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Criminal Law - Federal Rule of Collateral Estoppel Held to be Incorporated into the Double Jeopardy Clause and Applicable to the States through the Fourteenth Amendment

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CRIMINAL LAW—Federal Rule of Collateral Estoppel Held to be Incorporated into the Double Jeopardy Clause and Applicable to the States through the Fourteenth Amendment.

On January 10, 1960, in the early morning hours, six men were robbed while playing poker in the basement of a private home in Lee's Summit, Missouri. Their assailants, three or four masked men armed with a shotgun and pistols, took money and various items of personal property from their victims, and then fled in a stolen car. The car was recovered a short while thereafter, and three men on foot were arrested by a Missouri state trooper in the vicinity of the abandoned vehicle. Some distance away, Bob Fred Ashe was arrested by another officer. All four men were subsequently charged with seven separate offenses: the armed robbery of each of the six victims, and the theft of the car.

In May of 1960, Ashe was tried for the robbery of Donald Knight, one of the six card players. The prosecution called Knight and three fellow victims to testify to the circumstances of the holdup and their losses. The defense did not cross-examine these witnesses concerning the robbery itself or any losses resulting from it. Rather, an attack was made only on the weaknesses of the testimony offered to identify Ashe as a participant in the alleged crime. Two witnesses had thought there were only three robbers, and they were not able to identify Ashe as one of them. Another witness testified that he had positively identified the other three suspects at the police station, but could say only that Ashe's voice was very similar to that of one of the robbers. The fourth witness for the state identified Ashe, but only by "his size, height, and actions." After the close of its cross-examination, the defense declined to offer testimony of its own, and waived final argument.

The trial judge instructed the jury that Ashe was guilty of robbery if he had taken "any money" from Knight; and further, he was guilty even if he had not personally robbed Knight, but had merely participated in the holdup. The jury, though not instructed to elaborate on its findings, returned a verdict of "not guilty due to insufficient evidence."

Six weeks later, Ashe was again brought to trial, this time charged with the robbery of a different participant in the card game. The de-

fendant filed a motion to dismiss based on the previous acquittal, but this was denied. The only new testimony offered at the second trial was that of the wife of one of the victims. Further, one of the witnesses whose identification testimony had been particularly weak in the first trial was not called in the subsequent prosecution. The remaining witnesses, however, were now able to offer additional testimony tending to identify Ashe as a participant in the robbery. For instance, the two men who previously had been completely unable to identify Ashe, now stated that his features, size, and mannerisms were the same as those of one of the robbers. Another witness now identified Ashe, not only by his size and actions, but also by the peculiar sound of his voice. The case went to the jury on instructions almost identical with those of the first trial, and the defendant was found guilty.

The Supreme Court of Missouri affirmed the conviction,[1] and a collateral attack in the state courts some four years later was also unsuccessful.[2] Ashe next brought a habeas corpus proceeding in the Federal District Court for the Western District of Missouri, claiming that the second trial had denied his constitutional right not to be put twice in jeopardy. The District Court denied the writ[3] on the basis of *Hoag v. New Jersey*,[4] and the Court of Appeals affirmed on the same authority.[5]

The facts in *Hoag v. New Jersey* were very similar to those in *Ashe*. *Hoag* involved one criminal occurrence affecting multiple robbery victims. The only issue contested by the defendant at the trial for the robbery of one of the victims, was his presence at the robbery. The jury returned a verdict of not guilty. Subsequently Hoag was tried again on an indictment charging him with the robbery of a second victim, and he was found guilty. The decision of the trial court was affirmed by the state appellate and supreme courts.[6] Hoag appealed to the Supreme Court of the United States claiming a denial of due process on two grounds: first, that the successive prosecutions by the state were actually for the "same offense"; and second, that the state at the second trial failed to apply the doctrine of collateral estoppel.[7] The Supreme Court, using only the standards of Fourteenth Amendment due process, affirmed the

1. State v. Ashe, 350 S.W.2d 768 (Mo. Sup. Ct. 1961).
2. State v. Ashe, 403 S.W.2d 589 (Mo. Sup. Ct. 1966).
3. Ashe v. Swenson, 289 F. Supp. 871 (W.D. Mo. 1967).
4. 356 U.S. 464 (1958).
5. Ashe v. Swenson, 399 F.2d 40 (8th Cir. 1968).
6. 35 N.J. Supra. 555, 114 A.2d 573 (1955); 21 N.J. 496, 122 A.2d 628 (1956).
7. Collateral estoppel, more commonly employed in a civil suit, precludes future

conviction, holding that New Jersey's course of action in prosecuting Hoag a second time was not "fundamentally unfair."[8] The Court did not find it necessary to decide whether collateral estoppel is a due process requirement, having accepted New Jersey's determination that the doctrine was inapplicable in the particular case.

Despite the close factual similarity to *Hoag*, the Supreme Court in *Ashe v. Swenson*[9] reversed the Court of Appeals' decision, viewing the issues from an entirely different constitutional perspective. Subsequent to *Hoag*, the Court had held in *Benton v. Maryland*[10] that the Fifth Amendment was applicable to the states through the Fourteenth Amendment. Thus, the first question to be decided in *Ashe* did not concern a possible denial of Fourteenth Amendment due process, as in *Hoag*, but focused on whether the successive prosecutions had in some way subjected the petitioner to double jeopardy in violation of his Fifth Amendment rights.

In delivering the opinion of the Court, Mr. Justice Stewart did not disturb the holding in *Hoag* as to whether successive trials in such multiple victim cases were for the "same offense." However, he did conclude that the rule of collateral estoppel, well established in federal law, is in fact an ingredient of the Double Jeopardy Clause of the Fifth Amendment, and is not a matter to be left for state determination within the doctrine of "fundamental fairness."

Mr. Justice Stewart then considered what kind of test was to be employed in determining when to apply the doctrine of collateral estoppel. He concluded that where a former trial results in a general verdict of acquittal, the test to be utilized based on an "examination of the record, the pleadings, evidence, charge and other relevant matter,"[11] is whether a rational jury could have reached its verdict upon any issue other than that which the defendant seeks to preclude from consideration in a subsequent trial. Applying this test with "realism and rationality", Mr. Justice Stewart concluded that Ashe could have been acquitted at the first trial only on the issue of identity, and that once that issue had been decided in Ashe's favor, the prosecution was barred from litigating it again.

Mr. Justice Brennan, joined by Justices Douglas and Marshall, con-

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relitigation between two parties of an issue which has already been determined in a trial in which those same parties had an interest.

8. Hoag v. New Jersey, 356 U.S. 464, at 467.
9. Ashe v. Swenson, 397 U.S. 436 (1970).
10. 395 U.S. 784 (1969).
11. 397 U.S. at 453.

curred in the result, but criticized the opinion of the Court as being too limited in its practical application. He argued that the Double Jeopardy clause not only embraces the doctrine of collateral estoppel, but also requires that the prosecution join at one trial all charges against a defendant which "grow out of a single criminal act, occurrence, episode, or transaction."[12]

Mr. Justice Burger, on the other hand, dissented, claiming that there is no authority for designating collateral estoppel an "essential ingredient" of the Double Jeopardy Clause. Further, assuming *arguendo* that the states could be held to the doctrine of collateral estoppel in criminal cases, Mr. Justice Burger stated that the majority had violated its own determinative test by assuming that the identity of Ashe was the only issue on which the jury could have based its verdict.[13] Finally, Mr. Justice Burger stated that the doctrine of collateral estoppel would introduce a large element of confusion and conjecture into criminal cases, and therefore was an inappropriate tool to use in the enforcement of constitutional guarantees.

The opinion of the Court in *Ashe* is important as a further delineation of the rights guaranteed under the Double Jeopardy Clause of the Fifth Amendment. The decision of the Court makes it clear that collateral estoppel is a constitutional guarantee in criminal prosecutions, that it applies to the states because of the decision in *Benton v. Maryland*,[14] and that the states, in employing the doctrine, will be required to adhere to federal standards. Collateral estoppel will be a substantial check upon the prosecution's ability to subject a criminal defendant to several trials for a single criminal act or episode. *Ashe v. Swenson* is also significant for the discussions in the concurring and dissenting opinions of a "one transaction rule." This rule was formulated with the purpose of further protecting criminal defendants by more broadly defining "same offense" under the Fifth Amendment's Double Jeopardy Clause. Although the opinions on this issue do not have the force of law, they do offer an important insight into the attitudes of members of the Court concerning a rule which would provide additional safeguards against the "harassment" of multiple trials. Under the facts in *Ashe*, however, the majority did not need to consider the application of the more broadly based "one transaction rule." Rather, it relied on a doc-

12. 397 U.S. at 453-54.
13. *See* J. Burger's factual distinction, 397 U.S. at 466-468.
14. *See* n. 8, *supra*. The Court in *Benton* made it clear that its decision in that case would be retroactive.

trine familiar in the federal courts for more than fifty years, collateral estoppel.

COLLATERAL ESTOPPEL IN THE FEDERAL COURTS: ORIGIN AND EVOLUTION

Broadly defined, collateral estoppel is that doctrine which holds that an issue of ultimate fact, once determined by a valid and final judgment, cannot be relitigated between the same parties in a future lawsuit. Originally employed only in civil suits, the doctrine found its way into a federal criminal proceeding in the case of *United States v. Oppenheimer*.[15] The Court granted defendant's motion to quash the indictment in the first trial, ruling that the government's charges were barred by the statute of limitations. In a subsequent but unrelated case, however, this ruling was shown to be erroneous, whereupon the government reindicted Oppenheimer on the original charge. To the defendant's contention that the charge in the second trial was res judicata due to the successful plea in bar at the first prosecution, the government responded that a Fifth Amendment defense was inapplicable because the case had never been before a jury, and thus jeopardy had not attached. The Supreme Court, citing the English case *The Queen v. Miles*,[16] ruled that:

> [W]here a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offense. . . . The Fifth Amendment was not intended to do away with what in the civil law is a fundamental principle of justice in order when a man has been acquitted on the merits, to enable the Government to prosecute him a second time.[17]

It should be noted, although the opinion in *Oppenheimer* can be read in such a way as to support the concept of collateral estoppel in criminal cases, the case strictly concerns the doctrine of res judicata. The defendant in the second trial was *not* trying to preclude the relitigation of an issue which had been previously determined. Rather, he sought to preclude the second trial itself on the ground that he was being charged with the identical cause of action of which he had already been acquitted. The situation was quite different from that presented in *Ashe*

15. 242 U.S. 85 (1916).
16. 24 Q.B.D. 423, 431 (1890).
17. United States v. Oppenheimer, 242 U.S. 85, 88 (1916).

where the causes of action in each trial were different. Nevertheless, numerous subsequent cases rely on *Oppenheimer* as authority for the rule of collateral estoppel in criminal prosecutions.[18]

United States v. DeAngelo[19] is one of the most lucid explanations of the doctrine of collateral estoppel. There the defendant was first tried and acquitted of robbing a member bank of the Federal Reserve System, and subsequently was tried for conspiring to rob the same bank. The United States attorney, in his opening remarks to the jury in the second trial, stated that he would prove that the defendant committed the overt acts constituting the conspiracy, and further, that the defendant participated in the underlying substantive offense as well. Defense counsel moved to set up the prior acquittal of the robbery as a defense, but the trial judge denied the motion. The Court of Appeals reversed the decision of the trial court on the basis of the trial court's erroneous preclusion of that defense, and said:

> Even though there has been no former acquittal of the particular offense on trial, a prior judgment of acquittal on related matters has been said to be conclusive as to all that judgment determined.
>
> . . .
>
> [A] rule of evidence has been recognized which accords the accused the right to claim finality with respect to a fact or a group of facts previously determined in his favor upon a previous trial.[20]

The Supreme Court in *Sealfon v. United States*[21] accepted without comment the contention that collateral estoppel applies to criminal proceedings, but made no effort to define the rule as procedural, evidentiary or constitutional. It merely concluded that in the case at bar, petitioner, previously acquitted of conspiring to defraud the United States, could not be convicted of the underlying substantive offense, since the central fact at issue in the conspiracy trial was also essential to the latter prosecution. That central fact having been once found in the defendant's favor, the prosecution was precluded from relitigating it at the latter trial.

In *United States v. Cowart*,[22] the rule was thus succinctly stated:

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18. *See* United States v. Curzio, 170 F.2d 354 (3rd Cir. 1948); Sealfon v. United States, 332 U.S. 575 (1947); Yates v. United States, 354 U.S. 298 (1956).
19. 138 F.2d 466 (3rd Cir. 1943).
20. United States v. DeAngelo, 138 F.2d 466 at 468 (3rd Cir. 1943). In reaching this decision the court relied on United States v. Carlisi, 32 F. Supp. 479 (E.D.N.Y. 1940). In *Carlisi* the prosecution attempted to introduce evidence of conspiracy to defraud the United States. The court held that such evidence was precluded from use because it had been declared inadmissible (as fruits of an illegal search and seizure) in the previous trial charging the substantive offense on which the conspiracy was based.
21. 332 U.S. 575 (1948).
22. 118 F. Supp. 903 (D.D.C. 1954).

> [T]o bar the litigation of an issue, the same issue must have been determined favorably to the defendant, expressly or by necessary implication, in a previous proceeding between the same parties.[23]

The phrase "determination . . . expressly or by necessary implication" in the *Cowart* decision is an important variation on the definition of collateral estoppel, for it can be interpreted as permitting an element of discretion in deciding upon what issue a verdict has been based.

Finally, the rule was reiterated by the Court of Appeals for the Second Circuit in the case of *United States v. Kramer*:

> The Government is free within the limits set by the Fifth Amendment to charge an acquitted defendant with other crimes claimed to arise from the same or related conduct; but it may not prove the new charge by asserting facts necessarily determined against it on the first trial.[24]

Although the federal courts since *Oppenheimer* have defined and applied collateral estoppel with a great deal of consistency, there has been little or no analysis of the nature of the rule itself. The Court in *Oppenheimer* admitted that it was borrowing a rule of procedure from the civil courts, but it then implied a constitutional basis for collateral estoppel by referring to it as a "fundamental principle of justice."[25] On the other hand, the decision in *United States v. DeAngelo*[26] refers to collateral estoppel as a rule of evidence, which seems to indicate that that court considered it something less than a constitutional guarantee as implied in *Oppenheimer*. Most federal courts employing the rule, however, have avoided any attempt at categorization, contenting themselves merely with a statement affirming the applicability of collateral estoppel to criminal proceedings.

Nevertheless, the Court in *Ashe* concluded that collateral estoppel is an essential ingredient of the Double Jeopardy Clause of the Fifth Amendment. As Mr. Justice Burger points out in his dissent, it is difficult to find any solid case authority for this decision. *Oppenheimer* apparently does provide some support for the Court's conclusion, but it must be remembered that the *Oppenheimer* decision actually involved res judicata rather than collateral estoppel. There are no case decisions to be found that consider collateral estoppel a constitutional guarantee. Moreover, the decision in *United States v. Kramer*,[27] which applied

23. United States v. Cowart, 118 F. Supp. 903 at 906.
24. 289 F.2d 909, at 916 (2d Cir. 1961).
25. United States v. Oppenheimer, 242 U.S. 85, 88.
26. *See* n. 20 *supra*.
27. *See* n. 24 *supra*.

collateral estoppel, can be taken to imply that the rule is extrinsic to the Fifth Amendment. There the court held that the government could charge an acquitted defendant for other crimes which arose from the same or related conduct, but only, if in doing so, no Fifth Amendment rights were violated. But the court then additionally stated that the doctrine of collateral estoppel would also apply at any subsequent trials. It is arguable that the court in *Kramer* separately referred to Fifth Amendment restrictions and collateral estoppel because it felt that the latter simply was not a constitutional guarantee. Also, the Court in *Hoag* stated that:

> Despite its [collateral estoppel's] wide employment, we entertain grave doubts whether it is a constitutional requirement. Certainly this Court has never so held.[28]

One would have to assume that the Court was holding its "grave doubts" with reference to the Fourteenth Amendment, for *Hoag* concerned review of a state court decision prior to the decision in *Benton* making the Fifth Amendment applicable to the states. Yet the language in *Hoag* is not clear, and it is certainly possible that the Court's comments in that case were intended to include the Fifth as well as the Fourteenth Amendment. If this is so, then there is some support for Mr. Justice Burger's claim in his dissent in *Ashe* that a rule of the federal courts has been elevated to the status of a constitutional guarantee.

Regardless of how compelling one may find Mr. Justice Burger's dissent, it must be pointed out that among every other member of the Court in *Ashe* there was substantial agreement that collateral estoppel is an ingredient of the Fifth Amendment. At this point, then, it is appropriate to turn from a consideration of the history of collateral estoppel at the federal level, to an examination of its effects upon criminal prosecutions in the state courts.

ASHE: IMPACT ON THE STATES

Before the Supreme Court, in *Benton v. Maryland*,[29] decided that the Fifth Amendment was applicable to the states through the Fourteenth Amendment, state courts were allowed to handle the question of successive prosecutions and double jeopardy within the limits set up by their own constitutions and the fundamental fairness interpretation of the Fourteenth Amendment's due process clause. Nearly all states have constitutional provisions which prohibit putting a man "twice in jeo-

28. Hoag v. New Jersey, 356 U.S. 464, at 471.
29. *See* n. 10 *supra.*

pardy for the same offense."[30] Actually, a common law notion of double jeopardy existed prior to the Eighteenth Century, but at that time, and even when the Bill of Rights was adopted, there was no authoritative definition of "same offense."[31] Today most American jurisdictions adhere to the "same evidence" test, first espoused in England in *The King v. Vandercomb & Abbott*,[32] and later adopted by the federal courts.[33] In essence the rule is that where evidence required to support a second prosecution is different from that required to support the first, a conviction or acquittal on the first indictment is no bar to the second. The Supreme Court has never explicitly rejected this test as a ground for initiating successive trials where multiple victims are involved.[34] Nevertheless, the Federal Government has apparently never used the test in such a manner, but rather has employed it as a tool to prosecute a defendant for more than one offense arising from one transaction. However, it has always done so at the same trial.[35]

There are, on the other hand, numerous instances in which state courts have engaged in successive prosecutions on the basis of this same evidence test, and the Supreme Court in the past has affirmed their actions. In *Ciucci v. Illinois*,[36] a companion case to *Hoag*, the Court decided that a defendant had not been denied due process by being prosecuted in three successive trials for the murder of his wife and two children. The first two trials resulted in penalties of imprisonment, while at the third trial the defendant was given the death penalty. Another example is *Johnson v. Commonwealth*,[37] where each of seventy-five poker hands was considered a separate offense, and a second prosecution was allowed.

As cases involving multiple prosecutions by state courts have been reviewed by the Supreme Court, they have been subjected to the standards of due process of the Fourteenth Amendment as enunciated by Mr. Justice Cardozo in *Palko v. Connecticut*:

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30. *See, e.g.*, Ill. Const. art. II § 10 (1870).
31. *See* J. Brennan's discussion in *Ashe*, at 450-51.
32. 2 Leach 708, 720, 168 E.R. 455, 461 (Ex 1796).
33. *See e.g.*, Owsley v. Cunningham, 190 F. Supp. 608 (E.D. Va. 1961); Montgomery v. United States, 146 F.2d 142 (4th Cir. 1944).
34. Compare J. Brennan's remark in *Ashe* concerning rejection by the Supreme Court of the same evidence rule: 397 U.S. 436, at 452-53 (citing In re Nielson, 131 U.S. 176 (1889)).
35. *See e.g.*, Gore v. United States, 357 U.S. 386 (1958); also *see* Loyola Chi. L.J. 98, at 108 (1970); Whether this is because of the federal rule of collateral estoppel or because of Justice Department policy is unclear. See the Attorney General's remarks concerning successive state-federal prosecutions after Abbatte v. United States, 359 U.S. 187 (1959) at 27 U.S.L.W. 2509 (1959).
36. 356 U.S. 571 (1958).
37. 201 Ky. 314, 256 S.W. 388 (1923).

> Is that [state action] a hardship so acute and shocking that our polity will not endure it? Does it violate those fundamental principles of liberty and justice which lie at the base of all our civilized institutions?[38]

This concept was the motivating force of the Court when it affirmed New Jersey's successive prosecutions in *Hoag*, and stated that the states should have the widest latitude in the administration of their own systems of criminal justice. As long as the states were consistent in their application or nonapplication of their own rule of collateral estoppel, the Supreme Court, using the fundamental fairness interpretation of due process, did not attempt to interfere.[39] Apparently the doctrine of collateral estoppel was not considered a factor in determining whether "fundamental fairness" had been violated.

Now, however, fundamental fairness and the due process clause are not the only standards to which the states must adhere regarding the question of double jeopardy.[40] The decision in *Ashe* will result in a more uniform handling of double jeopardy problems with the federal standards constituting the lowest level of protection offered to a defendant in criminal cases.[41] The Supreme Court will be free "to make certain that [those] principles have been constitutionally applied . . . [and will not hesitate] to make an independent examination of the whole record"[42] in its determination of compliance with the rule of collateral estoppel by state courts.

Collateral Estoppel: Difficulties and Deficiencies in Implementation

The basic function of collateral estoppel is to prevent litigation at a second criminal prosecution of issues previously *determined* in favor of a defendant. The Court's opinion in *Ashe* explains that this determination can be made by finding whether the jury could have rationally grounded its verdict only on the issue which a defendant seeks to preclude from further litigation. This test, then, generally is effective only where a single issue is seriously contested in the first trial. A defendant in a multiple issue trial who wishes to avail himself of collateral estoppel in future trials is put in an unfavorable position in the first

38. 302 U.S. 319 (1937).
39. *See* n. 28 *supra.*
40. Benton v. Maryland, 395 U.S. 784 (1969).
41. States could undoubtedly adopt stricter standards; *see* State v. Cormier, 46 N.J. 494, 218 A.2d 138 (1966), in which the New Jersey Supreme Court disassociated itself with the state level decision in *Hoag*.
42. N.Y. Times v. Sullivan, 376 U.S. 254 at 285 (1964).

prosecution: in order to be sure the doctrine of collateral estoppel will apply in a subsequent prosecution he must limit his defenses to one essential issue. Such a tactic may deprive him of other issues with which he might defend himself.

Of course, the defendant might be able to avoid such a course of action by trying all issues and requesting a special verdict or special interrogatories. These possible solutions, however, would only create additional problems. Instituting special verdicts would deprive a defendant of any possibility of jury irrationality growing out of public sentiment, and it has been suggested that it might even conflict with the constitutional guarantee of trial by jury.[43]

The Supreme Court in *Ashe*, however, has not stipulated that there must be only one contested issue in a trial for collateral estoppel to apply. It is not impossible to conceive of a multiple issue trial where it could be determined from the record, pleadings, and charge, on what issue the jury had rationally based its verdict. The Court's opinion, however, leaves unresolved a number of problems in the implementation of the collateral estoppel doctrine in multiple issue trials. First, the Court does not enunciate what standards should be used to isolate the issue necessarily determined by the jury. Second, it is unclear whether judges themselves must evaluate the credibility of evidence offered and thus become triers-of-fact after a verdict has been rendered. Third, even assuming there was only one contested issue, it is also unclear how or even if, the courts should take into account the possibility of jury irrationality.[44] Justice Burger pointed out these difficulties in his dissent, concluding that: "The Court bases its holding on sheer guesswork which should have no place . . . in our review of state convictions by way of habeas corpus."[45]

Even in a situation where collateral estoppel is clearly applicable, a court is faced with the problem of deciding where to draw the line in categorizing 'facts' determined by the verdict. A defendant might claim that he contested but one issue, and that not only is that issue precluded

43. *See Bis Vexari: New Trials and Successive Prosecutions*, 74 Har. L.R. 1 (1960). Another possibility, questioning the jury *after* the trial as the "rational" basis of their verdict, would conflict with the well established policy against exploring the jury's mental processes, and probably would be unreliable in any event.

44. The Court's opinion in *Hoag* alluded to the potential for jury irrationality when it referred to the case of Dunn v. United States, 284 U.S. 390 (1932). The Court in *Dunn* held that a defendant may not make use of an inconsistency between verdicts returned on several counts of an indictment in order to secure a reversal of his conviction, because there was always a possibility that the jury may have exercised its prerogative of irrationality.

45. 397 U.S. at 468.

from further litigation, but so also are all matters which were presented to support his defense. What is to be done with these "mediate" as opposed to "ultimate" facts? The Court in *Ashe* gives no hint as to the existence of the problem, much less a solution. However, the matter has been touched upon by the Second Circuit Court of Appeals in *United States v. Kramer.*[46] That court held that collateral estoppel applies "when it is evident from the pleadings and the record that determination of the fact in question was necessary to the final judgment, and it was foreseeable that the fact would be of importance in possible future litigation."[47] This is somewhat more precise than the formulation of the Supreme Court as expressed in *Yates v. United States,*[48] which calls for preclusion of questions of fact, as well as questions of mixed fact and law that were essential to the decision in the first case. Yet neither of these expressions are all-inclusive. An area not covered by these formulations exists, for example, where a defendant contests one single issue, and brings to bear three separate pieces of evidence to support his defense. If the defendant is acquitted, the issue he contested will be the rational basis on which the jury based its verdict. Yet one or more of the supporting facts was certainly essential to the final judgment, and perhaps should also be precluded from further litigation. But how would a court decide which of these "mediate" facts had been determined in favor of the defendant? The decision in *Ashe* gives no indication as to how this problem should be handled.

Another difficulty with collateral estoppel in criminal cases concerns the concept of mutuality. In civil cases a reciprocity exists between the parties to the suit to the extent that a fact determination can work either for or against any party. Collateral estoppel is, in effect, a two edged sword in civil cases. Is this mutuality theory to be carried into criminal prosecutions? Consistency with the doctrine as applied in the civil courts would seem to answer in the affirmative, but at least one federal court, that in *United States v. DeAngelo,* clearly stated it will not:

> Nor can there be any requirement of mutuality with respect to a criminal judgment's conclusiveness. An accused is entitled to a trial *de novo* of the facts alleged and offered in support of each offense charged against him.[49]

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46. *See* n. 24 *supra.*
47. *Id.* at 917.
48. 354 U.S. 298 at 336.
49. United States v. De Angelo, 138 F.2d 466, at 468.

Further, the majority opinion in *Ashe* implied that it saw no problem with such a question, stating that:

> As a rule of federal law, therefore, it is much too late to suggest that this principle [collateral estoppel] is not fully applicable to a former judgment in a criminal case, because of lack of 'mutuality' . . .[50]

Assuming, however, that collateral estoppel can be implemented effectively in criminal cases, will the prosecution be put at too great a disadvantage? Certainly the doctrine will create additional difficulties for the state in its legitimate end of enforcing criminal statutes. Today it is impossible in a criminal prosecution for the state to appeal what it considers to be an erroneous decision at the trial level, except where the trial judge makes a substantive error of law.[51] Placed in such a disadvantageous position, prosecutors have contended that marginal judicial decisions tend to favor a defendant simply because judges know that these decisions cannot be reviewed on appeal.[52] If one concedes some measure of validity to this argument, it is apparent that incorporating the doctrine of collateral estoppel into the Double Jeopardy Clause further decreases a prosecutor's chances of securing a conviction when he feels error has occurred. Since the state has an interest in enforcing its criminal statutes on behalf of the people as a whole, another question raised by the *Ashe* decision concerns to how great a disadvantage the state should be put, in the interest of expanding the protection of individuals' rights.[53] It is conceded that states still do have the deterrent of multiple-count indictments at one trial, and the possibility of consecutive sentencing. Nevertheless, it is at least to be kept in mind that the rule of *Ashe* will somewhat impede the states in their protection of the people through enforcement of its criminal statutes.

Although the doctrine of collateral estoppel is a further impediment to the prosecution, there is the possibility that it will have only a limited application. First, it seems improbable that a large number of defense attorneys in multiple issue trials will be willing to contest just one issue in the hope of invoking the doctrine in a subsequent prosecution. Sec-

50. 397 U.S. at 443.

51. It has been suggested that there is really no constitutional requirement that the state be denied recourse to appeal. When a defendant wins an appeal for a new trial on grounds of error, the new trial is considered an extension of the original prosecution, and thus no double jeopardy problem is presented. The same reasoning could apply to appeals by the prosecution. However, it seems safe to assume that at this stage of constitutional interpretation a reversal of this limitation on the states' prosecutorial powers is unlikely to occur.

52. *See Bis Vexari*, 74 Har. L.R. 1, at 5, n. 21.

53. It seems that the use of collateral estoppel should be disallowed at least where the jury verdict is plainly irrational.

ond, it is possible that the issue determined by a jury's verdict will not be essential to subsequent trials.[54] Finally, and perhaps most obviously, collateral estoppel is of no use to a defendant who, though he might find himself in circumstances identical to those of Ashe, is unfortunate enough to be convicted at the first trial. Such a defendant is afforded no protection from a prosecutor who is determined to string out a succession of trials until he is satisfied with the penalty handed down.[55] What is even more disturbing is the fact that such prosecutions themselves might be purposely employed as a means of punishment through humiliation, expense and anxiety.[56]

It is apparent, then, that collateral estoppel is severely inadequate in a number of situations. The question remains as to what rule of law, if any, would be efficacious in those circumstances where collateral estoppel does not apply.

COLLATERAL ESTOPPEL: CHANCES FOR EXTENSION OR SUPPLEMENTATION

Whenever possible the Supreme Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."[57] The Court in *Ashe* was able to reverse the petitioner's second conviction by employing collateral estoppel, so it is not surprising that the opinion of the court did not discuss the inadequacies of the doctrine as applied to differing situations. Mr. Justice Brennan, joined by Justices Marshall and Douglas, voiced sharp concern over the gaps collateral estoppel would leave in an individual's protection against double jeopardy. Citing *Green v. United States*,[58] Mr. Justice Brennan emphasized the point that the Double Jeopardy Clause is designed to prevent the "harassment and vexation" arising from successive prosecutions as well as any convictions which might take place after the first trial. Manifestly, then, in a single issue trial where it could be determined that the jury exercised its prerogative of irrationality; where there are multiple issues which the defendant must litigate; where the issue de-

54. This problem can be illustrated by the example of an alleged robber who contests only the issue of a victim's losses at the first trial. An acquittal would preclude relitigating that issue, but subsequent prosecutions based on the robbery of other victims would not be barred by collateral estoppel.

55. The prosecutor in the *Ciucci* case (*see* n. 36 *supra*) in an interview with a Chicago Daily News reporter announced his intention (prior to the first trial) of initiating three trials if necessary to secure the death penalty for the defendant.

56. Further, it is possible that such a situation might constitute cruel and unusual punishment.

57. *See* J. Brandeis's opinion in Ashwander v. TVA, 297 U.S. 288 (1936).

58. 355 U.S. 184 (1957).

termined is not vital to a subsequent trial; or where the first trial results in a conviction; a defendant may be subjected to such harassment and vexation. Mr. Justice Brennan further suggests that the only justification behind such successive trials is that of affording the state additional opportunities for convictions, which would not be needed if the first prosecution were handled competently. The defendant does not enjoy the privilege of an opportunity to reverse a previous valid conviction, yet the state in effect has this chance as against the defendant's previous valid acquittal. The fact that the state cannot appeal a judgment may provide some basis for arguing that the prosecution should have more than one opportunity to convict; nevertheless, the policy behind such an argument, that of enforcement of criminal statutes, should fall before the more important consideration of freedom from undue governmental harassment.

Since it seems apparent that collateral estoppel as employed by the majority opinion in *Ashe* does not effectively prevent the abuses of harassment, the solution is to expand or supplement the doctrine. Instituting special verdicts or post-trial questioning has already been sugtested,[59] but even should they prove practicable they would be of no use where the issue precluded is not vital, or where there has been a conviction. Another answer might be to allow judges at the trial level unlimited discretion in determining the rational basis of a jury's verdict, so long as such discretion is exercised only in favor of the defendant. This would probably result in a great lack of uniformity and conjecture, however, and would prove useless in the same situations where special verdicts and post-trial questioning are ineffective. Further, situations would undoubtedly arise where, even with unlimited discretion, a judge could not decide what issue had been determined. Also, it is certainly arguable that where a jury verdict is plainly irrational, a judge should not have the discretion to apply the rule of collateral estoppel.

A more practicable alternative would be the "one transaction rule" as espoused by Mr. Justice Brennan in *Ashe*. This rule would call for joinder at one trial of all charges arising out of the same transaction, episode or occurrence. Charges not so joined would be barred from future prosecutions.[60] The trial judge would have the discretion to sever those charges, however, if it appeared that it would prejudice the defendant not to do so. At least in this manner the question is a ju-

59. *See* pg. 192 *supra*.
60. With certain exceptions, *e.g.*, where a crime is not completed or discovered until after commencement of the first trial.

dicial rather than prosecutorial one, and the defendant will have access to the appellate process.

Some states already have enacted statutes which resemble Mr. Justice Brennan's one transaction rule.[61] Further, the Federal Rules of Criminal Procedure liberally encourage joinder of charges.[62] But perhaps the most lucid formulation of this supplemental aid to collateral estoppel is that suggested by the ALI Model Penal Code, which provides for joinder of known charges where:

> the offenses are based on a series of acts or omissions motivated by a common sense purpose or plan and which result in the repeated commission of the same offense or affect the same person or the same persons or the property thereof.[63]

This provision would provide defendants with maximum protection from the abuses of successive prosecutions, yet still allow the state to split an occurrence into separate offenses for the purpose of multiple-count indictments and consecutive sentencing.[64] Criminal defendants would thus be afforded greater benefits from the Double Jeopardy Clause, while there would not be an acute lessening of the state's ability to enforce criminal statutes.

CONCLUSION

In a traditional manner, the Court disposed of the question in *Ashe* by means of a decision combining effectiveness and restraint. Expressly incorporating collateral estoppel into the Double Jeopardy Clause was all that was required to reverse Ashe's conviction; the Court did not attempt to redress future wrongs of a differing but related nature. But the spirit behind the *Ashe* decision is unmistakeably similar to that of *Green v. United States*,[65] where the Court held that no criminal defendant should have to run the gantlet more than once. The *Ashe* Court found itself concerned with the danger of convictions resulting from successive trials after an initial acquittal, and declared

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61. *See, e.g.*, Ill. Rev. Stat. ch. 38 §§ 3-3, 3-4(b)(1), (1967). To assume that because of the existence of this statute Ashe v. Swenson imposes no additional restrictions on the criminal procedural law of Illinois would be a mistake. In People v. Johnson, 44 Ill. 2d 463, 256 N.E.2d 343 (1970), where three accused persons broke into the victim's apartment and after taking her money, raped her, consecutive trials for burglary and rape were held valid. Under *Ashe* if the defendant was acquitted in the first trial and if the court determined the only issue in that rape trial was whether the accused was one of the three participants in the crimes, the burglary trial would be precluded.

62. Federal Rules of Criminal Procedure, rules 8, 13, 14, and 18.

63. ALI Model Penal Code § 1.08(2), Tent. Draft No. 5, 1956.

64. It would also greatly serve the purpose of judicial economy.

65. *See* n. 58 *supra*.

that such a danger ran against the very essence of the Fifth Amendment. If an appropriate case presents itself, it is submitted that the Court will adopt something similar to the "one transaction rule" formulated by Mr. Justice Brennan.[66] To predict otherwise would be to conclude that the Court considers a defendant in need of protection from successive related prosecutions only in the situation where the first trial results in an acquittal based on a clearly contested issue, and that any and all other situations are outside the sphere of protection. Creating such a distinction in the application of Fifth Amendment guarantees belies the very policy considerations which played such a large part in the *Ashe* decision. It seems much more cogent to argue that *Ashe* is merely an intermediate step towards a more comprehensive goal of guaranteeing:

> [T]hat the State with all its resources and power [shall] not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal, and compelling him to live in a continuing state of anxiety and insecurity.[67]

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66. Justices Burger and Harlan were the only members of the Court to voice disapproval of the rule. Justice Black concurred emphatically with the majority opinion on collateral estoppel. It seems safe to suggest that Justice Black, as well as Justices Stewart and White (the majority opinion) would tend to agree with Justice Brennan rather than Chief Justice Burger regarding the one transaction rule.

67. Green v. United States, 355 U.S. 184, at 187 (1957); cited by J. Brennan in his concurring opinion in *Ashe*, 397 U.S. at 450.