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Criminal Law - Double Jeopardy - Collateral Estoppel - Ashe v. Swenson

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COMMENT

CRIMINAL LAW — DOUBLE JEOPARDY — COLLATERAL ESTOPPEL

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

A POKER game in the home of John Gladson was interrupted when three or four armed masked men broke into the basement and robbed each of the six poker players of money and personal property. The robbers then fled in a car belonging to one of the victims. The stolen car was discovered in a field and later that morning three men were arrested near the car. Petitioner, Ashe, was arrested separately some distance away. All four were charged with seven separate offenses — armed robbery of each of the six poker players and car theft.

In May of 1960, Ashe stood trial for the armed robbery of Knight, one of the poker players. The prosecution's evidence as to the fact of the robbery and the items taken was unassailable. But the evidence establishing Ashe as one of the robbers was weak and inconsistent. Defendant's cross-examination brought out the inconsistencies of the identification testimony. He offered no testimony himself and waived final argument. The jury in an unusually general verdict found Ashe not guilty due to insufficient evidence.

Six weeks later, Ashe was tried for the robbery of Roberts, another poker player. The jury this time found Ashe guilty and he was sentenced to a 35-year term in the state penitentiary. The evidence with respect to Ashe's identity was much stronger at the second trial. A witness who had previously identified the other three men charged, but *not* petitioner, was not called at all. A second witness who had maintained there were only three robbers identified Ashe as one of them at the second trial. A witness who could only identify Ashe by "size, height and actions" in the first trial remembered his voice and a peculiar movement of his mouth in the second trial.[1]

Petitioner's appeal and collateral attacks were unsuccessful. In 1969, the United States Supreme Court granted certiorari.[2]

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[1] *See* Justice Stewart's statement of the facts, Ashe v. Swenson, 397 U.S. 436, 437-40 (1970) and Justice Brennan's statements at 457-59.

[2] 393 U.S. 1115 (1969).

I. Collateral Estoppel: The Narrow Ground of Decision in *ASHE*

The Supreme Court in *Ashe* held[3] that the doctrine of collateral estoppel, one peculiarly applicable to multiple prosecutions growing out of the same set of circumstances,[4] was embodied in the fifth amendment guarantee against double jeopardy.[5] Under the Court's definition, collateral estoppel "means simply that when an issue of ultimate fact[6] has once been determined by a valid and final judgment,[7] that issue cannot again be litigated between the same parties[8] in any

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[3] Only eight Justices participated in the decision; Justice Blackmun did not take his seat on the Court until June 9, 1970, approximately two months after the *Ashe* decision. Justice White adopted the opinion written by Justice Stewart; Justices Black and Harlan concurred separately, and Justices Marshall and Douglas joined in Justice Brennan's concurrence; Chief Justice Burger dissented. Thus, references to the "opinion" of the Court refer to Justice Stewart's plurality opinion which was fully adopted only by Justice White.

[4] *See, e.g.*, United States v. Kramer, 289 F.2d 909 (2d Cir. 1961); Carson v. People, 4 Colo. App. 463, 36 P. 551 (1894); State v. Hoag, 21 N.J. 496, 122 A.2d 628 (1956), *aff'd*, 356 U.S. 464 (1958).

[5] 397 U.S. 436, 445 (1970).

[6] A "fact 'distinctly put in issue' and not merely collaterally in question," is an ultimate fact. People v. Cornier, 42 Misc. 2d 963, 967, 249 N.Y.S.2d 521, 526 (1964). *People v. Lo Cicero* further explains that "collateral estoppel applies only to questions that were actually litigated...." 17 App. Div. 2d 31, 34, 230 N.Y.S.2d 384, 388 (Sup. Ct. 1962).

Once the defense of collateral estoppel is sustained in a criminal proceeding, one of two effects is possible. The doctrine may operate as a complete bar to the subsequent prosecution if the issue previously decided in defendant's favor "would be essential to the case against him on the second charge." United States v. Kenny, 236 F.2d 128, 130 (3d Cir. 1956). If the issue previously decided is not decisive of the outcome in the second prosecution, the doctrine of collateral estoppel "accords to the accused the right to claim finality with respect to a fact or group of facts previously determined in his favor . . . ." United States v. Carlisi, 32 F. Supp. 479, 482 (D.C.N.Y. 1940). However, there is no complete bar to the subsequent prosecution. United States v. De Angelo, 138 F.2d 466, 469 (3d Cir. 1943).

[7] The valid and final judgment required can be acquittal by a judge, United States v. Oppenheimer, 242 U.S. 85, 87 (1916); a jury verdict of not guilty, Hoag v. New Jersey, 356 U.S. 464, 465 (1958); or a conviction, Carson v. People, 4 Colo. App. 463, 465, 36 P. 551, 552 (1894). However, "a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment... for the same offense of which he had been convicted," the defense or collateral estoppel notwithstanding. United States v. Ball, 163 U.S. 662, 672 (1896).

[8] "[I]t is essential that the party sought to be estopped be identical to, or a strict privity with, the party who previously had his day in court and lost." People v. Lo Cicero, 14 N.Y.2d 374, 380, 251 N.Y.S.2d 953, 957, 200 N.E.2d 622, 625 (1964). Thus, "[w]hen the same act is an offense against both state and federal governments, its prosecution and punishment by the latter, after prosecution and punishment by the former, is not double jeopardy. United States v. Lanza, 260 U.S. 377 . . . ." Under the same reasoning, successive prosecutions by municipal governments and the federal government cannot be barred by the

future lawsuit."[9]

To understand fully the meaning of collateral estoppel as embodied in the guarantee against double jeopardy, it is necessary to differentiate between these two defenses. While both require identity of parties,[10] the defense of collateral estoppel ordinarily attaches *only* to a judgment,[11] while the defense of double jeopardy may be sustained in the absence of a judgment.[12] A second distinction is that " '[f]ormer jeopardy' involves identity of offenses, while 'collateral estoppel' (an extension of *res judicata*) . . . is conclusive as to matters actually litigated and determined by the judgment. . . ."[13] Finally, the defense of double jeopardy, if successfully interposed, is a complete bar to subsequent prosecution. Its "protection is not . . . against the peril of second punishment, but against being again tried for the same offense."[14] A successful defense of collateral estoppel, on the other hand, *may* operate as a complete bar if the issue previously decided would be decisive of the outcome in the second prosecution,[15] or it may solely preclude further litigation of certain facts or issues decided in the former prosecution.[16] The practical effect of the differences between the defense of double jeopardy and that of collateral estoppel is that the latter "may have

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defense of collateral estoppel. Smith v. United States 243 F.2d 877, 878 (6th Cir. 1957).

Similarly, "a judgment in the principal felon's case whether of conviction or acquittal, is not admissible for any purpose in an action against the accessory." Roberts v. People, 103 Colo. 250, 261, 87 P.2d 251, 256 (1938).

[9] 397 U.S. 436, 443 (1970).

[10] *See* note 8 *supra.*

[11] "[I]n order for the doctrine to apply, there must have been a definite determination of an issue favorable to the defendant in the prior trial . . . either expressly or by necessary implication." United States v. Perrone, 161 F. Supp. 252, 258 (D.C.N.Y. 1958). *See* note 7 *supra.*

[12] The defense of double jeopardy is available to "one who has been acquitted by a verdict duly rendered, although no judgment be entered on the verdict . . . ." Kepner v. United States, 195 U.S. 100, 130 (1904). "[A] defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again." Green v. United States, 355 U.S. 184, 188 (1957).

[13] United States v. Wapnick, 198 F. Supp. 359, 359-60 (D.C.N.Y. 1961). A similar statement with regard to the applicability of the doctrine of collateral estoppel is that it "is not affected by the existence of two separate and distinct crimes, although this does render the double jeopardy plea . . . often raised in these cases, without merit." Adams v. United States, 287 F.2d 701, 703 (5th Cir. 1961).

[14] Kepner v. United States, 195 U.S. 100, 130 (1904).

[15] United States v. Kenny, 236 F.2d 128, 130 (3d Cir. 1956).

[16] *See, e.g.*, United States v. De Angelo, 138 F.2d 466 (3d Cir. 1943); United States v. Carlisi, 32 F. Supp. 479 (D.C.N.Y. 1940).

determining effect in situations where double jeopardy is unquestionably inapplicable."[17]

The expansion of the defense of double jeopardy to include collateral estoppel allowed the court to apply the constitutional doctrine to *Ashe*, which concerned a situation not involving an "identity of offenses." After holding that collateral estoppel was embodied in the fifth amendment guarantee, the first step was then a determination by the Court of the questions actually decided in the first prosecution.

The Supreme Court had previously recognized the difficulty of this first step: "In numerous criminal cases both state and federal courts have declined to apply collateral estoppel because it was not possible to determine with certainty which issues were decided by the former general verdict of acquittal."[18]

In *Ashe*, the Court deftly completed this first and most important step in the application of collateral estoppel, over the objections of Chief Justice Burger,[19] by finding that "[t]he 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."[20] The Court here was clearly aided in its determination of the issue before the jury by defendant's inaction at the trial. Ashe conceded for all practical purposes the robbery and the identity of Knight as one of the victims. His only activity was cross-examination of the witnesses as to the identity of the robbers. He did not present an alibi and waived final argument.

The second step in the application of collateral estoppel was to decide if the determination made at the first trial

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[17] Yawn v. United States, 244 F.2d 235, 237 (5th Cir. 1957). *See* United States v. Williams, 341 U.S. 58 (1951); United States v. Oppenheimer, 242 U.S. 85 (1916); United States v. De Angelo, 138 F.2d 466 (3d Cir. 1943).

[18] Hoag v. New Jersey, 356 U.S. 464, 472 (1958).

[19] 397 U.S. 436 (1970).

> To me, if we are to psychoanalyze the jury, the evidence adduced at the first trial could more reasonably be construed as indicating that Ashe had been at the Gladson home with the other three men but was not one of those involved in the basement robbery.
> . . . .
> Accordingly, even the facts in this case which the Court's opinion considers to 'lead to but one conclusion,' are susceptible of an interpretation that the first jury did not base its acquittal on the identity ground which the Court finds so compelling. The Court bases its holding on sheer 'guesswork'. . . .

Id. at 467-68 (Burger, C.J., dissenting opinion).

[20] 397 U.S. 436, 445 (1970).

would be a complete bar to further prosecution. Since the Court had decided that the acquittal meant that Ashe was *not* one of the robbers, his second prosecution was barred because his identity as one of the robbers would have been essential for conviction.[21]

II. APPLYING THE DOCTRINE OF COLLATERAL ESTOPPEL

The Supreme Court recognized in its opinion the similarity of the circumstances as presented by *Ashe* to those in *Hoag v. New Jersey*.[22] However, the decision in *Benton v. Maryland* which held "that the double jeopardy prohibition of the Fifth Amendment . . . should apply to the States through the Fourteenth Amendment"[23] was seen to put *Ashe* in a quite different perspective. The question was "no longer whether collateral estoppel is a requirement of due process, but whether it is a part of the Fifth Amendment's guarantee against double jeopardy."[24] The Court found that it was, and that applicability of the doctrine was "no longer a matter to be left for state court determination within the broad bounds of 'fundamental fairness,' but a matter of constitutional fact [which the Court] must decide through an examination of the entire record."[25] While the Court did not join in the Justice Black's view that the due process test of "fundamental fairness" has *no* relevancy today in constitutional law,[26] it may have advanced that view by explicitly refusing to use the test under essentially the same facts as were presented in *Hoag*.

The new stature given to the doctrine of collateral estoppel by *Ashe* could be seen to raise again the question of whether all of the pronouncements concerning the doctrine in the civil setting, where it first developed, should apply in the criminal sphere as well. Chief Justice Burger in dissent briefly raised

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[21] *Id.* at 446.

[22] 356 U.S. 464 (1958). Hoag was first tried for the armed robbery of three men, who with others had been held up in a tavern. The prosecution's proof as to the identity of Hoag as one of the robbers was weak, and Hoag interposed an alibi. The jury found him not guilty. Hoag was brought to trial for the robbery of a fourth victim, and was convicted. The Supreme Court, relying on the fact that the failure of posecution's witnesses to identify Hoag at the first trial when they had previously identified him, affirmed Hoag's conviction, finding that retrial under those circumstances did not amount "to a denial of those concepts constituting 'the very essence of a scheme of ordered justice, which is due process.' " *Id.* at 470.

[23] 395 U.S. 784, 794 (1969). North Carolina v. Pearce, 395 U.S. 711 (1969), established the retroactivity of the rule.

[24] Ashe v. Swenson, 397 U.S. 436, 442 (1970).

[25] *Id.* at 442-43.

[26] *Id.* at 447 (Black, J., concurring opinion).

the issue of mutuality of estoppel when invoked in criminal cases.[27] However, the plurality opinion, relying upon a passing statement in *United States v. Kramer*,[28] declined to confront the issue of mutuality, intimating perhaps that it is not applicable, but failing to resolve clearly the confusion in the law[29] as to when the prosecution may invoke the doctrine against the interests of the accused.

The Court does offer some direction as to the manner in which the doctrine of collateral estoppel is to be applied in criminal cases. The application must be one of "realism and rationality"[30] and requires the court to " 'examine the record of a prior proceeding, taking into the 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.' "[31] The inquiry as to issues determined by the jury, finally, " 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.' "[32]

Implicit in the Court's insistence in *Ashe* upon a practical application of the doctrine is the realization of the difficulties

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[27] *Id.* at 464-65 (Burger, C.J., dissenting opinion). United States v. Rangel-Perez, 179 F. Supp. 619 (D.C.Cal. 1959) concluded, after a lengthy review of both case and secondary sources, that "[a]lthough it is the rule in civil cases that collateral estoppel is applied mutually in favor of and against both the plaintiff and the defendant, it is much less clear whether the doctrine is to be applied with the same mutuality in criminal cases." *Id.* at 624. The court did find, however, several instances in which the doctrine was "applied against the interests of the accused . . . ." *Id.* at 623, and applied it against petitioner in that case as to the issue of nationality status. *Id.* at 625. *See* Steele v. United States, 267 U.S. 505 (1925) (doctrine used against petitioner with regard to previously decided issue of constitutional validity of warrant); United States v. Wainer, 211 F.2d 669 (7th Cir. 1954) (previous conviction of illegal production and sale of liquor held conclusive as to defendant's proprietorship in later prosecution); Collins v. United States, 206 F.2d 918 (8th Cir. 1953) (previously decided issue of voluntary waiver of counsel held conclusive).

[28] 289 F.2d 909 (2d Cir. 1961). "It is much too late to suggest that this principle is not fully applicable to a former judgment in a criminal case . . . because of lack of 'mutuality'. . . ." *Id.* at 913.

[29] In *United States v. DeAngelo*, the court stated: "Nor can there be any requirement of mutuality with respect to a criminal judgment's conclusiveness. An accused is constitutionally entitled to a trial *de novo* of the facts alleged and offered in support of each offense charged against him and to a jury's independent finding with respect thereto." 138 F.2d 466, 468 (3d Cir. 1943). *Accord*, United States v. Carlisi, 32 F. Supp. 479, 481-83 (D.C.N.Y. 1940). However, cases have applied the doctrine against the interests of the accused. *See* cases cited note 27 *supra*.

[30] 397 U.S. 436, 444 (1970).

[31] *Id.* at 444, *quoting from* Mayers and Yarborough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 38-39 (1960), [hereinafter cited as *Bis Vexari*].

[32] Ashe v. Swenson, 397 U.S. 436, 444 (1970), *quoting* Sealfon v. United States, 332 U.S. 575, 579 (1948).

necessarily encountered in trying to determine the issues decided in a general verdict of acquittal.[33] Only a very small class of accused persons will be able to avail themselves of the doctrine of collateral estoppel because of the requirements necessary to invoke it,[34] and they may ultimately find their efforts unrewarded if the court finds it impossible to apply the doctrine.[35] Though there will be some defendants for whom the Court's holding in *Ashe* will afford protection from the burden of successive prosecutions, it is suggested that merely endowing the doctrine of collateral estoppel with constitutional status does not make its application any easier, and instances of application for defendants' benefit will not increase appreciably. Two scholars, commenting 10 years ago on the effect of giving the doctrine of collateral estoppel constitutional stature, concluded: "With the concept firmly established as a part of federal jurisprudence, a constitutional basis would be relevant only as a deterrent to the overruling of former cases or as a block to legislative attempts to eradicate it—both seemingly remote possibilities."[36]

III. JUSTICE BRENNAN'S CONCURRENCE

Justice Brennan avoids the problems of mutuality, interpretation of a general verdict, and the limited protections afforded by collateral estoppel, by suggesting an alternative means of applying the double jeopardy clause.[37] He first agrees with the constitutional status given to the doctrine of collateral estoppel in the plurality opinion, but he states that the doctrine has limited availability.[38] The fifth amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb . . . ."[39] Application of the protection is determined by the "same evidence" test in most jurisdictions. The use of this test to define "same offense"

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[33] The Court in *Ashe* explicitly recognized the problem when it found that any application "more technically restrictive would . . . amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal." 397 U.S. 436, 444 (1970).

[34] *See* notes 6-8 *supra*, and the Court's definition of collateral estoppel, 397 U.S. 436, 443 (1970).

[35] Schaefer, *Unresolved Issues in the Law of Double Jeopardy: Weller and Ashe*, 58 CALIF. L. REV. 391, 394 (1970).

[36] *Bis Vexari*, *supra* note 31, at 39.

[37] Ashe v. Swenson, 397 U.S. 436, 448 (1970) (Brennan, J., concurring opinion).

[38] *Id.* at 459.

[39] U.S. CONST. amend. V.

first occurred in *Morey v. Commonwealth*[40] and has been refined over the years. The "distinct elements" variation of the test, used in the federal system, and adopted in actuality or in effect in many states, was defined in *Gavieres v. United States*: "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt defendant from prosecution and punishment under the other."[41] Justice Brennan finds that use of the "same evidence" test to apply the protection against double jeopardy "virtually annuls the constitutional guarantee,"[42] since reprosecution is possible in a variety of situations. If several victims are involved during commission of a single criminal episode, separate prosecutions may be brought as to each one.[43] Multiple prosecutions may be brought where a single course of conduct can be theoretically divided into chronologically separate crimes.[44] A single act may lead to multiple prosecutions if seen from the viewpoint of different statutes.[45] Successive prosecutions are permissible if undertaken by separate sovereigns.[46] Even these few examples show that "the opportunities for multiple prosecutions for an essentially unitary criminal episode are frightening."[47] The weakness of the "same evidence" test and its variations is that they are "so narrowly drawn as not to afford any real protection against cumulation of the number of prosecutions, the number of convictions, or the amount of punishment."[48]

Brennan states his alternative to the "same evidence" test as follows: "In my view, the Double Jeopardy Clause requires the prosecution, except in most limited circumstances, to join

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[40] 108 Mass. (12 Browne) 433 (1871). "A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other." *Id.* at 434.

[41] 220 U.S. 338, 342 (1911), quoting Morey v. Commonwealth, 108 Mass. (12 Browne) 433 (1871).

[42] 397 U.S. 436, 451 (1970).

[43] Ciucci v. Illinois, 356 U.S. 571 (1958); State v. Hoag, 21 N.J. 496, 122 A.2d 628 (1956), *aff'd*, 356 U.S. 464 (1958).

[44] Johnson v. Commonwealth, 201 Ky. 314, 256 S.W. 388 (1923).

[45] Blockburger v. United States, 284 U.S. 299 (1932).

[46] Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959). In a decision announced the same day as *Ashe*, Waller v. Florida, 397 U.S. 387 (1970), the Court held that a municipality and a state are not separate sovereigns for the purposes of multiple prosecutions.

[47] Ashe v. Swenson, 397 U.S. 436, 452 (1970) (Brennan, J., concurring opinion).

[48] MODEL PENAL CODE § 1.07(2), Comment (Tent. Draft No. 5, 1956), [hereinafter cited as M.P.C].

at one trial all the charges against a defendant which grow out of a single criminal act, occurrence, episode, or transaction."[49] This approach has been criticized as one which begs the question by changing the problem of defining "offense" to one of defining "transaction"[50] since "any sequence of conduct can be defined as an 'act' or a 'transaction'."[51,52] Justice Brennan recognizes the definitional problem and would seek guidance from cases interpreting "same transaction," for example, as used in the Federal Rules of Criminal Procedure, and cases which have construed the phrase in civil proceedings.[53]

This alternative does not forbid separate charges or separate punishments; the only requirement under Brennan's alternative test is that if the charges arose from a single transaction, they must be adjudicated in one trial. Chief Justice Burger's suggestion that Brennan "totally overlooks the significance of there being *six entirely separate charges* . . ."[54] must be seen as a misreading of the test. Brennan's test does not affect (nor is it affected by) the number of charges which may be filed, but only by the number of trials which may be held.

IV. THE ALTERNATIVES TO *Ashe*

Compulsory joinder of charges arising out of the same transaction is the essence of Brennan's alternative. It is subject to varied criticisms levelled by prosecutors. Two of these appear to be valid: confusion of the jury because the charges are complicated, and prejudice to the prosecution with regard

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[49] 397 U.S. 436, 453-54 (1970). (footnote omitted). For cases in which the same transaction test was applied, *see, e.g.*, Triplett v. Commonwealth, 84 Ky. 193, 1 S.W. 84 (1886); Paxton v. State, 151 Tex. Cir. 324, 207 S.W.2d 876 (1948); Connelly v. D.P.P. [1964] A.C. 1254, 1347 (Opinion by Lord Devlin).

[50] Haddad and Mulock, *Double Jeopardy Problems in the Definition of the Same Offense: State Discretion to Invoke the Criminal Process Twice*, 22 U. FLA. L. REV. 515, 516 (1969).

[51] "Offense" is not usually considered to be synonymous with "act." 1 WHARTON'S CRIMINAL LAW AND PROCEDURE § 145 (Anderson ed. 1957).

[52] Note, *Twice in Jeopardy*, 75 YALE L. REV. 262, 276 (1965).

[53] 397 U.S. 436, 454 n. 8 (1970). Since many of the possibilities for abuse of the criminal process have evolved because of the specificity attempted both in statutes and in the definitions of the "same evidence" test, it is conceivable that scholars and judges find it not only possible but perhaps desirable to eschew a precise formulation of the elements involved in a "same transaction," "same conduct," or "same criminal episode" test. The American Law Institute in its Comment to M.P.C. § 1.07 (2) concluded with reference to the "same conduct" test: "In view of the infinite number of possible factual variations, no effort is made to be more specific. The courts must be entrusted with interpretation of the term in light of the evident purpose of the section to eliminate undue harassment by successive trials, so far as that is feasible." (Tent. Draft No. 5, 1956).

[54] 397 U.S. 436, 468 (1970) (Burger, C.J., dissenting opinion).

to the time necessary to prepare very dissimilar charges for a single trial.[55] Justice Brennan's formulation does not expressly account for these objections to compulsory joinder under the "same transaction" test, but it would probably not be applied under these circumstances.[56]

Support for this alternative to the "same evidence" test may be found in various areas of modern legal thought. The proposed official draft of the American Law Institute's Model Penal Code incorporates a compulsory joinder provision and substantially embodies the "same transaction" requirement.[57] It also provides for separate trials if the court "is satisfied that justice so requires."[58] "The penalty for failure to join an offense, unless the court granted leave, is that the state is precluded from subsequently charging the defendant with that offense."[59] When deciding whether separate trials should be granted, the Court must apply the "distinct elements" varia-

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[55] Note, *Twice in Jeopardy*, 75 YALE L. REV. 262, 286-93 (1965).

[56] 397 U.S. 436, 453-54 (1970). The two exceptions he does explicitly recognize are: 1) "where a crime is not completed or not discovered, despite diligence on the part of the police, until after the commencement of a prosecution for other crimes arising from the same transaction, an exception . . . should be made to permit a separate prosecution." 2) "Another exception would be necessary if no single court had jurisdiction of all the alleged crimes." *Id.* at 435 n. 7.

[57] M.P.C. § 1.07 (2) (Proposed Off. Draft 1962).

> (2) *Limitation on Separate Trials for Multiple Offenses.* Except as provided in Subsection (3) of this Section, a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court.

M.P.C. § 1.09 (Proposed Off. Draft 1962).

> *When Prosecution Barred by Former Prosecution for Different Offense.* Although a prosecution is for a violation of a different provision of the statutes than a former prosecution or is based on different facts, it is barred by such former prosecution under the following circumstances:
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> (1) The former prosecution resulted in an acquittal or in a conviction . . . and the subsequent prosecution is for:
>
> (a) any offense of which the defendant could have been convicted on the first prosecution; or
>
> (b) any offense for which the defendant should have been tried on the first prosecution under Section 1.07, unless the Court ordered a separate trial of the charge of such offense . . . .

[58] M.P.C. § 1.07 (3) (Proposed Off. Draft 1962).

> (3) *Authority of Court to Order Separate Trials.* When a defendant is charged with two or more offenses based on the same conduct or arising from the same criminal episode, the Court, on application of the prosecuting attorney or of the defendant, may order any such charge to be tried separately, if it is satisfied that justice so requires.

[59] M.P.C. § 109 (1)(b) Comment (Tent. Draft No. 5, 1956). Joinder is also excused if the acquittal or conviction in the first prosecution has been reversed.

tion of the "same evidence" test,[60] and a requirement that the law defining each of the offenses is directed at a substantially different evil must be met before a subsequent prosecution can be had.[61]

The ABA Minimum Standards for Criminal Justice provide for a weaker compulsory joinder of offenses which are within the jurisdiction of the same court and are based on the same conduct or arise from the same criminal episode, since a timely motion for joinder must be made by the defendant when he knows in advance of the first trial that he has been charged with related offenses.[62] The ABA commentary adopts the Model Penal Code comments and states that the purpose of the standard is to protect defendants from "successive prosecutions based upon essentially the same conduct, whether the purpose in so doing is to hedge against the risk of an unsympathetic jury at the first trial, to place a 'hold'

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[60] M.P.C. § 1.09 (1)(c)(i): "[T]he offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted [must each require] proof of a fact not required by the other . . . ."

[61] M.P.C. § 1.09 (1)(c)(i): "[T]he law defining each of such offenses [must be] intended to prevent a substantially different harm or evil . . . ." The comment to this section states that "[it]" is designed to provide minimal protection if for any reason the compulsory joinder provision does not operate. It adopts for this purpose the federal rule." (Tent. Draft No. 5, 1956).

[62] ABA MINIMUM STANDARDS FOR CRIMINAL JUSTICE, JOINDER AND SEVERANCE, §§ 1.1, 1.3 (App. Draft, 1968).

> 1.1 Joinder of offenses.
> Two or more offenses may be joined in one charge, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:
> (a) are of the same or similar character, even if not part of a single scheme or plan; or
> (b) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.
>
> 1.3 Failure to join related offenses.
> (a) Two or more offenses are related offenses, for purposes of this standard, if they are within the jurisdiction of the same court and are based on the same conduct or arise from the same criminal episode.
> (b) When a defendant has been charged with two or more related offenses, his timely motion to join them for trial should be granted unless the court determines that because the prosecuting attorney does not have sufficient evidence to warrant trying some of the offenses at that time, or for some other reason, the ends of justice would be defeated if the motion were granted. A defendant's failure to so move constitutes a waiver of any right of joinder as to related offenses with which the defendant knew he was charged.
> (c) A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense, unless a motion for joinder of these offenses was previously denied or the right of joinder was waived as provided in section (b). . . .

upon a person after he has been sentenced to imprisonment, or simply to harrass by multiplicity of trials."[63]

The Federal Rules of Criminal Procedure provide for *permissive* joinder of offenses which "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."[64]

In 1964, the House of Lords in England was faced with much the same problem as was our Supreme Court in *Ashe*.[65] England had not adopted the use of collateral estoppel in criminal cases, and while it may have applied under the circumstances of the case, Lord Devlin in his opinion chose an alternative. The problems he found with applying collateral estoppel in criminal cases were similar to those discussed by Justices Brennan and Burger in *Ashe*.[66] "The main difficulty about its application to criminal trials is that . . . there is no determination by the jury of separate issues . . . ."[67] . . . [F]or estoppel on issues to work satisfactorily, the issues need to be formulated with some precision."[68] Lord Devlin recognized the problem of "whether [collateral estoppel] should be made available to the prosecution in criminal law."[69] As an alternative to the use of collateral estoppel, the English courts were directed by rule of court "that the prosecution must as a general rule join in the same indictment charges that 'are founded on the same facts, or form or are part of a series of offences of the same or similar character . . .'" and the courts were given "power to enforce such a direction . . . by staying a second indictment if [they were] satisfied that its subject-matter ought to have been included in the first."[70] Thus, Justice Brennan notes: "England, to . . . abandoned its surviving

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[63] M.P.C. § 1.08 (2) Comment p. 34 (Tent. Draft No. 5, 1956).

[64] FED. R. CRIM. P. 8 (a). Rule 13 provides that "[t]he court may order two or more indictments or informations or both to be tried together if the offenses . . . could have been joined in a single indictment or information." Rule 14 provides for severance of offences or defendants if either the prosecution or the defense would be prejudiced by joinder or if justice otherwise requires it.

[65] Connelly v. D.P.P., [1964] A.C. 1254. The fact situation in this case was more difficult because defendant's first trial resulted in a conviction for murder which was reversed on other grounds at the appellate level. His second prosecution, at which he raised the defenses of double jeopardy and collateral estoppel, was for robbery.

[66] 397 U.S. 436, 459-60 (1970) (Brennan, J. concurring opinion). *Id.* at 464-68 (Burger, C.J., dissenting opinion).

[67] Connelly v. D.P.P., [1964] A.C. 1254, 1344.

[68] *Id.* at 1345.

[69] *Id.* at 1346.

[70] *Id.* at 1347.

rules against joinder of charges and . . . adopted the 'same transaction' test."[71]

Though Justice Brennan voiced his concern about prosecutorial abuse of the criminal process more openly than did the remainder of the Court, it is fair to infer that all of the Justices are concerned with what has been called the "vanishing constitutional right" against being twice put in jeopardy for the same offense.[72] The plurality opinion finds that the prosecution in *Ashe* "refined his presentation in light of the turn of events at the first trial . . . [and that] this is precisely what the constitutional guarantee forbids."[73] If the position is accepted that giving the doctrine of collateral estoppel constitutional stature will not afford any additional protection to the great majority of defendants facing a second prosecution, it is necessary to ask whether Justice Brennan's alternative would protect defendants to any greater degree.

To determine the practical effect of the various tests which have been used to bar subsequent prosecutions, each test might be applied to a set of facts which was presented to the Supreme Court in 1958.

> Petitioner was charged in four separate indictments with murdering his wife and three children, all of whom, with bullet wounds in their heads, were found dead in a burning building.... In three successive trials, petitioner was found guilty of the first degree murder of his wife and two of his children. At each of the trials the prosecution introduced into evidence details of all four deaths.... At the first two trials, involving the death of the wife and one of the children, the jury fixed the penalty at 20 and 45 years' imprisonment respectively. At the third trial, involving the death of a second child, the penalty was fixed at death.[74]

Considering petitioner's claim that the subsequent prosecutions violated the due process clause of the 14th amendment, the Court in 1958 found that "[t]he State was constitutionally

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[71] 397 U.S. 436, 454 (1970).

[72] Note, *Double Jeopardy: A Vanishing Constitutional Right*, 14 How. L.J. 360 (1968). *See* Haddad and Mulock, *Double Jeopardy Problems in the Definition of the Same Offense: State Discretion to Invoke the Criminal Process Twice*, 22 U. FLA. L. REV. 515 (1969); Horack, *The Multiple Consequences of a Single Criminal Act*, 21 MINN. L. REV. 805 (1937); Kirchheimer, *The Act, The Offense and Double Jeopardy*, 58 YALE L.J. 513 (1949); *Bis Vexari, supra* note 31; Note. *Twice in Jeopardy*, 75 YALE L.J. 262 (1965); Note, *Multiple Prosecution: Federalism v. Individual Rights* 20 U. FLA. L. REV. 355 (1968). These articles discuss fully the vagaries of the "same evidence" test, the multiplicity of similar criminal statutes which allow almost unlimited discretion in filing charges, the dual sovereignty exception, and a host of similar substantive and procedural exceptions to the guarantee against double jeopardy which have combined over the years to limit severely its protection of the individual and to establish in actuality its position as a vanishing constitutional right.

[73] 397 U.S. 436, 447 (1970).

[74] Ciucci v. Illinois, 356 U.S. 571, 572 (1958).

entitled to prosecute these individual offenses singly at separate trials, and to utilize therein all relevant evidence, in the absence of proof establishing that such a course of action entailed fundamental unfairness."[75] In the Court's opinion, there was no such unfairness either as to the successive prosecutions or as to the apparent "jury shopping" of the prosecution.[76]

If the circumstances of this case had been brought to the Court in 1969, following the decision in *Benton v. Maryland*[77] which applied the protection against double jeopardy to the States through the 14th amendment, the result would probably not have been any different. Double jeopardy requires identity of offenses if it is to be successfully interposed as a defense,[78] and petitioner was charged in the subsequent prosecutions with the murders of family members other than his wife. Conviction in the second and third prosecutions required proof of additional facts, i.e., establishing the children as victims, and therefore reprosecution would have been allowed.

The *Ashe* decision incorporating collateral estoppel into the fifth amendment guarantee against double jeopardy would also be of little or no use to this defendant in 1970. His initial prosecution resulted in a conviction, and it would seem impossible for a court to glean anything from a general verdict of "guilty" which might be of benefit to petitioner. Indeed if collateral estoppel were invoked at all, it would be likely that the prosecution would seek to use the doctrine to prevent relitigation of issues previously decided against petitioner. If, on the other hand, petitioner's first trial had ended in an acquittal, collateral estoppel could have been invoked to prevent relitigation of issues decided by the jury at the first prosecution. This assumes that the court could rationally determine what those issues were. It is possible that the defense of collateral estoppel would bar the later prosecutions in much the same way as petitioner Ashe's second prosecution was barred.

Under the alternative proposed by Justice Brennan, the prosecution would have been required to join at one trial all of the charges against petitioner, since it appears from the

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[75] *Id.* at 573.

[76] *Id.* According to various newspaper reports, the prosecution expressed extreme dissatisfaction with the prison sentences which resulted from the first two trials and announced a determined purpose to prosecute petitioner until a death sentence was obtained. These newspaper articles were not part of the record and the Court refused to consider them.

[77] 395 U.S. 784 (1969).

[78] United States v. Wapnick, 198 F. Supp. 359, 359-60 (D.C.N.Y. 1961), Blockburger v. United States, 284 U.S. 299, 304 (1932).

facts of the case that the four alleged murders grew out of a single criminal episode.[79] Since the charges were not joined, the subsequent prosecutions would be barred unless one of the exceptions to the rule of compulsory joinder could be invoked by the prosecution.[80] It is to be noted that Brennan's alternative would not force the prosecution to limit the number of offenses charged in one trial, nor would it preclude different or consecutive sentences from being imposed for the various offenses charged.[81] It would only require that all four indictments for murder be prosecuted at one trial.

The above applications of the various tests show that collateral estoppel is of little benefit to defendants who were convicted at their first prosecutions. It is also clear that one of the elements of abuse not solved by Justice Brennan's alternative is the prosecutor's discretion to charge a defendant with several offenses under several statutes, even though they all arose out of one criminal transaction and must be adjudicated at one trial.[82]

It is suggested that the Supreme Court will soon have to recognize broader grounds than those of collateral estoppel on which an accused can base a plea of double jeopardy if the guarantee is to retain any meaning at all. Justice Brennan's alternative may prove persuasive to a majority of the Court in the future. He was joined in his opinion by Justices Douglas and Marshall,[83] and only two members of the Court, Chief Jus-

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[79] "Episode" has been defined as "an occurrence or connected series of occurrences and developments which may be viewed as distinctive and apart although part of a larger or more comprehensive series . . . ." WEBSTER, THIRD NEW INTERNATIONAL DICTIONARY 765 (1961). This definition is adopted by ABA MINIMUM STANDARDS FOR CRIMINAL JUSTICE, JOINDER AND SEVERANCE, 1.3 (a) Commentary (App. Draft 1968).

[80] 397 U.S. 436, 453 n. 7, 455 n. 11 (1970) (Brennan, J., concurring opinion).

[81] It should further be noted that the protections afforded by Brennan's alternative do not prevent these abuses where statutes are so written as to allow prosecutions for essentially the same acts under various statutes. Thus, as in Gore v. United States, 357 U.S. 386 (1958), a narcotics violator was prosecuted for possession of unstamped narcotics under three separate statutes in each case, the mere fact of possession being required as proof. New York alleviates this problem by statute, providing for non-consecutive sentencing "[w]hen more than one sentence . . . is imposed on a person for two or more offenses committed through a single act or omission . . . ." N.Y. PENAL LAW § 70.25 (2) (McKinney 1967). Clearly it would not benefit the New York prosecutor to charge any but the most serious provable offense thus eliminating any multiplicity in charging or sentencing and avoiding the harassment discussed in *Ashe*.

[82] The American Bar Foundation Project suggests that prosecutors will not amass more counts under a required joinder rule than they do when joinder is permissive. Prosecutors will select those charges which they feel they can best prove. *The Administration of Criminal Justice in the United States*, 6 AMERICAN BAR FOUNDATION 129 (pilot project report).

[83] 397 U.S. 436, 448 (1970).

tice Burger and Justice Harlan, expressly rejected Brennan's alternative.[84] It is possible that the two Justices in the plurality opinion felt only that on the facts in *Ashe*, a broader holding than that incorporating collateral estoppel would have constituted "reaching out" on the part of the Court to establish new guidelines. Perhaps the limited effect in practice of the use of the defense of collateral estoppel will in the future sway the majority to Brennan's view that the "correction of the abuse of criminal process should not in any event be made to depend on the availability of collateral estoppel."[85]

[84] *Id.* at 448, 468.
[85] *Id.* at 459.