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Constitutional Law--Double Jeopardy--Collateral Estoppel Is Constitutionally Required in Criminal Cases Because It Is Embodied in the Fifth Amendment Double Jeopardy Clause--*Ashe v. Swenson*

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RECENT DEVELOPMENTS

CONSTITUTIONAL LAW—DOUBLE JEOPARDY—Collateral Estoppel Is Constitutionally Required in Criminal Cases Because It Is Embodied in the Fifth Amendment Double Jeopardy Clause—*Ashe v. Swenson**

In the early morning of January 10, 1960, several armed masked men broke into a home where six men were engaged in a poker game. Each of the players was robbed of money and personal property before the robbers fled in a car belonging to one of the victims. Three men were subsequently arrested near a field where the stolen car had been abandoned. Petitioner Ashe was arrested separately some distance away. In May 1960, Ashe was tried for robbing Donald Knight, one of the six poker players.[1] At the trial, the prosecution clearly proved that a holdup had occurred and that Knight had lost personal property. The evidence tending to prove Ashe's own participation in the robbery, however, was weak.[2] In fact, the prosecution never clearly established whether there were three or four robbers. The jury returned a verdict of not guilty due to insufficient evidence.[3]

Six weeks after his acquittal, Ashe was brought to trial for the robbery of another of the poker players. Ashe's preliminary motion to dismiss based on the previous acquittal was overruled. The witnesses at this second trial were substantially the same as in the first trial, but their testimony implicating Ashe was considerably stronger.[4] Ashe was convicted and sentenced to a thirty-five-year term in the state penitentiary.

The Supreme Court of Missouri affirmed the conviction and denied Ashe's plea of former jeopardy.[5] Ashe attempted a collateral attack on the conviction in the state courts five years later, but that

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* 397 U.S. 436 (1970).

1. Specifically, Ashe was charged with robbery in the first degree in violation of MO. REV. STAT. § 560.120 (1959).

2. Two of the witnesses thought that there had been only three robbers at the house on the night in question and neither could identify Ashe as one of them. Another witness could only say that the petitioner's voice sounded very much like that of one of the robbers. A fourth witness could identify Ashe only by his "size and height, and his actions." Ashe v. Swenson, 397 U.S. 436, 438 (1970).

3. The jury was instructed that if it found that Ashe was one of the participants in the robbery, then the theft of any money from the victim, a fact clearly shown by the testimony, would sustain a conviction. 397 U.S. at 439 nn.2 & 3.

4. Two witnesses that had been unable to identify Ashe in the first trial testified in the second that his "features, size, and mannerism" matched those of one of the robbers. 397 U.S. at 440. Another witness who earlier could only identify Ashe by his size and actions recollected the sound of Ashe's voice at the second trial. Finally, the state did not call the one witness whose testimony in the first trial had been most damaging to the prosecution's case. 397 U.S. at 440.

5. State v. Ashe, 350 S.W.2d 768 (Mo. 1961).

attempt was equally unsuccessful.[6] Ashe then brought a federal habeas corpus proceeding, claiming that the second trial had violated his constitutional right not to be twice put in jeopardy.[7] The district court, and later the court of appeals,[8] both felt constrained, upon the authority of *Hoag v. New Jersey*,[9] from giving any relief, although both courts apparently found some merit in Ashe's claim.[10]

The facts in *Hoag* were very similar to those in *Ashe*. The defendant in *Hoag* was first tried for robbing three different customers of a tavern. He was acquitted on the basis of insufficient evidence. In a second trial for the robbery of a fourth customer, however, Hoag was convicted. On certiorari, the Supreme Court, using a fundamental-fairness standard,[11] held that the petitioner's second trial did not violate the due process clause of the fourteenth amendment.[12] The Court did not consider whether collateral estoppel was required of the states under fourteenth amendment due process since the lower court had found that upon the facts of the case the previous conviction would not give rise to collateral estoppel.[13]

Despite the fact that the Supreme Court did not directly rule on the issue of collateral estoppel in *Hoag*, that case has been cited as authority by courts in rejecting arguments that collateral estoppel is required by fourteenth amendment due process.[14] The case has been cited as authority both because it presented such a classic example of a situation in which collateral estoppel would apply, and because of dictum in which Justice Harlan expressed "grave doubts whether

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6. State v. Ashe, 403 S.W.2d 589 (Mo. 1966).

7. Ashe v. Swenson, 289 F. Supp. 871 (W.D. Mo. 1967).

8. Ashe v. Swenson, 399 F.2d 40 (8th Cir. 1968).

9. 356 U.S. 464 (1958).

10. Judge Oliver of the district court said, "However persuasive the dissenting opinions in the *Hoag* case may be, it is the duty of this Court to follow the law as stated by the Supreme Court of the United States until it expresses a contrary view. Certainly the factual circumstances of this case provide an excellent opportunity for reexamination of the questions presented." 289 F. Supp. at 873. Judge—now Justice—Blackmun of the Eighth Circuit, in referring to a suggestion that *Hoag v. New Jersey* not be followed, commented for the majority, "It usually is difficult for a lower federal court to forecast with assurance a Supreme Court decision as to the continuing validity of a holding of a decade ago by a Court then divided as closely as possible. This is particularly so when the decision is in the rapidly developing and sensitive area of the criminal law and the Fourteenth Amendment Bill of Rights relationship." 399 F.2d at 46.

11. Justice Harlan for the majority restated the test for determining whether a state has violated fourteenth amendment due process as "whether such a course has led to fundamental unfairness." 356 U.S. at 467. For a critical discussion of fourteenth amendment due process standards, see Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957).

12. 356 U.S. at 466.

13. 356 U.S. at 471.

14. A good example of this reasoning may be found in the Eighth Circuit opinion on Ashe's appeal. 399 F.2d at 45.

collateral estoppel [could] be regarded as a constitutional requirement."[15]

When the Supreme Court decided *Hoag*, however, the guarantee of the fifth amendment double jeopardy clause had not yet been made applicable to the states through the fourteenth amendment; nor had the double jeopardy clause been made applicable to the states at the time of the decision of the court of appeals in *Ashe*. After that decision, however, the Supreme Court declared, in *Benton v. Maryland*,[16] that the fifth amendment double jeopardy clause was enforceable against the states through the due process clause of the fourteenth amendment.

The double jeopardy clause, as it is now employed in both the federal and state courts, consists of two basic rules: first, once a man is convicted, he may not be reprosecuted in order to impose upon him another sentence for the same offense; and second, once a man is acquitted, he may not be reprosecuted for the same offense in order to give the state another chance to convict him.[17] The latter rule, barring reprosecution after acquittal, is conceptually allied with the doctrine of collateral estoppel since collateral estoppel has been used in the federal courts to achieve the same protections for defendants.[18] Because of this customary interplay between the two doctrines in the federal courts, the Supreme Court granted certiorari in *Ashe*[19] to determine whether, in light of *Benton*, collateral estoppel should be made applicable to the states as part of the traditional double jeopardy rule.

In a seven-to-one decision,[20] the Court held that the doctrine of collateral estoppel is constitutionally required because it "is embodied in the Fifth Amendment guarantee against double jeopardy."[21] As defined by the Court, this doctrine "means simply that

15. 356 U.S. at 471.

16. 395 U.S. 784 (1969).

17. *See* Green v. United States, 355 U.S. 184, 187 (1957); *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 169 (1879). *See also* Comment, *Twice in Jeopardy*, 75 YALE L.J. 262 (1965).

18. Theoretically, at least, collateral estoppel will not apply in the case of a conviction because as applied to criminal cases there is very probably no mutuality of estoppel—*i.e.*, although a defendant can bar an issue resolved in his favor at the first trial from being retried, the prosecutor must have all issues that were resolved in his favor examined anew in each subsequent trial. Thus, if certain defenses are rejected by a jury, the prosecutor cannot use estoppel to bar the defendant from asserting the same defenses at a later trial. *See, e.g.*, Pulley v. Norvel, 431 F.2d 258 (6th Cir. 1970), in which the court held that *Ashe* did not apply when the defendant was convicted in the first trial. For a discussion of the federal-court treatment of the mutuality-of-estoppel doctrine, see text accompanying notes 82-86 *infra*.

19. 393 U.S. 1115 (1969).

20. Justice Stewart wrote the majority opinion. Justice Black (397 U.S. at 447) and Justice Harlan (397 U.S. at 448) concurred separately, and Justice Brennan concurred in an opinion joined by Justices Douglas and Marshall. 397 U.S. at 448. Chief Justice Burger dissented. 397 U.S. at 460.

21. 397 U.S. at 445.

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."[22]

The Court's reasoning in reaching its decision was not entirely clear. Chief Justice Burger's dissent, in fact, asserted that there was virtually no argument for the decision.[23] The decision does, however, appear to be based on two important considerations. First, the rule of collateral estoppel has long been successfully applied to criminal cases in the federal courts.[24] It has never been necessary, however, to determine whether the doctrine was a constitutional right since the Supreme Court possessed the power to impose it upon the federal courts by way of the Court's general supervisory power over the federal court system.[25] But even though the federal courts have never specifically declared collateral estoppel to be a constitutional requirement, federal judges have been so impressed with the basic fairness of the doctrine that they have elevated it almost to the status of a fundamental right of the accused.[26] Justice Stewart, in the majority opinion in *Ashe*, recognized the general acceptance of the federal rule and the practical results reached in many cases through its application.[27] For Justice Stewart, the only question was whether this firmly established federal rule was embodied in the guarantee against double jeopardy and was therefore a constitutional requirement to be applied to the states.[28] The successful application of this rule by the federal courts, then, seemed to be a very important factor in the Court's decision that the rule had constitutional status.

But the fact that the federal courts have traditionally used the

22. 397 U.S. at 443.

23. The Chief Justice said in dissent that "the only expressed rationale for the majority's decision is that Ashe has 'run the gantlet' once before," and later that "[t]his is decision by slogan." 397 U.S. at 465.

24. *See, e.g.*, Sealfon v. United States, 332 U.S. 575 (1948); United States v. Adams, 281 U.S. 202 (1930); Collins v. Loisel, 262 U.S. 426 (1923); United States v. Oppenheimer, 242 U.S. 85 (1916); United States v. Kramer, 289 F.2d 909 (2d Cir. 1961); Yawn v. United States, 244 F.2d 235 (5th Cir. 1957); Cosgrove v. United States, 224 F.2d 146 (9th Cir. 1955); Williams v. United States, 179 F.2d 644 (5th Cir. 1950); United States v. Curzio, 170 F.2d 354 (3d Cir. 1948); Ehrlich v. United States, 145 F.2d 693 (5th Cir. 1944); United States v. De Angelo, 138 F.2d 466 (3d Cir. 1943); United States v. Cowart, 118 F. Supp. 903 (D.D.C. 1954); United States v. Carlisi, 32 F. Supp. 479 (E.D.N.Y. 1940).

25. *See, e.g.*, McNabb v. United States, 318 U.S. 332 (1943). *See also* Ashe v. Swenson, 397 U.S. 436, 464 (1970) (Chief Justice Burger, dissenting).

26. *See, e.g.*, United States v. Kramer, 289 F.2d 909 (2d Cir. 1961). In *Kramer* the defendant was first acquitted of burglarizing United States post offices. The court found that since the acquittal could only mean that the jury had believed defendant's denial of any participation whatsoever in the burglaries, a subsequent prosecution for conspiracy and receiving stolen goods was prohibited by the doctrine of collateral estoppel. Judge Friendly, in his opinion for the majority, gave great weight to the fairness inherent in the doctrine. The opinion also contains an excellent discussion of most of the aspects of the application of collateral estoppel in federal criminal cases.

27. 397 U.S. at 443.

28. 397 U.S. at 445.

doctrine of collateral estoppel in a criminal context was not sufficient to make that doctrine a constitutional requirement. This continued use, however, gave the Court a practical framework in which to determine whether the doctrine of collateral estoppel was a part of the guarantee against double jeopardy. The major reason for the decision in *Ashe* was the Court's recognition that collateral estoppel is similar both in purpose and policy to double jeopardy and that in some instances the former doctrine would promote their common purposes much better than would the traditional double jeopardy rule barring reprosecution after acquittal. Justice Stewart made it clear that the Court considers the guarantee against double jeopardy to be a basic, fundamental protection that should be guarded.[29] According to the majority opinion, the doctrine of collateral estoppel is embodied in the guarantee against double jeopardy because "whatever else that guarantee may embrace . . . it surely protects a man who has been acquitted from having to 'run the gantlet' a second time."[30] Thus, the Court appears to be indicating that collateral estoppel should have the effect in *Ashe* that the double jeopardy guarantee should have—to prevent a man from having to run the gantlet of a criminal trial two times. It seems clear from a variety of indications by the Justices[31] that the Court was concerned that the purpose of the double jeopardy guarantee was being eroded through judicial interpretation and that it realized that collateral estoppel would in many cases promote the purposes of the traditional double jeopardy rule. These factors were at the core of the Court's decision.

It is, therefore, important in any analysis of the *Ashe* decision to examine the policies and purposes behind collateral estoppel and double jeopardy and the current effectiveness of the two doctrines in light of these policies and purposes. The policies of the double jeopardy guarantee are well defined in the federal cases.[32] Basically, it is recognized that the state, having at hand many more resources than the average defendant can muster, should not be allowed to make

29. 397 U.S. at 445-46 n.10. The history and purpose of the double jeopardy clause and the gradual erosion of its protection are described by Justice Stewart at 397 U.S. at 445-46 n.10.

30. 397 U.S. at 445-46.

31. The language of the holding that collateral estoppel is "*embodied* in the Fifth Amendment guarantee against double jeopardy," 397 U.S. at 445 (emphasis added), connotes an identity of purpose and effect in the two doctrines. Furthermore, the concurring opinions lend support to this interpretation. Justice Black stated that the double jeopardy clause should prevent the government from subjecting a defendant to the hazard of two trials for the same offense and that the doctrine of collateral estoppel is basic to the prohibition against double jeopardy. 397 U.S. at 447-48. Justice Harlan stated that Ashe's second trial brought "double jeopardy standards into play." 397 U.S. at 448. Justice Brennan, joined by Justices Douglas and Marshall, simply agreed that the "Double Jeopardy Clause incorporates collateral estoppel." 397 U.S. at 448.

32. *See*, e.g., Green v. United States, 355 U.S. 184 (1957); United States v. Kramer, 289 F.2d 909 (2d Cir. 1961). *Kramer* is discussed in note 26 *supra*.

successive attempts to convict an individual for an alleged offense. Successive prosecutions cause the defendant expense and embarrassment and force him to live in a state of insecurity knowing that the end of one trial may not necessarily be the end of his troubles.[33] The state ought not to be allowed to retry a defendant for the purpose of finding the right combination of convincing evidence and a willing jury that will finally produce a conviction.[34] Nor should the state be permitted to use the criminal process as a means of arbitrarily harassing an individual.[35]

At the time of the early development of the common-law rule against double jeopardy, the objectives outlined above were well implemented by a rule such as that required by the double jeopardy clause.[36] Subsequent developments, however, stripped this rule of much of its utility. First, as the Supreme Court noted in *Ashe*, the number of legal categories at early common law was quite small and the scope of each was very large.[37] When the rule stated, therefore, that successive prosecutions for the same offense were prohibited, the law did not distinguish between the legal meaning of offense and the underlying factual transaction.[38] One or a series of criminal acts was likely to yield but one single "offense."[39] More recently, however, trends toward specificity in legal draftsmanship and the existence of large numbers of specific and overlapping statutory offenses have made it easy for prosecutors to find a number of indictable offenses in virtually any criminal transaction.[40] Thus, although the problem of multiple prosecutions, not multiple indictments, was the specific issue in the *Ashe* case, the availability of multiple indictments makes it possible to bring a number of prosecutions for different offenses against one person who has engaged in but one criminal transaction. This multiple-indictment factor decreases the utility of the traditional double jeopardy rule.

In addition to increased specificity of crimes, the problem of

33. *See* Green v. United States, 355 U.S. 184, 190 (1957).

34. North Carolina v. Pearce, 395 U.S. 711, 734 (1969) (Justice Douglas, concurring). *See also* Hoag v. New Jersey, 356 U.S. 464, 474-75 (1957) (Chief Justice Warren, dissenting). The Court in *Ashe* pointed out that the prosecution had admitted having "treated the first trial as no more than a dry run for the second prosecution . . . ." 397 U.S. at 447.

35. North Carolina v. Pearce, 395 U.S. 711, 733 (1969) (Justice Douglas, concurring).

36. *See* Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 YALE L.J. 339, 341-43 (1956); Note, *Double Jeopardy and the Multiple Count Indictment*, 57 YALE L.J. 132 (1947). *See also* Lugar, *Criminal Law, Double Jeopardy and Res Judicata*, 39 IOWA L. REV. 317 (1954). For a general history of the doctrine of double jeopardy, see J. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY (1969).

37. 397 U.S. at 445 n.10.

38. 397 U.S. at 445 n.10.

39. *See* Comment, *supra* note 36, at 342 n.14.

40. *Id.* at 344. *See also* Note, *supra* note 36, at 133.

multiple prosecutions is compounded in the federal courts and in the majority of the state courts by the definition that those courts give to what constitutes the "same offense" for purposes of the fifth amendment.[41] The test for "same offense" was stated in the leading case of *Blockburger v. United States.*[42] When a criminal act constitutes a violation of two distinct statutory provisions, the test to determine whether there are one or two offenses is whether either provision requires proof of facts that the other does not.[43] Offenses are the same for purposes of the traditional double jeopardy rule only when the evidence required to support a conviction upon one of the indictments is sufficient also to give rise to a conviction upon the other.[44]

Such a test can lead to an extremely restrictive application of the double jeopardy rule. Very few separate offenses arising in a given situation will require exactly the same evidence in order to convict the defendant. In *Blockburger,* for example, the defendant was convicted, on the basis of a single act, both of selling morphine not in or from the original stamped packet and of selling morphine not pursuant to a written order of the purchaser. In *Wood v. United States,*[45] one sale supported five separate counts of violations of the narcotics laws. The possibilities inherent in more complex criminal acts or in several acts constituting the same transaction seem infinite. Some commentators, faced with this state of affairs, concluded that in actuality the traditional double jeopardy guarantee no longer existed in a meaningful form.[46]

It was with this critical situation in mind that the Court in *Ashe* considered the constitutional status of the collateral-estoppel doctrine. The basic policy considerations for this doctrine, when it is applied to criminal cases, are nearly identical to the objectives of the traditional double jeopardy rule barring reprosecution after acquittal.[47]

41. It can be argued that in North Carolina v. Pearce, 395 U.S. 711 (1969), the Court decided by implication that many, if not all, of the federal standards concerning double jeopardy existing prior to *Benton* are part of the constitutional guarantee against double jeopardy and, therefore, apply to the states by virtue of *Benton.* If this were the case, the same-offense test applied by the federal courts would, by virtue of *Benton,* be the minimum standard in the state courts. In *Pearce* the Court held that the federal requirement that punishment already exacted must be fully credited in imposing sentence upon a new conviction for the same offense was also required of the states by the double jeopardy clause.

42. 284 U.S. 299 (1932).

43. 284 U.S. at 304.

44. United States v. Kramer, 289 F.2d 909, 913 (2d Cir. 1961). For a complete discussion of double jeopardy standards in the federal courts, see Orfield, *Double Jeopardy in Federal Criminal Cases,* 3 CAL. WEST. L. REV. 76 (1967).

45. 317 F.2d 736 (10th Cir. 1963).

46. *See* Comment, *supra* note 36; Note, *Double Jeopardy: A Vanishing Constitutional Right,* 14 How. L.J. 360 (1968).

47. *See* United States v. Kramer, 289 F.2d 909, 913 (2d Cir. 1961). *See also* Lugar,

The Court recognized this close similarity and also recognized that collateral estoppel would often achieve the same ends as the traditional double jeopardy rule.[48] Further, collateral estoppel would in many cases accomplish what the double jeopardy clause was designed to do but until the *Ashe* decision could not do. In *Ashe*, for example, the defendant could not plead double jeopardy because the robberies of different victims constituted separate offenses under the same-evidence rule.[49] The Supreme Court recognized that such a result was unfair to the defendant and violated the purposes of the double jeopardy guarantee.[50] Collateral estoppel, however, could be applied in this case to protect the defendant. The only conceivable issue before the first jury was whether *Ashe* was one of the robbers.[51] The general verdict acquitting Ashe in the first trial could have only been a decision on that one issue, and, therefore, the Court held that the prosecution was collaterally estopped from relitigating that issue in a second trial.[52] Hence, collateral estoppel in *Ashe* was employed to effect the purposes of double jeopardy when the protection of the latter doctrine was unavailable to the defendant.

If the bases for the holding that collateral estoppel is embodied in the double jeopardy clause are that both doctrines spring from the same policy considerations and that collateral estoppel will often promote these considerations when double jeopardy will not, the question remains how successfully the former doctrine protects the policies of the latter. This inquiry becomes especially relevant in light of the fact that an alternative "cure" for the ailing double jeopardy guarantee was proposed by three members of the Court in a concurring opinion by Justice Brennan.[53] Justice Brennan suggested that the definition of the term "offense" be changed to give the double jeopardy clause a broader scope of application. This proposed solution will be discussed below in relation to the relative success of the collateral-estoppel "cure."[54]

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supra note 36, at 330; Meyers & Yarbrough, *Bix Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 29 (1960).

48. 397 U.S. at 445-46 n.10. *See also* Meyers & Yarbrough, *supra* note 47; Comment, *Collateral Estoppel in Criminal Cases*, 28 U. CHI. L. REV. 142 (1960); Comment, *Double Jeopardy: Vandercomb to Cichos—Two Centuries of Judicial Failure in Search of a Standard*, 45 J.URBAN L. 405 (1967); Comment, *supra* note 17; Note, *Collateral Estoppel in Criminal Cases—A Supplement to the Double Jeopardy Protection*, 21 RUTGERS L. REV. 274 (1967).

49. Ashe v. Swenson, 399 F.2d 40, 45 (8th Cir. 1968). *See also* State v. Citius, 331 Mo. 605, 56 S.W.2d 72 (1932).

50. *See* notes 29-31 *supra* and accompanying text.

51. *See* note 3 *supra*.

52. 397 U.S. at 446.

53. Justices Douglas and Marshall joined in Justice Brennan's concurring opinion. 397 U.S. at 448.

54. *See* text accompanying notes 93-96 *infra*.

The first difficulty attending collateral estoppel in criminal cases that might act to limit that doctrine's application is the problem of the general verdict.[55] In order for an issue to be barred in a second trial, it is necessary that the issue be put in contention and finally determined in the first trial.[56] In the case of a general verdict of acquittal, the court must first determine exactly what issues were decided by the jury,[57] for if it is not possible to make such a determination no estoppel will arise.[58] While it is certain in such a case that the prosecution has failed to establish its case beyond a reasonable doubt, it is often unclear whether the jury has affirmatively decided a particular issue in the defendant's favor. Considering only the pleadings of the parties, the instructions to the jury, and the verdict of not guilty, it is usually impossible to determine the jury's decision on the specific issue in question. The federal courts, however, have established a more liberal procedure for discovering which issues were determined by the jury.

In *Sealfon v. United States*,[59] the Supreme Court made it very clear that in determining what issues were decided, consideration must be given not only to the pleadings, instructions, and verdict, but that the inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings."[60] The Court in *Ashe* realized that if a court did not take such an approach the collateral-estoppel rule would be rendered ineffective:

> The federal decisions have made clear 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 realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires the court to "examine the record of a prior proceeding . . . 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."[61]

The Court, then, clearly included this aspect of the federal rule as part of the constitutional requirement of collateral estoppel.[62]

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55. *See* Comment, 28 U. CHI. L. REV. 142, *supra* note 48, at 144.

56. RESTATEMENT OF JUDGMENTS § 68, comment *a* (1942). *See also* United States v. Rangel-Perez, 179 F. Supp. 619, 622-23 (S.D. Cal. 1959).

57. United States v. Kramer, 289 F.2d 909, 913 (2d Cir. 1961).

58. *See* Sealfon v. United States, 332 U.S. 575 (1948). *See also* Comment, 28 U. CHI. L. REV. 142, *supra* note 48, at 144.

59. 332 U.S. 575 (1948).

60. 332 U.S. at 579.

61. 397 U.S. at 444, quoting with approval Meyers & Yarbrough, *supra* note 47, at 38-39. For an interesting discussion on jury behavior in this context, see Comment, 28 U. CHI. L. REV. 142, *supra* note 48, at 146.

62. A state court applying *Ashe* assumed that this manner of interpreting a general

This practical approach, of course, will not solve all of the difficulties involved in the general-verdict question. First, the *Sealfon* rule is hardly explicit, and it is subject to various interpretations in the trial courts, particularly overly strict ones. Such an application can be controlled to some degree by access to appellate courts. But a more difficult problem—a problem inherent in the collateral-estoppel rule as applied to criminal cases—is the likelihood that even a liberal application of the *Sealfon* rule will not suffice to identify what issues were affirmatively decided in the defendant's favor by the jury. In *United States v. Kenny*,[63] for example, Kenny and his partners were tried first for having knowingly made false statements in affidavits relating to contracts within the jurisdiction of a federal agency. After being acquitted in this first case, Kenny was tried alone in a second case for making other false statements. Since it was proven that Kenny himself did not sign any of the affidavits containing the alleged false statements, the fact of his partnership with the man who did sign the affidavit was a necessary ingredient of the prosecution's case. But, in the first trial, the jury could have found either that the requisite intent was not present in signing the documents or that no partnership existed. The court held, therefore, that since it could not be determined with accuracy which fact actually was determined in the defendant's favor, the issue of partnership was not barred by collateral estoppel in the second trial.[64] In such a case, and in many—if not most—other kinds of complicated criminal proceedings, it will be difficult or impossible to determine with any specificity what was decided by the jury. In a great many criminal cases, therefore, the doctrine of collateral estoppel will not apply.[65] In these cases, defendants will be left with the old standards of double jeopardy and the accompanying unfairness that goes with those standards.[66]

Furthermore, the general verdict places a defendant in a most troublesome dilemma. He must either put a very few of his defenses in issue, thereby assuring a collateral-estoppel effect in any future proceeding, but at the same time risking a conviction by not put-

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verdict was indeed a requirement of the *Ashe* holding. Commonwealth v. Cole, 7 CRIM. L. REP. 2355 (Pa. C.P. June 6, 1970).

63. 236 F.2d 128 (3d Cir. 1956).

64. 236 F.2d at 130-31. *See also* United States v. Kaadt, 171 F.2d 600 (7th Cir. 1948); United States v. Perrone, 161 F. Supp. 252 (S.D.N.Y. 1958).

65. *See* Lugar, *supra* note 36, at 344.

Some writers have proposed that the problem of the general verdict could be corrected by instituting special verdicts in criminal cases. *See Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 874-78 (1952). But this idea has not been well received by the courts in criminal cases. *See, e.g.*, Stein v. New York, 346 U.S. 156, 178 (1953); United States v. Spock, 416 F.2d 165, 183 (1st Cir. 1969).

66. *See* text accompanying notes 33-35 *supra*.

ting his other valid defenses in issue; or he must put all the defenses he has before the jury, thereby better shielding himself against a conviction, but unfortunately destroying the possibility of any future collateral-estoppel effect on all of the issues raised by these defenses.[67] While normally the risk of the first conviction would be great enough to make this choice very easy, in certain extraordinary cases when the sentence for the first charge is light and there is a substantial possibility of later harassment by the prosecution, this choice might become important. To force such a choice on a defendant is, of course, most unfair; and, again, the *Ashe* solution to the ineffectiveness of the traditional double jeopardy rule does not really meet the problem.

A related difficulty that courts may encounter in applying the *Ashe* decision is the problem whether the distinction made in the civil area between ultimate and mediate facts should be used when collateral estoppel is applied in criminal cases. As defined in *The Evergreens v. Nunan*,[68] ultimate facts are those "which the law makes the occasion for imposing its sanctions."[69] They are, in other words, the facts that determine finally whether the defendant is to be exonerated or held liable. Mediate facts, on the other hand, are those from which the defendant's liability or nonliability is merely inferred.[70] Collateral estoppel applies only to those issues that were ultimate in the first action. The policy behind this doctrine in civil cases is the fear that the other party may not have had a fair opportunity to litigate fully those issues that were not ultimate in the first action. But a strict application of this doctrine in criminal cases would severely limit the utility of collateral estoppel. For example, if a defendant were acquitted of robbing Bank *A*, the only ultimate fact determined might be that defendant did not commit the act of robbing Bank *A*. Even if it could be shown that the jury had determined that defendant did not rob Bank *A* because he was out of the city on that day, a prosecutor could still try him for robbing Bank *B* on that same day. The defendant would have to "run the gantlet" again on the issue whether he was in the city on the day of the robberies because that issue was not ultimate in the first trial. Since most offenses would in fact require different ultimate facts in order to result in conviction, the *Ashe* decision would have a very limited effect.

It has been argued that since the policy reasons for collateral estoppel are different in the criminal area, the ultimate-fact rule should not

67. *See* Lugar, *supra* note 36, at 347; Comment, 28 U. CHI. L. REV. 142, *supra* note 48, at 147.

68. 141 F.2d 927 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944).

69. 141 F.2d at 928.

70. 141 F.2d at 928.

apply in criminal cases.[71] In criminal law, the state is more likely to have a chance in the first trial to litigate fully all the issues than would either of the parties in a civil action.[72] Also, it could be argued that the *Ashe* holding prohibits an application of the ultimate-fact rule in the criminal context. The Court in *Ashe* spoke of the danger of applying archaic and hypertechnical rules,[73] and the ultimate-fact rule does appear to be a hypertechnical rule in the criminal area. More important, the facts in *Ashe* are not consistent with a strict application of the ultimate-fact rule. The ultimate fact established in the first trial was that Ashe had not robbed Knight. This finding was not contradictory to the ultimate fact that the prosecution tried to prove in the second case—that Ashe robbed Roberts, another victim of the robbery. The Court did mention the term "ultimate fact" in its definition of collateral estoppel;[74] yet the Court did not say what definition of ultimate fact is included in collateral estoppel. Clearly, a strict application of the ultimate-fact rule would not be permitted in the criminal context; but does the Court's reference to ultimate facts mean that the rule is to be of *some* effect in that context? The Supreme Court left the lower courts to speculate on this issue and perhaps again to limit the collateral-estoppel rule.

There is, in fact, already evidence of possible confusion in interpreting the *Ashe* decision. In *United States v. Fusco*,[75] the Court of Appeals for the Seventh Circuit held that collateral estoppel barred a second prosecution of a defendant for possession of stolen goods after the first conviction for the theft of the goods had been reversed by that court on the grounds of insufficient evidence. The court cited *Ashe* as controlling in the case but by way of dictum indicated that it would strictly apply the rule of ultimate facts.[76] The court then cited an example that it said would not present a double jeopardy situation: a bank robber, while escaping from the bank, kills a man; he is first tried for bank robbery and then in a second trial is prosecuted for murder. The court concluded that since the "ultimate facts" to be determined in the prosecution for these different offenses would be different, collateral estoppel would not bar a second trial.[77] It ap-

71. *See* United States v. Kramer, 289 F.2d 909, 917 (2d Cir. 1961), in which the court quoted with approval a statement by Professor Scott in Scott, *Introduction*, 39 IOWA L. REV. 214, 216 (1954), referring to the policy differences between the two areas.

72. *See* Note, *supra* note 48, at 281.

73. *See* note 61 *supra* and accompanying text.

74. 397 U.S. at 443.

75. 427 F.2d 361 (7th Cir. 1970).

76. 427 F.2d at 363.

77. 427 F.2d at 363. There is some doubt that even a very strict interpretation of the ultimate-fact rule would yield this result. The ultimate fact determined by acquittal in the first trial would be that the defendant did not rob the bank. In the trial for

pears that the court in *Fusco* was confused in its interpretation of the ultimate-fact rule. For collateral estoppel to apply, it is not necessary that the second trial be for an offense that concerns the same ultimate facts as the first offense. Collateral estoppel applies to issues, not offenses.[78] If an issue is ultimate in the first action, collateral estoppel applies. The court's dictum in *Fusco* also indicates that the *Ashe* decision did not make clear what the rule concerning ultimate facts is to be. In the absence of such a clear expression of the rule, lower courts may continue to be confused in their application of the *Ashe* holding.[79]

Another possible difficulty stems from the fact that collateral estoppel is applicable only in the case of a final judgment on the merits.[80] Actually, this requirement is quite reasonable since a final judgment is necessary in order to know with any certainty what issues were determined in the defendant's favor. But the requirement does give rise to serious limitations. While double jeopardy will apply when a mistrial is declared because the government is unable or fails to proceed,[81] collateral estoppel will not. Thus, the prosecutor may, given the knowledge that his case is weak, fail to proceed further. The doctrine of double jeopardy will prevent him from trying the

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murder, if the evidence tended to show that the same man robbed the bank and committed the murder, the fact that defendant did not rob the bank would exonerate him of the murder.

78. *See* text accompanying note 22 *supra*.

79. Such confusion might arise from "joining" the doctrine of collateral estoppel with the double jeopardy rule against retrial after acquittal. Conceptually, the scope of operation of the traditional notions of double jeopardy and collateral estoppel are quite different. Double jeopardy applies in some cases when collateral estoppel does not apply, and collateral estoppel applies in some cases in which double jeopardy does not apply. *See* Annot., 9 A.L.R.3d 203 (1966). The traditional rules are incompatible to a degree, and this incompatibility might lead to confusion in the interpretation of *Ashe*. The *Fusco* court, for example, apparently believed that because collateral estoppel was required by the double jeopardy clause, a same-offense test must be applied in order to determine whether collateral estoppel is available in a particular case. The court determined that the same-offense test involves an inquiry into whether the same ultimate facts are required to prove both prosecutions. The Supreme Court's opinion in *Ashe*, of course, gave no indication that collateral estoppel should be so restricted simply because it is a rule of the double jeopardy clause. The opinion merely asserted that the federal rule of collateral estoppel was a constitutional requirement. 397 U.S. at 445. Collateral estoppel is a rule of double jeopardy because, like the double jeopardy rule against reprosecution, it prevents the state from making the accused "run the gantlet" twice. A same-offense test should not be imposed upon that rule.

80. *See* United States v. Harriman, 130 F. Supp. 198 (S.D.N.Y. 1955).

81. For example, in Downum v. United States, 372 U.S. 734 (1963), the jury in the first trial was discharged because of the absence of a prosecution witness upon whom a subpoena could not be served and whose testimony was essential in order to prove two of the six counts of the indictment. The Supreme Court held that a second trial placed the defendant in double jeopardy. *See also* Green v. United States, 355 U.S. 184 (1957); Cornero v. United States, 48 F.2d 69 (9th Cir. 1931). For a complete discussion of when double jeopardy attaches, see Orfield, *supra* note 44, at 77; Note, *Double Jeopardy: The Reprosecution Problem*, 77 HARV. L. REV. 1272, 1275 (1969).

defendant again for the same offense, but when he prosecutes the defendant a second time for a slightly different offense, collateral estoppel will not be available as a defense since the first trial never reached a final judgment on the merits. The *Ashe* decision does not explicitly prohibit this method of prosecutorial harassment, although it can be argued that since the Court made collateral estoppel a rule of double jeopardy and since double jeopardy does not always require a final judgment in order to apply, collateral estoppel may not in some cases require a final judgment. But the *Ashe* decision gives no indication that the Court meant to change the final-judgment requirement of the collateral-estoppel rule, and again the lower courts are left to speculate on how to deal with this problem in light of *Ashe*.

The question of mutuality also presents a possible point of confusion concerning the *Ashe* holding, although that question may be less troublesome than the problems presented by the ultimate-fact and final-judgment rules. In civil actions, collateral estoppel must be capable of application by both parties in order to be available to either.[82] An application of the rule of mutuality in criminal cases, however, might result in constitutional difficulties. A right of collateral estoppel on the part of the prosecution would appear to deny a defendant's right to a jury trial on the issue involved and to violate the presumption of innocence in the second trial.[83] An accused is also constitutionally entitled to a "trial de novo of the facts alleged and offered in support of each offense charged against him and to a jury's independent finding with respect thereto."[84] The federal courts have recognized these difficulties and have not required mutuality of estoppel in criminal cases.[85] The Court in *Ashe* quoted with approval the statement from *United States v. Kramer* that "[i]t is much too late to suggest that this principal is not fully applicable to a former judgment in a criminal case . . . because of lack of 'mutuality' . . . ."[86] It may safely be assumed, therefore, that the Court in *Ashe* recognized the problem of mutuality and intended that the federal practice of not requiring mutuality be continued. As a result, the mutuality issue should not give the lower courts any difficulty in applying the *Ashe* rule.

A final limiting aspect of collateral estoppel is that facts or issues that are sought to be estopped must have already been litigated and determined as between the same parties.[87] In criminal cases, this

82. *See* Kirby v. Pennsylvania R.R., 188 F.2d 793 (3d Cir. 1951).

83. *See* Comment, 28 U. CHI. L. REV. 142, *supra note* 48, at 149.

84. United States v. DeAngelo, 138 F.2d 466, 468 (3d Cir. 1943), quoted in United States v. Kramer, 289 F.2d 909, 919 (2d Cir. 1961).

85. *See, eg.*, United States v. Kramer, 289 F.2d 909, 919 (2d Cir. 1961).

86. 289 F.2d 909, 913 (2d Cir. 1961), quoted at 397 U. S. at 443.

87. *See* Moore v. United States, 344 F.2d 558 (D.C. Cir. 1965).

requirement of identity of parties means that collateral estoppel cannot apply when different sovereignties prosecute a defendant. An acquittal by a state court, for example, may not be used to estop an issue involved in a subsequent federal prosecution.[88] It has been argued that the identity-of-parties requirement, like the mutuality requirement, has no place in the application of collateral estoppel in the criminal context.[89] Since the doctrine of collateral estoppel is meant to afford a defendant greater security from the harassment of multiple trials and since the interests of one sovereign will frequently be adequately protected in a prosecution by the other sovereign, this argument is well taken. Nevertheless, since the federal courts appear to have accepted the identity-of-parties requirement,[90] and since the *Ashe* opinion made no attempt to change the rule,[91] it is fairly certain that for the time being that requirement will act as another limitation on the collateral-estoppel doctrine.[92]

It appears, then, that if the Supreme Court was concerned about the ineffectiveness of the double jeopardy clause and that if it based its decision in *Ashe* for the most part on the belief that elevating collateral estoppel to constitutional status would increase a defendant's protection under that clause, the decision has not accomplished as much as the Court intended. It should be considered whether the solution proposed by Justice Brennan in his concurring opinion[93] is more logical than the majority's solution and would be more effective in accomplishing the goals that the Court had in mind. Justice Brennan suggested that a more complete cure for the ailing double jeopardy guarantee would be to change the definition of what constitutes an offense. The same-evidence test, he said, is not constitutionally required and could be changed upon a showing that another test would more successfully protect the objectives of the double jeopardy guarantee.[94] Justice Brennan offered an alternative test—the same-transaction test—the effect of which would be to require the prosecution, except in limited circumstances, to "join at one trial all the charges against a defendant which grow out of a single

88. *See* Ferina v. United States, 340 F.2d 837 (8th Cir. 1965).

89. *See* Note, *supra* note 48, at 277.

90. *See* Ferina v. United States, 340 F.2d 837 (8th Cir. 1965).

91. ". . . [T]hat issue cannot again be litigated between the *same* parties in any future lawsuit." 397 U.S. at 443 (emphasis added).

92. In Waller v. Florida, 397 U.S. 387 (1970), the Court held that the State of Florida and its municipalities were not separate sovereign entities each entitled to impose punishment for the same alleged crime. *See* Recent Development, 68 MICH. L. REV. 336 (1969). If *Waller* points to the possibility of a re-examination of Bartkus v. Illinois, 359 U.S. 121 (1959), in which the Court held that both the state and federal government could try a defendant for the same bank robbery, then any subsequent change in the double jeopardy rule might in turn change the collateral-estoppel rule.

93. 397 U.S. at 448.

94. 397 U.S. at 452.

act, occurrence, episode or transaction."[95] Although this test, as it is applied in certain jurisdictions, is not without limitations of its own,[96] a careful formulation of the collateral-estoppel doctrine based upon this test might more nearly fulfill the objectives of the double jeopardy rule and might be a more logically consistent solution to the current ineffectiveness of that rule.

Since the majority's solution in *Ashe* does so little to deal with that ineffectiveness, it seems clear that the Court will have occasion to consider the double jeopardy problem again in the near future. The Court may then be more willing to give a closer examination to Justice Brennan's solution to the problem. But until that or some other solution is adopted by the Court, the double jeopardy guarantee—even with the added protection of the collateral-estoppel doctrine—will continue to be an illusory guarantee. The *Ashe* decision will lend substance to that guarantee only in narrow, infrequent, and at present, uncertain instances,[97] while in most cases the objectives of the fifth amendment double jeopardy clause will remain discouragingly unfulfilled.

95. 397 U.S. at 453-54. *See also* Lugar, *supra* note 36, at 323; Comment, 45 J. URBAN L. 405, *supra* note 48, at 444; Note, *supra* note 48, at 275.

96. *See* Lugar, *supra* note 36, at 324.

97. It is outside the scope of this Recent Development to discuss in any detail the specific effects that an application of collateral estoppel would have in various criminal situations. For a fairly complete discussion of these effects, see Perkins, *Collateral Estoppel in Criminal Cases*, 1960 U. ILL. L.F. 533, 549. *See also* Annot., 9 A.L.R.3d 203 (1966).