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Offensive Issue Preclusion in the Criminal Context: Two Steps Foward, One Step Back

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I. INTRODUCTION

The last thirty-five years have brought a myriad of changes to the law of res judicata. Res judicata literally means "a thing decided."[1] The doctrine rests on the premise that once a controversy

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1. The term res judicata has been used by the courts to mean two different things. Sometimes the courts use the term to describe any situation in which a party is foreclosed from litigating something later because of something that happened in earlier litigation. Used in this generic way, res judicata is an umbrella term that covers the whole area. The second, more technical meaning of res judicata is applicable only when a party is attempting to relitigate his whole

has been decided, that determination should be conclusive in a subsequent action.[2] While claim preclusion[3] attempts to avoid duplication of whole claims or cases, issue preclusion or collateral estoppel[4] works to avoid duplication of particular issues. In effect, the doctrine of issue preclusion scans the first litigation and takes note of each issue decided in it. Then, if a second lawsuit based on a different cause of action attempts to reintroduce the same issue, issue preclusion intervenes to preclude relitigation of that issue and bind parties to the result originally achieved.

The doctrine of issue preclusion has undergone significant developments in recent years.[5] In the context of federal civil litiga-

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claim or cause of action; thus res judicata would apply not only to foreclose rehearing matters that have been litigated earlier, but also to prevent litigation of matters that might have been litigated in the earlier action. In this technical sense, res judicata means "claim preclusion." *See generally* 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE 131, 132 (3d ed. 1998); Rivet v. Regions Bank of La., 522 U.S. 470, 476 (1998) (defining res judicata). For the purposes of this article, I will use res judicata in its broad, umbrella sense to include both claim preclusion and issue preclusion.

2. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

3. Claim preclusion is one subset of res judicata. Claim preclusion is asserted by a party in the second action who claims that the other party cannot bring the lawsuit because the claim was already litigated in the first action. The party asserting claim preclusion can argue that the other party either lost in the first lawsuit and is therefore barred from bringing the claim, or the other party won in the prior lawsuit and therefore the claim merged in the first judgment. *See generally* Victoria L. Hooper, *Avoiding the Trap of Res Judicata: A Practitioner's Guide to Litigating Multiple Employment Discrimination Claims in the Third Circuit*, 45 VILL. L. REV. 743 (2000).

4. Courts use the phrases collateral estoppel and issue preclusion interchangeably. For the purposes of this article, I will use the term issue preclusion. *See* Ashe v. Swenson, 397 U.S. 436 (1970); RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982); 18 MOORE, ET AL., *supra* note 1, at ¶ 132.01[2].

5. For various articles discussing the developments in issue preclusion, see Wystan M. Ackerman, *Precluding Defendants from Relitigating Sentencing Findings in Subsequent Civil Suits*, 101 COLUM. L. REV. 128 (2001); Monica Renee Brownewell, *Rethinking the Restatement View (Again!): Multiple Independent Holdings and the Doctrine of Issue Preclusion*, 37 VAL. U. L. REV. 879 (2003); Philip C. Chronakis, *Cold Comfort for a Change: Trends of Preclusion in Habeas Corpus Litigation*, 76 U. DET. MERCY L. REV. 17 (1998); *Collateral and Equitable Estoppel of Federal Criminal Defendants*, 29 RUTGERS L. REV. 1221 (1976); *Collateral Estoppel in Criminal Cases—A Supplement to the Dou-*

tion, the Supreme Court abandoned the requirement of mutuality[6] in cases involving defensive issue preclusion.[7] As a result, only the party against whom issue preclusion is sought to be used must have been a party in the first action.[8] Eight years later, in *Parklane Hosiery Co. v. Shore, Inc.*,[9] the Supreme Court held that in the federal civil context, trial courts should have broad discretion in allowing offensive issue preclusion.[10] Therefore, in federal civil

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ble Jeopardy Protection, 21 RUTGERS L. REV. 274 (1967); Michael P. Daly, *"Give Me Your Tired, Your Poor," Your Collaterally Estopped Masses? Guilty Pleas and Collateral Estoppel of Alienage in Criminal Proceedings:* United States v. Gallardo-Mendez, 44 VILL. L. REV. 671 (1999); Mitchell Keiter, *The Mauled Verdict: The Knoller Case Shows Why Res Judicata Should Protect Partial Convictions as Well as Acquittals*, 33 MCGEORGE L. REV. 493 (2002); Richard B. Kennelly, Jr., *Precluding the Accused: Offensive Collateral Estoppel in Criminal Cases*, 80 VA. L. REV. 1379 (1994); David Lehn, *Adjudicative Retroactivity as a Preclusion Problem:* Dow Chemical Co. v. Stephenson, 59 N.Y.U. ANN. SURV. AM. L. 563 (2004); *The Due Process Roots of Criminal Collateral Estoppel*, 109 HARV. L. REV. 1729 (1996); Alan D. Vestal, *Issue Preclusion and Criminal Prosecutions*, 65 IOWA L. REV. 281 (1980).

6. The doctrine of mutuality prevents a party from relying on a former judgment unless he would have been bound by the judgment had the action been decided the other way. *See* Kirby v. Penn. R.R. Co., 188 F.2d 793, 797 (3d Cir. 1951); Herbert Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457, 1459 (1968). An issue regarding mutuality arises when one of the parties in the first action is different from one of the parties in the second action. Under the traditional mutuality doctrine, there could be no preclusion in the second action unless the parties were identical because different parties necessarily resulted in a judgment that could not bind the new party in the second lawsuit.

7. In *Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313 (1971), the Supreme Court abandoned the rule of mutuality in the federal courts in the case of defensive issue preclusion. *Id.* at 349–50.

8. Assume that Bob sues Carl for negligence and loses on the ground that Bob was contributorily negligent. Bob then sues Donald in a second action. Donald asserts issue preclusion and argues that the issue of negligence has already been determined and that Bob is the negligent party. Donald, who was not a party in the first action, is using issue preclusion defensively to defeat the claim in the second action. Following *Blonder-Tongue*, Donald is permitted to use issue preclusion to defeat Bob's claim as long as Bob was a party in the first action.

9. 439 U.S. 322 (1979).

10. Parklane Hosiery Co. v. Shore, Inc., 439 U.S. 322 (1979). Assume that Bob sues Carl for negligence and loses on the ground that Bob was con-

cases, issue preclusion can be used in the second lawsuit by either the defendant or the plaintiff and can bind a party who was not a party in the first action.[11]

Although first developed in civil litigation, collateral estoppel has also been a rule of federal criminal law since 1916.[12] More recently, in 1970, the Supreme Court held that a criminal defendant's right to use issue preclusion offensively against the government is rooted in the Fifth Amendment guarantee against double jeopardy.[13] Therefore, a defendant has a constitutional right to assert issue preclusion against the government to prevent the government from relitigating an issue determined in a previous action in favor of the defendant.[14]

The Supreme Court has not addressed whether the rationale enunciated in *Parklane* can be applied in the criminal context, thus allowing the government to invoke offensive issue preclusion to prevent the defendant from relitigating an issue that was decided in a previous criminal trial in favor of the government. The lower federal courts are divided on whether offensive collateral estoppel is appropriate in the criminal context.[15] Recent decisions have con-

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tributorily negligent. Now, in a second action, Donald sues Bob for harms resulting from the same accident. Donald asserts issue preclusion and argues that Bob was already found to be negligent in the first action. This is an example of offensive issue preclusion because Donald, who was not a party to the first action, is using issue preclusion to establish his claim.

11. *See, e.g.*, Appling v State Farm Mut. Auto Ins. Co., 340 F.3d 769 (9th Cir. 2003) (allowing offensive issue preclusion to prevent defendant from relitigating whether termination without cause was a provision of the contract); Loeb Indus., Inc. v Sumitomo Corp., 306 F.3d 469, 496 (7th Cir. 2002) (allowing offensive issue preclusion and dismissing claims); Pena v. Travis, 2002 WL 31886175, at *10 (S.D.N.Y. Dec. 27, 2002) (allowing defensive issue preclusion and rejecting plaintiff's claim of civil rights violation where the same matter brought against the same defendants in earlier action); Meador v Oryx Energy Co., 87 F. Supp. 2d 658, 667 (E.D. Tex. 2000) (granting summary judgment to defendant on grounds of issue preclusion when the issue raised in the second suit had been adequately and finally litigated in the first case).

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

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

14. *See id.* at 445.

15. *See, e.g.*, United States v. Gallardo-Mendez, 150 F.3d 1240, 1243 (10th Cir. 1998) (refusing to allow offensive issue preclusion following a guilty plea); United States v. Pelullo, 14 F.3d 881, 897 (3d Cir. 1993) (refusing to al-

tinued to extend the law of issue preclusion by allowing the use of offensive issue preclusion in criminal trials that involve issues of citizenship status, while refusing to expand it to other contexts.[16]

In a country that has been recently scarred by the events of September 11, 2001, the current position of the courts is troubling. According to the United States Census Bureau, between eight mil-

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low offensive issue preclusion); Hernendez-Uribe v. United States, 515 F.2d 20, 22 (8th Cir. 1975) (allowing offensive issue preclusion); Pena-Cabanillas v. United States, 394 F.2d 785, 788 (9th Cir. 1968) (allowing offensive issue preclusion); United States v. Rangel-Perez, 179 F. Supp. 619, 622 (S.D.Cal. 1959) (allowing offensive issue preclusion). *Compare* Hernandez-Uribe v. United States, 515 F.2d 20, 22 (8th Cir. 1975), *cert. denied*, 423 U.S. 1057 (1976) (affirming defendant's conviction, holding that issue preclusion prevented defendant from relitigating his citizenship status, because the defendant was bound by an earlier adjudication in which he pleaded guilty to a matter involving the same crime) *and* Pena-Cabanillas v. United States, 394 F.2d 785, 788 (9th Cir. 1968) (affirming defendant's conviction, holding that collateral estoppel prevented defendant from relitigating his alien status, because it had already been determined under a prior adjudication) *with* United States v. Gallardo-Mendez, 150 F.3d 1240, 1243 (10th Cir. 1998) (reversing the defendant's conviction, holding that the government may not use a judgment following a plea of guilty to collaterally estop a criminal defendant from relitigating an issue in a subsequent criminal proceeding) *and* United States v. Harnage, 976 F.2d 633, 636 (11th Cir. 1992) (reversing defendant's conviction, holding that the government may not collaterally estop a criminal defendant from relitigating an issue decided against the defendant in a different court in a prior proceeding).

16. *See, e.g.*, United States v. U.S. currency in the amount of $119,984.00, 304 F.3d 165 (2d Cir. 2002) (refusing to allow government to use issue preclusion in a subsequent forfeiture proceeding); *Pelullo*, 14 F.3d at 897 (refusing to allow issue preclusion by government in case involving RICO); *Harnage*, 976 F.2d at 636 (refusing to allow offensive use of issue preclusion by government in case involving conspiracy to distribute drugs). Other than the cases in footnote 15, there have been very few decisions aside from alienage cases that have allowed offensive issue preclusion. In *People v. Ford*, 416 P.2d 132 (Cal. 1966), the California Supreme Court held in a felony-murder case that the doctrine of issue preclusion applies to both civil and criminal cases. *Ford*, 416 P.2d at 138. In *Carmody v. Seventh Judicial District Court In and For Lincoln County*, 398 P.2d 706 (Nev. 1965), the Nevada Supreme Court stated in dicta that issue preclusion could be applied against defendants in a case involving felony-murder. *Carmody*, 398 P.2d at 707. Finally, in *United States v. Colacurcio*, 514 F.2d 1 (9th Cir. 1974), the court did not allow issue preclusion under the facts of the case, but did state in dictum that issue preclusion could be invoked against the defendant in all types of cases. *Colacurcio*, 514 F.2d at 6.

lion and twelve million illegal aliens are believed to be living in the United States, with anywhere from one million to three million more expected this year.[17] At the same time, to address the security concerns, the federal government has increased its emphasis on interior enforcement of illegal aliens. The American public is experiencing the unleashing of xenophobia and is vulnerable to demagoguery about the status of aliens in our country.

This article addresses whether the expansion of the doctrine of issue preclusion in the federal criminal area should mirror the expansion of the doctrine in the federal civil area.[18] The article examines the general requirements of issue preclusion and the evolution of issue preclusion in both the civil and criminal context.[19] Next, this article examines the current status of offensive and defensive issue preclusion when the first suit is civil and the second suit is criminal,[20] the first suit is criminal and the second suit is civil,[21] and where both the first and second action is criminal.[22] The article then analyzes whether the approach taken by the courts

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17. *See* Kevin E. Deardorff & Lisa M. Blumerman, Evaluating Components of International Migration: Estimates of the Foreign-Born Population by Migrant Status in 2000 (U.S. Census Bureau, Working Paper Series No. 58, 2001), http://www.census.gov/population/www/documentation/twps0058.html; Joe Costanzo, Cynthia Davis, Caribert Irazi, Daniel Goodkind, & Roberto Ramirez, Evaluating Components of International Migration: The Residual Foreign Born (U.S. Census Bureau, Working Paper Series No. 61, 2001), http://www.census.gov/population/www/documentation/twps0061.html.

18. I will only be addressing federal cases, although various state courts have looked at this issue and have found different results. *See, e.g.*, Gutierrez v. Superior Court, 29 Cal. Rptr. 2d 376 (Cal. Ct. App. 1994) (holding prior conviction for attempted murder is not preclusive in subsequent cases for murder involving same victim); State v. Stiefel, 256 So. 2d 581, 585 (Fla. Dist. Ct. App. 1972) (holding defendant has a right to a jury trial on all issues related to a criminal charge); Rouse v. State, 97 A.2d 285 (Md. 1953) (holding that issue preclusion would abridge the constitutional right of the accused to have the case proved beyond a reasonable doubt); *Carmody*, 398 P.2d at 707 (Nev. 1965) (finding that a guilty plea to the crime of robbery was preclusive in subsequent trial for felony murder); State v. Thomas, 276 A.2d 391 (N.J. Super. Ct. Law Div. 1971) (asserting that collateral estoppel is not available to the government).

19. *See infra* Part II.

20. *See infra* Part III–V.

21. *See id.*

22. *See id.*

in the civil area should be applied to the criminal area, and the appropriate parameters of that approach.[23] Finally, the article concludes that although the courts should allow the government to use offensive collateral estoppel in criminal cases, the courts must be vigilant in ensuring that there is no prejudice.[24]

II. THE EVOLUTION OF ISSUE PRECLUSION

In both the civil and criminal context, issue preclusion may be applied if certain elements are present.[25] First, the issue on which there was a decision in the prior litigation must be the same issue that is being considered in the pending litigation.[26] Second, a decision on that issue must have been necessary for the judgment in the first litigation and must have been a final judgment.[27] Although

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23. *See infra* Part VI.

24. *See infra* Part VII. *But see Collateral and Equitable Estoppel*, *supra* note 6, for the argument that collateral estoppel should only be used for crimes containing a status element.

25. The requirements of issue preclusion are set forth in 1B J.MOORE, FEDERAL PRACTICE 0.443[1] at 3901 (2d ed. 1974).

26. Bernhard v. Bank of Am. Nat'l Sav. Assn., 122 P.2d 892, 895 (Cal. 1942).

27. *Id.* Because issue preclusion can only exist if the precise issue has been litigated and was necessary to the judgment below, the court must examine the first proceeding to determine if the issue decided was necessary for the judgment. When the first proceeding is a civil suit, and the second proceeding is also a civil suit, the court can look to see if there was a special verdict or findings of fact and conclusions of law in order to identify (1) how the issues were decided and (2) whether they were necessary to the judgment. Even when the first proceeding is a criminal prosecution, and the jury has returned a guilty verdict, it may be possible to determine the issues that were necessarily decided. *See* Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 572 (1951) (enunciating the trial court's role in looking at the first proceeding and explaining the findings to the jury in the second proceeding). When the first proceeding is a criminal prosecution and the jury has returned an acquittal, it becomes very difficult for the court to determine whether the issues were necessarily decided. *See* United States v. King, 563 F.2d 559, 561 (2d Cir. 1977) (refusing to allow the defendant to use issue preclusion in a second prosecution following an acquittal because the defendant could not demonstrate that the precise issue had been necessarily litigated and decided in the first prosecution). In addition, it is possible for issue preclusion to exist if a party fails to contest an issue that is necessary to a decision and a judgment that is unfavorable to that party is found

both of these elements raise a myriad of issues, they are not discussed at length in this article.

A third traditional requirement of issue preclusion in the civil context has been that the parties in the second proceeding must be the same as the parties in the first proceeding in which the issue sought to be established was originally determined.[28] A judgment that was obtained in the first action could not be used in a subsequent action against someone who was not a party in that first action because that would violate the non-party's right to due process.[29] Under the traditional mutuality doctrine, courts held that, if a judgment could not be used against one party because it would violate due process, that judgment could also not be used offensively even though such use would not raise any constitutional implications.[30] As a result, the doctrine of mutuality prevented a party from relying on a former judgment unless that party would have been bound by that judgment had the action been decided the other way.[31]

The move away from the strict requirement of mutuality in the civil context began with the California state court's decision in *Bernhard v. Bank of America*.[32] In *Bernhard*, an ailing woman set

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on that issue, a court in a subsequent proceeding may find that issue to be precluded. In criminal cases, this becomes a significant problem in cases where the first proceeding is a guilty plea. Under the Restatement of Judgments approach, there could be no issue preclusion because the first proceeding was not actually litigated. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982). However, a number of courts have held that the parties could use issue preclusion following a guilty plea when the second litigation is a civil suit. *See* Ivers v. United States, 581 F.2d 1362 (9th Cir. 1978) (holding that a criminal conviction based upon a guilty plea conclusively establishes that the defendant engaged in the criminal act for which he was convicted).

28. *Bernhard*, 122 P.2d at 895.

29. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979); Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 329 (1971).

30. *See* Ralph Wolff & Sons v. N.Z. Ins. Co., 58 S.W.2d 623, 625 (Ky. 1933) ("To bind the plaintiffs the defendants must also have been bound, for an estoppel is always mutual.").

31. Kirby v. Penn. R.R. Co., 188 F.2d 793, 797 (3d Cir. 1951); *Bernhard*, 122 P.2d at 894.

32. *Bernhard*, 122 P.2d at 895.

up a joint account with her caretaker.[33] The caretaker then removed the money from the joint account and set up a new account in the caretaker's own name.[34] The woman died, and as executor of the estate, the caretaker did not include the money from the joint account in the estate.[35] When the caretaker filed an accounting and simultaneously resigned as executor, the other testamentary beneficiaries objected.[36] The probate court overruled the objections and settled the account, finding that the woman had made a gift of the money to the caretaker.[37] Thus, in the first action, the caretaker prevailed after a finding that the money was a gift.

In the second action, one of the testamentary beneficiaries became the administratrix following the caretaker's resignation.[38] This administratrix/beneficiary brought a new action against the bank, alleging that it was liable for allowing the transfer of the funds from the woman's account to the caretaker's account without the woman's approval.[39] The bank then sought issue preclusion against the administratrix on the issue of the woman's consent, based on the finding of the probate court in the first action that the money was a gift.[40] The administratrix argued the traditional doctrine of mutuality should apply because, since she could not have used estoppel against the bank, then the bank could not use estoppel against the administratrix.[41]

The court rejected the mutuality argument in the context of defensive issue preclusion, and stated that "[t]he criteria for determining who may assert a plea of res judicata differ fundamentally from the criteria for determining against whom a plea of res judicata may be asserted."[42] Although due process forbids binding a non-party to the judgment in the first action, if the party against whom the claim is asserted has had his day in court, either person-

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33. *Id.* at 893.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 893–94.
41. *Id.* at 894.
42. *Id.*

ally or through a representative, then it should be proper to allow the assertion of the doctrine against that party.[43] In *Bernhard*, the administratrix had already had her day in court in the first action; and therefore, the bank could properly use the court's finding against her.[44] Thus, the California Supreme Court held that if a party had already litigated the issue in the first civil action, that particular finding could be used against that party in the second action, even if the party asserting issue preclusion was not a party in the first action.[45]

In *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*,[46] the United States Supreme Court, following the changes set in motion by Justice Traynor in *Bernhard*, abandoned the rule of mutuality in the federal courts in the case of defensive issue preclusion.[47] The Court distinguished between offensive and defensive use of non-mutual issue preclusion and held that, with respect to defensive issue preclusion, there was no need to adhere to the traditional doctrine of mutuality.[48] As a result, in civil actions in the federal courts, when a party has already litigated an issue in the first action, the finding can then be used against that party in the second action, even if the party asserting defensive issue preclusion was not a party in the first action.[49]

Eight years later in *Parklane* the Supreme Court dealt with the more difficult issue of the offensive use of issue preclusion.[50] In the first action,[51] the SEC sought injunctive relief against Parklane on the grounds that Parklane had issued a materially false and misleading proxy statement.[52] The district court found for the SEC, a

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43. *Id.*
44. *Id.*
45. *Id.* at 895.
46. 402 U.S. 313 (1971).
47. Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 350 (1971).
48. *Id.* at 329–30.
49. *Id.*
50. Parklane Hosiery Co. v. Shore, Inc., 439 U.S. 322, 326 (1979).
51. The first action actually began after the second action but concluded first. *Id.* at 324. However, both actions arose out of the same transaction. *Id.* at 327.
52. SEC v. Parklane Hosiery Co., 422 F. Supp. 477, 480 (S.D.N.Y.

declaratory judgment was entered,[53] and the Second Circuit affirmed.[54] The second action was a shareholders' derivative action in which the plaintiffs moved for partial summary judgment, asserting that Parklane should be estopped from relitigating the issue it lost in the first action, namely whether the proxy statement was false and misleading.[55] The district court denied the motion on the grounds that it would deprive the defendant of his right to a trial by jury.[56] The Second Circuit reversed, holding that the prior adjudication removed those facts from controversy; thus there was no right to a trial by jury.[57] Consequently, unlike *Bernhard* and *Blonder-Tongue*, in which the parties were trying to use issue preclusion defensively, the *Parklane* plaintiffs were trying to use issue preclusion offensively to establish their claim that the proxy statement was false and misleading.[58]

The Court allowed the use of issue preclusion here even though it was offensive.[59] Finding that the application of issue preclusion would not deny Parklane its Seventh Amendment right to a jury trial, the Court held that Parklane had a full and fair opportunity to litigate the factual issues in the first trial.[60] The Court stated that in cases involving offensive issue preclusion, the trial courts should have broad discretion in deciding whether issue preclusion is appropriate.[61] In making that determination, the trial court should apply a balancing test to see whether the plaintiff could have joined the first action but failed to do so, and whether the second action presented procedural opportunities that were not available in the first action.[62]

1976), *aff'd*, 558 F.2d 1083 (2d Cir. 1977).

53. *Parklane Hosiery Co.*, 422 F. Supp. at 486–87.
54. *Parklane Hosiery Co.*, 558 F.2d at 1090.
55. Shore v. Parklane Hosiery Co., 565 F.2d 815, 818 (2d Cir. 1977).
56. *Id.*
57. *Id.* at 819–22.
58. Parklane Hosiery Co. v. Shore, Inc., 439 U.S. 322, 329 (1979).
59. *Id.* at 331–32.
60. *Id.* at 335–36.
61. *Id.* at 331.
62. *Id.* at 329–31.

In the federal civil context, therefore, defensive issue preclusion is always allowed,[63] while offensive issue preclusion is allowed on a case-by-case basis, at the discretion of the trial judge.[64] In the federal criminal context, on the other hand, a defendant has been able to use issue preclusion to preclude the government from relitigating an issue determined in a prior acquittal since 1916.[65] Rejecting the civil rule of mutuality when issue preclusion is used defensively, the courts have held that even though a criminal defendant cannot be estopped on an issue decided against him, the defendant can use defensive issue preclusion to estop the government when the issue in the first proceeding was decided in the defendant's favor.[66] The rationale is that the defendant "always has the right to have the jury or the triers of fact determine anew every element of guilt."[67]

In *Ashe v. Swenson*,[68] which was decided in 1970, one year before *Blonder-Tongue* and nine years before *Parklane*, the Supreme Court held that asserting collateral estoppel against the government is a constitutional right of the accused, inherent in the Double Jeopardy Clause of the Fifth Amendment and applicable to the states through the Fourteenth Amendment.[69] In *Ashe*, the defendant and three other co-defendants were prosecuted for a robbery that occurred during a poker game.[70] The defendant was acquitted.[71] Six weeks later the defendant was brought to trial for a second robbery that occurred during the same poker game.[72] The defendant moved to dismiss on the ground that he had previously been acquitted.[73] The court denied the motion and the defendant

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63. Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 313 (1971).

64. *Parklane Hosiery Co.*, 439 U.S. at 331.

65. United States v. Oppenheimer, 242 U.S. 85, 88 (1916).

66. United States v. De Angelo, 138 F.2d 466, 468 (3d Cir. 1943); United States v. Carlisi, 32 F. Supp. 479, 482 (E.D.N.Y. 1940).

67. *Carlisi*, 32 F. Supp. at 482.

68. 397 U.S. 436 (1970).

69. Ashe v. Swenson, 397 U.S. 436, 445 (1970).

70. *Id.* at 437–38.

71. *Id.* at 439.

72. *Id.*

73. *Id.*

was convicted.[74] The defendant then brought a petition for a writ of habeas corpus on the ground that the second prosecution violated his constitutional right not to be put in double jeopardy.[75] The United States Supreme Court granted the writ, holding that "when an issue of ultimate fact has once been determined by a valid and final judgment, the issue cannot again be litigated between the same parties in any future lawsuit."[76] Therefore, because the jury in the first prosecution determined that there was reasonable doubt as to whether the defendant was one of the robbers, the state was precluded from presenting evidence on identification in the second prosecution.[77]

The Court noted that the "rule of collateral estoppel in [federal] criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality."[78] The Court set out a test where the trial court has to examine the record of the prior proceeding including the pleadings, evidence, and charge, and then determine whether a jury could have reached its verdict on a ground other than what the defendant seeks to estop.[79] If the trial court concludes that a jury would not have reached its verdict under any other rationale, the defendant is permitted to use issue preclusion against the government.[80]

Therefore, a defendant can use issue preclusion defensively in a second criminal prosecution to bar the government from relitigating an issue that was decided in the first prosecution where the defendant was acquitted. There is no requirement of mutuality.

This needs to be distinguished from the situation where the government seeks to use issue preclusion offensively to bar the defendant from relitigating an issue that was decided against the defendant at a previous criminal trial. The Supreme Court has not spoken on the issue and the lower courts are divided.[81] The analy-

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74. *Id.* at 439–40.
75. *Id.* at 440.
76. *Id.* at 443.
77. *Id.* at 446.
78. *Id.* at 444.
79. *Id.*
80. *Id.* at 445.
81. In *Simpson v. Florida*, 403 U.S. 384 (1971), the defendant was con-

sis by the courts is further complicated when the action is either a civil action or a criminal action that does not end in an acquittal or conviction.

III. THE CURRENT STATUS OF THE USE OF DEFENSIVE ISSUE PRECLUSION

Defensive issue preclusion comes into play when a party who was a criminal defendant in a prior prosecution is either being sued civilly or is being criminally prosecuted in a second action.[82] When the actions involve similar issues, the defendant may argue that an issue that has been decided in the first action should not be relitigated, and that the prosecution or plaintiff should be bound by that earlier determination.[83] To use issue preclusion at all, the issue on which there was a prior determination must be the same issue that is being considered in the pending litigation, and a decision on the issue must have been necessary for the judgment in the first litigation.[84] The law is fairly clear that a criminal defendant may use issue preclusion to bar a subsequent criminal prosecution if the first criminal prosecution ended with either a jury verdict or a dismissal of the indictment.[85] The law is less clear if the first criminal

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victed of armed robbery. *Id.* at 384. After a reversal for an error in jury instructions, the defendant was retried and acquitted. *Id.* He was then tried and convicted at a third trial for the robbery of a different person during the same incident. *Id.* at 385. The defendant argued that the issue of whether he was a robber had already been decided at the previous trial, and therefore could not be relitigated. *Id.* The state appellate court held that the issue had been properly relitigated, reasoning that the first conviction nullified the later acquittal for purposes of collateral estoppel. *Id.* at 386. The United States Supreme Court reversed, holding that there is no requirement of mutuality under its decision in *Ashe*. *Id.* Therefore, although the prior conviction could not be used against the defendant, the prior acquittal could be used against the government. *Id.* Although this could be interpreted as disapproval of the use of collateral estoppel by the government against criminal defendants, it is nowhere near definitive.

82. United States v. Oppenheimer, 242 U.S. 85, 87 (1916).

83. *See, e.g.*, *Ashe*, 397 U.S. at 436 (holding that where defendant was acquitted of robbery charge in the trial of one victim when witnesses unable to identify him as participant, the government was precluded from subsequent prosecution of defendant for same crime against a different victim).

84. *Id.* at 443.

85. *Id.* at 444–45.

prosecution ended with a plea bargain, or if the second action is civil and not criminal.

Like the use of issue preclusion in the civil context, the doctrine of criminal defensive issue preclusion has its roots in common law.[86] A criminal defendant first used issue preclusion to bar a subsequent criminal prosecution in 1916 in *United States v. Oppenheimer*.[87] In *Oppenheimer*, the defendant argued that the government was precluded from indicting him because the indictment for the same offense had been dismissed on statute of limitations grounds.[88] The government argued that the defendant could not assert issue preclusion because no jeopardy had attached in the first prosecution.[89] Justice Holmes determined that even though double jeopardy had not attached in the first proceeding, defensive criminal issue preclusion had its source in fundamental rights other than the guarantee against double jeopardy.[90] Based on this reasoning, the Court affirmed the dismissal of the second indictment.[91]

Following *Oppenheimer*, the use of defensive issue preclusion in subsequent criminal prosecutions became important to protect defendants in ways that were unavailable under the Double Jeopardy Clause of the Constitution.[92] In 1961, the Second Circuit continued its broad interpretation of defensive collateral estoppel, holding in *United States v. Kramer*[93] that an acquittal on burglary

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86. In *The Queen v. Miles*, 24 Q.B.D. 423, 431 (1890), the court held that "the criminal law is in unison with that which prevails in civil proceedings" and "where a criminal charge has been adjudicated . . . that adjudication, whether it takes the form of an acquittal or conviction, is final . . . and may be pleaded in bar to any subsequent prosecution for the same offence . . . ."

87. 242 U.S. 85 (1916).

88. *Id.* at 86.

89. *Id.* at 87.

90. *Id.* at 87–88.

91. *Id.* at 88.

92. The Double Jeopardy Clause has been construed very narrowly. The traditional test compares the statutory elements of each charged offense, and the court looks to see "whether each provision requires proof of an additional fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932). The Court has only expanded double jeopardy protections to bar subsequent prosecutions for lesser-included offenses. Harris v. Oklahoma, 433 U.S. 682, 682 (1977).

93. 289 F.2d 909 (2d Cir. 1961).

charges in the first action barred a subsequent action for conspiracy to burglarize.[94]

In 1970, in *Ashe*, the Court parted ways with *Oppenheimer* when it constitutionalized issue preclusion as part of the Fifth Amendment's guarantee against double jeopardy rather than grounding it as a requirement of due process.[95] Ironically, rather than broadening the use of defensive issue preclusion, the decisions following *Ashe* began to erode the use of the doctrine by criminal defendants. In *United States v. One Assortment of 89 Firearms*,[96] the Court held that the defendant could not use issue preclusion to bar a civil forfeiture proceeding following an acquittal because the acquittal did not prove that the defendant was innocent; rather, it only proved "the existence of reasonable doubt as to his guilt."[97] The Court held that the government should still be permitted to show in the civil forfeiture that the defendant had been involved in criminal conduct by a preponderance of the evidence.[98] Six years later, in *Dowling v. United States*,[99] the Court again limited the use of defensive issue preclusion.[100] In *Dowling*, the defendant was acquitted of robbery in the first trial in which he was allegedly identified when the victim unmasked him.[101] In the second action, the defendant was tried for a bank robbery in which

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94. United States v. Kramer, 289 F.2d 909 (2d Cir. 1961). Many states also followed that trend. *See* State v. Safrit, 551 S.E.2d 516 (N.C. Ct. App. 2001) (holding later trial on same charge involving different primary offense is barred by preclusion); People v. Mitchell, 81 Cal. App. 4th 132 (2000) (determining state is prohibited under collateral estoppel doctrine from presenting evidence on prior conviction when the evidence was insufficient to support a sentence enhancement); State v. Secret, 524 N.W.2d 551 (Neb. 1994) (holding an indeterminate sentence was barred by collateral estoppel); People v. Joon Ho Chin, 186 Misc. 2d 454 (N.Y. Sup. 2000) (barring state by collateral estoppel from introducing evidence of physical force during retrial of rape); People v. Beltran, 210 P.2d 238 (Cal. Ct. App. 1949); Harris v. State, 17 S.E.2d 573 (Ga. 1941).

95. Ashe v. Swenson, 397 U.S. 436, 445–46 (1970).

96. 465 U.S. 354 (1984).

97. *One Assortment of 89 Firearms*, 465 U.S. at 361–62.

98. *Id.* at 362.

99. 493 U.S. 342 (1990).

100. *Dowling*, 493 U.S. 342, 349 (1990).

101. *Id.* at 344–45.

he allegedly wore the same mask.[102] The defendant argued that the victim was precluded from testifying that the masked defendant had robbed her.[103] The Court affirmed the defendant's conviction because in the first trial the government had failed to prove beyond a reasonable doubt that the defendant had committed the act, and to introduce evidence of the same act in another trial, the government only had to show that a jury could reasonably conclude that the defendant had committed the act.[104] Because of the difference in the burdens of proof, the Court held that the defendant could not use issue preclusion,[105] once again substantially restricting its use.

Therefore, even though the Court has held that the criminal defendant's defensive use of issue preclusion against the government is not subject to the requirements of mutuality and, in fact, is protected by the United States Constitution, its use has been limited. As a general rule, it can always be used in a second criminal prosecution when the first prosecution ended in an acquittal.[106] There are many problems, however, if the second lawsuit is civil or if the first lawsuit did not end in a jury verdict.

IV. THE CURRENT STATUS OF THE USE OF CRIMINAL OFFENSIVE ISSUE PRECLUSION

The only guidance by the Supreme Court as to the use of offensive issue preclusion in criminal cases derives from *Standefer v. United States*.[107] In *Standefer*, the prosecution charged the defendant with aiding and abetting after the principal had already been acquitted of the substantive offense.[108] The defendant unsuccessfully argued that the prosecution should be estopped from prosecuting him because the individual whom he had allegedly aided and abetted had been acquitted by a jury.[109] The Court recalled that it had authorized "nonmutual collateral estoppel" in both

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102. *Id.*
103. *Id.* at 344–47.
104. *Id.* at 348–49.
105. *Id.* at 349.
106. *See supra* note 27.
107. 447 U.S. 10 (1980).
108. *Id.* at 11–13.
109. *Id.* at 13.

Blonder-Tongue and *Parklane,* and that the estoppel applied in *Parklane* was offensive.[110] The defendant in *Standefer*, however, was not attempting to use offensive issue preclusion, but was attempting to use defensive issue preclusion.[111] The Court distinguished *Standefer* from *Parklane* and *Blonder-Tongue* and rejected the "application of nonmutual [collateral] estoppel in criminal cases."[112] Although some courts have construed this to mean that the Court "declined to extend *Parklane* to criminal cases,"[113] the more rational conclusion is that the Court did not reach any conclusions about offensive preclusion in criminal cases. The facts did not deal with offensive issue preclusion; the Court did not discuss offensive preclusion; and its analysis only discusses why nonmutual defensive issue preclusion was not appropriate in the case.[114]

The first lower court case where the government used issue preclusion offensively against a criminal defendant was *United States v. Rangel-Perez.*[115] The defendant in *Rangel-Perez* was convicted in 1943 of illegal entry into the United States from Mexico.[116] The indictment underlying that conviction stated that the defendant had been deported from the United States in 1941 and was discovered back in the United States in 1942.[117] Approximately fifteen years later, the defendant, after being discovered in California, was again indicted and tried for illegal entry at a trial before a judge.[118] At the second trial, the government argued that the issue as to whether the defendant was an alien in 1943 was

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110. *Id.* at 21.

111. *Id.* The defendant urged the Court "to apply nonmutual estoppel against the Government." *Id.*

112. *Id.* at 23.

113. United States v. Pelullo, 14 F.3d 881, 894 n.7 (3d Cir. 1994).

114. *Standefer*, 447 U.S. at 22–23. The Court stated that it was concerned about an erroneous acquittal, perhaps the result of jury nullification, which could then multiply by binding future juries. *Id.*

115. 179 F. Supp. 619 (S.D. Cal. 1959).

116. *Id.* at 621. For the relevant statutory language, see 8 U.S.C. § 180 (1940), which required that a defendant knowingly, willfully, unlawfully, and feloniously enter the United States. 8 U.S.C. § 180 (repealed June 27, 1952) has been replaced by 8 U.S.C. §§ 1101(g) and 1326.

117. *Rangel-Perez*, 179 F. Supp. at 622.

118. *Id.* at 622.

fully adjudicated at the earlier trial, and that issue preclusion could therefore be invoked against the defendant to alleviate the need to determine the defendant's citizenship.[119] The court held that the government could invoke the doctrine of collateral estoppel against the accused to establish his nationality status as being that of alien in 1943.[120] The issue of the defendant's citizenship was actually litigated at the 1943 trial, a finding of fact that the defendant was an alien was made, and this finding was necessary to the judgment of guilty of the crime of illegal entry.[121] Therefore, the court, for the first time, allowed the government to invoke non-mutual offensive issue preclusion.[122]

Nine years later, in *Pena-Cabanillas v. United States*,[123] the Ninth Circuit also addressed whether the government could use offensive issue preclusion to prevent the defendant from relitigating his status as an alien.[124] In *Pena-Cabanillas*, the defendant was convicted in 1964 for falsely and willfully representing himself to be a United States citizen.[125] In the second trial, the defendant was indicted and tried for the offense of illegal entry into the United States.[126] In the second action, the district court took judicial notice of the 1964 conviction and held that since the issue of citizenship was the same in both trials, the defendant was precluded from offering evidence pertaining to his citizenship up to and including the 1964 conviction.[127] Following the reasoning of the court in *Rangel-Perez*, the court found that the district court had correctly allowed offensive issue preclusion.[128]

In 1975, the Eighth Circuit also upheld the use of offensive issue preclusion in *Hernandez-Uribe v. United States*,[129] which also

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119. *Id.*
120. *Id.* at 626–27.
121. *Id.* at 626.
122. *Id.*
123. 394 F.2d 785 (9th Cir. 1968).
124. Pena-Cabanillas v. United States, 394 F.2d 785 (9th Cir. 1968).
125. *Id.* at 786. The defendant was convicted of violating 18 U.S.C. § 911 (2003). *Id.*
126. *Id.*
127. *Id.* at 786.
128. *Id.* at 787–88.
129. 515 F.2d 20 (8th Cir. 1975).

involved the crime of illegal entry under 8 U.S.C. § 1326.[130] The district court instructed the jury that the defendant was bound by an earlier judicial determination that he was an alien as of 1967, and therefore the jury could not consider any evidence pertaining to his citizenship as of that date.[131] The defendant appealed, arguing that the instruction deprived "him of his right to a presumption of innocence, his sixth amendment right to a trial by jury, and his right to confrontation of witnesses . . . ."[132] The court held that by pleading guilty in the 1967 case involving the same crime, the defendant admitted all of the essential elements of the crime, including that he was an alien until June 1967, and therefore issue preclusion was proper.[133] Although the defendant attempted to distinguish this case from *Pena-Cabanillas* and *Rangel-Perez* by arguing that the earlier finding of alienage in his case was the result of a guilty plea and not a full adversary proceeding, the court held that procedures surrounding a guilty plea ensure that there is a factual basis and therefore issue preclusion is still appropriate.[134]

More recently, in *United States v. Gallardo-Mendez*,[135] the Tenth Circuit reversed the defendant's conviction for violating 8

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130. *Id.* at 20–21.

131. *Id.* at 21.

132. *Id.*

133. *Id.*

134. *Id.* at 22. In 1980, the Ninth Circuit again addressed the issue in *United States v. Bejar-Matrecios*, 618 F.2d 81 (9th Cir. 1980). In *Bejar-Matrecios*, the defendant was tried for illegal reentry into the United States under 8 U.S.C. § 1326. *Id.* at 82. At the trial, the government introduced evidence that showed that the defendant had once pled guilty to a violation of 8 U.S.C. § 1325, which is misdemeanor illegal entry. *Id.* at 83. The government argued that under a theory of offensive issue preclusion the defendant's citizenship status had been determined by that prior conviction and could not be relitigated. *Id.* The district court allowed the preclusion. *Id.* Although the Ninth Circuit reversed the conviction on the grounds that the manner in which the government introduced the evidence was highly prejudicial, the court did emphasize that the doctrine of issue preclusion applies equally whether the previous criminal conviction is based on a jury verdict or a guilty plea. *Id.* at 83–84. Had the evidence been properly introduced, evidence of the prior conviction would have conclusively established that the defendant was an alien at the time of the § 1325 conviction. *Id.* at 84.

135. 150 F.3d 1240 (10th Cir. 1998).

U.S.C. § 1326.[136] The court held that the government may not use a judgment resulting from a plea of guilty to preclude "a criminal defendant from relitigating an issue in a subsequent criminal proceeding."[137] In this case, the defendant was indicted for violating 8 U.S.C. § 1326 in 1991, pled guilty, and was deported.[138] In 1996 the defendant was again found in the United States, and was indicted under 8 U.S.C. § 1326 for the "illegal reentry of a deported alien."[139] The government requested that the defendant be precluded from contesting "his alienage prior to his 1991 conviction."[140] The defendant objected, but the district court invoked issue preclusion and instructed the jury that that there had been a judicial determination that prior to 1991 the defendant was not a citizen, and that "[t]he defendant is bound by that determination."[141] The court did not address the broad question of whether issue preclusion could be asserted against a criminal defendant, but instead looked at the more narrow issue of whether a guilty plea can be used to preclude the defendant from relitigating an issue in a subsequent trial.[142] Disagreeing with the Eighth Circuit in *Hernandez-Uribe*, the court found that the rules of criminal procedure do not protect the defendant in the same way as the protections afforded by a jury trial and the Due Process Clause of the United States Constitution.[143] Therefore, the court reversed the defendant's conviction and remanded the case for a new trial.[144]

The Ninth Circuit has also approved, in theory, the offensive use of issue preclusion in a case not involving a status issue.[145] In *United States v. Colacurcio*,[146] the defendant appealed a conviction for income tax evasion alleging that the district court erred when it allowed certain facts from a previous proceeding to be considered

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136. *Id.* at 1246.
137. *Id.*
138. *Id.* at 1241.
139. *Id.*
140. *Id.* at 1241–42.
141. *Id.*
142. *Id.* at 1243.
143. *Id.* at 1245.
144. *Id.* at 1246.
145. *See* United States v. Colacurcio, 514 F.2d 1 (9th Cir. 1975).
146. 514 F.2d 1 (9th Cir. 1975).

"as a fact proven in these proceedings."[147] The defendant was precluded in the second action from denying that he had received specific amounts of money.[148] The district court held that although *Rangel-Perez* and *Pena-Cababillas* were "limited to the question of [a] defendant's status, the rationale of those cases" applies equally to cases that do not deal with status issues.[149] The Ninth Circuit reversed the defendant's conviction, however, on the grounds that the specific amount of the payments was not a necessary element of the first conviction, and therefore did not satisfy the "necessarily litigated and essential to the judgment" requirement of issue preclusion.[150]

In addition to the Ninth Circuit, other circuits have not allowed the government to use offensive issue preclusion. For instance, in *United States v. Harnage*,[151] the Eleventh Circuit analyzed whether the government could "preclude a defendant from relitigating a prior unsuccessful attempt to quash a subpoena in a different [federal] court."[152] The court refused to allow offensive collateral estoppel, finding that it would not serve its original purpose—judicial economy.[153] In addition, in *United States v. Pelullo*,[154] the Third Circuit held that the application of offensive issue preclusion deprived the defendant of his right to a jury trial.[155] In *Pelullo*, the defendant was convicted in 1991 of forty-nine counts of wire fraud.[156] On appeal, the court affirmed the conviction of count fifty-four, but reversed the conviction on all other counts because of the erroneous admission of some testimony.[157] The defendant was retried, and convicted, and was sentenced for all convictions, including count fifty-four in 1993.[158] The defen-

147. *Id.* at 3.
148. *Id.* at 4.
149. *Id.* at 6.
150. *Id.* at 6–7.
151. 976 F.2d 633 (11th Cir. 1992).
152. *Harnage*, 976 F.2d at 635.
153. *Id.*
154. 14 F.3d 881 (3d Cir. 1994).
155. *Pelullo*, 14 F.3d at 889.
156. *Id.* at 885.
157. *Id.*
158. *Id.*

dant was again indicted for violations of RICO, and during the second trial, the district court admitted evidence of the conviction of count fifty-four for the purpose of proving the RICO count.[159] The court then instructed the jury that "as a matter of law, the defendant has committed the wire fraud offense . . . [t]hat means you don't have to consider whether the government has proved this offense."[160]

The lower courts are split as to whether the offensive use of issue preclusion should be allowed.[161] The courts that have embraced it have all used it against defendants in cases involving citizenship status.[162] Although some courts have stated that it could be applied to defendants in any situation, those courts have not actually allowed it for different reasons.[163] Finally, some circuits have refused to allow offensive issue preclusion in any situation.[164]

V. THE ARGUMENTS BOTH FOR AND AGAINST USING OFFENSIVE ISSUE PRECLUSION IN CRIMINAL CASES

The arguments for and against using offensive issue preclusion against a criminal defendant fall into two different categories. First, there is the issue of whether offensive issue preclusion deprives the criminal defendant of his constitutional rights under the Fifth and Sixth Amendments.[165] Second, if those rights are not violated, the question becomes whether the use of defensive issue preclusion satisfies the policies behind issue preclusion.[166]

A. Constitutional Arguments

The right to a trial by jury in a criminal proceeding is set forth in Article III of the Constitution, which states that "[t]he [t]rial of

159. *Id.* at 887.

160. *Id.*

161. *See supra* notes 115, 123, 129, 135, 151, and 154.

162. *See, e.g.*, United States v. Rangel-Perez, 179 F. Supp. 619 (S.D.Cal. 1959).

163. *See* United States v. Harnage, 976 F.2d 633, 634–36 (11th Cir. 1992).

164. *See* United States v. Pelullo, 14 F.3d 881 (3d Cir. 1994).

165. McCarthy v. United States, 394 U.S. 459 (1969).

166. United States v. Gallardo-Mendez, 150 F.3d 1240, 1240 (10th Cir. 1998); *Harnage*, 976 F.2d at 635.

all crimes . . . shall be by [j]ury."[167] This right is reiterated in the Sixth Amendment to the Constitution, which provides "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."[168] The main function of the jury is to determine the facts of the case and to render a decision regarding the guilt or innocence of the criminal defendant.[169]

One constitutional argument against the use of offensive issue preclusion against a criminal defendant is that issue preclusion deprives the jury in the second trial of the opportunity to consider all of the evidence that affected the determination of guilt or innocence.[170] The language of the Sixth Amendment makes it clear that the right to a jury trial extends to each new criminal proceeding, not merely until one jury determines an issue.[171] Issue preclusion stands for the principle 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."[172] When a court applies issue preclusion it instructs the jury that a required element of the case is already conclusively settled, thereby precluding the jury from a complete view of the facts.[173] The jury in the first trial could have reached a different result from the jury in the second trial, and thus the jury in the second trial must be presented with all of the evidence relating to the

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167. U. S. CONST. art III, § 2, cl.3.

168. U. S. CONST. amend VI.

169. "[T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury." Bollenbach v. United States, 326 U.S. 607, 614 (1946). *See generally* Baltimore & Carolina Line Inc. v. Redman, 295 U.S. 654, 657 (1935) (holding that while it is the court's province to decide the law and to instruct the jury as to the principles of law that govern its deliberations, it is the jury, and the jury alone, that determines the facts); State v. Ingenito, 432 A.2d 912, 916 (N.J. 1981) (stating that although it is important that the evidence before the jury be as full and complete as possible in order to aid the jury in the discharge of its fundamental responsibilities, "[i]t is not...the evidence of record that establishes a defendant's guilt or innocence but the jury's determination of the facts drawn from such evidence.").

170. *Gallardo-Mendez*, 150 F.3d at 1243.

171. United States v. Pelullo, 14 F.3d 881, 895 (3d Cir. 1994).

172. Ashe v. Swenson, 397 U.S. 436, 443 (1970).

173. *See* State v. Ingenito, 432 A.2d 912, 916 (N.J. 1981).

charge. [174] The jury is unable to fully perform "its paramount deliberative and decisional responsibilities"[175] and therefore the defendant's right to a jury trial is fundamentally abridged.

Another constitutional argument is that a textual and procedural analysis of the Sixth Amendment right to a jury trial, compared to the Seventh Amendment civil right to a jury trial, supports the conclusion that offensive issue preclusion cannot be applied in a criminal proceeding. The Seventh Amendment states, "In Suits in common law . . . the right of trial by jury shall be preserved . . ."[176] In contrast, the Sixth Amendment provides an absolute right to a speedy and public trial, by an impartial jury.[177] Courts have held that issue preclusion can be applied in the civil context because the right to a jury trial is preserved rather than guaranteed.[178] Therefore, the difference in the language of the Sixth and Seventh Amendments provides a textual anchor for the proposition that issue preclusion may not be applied against a criminal defendant.[179]

The courts that have allowed offensive issue preclusion have found that the defendant's right to a jury trial is not compromised

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174. *Id.*

175. *Id.*

176. U.S. CONST. amend. VII.

177. U.S. CONST. amend. VI ("In all criminal Prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .").

178. *See* U.S. CONST. amend. VII. There are also procedural differences between criminal and civil trials that could be used to support the conclusion that preclusion is only appropriate in civil cases. In *Parklane Hosiery Co. v. Shore*, the Court references these procedural devises to support its holding that collateral estoppel does not infringe on the Seventh Amendment right to a jury trial. Parklane Hosiery Co. v. Shore, 439 U. S. 322, 335–37 (1919). *See* Galloway v. United States, 319 U.S. 372, 388–94 (1943) (stating that a directed verdict does not violate the Seventh Amendment); Gasoline Products Co. v. Champlin Ref. Co., 283 U.S. 494, 497–99 (1931) (holding retrial limited to question of damages does not violate the Seventh Amendment); Fidelity & Deposit Co. of Maryland v. United States, 187 U.S. 315, 321 (1902) (holding that summary judgment does not violate the Seventh Amendment).

179. United States v. Pelullo, 14 F.3d 881, 894 (3d Cir. 1994). When both the Sixth and Seventh Amendments were being ratified in 1791, collateral estoppel was being applied against a defendant in civil cases, but there are no cases where the government was allowed to invoke collateral estoppel. *Id.* at 894–95. Therefore, "the framers intended them to have [a] different import by using dramatically different language[s]." *Id.* at 895.

in any way.[180] The elements of issue preclusion require that the issue be fully litigated and necessarily decided in the first proceeding.[181] The defendant is therefore afforded all of the procedural benefits of a criminal proceeding including the incentive to fully litigate the issue in the first trial.[182] There is no additional fact finding function for the jury to perform because the facts of the common issue were resolved in the first action.[183]

It is true that a jury is less informed when an accused is unable to relitigate a certain issue in a second trial, but this does not seem to compromise the defendant's right to a jury trial under the Sixth Amendment.[184] There are other situations where, as in issue preclusion, a court can take a subsequent action against a defendant without giving the defendant the benefit of a jury deliberation.[185] The defendant was able to exercise his constitutional rights in the first trial.[186] There is no fact finding function in the second trial, because, as the Supreme Court has stated, "the whole premise of issue preclusion is that once an issue has been resolved in a prior proceeding, there is no further fact finding function to be performed."[187] In addition, a jury can still choose to acquit in the

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180. *See, e.g.*, Hernandez-Uribe v. United States, 515 F.2d 20 (8th Cir. 1975).

181. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982); United States v. Crooks, 804 F.2d 1441, 1446 (9th Cir. 1987) (stating that in the criminal context, the collateral estoppel analysis involves a three-step analysis: (1) whether "the issues in the two actions are [identical in order to] determine whether they are sufficiently similar and material to justify invoking the [collateral estoppel] doctrine;" (2) whether, after an examination of the first record, it can be determined that the issue was fully litigated; and (3) whether, after an examination of the first record, it can be ascertained that the issue was necessarily decided).

182. Fireman's Fund Ins. Co. v. Stites, 258 F.3d 1016, 1021 (9th Cir. 2001).

183. *Parklane Hosiery Co.*, 439 U.S. at 336 n.23.

184. Kennelly, *supra* note 6 at 1405–06.

185. *Id.* at 1407. Professor Kennelly uses the harmless error review, the revocation of probation, and the appellate entry of conviction on lesser-included offenses as three examples of situations where a prior conviction justifies the court acting against the defendant without the defendant having an additional jury trial. *Id.*

186. Kennelly, *supra* note 6, at 1405.

187. *Parklane Hosiery Co.*, 439 U.S. at 336 n.23.

second action.[188] Therefore, the Sixth Amendment right to a jury trial is not sufficient to make offensive issue preclusion unavailable to the government.

A third constitutional argument is that the application of offensive issue preclusion by the government violates the defendant's Fifth Amendment right to due process.[189] Under the Due Process Clause, a criminal defendant has the right to a determination by a jury of whether the prosecution has proved every element of the crime charged beyond a reasonable doubt.[190] By finding that an element of the crime has been conclusively proven, the argument is that the prosecution is relieved of its burden of proof.[191] Not only is the prosecution relieved of its burden of proof, but the burden shifts to the defendant to overcome the prejudice of the jury created by the knowledge of the previous determination.[192]

In addition, the application of offensive issue preclusion jeopardizes the defendant's presumption of innocence, which is guaranteed under the Due Process Clause.[193] A criminal defendant's right to a presumption of evidence "is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[194] An instruction to a jury that one element is conclusively determined may constitute a strong "pull towards a guilty verdict."[195] Thus, issue preclusion violates the Due Process Clause because it threatens the presumption of innocence guaranteed to every criminal defendant.

It seems, however, that if issue preclusion does not violate the right to a jury trial or the right to confront witnesses, then it should

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188. Kennelly, *supra* note 6 at 1405.

189. United States v. Gallardo-Mendez, 150 F.3d 1240 (10th Cir. 1998).

190. *In re* Winship, 397 U.S. 358, 364 (1970). The Supreme Court stated, "we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 354.

191. Helvering v. Mitchell, 303 U.S. 391 (1938); *Gallardo-Mendez*, 150 F.3d at 1240; United States v. Tunning, 69 F.3d 107 (6th Cir. 1995).

192. *See* State v. Ingenito, 432 A.2d 912, 916–19 (N.J. 1981).

193. *Id.* at 912; *see* Byrd v. People, 58 P.3d 50 (Colo. 2002); People v. Goss, 521 N.W.2d 312 (Mich. 1994).

194. Coffin v. United States, 156 U.S. 432, 453 (1895).

195. *Ingenito*, 432 A.2d at 918–19.

satisfy due process.[196] Although under the doctrine of issue preclusion, a jury could hear about a defendant's prior conviction, this would only happen if the crime relates to a central issue in the second trial, not if it only relates to motive.[197] If the court finds that applying issue preclusion would be fundamentally unfair and violate a defendant's due process rights, the court could refuse to apply it in that particular case.

B. Policy Arguments

In addition to constitutional arguments, courts have refused to use offensive issue preclusion in criminal cases because the policy reasons used to support preclusion in civil cases do not justify the use of the doctrine against criminal defendants.[198] The notion of judicial efficiency and finality has been invoked in civil trials to support the use of issue preclusion since the prompt resolution of claims and finality are desirable goals in civil litigation.[199] The issue becomes whether these considerations have the same worth in criminal cases as they do in civil cases.[200] Courts have determined that the efficiencies of issue preclusion pale in comparison to the importance of upholding a criminal defendant's right to vigorously defend himself and protect his liberty.[201] In *Parklane*, the

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196. *See* Kennelly, *supra* note 6 (pointing out how the state courts that have expressed concern about due process really seem to be talking about the right to trial and to confront witnesses).

197. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982). One of the elements of issue preclusion is that the issue be identical in the first and second action. *Id.*

198. *See* United States v. Harnage, 976 F.2d 633, 634 (11th Cir. 1992) (declining to allow offensive issue preclusion against the accused, the Eleventh Circuit decided that ruling on the collateral estoppel motion would consume at least as much time as relitigating the issue, thereby "completely defeating the doctrine's goal [of] judicial efficiency and economy.").

199. Parklane Hosiery Co. v. Shore, 439 U.S. 332, 326, 329–30 (1979); Blonder-Tongue Labs. Inc. v. Univ. of Ill. Found., 402 U.S. 313, 328–29 (1971).

200. United States v. Gallardo-Mendez, 150 F.3d 1240 (6th Cir. 1995); Brazzell v. Adams, 493 F.2d 489 (5th Cir. 1974); Hyslop v. United States, 261 F.2d 786 (8th Cir. 1958).

201. *See* Lucido v. Superior Court of Mendocino County, 795 P.2d 1223, 1232 (Cal. 1990). A criminal defendant has interest of immense importance at

Court advocated the use of offensive issue preclusion in civil cases, but cautioned that the "offensive use of collateral estoppel does not promote judicial economy in the same manner as defensive collateral estoppel"[202] since "it may be unfair to defendants."[203] In addition, judicial efficiency may be vitiated by the necessarily detailed review of the previous criminal proceeding to ensure that the defendant's rights have been protected.

Yet, the use of offensive issue preclusion by the government has resulted in judicial efficiency.[204] Illegal immigration puts an added burden on federal courts by requiring the determination of an alien's status prior to deportation. The federal docket backlog continues to grow and may deleteriously affect the quality of the federal courts.[205]

The most serious problem is that issue preclusion has only been applied to defendants in cases involving alienage status is-

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stake, "both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." *In re* Winship, 397 U.S. 358, 363 (1969). In his dissent in *Ashe*, Justice Burger stated that "in criminal cases, finality and conservation of private, public, and judicial resources are lesser values than in civil litigation . . . . [C]ourts that have applied the collateral-estoppel concept to criminal actions would certainly not apply it to both parties, as is true in civil cases . . . ." Ashe v. Swenson, 397 U.S. 436, 464–65 (Burger, J., dissenting) (emphasis omitted).

202. *Parklane Hosiery Co.*, 439 U.S. at 329.

203. *Id.* at 330.

204. *See* Hernandez-Uribe v. United States, 515 F.2d 20, 21–22 (8th Cir. 1975) (holding that the relitigation of alienage issues undermines the purpose of federal immigration laws); Pena-Cabanillas v. United States, 394 F.2d 785, 787–88 (9th Cir. 1968) (noting that without the threat of collateral estoppel, defendants would have the added incentive to attempt to illegally reenter the United States) *But see* 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, 1083 (1982) (finding that offensive issue preclusion does not promote judicial economy).

205. *See* Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 811 (1989) (noting that duplicative litigation and resulting docket delays cause major problems in federal courts); Leonidas Ralph Mecham, Administrative Office of the United States Courts, Federal Judicial Caseload: A Five-Year Retrospective (1998), http://www.uscourts.gov/caseload.pdf (finding that federal courts' caseload has reached record heights).

sues, which rings suspiciously of xenophobia.[206] Since the terrorist attacks of September 11, 2001, there has been serious scrutiny of the immigration laws. There were calls to halt immigration altogether,[207] draft harsher immigration laws,[208] close the borders with Canada and Mexico,[209] and stop the issuance of foreign student visas.[210] Although none of these things happened, there continues to be a heightened awareness of issues with immigration. One way to address security concerns is through interior enforcement. More than ever, federal immigration authorities are using federal criminal laws to target illegal aliens.[211] Immigration officials are being

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206. Daly, *supra* note 6, at 694–95.

207. *See* Eric Lichtblau, Ricardo Alonso-Zaldivar, Nick Anderson, *After The Attack; Security Clampdown; Government Seeks Expanded Powers to Plug Security Holes; Safety: Officials want tougher immigration restrictions and greater use of wiretaps on terrorism suspects*, L.A. TIMES, Sept. 17, 2001, at A9 (noting that "[s]ome immigration experts speculate that the Bush administration could consider invoking Section 215 of the Immigration and Nationality Act, giving the president the authority to restrict the exit and entry of any foreign nationals."); *see also* Myriam Marquez, Editorial, *To Ideologues: Stop Painting The War In Your Own Image*, ORLANDO SENTINEL, Sept. 27, 2001, at A15.

208. *See* Greg Miller & Nick Anderson, *After the Attack; National Security; Mood Swiftly Changes on Immigration*, L.A. TIMES, Sept. 18, 2001, at A12 (reporting that "[t]he White House made it clear Monday [September 17, 2001] that tightening restrictions will be on its agenda, too, as Atty. Gen. John Ashcroft said new immigration measures will be part of an anti-terrorism legislative package delivered to Congress this week.").

209. See Courtney Lingle, Mexican Immigrants Fear Border Closing, Local Community Pleads: Don't Punish Us For Attacks, DENVER POST, Sept. 26, 2001 at A11; *see also* Editorial, Step up, clamp down; If the United States is to become safer and more secure from terrorism, Canada needs to be more strict with its border and immigration regulations, ATLANTA JOURNAL-CONSTITUTION, Sept. 26, 2001, at A12.

210. *See* Ved P. Nanda, *Tightened Visa Restrictions Have Flaws*, DENVER POST, Nov. 5, 2001, at B7 (stating that "[s]hortly after Sept. 11, Sen. Dianne Feinstein, D-Calif., proposed a six-month moratorium on student visas. After discussions with several prominent university officials, however, she instead proposed more careful tracking."); *see also* Jonathan Peterson & Rebecca Trounson, *Response To Terror; Foreign Students Scrutinized*, L.A. TIMES, Sept. 29, 2001, at A1; *see also* Carolyn Lochhead, *Feinstein tries to put student visas on hold; Hijack suspect abused system, she says*, S.F. CHRONICLE, Sept. 28, 2001, at A1.

211. For example, in April 2003, John Ashcroft ordered all Haitians seek-

unusually aggressive in deporting aliens to countries such as Jamaica, Guyana, and Honduras.[212] The use of collateral estoppel, especially in cases involving citizenship status, has the potential to be abused in this time of heightened scrutiny. This is bolstered by the fact that even before this increase in emphasis on interior enforcement, the only time that courts have successfully used offensive issue preclusion was in immigration cases.[213] Therefore, it is important that any test be extremely sensitive to potential abuse as a result of xenophobia.

VI. A NEW TEST: RULES PLUS FAIRNESS

Upon balance, offensive issue preclusion, if applied carefully and consistently, is a useful tool. The main problem, however, is that the courts only seem to embrace it in cases that deal with the alienage status issue. Therefore, it is important to address this concern in formulating a test for the courts to follow. On the other hand, a danger arises in formulating a test that becomes so complex that the "goal of greater fairness is also thwarted."[214] "The critical task," therefore, is to "define rules that provide answers that are both clear and just for most cases, and that incorporate levels of flexibility and discretion that permit just results in special cases without undermining the general rules."[215]

In *Parklane,* the Supreme Court created a broad discretionary test for allowing offensive preclusion in civil cases in the federal courts.[216] Although the Court did not explicitly set out factors that subsequent courts should examine, the Court did state its concerns

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ing asylum to be indefinitely detained on the ground that immigration from Haiti is a threat to national security. Immigration authorities were even deporting immigrants to Somalia, where there is no functioning government and where al-Queda has allegedly established a base of operations. *See* Ali v. Ashcroft, 346 F.3d 873 (9th Cir. 2003) (granting an injunction forbidding those deportations).

212. *See* www.usdoj.gov/oig/special/03-06/.

213. *See supra* notes 115, 123, 129, 135, 151, and 154.

214. 18 CHARLES A. WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4403, at 45 (2d ed. 2002).

215. *Id.* § 4416, at 400.

216. Parklane Hosiery Co. v. Shore, Inc., 439 U.S. 322, 331 (1979).

about the use of offensive preclusion.[217] For example, if the damages in the first lawsuit were small, the defendant might not have litigated the first suit aggressively.[218] If there were different procedural options available in the first and second actions, the defendant might not have had a full and fair opportunity to litigate in the first action.[219] The Court also had concerns about plaintiffs adopting a "wait and see" attitude, hoping that another plaintiff will bring a suit against the defendant that results in a favorable judgment.[220] Instead of aiding judicial economy, this attitude thwarts it by keeping plaintiffs from consolidating initial lawsuits.[221] Yet, the Court held that "the preferable approach for dealing with these problems . . . [is] to grant trial courts broad discretion to determine when it should be applied."[222]

This test is too broad to be useful in applying non-mutual offensive issue preclusion in the criminal context. Further, the concerns that are raised on the civil side are different from the concerns raised on the criminal side. For example, there is little concern that prosecutors will adopt a "wait and see" attitude and bring separate prosecutions to perfect their case.[223] On the other hand, the constitutional protections afforded to criminal defendants raise grave concerns about individual freedom and rights.

In *United States v. Levasseur*,[224] the Massachusetts District Court created a test in a complicated criminal RICO case involving numerous pre-trial motions.[225] The defendants had been "previ-

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217. *Id.* at 329–31.

218. *Id.* at 330–31.

219. *Id.*

220. *Id.* at 330.

221. *Id.*

222. *Id.* at 331.

223. Prosecutors have little to gain by bringing separate prosecutions to perfect their cases. In *United States v. Dixon*, 509 U.S. 688 (1993), the Court pointed out that under *Ashe*, an acquittal in the first action will probably bar litigation of essential facts in a new prosecution of the same defendant. *Id.* at 710–11 n.15 (citing Ashe v. Swenson, 397 U.S. 436 (1970)). In addition, prosecutors should "be deterred from abusive, repeated prosecutions" because of limited judicial resources and other demands on their time. *Id.*

224. 699 F. Supp. 965 (D. Mass. 1988).

225. United States v. Levasseur, 699 F. Supp. 965 (D. Mass. 1988), *rev'd on other grounds,* 846 F.2d 786 (1st Cir. 1988). The defendants were indicted

ously tried in the Eastern District of New York on an indictment charging them with conspiracy to bomb buildings," an actual bombing, and an attempted bombing.[226] Following a trial, the defendants were convicted on some of the counts and a mistrial was declared for the other counts wherein the jury was unable to reach a verdict.[227] The government then decided to pursue these "open counts" in a Massachusetts federal court.[228] All of the open counts from the trial in the Eastern District of New York were among the predicate acts set out in the Massachusetts indictment to sustain the alleged RICO violation.[229] The defendants moved to suppress, seeking to preclude the government from introducing evidence of the predicate acts that had already been tried in the Eastern District of New York and had resulted in a mistrial.[230] In response, the government asserted that, because the substance of the defendants' motion to dismiss had already been litigated and denied in a case involving the same defendants in the Eastern District of New York, the defendants should be collaterally estopped from suppressing the evidence.[231]

In order to render its decision, the Massachusetts court created a test outlining criteria that must be met to allow the government to use offensive issue preclusion.[232] First, there must be an exact identity of the issues in both proceedings.[233] Second, "a defendant must have had sufficient incentive to have vigorously . . . litigated the issue in [the] previous proceeding."[234] Third, "the defendant estopped must have been a party to the previous litigation."[235] Fourth, the applicable law has to be identical in both proceed-

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for three counts of violating the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c). *Id.* at 968.

226. *Id.* at 969.
227. *Id.*
228. *Id.* at 969–70.
229. *Id.* at 970.
230. *Id.* at 979.
231. *Id.* at 980.
232. *Id.* at 981.
233. *Id.* This is an element of preclusion under any test.
234. *Id.*
235. *Id.*

ings.[236] Finally, "the first proceeding must result in a final judgment on the merits that provides the defendant" with the opportunity and incentive to appeal.[237] The court also noted that even if this criteria is satisfied, offensive issue preclusion "may still be improper under certain circumstances," such as a change in the governing law, or a showing that the defendant had ineffective assistance of counsel at the first proceeding.[238]

The *Levasseur* test, which is much more specific than the test in *Parklane*, provides a framework that could be applied to all criminal cases involving offensive preclusion.[239] The requirement that the issues be identical in both lawsuits, the requirement that the defendant have had sufficient incentive to vigorously litigate the issue in the first litigation, and the requirement that the first litigation end in a final judgment all must be satisfied to meet the general elements of preclusion.[240] These protect the defendant from violations of the right to a jury trial under the Sixth Amendment because the facts of the common issue were resolved in the first action.[241] Under this framework, a guilty plea by itself could not be a basis for preclusion because the issues would not have been fully litigated.[242]

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236. *Id.* In explaining this element, the court stated that "if the proceedings . . . take place in districts in different circuits, the defendant cannot be estopped unless the governing law is the same." *Id.* There was no additional precedent provided for this element. When the court applied this element to the facts of the case before it, the court found that the case law was identical because the law applying to the collateral estoppel issue was mostly Supreme Court precedent. *Levasseur*, 669 F. Supp. at 981. It is not clear whether the court was referring to the law of collateral estoppel or the substantive law surrounding the issue.

237. *Levasseur*, 669 F. Supp. at 981.

238. *Id.* at 981 n.23. In *United States v. Harnage*, 976 F.2d 633 (11th Cir. 1992), the Eleventh Circuit criticized the *Levasseur* analysis by stating "that it would create more problems than it was designed to solve." *Id.* at 635. It would therefore completely defeat the doctrine's goals—judicial efficiency and economy. *Id. See also* Kennell, *supra* note 6 (reviewing the *Levasseur* criteria and finding that it is over inclusive in some ways and under inclusive in others).

239. *See id.*

240. *See id.*

241. *Id.* at 981.

242. In *United States v. Gallardo-Mendez*, 150 F.3d 1240 (10th Cir. 1998),

This test has one additional requirement: that the court perform an additional "fairness" examination even if the criteria are satisfied.[243] This "fairness" examination should be used by the court to ensure that the doctrine is not only being applied in cases involving illegal aliens. In this way, policy concerns about illegal aliens will not usurp a defendant's right to a fair and just trial.[244]

VII. CONCLUSION

While continuing to address the threats of terrorism, courts must decide how the United States should protect the civil liberties of its citizens and non-citizens while securing them from the threat of a terrorist attack. Part of this scrutiny involves the decision of whether to allow offensive issue preclusion in criminal cases in light of the potential to target its use in cases involving alien citizenship status. Currently, in the federal civil context, defensive issue preclusion is almost always allowed, while offensive issue preclusion is allowed on a case-by-case basis.[245] In the federal criminal context, a criminal defendant can always use defensive issue preclusion against the government in the second action when the defendant was acquitted in the first action.[246] The question becomes whether the government can use issue preclusion offensively to bar the criminal defendant from relitigating an issue that was decided against the defendant in the first action.

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the court found that a plea of guilty to illegal entry could not be used for collateral estoppel in a subsequent criminal proceeding. *Id.* at 1244. *But see* United States v. Bejar-Matrecios, 618 F.2d 81, 84 (9th Cir. 1980) (opining that a voluntary guilty plea constitutes an admission of all the facts alleged in the indictment and therefore it is fair to estop the defendant from litigating one of those facts at a subsequent criminal proceeding); Hernandez-Uribe v. United States, 515 F.2d 20, 22 (8th Cir. 1975) (finding that defendant, by a voluntary plea, waived constitutional rights in a subsequent proceeding).

243. *Levasseur*, 699 F. Supp. at 981.

244. For a general discussion of some of the policy concerns involving issues of status, see Daly, *supra* note 6; Tanya Kateri Hernandez, *The Construction of Race and Class Buffers in the Structure of Immigration Controls and Laws*, 76 OR. L. REV. 731 (1997) (noting current anti-immigrant sentiment).

245. *See supra* note 56–57 and accompanying text.

246. *See supra* note 58 and accompanying text.

The test set out by the United States Supreme Court in *Parklane,* which addressed the factors a court should look at in deciding whether there should be offensive issue preclusion in civil cases, is not sufficient to address the myriad of concerns that are present in the criminal context. On balance, however, offensive issue preclusion in criminal cases is a useful tool that does not necessarily infringe on defendants' constitutional rights and can serve important policy objectives of judicial economy and finality. Therefore, it is important to create a new, more specific test that allows the government to use offensive preclusion against criminal defendants in appropriate cases.

Immigration has influenced the face of the United States more than any other cultural, political, or economic policy. If used carefully and consistently by the courts, offensive issue preclusion can prevent unnecessary litigation, discourage subsequent crimes, and even prevent an influx of illegal aliens. As a country that is committed to its heritage as a nation of immigrants and as a refuge for those escaping oppression and seeking opportunity, we can be equally committed to the fair and constitutional use of collateral estoppel.