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ASHE v. SWENSON: COLLATERAL ESTOPPEL, DOUBLE JEOPARDY, AND INCONSISTENT VERDICTS

INTRODUCTION

The Supreme Court in *Ashe v. Swenson*[1] held that the fifth amendment's guarantee against double jeopardy,[2] applicable to the states through the fourteenth amendment,[3] requires that a criminal defendant acquitted of a crime be able to invoke the doctrine of collateral estoppel[4] in a later trial. Commentators had long urged such a rule,[5] and though it has existed for some time in the federal courts,[6] its elevation to a constitutional requirement is a significant step. The case invites consideration of the meaning and purpose of the double jeopardy guarantee and of the jury system itself. Specifically in regard to the latter, *Ashe* may subvert the currently accepted practice of allowing a jury to reach an inconsistent verdict in certain cases.[7] This Comment will examine the effects that *Ashe* may have in these areas.

I. THE INSTANT CASE

On January 10, 1960, three or four masked men broke into a private home and robbed each of six men who were playing poker. Ashe was charged with robbing one of the players, Knight, and was tried. At the trial, although the proof, both that a robbery had occurred and that money had been taken from Knight and the others, was strong and unchallenged, there was little evidence that Ashe had been present. The defense offered no testimony. The trial judge instructed the jury in effect that if a robbery was proved and if Ashe was one of the robbers, he was guilty even if he had not himself robbed Knight. The verdict was "not guilty due to insufficient evidence."[8]

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1. 397 U.S. 436 (1970).
2. "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."
3. Benton v. Maryland, 395 U.S. 784 (1969), *overruling on this point* Palko v. Connecticut, 302 U.S. 319 (1937).
4. The principle of collateral estoppel, traditionally invoked in civil cases, can be expressed as follows:

> Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action . . . .

RESTATEMENT OF JUDGMENTS § 68(1) (1942).
5. *E.g.*, Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 40 (1960); Lugar, *Criminal Law, Double Jeopardy, and Res Judicata*, 39 IOWA L. REV. 317, 318 (1954); Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 284 (1965); Comment, *Double Jeopardy and Collateral Estoppel in Crimes Arising from the Same Transaction*, 24 MO. L. REV. 513, 523 (1959).
6. Sealfon v. United States, 332 U.S. 575 (1948). The *Ashe* Court in fact considered that "collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in *United States* v. *Oppenheimer*, 242 U.S. 85 [1916]," 397 U.S. at 443, although *Oppenheimer* involved only res judicata. *See* note 43 *infra*.
7. Dunn v. United States, 284 U.S. 390 (1932).
8. 397 U.S. at 437-39.

Ashe was subsequently tried for robbing another of the poker players during the same incident.[9] His motion to dismiss based on his previous acquittal was denied, and he was convicted. The Missouri Supreme Court affirmed,[10] and, after an unsuccessful collateral attack in the state courts,[11] Ashe brought a habeas corpus action in the federal district court, claiming that the second prosecution violated the double jeopardy clause of the fifth amendment. The court denied the writ,[12] relying on *Hoag v. New Jersey*,[13] which on materially similar facts had held that there was no violation of due process. The court of appeals affirmed,[14] but the United States Supreme Court reversed, holding that Missouri had violated the double jeopardy guarantee when it prosecuted Ashe a second time.[15] In an opinion by Justice Stewart, the Court decided that the guarantee encompasses collateral estoppel, and that accordingly Ashe's prior acquittal had conclusively determined that he was not one of the robbers.

Justice Stewart noted that the perspective of the problem had changed since the Court's 1958 decision in *Hoag v. New Jersey*.[16] At that time it had viewed the question presented by the holding of the second trial solely in terms of the fourteenth amendment's due process clause and concluded that New Jersey had not pursued a course of "fundamental unfairness"[17] toward Hoag. The intervening decision in *Benton v. Maryland*,[18] however, "held that the Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment,"[19] thereby changing the question from whether collateral estoppel is a requirement of due process to whether it is a part of the more explicit double jeopardy guarantee.[20] Justice Stewart also observed that the Court in *Hoag* had avoided deciding whether collateral estoppel is a constitutional requirement by accepting the state court's determination that the defendant's previous acquittal did not raise any estoppel, *i.e.*, that it did not "actually determine" the issue defendant sought to foreclose.[21] In applying the doctrine, the *Ashe* court rejected the restrictive application of it employed by some courts:[22]

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9. This is considered a separate offense under Missouri law, which subscribes to the "same evidence" test. *See* text accompanying note 29 *infra*.
10. State v. Ashe, 350 S.W.2d 768 (Mo. 1961).
11. State v. Ashe, 403 S.W.2d 589 (Mo. 1966).
12. Ashe v. Swenson, 289 F. Supp. 871 (W.D. Mo. 1967).
13. 356 U.S. 464 (1958). In *Hoag*, the Court avoided the ultimate issue of whether collateral estoppel in successive criminal prosecutions is a constitutional mandate. *See* text accompanying note 21 *infra*.
14. Ashe v. Swenson, 399 F.2d 40 (8th Cir. 1968).
15. Ashe v. Swenson, 397 U.S. 436 (1970).
16. 356 U.S. 464 (1958).
17. *Id.* at 467-69.
18. 395 U.S. 784 (1969). *See* text accompanying note 3 *supra*.
19. Ashe v. Swenson, 397 U.S. 436, 437 (1970).
20. *Id.* at 442.
21. *Id.* *See* text accompanying notes 33-36 *infra*. In his majority opinion in *Hoag*, however, Justice Harlan expressed "grave doubts whether collateral estoppel can be regarded as a constitutional requirement." 356 U.S. at 471.
22. *See* text accompanying notes 33-41 *infra*.

> [T]he 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 a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."[23]

Applying this approach, Justice Stewart noted that the record was devoid of any indication that the first jury could rationally have found that a robbery had not occurred or that Knight had not been a victim of that robbery. "The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not."[24] Thus, the Court held, Ashe's second prosecution on the same issue violated the guarantee against double jeopardy.

Justices Black, Harlan, and Brennan each wrote concurring opinions. Chief Justice Burger dissented; he denied that the first jury's acquittal had necessarily determined that Ashe was not present at the robbery scene, hinted in passing at the problem of mutuality of estoppel,[25] and expressed strong opposition to the position taken by Justice Brennan, in his concurring opinion, that the robberies of multiple individuals in the same episode were not sufficiently discrete to justify multiple trials.[26]

II. The Guarantee Against Double Jeopardy

To appreciate the significance of the Court's extension of collateral estoppel to successive criminal trials and to comprehend the policy considerations involved, it is necessary to examine the protection afforded defendants under the double jeopardy clause.[27] As Professor Lugar has observed:

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23. 397 U.S. at 444, *quoting* Mayers & Yarbrough, *supra* note 5, at 38-39.

24. 397 U.S. at 445.

25. In civil cases, "[t]he rule of mutuality in collateral estoppel holds that unless both parties are bound by a prior judgment, neither may use the prior judgment as determinative of an issue in a second action." Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 Colum. L. Rev. 1457, 1459 (1968). The rule usually applies where collateral estoppel is sought to be invoked by a *non-party* to the first action, however, and is only justified by possible unfairness in subjecting a party to unforeseen liability vis-à-vis a presently unknown adversary. F. James, Civil Procedure 595-96 (1965). This rationale would seem to be inapplicable in successive *criminal* prosecutions against the same defendant, where the state may be precluded from invoking collateral estoppel against him due to various constitutional considerations. *See* Comment, *The Use of Collateral Estoppel Against the Accused*, 69 Colum. L. Rev. 515 (1969). *See also* Gershenson, *Res Judicata in Successive Criminal Prosecutions*, 24 Brook. L. Rev. 12 (1957); Comment, *Res Judicata in Criminal Cases*, 27 Tex. L. Rev. 231 (1948). United States v. DeAngelo, 138 F.2d 466, 468 (3d Cir. 1943), and United States v. Carlisi, 32 F. Supp. 479, 482 (E.D.N.Y. 1940), for example, both indicate in dictum that collateral estoppel cannot be used against a defendant. The majority in *Ashe*, in any event, was not bothered by this possibility in holding that a defendant could invoke collateral estoppel in his own behalf.

26. 397 U.S. at 460-70 (dissenting opinion).

27. The double jeopardy protection, which is contained in the fifth amendment of the United States Constitution and in many state constitutions, is derived from the English

> [W]ith the ever-expanding number of statutory offenses the protection provided by this principle [double jeopardy] becomes less and less since the doctrine applies only where the defendant is twice placed in jeopardy for the *same offense.* Under rules generally applied by the courts in determining whether the same offense is being charged, the prosecutor may, with little imagination and even less research, reindict for a different offense if his first venture was unsuccessful, even though the defendant is being retried for essentially the same anti-social conduct.[28]

The rule described as "generally applied by the courts" for the determination of whether double jeopardy precludes a subsequent prosecution is the "same evidence" test: If the matter set out in the second indictment was admissible as evidence under the first indictment, and if a conviction could properly have been sustained upon such evidence, then the plea of double jeopardy is valid.[29] This test allowed the reprosecution of Ashe; since different victims were involved in the two separate charges, there was some difference in the evidence necessary for conviction under them. This rule would seem to open the door to frustration of the policy of the double jeopardy clause, which is to protect defendants from harassment and oppression by the state,[30] since the defendant is often forced to litigate *some* issues, at least, more than once. A few courts, apparently disturbed by this fact,[31] have employed the "same transaction" test, which Justice Brennan advocated in his concurring opinion in *Ashe.*[32] Under this formulation, double jeopardy will preclude a subsequent prosecution if both offenses charged were part of the same criminal episode, as was clearly the case in *Ashe.*

The Court majority took a middle course in deciding that the doctrine of collateral estoppel is a constitutional requirement in successive criminal trials, and by giving the words "actually determined" a liberal application based on the assumption that a jury acts rationally. An examination of the line of cases rejected by the Court reveals the unsatisfactory nature of a narrower view.

In *Hoag v. New Jersey,*[33] for example, the defendant was tried on three separate indictments consolidated for one trial, for robbing three persons on

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pleas of *autrefois acquit* and *autrefois convict. See* 4 W. BLACKSTONE, COMMENTARIES *335: "[T]he plea of *autrefois acquit,* or a former acquittal, is grounded on this universal maxim of the common law of England—that no man is to be brought into jeopardy of his life, more than once for the same offense."

28. Lugar, *supra* note 5, at 317; *accord,* Kirchheimer, *The Act, the Offense and Double Jeopardy,* 58 YALE L.J. 513 (1949): "Under existing procedure, a skillfull prosecutor finds it easy to manipulate offense categories in such a way as to sidestep constitutional guaranties against double jeopardy." *Id.* at 525.

29. The test appears to have arisen in Rex v. Vandercomb and Abbott, 2 Leach 708, 720, 168 Eng. Rep. 455, 461 (Crown, 1796). *See also* Blockburger v. United States, 284 U.S. 299, 304 (1932) (definition of "offense" within multiple count indictment); Commonwealth v. Clair, 89 Mass. (7 Allen) 525 (1863). For various formulations of the test *see* Note, *Double Jeopardy and the Concept of Identity of Offenses,* 7 BROOK. L. REV. 79, 83, 86 (1937).

30. *See* text accompanying notes 54-58 *infra.*

31. *See* Lugar, *supra* note 5, at 323.

32. 397 U.S. at 453 (concurring opinion). *See* text accompanying notes 59-60 *infra.*

33. 356 U.S. 464 (1958).

the same occasion. For his defense he offered an alibi; after being acquitted, he was later indicted, tried, and convicted for robbing a fourth person during the same occurrence. The Supreme Court upheld the conviction, agreeing with the state court's ruling that no estoppel was raised because the first jury might *not* have believed Hoag's alibi and might have acquitted on the basis of some element of the prosecution's case that he did not contest at the trial. In other words, the Court reasoned that the first jury did not "necessarily decide" the issue of defendant's presence at the crime, even though this was the only issue he had contested. As the state court said:

> There is nothing to show that the jury did not acquit the defendant on some other ground or because of a general insufficiency in the State's proof. Obviously, the trial of the first three indictments involved several questions, not just the defendant's identity, and there is no way of knowing upon which question the jury's verdict turned.[34]

Chief Justice Warren and Justices Douglas and Black, dissenting in *Hoag*, disagreed with the state court. Justice Douglas wrote:

> The resolution of this crucial alibi issue in favor of the prosecution was as essential to conviction in the second trial as its resolution in favor of the accused was essential to his acquittal in the first trial. Since petitioner was placed in jeopardy once and found not to have been present or a participant, he should be protected from further prosecution for a crime growing out of identical facts and occurring at the same time.[35]

Over vigorous dissent, then, the Court in *Hoag* approved the view that since a general verdict of acquittal does not show on its face the reason for the conclusion, the jury rendering it may have acquitted because of a general failure of proof, and hence no one issue of fact can be said to have been "necessarily determined." In *Hoag*, this meant making the assumption that the jury refused to believe unimpeached and uncontradicted testimony for the prosecution concerning the occurrence of the robbery.[36] This is the very assumption the Court rejected in *Ashe* by imputing rationality to the jury. In a footnote, the *Ashe* Court quoted with approval the following criticism of the rule of *Hoag*:

> "If a later court is permitted to state that the jury may have disbelieved substantial and uncontradicted evidence of the prosecution on a point the defendant did not contest, the possible multiplicity of prosecutions is staggering. . . . In fact, such a restrictive definition of 'determined' amounts simply to a rejection of collateral estoppel, since it is impossible to imagine a statutory offense in which the government has to prove only one element or issue to sustain a conviction."[37]

34. State v. Hoag, 21 N.J. 496, 505, 122 A.2d 628, 632°(1955).
35. 356 U.S. at 479 (dissenting opinion).
36. *See* Knowlton, *Criminal Law and Procedure*, 11 RUTGERS L. REV. 71, 90 (1956).
37. 397 U.S. at 444 n.9, *quoting* Mayers & Yarbrough, *supra* note 5, at 38.

A case similar to *Hoag* in its material facts and in the court's approach to collateral estoppel is *People v. Rogers*.[38] There were two indictments, one charging that the defendant had robbed *A*, the other charging that at the same place and time he had attempted to rob *B*. The defendant was tried on the first charge; he defended with an alibi and was acquitted. In denying a motion in arrest of judgment after a conviction in the second trial the court, while accepting the general applicability of collateral estoppel to successive criminal trials, rejected defendant's contention that collateral estoppel should be applied in this particular case to the issue of his presence at the robbery scene. The court wrote:

> Of itself the verdict spoke but one thing, that defendant was not guilty. On what evidence or lack of evidence it was based it is legally impossible to say. To the argument that it was based upon the alibi it may with equal force be argued that it was based on the failure of proof of either or both essentials of the crime and that the testimony in support of the alibi was either ignored or disbelieved.[39]

It might be said of this approach that it pays lip service to the applicability of collateral estoppel to criminal trials but then destroys the usefulness of the doctrine by unreasonably restricting the issues "actually determined" at a prior trial. A recent example is *State v. Sanders*,[40] which involved the murder, at the same place and at approximately the same time, of two girls. Sanders was tried for the murder of girl *A*; the jury found him not guilty by reason of insanity. He was then tried for the murder of companion girl *B*. The trial judge applied collateral estoppel in dismissing the charge, holding that the defendant's insanity at the time of the alleged crime had already been adjudicated by the prior acquittal. The appellate court reversed, holding the Sanders's insanity at the time of girl *B*'s murder had *not* been previously adjudicated. The court argued that the prior verdict had decided only defendant's insanity at the time of girl *A*'s murder and hypothesized that he may have killed *B* first, while sane, and then gone insane and killed *A*; or that he may have been only temporarily insane when he killed *A*, and regained his sanity before killing *B*.

There was a strong dissent in *Sanders*:

> The inescapable logical conclusion reached by the trial judge and overwhelmingly supported by the record in the [prior trial for the murder of girl *A*] is: "[T]he jury could not have reasonably rendered their verdict upon any other basis than a determination by them that the defendant was insane at the time and place, when and where, both [girls were murdered]."[41]

38. 102 Misc. 437, 170 N.Y.S. 86 (Sup. Ct. N.Y. County), *aff'd*, 184 App. Div. 461, 171 N.Y.S. 451 (1st Dep't 1918), *aff'd*, 226 N.Y. 671, 123 N.E. 882 (1919).

39. 102 Misc. at 440, 170 N.Y.S. at 88. *Accord*, State v. Barton, 5 Wash. 2d 234, 105 P.2d 63 (1940).

40. 229 So. 2d 288 (Fla. App. 1969).

41. *Id.* at 294 (dissenting opinion).

The approach of the dissent in *Sanders* to the conclusiveness of prior acquittals, sometimes referred to as the doctrine of "reasonable speculation,"[42] is characteristic of the line of cases vindicated by *Ashe*. In 1916 the Supreme Court indicated that collateral estoppel extends in the federal courts to successive criminal trials as well as civil trials.[43] Rejecting the argument of the Government that the doctrine of res judicata is applicable to criminal cases only in the modified form of the double jeopardy clause, Justice Holmes wrote: "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt."[44]

Since 1916, the current of federal opinions has been strongly in favor of the use of collateral estoppel in criminal trials,[45] although not on the constitutional grounds relied upon in *Ashe*. Some of these cases employed the doctrine of "reasonable speculation," under which the court will examine the record of the previous prosecution, evaluate the pleadings, defenses, evidence, and jury instructions, and then determine the issue or issues upon which a rational jury must have reached its verdict.[46] Such an approach saves a general verdict of acquittal from the impotence it is afforded in such cases as *Hoag*, *Rogers*, and *Sanders*.[47]

In *Sealfon v. United States*,[48] for example, petitioner had been tried and acquitted on a conspiracy charge, and then was tried for the substantive offense. The crux of the prosecution's case at the second trial was an alleged agreement vital to its case at the first trial. In an opinion by Justice Douglas, the Court rejected the prosecution's argument that the basis of the first jury's acquittal could not be known with certainty:

> The instructions under which the verdict was rendered, however, must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings. We look to them only for such light as they shed on the issues determined by the verdict.[49]

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42. *See* Note, *Twice in Jeopardy*, *supra* note 5, at 285.

43. United States v. Oppenheimer, 242 U.S. 85 (1916). This case did not involve any collateral estoppel issue; the Court held only that res judicata was applicable to the facts before it, since they involved a subsequent prosecution for the *same* offense where, for technical reasons, a plea of double jeopardy was not valid. The rule was apparently first widened to include collateral estoppel (*i.e.* where the subsequent prosecution was for a *different* offense) in United States v. Adams, 281 U.S. 202, 205 (1930) (*semble*), and more clearly so in Sealfon v. United States, 332 U.S. 575 (1948). The *Ashe* Court in fact considered the matter decided by *Oppenheimer*, 397 U.S. at 443, (*see* note 6 *supra*), though Justice Holmes himself (who wrote for the *Oppenheimer* Court) did not seem to agree. *See* text accompanying note 66 *infra*. For a discussion of the *Sealfon* case, *see* text accompanying notes 48-50 *infra*.

44. 242 U.S. at 87.

45. Mayers & Yarbrough, *supra* note 5, at 38.

46. *See* United States v. Kramer, 289 F.2d 909 (2d Cir. 1961); text accompanying note 23 *supra*.

47. Note, *Twice in Jeopardy*, *supra* note 5, at 285.

48. 332 U.S. 575 (1948). *See* note 43 *supra*.

49. 332 U.S. at 579 (citation omitted).

The Court found that the only instructions by the first trial judge relating to the facts of the case caused the jury necessarily to consider and determine in its acquittal the same issue that was controlling in the second trial. Since he was acquitted, the determination must have been in the accused's favor, and the Court held that collateral estoppel precluded the prosecution from relitigating that issue in the second trial.

In *United States v. DeAngelo*,[50] the defendant's conviction was reversed because he had not been permitted to use a general verdict of acquittal from a prior robbery trial to bar relitigation of the issue of his presence and participation in the crime in a subsequent conspiracy trial based on the same conduct. The court reasoned that since the prior indictment had alleged defendant's presence and participation and since his plea of not guilty had put in controversy every material allegation of the charge, the verdict of acquittal necessarily determined those issues adversely to the prosecution's allegations. The court distinguished between collateral estoppel and double jeopardy:

> The conclusiveness of a fact which has been competently adjudicated by a criminal trial is not confined to such matter only as is sufficient to support a plea of double jeopardy. 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 the judgment determined. . . . The matter is one of collateral estoppel of the prosecutor.[51]

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50. 138 F.2d 466 (3d Cir. 1943).

51. *Id.* at 468 (citation omitted). *See also* Yawn v. United States, 244 F.2d 235 (5th Cir. 1957), which held that where a defendant was acquitted of the substantive charge of unlawful possession of a still, the doctrine of collateral estoppel was applicable and precluded the Government from establishing the fact of possession of such still in a second prosecution for conspiracy.

Many state court decisions similarly follow the "reasonable speculation" approach. In State v. George, 253 Ore. 458, 455 P.2d 609 (1969), it was held that where the evidence and the instructions given in a trial resulting in defendant's acquittal of the murder of one of two shooting victims established that both victims were killed by the same shot and that all criminal responsibility for firing the shot was necessarily adjudicated in defendant's favor, the doctrine of collateral estoppel barred the state from relitigating the criminal responsibility issue in a subsequent prosecution for the killing of the other victim. The court rejected the state's argument that the first jury may have disbelieved the expert's one-bullet theory, noting that there was no evidence before the jury to sustain an alternative theory.

In People v. Grzesczak, 77 Misc. 202, 137 N.Y.S. 538 (Nassau County Ct. 1912), the accused did not attempt in his first trial to deny that the crime (arson) had been committed; he merely contended that he had not participated, and he was acquitted. The court directed a verdict of not guilty in a second trial of defendant, for robberv arising out of the same transaction, on the ground that by prior acquittal the first jury had necessarily found that the defendant was not present at the crime scene. The court wrote:

> The only litigated question of fact on both these indictments is the presence of the accused when these crimes were committed. That question having once been decided, it cannot again be tried. Should the jury in this case find the defendant guilty nnder the defense herein interposed, that of an alibi, we would be confronted with two incompatible verdicts, which would amount to a finding on the one hand that the defendant was not present, and on the other hand that he was present.

Id. at 206, 137 N.Y.S. at 541.

While the policy motivating the court in *Grzesczak* was the avoidance of inconsistent verdicts, *see* text accompanying notes 61-79 *infra*, other courts have emphasized different reasons for applying collateral estoppel and the "reasonable speculation" approach in

These cases reveal the difficulties courts encounter in applying collateral estoppel to criminal cases. The main problem is determining what issues a prior acquittal has "necessarily determined." While this problem also arises when the doctrine is used in civil litigation, it is more acute in the criminal area; in criminal cases the defense plea is usually a general denial ("not guilty"), the jury instructions usually set out several theories on which the jury might find the defendant not guilty, and the verdict returned by the jury is a general one.[52] Arguably the danger in the use of collateral estoppel under these circumstances is that it will preclude too much, *i.e.*, that the prosecution may be estopped from relitigating an issue that, while touched upon by a prior trial, was not "actually determined" by the judgment, thus frustrating the public interest in punishing criminals. *Ashe* requires only, however, that the court decide, after a thorough search of the trial record, what issues a rational jury *must* have decided in reaching its verdict; if the jury *might* not have decided an issue, it will not be foreclosed.[53] If anything, error is likely to be in the prosecution's favor, since a jury will often determine many issues without the verdict and record revealing that it did.

The congruence of the policy considerations behind more traditional uses of res judicata and collateral estoppel on the one hand, and behind the double jeopardy protection on the other, lends strength to the view that the latter should *at least* include the former. It has been said that the application of collateral estoppel in criminal cases presents "questions of policy quite different from those applicable to civil proceedings."[54] "Collateral estoppel in civil cases

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criminal cases. In People v. Kleinman, 168 Misc. 920, 6 N.Y.S.2d 246 (Sup. Ct. 1938), the court invoked collateral estoppel in favor of the accused, but noted that it was merely a "rule of evidence." A similar position was taken in United States v. Simon, 225 F.2d 260 (3d Cir. 1955): "The issue is not whether there can be inconsistent verdicts from one trial, but rather whether the Government is estopped from relitigating in a second trial facts already determined in the first." *Id.* at 262 (citation omitted); *accord*, Abbate v. United States, 359 U.S. 187 (1959).

In People v. Cunningham, 62 Misc. 2d 515, 308 N.Y.S.2d 990 (Sup. Ct. Kings County 1970), while the court noted that unlike double jeopardy, collateral estoppel had no constitutional basis and was only a rule of evidence, the opinion emphasized the critical role collateral estoppel could play in protecting defendants from harassment when double jeopardy protection was not available. And United States v. Rachmil, 270 F. 869 (S.D.N.Y. 1921), anticipated the *Ashe* decision's reliance on constitutional grounds. The district court sustained a motion to quash an indictment for attempting to evade the income tax, on the ground that there had been a previous adjudication in favor of the defendants in a charge involving identical issues. In the previous trial the accused had been acquitted of having conspired to attempt to evade the income tax. The district court wrote:

> Upon a trial of the present indictment, the issue as to whether the return filed was false and fraudulent, would be a fundamental proposition. That issue was involved in the previous trial, and to permit it to be litigated again would come so close to an encroachment upon the constitutional rights of the defendants as to warrant me to quash the present indictment.

Id. at 871.

52. Lugar, *supra* note 5, at 332.

53. 397 U.S. at 444. *See* text accompanying notes 23, 37 *supra*.

54. Scott, *Introduction*, 39 IOWA L. REV. 214, 216 (1954). For a good discussion of the policy considerations behind the civil litigation use of collateral estoppel, *see* Polasky, *Collateral Estoppel—Effects of Prior Litigation*, 39 IOWA L. REV. 217 (1954).

is grounded on the belief that the burden of relitigation upon parties and upon the judicial system outweighs the possibility of injustice in perpetuating an erroneous determination in an earlier suit."[55] The burden of relitigation on the defendant in a criminal case is all the more overbearing because of the much greater resources of his adversary—the state—and because of the higher stakes involved—prison, or worse. As one writer expressed it:

> In its traditional application, double jeopardy is a rule of finality: a single fair trial on a criminal charge bars reprosecution. Double jeopardy shares the purposes of civil law rules of finality; it protects the defendant from continuing distress, enables him to consider the matter closed and to plan ahead accordingly, and saves both the public and the defendant the cost of redundant litigation. But double jeopardy is not simply res judicata dressed in prison grey. It was called forth more by oppression than by crowded calendars. It equalizes, in some measure, the adversary capabilities of grossly unequal litigants.[56]

Collateral estoppel is a minimum protection because, unlike the "same evidence" test,[57] it operates directly on repetitive litigation, to the extent of foreclosing only litigation of issues that have in fact been previously decided. Without at least this much, the prosecution can use the first trial as a "dry run," as the Court found had happened in *Ashe*.[58] The result clearly is harassment of the defendant, without any justification in governmental needs.

III. The Implications of *Ashe*

A. *The Same Transaction Test*

The foregoing discussion raises the question whether *Ashe* goes far enough in giving defendants adequate protection under the double jeopardy clause. In his concurring opinion Justice Brennan asserted that the clause requires the prosecution, in most circumstances, to join at one trial all charges growing out of a single criminal act or transaction.[59] This view arises from the realization that in many cases, it will be impossible for a later court to say with reasonable certainty what a previous judgment of acquittal has "necessarily concluded." Professor Lugar has written:

> As long as the defendant is permitted to plead generally not guilty, not being required to plead specially to the charges contained in the accusation, under the plea of not guilty is allowed to raise affirmative defenses, and the jury to return a general verdict, there is little possibility that the maxim res judicata will serve as a real limitation on

55. Mayers & Yarbrough, *supra* note 5, at 31 (footnote omitted).
56. Note, *Twice in Jeopardy*, *supra* note 5, at 277-78 (footnotes omitted).
57. *See* text accompanying note 29 *supra*.
58. 397 U.S. at 447. Both the majority opinion, *id.* at 440, and Justice Brennan's concurring opinion, *id.* at 458-59, described in some detail the improvements in the prosecution's case at the second trial.
59. *Id.* at 453.

> repeated prosecutions permitted by the rules used in applying the doctrine of double jeopardy. . . .
>
> Not until the prosecutor is required to use in one case all of the existing operative facts, known or discoverable by him, arising from essentially one criminal act of the accused, or be forever barred from using any of them in future prosecutions, will the accused be protected from undue harassment.[60]

Aside from this strong policy reason supporting its adoption, the same transaction test is a logical extension of the collateral estoppel requirement. The latter, where it can be invoked, usually precludes a second trial entirely, since the issues "actually determined" in the defendant's favor will often be central to any finding of culpability for the same episode. In such a case the "same transaction" test merely extends the protection to cases involving a multitude of issues, where collateral estoppel cannot be invoked because the verdict does not explicitly reveal what issues must have been decided in the defendant's favor.

B. *Inconsistent Verdicts*

Ashe may also appear to undermine the validity of certain kinds of inconsistent criminal verdicts that had previously been accepted.[61] The leading case is *Dunn v. United States*,[62] which upheld, on non-constitutional grounds, a multiple-count verdict containing an acquittal and a conviction that were logically incompatible.[63] The two grounds for the Court's holding were first, that the case was analogous to an acquittal followed by a conviction for a different offense based partially on the same evidence—a result that was thought permissible at that time[64]—and second, that the jury was presumably

60. Lugar, *supra* note 5, at 347. *See* Knowlton, *supra* note 36, at 95; MODEL PENAL CODE § 1.08(2), (3) (Tent. Draft No. 5, 1956) on compulsory joinder rules.

The presence of a large number of counts in an indictment may, of course, confuse the jury, and the jury may also feel more psychological pressure to convict on at least one count in such a situation. Constant aid by the judge during the trial should largely eliminate these problems, however.

61. Chief Judge Bazelon of the District of Columbia Circuit raised this point in his concurring opinion in United States v. Fox, 433 F.2d 1235, 1239 (D.C. Cir. 1970).

Where one defendant is involved, the only inconsistency tolerated is between an acquittal and a conviction, in a *jury* verdict, and this tolerence is not universal. Dunn v. United States, 284 U.S. 390 (1932); cases cited in Comment, *Inconsistent Verdicts in a Federal Criminal Trial*, 60 COLUM. L. REV. 999, 1002 n.18 (1960). Inconsistent convictions are uniformly struck down, cases cited in Comment, *supra*, at 999, 1001 nn. 1, 2, 12, 13, 14, 17, and an inconsistent acquittal/conviction combination in a bench trial has been held invalid, United States v. Maybury, 274 F.2d 899 (2d Cir. 1960), *noted in* Comment, *supra*; 6 How. L.J. 225 (1960).

For more detailed descriptions of carly cases spanning the range of inconsistent verdict situations, see Annot., 80 A.L.R. 171 (1932).

62. 284 U.S. 390 (1932).

63. The defendant was indicted on three counts: (1) for maintaining a common nuisance by keeping intoxicating liquor for sale at a specified place; (2) for unlawful possession of intoxicating liquor; and (3) for the unlawful sale of such liquor. The jury found him guilty on the first count but not guilty on the second and third counts, although the sale for which he was acquitted on the third count was necessary to find a nuisance on the first count.

64. 284 U.S. at 393. *See* Blockburger v. United States, 284 U.S. 299, 304 (1932).

being lenient toward the defendant so that the rule against inquiring into the bases of jury verdicts would therefore apply.[65]

The premise of the Court, speaking through Justice Holmes, for the first rationale was that

> [i]f separate indictments had been presented against the defendant for possession and for maintenance of a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as *res judicata* of the other.[66]

Holmes found precedent for treating the different counts of a multi-count indictment as if they were separate indictments,[67] so that acquittal on one count need have no effect on the result on other counts.

The Court's premise was invalidated when *Sealfon v. United States*[68] was decided in 1948, if not sooner;[69] while *Ashe* may be seen as adding emphasis to its invalidity, the double jeopardy reasoning of *Ashe* is not directly relevant to inconsistent verdicts.[70]

Dunn may nevertheless survive because of its second rationale, namely, that a verdict is not to be impeached solely because the jury may have compromised in defendant's favor in reaching it. *Ashe* would seem to have something to say about this rule, since the case places such great reliance on the rationality of the jury.[71] Arguably, if the first jury is so rational that a later court can discern what issues it must have decided in acquitting a defendant, then it should be held rational enough to render a consistent verdict.

The *Ashe* and *Dunn* situations are distinctly different, however. In *Ashe* the assumption of the jury's rationality is made for the purpose of saving defendants from having to relitigate issues decided in their favor, in furtherance of the policy of the double jeopardy clause. Where a single jury verdict is involved, however, such a double jeopardy consideration is not relevant, and

65. 284 U.S. at 393-94.

66. *Id.* at 393.

67. Selvester v. United States, 170 U.S. 262 (1898); Latham v. The Queen, 5 Best & Smith 635, 122 Eng. Rep. 968 (Q.B. 1864). These cases did not raise the question of inconsistency, since they involved verdicts in which the jury had convicted on one or more counts and had failed to reach a decision on other counts.

68. 332 U.S. 575 (1948). Lower courts have followed *Dunn* despite *Sealfon*, however. *E.g.*, United States v. Marcone, 275 F.2d 205 (2d Cir.), *cert. denied*, 362 U.S. 963 (1960); Silverman v. United States, 275 F.2d 173 (D.C. Cir. 1960). The Supreme Court has not re-examined the issue, and these cases have been strongly criticized. *See* Comment, *supra* note 61, at 1009.

It is curious that Justice Holmes made the statement, quoted in text accompanying note 66 *supra*, in the face of his own earlier holding that res judicata must be applied in successive criminal trials in the federal courts. United States v. Oppenheimer, 242 U.S. 85 (1916). This apparent contradiction may perhaps be explained by the fact that *Oppenheimer* was a very narrow decision, involving a second trial for an identical offense, whereas Justice Holmes' *Dunn* hypothetical actually involved collateral estoppel. The Court in *Ashe*, however, cited *Oppenheimer* for the broader proposition that collateral estoppel applied in successive federal criminal trials. 397 U.S. at 443. *See* notes 43-44 *supra* and accompanying text.

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

70. *But cf.* text after note 77 *infra*.

71. *See* text accompanying notes 23, 24, 37 *supra*.

allowing to the jury a large measure of discretion would seem to comport with its role in the Anglo-American legal system. As one commentator has said,

> [T]he law states duties and liabilities in black and white terms. Human actions are frequently not as clean-cut. . . . To deny the jury a share in this endeavor [to search for a middle ground] is to deny the essence of the jury's function, which is finding a solution for those occasional hard cases in which "law and justice [. . .] do not coincide."[72]

Representing the "conscience of the community," juries have long exercised the function of "nullification," or the mitigation of the harsh effects of law when community sentiment commands it.[73] The *Dunn* rule allows a verdict more precisely tempered to the jury's feelings,[74] lessening the possibility of unwarranted leniency or severity of result.

The validity of *Dunn* under this reasoning depends entirely on the assumption that the jury must have found sufficient evidence to convict and is exercising leniency. This assumption can be seen in Justice Holmes' opinion itself, where he quoted the following language from a lower court opinion in another case:

> "We interpret the acquittal as no more than [the jury's] assumption of a power which they had no right to exercise, but to which they were disposed through lenity."[75]

Furthermore, where an inconsistent verdict is clearly of no benefit to the defendant, *i.e.* in the case of inconsistent convictions, it is not allowed to stand.[76]

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72. Bickel, *Judge and Jury—Inconsistent Verdicts in the Federal Courts*, 63 HARV. L. REV. 649, 651 (1950), *quoting* J. FRANK, COURTS ON TRIAL 128 (1949) (ellipsis to indicate omission added in the Frank quotation).

73. For a thorough treatment of this function of the jury as reflected in recent Supreme Court cases, *see* Note, *Trial by Jury in Criminal Cases*, 69 COLUM. L. REV. 419 (1969).

74. In Professor Bickel's words, the *Dunn* rule

> permits a sensible compromise between the necessity of convicting some likable people, or defendants who have committed a momentarily popular crime, and the tendency of juries to be reluctant to do so.

Bickel, *supra* note 72, at 652.

75. 284 U.S. at 393, *quoting* Steckler v. United States, 7 F.2d 59, 60 (2d Cir. 1925). The jury leniency rationale was noted and distinguished by the Second Circuit when it held that a judge could not render an inconsistent verdict. United States v. Maybury, 274 F.2d 899, 903 (2d Cir. 1960) (opinion of Friendly, J.). Professor Bickel, apparently the most ardent early advocate of the *Dunn* result, also bases his view on this rationale:

> *Dunn* reaffirms the jury's power to exercise leniency by limiting punishment to sentence upon only one of many counts—even though in recognizing this power the Court alluded to it as one to which the jury has no "right."
>
> . . . .
>
> It seems likely, as was assumed by the Court, that a second jury in *Dunn* would have viewed the evidence on the new trial as had its predecessor, and, under strong instructions, would have convicted on all counts. . . . [*Dunn* and *Sealfon*] express the same policy; they each give the defendant the benefit of any break any single jury may wish him to have.

Bickel, *supra* note 72, at 651-52 (footnotes omitted).

76. *See* note 61 *supra*.

It seems altogether possible that the *Dunn* rule will not *always* operate in defendant's favor; an inconsistent acquittal and conviction may be the result of prejudice or confusion, for example.[77] Where this is conceivably the case, the rule requires some modification. It also appears somewhat inconsistent with our notions of the jury system to give full weight to a conviction and none to an acquittal when the two are incompatible. After *Sealfon* and *Ashe*, such verdicts place a greater hardship on a defendant who is tried on all possible counts at once than on one who is subject to separate trials. The latter will not even be tried a second time if he is acquitted the first time, while the former will suffer conviction. Such a result should hardly be justified by invoking the need to preserve jury discretion, since it is the defendant who is supposed to be protected by that discretion and who will presumably appeal an inconsistent verdict.

The *Dunn* situation clearly involves conflicting policies, though there may be a middle ground between the defendant's interest in jury leniency and his interest in a consistent verdict.[78] Justice Butler's view expressed in his dissent in *Dunn*, namely, that the conviction must be able to stand without any fact found in defendant's favor by the acquittal,[79] would bring the result into line with *Sealfon* and *Ashe*, but it would also seem to rule out any inconsistency. It is possible that the record of the particular case, or the verdict itself, will reveal to a trial or appellate judge whether or not a jury compromise was operating in the defendant's favor. The combination of an inconsistent verdict and meager evidence, even if enough to support a simple conviction, should be ground for reversal, since there is a substantial possibility that the jury convicted out of prejudice or confusion. On the other hand, where the evidence against the defendant is staggering, it might be safe to uphold the verdict as expressing jury leniency. On the face of the verdict, a conviction for a minor crime combined with an acquittal for a major one based on the same facts suggests leniency, while a conviction for the major offense and an acquittal on the minor offense suggests confusion. As a last alternative, a court could reasonably go all the way and find that all inconsistent verdicts appealed by the defendant contain on their face sufficient possibility of mistake to warrant setting them aside.

CONCLUSION

Ashe v. Swenson is a thought-provoking case, raising as it does the question of where and to what extent symmetry and consistency are goals of

77. Comment, *supra* note 61, at 1007. This Comment contains particularly forceful criticism of *Dunn* along the line mentioned in the text, *see id.* at 1007-09.

78. The constitutional questions raised by inconsistent verdicts reflect this conflict. In favor of such verdicts is the right to jury trial, which, however, the defendant would seem willing to waive by his appeal. Weighing against them, on the other hand, are due process and equal protection considerations, insofar as such verdicts are repugnant to logic and result in the defendants' being treated more harshly than if they had undergone successive trials.

79. 284 U.S. at 403, 406-07 (Butler, J., dissenting).

the law. The simple answer is that they are not goals in themselves, but only so far as they further other less abstract legal policies. Thus in the area of successive prosecutions, the assumption of jury rationality furthers the policy of the guarantee against double jeopardy. *Ashe*'s effect here is clear, and it only remains to be seen whether the Supreme Court will go beyond it and require the use of the "same transaction" test. In the case of jury verdicts, inconsistency may be accepted where it appears to advance the jury's exercise of its mitigating function, and struck down where it does not. Though *Ashe* by itself undermines the allowance of inconsistency, that question will ultimately be decided by weighing the more conflicting policies that abound in the jury area.