OFFENSE

I. INTRODUCTION

In the American criminal justice system, a defendant is frequently prosecuted in separate trials for two or more offenses stemming from a single criminal episode. Although the Supreme Court has not yet extended the Constitution's prohibition on double jeopardy to prohibit such successive prosecutions,[1] a defendant may be able to raise the defense of collateral estoppel and thus bar the relitigation of an issue previously determined in his favor.[2] An insanity acquittal presents just such an opportunity.[3] For example, when a defendant is acquitted in

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1. Blockburger v. United States, 284 U.S. 299, 304 (1932), *overruled by* Whalen v. United States, 445 U.S. 684 (1980). The Fifth Amendment's Double Jeopardy Clause states: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life and limb . . . ." U.S. CONST. amend. V. The Double Jeopardy Clause prohibits the duplicative prosecution of a defendant for the "same offense." *Blockburger*, 284 U.S. at 304. For double jeopardy purposes, an offense is the violation of a distinct statutory provision. *Id.* In determining whether two statutory provisions are distinct, the test is "whether each provision requires proof of a fact which the other does not." *Id.* (citing Gavieres v. United States, 220 U.S. 338, 342 (1911)). Double jeopardy is not implicated when each offense for which the defendant is prosecuted requires proof of a different statutory element. *Id.* The Supreme Court has recently held that the Due Process Clause of the Fifth Amendment "bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Grady v. Corbin, 495 U.S. 508, 521 (1990) (footnote omitted).

2. Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Ashe v. Swenson, 397 U.S. 436, 443 (1970); *see also* Harris v. Washington, 404 U.S. 55, 56 (1971) (quoting *Ashe*, 397 U.S. at 443); United States v. Seley, 957 F.2d 717, 720-21 (9th Cir. 1992) (quoting *Ashe*, 397 U.S. at 443). For an explanation of collateral estoppel, see *infra* text accompanying notes 39-97.

3. Consider, for example, the following hypothetical: Defendant (D) kidnaps victim (V) from V's house in Green County. D takes V to Orange County where he rapes her. The entire episode lasts two hours. D is indicted in Green County for kidnapping and in Orange County for

one trial by reason of insanity and then subsequently prosecuted for a related offense, the defendant may, under certain circumstances, raise the defense of collateral estoppel. In these situations, courts are sharply divided with regard to the issue-preclusive effect of an insanity acquittal on a subsequent prosecution for a related offense.[4]

This Comment focuses on the issue-preclusive effect of an insanity acquittal. It delineates a cohesive standard of issue preclusion by examining the often contradictory case law in light of the Supreme Court's recognition of criminal collateral estoppel as a constitutional safeguard.[5] Part II of this Comment compares the doctrines of civil and criminal collateral estoppel.[6] Part III examines the insanity defense and establishes a standard that courts may apply when confronted with a defendant's claim of estoppel in the context of an insanity acquittal.[7]

II. BACKGROUND

Courts currently recognize the dual doctrines of collateral estoppel and res judicata.[8] Although they are closely related, collateral estoppel and res judicata are distinct legal doctrines with similar origins.[9] Collateral estoppel is applied in both civil and criminal law.[10] The Supreme Court first recognized the doctrine of collateral estoppel in a

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rape. An Orange County jury acquits D on the rape charge finding D not guilty by reason of insanity. Green County then prosecutes D for kidnapping. D raises the defense of collateral estoppel. D contends that Green County is precluded from asserting his sanity because the issue of his sanity was conclusively determined by the Orange County acquittal.

4. *Compare* State v. Sanders, 229 So. 2d 288 (Fla. Dist. Ct. App. 1969) (prior acquittal not a bar to subsequent prosecution where no more than one hour separated the criminal acts) *and* Gray v. State, 329 A.2d 751 (Md. Ct. Spec. App. 1974) (insanity acquittal on one murder charge does not preclude the prosecution of a defendant on another charge of murder which occurred on a different day) *with* United States *ex rel.* Taylor v. Redman, 500 F. Supp. 453 (D. Del. 1980) (collateral estoppel bars subsequent prosecution where two hours separated criminal acts arising out of the same series of events) *and* Munn v. Pate, 489 P.2d 534 (Okla. Crim. App. 1971) (collateral estoppel bars subsequent prosecution where minutes separated criminal acts). For a discussion of insanity acquittal cases, see *infra* notes 118-225 and accompanying text.

5. *Ashe*, 397 U.S. at 445. For a discussion of *Ashe*, see *infra* note 65 and accompanying text and text accompanying notes 69-72.

6. *See infra* notes 8-114 and accompanying text.

7. See *infra* notes 115-245 and accompanying text.

8. *See, e.g.*, Ham v. Aetna Life Ins. Co., 283 F. Supp. 153, 154 (N.D. Okla. 1968) (court recognized separate doctrines of res judicata and collateral estoppel); Stadler v. Cherry Hill Developers, Inc., 150 So. 2d 468, 471 (Fla. Dist. Ct. App. 1963) (Florida law recognizes separate doctrines of res judicata and estoppel by judgment).

9. *See generally* Robert W. Millar, *The Premises of the Judgment as Res Judicata in Continental and Anglo-American Law*, 39 MICH. L. REV. 238 (1940) [hereinafter Millar, *Premises*].

10. Allan D. Vestal & John C. Coughenour, *Preclusion/Res Judicata Variables: Criminal Prosecutions*, 19 VAND. L. REV. 683, 683 (1966). In modern usage, the terms "collateral estoppel" and "issue preclusion" are synonymous. *See infra* note 22 and accompanying text.

civil context.[11] Later, the Court recognized criminal collateral estoppel as well.[12] The Court recently elevated criminal collateral estoppel to the status of a constitutional safeguard.[13] As an extension of the Constitution's double jeopardy protection, criminal collateral estoppel may be raised to preclude prosecution after an initial acquittal for a related offense.[14]

A. The Doctrine of Civil Collateral Estoppel

1. The History of Res Judicata and its Relationship to Collateral Estoppel

The literal meaning of res judicata[15] is "[a] matter adjudged."[16] A broad definition of res judicata[17] embodies the subsidiary rules of merger,[18] bar,[19] and collateral estoppel.[20] A narrower definition of the doctrine embodies only merger and bar.[21] In an effort to clarify this

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11. *See* Cromwell v. County of Sac, 94 U.S. 351 (1876).

12. *See* United States v. Oppenheimer, 242 U.S. 85 (1916).

13. Ashe v. Swenson, 397 U.S. 436 (1970). For a discussion of *Ashe*, see *infra* note 65 and accompanying text and text accompanying notes 69-72.

14. *Ashe*, 397 U.S. at 445.

15. Courts state the doctrine of res judicata as follows:

> [T]hat an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.

See Hastings v. Rose Courts, Inc., 373 S.W.2d 583, 587 (Ark. 1963), *cert. denied*, 377 U.S. 964 (1964) (quoting 30A Am. Jur. *Judgments* § 324 (1958)) (footnotes omitted); Norwood v. McDonald, 52 N.E.2d 67, 71 (Ohio 1943) (quoting 30A Am. Jur. *Judgments* § 324 (1958)) (footnotes omitted).

16. BLACK'S LAW DICTIONARY 1305 (6th ed. 1990). Alternative definitions of res judicata include: "a thing judicially acted upon or decided" and "a thing or matter settled by judgment." *Id.*

17. *See generally* United States v. Moser, 266 U.S. 236, 241 (1924) (doctrine of res judicata includes collateral estoppel); Southern Pac. R.R. Co. v. United States, 168 U.S. 1, 48 (1897) (the doctrine of res judicata includes a "right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . [which] cannot be disputed in a subsequent suit between the same parties or their privies . . . ."); Cromwell v. County of Sac, 94 U.S. 351, 352-53 (1876). For a statement of the doctrine of res judicata as applied in *Cromwell*, see *infra* text accompanying notes 41-42.

18. The doctrine of merger precludes subsequent litigation upon the same cause of action when the plaintiff prevailed on the merits in the initial suit. RESTATEMENT OF JUDGMENTS §§ 47, 68 cmt. a (1942).

19. The doctrine of bar precludes subsequent litigation upon the same cause of action when the defendant prevailed upon the merits in the initial suit. *Id.* §§ 48, 68 cmt. a.

20. For a discussion of the civil doctrine of collateral estoppel, see *infra* text accompanying notes 39-61.

21. *See, e.g.*, Ham v. Aetna Life Ins. Co., 283 F. Supp. 153, 154 (N.D. Okla. 1968) (court recognized separate doctrines of res judicata and collateral estoppel); Stadler v. Cherry Hill Developers, Inc., 150 So. 2d 468, 471 (Fla. Dist. Ct. App. 1963) (Florida law recognizes separate doctrines of res judicata and estoppel by judgment).

ambiguity, the drafters of the Restatement (Second) of Judgments adopted the rules of "claim preclusion" and "issue preclusion" to describe the preclusive effect of a prior judgment in a subsequent action.[22] Claim preclusion bars a subsequent action on the same claim.[23] Issue preclusion bars the relitigation of an issue that has been determined by a valid and final judgment in a subsequent action on the same or different claim.[24]

The res judicata concept of claim preclusion is a doctrine of Roman origin.[25] Originally, the doctrine allowed either party to a dispute to plead *exceptio rei iudicatae*[26] in order to bar a new action on a demand which was previously adjudged between the parties.[27] The doctrine's premise was the principle that "one suit and one decision was enough for any single dispute."[28] A plea of *exceptio rei iudicatae* did not merely bar the relitigation of the same claim, but also advanced the principle that the truth of the contents of a judgment must be assumed.[29]

The res judicata concept of issue preclusion evolved from the Germanic common-law doctrine of estoppel by record.[30] Originally, estoppel by record was a true form of estoppel created by allegation instead of by judgment.[31] The estoppel extended to all material issues decided by the verdict.[32] The estoppel also extended to all material admissions expressed or implied in the pleadings, provided that the verdict was rendered against the admitting party.[33] The rendition of a judgment gave force to the estoppel.[34]

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22. RESTATEMENT (SECOND) OF JUDGMENTS Introduction at 1 (1982). The Restatement (Second) adopts the terminology first suggested by Professor Allan D. Vestal in his article, *Preclusion/Res Judicata Variables: Parties*, 50 IOWA L. REV. 27, 27-28 (1964).

23. RESTATEMENT (SECOND) OF JUDGMENTS Introduction, at 1.

24. *Id.*

25. *See* WILLIAM W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 695-99 (Peter Stein ed., 1966); HENRY J. ROBY, ROMAN PRIVATE LAW IN THE TIMES OF CICERO AND OF THE ANTONINES 388-93 (Scientia Verlag Aalen, 1975) (1902).

26. "An exception or plea of matter adjudged; a plea that the subject-matter of the action has been determined in a previous action." BLACK'S LAW DICTIONARY 560 (6th ed. 1990). An alternative spelling is *exceptio rei judicatae*. ROBY, *supra* note 25, at 388.

27. BUCKLAND, *supra* note 25, at 697.

28. ROBY, *supra* note 25, at 388 (*singulis controversiis singulas actiones unumque judicati finem sufficere*).

29. ROBY, *supra* note 25, at 388.

30. Millar, *Premises*, *supra* note 9, at 238.

31. Millar, *Premises*, *supra* note 9, at 240; *see also* Outram v. Morewood, 102 Eng. Rep. 630, 633 (K.B. 1803) ("[I]t is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel.").

32. Millar, *Premises*, *supra* note 9, at 239.

33. Millar, *Premises*, *supra* note 9, at 239.

34. Millar, *Premises*, *supra* note 9, at 239.

The Roman-law doctrine of res judicata appeared in English law as early as the twelfth century.[35] The introduction of Roman-law res judicata, however, did not supplant the preexisting Germanic doctrine of estoppel by record.[36] Instead, the two doctrines coexisted and eventually merged into the general rule of res judicata.[37] Relying heavily on English law, the United States Supreme Court first recognized these dual doctrines in 1876.[38]

2. The Meaning and the Application of Civil Collateral Estoppel

The term "estoppel" is derived from the French word *estoupe* which, as it originally applied, prevented a party from denying the validity of a record, including his own deed.[39] Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."[40] Justice Field's holding in *Cromwell v. County of Sac*[41] provided the earliest clear statement of the rule of collateral estoppel as it applies in American law:

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

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35. Robert W. Millar, *The Historical Relation of Estoppel By Record To Res Judicata*, 35 ILL. L. REV. 41, 44 (1940) [hereinafter Millar, *Historical Relation*].

36. *Id.* at 44-45.

37. Millar, *Premises*, *supra* note 9, at 251.

38. Cromwell v. County of Sac, 94 U.S. 351, 353 (1876); see *infra* text accompanying notes 41-42.

39. WARREN FREEDMAN, RES JUDICATA AND COLLATERAL ESTOPPEL; TOOLS FOR PLAINTIFFS AND DEFENDANTS 2 (1988).

40. Ashe v. Swenson, 397 U.S. 436, 443 (1970); *see also* Harris v. Washington, 404 U.S. 55, 56 (1971); United States v. Seley, 957 F.2d 717, 720-21 (9th Cir. 1992).

Both Restatements embody equivalent statements of the rule. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."); *see also* RESTATEMENT OF JUDGMENTS § 68(1) (1942) ("Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action. . . .").

The Restatement (Second) rule of issue preclusion includes both direct and collateral estoppel. RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. b. Direct estoppel is the preclusion of an issue in a second action on the same claim. *Id.* Collateral estoppel is the preclusion of an issue brought on a different claim. *Id.*

41. 94 U.S. 351 (1876).

gated and determined. Only upon such matters is the judgment conclusive in another action.[42]

In *Parklane Hosiery Co. v. Shore*,[43] the Supreme Court recognized that collateral estoppel serves the "dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation."[44] Therefore, in civil matters, the doctrine of collateral estoppel is premised upon a respect for the finality of a judgment,[45] as well as a belief in the reliability of a finding.[46]

Although the elements of collateral estoppel have been expressed by courts in a variety of ways, these elements are well established. Essentially, a previously decided issue operates as a collateral estoppel if the issue is: (1) identical to the one sought to be precluded; (2) adjudicated on the merits; (3) determined by a valid and final judgment; and (4) essential to the prior judgment.[47] Additionally, the judge-made doctrine of mutuality of estoppel requires that both parties or their privies in the subsequent action be bound by the prior judgment in order for either party to assert the prior judgment as a conclusive determination of an issue in the subsequent action.[48]

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42. *Id.* at 353.

43. 439 U.S. 322 (1979). In *Parklane Hosiery*, stockholders of the Parklane Hosiery Company brought a class action against the corporation, its officers, directors, and stockholders alleging that the defendants issued a materially false and misleading proxy statement in connection with a merger. *Id.* at 324. Before the stockholder's action was tried, the Securities and Exchange Commission (SEC) filed a similar suit against the defendants. *Id.* At trial, the SEC prevailed. *Id.* at 325. The court found that the proxy statement was materially false and misleading. *Id.*

The plaintiff stockholders then moved for partial summary judgment contending that the defendants were collaterally estopped from relitigating the issues determined in the previous SEC trial. *Id.* Ultimately, the plaintiffs prevailed in their contention, even though there was a lack of mutuality between the parties. *Id.* at 327-28. The Supreme Court, in granting partial summary judgment, recognized the offensive use of collateral estoppel. *Id.* at 331-33. For a discussion of offensive collateral estoppel, see *infra* notes 58-61 and accompanying text.

44. *Parklane Hosiery*, 439 U.S. at 326. Arguably, offensive collateral estoppel is not supported by the policy of judicial economy. Offensive collateral estoppel allows a plaintiff to "adopt a 'wait-and-see' attitude" because a plaintiff may use a previous judgment against a defendant, but the same plaintiff will not be bound by a previous judgment in favor of that defendant. *Id.* at 329-30. *See generally* Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010 (1967).

45. *See* Crist v. Bretz, 437 U.S. 28, 33 (1978) (a primary purpose of the collateral estoppel doctrine is to preserve the finality of judgments); *see also* FREEDMAN, *supra* note 39, at 1, 25-26.

46. FREEDMAN, *supra* note 39, at 27 (collateral estoppel prevents inconsistent judgments which would undermine the integrity of the judicial system by adversely impacting the "widespread belief that all or most decisions are reliable").

47. Jonathan C. Thau, *Collateral Estoppel and the Reliability of Criminal Determinations: Theoretical, Practical, and Strategic Implications for Criminal and Civil Litigation*, 70 GEO L.J. 1079, 1082 (1982) (citing Haize v. Hanover Ins. Co., 536 F.2d 576, 579 (3d Cir. 1976)).

48. *See* Triplett v. Lowell, 297 U.S. 638, 642 (1936) (adjudication adverse to claims of a patent, while given great weight, does not preclude suit upon the same claims against another

In civil law, the mutuality of estoppel doctrine steadily declined following the California Supreme Court's abandonment of the rule in *Bernhard v. Bank of America National Trust & Savings Ass'n.*[49] In response to Justice Traynor's opinion in *Bernhard*, a number of state and federal courts rejected the mutuality requirement where the prior judgment was invoked defensively.[50] In keeping with *Bernhard*, the United States Supreme Court eliminated the mutuality requirement in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation.*[51]

In place of the mutuality of estoppel doctrine, civil courts have substituted the rule that a party against whom an estoppel is asserted must have had "a full and fair opportunity to litigate . . . ."[52] Primarily, the full and fair opportunity to litigate requirement reflects a concern for the reliability of the prior judgment.[53] In determining the degree of reliability of the previous judgment, many factors must be taken into account. These factors include whether: (1) the prior action was for small or nominal damages; (2) future actions were unforeseeable at the time of the prior action; (3) the verdict of the prior judgment is inconsistent with another judgment; and (4) the action affords procedural opportunities which were unavailable in the prior action.[54] Courts must also consider differences in the allocation of the burden of persuasion between the two actions.[55]

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defendant), *overruled by* Blonder-Tongue Labs., Inc. v. University of Ill. Found., 402 U.S. 313 (1971).

49. 122 P.2d 892, 894-95 (Cal. 1942).

50. *See, e.g.,* State v. Capital Airlines, Inc., 267 F. Supp. 298, 302-05 (D. Md. 1967); United States v. United Air Lines, 216 F. Supp. 709, 725-30 (E.D. Wash. 1962); Pennington v. Snow, 471 P.2d 370, 376-77 (Alaska 1970); Ellis v. Crockett, 451 P.2d 814, 822 (Haw. 1969).

51. 402 U.S. 313 (1971).

52. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 328 (1979) (quoting *Blonder-Tongue Labs., Inc.*, 402 U.S. at 329).

53. Thau, *supra* note 47, at 1085. The integrity of the legal system depends upon a belief in the reliability of decisions. *Id.* at 1085 n.29. Where the party had a full and fair opportunity to litigate, a retrial of the issues would not be likely to produce a more reliable result. *Id.* at 1085-86.

54. *Parklane Hosiery*, 439 U.S. at 330-31. The Restatement (Second) of Judgments also lists exceptions to the general rule of issue preclusion including: (1) the inability to obtain appellate review; (2) the differences in procedure, allocation of jurisdiction, or the burden of persuasion between the actions; (3) concern for the public interest or the interests of nonparties to the first action; (4) a lack of foreseeability that the issue would arise in a subsequent action; (5) a lack of incentive or opportunity to fully litigate in the initial action; and (6) situations where the issue is one of law and the actions are substantially unrelated, where an intervening change in the legal context warrants a new determination, or where an exception is necessary to avoid an inequitable administration of the law. Restatement (Second) of Judgments § 28 (1982).

55. Restatement (Second) of Judgments § 28(4). The difference in the allocation of the burdens of persuasion is especially relevant in "cross-over" estoppel where the estoppel operates to preclude the relitigation of an issue determined in a civil proceeding when the issue is raised in a subsequent criminal proceeding, or when an issue is determined in a criminal proceeding and is,

Collateral estoppel may operate either offensively or defensively.[56] Defensive collateral estoppel prevents a plaintiff "from asserting a claim that the plaintiff had previously litigated and lost against another defendant."[57] Offensive collateral estoppel allows a plaintiff to estop the relitigation of an issue which the defendant has litigated and lost against another plaintiff.[58] Initially, courts, while recognizing defensive collateral estoppel, were reluctant to adopt offensive collateral estoppel.[59] Nevertheless, following the Supreme Court's decision in *Parklane Hosiery*,[60] the clear trend has been to allow the use of offensive collat-

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thus, precluded in a subsequent civil proceeding. *See, e.g.*, Helvering v. Mitchell, 303 U.S. 391, 397 (1938) (acquittal on a criminal charge did not bar a civil action because of differing burdens of proof); United States v. Burch, 294 F.2d 1, 3 (5th Cir. 1961) (acquittal does not preclude a subsequent civil proceeding because proof in a criminal prosecution may not be sufficient to establish guilt beyond a reasonable doubt, yet the evidence may be sufficient to satisfy the civil preponderance of the evidence standard); United States v. Konovsky, 202 F.2d 721, 726-27 (7th Cir. 1953) (no preclusion where a criminal prosecution followed a civil suit because of differing burdens of proof); United States v. Burns, 103 F. Supp. 690, 691 (D. Md.) (acquittal in a criminal prosecution given no preclusive effect in a subsequent civil action because of the differing burdens of proof), *aff'd*, 200 F.2d 106 (4th Cir. 1952). *See generally* Susan Brenner, *"Crossing-Over:" The Issue-Preclusive Effects of a Civil/Criminal Adjudication upon a Proceeding of the Opposite Character*, 7 N. ILL. U. L. REV. 141 (1987).

56. *Parklane Hosiery*, 439 U.S. at 329.

57. *Id.*

58. *Id.*

59. *See, e.g.*, Nevarov v. Caldwell, 327 P.2d 111, 115-16 (Cal. Ct. App. 1958); Reardon v. Allen, 213 A.2d 26, 32 (N.J. Super. Ct. Ch. Div. 1965). *But see* Berner v. British Commonwealth Pac. Airlines, 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966); Evergreens v. Nunan, 141 F.2d 927, 929 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944).

60. In *Parklane Hosiery*, the Court recognized the use of offensive collateral estoppel in federal courts, but granted broad discretion to trial courts regarding the extent of its application. 439 U.S. at 331. In so doing, the Court acknowledged two arguments against the use of offensive collateral estoppel. *Id.* at 329-30. First, offensive collateral estoppel does not effectively promote judicial economy. *Id.* Defensive collateral estoppel promotes judicial economy by encouraging a plaintiff to join all potential defendants in the first action because it precludes him from relitigating the same issue in a subsequent action against a different adversary. *Id.* In contrast, offensive collateral estoppel encourages the plaintiff to adopt a "wait and see" approach. *Id.* at 330. The plaintiff has no incentive to intervene because he or she might benefit from a favorable judgment in an action by another plaintiff. *Id.* Thus, the overall amount of litigation will likely increase as a result of the operation of the offensive collateral estoppel doctrine. *Id.*

Another argument against offensive collateral estoppel is that it presents a greater risk of unfairness to the defendant. *Id.* at 330. A defendant does not always have an "incentive to defend vigorously" because the initial action may be for nominal damages or future actions may be unforeseeable. *Id.* Additionally, offensive collateral estoppel may be unfair if the judgment relied upon is inconsistent with previous judgments in favor of the defendant, or if the second action "affords the defendant procedural opportunities unavailable in the first action . . . ." *Id.* at 331.

In granting broad discretion to the trial court, the *Parklane Hosiery* Court adopted the Restatement's full and fair opportunity to litigate requirement. *Id.* at 331 n.16. Quoting the Restatement, the *Parklane* Court recognized that:

> [T]he distinct trend if not the clear weight of recent authority is to the effect that there is no intrinsic difference between "offensive" as distinct from "defensive" issue preclusion,

eral estoppel where the defendant has had a full and fair opportunity to litigate.[61]

B. The Doctrine of Criminal Collateral Estoppel

1. The History of Criminal Collateral Estoppel

Although collateral estoppel evolved as a principle of civil law, early state court decisions began recognizing collateral estoppel as a principle of criminal law as well.[62] In *United States v. Oppenheimer*, the Supreme Court first applied the collateral estoppel doctrine in the context of federal criminal law.[63] Although it recognized the doctrine of criminal collateral estoppel, the Supreme Court was initially hesitant to regard it as a constitutional requirement.[64] Only recently, in *Ashe v. Swenson*,[65] did the Court acknowledge the constitutional status of the

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although a stronger showing that the prior opportunity to litigate was adequate may be required in the former situation than the latter.

Id. at 331 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 88, Reporter's Note at 99 (Tent. Draft No. 2, 1975)). Accordingly, the *Parklane Hosiery* Court established the general rule that offensive collateral estoppel should not be allowed where "a plaintiff could have easily joined in the earlier action," or where the application would be unfair to the defendant. 439 U.S. at 331.

61. *See, e.g.*, Hunter v. Des Moines, 300 N.W.2d 121, 126 (Iowa 1981); Haran v. Board of Registration in Medicine, 500 N.E.2d 268, 272-73 (Mass. 1986); Local 2839 Am. Fed'n of State, County & Mun. Employees, AFL-CIO v. Udall, 806 P.2d 572, 576-77 (N.M. 1991); *but see* Zeidwig v. Ward, 548 So. 2d 209, 212 (Fla. 1989) (" '[T]he well established rule in Florida has been and continues to be that collateral estoppel may be asserted only when the identical issue has been litigated between the same parties *or their privies*.' ") (emphasis added in *Zeidweig*) (quoting Trucking Employees of N.J. Welfare Fund, Inc. v. Romano, 450 So. 2d 843, 845) (Fla. 1984)).

62. The earliest state court decision to suggest the application of criminal collateral estoppel was a 1909 New York trial court decision, People *ex rel.* Thaw v. Lamb, 118 N.Y.S. 389 (N.Y. Sup. Ct. 1909). In *Thaw*, the defendant was acquitted of murder because of insanity and subsequently committed to a hospital without a further sanity hearing. *Id.* at 390. In upholding the state's actions, the court refused to recognize the acquittal as a bar to the defendant's assertion of sanity subsequent to the commission of the crime. *Id.* at 392. Instead, the court created a presumption of insanity and shifted the burden to the defendant to prove that he had become sane since the commission of the crime. *Id.* This is the approach adopted by Colorado courts. *See infra* notes 213-25 and accompanying text.

63. 242 U.S. 85, 88 (1916). An early argument against criminal collateral estoppel was that the Fifth Amendment's double jeopardy protection provided a sufficient analogous safeguard for the criminal defendant. *Id.* at 87. In *Oppenheimer*, Justice Holmes rejected this argument, holding that the Fifth Amendment's double jeopardy protection was not intended to exclude that which is a fundamental principle of justice in civil law. *Id.* Justice Holmes, thus, acknowledged the principle of criminal collateral estoppel stating that "[i]t cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." *Id.*

64. Hoag v. New Jersey, 356 U.S. 464, 471 (1958) ("[W]e entertain grave doubts whether collateral estoppel can be regarded as a constitutional requirement."), *overruled by* Ashe v. Swenson, 397 U.S. 436 (1970).

65. 397 U.S. 436, 445 (1970). In *Ashe*, three or four unknown people robbed six poker players. *Id.* at 437. The state tried the petitioner for one of the robberies. *Id.* At trial, the petitioner was found "not guilty" due to insufficient evidence." *Id.* at 439. Six weeks later, the state

collateral estoppel doctrine as a principle embodied in the Fifth Amendment's prohibition on double jeopardy.

While collateral estoppel is a common-law doctrine, criminal collateral estoppel has become a statutory defense in many jurisdictions.[66] Following the Supreme Court's decision in *Ashe*, the Model Penal Code incorporated a general rule of defensive collateral estoppel.[67] Currently, eleven state statutory schemes include a similar provision.[68]

2. The Issue-Preclusive Effect of a General Verdict of Acquittal

The Supreme Court has held that a prior acquittal may bar the relitigation of an issue in a subsequent prosecution for a related offense.[69] While the Supreme Court has recognized the issue-preclusive effect of an acquittal on a subsequent prosecution, such an application of the collateral estoppel doctrine is complicated by the absence of specific legal findings in a general verdict of acquittal.[70] The Court addressed this complication in *Ashe* and noted that "the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with real-

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tried the petitioner for the robbery of one of the other poker players. *Id.* The petitioner argued that the second prosecution violated the Double Jeopardy Clause of the Fifth Amendment. *Id.* The Supreme Court agreed, holding that collateral estoppel is an essential part of the prohibition against double jeopardy. *Id.* at 445.

66. For a list of jurisdictions which statutorily recognize criminal collateral estoppel, see *infra* note 68.

67. MODEL PENAL CODE § 1.09(2) (Proposed Official Draft 1985). The Model Penal Code states that a subsequent prosecution is barred by a former prosecution for a different offense when

> [t]he former prosecution was terminated, after the information was filed or the indictment found, by acquittal or by a final order or judgment for the defendant that has not been set aside, reversed or vacated and which acquittal, final order or judgment necessarily required a determination inconsistent with a fact that must be established for conviction of the second offense.

Id. The Model Penal Code limits the scope of the estoppel to the preclusion of prior determinations of fact. *Id.* § 1.09 cmt. 5. *Compare* Model Penal Code § 1.08(2), which incorporates direct estoppel by barring a second prosecution for the same offense if the initial prosecution requires "a determination inconsistent with a fact or a legal proposition that must be established for conviction of the offense." *Id.* § 1.08(2).

68. *See* ARK. CODE ANN. § 5-1-113(2) (Michie 1987); COLO. REV. STAT. ANN. § 18-1-302(1)(b) (West 1990); DEL. CODE ANN. tit. 11, § 208(2) (1987); HAW. REV. STAT. § 701-111(2) (1985); ILL. ANN. STAT. ch. 38, para. 3-4(b)(2) (Smith-Hurd 1989); KAN. STAT. ANN. § 21-3108(2)(b) (1988); KY. REV. STAT. ANN. § 505.040(2)(a) (Baldwin 1988); N.J. STAT. ANN. § 2C:1-10(b) (West 1982); PA. STAT. ANN. tit. 18, § 110(2) (1983); TEX. CODE CRIM. PROC. ANN. art. 27.05(4) (West 1989); UTAH CODE ANN. § 76-1-403(1)(b)(iv) (1990).

69. *See* Sealfon v. United States, 332 U.S. 575, 579-80 (1948) (prior acquittal on a conspiracy charge precluded the prosecution of the defendant on a related aiding and abetting charge).

70. *See, e.g.*, United States v. Adams, 281 U.S. 202, 205 (1930) (prior acquittal did not bar a subsequent prosecution because the record was ambiguous in that it failed to clarify which of the two alternative grounds was the premise of the verdict). *See generally* Vestal, *supra* note 22, at 208-301.

ism and rationality."[71] In order to determine whether a previous judgment bars the relitigation of a particular issue, a court must "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."[72] Thus, an examination of the trial court's record of acquittal is essential to a determination of the issue-preclusive effect of a general verdict of acquittal.

C. *Distinctions Between Civil and Criminal Collateral Estoppel*

1. The Mutuality Requirement in Criminal Collateral Estoppel

Although the doctrine of criminal collateral estoppel evolved from the civil law, this doctrine is not entirely equivalent to its civil counterpart. While the mutuality requirement has gradually been abandoned in the civil context, the mutuality rule remains in force in the criminal context, especially where it is applied to defendants in subsequent actions.[73] The United States Supreme Court confirmed the force of the criminal law mutuality requirement in *Standefer v. United States*.[74]

In denying the application of nonmutual collateral estoppel, the *Standefer* Court noted that differing considerations exist between criminal and civil cases.[75] The *Standefer* Court first acknowledged that, in a criminal case, procedural limitations often render the government "without the . . . 'full and fair opportunity to litigate' that is a prerequisite of estoppel."[76] Furthermore, the *Standefer* Court questioned the

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71. Ashe v. Swenson, 397 U.S. 436, 444 (1970).

72. *Id.*

73. *See, e.g.*, State v. Kott, 636 P.2d 622, 626-27 (Alaska Ct. App. 1981), *aff'd*, 678 P.2d 386 (1984) (judgment favorable to one defendant should not bar the prosecution of a codefendant in a subsequent proceeding); People v. Nunez, 228 Cal. Rptr. 64, 69-70 (Cal. Ct. App. 1986) (collateral estoppel does not apply where alleged coconspirators are tried separately); Missouri v. Lundy, 829 S.W.2d 54, 56 (Mo. Ct. App. 1992) (motion to suppress evidence successfully raised by one defendant was not given collateral estoppel effect when raised by a second defendant because of nonmutuality). *But see* Jackson v. District of Columbia, 412 A.2d 948, 952 (D.C. 1980) (defendant may assert collateral estoppel against a plaintiff on issues litigated by the same plaintiff in a prior proceeding).

74. 447 U.S. 10 (1980). In *Standefer*, the defendant sought to apply the prior acquittal of the alleged perpetrator of an offense as collateral estoppel to his prosecution as an aider and abettor. *Id.* at 21-22.

75. *Id.* at 22.

76. *Id.* Significant procedural limitations include limitations on the prosecutor's discovery rights, prohibitions against directed verdicts and judgments notwithstanding verdict, prohibitions against obtaining a new trial where an acquittal was plainly contrary to the weight of the evidence, prohibitions against obtaining appellate review where a defendant is acquitted, and limitations on the use of evidence. *Id.* at 22-23.

reliability of a jury verdict of acquittal.[77] Recognizing that estoppel is premised upon an "underlying confidence that the result achieved in the initial litigation was substantially correct,"[78] the Court expressed its concern that juries have the power to acquit out of "compassion or compromise."[79] The Court's concern for the reliability of jury verdicts is heightened by the recognition that a criminal court is unable to have an acquittal set aside on appeal.[80] Thus, an unreliable verdict is of much greater impact in the criminal context than it is in a civil case.

Finally, the *Standefer* Court recognized the existence of differing policy considerations in criminal and civil cases. Unlike the situations in *Parklane* or *Blonder-Tongue,* where the proceedings provided "a forum for the ascertainment of private rights,"[81] the purpose of a criminal trial is to "vindicate the public interest in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant."[82] Thus, the application of criminal collateral estoppel furthers an "important federal interest in the enforcement of the criminal law" which is absent in cases where civil collateral estoppel is applied.[83]

Recent state court decisions suggest that the requirement of a mutuality of defendants in subsequent proceedings remains in full force.[84] In retaining the mutuality requirement, at least one state court followed the *Standefer* Court's policy rationale and emphasized the government's interest in the enforcement of the criminal law.[85] State court

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77. *See id.*

78. *Id.* at 23 n.18.

79. *Id.* at 22.

80. United States v. Scott, 437 U.S. 82, 91 (1978) ("A judgment of acquittal, whether based upon a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution . . . .").

81. *Standefer,* 447 U.S. at 25.

82. *Id.*

83. *Id.* at 24.

84. *See, e.g.,* State v. Kott, 636 P.2d 622, 626-27 (Alaska Ct. App. 1981), *aff'd*, 678 P.2d 386 (Alaska 1984) (a judgment favorable to one defendant should not bar the prosecution of a codefendant in a subsequent proceeding); People v. Nunez, 228 Cal. Rptr. 64, 69-70 (Cal. Ct. App. 1986) (collateral estoppel does not apply where alleged coconspirators are tried separately); Missouri v. Lundy, 829 S.W.2d 54, 56 (Mo. Ct. App. 1992) (motion to suppress evidence successfully raised by one defendant was not given collateral estoppel effect when raised by a second defendant because of nonmutuality); *but see* Jackson v. District of Columbia, 412 A.2d 948, 952 (1980) (defendant may assert collateral estoppel against a plaintiff on issues litigated by the same plaintiff in a prior proceeding).

85. *See, e.g.,* People v. Allee, 740 P.2d 1, 9 (Colo. 1987) ("Criminal cases also involve a consideration wholly absent in civil cases - the important state interest in enforcement of the criminal law. We are persuaded that this interest outweighs the concerns for crowded court dockets and consistency of verdicts - two important considerations favoring the use of collateral estoppel.").

decisions have also echoed the Supreme Court's lack of faith in the reliability of jury verdicts of acquittal.[86]

The mutuality requirement, as it applies to prosecuting parties, however, has lost its force in many jurisdictions.[87] The Model Penal Code provides for the application of collateral estoppel between jurisdictions and, thus, rejects "the traditional objection that the doctrine is inapplicable when different states are involved because the parties are not the same."[88] At least ten state codes now provide for estoppel between jurisdictions.[89]

2. Offensive Criminal Collateral Estoppel

Prosecutors invoke the doctrine of collateral estoppel infrequently because many jurisdictions require the joinder of all charges arising out of a single criminal episode or transaction.[90] Where prosecutors attempt to invoke the collateral estoppel doctrine against a defendant

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86. *See, e.g., Kott*, 636 P.2d at 626 (juries acquit out of compassion or compromise and the state has no right to appeal acquittal); *Nunez*, 228 Cal. Rptr. at 69-70 (echoing *Standefer's* concern for the reliability of an acquittal).

Accepting the arguable unreliability of a jury verdict of acquittal, a court would be more effective in safeguarding the government's interest in the enforcement of criminal law by utilizing a broader and more flexible requirement that a party have a full and fair opportunity to litigate than by utilizing a narrower requirement that the parties be identical or privies.

87. For a discussion of the mutuality requirement, see *infra* notes 88-89 and accompanying text.

88. MODEL PENAL CODE § 1.10 cmt. 5 (1985). Section 1.10 states:

> When conduct constitutes an offense within the concurrent jurisdiction of this State and of the United States or another State, a prosecution in any such other jurisdiction is a bar to a subsequent prosecution in this State [where] [t]he former prosecution was terminated . . . by an acquittal or by a final order or judgment for the defendant that has not been set aside, reversed or vacated and which acquittal, final order or judgment necessarily required a determination inconsistent with a fact that must be established for conviction of the offense for which the defendant is subsequently prosecuted.

Id. § 1.10. The Code's abandonment of mutuality as it applied to prosecuting parties is evidently premised upon the belief that the prosecuting parties in each jurisdiction have a sufficient incentive to prosecute vigorously. Vigorous prosecution ensures the reliability of the verdict and, thus, makes collateral estoppel proper.

89. *See* ARK. CODE ANN. § 5-1-114(2) (Michie 1987); COLO. REV. STAT ANN. § 18-1-303(1)(b) (West 1990); DEL. CODE ANN. tit. 11, § 209(2) (1987); HAW. REV. STAT. § 701-112(2) (1985); ILL. ANN. STAT. ch. 38, para. 3-4(c)(2) (Smith-Hurd 1989); KAN. STAT. ANN. § 21-3108(3)(b) (1988); KY. REV. STAT. ANN. § 505.050(2) (Baldwin 1988); MONT. CODE ANN. § 46-11-504(2) (1991); N.J. STAT. ANN. § 2C:1-11(b) (West 1992); PA. CON. STAT. ANN. tit. 18, § 111(2) (1983).

90. *See, e.g.*, ILL. REV. STAT. ch. 38, para. 3-3 (1977); People v. White, 212 N.W.2d 222, 228-29 (Mich. 1973), *overruled on other grounds*, People v. Robideau, 355 N.W.2d 592 (Mich. 1984); State v. Gregory, 333 A.2d 257, 263 (N.J. 1975); *see also* MODEL PENAL CODE §§ 1.07 and 1.08 (Proposed Official Draft 1985). Section 1.07 requires joinder in one trial of all charges which arise from the same criminal episode. *Id.* § 1.07 cmt. 1. Section 1.08 precludes prosecution of offenses in which the defendant could have been convicted in the first prosecution, thereby protecting a defendant who was placed in jeopardy of being convicted of a lesser offense. *Id.* § 1.08(1)(a) cmt. 1.

who was convicted in a prior proceeding, some courts have refused to recognize the collateral estoppel rule because of its impact on the defendant's constitutional rights, including the right to a trial by jury.[91] Other courts have accepted the application of the rule of offensive collateral estoppel by a prosecutor because of the fact that the first prosecution affords the defendant all of his or her constitutional rights with respect to the precluded issues.[92] The question of whether a prosecutor may invoke collateral estoppel against a defendant has not yet reached the Supreme Court. The Court's decision in *Parklane Hosiery*, however, suggests that offensive criminal collateral estoppel is appropriate, so long as the defendant has had a full and fair opportunity to litigate the previous charge.[93]

3. The Defendant's Motion for Separate Trials: Is it a Waiver of Collateral Estoppel?

A split of authority exists with regard to the issue of whether a defendant should be precluded from raising the defense of collateral estoppel in a second prosecution when he or she has moved for separate trials.[94] Some authorities suggest that a defendant's motion for separate trials constitutes a waiver of his or her collateral estoppel rights.[95] The Model Penal Code does not regard a defendant's motion for separate trials as a waiver of his or her collateral estoppel rights.[96]

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91. *See, e.g.*, United States v. Panetta, 436 F. Supp. 114, 122 (E.D. Pa. 1977), *aff'd*, 568 F.2d 771 (3d. Cir. 1978) (defendant allowed to relitigate an issue previously determined against him because precluding him from relitigating would infringe upon his constitutionally protected right to a jury trial); State v. Stiefel, 256 So. 2d 581, 585 (Fla. Dist. Ct. App. 1972) (defendant convicted of drunk driving was not precluded from relitigating the issue of his sobriety in a subsequent manslaughter prosecution involving the same accident because "due process considerations . . . assure an accused a jury trial on *all* issues relating to each element of a given criminal charge"). *See generally* Vestal, *supra* note 22, at 312-18.

92. *See, e.g.*, United States v. Colacurcio, 514 F.2d 1, 6 (9th Cir. 1975) (defendant's constitutional rights were not violated with respect to facts which were essential to the determination of charges against him because the defendant had the opportunity to cross-examine all witnesses and was accorded a trial by jury).

93. *See* Vestal, *supra* note 22, at 320. In *Parklane Hosiery*, the Court held that the defendant had lost his right to a civil trial by jury on the issues determined in a previous action in equity. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 337 (1978).

94. MODEL PENAL CODE § 1.09 cmt. 5, n.46 (1985).

95. *See* Jeffers v. United States, 432 U.S. 137, 152 (1977) (successive prosecutions for a greater and a lesser offense are permitted where the defendant has moved for separate trials); *In re* A.L.S., 377 A.2d 1149, 1151 (D.C. 1977) (defendant waives collateral estoppel by moving for separate trials). The Uniform Rules of Criminal Procedure, § 472(b) states:

> A defendant's motion for severance of offenses precludes him from asserting the collateral estoppel defense . . . unless the motion was made . . . on the specified ground that the trier of fact would be unable to distinguish the evidence and apply the law intelligently as to each offense because of the number of offenses charged and the complexity of the evidence.

UNIFORM R. CRIM. P. § 472(b) (1974).

96. MODEL PENAL CODE § 1.09 cmt. 5, n.46.

The Model Penal Code adopts the better view. While a waiver of collateral estoppel may discourage a defendant from moving for separate trials, it does not support the policy of promoting judicial economy because it requires repetitive litigation of identical issues in situations where the defendant does not move for separate trials. Likewise, precluding a defendant from raising the defense of collateral estoppel fails to safeguard the defendant's rights and increases the likelihood of inconsistent verdicts.[97] Finally, a waiver would accomplish little in the way of promoting the enforcement of criminal law because it would decrease the state's incentive to vigorously pursue the initial charge because the prosecuting authority would have a second opportunity to prevail against the same defendant.

D. *The Issue-Preclusive Effect of an Insanity Acquittal Prior to* Ashe

Historically, courts have been reluctant to recognize the issue-preclusive effect of a verdict of not guilty by reason of insanity on a subsequent prosecution for a related offense.[98] In *Hotema v. United States*,[99] a pre-*Oppenheimer* case,[100] the United States Supreme Court rejected the contention that a verdict of not guilty by reason of insanity barred the prosecution of the defendant for a contemporaneous offense.[101] In *Hotema*, the defendant was tried for two murders and

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97. JURISDICTIONS WHICH RECOGNIZE THE WAIVER SEEM TO FOCUS THEIR INQUIRY SOLELY UPON THE COLLATERAL ESTOPPEL DOCTRINE'S PROTECTION OF INDIVIDUAL RIGHTS AS ANALOGOUS TO DOUBLE JEOPARDY. FOR EXAMPLE, IN *In re* A.L.S., the court, in denying collateral estoppel after the defendant had moved for separate trials, premised its holding upon *Jeffers v. United States* which was decided strictly upon double jeopardy grounds. *Compare, In re* A.L.S., 377 A.2d at 1151 *with* Jeffers v. United States, 432 U.S. at 152. Although double jeopardy incorporates collateral estoppel as an additional safeguard of an individual's Fifth Amendment rights, criminal collateral estoppel is also premised upon broader policies including judicial economy and the enforcement of the criminal law. *See supra* text accompanying notes 82-83.

98. *See, e.g.*, Hotema v. United States, 186 U.S. 413, 422 (1902) (verdict of not guilty by reason of insanity does not preclude a prosecution for a related offense); Buatte v. United States, 350 F.2d 389, 394 n.5 (9th Cir. 1965), *cert. denied*, 385 U.S. 856 (1966) (reversal of a conviction on the grounds that the government had not met its burden of proving the defendant's sanity at time of shooting did not collaterally estop prosecution for a contemporaneous shooting); People v. Glover, 65 Cal. Rptr. 219, 224 (Cal. Ct. App. 1967) (jury finding of defendant's insanity in a robbery prosecution did not collaterally estop the defendant's prosecution for the battery of a peace officer because of a two month time difference between the two insanity issues); People v. Seawright, 220 N.E.2d 101, 102 (Ill. App. Ct. 1966) (February 24, 1960, jury determination that the defendant was not fit to stand trial for a crime he had committed on September 15, 1959, did not collaterally estop his prosecution for a robbery committed on July 6, 1959); State v. Cannon, 169 So. 446, 447-48 (La. 1936) (a defendant convicted of one killing was not precluded from raising the defense of insanity in a subsequent prosecution for a second killing which was committed during the same criminal episode).

99. 186 U.S. 413 (1901).

100. United States v. Oppenheimer, 242 U.S. 85 (1916).

101. *Hotema*, 186 U.S. at 422.

found not guilty by reason of insanity.[102] Subsequently, the defendant was indicted for a third murder which was committed on the same day.[103] In response to the indictment, the defendant filed a special plea stating that the prosecution should be barred because he had already once been placed in jeopardy.[104] The Court stated that the defendant's plea was "wholly without merit"[105] and rejected the defendant's contention.

Although the defendant's special plea was couched in the language of double jeopardy, the defendant's argument was premised upon issue preclusion. At the time of the *Hotema* decision, the Court did not recognize the application of criminal collateral estoppel.[106] Thus, by summarily rejecting the defendant's contention, the Court refused to recognize the doctrine of criminal collateral estoppel.

The *Hotema* Court's opinion is nevertheless instructive in that it foreshadows a significant area of controversy regarding the preclusive effects of an adjudication of insanity — the reliability of a judicial finding. The *Hotema* Court reviewed the trial court's record and noted that the first jury was unable to agree upon a verdict, the second jury acquitted, and that the third jury convicted.[107] In denying the issue-preclusive effect of the insanity acquittal, the Court appears to have questioned the reliability of the juries' findings.

Similarly, in *People v. Cygan*,[108] the Michigan Supreme Court refused to recognize the issue-preclusive effect of an insanity acquittal in a subsequent prosecution for a contemporaneous offense.[109] The defendant in *Cygan*, who was charged with murdering his wife, pleaded temporary insanity and was acquitted in a general jury verdict.[110] In a subsequent proceeding, the state tried the defendant for the contemporaneous shooting of his mother-in-law.[111] The defendant raised collateral estoppel as a defense to the second prosecution.[112] Cit-

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102. *Id.* at 421-22.

103. *Id.* at 422.

104. *Id.*

105. *Id.*

106. The Court first recognized criminal collateral estoppel in 1916 in United States v. Oppenheimer, 242 U.S. 85 (1916).

107. *Hotema*, 186 U.S. at 422.

108. 200 N.W. 967 (Mich. 1924).

109. *Id.* at 968.

110. *Id.* While the prior acquittal was on a general verdict, the court implicitly acknowledged that the prior acquittal was premised upon the defendant's temporary insanity as evidenced in the court's opinion by its reference to *Hotema* as a judicial resolution of "identically the same question." *Id.*

111. *Id.*

ing *Hotema*, the court rejected the defendant's estoppel claim.[113] Again, it is evident that the court questioned the reliability of the jury's finding. Later pre-*Ashe* decisions similarly rejected the operation of insanity acquittals as issue-preclusive devices in subsequent prosecutions.[114]

III. Analysis

In light of *Hotema* and subsequent state court decisions, it appears that a defendant's collateral estoppel contention would have had little chance of succeeding prior to the Supreme Court's decision in *Ashe*.[115] Pre-*Ashe* courts would almost certainly have rejected the notion that an insanity acquittal precludes a finding of sanity at a time other than the precise moment in question in the initial proceeding. While a clear majority of post-*Ashe* decisions continue to reject the issue preclusive effect of insanity acquittals,[116] courts are currently receptive to collateral estoppel arguments under certain circumstances.[117] In order to understand the merits of a defendant's collateral estoppel contention, as well as the likelihood of its success, it is necessary to evaluate post-*Ashe* case law in light of the Supreme Court's decision in *Ashe*.

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113. *Id.* In *Hotema*, the defendant admitted the killing. Hotema v. United States, 186 U.S. 413, 419 (1902). His only defense was a plea of insanity. *Id.* Therefore, the sanity of the defendant was the only issue in controversy at trial. *Cygan*, 200 N.W. at 968 (citing *Hotema*, 186 U.S at 422).

114. *See* Buatte v. United States, 350 F.2d 389, 394 n.5 (9th Cir. 1965), *cert. denied*, 385 U.S. 856 (1966) (reversal of a conviction on the grounds that the government had not met its burden of proving the defendant's sanity at the time of the shooting did not collaterally estop his prosecution for a contemporaneous shooting); People v. Glover, 65 Cal. Rptr. 219, 224 (Cal. Ct. App. 1967) (jury finding of defendant's insanity in a robbery prosecution did not collaterally estop the defendant's prosecution for the battery of a peace officer because of a two month time difference between the two insanity issues); People v. Seawright, 220 N.E.2d 101, 102 (Ill. App. Ct. 1966) (February 24, 1960, jury determination that the defendant was not fit to stand trial for a crime he had committed on September 15, 1959, did not collaterally estop his prosecution for a robbery committed on July 6, 1959); State v. Cannon, 169 So. 446, 447-48 (La. 1936) (a defendant convicted of one killing was not precluded from raising the defense of insanity in a subsequent prosecution for a second killing which was committed during the same criminal episode).

115. For a survey of pre-*Ashe* cases, see *supra* notes 98-114 and accompanying text.

116. *Compare* State v. Sanders, 229 So. 2d 288 (Fla. Dist. Ct. App. 1969) (prior acquittal did not bar a subsequent prosecution where two hours separated the criminal acts) *and* Gray v. State, 329 A.2d 751 (Md. Ct. Spec. App. 1974) (insanity acquittal does not preclude the litigation of the defendant's sanity in a subsequent prosecution) *with* United States *ex rel.* Taylor v. Redman, 500 F. Supp. 453 (D. Del. 1980) (collateral estoppel bars subsequent prosecution where two hours separated criminal acts) *and* Munn v. Pate, 489 P.2d 534 (Okla. Crim. App. 1971) (collateral estoppel bars subsequent prosecution where minutes separated criminal acts).

117. *See Redman*, 500 F. Supp. 453 (collateral estoppel bars subsequent prosecution where two hours separated criminal acts) *and Munn*, 489 P.2d 534 (collateral estoppel bars subsequent prosecution where minutes separated criminal acts).

A. *A Survey of Post-*Ashe *Cases*

The simplest example of the effect of collateral estoppel in the context of an acquittal occurs when a defendant is determined to be insane in a prior acquittal and then the identical issue is relitigated in a subsequent prosecution. For instance, in *Riley v. State*,[118] a Georgia Court of Appeals upheld a defendant's collateral estoppel contention.[119] In *Riley*, a jury first acquitted the defendant by reason of insanity on an assault charge.[120] Then, during the defendant's prosecution for a separate offense, the trial court allowed a second jury to determine the defendant's intent at the time of the prior assault in order to compare it with the defendant's intent at the time of the separate incident.[121] In its consideration of the propriety of this practice, the *Riley* court held that the state could not relitigate the issue of the defendant's sanity at the time of the assault for which the defendant was acquitted because the identical issue had already been determined in the previous trial.[122]

Moreover, where the record specifies the boundaries of an insanity adjudication, the issue-preclusive effect of the determination is similarly uncomplicated. For example, in *Gray v. Maryland*,[123] the state indicted the defendant for six separate offenses including one episode on October 16, 1972, one on November 20, 1972, and another on December 11, 1972.[124] The defendant moved for separate trials, and was acquitted on the two counts occurring on November twentieth by reason of insanity.[125] Subsequently, the defendant was convicted in a bench trial on counts stemming from the October and December criminal episodes.[126]

The defendant argued that the judgment in the first trial barred the relitigation of the issue of her sanity in the subsequent prosecution.[127] In examining the record, the court noted that the trial judge in the first trial expressly rejected the contention that the defense of collateral estoppel could bar the relitigation of the issue in a subsequent prosecution.[128] The trial judge stated that the verdict "does not say that through the periods of time as mentioned in this indictment that Ms.

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118. 353 S.E.2d 598 (Ga. Ct. App. 1987).
119. *Id.* at 600.
120. *Id.* at 599.
121. *Id.* at 600.
122. *Id.*
123. 329 A.2d 751 (Md. Ct. Spec. App. 1974).
124. *Id.* at 752.
125. *Id.*
126. *Id.*
127. *Id.* at 753.
128. *Id.* at 755.

Gray was insane, but it does say that the State has not shown beyond a reasonable doubt that Mrs. Gray was sane on the 20th of November . . . ."[129] Therefore, the court rejected the defendant's collateral estoppel argument.[130]

While the court's decision in *Gray* supports the proposition that a record may specify the dimensions of a litigated issue, it is essential to remember that the basis of the jury's determination is controlling.[131] A special verdict by the jury specifying the dimensions of an issue would be determinative.[132] In the absence of a special finding, the trial court's opinion with respect to the meaning of the jury verdict, while persuasive, is not determinative in that it merely suggests the trial judge's opinion of the dimensions of the issue.[133] The judge's statement for the record only controls in a non-jury trial such as *Gray*.[134]

The vast majority of cases are more complex in that there is a lack of total identity between the sanity issues in the two proceedings.[135] The insanity issues are not identical because the criminal acts at issue typically occur at different times, and the record does not expressly specify the boundaries of the finding.[136] Where there is a time lapse between criminal acts, the crucial question is whether the trier of fact's finding with respect to the defendant's insanity, which resulted in the prior acquittal, was broad enough to include a determination of the

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129. *Id.*

130. *Id.* at 756.

131. *See* Ashe v. Swenson, 397 U.S. 436, 444 (1970) (A court must examine the record to determine "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.").

132. This conclusion follows logically from *Ashe*. Where a special jury verdict states the exact boundaries of a finding of fact, a further examination of the record would be unnecessary. The special verdict would specify whether the jury grounded its verdict upon an issue other than the one which the defendant seeks to foreclose. For example, the jury might find that the defendant's insanity lasted for a two week period during which the defendant committed both of the criminal acts in question.

133. This conclusion also follows logically from *Ashe*. The *Ashe* mandate requires the court, in the subsequent proceeding, to examine the entire record to determine the basis of the jury's verdict. 397 U.S. at 443. Thus, the court cannot defer to the judgment of the trial court judge regarding the basis of the jury's verdict.

134. In a non-jury trial the judge is also the finder of fact. Therefore, the judge's statement in a non-jury trial is analogous to a specific finding by the jury.

135. *See, e.g.*, Nacher v. State, 465 So. 2d 598, 599-600 (Fla. Dist. Ct. App. 1985) (sanity issues were not identical because three hours separated the criminal acts in question); State v. Nagel, 535 P.2d 641 (N.M. Ct. App.) (sanity issues were not identical because sixteen hours separated the criminal acts in question), *cert. denied*, 535 P.2d 657 (N.M. 1975).

136. *See, e.g.*, People v. Horn, 205 Cal. Rptr. 119, 132 (Cal. Ct. App. 1984) (defendant's sanity at time of a manslaughter is a different issue than the defendant's sanity at time of a robbery).

defendant's insanity at the time of the criminal act for which the defendant is subsequently prosecuted.[137]

In *United States ex rel. Taylor v. Redman*,[138] the defendant successfully raised the defense of collateral estoppel in the context of an insanity acquittal. In *Taylor*, the defendant forcibly entered his sister-in-law's home in New Castle County where he bound his niece and nephew, struck his sister-in-law, and forced her to leave with him in his car.[139] The defendant then drove his sister-in-law to Kent County where he raped her approximately two hours later.[140] At his trial for rape, a Kent County jury acquitted the defendant by rendering a verdict of not guilty by reason of mental illness.[141] A New Castle County jury then convicted the defendant for the New Castle County offenses.[142] On appeal, the defendant contended that the Kent County acquittal collaterally estopped the New Castle County prosecutor from asserting his sanity.[143]

The Delaware Supreme Court rejected the defendant's collateral estoppel argument in *Taylor v. State*.[144] The court premised its decision on two theories.[145] First, the *Taylor* court held that the Kent County jury lacked jurisdiction to determine the defendant's sanity in New Castle County.[146] Second, the *Taylor* court found that the issue of the defendant's sanity in New Castle County was not essential to the Kent County judgment.[147]

In granting the defendant's petition for a writ of habeas corpus, a Delaware federal district court held that the Kent County jury had jurisdiction to determine the necessary factual issues by virtue of its jurisdiction to try the case.[148] Furthermore, the District Court stated that the Delaware Supreme Court had ignored the "mandate of *Ashe*, which does not limit criminal collateral estoppel to determinations strictly necessary to the original verdict according to the terms of the indictment."[149]

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137. *See* United States *ex rel.* Taylor v. Redman, 500 F. Supp. 453, 457 (D. Del. 1980) (a rational jury could not have concluded that the defendant was mentally ill at the time of first crime, but sane at the time of the second crime).

138. 500 F. Supp. 453 (D. Del. 1980).

139. *Id.* at 454.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. 402 A.2d 373 (Del. 1979).

145. *Id.* at 376.

146. *Id.*

147. *Id.*

148. United States *ex rel.* Taylor v. Redman, 500 F. Supp. 453, 457 (D. Del. 1980).

149. *Id.* at 455.

In examining the evidentiary basis of the insanity determination, the district court noted that a rational jury could not have acquitted the defendant without determining that he was insane during the entire episode encompassing the crimes committed in both counties.[150] The court found no evidentiary basis which would allow a jury to conclude that the defendant was insane only during the commission of the crimes in Kent County.[151] During the trial, neither the prosecution nor the defense had made any precise time specifications.[152] Instead, both the prosecution and the defense directed the attention of the witnesses to the day in question without specifying the time.[153] Therefore, the determination of the defendant's insanity at the time of the crimes committed in New Castle County was included within the Kent County finding.

Ashe requires that a court "examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."[154] When applying the rule of *Ashe* in the context of an insanity acquittal, courts must acknowledge a fundamental distinction between general acquittals and insanity acquittals. Unlike an acquittal by general verdict, an acquittal by a verdict of not guilty by reason of insanity is unambiguous as to its legal grounds.[155] While a general verdict may be supported by alternative legal grounds, an insanity acquittal clearly establishes the defendant's insanity as the verdict's sole premise.[156]

Thus, the collateral estoppel controversy arises from the difficulty of defining the dimensions of the insanity determination, rather than from any dispute over the insanity premise of the prior acquittal. In order to comply with the mandate of *Ashe*, courts addressing a defendant's collateral estoppel contention must examine the record to determine whether a rational jury could have acquitted the defendant for the prior offense without determining that he or she was also insane at the time of the subsequent offense. As evidenced by the often contra-

150. *Id.* at 457.

151. *Id.*

152. *Id.*

153. *Id.*

154. Ashe v. Swenson, 397 U.S. 436, 444 (1970) (quoting Daniel K. Mayers & Fletcher L. Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 38-39 (1960)).

155. Hollander v. State, 296 N.E.2d 449, 452-53 (Ind. Ct. App. 1973) (an insanity defense is ordinarily raised by a special plea and entered by a special verdict of not guilty by reason of insanity).

156. *Id.*

dictory state court decisions regarding insanity acquittals,[157] criminal courts currently lack consistent guidelines with which to evaluate the dimensions of an insanity finding for purposes of a collateral estoppel argument.

B. Factors Used by the Courts in Determining the Issue-Preclusive Effect of an Insanity Acquittal

Courts generally consider three factors in determining the dimensions of an insanity finding. First, courts consider the amount of time separating the criminal acts for which the defendant is being separately prosecuted.[158] Second, courts determine the impact of the jurisdiction's legal standard of insanity on the dimensions of the finding.[159] Third, courts apply *Ashe* by reviewing the evidentiary basis of the defendant's prior acquittal and determining whether a rational jury could have based its decision on a finding other than the one sought to be foreclosed.[160]

1. Time Lapse Between Criminal Commissions

While courts acknowledge time lapse as a significant factor in determining whether an insanity acquittal is issue-preclusive, time lapse alone is not determinative.[161] Courts must consider time lapse in light of other relevant factors including the nature of the defendant's mental illness.[162] Nonetheless, time lapse is a very persuasive factor. Where a significant period of time separates criminal acts, collateral estoppel is not likely to apply.[163] In contrast, where the separate crimes for which

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157. *Compare* State v. Sanders, 229 So. 2d 288 (Fla. Dist. Ct. App. 1969) (prior acquittal did not bar a subsequent prosecution where two hours separated the criminal acts at issue) *and* Gray v. State, 329 A.2d 751 (Md. Ct. Spec. App. 1974) (insanity acquittal does not preclude the litigation of the defendant's sanity in a subsequent prosecution) *with* United States *ex rel.* Taylor v. Redman, 500 F. Supp. 453 (D. Del. 1980) (collateral estoppel bars subsequent prosecution where two hours separated the criminal acts) *and* Munn v. Pate, 489 P.2d 534 (Okla. Crim. App. 1971) (collateral estoppel bars subsequent prosecution where minutes separated the criminal acts).

158. For a discussion of time lapse, see *infra* notes 161-77 and accompanying text.

159. For a discussion of the legal standards of insanity, see *infra* notes 178-200 and accompanying text.

160. For a discussion of the evidentiary basis of an acquittal, see *infra* notes 201-08 and accompanying text.

161. *See, e.g., Sanders*, 229 So. 2d 288 (collateral estoppel not a bar where criminal acts are part of the same criminal episode); *but see Munn*, 489 P.2d 534 (collateral estoppel bars a subsequent prosecution where minutes separated the two criminal acts).

162. The court must take into account the nature of the defendant's illness because the nature of the illness is an essential element of the record of the previous prosecution. *See* Ashe v. Swenson, 397 U.S. 436, 444 (1970) (court must examine all relevant matter in the record with realism and rationality).

163. *See* Gray v. State, 329 A.2d 751 (Md. Ct. Spec. App. 1974) (verdict of not guilty by reason of insanity as to crimes committed on November 20, 1972, did not preclude prosecution for crimes committed on December 11, 1972).

the defendant is being prosecuted are part of the same criminal episode,[164] or closely related in time, courts are more likely to hold that the defense of collateral estoppel applies.[165]

Accordingly, in *Munn v. Pate*,[166] an Oklahoma court held that the doctrine of collateral estoppel barred a second prosecution where the two offenses were separated by only a matter of minutes.[167] In *Munn*, a jury acquitted the defendant by reason of insanity for one killing.[168] The state subsequently charged the defendant with a second killing which the defendant had committed within minutes of the first killing.[169] The court noted that there was "no significant time difference" between the two shootings.[170] The shootings were so close in time that they could be considered part of a single criminal episode.[171] The record showed that the "petitioner's mental capacity was the same at the time of both shootings."[172] Therefore, the issue of the defendant's insanity in the first prosecution was broad enough to encompass his mental condition at the time of the second shooting.[173]

In contrast, some courts are hesitant to recognize an insanity acquittal as issue-preclusive in a subsequent prosecution, even where the two prosecutions stem from a single criminal episode.[174] For example, in *State v. Sanders*,[175] a Florida court rejected the application of the collateral estoppel doctrine where the state prosecuted the defendant

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164. The term "same criminal episode" refers to crimes which are committed in close succession with some logical connection between the acts in question. *See generally* Borchardt v. United States, 469 U.S. 937 (1984). For example, a kidnapping and rape under certain circumstances may be considered as part of a single criminal episode. In any event, whether the acts in question constitute a single criminal episode is not determinative.

165. *See* United States *ex rel.* Taylor v. Redman, 500 F. Supp. 453 (D. Del. 1980) (collateral estoppel bars a subsequent prosecution where two hours separated the criminal acts and the criminal acts were part of a single criminal episode); *Munn*, 489 P.2d 534 (collateral estoppel bars a subsequent prosecution where minutes separated the criminal acts).

166. 489 P.2d 534 (Okla. Crim. App. 1971).

167. *Id.* at 536.

168. *Id.* at 535.

169. *Id.*

170. *Id.* at 536.

171. *Id.*

172. *Id.*

173. *Id.* Similarly, State v. Powell, 314 So. 2d 787 (Fla. Dist. Ct. App. 1975), a Florida Court of Appeals decision, also suggests that courts are receptive to collateral estoppel claims where the two prosecutions arise from a single criminal episode. In *Powell*, the defendant was acquitted by reason of insanity for murder, and subsequently prosecuted for an assault arising out of the same criminal episode. *Id.* at 787. In a very brief opinion, the court held that "the trial judge was eminently correct in holding that the State was collaterally estopped from prosecuting the two charges . . . ." *Id.*

174. *See, e.g.*, State v. Sanders, 229 So. 2d 288 (Fla. Dist. Ct. App. 1969) (no preclusion where the defendant is acquitted by reason of insanity for one criminal act and subsequently prosecuted for another act, where acts are part of same criminal episode).

175. 229 So. 2d 288 (Fla. Dist. Ct. App. 1969).

for two murders which occurred within an hour of each other and as part of the same criminal episode.[176] In holding that an insanity acquittal for the second shooting did not prohibit the state from prosecuting the defendant for the first shooting, the court noted that, even though the two shootings occurred at approximately the same time and in approximately the same place, the insanity could have been caused by the shock of the first shooting.[177]

Therefore, time lapse alone is not determinative. Even if a defendant commits two offenses virtually simultaneously, it is conceivable that an examination of the acquittal record would reveal that the defendant's insanity at the time of the second offense was triggered by the shock of the first offense or by some other intervening event. Hence, it is essential that the court consider time lapse in light of all of the evidence in the trial court's record of acquittal.

2. The Legal Standard of Insanity

Since a finding of insanity is an ultimate fact, consideration of the legal standard for insanity is essential in delineating the dimensions of the finding.[178] Therefore, if a defendant's insanity at one point in time

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176. In *Sanders*, the defendant and two girls were in the defendant's car. *Id.* at 290. After a scuffle, the defendant shot one of the girls. *Id.* The defendant could not recall shooting the second girl. *Id.* at 288. Approximately one hour elapsed between the shooting of the first girl and the defendant's return to a bowling alley. *Id.* at 291. The second shooting must, therefore, have occurred within the hour. *Id.* The second murder was tried first and the defendant was found not guilty by reason of insanity. *Id.* at 289. Later, in a trial for the first murder, the court examined the record and determined that the physical evidence showed that the "girls were not killed with a single blow . . . ." *Id.* at 293.

177. *Id.* at 291.

178. Flowers v. State, 139 N.E.2d 185, 192 (Ind. 1957) (defense of insanity is determined by the defendant's insanity at the moment of the act by the standard of insanity prevailing in the particular jurisdiction).

"The concept of insanity as an excuse for conduct which would otherwise be punishable as a crime was developed early in the history of English law." Michelle Migdal Gee, Annotation, *Modern Status of Test of Criminal Responsibility - State Cases*, 9 A.L.R.4th 526, 529 (1981). The classic test of insanity was formulated in M'Naghten's Case, 8 Eng. Rep. 718 (1843). According to the *M'Naghten* court, the proper test for determining criminal responsibility was whether the accused "was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong." *Id.* at 719. The *M'Naghten* rule is also called the right-and-wrong test. Gee, *supra*, at 529. The right-and-wrong test has two branches. *Id.* First, the accused is not criminally responsible "when he does not know the nature and quality of his act." *Id.* Second, the accused is not criminally responsible "when he does not know right from wrong in respect to that act." *Id.* Many states have adopted the *M'Naghten* rule as the sole test of insanity. *See, e.g.*, State v. Hudson, 730 P.2d 830, 834 (Ariz. 1986); People v. Skinner, 228 Cal. Rptr. 652, 658 (Cal Ct. App. 1986); Ferguson v. State, 417 So. 2d 631, 637-38 (Fla. 1982); State v. Craney, 347 N.W.2d 668, 679 (Iowa), *cert. denied*, 469 U.S. 884 (1984); State v. Grauerholz, 654 P.2d 395, 401 (Kan. 1982); State v. Welcome, 458 So. 2d 1235, 1240 (La. 1983), *cert. denied*, 470 U.S. 1088 (1985); State v. Schneider, 402 N.W.2d 738, 784 (Minn. 1987); Davis v. State, 551 So. 2d 165, 173 (Miss. 1989),

is found to have been triggered by a recent event, it follows that the jurisdiction recognizes some form of temporary insanity,[179] and it is less likely that a collateral estoppel argument will succeed. On the other hand, if the jurisdiction only recognizes a permanent or durational type of insanity, the defendant may persuasively argue that the insanity

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cert. denied, 494 U.S. 1074 (1990); State v. Hankins, 441 N.W.2d 854, 874 (Neb. 1989); Haynes v. State, 739 P.2d 497, 501 (Nev. 1987); State v. Humanik, 489 A.2d 691, 697 (N.J. Super. Ct. App. Div.), *cert. denied*, 501 A.2d 934 (1985); People v. Coker, 456 N.Y.S.2d 548, 549 (N.Y. App. Div. 1982); State v. Evangelista, 353 S.E.2d 375, 382 (N.C. 1987); Moore v. State, 672 P.2d 1175, 1177 (Okla. Crim. App. 1983); Commonwealth v. Young, 572 A.2d 1217, 1226 (Pa. 1990); Davenport v. State, 389 S.E.2d 649, 649 (S.C. 1990); State v. Jenner, 451 N.W.2d 710, 721 (S.D. 1990); Price v. Commonwealth, 323 S.E.2d 106, 109 (Va. 1984); State v. Rhodes, 274 S.E.2d 920, 921 (W. Va. 1981).

A number of jurisdictions employ the *M'Naghten* test modified by the "irresistible impulse" test of insanity. *See, e.g.*, People v. Wright, 648 P.2d 665, 667 (Colo. 1982); Caldwell v. State, 354 S.E.2d 124, 126 (Ga. 1987); State v. Hartley, 565 P.2d 658, 660-61 (N.M. 1977). Under the irresistible impulse test, an accused will be excused from criminal liability if he was forced to commit the crime by an impulse which he was powerless to control as a consequence of an actual disease of the mind. Hankins v. State, 201 S.W. 832, 837 (Ark. 1917).

At least one jurisdiction adopted the New Hampshire-*Durham* "product" test of insanity. *See* State v. Plummer, 374 A.2d 431, 435 (N.H. 1977). Under the "product" test, an accused is not criminally responsible if the "act was the product of mental disease or mental defect." Durham v. United States, 214 F.2d 862, 875 (D.C. Cir. 1954), *overruled by* United States v. Brawner, 472 F.2d 969 (D.C. Cir. 1972). "Disease" refers to "a condition which is considered capable of either improving or deteriorating," and "defect" refers to "a condition which is not considered capable of either improving or deteriorating . . . ." *Id.* The test is "whether the accused acted because of a mental disorder, and not whether he displayed particular symptoms which medical science has long recognized do not necessarily, or even typically, accompany even the most serious mental disorder." *Id.* at 876. Since the act must be the "product" of the mental disease or defect, the facts must be sufficient to establish that, but for the disease or defect, the act would not have been committed. Carter v. United States, 252 F.2d 608, 617 (D.C. Cir. 1957).

A number of jurisdictions employ the Model Penal Code test. *See* Crawford v. State, 377 So. 2d 145, 151-52 (Ala. Crim. App. 1979); Smith v. State, 614 P.2d 300, 302-03 (Alaska 1980); State v. Torrence, 493 A.2d 866, 867 n.2 (Conn. 1985); State v. Rodrigues, 679 P.2d 615, 617 (Hawaii), *cert. denied*, 469 U.S. 1078 (1984); State v. White, 456 P.2d 797, 802 (Idaho 1969); People v. Ward, 338 N.E.2d 171, 175 (Ill. 1975); Taylor v. State, 440 N.E.2d 1109, 1111 (Ind. 1982); Harper v. Commonwealth, 694 S.W.2d 665, 669 (Ky. 1985), *cert. denied*, 476 U.S. 1178 (1986); State v. Condon, 468 A.2d 1348, 1351 (Me. 1983), *cert. denied*, 467 U.S. 1204 (1984); Robey v. State, 456 A.2d 953, 961 (Md. Ct. Spec. App. 1983); Commonwealth v. Mills, 511 N.E.2d 572, 573 (Mass. 1987); People v. Mazzie, 357 N.W.2d 805, 807 (Mich. Ct. App. 1984); State v. Carr, 687 S.W.2d 606, 610 (Mo. Ct. App. 1985); State v. Capalbo, 433 A.2d 242, 244 n.4 (R.I. 1981); State v. Clayton, 656 S.W.2d 344, 346 (Tenn. 1983); State v. Samples, 328 S.E.2d 191, 194 n.4 (W. Va. 1985). The Model Penal Code test states that an accused is not criminally responsible if, at the time of the criminal conduct, and, as a result of mental disease or mental defect, the accused lacked substantial capacity either to understand the wrongfulness of his conduct, or to conform his conduct to the requirements of law. Gee, *supra*, at 536.

There is always a presumption of sanity regardless of the test for criminal responsibility employed. *Id.* at 530. The standards of proof vary from jurisdiction to jurisdiction. *Id.*

179. Temporary insanity is "[t]emporary mental illness, or mental illness of short duration, which existed at the time of the commission of the offense charged . . . ." State v. Boyd, 692 P.2d 769, 771 (Utah 1984).

finding includes a determination of his mental capacity over an extended period of time.

The impact of the jurisdiction's standard for insanity on the dimensions of the finding is evident in the *Sanders* decision.[180] The *Sanders* court acknowledged that the defendant's insanity at the time of the second shooting might have been a temporary form of mental illness triggered by the shock of the first shooting.[181] A recognition of temporary insanity was, therefore, an essential element of the court's decision.

A comparison of the New Mexico Court of Appeals' decision in *State v. Nagel*[182] with a later Florida District Court of Appeals' decision in *Nacher v. State*[183] provides an example of the impact of differing legal standards on the viability of the collateral estoppel defense. In *Nagel*, a New Mexico Court of Appeals held that collateral estoppel applied where sixteen hours separated the criminal acts at issue.[184] The defendant in *Nagel*, angered by his wife's infidelity, purchased a revolver and went to her lover's house where he bound two women.[185] Sixteen hours later, the defendant entered the lover's cabin and shot him four times.[186]

After a trial for the shooting, the jury acquitted the defendant on a verdict of not guilty by reason of insanity.[187] In a subsequent prosecution for the crimes committed in the lover's house, the court held that the issue of the defendant's sanity was foreclosed because New Mexico law defines insanity as "a true disease of the mind" which extends over "a considerable period of time."[188] Therefore, the jury's finding of insanity must have encompassed the defendant's mental condition at the time of the earlier crimes.

In *Nacher*, however, the court held that the defense of collateral estoppel did not apply where three hours separated the criminal acts in question.[189] The defendant in *Nacher* was prosecuted for murder and found not guilty by reason of insanity.[190] Subsequently, a second jury found the defendant guilty of armed robbery.[191] Only three hours sepa-

180. *See, e.g.*, 229 So. 2d at 291.
181. *Id.*
182. 535 P.2d 641 (N.M. Ct. App.), *cert. denied*, 535 P.2d 657 (1975).
183. 465 So. 2d 598 (Fla. Dist. Ct. App. 1985).
184. 535 P.2d at 644.
185. *Id.* at 641-42.
186. *Id.* at 642.
187. *Id.*
188. *Id.* at 644 (quoting State v. White, 270 P.2d 727, 730 (N.M. 1954)).
189. Nacher v. State, 465 So. 2d 598, 599-600 (Fla. Dist. Ct. App. 1985).
190. *Id.* at 599.
191. *Id.*

rated the two offenses.[192] On appeal, the defendant's only contention was that the prior acquittal conclusively established his insanity at the time of the offense for which he was later prosecuted.[193] In rejecting the defendant's collateral estoppel argument, the court noted that Florida "recognizes a so-called temporary or intermittent insanity operative only at the time of the offense."[194] The *Nacher* court distinguished *Nagel* on the basis of the differing standards of insanity adopted by the two jurisdictions.[195] Therefore, states that recognize the defense of temporary insanity are more likely to reject the doctrine of collateral estoppel than are states that only recognize a permanent form of insanity.

A California decision, *People v. Horn*,[196] also indicates that an insanity acquittal based upon a finding of temporary insanity will generally not estop the relitigation of the issue of the defendant's sanity in a trial for a separate offense. The *Horn* court rejected the defendant's contention that a prior insanity acquittal on an arson charge estopped the state from prosecuting her for a vehicular manslaughter which occurred some days later.[197] In rejecting the application of the collateral estoppel doctrine, the court stated that the question of the defendant's sanity at the time of the vehicular manslaughter incident was a different issue from the defendant's sanity at the time of the arson.[198] The court reached this conclusion by examining the record and noting that psychiatric testimony showed that the defendant was subject to mood swings and that "her mental capacity at one point in time is not necessarily indicative of her capacity at another time."[199]

Therefore, a defendant's collateral estoppel argument will be strongest if the he or she can show that the jurisdiction only recognizes a durational form of insanity. Although the vast majority of jurisdictions currently recognize some form of intermittent or temporary insanity,[200] it is still necessary to understand the jurisdiction's standard of

192. *Id.*
193. *Id.*
194. *Id.* at 601 (citation omitted).
195. *Id.*
196. 205 Cal. Rptr. 119 (Cal. Ct. App. 1984).
197. *Id.* at 132.
198. *Id.*
199. *Id.*
200. *See, e.g.*, Barbour v. State, 78 So. 2d 328, 340 (Ala. 1954) (insanity need not exist for any "definite" period); Condon v. State, 498 P.2d 276, 285 (Alaska 1972); State v. Lundstrom, 776 P.2d 1067, 1070 (Ariz. 1989); People v. Kelly, 516 P.2d 875, 883 (Cal. 1973); People v. Low, 732 P.2d 622, 626 n.4 (Colo. 1987) (temporary insanity is included within the general statutory definition of insanity); State v. Roy, 376 A.2d 391, 393 (Conn. 1977); Jackson v. State, 253 S.E.2d 874, 876 (Ga. Ct. App. 1979); Ferrier v. State, 514 N.E.2d 285, 288 (Ind. 1987), *cert. denied*, 111 S. Ct. 526 (interim ed. 1990); State v. Lucas, 368 N.W.2d 124, 128 (Iowa 1985); State v. DeMoss, 770 P.2d 441, 444 (Kan. 1989) (temporary insanity is a defense unless caused

insanity in order to evaluate the merits of a collateral estoppel argument following an insanity acquittal. Defense attorneys may profit by drawing attention to the jurisdiction's hesitation in adopting temporary insanity as a defense in previous cases.

3. The Evidentiary Basis of the Ruling

In order to evaluate the merits of a defendant's collateral estoppel contention, the *Ashe* Court held that a trial judge must examine the record of the prior acquittal.[201] If the record shows that a rational jury could not have acquitted the defendant for the first offense without also finding that the defendant was insane at the time of the second offense, the defendant will prevail.[202] Therefore, the contents of the record of acquittal are essential to the defendant's argument.[203]

The *Nacher* decision illustrates the importance of the contents of the record. In examining the record, the *Nacher* court noted that the jury's conclusion that the defendant was insane at the time of the armed robbery was not inevitable.[204] The evidence showed that the defendant had an "organic brain syndrome" which was aggravated by drug abuse.[205] The record also indicated that the defendant had ingested drugs after the armed robbery and prior to the shooting.[206] Also, there was no evidence in the record of the defendant's condition during the previous night.[207] The court held that "when, as here, there is an evidentiary basis to separate the two, a determination that the defendant was insane during a later crime does not foreclose a contrary finding as to a previous one — even one which occurred a very short time before."[208] Therefore, the contents of the record of the prior acquittal are essential to an estoppel contention.

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by voluntary intoxication); McClellan v. Commonwealth, 715 S.W.2d 464, 468 (Ky. 1986), *cert. denied*, 479 U.S. 1057 (1987); Porreca v. State, 433 A.2d 1204, 1207 (Md. Ct. Spec. App. 1981); Sparks v. State, 759 P.2d 180, 184 (Nev. 1988); State v. Sette, 611 A.2d 1129, 1137 (N.J. Super. Ct. App. Div. 1992) (recognizing temporary insanity stemming from involuntary intoxication); State v. Leonard, 266 S.E.2d 631, 637 (N.C.), *cert. denied*, 449 U.S. 960 (1980); Guance v. State, 751 P.2d 1074, 1077 (Okla. Crim. App. 1988); Simpson v. Simpson, 716 S.W.2d 27, 33 (Tenn. 1986); Gonzales v. State, 838 S.W.2d 848, 866 (Texas Ct. App. 1992) (recognizing temporary insanity, except in the case of voluntary intoxication); State v. Boyd, 692 P.2d 769, 771 (Utah 1984).

201. Ashe v. Swenson, 397 U.S. 436, 444 (1970).

202. *See* United States *ex rel.* Taylor v. Redman, 500 F. Supp. 453, 457 (D. Del. 1980).

203. *Ashe*, 397 U.S. at 444.

204. Nacher v. State, 465 So. 2d 598, 601 (Fla. Dist Ct. App. 1985).

205. *Id.* at 600.

206. *Id.*

207. *Id.* at 601.

208. *Id.*

C. *Mutuality of Prosecuting Parties*

In response to a defendant's collateral estoppel contention, the prosecution will likely argue that the collateral estoppel doctrine does not apply because of a lack of mutuality.[209] The prosecutor will argue that the state should not be precluded from litigating the issue of the defendant's sanity at the time of the second offense because it was not a party to the previous prosecution. Assuming that the offenses are prosecuted in two separate counties within the same state, the mutuality requirement is satisfied because the prosecutors in each county are privies.[210] The prosecutors are privies because, as agents of the state, they have a mutual interest in enforcing the criminal law.[211] Since prosecutors are privies asserting a common interest, collateral estoppel will not be denied because of a lack of mutuality. Even assuming that the counties are located in two different states, preclusion should still be allowed so long as the prosecutor in the initial acquittal had a full and fair opportunity to litigate and the other requirements of estoppel are met. The Model Penal Code's abandonment of the rule of mutuality, as it applied to prosecuting parties, illustrates the current trend towards allowing estoppel where there is no mutuality among prosecuting parties.[212]

D. *The Rebuttable Presumption*

Colorado currently recognizes that a prior adjudication of insanity, while not conclusive as to the issue of the defendant's sanity in a subsequent prosecution, does operate to create a presumption that the defendant was insane.[213] This presumption shifts the burden to the prosecution to show changed circumstances between the time of the two

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209. The author has found no case in which a lack of mutuality has been raised in the context of an insanity acquittal. That the defense of mutuality will be raised is suggested by the number of jurisdictions which have statutorily eliminated the defense. For a list of jurisdictions which have statutorily eliminated the defense, see *supra* note 89.

210. Privity exists "where a non-party substantially controls, or is represented by, a party to the action" or is " 'so closely related to the interest of the party to be fairly considered to have had his day in court.' " United States v. Perchitti, 955 F.2d 674, 676 (11th Cir. 1992) (quoting United States v. Bonilla Romero, 836 F.2d 39 (1st Cir. 1987), *cert. denied*, 488 U.S. 817 (1988).)

211. *See* State v. Cleveland, 794 P.2d 546, 549 (Wash. Ct. App. 1990) (where collateral estoppel is raised against the state it is immaterial that the Attorney General prosecuted one proceeding and a county prosecuting attorney prosecuted the other), *cert. denied*, 111 S. Ct. 1415 (interim ed. 1991).

212. *See supra* notes 87-89 and accompanying text. As previously suggested, at least ten states have incorporated the Model Penal Code's approach. *See supra* note 89.

213. *See* Blehm v. People, 817 P.2d 988 (Colo. 1991); People v. Kernanen, 497 P.2d 8 (Colo. 1972).

criminal acts at issue.[214] In *People v. Kernanen*,[215] the Colorado Supreme Court adopted the position that a prior adjudication of insanity creates a rebuttable presumption that the defendant was insane. In *Kernanen*, the defendant committed one robbery in Denver and another robbery in Jefferson County three hours later.[216] The defendant in *Kernanen* was first tried in Jefferson County and declared insane.[217] As a result, the defendant moved to dismiss the robbery charge pending against him in Denver on the grounds that the subsequent prosecution was barred by the doctrine of collateral estoppel.[218] In denying the defendant's estoppel argument, the court stated that "the defendant's state of mind at such time [of the Denver robbery] was not a matter distinctly put in issue or a question that was actually litigated in Jefferson County."[219] Recognizing that the defendant was probably suffering from the same incapacity during the earlier robbery in Denver, the court shifted the burden and required the state to prove that the defendant's mental state changed abruptly after the Denver robbery.[220] Thus, the Jefferson County determination created a rebuttable presumption that the defendant was insane at the time of the Denver robbery.[221]

In *Blehm v. People*,[222] the Colorado Supreme Court adhered to the *Kernanen* approach. In *Blehm*, a jury convicted the defendant of second degree burglary and habitual criminality.[223] The defendant challenged the verdict on collateral estoppel grounds stemming from prior insanity adjudications.[224] Although the court recognized that an insanity adjudication creates a presumption of continuing insanity until it is proven that the defendant's mental capacity has been restored, the court refused to hold that the presumption was irrebuttable.[225]

In its application, Colorado's rebuttable presumption approach should be strictly limited to instances where collateral estoppel is unavailable. While this approach affords the defendant some additional protection where he or she has previously has been found insane, it

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214. *Kernanen*, 497 P.2d at 12. This is the position suggested by the Restatement Second upon a civil finding of mental incapacity. For a discussion of the Restatement's position, see *infra* note 232.

215. 497 P.2d 8 (Colo. 1972).

216. *Id.* at 10.

217. *Id.*

218. *Id.*

219. *Id.* at 11.

220. *Id.* at 12.

221. *Id.*

222. 817 P.2d 988 (Colo. 1991).

223. *Id.*

224. *Id.* at 991.

225. *Id.* at 993.

nonetheless ignores the mandate of *Ashe* and is therefore constitutionally deficient. Although the use of a rebuttable presumption approach may afford a defendant greater protection where collateral estoppel would be improper, a defendant cannot be deprived of the benefit of the collateral estoppel defense where its application is proper. Furthermore, the rebuttable presumption approach fails to advance the important collateral estoppel policy of promoting judicial economy because it requires further litigation in every case. Thus, courts desiring to afford a defendant additional protection should limit the application of the rebuttable presumption approach to circumstances where collateral estoppel is not otherwise available.

E. Developing Guidelines for Delineating the Dimensions of an Insanity Finding

The application of collateral estoppel to post-insanity acquittal prosecutions provides a fragmented and often contradictory picture. Although some inconsistency arises from the differing standards of insanity,[226] inconsistency also stems from the absence of clear guidelines for determining the dimensions of an insanity finding and from a reluctance to expand the scope of the criminal collateral estoppel doctrine. Whether this reluctance evidences a lack of faith in the reliability of a jury verdict of acquittal[227] or a broader interest in ensuring the effective enforcement of criminal law,[228] the inconsistencies do not reflect a dispute over the proper legal standard governing the application of collateral estoppel in the context of an insanity acquittal. The proper test is whether an examination of the record, in light of the jurisdiction's standard of insanity, reveals that a rational jury could have acquitted the defendant without determining whether the defendant was also insane at the time of the criminal act for which he or she was subsequently charged.[229]

Accordingly, a defendant's collateral estoppel argument will ultimately succeed or fail based upon conclusions that the court derives from a careful examination of the acquitting court's trial record.[230] If the court concludes that the issue of the defendant's sanity was determined with respect to the entire criminal episode, the defendant will prevail. The court, therefore, faces the challenge of delineating the

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226. For a discussion of the impact of differing standards of insanity, see *supra* notes 178-200 and accompanying text.

227. *See* Standefer v. United States, 447 U.S. 10, 22-23 (1980) (questioning the reliability of a jury verdict of acquittal).

228. *See id.* at 25.

229. *See* United States *ex rel.* Taylor v. Redman, 500 F. Supp. 453, 457 (D. Del. 1980).

230. *See* Ashe v. Swenson, 397 U.S. 436, 444 (1970).

dimensions of the acquitting jury's finding without possessing clear methods to utilize in accomplishing this task.

Since much of the current controversy stems from the absence of specific guidelines for a criminal court to follow in delineating the boundaries of the issue, it is necessary to turn to civil law for an analogous set of guidelines. The Restatement (Second) of Judgments is helpful in this regard because it specifically addresses the problem of delineating an issue for purposes of issue and claim preclusion.[231] Further, the delineation of an issue presents a virtually identical challenge in both the criminal and civil contexts.

As an example of a difficult issue to delineate, the Restatement suggests a circumstance where there is a "lack of total identity between the matters involved in the two proceedings because the events in suit took place at different times."[232] The Restatement suggests that the delineation of an issue's breadth involves balancing the state's interest in providing a litigant his day in court against the state's interest in preventing repetitious litigation.[233] Applying a similar analysis to criminal law, the delineation of the breadth of an issue must involve a balancing of the state's interest in enforcing the criminal law, in judicial economy, and in safeguarding individual rights.

The Restatement's method of determining the dimensions of an issue to be precluded includes posing the question of whether there is "a substantial overlap between the evidence or argument to be advanced in the second proceeding and that advanced in the first?"[234] In some cases, "the overlap is so substantial that preclusion is plainly ap-

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231. RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. c (1980).

232. *Id.* The Restatement provides the following example:

> A brings an action against B to set aside a conveyance of Blackacre by C to B on the ground that at the time of the conveyance C was mentally incompetent. After trial, verdict and judgment are given for A. A second action is brought by A against B to set aside a conveyance of Whiteacre by C to B which took place one week after the conveyance of Blackacre. Unless B can establish changed circumstances occurring in the time between the two conveyances, the prior judgment is conclusive that C was incompetent when Whiteacre was conveyed. (The result would be the same if the Whiteacre conveyance had occurred one week before the Blackacre conveyance).

Id. § 27 cmt. c, illus. 7; *see also id.* § 27 cmt. c., Reporter's Note at 264-66. The Restatement illustration is analogous to the circumstance where a criminal defendant is found not guilty by reason of insanity and subsequently prosecuted for a related offense. Applying the Restatement rule, a finding of insanity at one time would preclude the relitigation of the issue of the defendant's sanity at another time unless the government can establish changed circumstances. This approach is analogous to the rebuttable presumption adopted in Colorado which is discussed *supra* notes 213-25 and accompanying text.

233. *Id.* § 27 cmt. c.

234. *Id.* Other inquiries include:

> [Whether] the new evidence or argument involve[s] application of the same rule of law as that involved in the prior proceeding . . . [whether] pretrial preparation and discovery relating to the matter presented in the first action [could] reasonably be expected to have

propriate."[235] The first arm of the Restatement's method of delineating an issue requires an examination of the record of the prior acquittal in light of the jurisdiction's legal standard of insanity. In the context of an insanity acquittal, the most important inquiry is whether the evidence of the defendant's insanity at the time of the criminal act for which he or she was acquitted substantially overlaps the time in question in the subsequent prosecution.[236] Where the overlap is significant, preclusion is proper.[237] Additionally, if the evidence of the defendant's insanity in the acquittal record is not directed to a specific time and the two criminal acts are closely related in time, the court should also conclude that the finding of insanity encompasses both incidents.[238]

A second essential inquiry is whether there is an evidentiary basis in the record to suggest a change in the defendant's sanity during the period of time between the two criminal acts.[239] Where there is an evidentiary basis in the record to suggest an intervening change in the defendant's mental condition, preclusion is properly rejected unless there is significant evidence which suggests that the defendant was in fact insane at the time of the two incidents in question, even though he was sane during the interim.

The second arm of the Restatement's method of delineating an issue requires a court to weigh the competing policies supporting the operation of the collateral estoppel doctrine.[240] In defining the dimensions of an insanity finding, the court's conclusion must balance the policies of enforcing the criminal law, of fostering judicial economy, and of safeguarding individual rights. The policies of fostering judicial economy and protecting the individual defendant from repetitive litigation would be furthered by granting the insanity finding the broadest possible dimensions. Nevertheless, the finding should not be granted such expansive breadth where such a move would threaten the effectiveness of the criminal justice system.

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embraced the matter sought to be presented in the second . . . [and] [h]ow closely related are the claims involved in the two proceedings?

Id.

235. *Id.*

236. This is an extension of the Restatement inquiry. *See supra* text accompanying note 234.

237. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. c (1980).

238. *See* United States *ex rel.* Taylor v. Redman, 500 F. Supp. 453, 457 (D. Del. 1980) (collateral estoppel is proper where the criminal acts at issue were closely related in time and neither the defense nor the prosecution made precise time specifications in a previous acquittal).

239. This is an extension of the rule of *Ashe* as adopted by the *Taylor* court. *See supra* text accompanying notes 149-53.

240. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. c (1980).

In weighing the competing policies, the key factor that a court must address is reliability. Since the collateral estoppel doctrine is premised upon the reliability of a judicial finding,[241] and because reliability ultimately ensures the effective enforcement of criminal law, courts should not be reluctant to grant an insanity finding its proper breadth where the record clearly indicates the reliability of such a result. Although the prosecuting authority may then be estopped from prosecuting the same defendant on a separate charge, the estoppel would serve to promote vigorous prosecution on the initial charge.

F. Practical Considerations

Returning to the merits of a defendant's estoppel argument, if the defense attorney in the first trial was rigorous in presenting his or her case, the attorney will have recognized the potential of defending a subsequent prosecution on collateral estoppel grounds and will have strategically introduced into the record as much evidence of the defendant's insanity at times other than the specific time in question as possible. This practice is possible because states ordinarily allow the admission of a wide range of evidence pertaining to the issue of the defendant's sanity.[242]

Additionally, where a defendant is to be prosecuted in a single trial for two or more related offenses, the defense might profit from a motion for separate trials. After moving for separate trials, the defense would first attempt to adjudicate the crime for which the defendant is most likely to receive an insanity acquittal and, thus, inject into the record evidence of insanity over an extended period of time. Then, if the defendant is acquitted, the defense would be in a position to raise the collateral estoppel defense as a bar to subsequent prosecution.[243] The strategy of moving for separate trials will also benefit the defendant where witnesses are unable to address the issue of the defendant's sanity at specific points in time and the defendant is nonetheless acquit-

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241. *See* FREEDMAN, *supra* note 39, at 27 (collateral estoppel prevents inconsistent judgments which would undermine the integrity of the judicial system by adversely impacting the "widespread belief that all or most decisions are reliable").

242. *See, e.g.*, Barbour v. State, 78 So. 2d 328, 333 (Ala. 1954) (when the issue of insanity is presented, both the defendant and state are allowed a "wide latitude" in making inquiries into the defendant's mental state, including a wide range of allowable evidence).

243. Defense counsel should keep in mind the potential ethical violations incident to manipulating the outcome of a trial through such procedures. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(2) (1980) ("In his representation of a client, a lawyer shall not . . . [k]nowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law."); *cf. id.* at 7-101(A)(1) ("A lawyer shall not intentionally . . . [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules . . . .").

ted. This strategy is unavailable in some jurisdictions which hold that a defendant's motion for separate trials constitutes a waiver of his or her right to raise collateral estoppel as a defense in a subsequent prosecution.[244] A careful prosecutor will also recognize the possibility of a collateral estoppel contention in a subsequent trial and attempt to restrict the introduction of evidence of insanity which does not specifically address the exact point in time which is at issue in the initial prosecution. Alternatively, the prosecutor will introduce evidence suggesting that the defendant's mental condition was subject to rapid change due to the influence of drugs or other factors. The mere fact that a defense attorney may succeed on the defendant's behalf through the use of collateral estoppel does not suggest that courts should limit its application out of fear that the defendant will prevail by manipulating criminal procedure. Estoppel is premised upon the reliability of a finding.[245] Where the previous acquittal is unreliable two safeguards exist: (1) the "full and fair opportunity to litigate" requirement; and (2) the *Ashe* mandate which allows a court to hold that a reasonable jury could have found the defendant insane at the time of one criminal act without also finding that the defendant was insane at the time of another criminal act. Therefore, where the finding upon which the estoppel is premised is reliable and encompasses the issue sought to be precluded, courts should not hesitate to recognize criminal collateral estoppel.

IV. CONCLUSION

Although the Supreme Court has not yet extended double jeopardy protection to prohibit successive prosecutions for related offenses, a defendant may be able to raise collateral estoppel to bar the relitigation of an issue previously determined in his or her favor. An affirmative defense such as insanity, once determined in the favor of a defendant, presents such an opportunity. Although the states are seriously divided as to the issue-preclusive effects of a verdict of not guilty by reason of insanity, the history and policies of collateral estoppel suggest

244. *See* Jeffers v. United States, 432 U.S. 137, 152 (1977) (successive prosecutions for a greater and a lesser offense are permitted where the defendant moved for separate trials); *In re* A.L.S., 377 A.2d 1149, 1151 (D.C. 1977) (a defendant waives his or her collateral estoppel rights by moving for separate trials). The Uniform Rules of Criminal Procedure, section 472(b) states:

> A defendant's motion for severance of offenses precludes him from asserting the collateral estoppel defense . . . unless the motion was made . . . on the specified ground that the trier of fact would be unable to distinguish the evidence and apply the law intelligently as to each offense because of the number of offenses charged and the complexity of the evidence.

UNIFORM RULES OF CRIMINAL PROCEDURE Rule 472(b) (1974).

245. *See* FREEDMAN, *supra* note 39, at 27 (collateral estoppel prevents inconsistent judgments which would undermine the integrity of the judicial system by adversely impacting the "widespread belief that all or most decisions are reliable").

the viability of such an application. The primary controversy over the issue-preclusive effect of an insanity acquittal stems from the difficulty of delineating the dimensions of the issue of the defendant's sanity. Where the breadth of the insanity finding may be determined from the record of a prior acquittal, courts should not hesitate to recognize the insanity acquittal as preclusive of a subsequent prosecution for a related offense.

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