Expanding Double Jeopardy: Collateral Estoppel and the Evidentiary Use of Prior Crimes of which the Defendant Has Been Acquitted

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NOTES

EXPANDING DOUBLE JEOPARDY: COLLATERAL ESTOPPEL AND THE EVIDENTIARY USE OF PRIOR CRIMES OF WHICH THE DEFENDANT HAS BEEN ACQUITTED

The fifth amendment to the United States Constitution guarantees that "No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb . . . ."1 Judicial expansion of this perennially unsettled2 prohibition took a significant step in Ashe v. Swenson3 when the United States Supreme Court found that the doctrine of collateral estoppel4 is a necessary ingredient in the constitutional guarantee against double jeopardy in criminal cases. The Court indicated that collateral estoppel as an abstract concept and as a constitutional ingredient are not equivalent, but did not examine the extent to which constitutional collateral estoppel affects the use of evidence in non-reprosecution situations. In Wingate v. Wainwright,5 however, the Court of Appeals for the Fifth Circuit undertook this examination. The court found that double jeopardy limitations preclude the government from introducing, at a subsequent prosecution of a different crime, evidence of prior crimes of which the

1. U.S. CONST. amend. V.
2. Throughout its history the concept of double jeopardy has lent itself to much discussion, but apparently there has been little agreement as to its meaning. One observer noted that the riddle of double jeopardy stands out today as one of the most commonly recognized yet most commonly misunderstood maxims in the law, the passage of time having served in the main to burden it with confusion upon confusion. Note, Criminal Law—Double Jeopardy, 24 MINN. L. REV. 522 (1940). A later commentator has accused the concept of displaying the "characteristic signs of doctrinal senility." Note, Twice in Jeopardy, 75 YALE L.J. 262, 264 (1965).

Some of the general moral convictions underlying the principle of double jeopardy existed among the ancient Greeks and Romans and were carried over into early English law. Not until the writings of Coke and Blackstone in the seventeenth and eighteenth centuries, however, did the principle receive some semblance of clarification. Even at the time of the adoption of the fifth amendment, the meaning and extent of the double jeopardy provision was uncertain. For a history of the double jeopardy concept, see J. Sigler, Double Jeopardy 1-37 (1969). See generally Note, What Constitutes Double Jeopardy?, 38 J. CRM. L.C. & P.S. 379 (1947); Note, Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee, 65 YALE L.J. 339 (1956).

4. As defined in Ashe, collateral estoppel “means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” Id. at 443. For the distinction between collateral estoppel and res judicata, see note 22 infra.
5. 464 F.2d 209 (5th Cir. 1972).
defendant has been acquitted (hereinafter characterized as "prior acquittals").

Wingate sounds a death knell, at least in the Fifth Circuit, for the evidentiary rule that evidence of another offense of which the defendant has been acquitted is admissible when offered for one of certain limited purposes. The longstanding tenacity and widespread acceptance of the rule, however, appear to present formidable opposition to such a holding. Furthermore, the traditional limitation of double jeopardy to reprosecution for the same offense, not directly refuted in Ashe, imposes a substantial obstacle to a reading of the Constitution that would proscribe issue relitigation where reprosecution for the same offense does not occur.

This note will explore the extent and validity of the expansive Wingate view of the double jeopardy clause, in terms of historical precedent and policy considerations underlying both double jeopardy and collateral estoppel. The collateral estoppel doctrine that has developed in the civil area has been used to bar the relitigation of previously determined facts used only as evidence in a second prosecution. It remains unclear whether constitutional collateral estoppel also can be used to preclude the relitigation of such evidentiary facts. If such is the case, double jeopardy may well emerge as a constitutional guarantee much greater in scope and effect than has been previously ascertained.

I. THE HOLDING IN Ashe

Not until 1969 in Benton v. Maryland did the United States Supreme Court hold the fifth amendment prohibition against double jeopardy applicable to the states through the fourteenth amendment. That decision should have presented few interpretative problems, since the overwhelming majority of American states already had incorporated some form of the traditional double jeopardy concept into state constitutional provisions or statutes. Of the remaining minority, several

6. "Prior acquittals" as hereinafter used does not refer to the record of the prior acquittal itself, but rather to the use of evidence from those prior crimes of which the defendant has been acquitted.
7. See note 48 and accompanying text infra.
8. See note 44 infra.
9. See note 42 infra.
had adopted the concept by judicial decision, either as part of the general common law\textsuperscript{13} or as a necessary ingredient of due process.\textsuperscript{14} Nevertheless, \textit{Benton} generated inevitable questions of meaning and application, eventually leading to another attempt by the Supreme Court to explain the constitutional scope and limits of double jeopardy. That explanation, given in \textit{Ashe v. Swenson},\textsuperscript{15} laid the foundation for the problem that this note explores.

An inauspicious poker game involving six men was unexpectedly interrupted by three or four armed robbers who divested each player of money and various items of personal property. The intruders fled in a car belonging to one of the victims. That same car was soon discovered in a nearby field, and three men found walking in the area were arrested. Ashe, the petitioner, subsequently was arrested some distance from the scene of the first three arrests. All four defendants were charged with armed robbery of each of the six victims and theft of the car.\textsuperscript{16}

Ashe first went to trial for the armed robbery of Donald Knight, one of the poker players. Evidence that the robbery had occurred was unquestionable and defense counsel did not even attempt to assail it. The only weakness in the state's case was the question of whether Ashe was one of the robbers. The trial judge instructed the jury that if it found the defendant to have been a participant in the robbery, then the theft of any goods would suffice for conviction, even though the defendant personally may not have robbed Knight.\textsuperscript{17} The jury found Ashe "‘not guilty due to insufficient evidence.’ "\textsuperscript{18}


\textsuperscript{14}See generally Kneier, Prosecution Under State Law and Municipal Ordinance as Double Jeopardy, 16 CORNELL L.Q. 201, 202 (1931).

\textsuperscript{15}397 U.S. 436 (1970).

\textsuperscript{16}Id. at 437-38.

\textsuperscript{17}Id. at 439.

\textsuperscript{18}Id.
Ashe was then brought to trial for the robbery of Roberts, another of the poker players. In the second proceeding the state was able to present a much stronger case as to Ashe's identity. After receiving instructions virtually identical to those given at the first trial, the jury returned a verdict of guilty.

The United States Supreme Court found that Ashe's second trial was barred by collateral estoppel as embodied in the fifth amendment guarantee against double jeopardy.\(^\text{19}\) According to the Court, collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."\(^\text{20}\) Applying the doctrine to Ashe's situation, the Court stated that once "a jury determined by its verdict that the petitioner was not one of the robbers, the state could [not] constitutionally hale him before a new jury to litigate that issue again."\(^\text{21}\)

In disclosing this newly recognized element of the double jeopardy clause, the Court gave some guidance to lower courts regarding its prospective application. Prior to Ashe courts often had refused to apply collateral estoppel, or the broader concept of res judicata,\(^\text{22}\) when general verdicts of acquittal had been rendered, particularly because of the confounding and uncertain nature of such verdicts.\(^\text{23}\) Although the specific question at issue had been litigated and an acquittal had been returned, courts hesitated to apply collateral estoppel in the absence of a definite finding of the specific fact to be precluded.\(^\text{24}\) In Ashe, however, the Court widened the protections of double jeopardy

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19. Id. at 445. Before Benton the Court had refused, in a case with facts similar to those in Ashe, to decide whether collateral estoppel is an ingredient of due process of law. See Hoag v. New Jersey, 356 U.S. 464, 471 (1958).

20. 397 U.S. at 443.

21. Id. at 446.

22. The term "res judicata" refers to the broader doctrine of which collateral estoppel is a subcategory. As traditionally defined, it encompasses the collateral estoppel concept:

[T]he doctrine of res judicata is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.

46 AM. JUR. 2D Judgments § 394 (1969) (footnotes omitted, emphasis added). Thus, res judicata includes in its scope both issue preclusion (through the operation of collateral estoppel) and claim preclusion, a separate and distinct concept.


by refusing to retain a strict standard for the application of collateral estoppel that would have limited the use of that doctrine in the criminal arena. The decision liberalizes the method by which constitutional collateral estoppel can be applied and consequently broadens the scope of cases that it will cover:

The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hyper-technical 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." The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." Any test more technically restrictive would, of course, simply 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.25

With this admonition, the Ashe Court recognized collateral estoppel as an element of the fifth amendment prohibition against double jeopardy.26

II. COLLATERAL ESTOPPEL: CIVIL, CRIMINAL AND CONSTITUTIONAL APPLICATION

Collateral estoppel historically has been a creature of civil litigation.27 It has come to mean:

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent

25. 397 U.S. at 444 (citation and footnotes omitted).
27. See Hoag v. New Jersey, 356 U.S. 464, 470 (1958); Southern Pac. R.R. v. United States, 168 U.S. 1, 48 (1897). One of the very early American statements of the rule is found in a civil case, Cromwell v. County of Sac, 94 U.S. 351, 353 (1876):
But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.
action between the parties, whether on the same or a different claim.  

The doctrine is a policy formulation in that it purports to promote efficiency and prevent delay in the judicial system by “preventing the relitigation of material issues of fact already adjudicated in a prior suit.” As such, it has not always been applied uniformly, since in many areas more immediately compelling considerations outweigh the important policies underlying the collateral estoppel theory. 

In criminal proceedings prior to Ashe, courts had increasingly recognized the value of collateral estoppel. The Supreme Court had


29. Note, Collateral Estoppel: Its Application and Misapplication, 29 Wash. & Lee L. Rev. 110 (1972). The importance of preventing needless relitigation and delay in the judicial system has long been recognized as the main policy purpose behind both collateral estoppel and res judicata. One court has recognized that practice does not make perfect in the judicial system: 

While “if at first you don’t succeed try, try again” may be a lofty and worthy ideal for the general public it has no place in the area of criminal prosecution where that first attempt at success has fully and completely adjudicated the issues and where the second prosecution merely rehashes old evidence. To try again in a situation such as this would allow for the self-perpetuation and self-generation of endless litigation and would do violence to the concepts of res judicata and collateral estoppel. United States v. Drevetzki, 338 F. Supp. 403, 409 (N.D. Ill. 1972). See also 46 Am. Jur. 2d Judgments § 395 (1969).  

30. This has been especially true in the area of administrative, patent and tax law. See Note, supra note 29, at 111-13; Note, Developments in the Law—Res Judicata, 65 Harv. L. Rev. 818, 882-83 (1952). Because it was considered only court-made policy, the doctrine as such was not always utilized in the criminal area. Prior to Ashe, the only supposed constitutional limitation on the court's discretion to apply or reject the doctrine was the concept of “fundamental unfairness” under the fourteenth amendment. See Note, Double Jeopardy and Criminal Collateral Estoppel in Washington, 6 Gonzaga L. Rev. 293, 303 (1971). But see Hoag v. New Jersey, 356 U.S. 464 (1958).  

31. See, e.g., Sealfon v. United States, 332 U.S. 575 (1948); Adams v. United States, 287 F.2d 701 (5th Cir. 1961); Yawn v. United States, 244 F.2d 235 (5th Cir. 1957); Cosgrove v. United States, 224 F.2d 146 (9th Cir. 1955); Harris v. State, 17 S. E. 2d 573 (Ga. 1941); Commonwealth v. Ellis, 35 N.E. 773 (Mass. 1893); State v. Cormier, 218 A.2d 138 (N.J. 1966). See also McLaren, The Doctrine of Res Judicata as Applied to the Trial of Criminal Cases, 10 Wash. L. Rev. 198 (1935); Note, supra note 23.  

Prior to Ashe, collateral estoppel was applied in criminal proceedings as a supplement to the double jeopardy concept in situations where double jeopardy was considered inapplicable. Thus the two principles, double jeopardy and collateral estoppel were seen as two distinct concepts: 

The distinction between a plea of former jeopardy and the principle of res judicata should be carefully observed . . . . Former jeopardy involves an “identity” of offenses, while in “collateral estoppel” . . . . the prior judgment “is
made it a part of nonconstitutional federal law. At the same time the very nature of the doctrine, founded on policy considerations alone, has prevented complete uniformity in its application. Policy considerations have become obsolete with the holding in *Ashe*, however, for the doctrine now is constitutionally mandated. The question for the lower courts to decide no longer is whether to apply collateral estoppel but rather how the doctrine is to be applied.

Only to a certain extent can courts find in civil collateral estoppel an analogy to the criminal version. The Court in *Ashe* acknowledged the civil requirements that the same parties must be involved in the subsequent litigation, and that the facts to be precluded must have been determined in an action culminating in a final judgment on the merits. The Court specifically rejected, however, another generally applied civil requirement, mutuality of estoppel, which requires “that

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82. See also United States v. Oppenheimer, 242 U.S. 85 (1916); Frank v. Magnum, 237 U.S. 309 (1915); United States v. Fassoulis, 445 F.2d 13 (2d Cir. 1971); United States v. Kramer, 289 F.2d 909, 916-17 (2d Cir. 1961); McLaren, supra at 203-04; Pattinson, *Double Jeopardy and Collateral Estoppel*, 4 CRIM. L. BULL. 406 (1968); Note, supra note 23, at 293-96.

32. The Supreme Court applied the doctrine as traditionally defined without specifically using the term “collateral estoppel.” See Sealfon v. United States, 332 U.S. 575 (1948); Frank v. Magnum, 237 U.S. 309 (1915). See also United States v. Oppenheimer, 242 U.S. 85 (1916), wherein the related civil doctrine of res judicata, though seen as separate and distinct from the requirements of the fifth amendment, was held applicable to federal criminal proceedings.

33. 397 U.S. at 442-43. A proposal has been made that in criminal cases the concept should be considered as a defendant’s doctrine, designed to protect his peculiar interests, and that strict identity of parties should not be required. See Note, supra note 23, at 277-78.

34. 397 U.S. at 443. See also United States v. Smith, 446 F.2d 200 (4th Cir. 1971); Ferina v. United States, 340 F.2d 837 (8th Cir. 1965); United States v. Harriman, 130 F. Supp. 198 (S.D.N.Y. 1955); State v. Fish, 122 N.W.2d 381 (Wis. 1963); Note, supra note 23, at 281-82.

35. The Supreme Court noted that although all of the features of collateral estoppel are not suitable for criminal proceedings, the general doctrine itself remains applicable. *See* 397 U.S. at 443. In a later effort to clarify the holding in *Ashe*, the Court reaffirmed the deletion of the mutuality requirement from collateral estoppel as an element of the double jeopardy guarantee: “Indeed in *Ashe* itself, we specifically noted that ‘mutuality’ was not an ingredient of the collateral estoppel rule imposed by the Fifth and Fourteenth Amendments upon the States.” Simpson v. Florida, 403 U.S. 384, 386 (1971). See also United States v. Bruno, 333 F. Supp. 570, 576 (E.D. Pa. 1971).

The specific omission of the mutuality requirement in *Ashe* seems mandated by constitutional and policy factors peculiar to the criminal law: to allow the prosecution to employ estoppel in criminal cases arguably deprives the accused of his right to confrontation and to a jury trial on each issue, and destroys the presumption of innocence at the second trial. See United States v. Bruno, 333 F. Supp. 570, 576 (E.D. Pa. 1971). See also Kirby v. United States, 174 U.S. 47 (1899); Rouse v. State, 97 A.2d 285 (Md. 1953).
a judgment which is not conclusive as to facts and law as against a party to a lawsuit shall not be so considered as to his adversary."  

Finally, the Court modified still another civil requirement, that the facts must have been "actually litigated and determined" in the previous action, in order to accommodate the special needs of the criminal system. The Court replaced that requirement with a "rational jury" standard: In deciding what facts have been "actually litigated and determined" by a general verdict of acquittal in the first action, the court must consider the entire record and determine "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose . . . ." In Ashe, for example, the first jury could not have based its verdict of acquittal on a finding that a robbery had not occurred or that Knight had not been a victim. Therefore, the first jury must have found that Ashe had not been one of the robbers—the very same issue that the state sought to relitigate.

More difficult to reconcile with the Ashe mandate is a collateral estoppel requirement that is both unsettled in the civil area and vital to resolving whether prior acquittals can be introduced as evidence in a subsequent criminal action. This is the traditional civil requirement that the facts to be precluded must be "ultimate facts" as opposed to "mediate" or "evidentiary" facts. In other words, to preclude the relitigation of facts in a subsequent proceeding, the facts determined in the first proceeding must be those upon which the earlier verdict ultimately depended. Mediate or evidentiary facts, relating to the facts . . . .

1953); Pattinson, supra note 31, at 408-09; Note, supra note 23, at 276-77; 28 U. Ch. L. Rev. 142, 151 (1960).

37. Cromwell v. County of Sac, 94 U.S. 351, 353 (1876). See also Ehrlich v. United States, 145 F.2d 693 (5th Cir. 1944); Harris v. State, 17 S.E.2d 573, 581 (Ga. 1941); Commonwealth v. Ellis, 35 N.E. 773 (Mass. 1893); Note, supra note 23, at 278-79.
38. 397 U.S. at 444. The confounding nature of general verdicts of acquittal in criminal cases has been seen as requiring such a modification in order to render collateral estoppel effective in criminal cases. See Pattinson, supra note 31, at 411-12. See also notes 23-24 and accompanying text supra.
40. Judge Learned Hand has set forth the distinction between these two concepts essential to the application of collateral estoppel:

[A] "fact" may be of two kinds. It may be one of those facts, upon whose combined occurrence the law raises the duty, or the right, in question; or it may be a fact, from whose existence may be rationally inferred the existence of one of the facts upon whose combined occurrence the law raises the duty, or the right. The first kind of fact we shall for convenience call an "ultimate" fact; the second, a "mediate datum." "Ultimate" facts are those which the law makes the occasion for imposing its sanctions.

The Evergreens v. Nunan, 141 F.2d 927, 928 (2d Cir. 1944). See also People v. Cornier, 249 N.Y.S.2d 521, 526 (Sup. Ct. 1964); Note, supra note 23, at 279-81.
dental and collateral matters decided in the first prosecution, will not be the basis for estoppel in another proceeding.

Courts occasionally have imposed an additional requirement upon collateral estoppel—that the facts established in the prior proceeding, be they ultimate or mediate, cannot be used to determine anything but an ultimate fact in the second suit.

With regard to constitutional collateral estoppel, the *Ashe* decision speaks of an "issue of ultimate fact" in its definition of collateral estoppel, but only in the context of the first proceeding. In discussing the subsequent action the Court uses the term "issue" without stating whether the issue also must be an ultimate fact in the second action in order to be precluded. A literal reading of the Court's language therefore might suggest that an ultimate fact in the first proceeding—such as a determination that defendant had not robbed another party—might be inadmissible in a second action, even if that fact were only an "evidentiary" or "mediate" fact in the latter case. Such an interpretation, however, would not be consistent with the recognized concept of double jeopardy, since that doctrine traditionally has been applied to a subsequent prosecution for a previously litigated offense, and has not been extended to bar the admission of a previously litigated issue

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41. See The Evergreens v. Nunan, 141 F.2d 927 (2d Cir. 1944); People v. Haran, 188 N.E.2d 707 (Ill. 1963); State v. Thompson, 39 N.W.2d 637 (Iowa 1949); *Ex parte Johnson*, 472 S.W.2d 156, 157 (Tex. Crim. App. 1971). The apparent purpose behind this requirement is to ensure that the parties will have had sufficient incentive and interest to litigate fully the issues before the parties become bound in future litigation by the outcome.

42. The case of The Evergreens v. Nunan, 141 F.2d 927 (2d Cir. 1944), appears to be the civil decision first clearly setting forth this theory. Acknowledging that there was a "dearth of authority upon the question" and thus leaving the court "free to decide," the court held that "no fact decided in the first [suit] whether 'ultimate' or a 'mediate datum,' conclusively establishes any 'mediate datum' in the second, or anything except a fact 'ultimate' in that suit." 141 F.2d at 930-31. This rule appears based on the belief that it is unfair to allow issues determined at the first proceeding to be conclusive in a subsequent situation when it would have been highly unlikely at the time of the first suit to appreciate the future importance and use of those issues.

The *Evergreens* requirement of ultimate facts in the second prosecution has not been widely accepted in either the civil or criminal area. See, e.g., Laughlin v. United States, 344 F.2d 187 (D.C. Cir. 1965); United States v. Kramer, 289 F.2d 909 (2d Cir. 1961); Yawn v. United States, 244 F.2d 235 (5th Cir. 1957); United States v. Simon, 225 F.2d 260, 262 (3d Cir. 1955); Bordonaro Bros. Theaters, Inc. v. Paramount Pictures, Inc., 203 F.2d 676, 678 (2d Cir. 1953); Paine & Williams Co. v. Baldwin Rubber Co., 113 F.2d 840 (6th Cir. 1940); Palma v. Powers, 295 F. Supp. 924 (N.D. Ill. 1969).

One writer has suggested that the fairness policy is absent in the criminal area since the prosecutor should be held responsible for recognizing the future relevance of the issues in subsequent criminal proceedings. See Note, supra note 23, at 281.

43. 397 U.S. at 443. For the Supreme Court's usage of "issue," see note 20 and accompanying text supra.
at a trial involving a different offense. Thus, any determination of the effect of *Ashe* upon the constitutionality of the evidentiary use of prior acquittals will largely depend upon whether collateral estoppel as required by the double jeopardy clause should be applied only to a redetermination of the ultimate fact of defendant's guilt or innocence as to the crime charged, or whether the constitutional doctrine also prohibits the introduction of the evidentiary fact of the prior acquittal.

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44. Double jeopardy traditionally has been viewed as encompassing three distinct situations. Beyond the scope of these three areas the fifth amendment protection has not been considered applicable. A statement of these "outer limits" is found in United States v. Engle, 458 F.2d 1021, 1025 (6th Cir. 1972):

There is general agreement that the Constitution's double jeopardy clause embodies "three separate constitutional protections." It proscribes a "second prosecution for the same offense after acquittal . . . a second prosecution for the same offense after conviction . . . [and] multiple punishments for the same offense." See also North Carolina v. Pearce, 395 U.S. 711, 717 (1969); Note, *Twice in Jeopardy*, 75 *Yale L.J.* 262 (1965).

These limits have long been accepted as the historical basis of the double jeopardy defense. The maxim "*Nemo debet bis vexari pro una et eadem causa*" (no one should be vexed twice for the same cause) ruled at common law; under the plea of *autrefois acquit* one could bar the reprosecution after a previous acquittal. "*Nemo debet bis puniri pro uno delecto*" (no one ought to be punished twice for the same wrong) encompassed the two other elements. The common law pleas of *autrefois convict* and *autrefois attaint* prevented a retrial after a previous conviction. By the time of the adoption of the fifth amendment the concept also had come to include a moral principle that multiple punishments were to be prohibited. See generally Sigler, supra note 2, at 1-37; Note, supra note 25, at 265-67.

45. Many courts have interpreted *Ashe* as applying constitutional collateral estoppel only where the issue to be precluded is an "ultimate" fact in the second prosecution. See United States v. Powers, 467 F.2d 1089, 1094 (7th Cir. 1972); United States v. Kills Plenty, 466 F.2d 240, 243 (8th Cir. 1972); United States v. Keine, 436 F.2d 850, 854-55 (10th Cir. 1971); United States v. Fusco, 427 F.2d 361, 363 (7th Cir. 1970). *Contra*, People v. Kernanen, 497 P.2d 8, 10 (Colo. 1972). Cf. note 42 supra, discussing the nonconstitutional treatment of this issue.

Although the Supreme Court in *Ashe* did not resolve this issue in reference to collateral estoppel as an ingredient of the fifth amendment, the Court, in an earlier case, spoke to the issue of the general doctrine of collateral estoppel, stating:

We think, however, that the doctrine of collateral estoppel does not establish any such concept of "conclusive evidence" . . . . The normal rule is that a prior judgment need be given no conclusive effect at all unless it establishes one of the ultimate facts in issue in the subsequent proceeding. So far as merely evidentiary or "mediate" facts are concerned, the doctrine of collateral estoppel is inoperative. *Yates* v. United States, 354 U.S. 298, 337-38 (1957).

If the same rule is applied to the constitutional collateral estoppel required by *Ashe*, then evidence of prior acquittals presumably would fall beyond the scope of constitutional collateral estoppel. However, the *Yates* consideration of collateral estoppel, only a minor issue in that particular case, has not been uniformly adopted even by lower federal courts. See, e.g., Laughlin v. United States, 344 F.2d 187 (D.C. Cir. 1965); United States v. Kramer, 289 F.2d 909, 917-18 (2d Cir. 1961); Palma v. Powers, 295 F. Supp. 924 (N.D. Ill. 1969).

Also, it is interesting to note that the statement in *Yates* cites for authority The
III. THE EVIDENTIARY RULE CONCERNING PRIOR ACQUITTALS

The general rule in the law of evidence has been that evidence of prior crimes is inadmissible for purposes of showing the bad character of the defendant. In deference to general concepts of justice and fair play it is felt that a defendant should be protected from a jury verdict influenced by his prior actions. The rule, however, has

Evergreens v. Nunan, 141 F.2d 927 (2d Cir. 1944), which cites for its authority the very lack of previous authority. See note 42 supra; RESTATEMENT OF JUDGMENTS § 68, comment p (1942), which states:

The rules stated in this Section [on collateral estoppel] are applicable to the determination of facts in issue, but not to the determination of merely evidentiary facts, even though the determination of the facts in issue is dependent upon the determination of the evidentiary facts.

This statement does not specify whether the rules apply only to facts in the first proceeding or also to those in the second. However, in the illustration following the comment the fact was evidentiary in both the first and second proceeding, in which case under either rule collateral estoppel would not apply. The Restatement, therefore, does not appear to confirm conclusively the statement in Yates.

Furthermore, with the advent of the RESTATEMENT (SECOND) OF JUDGMENTS (Tent. Draft No. 1, 1973), the continued validity of the rule in The Evergreens and the statement in Yates is further undermined. Comment j to § 68 is a definite response to those decisions and flatly eliminates from the Restatement any implied requirement that there be an ultimate fact in the second prosecution. The comment states that the formulation [that the issue to be estopped must be one of ultimate fact in the second prosecution] . . . is at odds with the rationale on which the rule of issue preclusion is based. The line between ultimate and evidentiary facts is often impossible to draw. Moreover, even if a fact is categorized as evidentiary, great effort may have been expended by both parties in seeking to persuade the adjudicator of its existence or nonexistence and it may well have been regarded as the key issue in the dispute. In these circumstances the determination of the issue should be conclusive whether or not other links in the chain had to be forged before the question of liability could be determined in the first or second action.

The appropriate question, then, is whether the issue was actually recognized by the parties as important and by the trier as necessary to the first judgment. If so, the determination is conclusive between the parties in a subsequent action, unless there is a basis for an exception under § 68.1—for example, that the significance of the issue for the purposes of the subsequent action was not sufficiently foreseeable at the time of the first action.

The exceptions in § 68.1 include consideration of such factors as the inability to obtain appellate review, an intervening change in the law, differences in the quality and extent of procedure, differences in the burden of proof, and unforeseeability of the future implications of the issue. Thus the current Restatement view seems to disregard the distinctions between evidentiary and ultimate facts as relevant in applying collateral estoppel. If the Court proves willing to recognize constitutionally the Restatement's construction of collateral estoppel, then evidentiary facts such as prior acquittals should be precluded in the subsequent proceeding.


47. The prospect of verdicts tainted by prejudicial considerations has long appeared inimical to the integrity of the legal system. One early American decision, reflecting the
been extensively qualified by almost universally recognized exceptions: evidence of other crimes is admissible to establish directly the particular crime, or to prove motive, intent, identity, absence of mistake and accident, or a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other.48

The widely accepted corollary to the rule on admissibility of prior crimes is that if such evidence satisfies one of these recognized exceptions, then it remains admissible even if the defendant has been acquitted of the other crime.49 The logic of this corollary rests on the importance given to relevancy as the key factor in determining the admissibility of evidence. It is the relevancy of the act itself that is important, not its actual criminality. McCormick states that the other crime need not be proved beyond a reasonable doubt for admissibility, and thus implies that crimes of which the defendant has been acquitted generally accepted moral position, noted that the rule “was predicated on the fundamental principle of justice that the bad man no more than the good ought to be convicted of a crime not committed by him.” Paulson v. State, 94 N.W. 771, 774 (Wis. 1903).

48. This general rule has come to be accepted by the great majority of jurisdictions, with slight variance in the categories of exceptions. See, e.g., United States v. Woods, 484 F.2d 127 (4th Cir. 1973); People v. Robillard, 358 P.2d 295 (Cal. 1960); People v. Donaldson, 278 P.2d 739 (Cal. Ct. App. 1955); State v. Harris, 164 A.2d 399 (Conn. 1960); Williams v. State, 110 So. 2d 654 (Fla. 1959); Blackburn v. State, 208 So. 2d 625, 626 (Fla. 3d Dist. Ct. App. 1968); People v. Smith, 165 N.E.2d 333 (Ill. 1960); Purviance v. State, 44 A.2d 474 (Md. 1945); State v. Taylor, 324 S.W.2d 643 (Mo. 1959); State v. Hopkins, 219 P. 1106, 1108 (Mont. 1929); State v. Yormark, 284 A.2d 549, 560 (N.J. Super. App. Div. 1971); People v. Formato, 143 N.Y.S.2d 205 (1955). See also 1 S. GARD, JONES ON EVIDENCE § 4:15 (6th ed. 1972); J. PRINCE, RICHARDSON ON EVIDENCE § 175 (9th ed. 1964); 2 FLA. ST. U.L. REV. 197 (1974); 51 MARQUETTE L. REV. 104 (1967).

are admissible.\textsuperscript{50} The overriding policy of presenting all relevant evidence to the jury apparently has convinced the majority to admit evidence of prior acquittals despite its probable prejudice to the defendant.\textsuperscript{51} The actual acquittal becomes a factor to be considered in balancing the conflicting interests of admitting all relevant evidence and of protecting the defendant from potential prejudice; thus, the question of admissibility becomes a discretionary decision for the trial judge.\textsuperscript{52}

Although admissibility is by far the majority view, a minority of jurisdictions do not admit prior acquittals, even for the enumerated purposes, on the basis of either collateral estoppel or a strong regard for notions of fair play and justice in the criminal system.\textsuperscript{53} Prior to \textit{Ashe} no constitutionally mandated doctrine appeared to compel this minority approach. A strict reading of \textit{Ashe}, however, may now oblige the courts to apply constitutional collateral estoppel to bar the use of prior acquittals. In \textit{Wingate v. Wainwright}\textsuperscript{54} the Fifth Circuit invoked this rationale in rejecting the majority rule. \textit{Wingate} has been the only decision yet interpreting \textit{Ashe} to preclude admissibility of evidentiary, as opposed to ultimate, facts as an extension of the double jeopardy doctrine. Historically, the double jeopardy claim has arisen

\begin{itemize}
\item[50.] McCormick states the prevailing view as follows:
\begin{quote}
In the first place, it is clear that the other crime, when it is found to be independent-\textit{ly} relevant and admissible, need not be established beyond a reasonable doubt, either as to its commission or as to defendant's connection therewith, but for the jury to be entitled to consider it there must of course be substantial evidence of these facts, and some courts have used the formula "clear and convincing."
\end{quote}
And it is believed that before the evidence is admitted at all, this factor of the substantial or unconvincing quality of the proof should be weighed in the balance.
\end{itemize}

C. McCormick, Evidence § 190 (2d ed. 1972). \textit{See also} People v. Albertson, 145 P.2d 7 (Cal. 1944); People v. Lisena, 94 P.2d 569 (Cal. 1939); Williams v. State, 110 So. 2d 654 (Fla. 1959); State v. Porter, 294 N.W. 898 (Iowa 1940); Tucker v. State, 412 P.2d 970 (Nev. 1966); Scott v. State, 144 N.E. 19 (Ohio 1914); Wrather v. State, 169 S.W.2d 854 (Tenn. 1943); 1 J. Wigmore, Evidence § 216 (3d ed. 1940).

\begin{itemize}
\item[51.] \textit{See United States v. Castro-Castro}, 464 F.2d 336 (9th Cir. 1972); Hernandez v. United States, 370 F.2d 171 (9th Cir. 1966).
\item[52.] \textit{See Hernandez v. United States}, 370 F.2d 171, 173-74 (9th Cir. 1966).
\item[53.] \textit{See State v. Little}, 350 P.2d 756 (Ariz. 1960); Blackburn v. State, 208 So. 2d 625, 626 (Fla. 3d Dist. Ct. App. 1968) (dissenting opinion); Asher v. Commonwealth, 364 S.W.2d 824 (Ky. 1959); McDowell v. State, 155 S.W.2d 577 (Tex. 1941); 1 S. Gard, Jones on Evidence § 4:15 (6th ed. 1972).
\item[54.] Some cases, though not holding the evidence of the prior crime inadmissible, have held the record of the acquittal of that crime admissible under a theory of res judicata. See Mitchell v. State, 37 So. 76 (Ala. 1904); People v. Simms, 300 P.2d 898 (Cal. Ct. App. 1956); State v. Leahy, 54 N.W.2d 447 (Iowa 1952); State v. Millard, 242 S.W. 923 (Mo. 1922); State v. Hopkins, 219 P. 1106 (Mont. 1923); Koenigstein v. State, 162 N.W. 879 (Neb. 1917). It seems preferable simply to deem the evidence of crime inadmissible in the first instance, since it is unlikely that introducing the record of acquittal will eliminate the prejudicial effect on the jury.
\end{itemize}

\begin{itemize}
\item[54.] 464 F.2d 209 (5th Cir. 1972).
\end{itemize}
only when a second prosecution for the same offense has been initiated, or additional punishment for the same conviction imposed. The absence of either situation in Wingate makes that decision significant in considering how far the protection against double jeopardy eventually may reach.

IV. The Holding in Wingate

Donald Wingate was charged in the Florida courts with robbing a small store. At trial the state introduced testimony by victims of three earlier robberies identifying Wingate as the person who had robbed them. Defense counsel objected on the grounds that Wingate had been acquitted of two of these robberies, and also on the grounds of irrelevance. Defense objections were overruled and Wingate was found guilty. On appeal the state court affirmed, and held the testimony regarding the earlier robberies admissible in that it "tended to establish a definite and ascertainable modus operandi similar to the scheme of robbery used on the victim of the robbery in the instant case." The court concluded that the prior acquittals did not render the evidence inadmissible.

Wingate subsequently petitioned for a writ of habeas corpus. The federal district court denied the petition and found Ashe inapplicable because the issues Wingate sought to preclude "were not issues of 'ultimate' fact in the second prosecution." On appeal the Fifth Circuit reversed and found that the constitutional guarantee against double jeopardy, as extended by the Ashe interpretation of collateral estoppel, necessarily rendered the evidence inadmissible. The court remanded, however, with instructions "to grant the writ of habeas corpus unless within a reasonable time the State of Florida proceeds to retry Wingate on this charge." Therefore the court did not conclusively bar a subsequent prosecution based on other, admissible evidence. Thus, the Fifth Circuit significantly altered the traditional application of the double jeopardy defense by extending availability of the doctrine beyond situations of reprosecution and multiple punishment.

55. See note 44 supra.
56. 464 F.2d at 215.
58. Id. at 44-45. The state court decision was eventually denied certiorari by the United States Supreme Court. See Wingate v. Florida, 400 U.S. 994 (1971). The state court case, however, had been argued on two main issues: the evidentiary rule on prior crimes and the allegedly prejudicial remarks made by the prosecutor. The double jeopardy issue was not argued at the state court level.
59. 464 F.2d at 213.
60. Id. at 215.
61. See note 44 supra.
In reaching this novel result, the court held that

under *Ashe* where the state in an otherwise proper prosecution seeks for any purpose to relitigate an issue which was determined in a prior prosecution of the same parties, then the evidence offered for such a relitigation must be excluded from trial and the state must be precluded from asserting that the issue should be determined in any way inconsistent with the prior determination.62

A dilemma arises, however, in holding that the admissibility of evidence may be restricted by the double jeopardy clause. It is unclear whether constitutional collateral estoppel precludes introduction of a previously litigated fact that will be "evidentiary," rather than "ultimate," in a second proceeding. *Ashe* did not confront this dilemma directly; the Court seemed only to require that an "ultimate" fact in the first proceeding must be precluded in the second.63

Perhaps *Ashe* implicitly recognized a narrow constitutional principle, mandated by the double jeopardy clause in criminal cases and qualitatively different from the broader doctrine of collateral estoppel derived from civil proceedings. The broader doctrine generally forecloses use in a second trial of previously litigated ultimate facts whether they are evidentiary or ultimate in the subsequent proceeding.64 It could be argued that the Supreme Court did not intend to incorporate into the constitutional principle of collateral estoppel the preclusion of facts used only as evidence in a subsequent proceeding. The Court instead might have intended to restrict its consideration of double jeopardy to its traditional area of concern: "multiple prosecutions arising out of the same transaction or same offense."65 The logical inference from this restrictive view would be that all previously litigated facts are admissible, as long as a reprosecution for the "same offense" has not been initiated.

This argument, however, was not persuasive to the *Wingate* court. The court supported its broader view of double jeopardy first by rejecting the idea that consideration of double jeopardy has been limited to a "same transaction"—"same offense" framework.66 The court then reasoned that the "quality" of jeopardy to which a defendant is exposed when an issue is relitigated is no different from the jeopardy that arises when reprosecution occurs.67

62. 464 F.2d at 215.
63. 397 U.S. at 443.
64. See note 42 supra.
65. 464 F.2d at 213. This was essentially the state's position in *Wingate*.
66. Id. at 213.
67. Id. at 213-14.
A. "Same Offense"—"Same Transaction"

While the fifth amendment declares that no person shall "be subject for the same offense to be twice put in jeopardy," the precise meaning of "same offense" is not set forth in the Constitution. Moreover, the problem of defining the term does not have an extensive history. At common law double jeopardy applied only to a very limited number of felonious offenses. The problem of duplicative prosecutions for technically different offenses did not arise until more recent times, as a result of the increased number of multiple statutory offenses for essentially the same criminal transaction. Led by the mandate of the Supreme Court, in defining "same offense" courts have accepted what is widely known as the "same evidence" test: "Where the act constitutes a violation of two distinct statutory provisions, the test to determine whether there are two offenses or one is whether either statute requires proof of facts which the other does not." By using this test the courts have refused to find double jeopardy in reprosecution cases where,

68. U.S. Const. amend. V.

69. By the eighteenth century the concept of double jeopardy had come to be seen as applicable only to capital offenses, wherein one's "life or limb" was literally endangered. The problem of multiple statutory offenses was not prevalent in the early common law; the punishment of death was required only for very serious crimes, such as treason, murder and rape. Even at the adoption of the American Constitution, there were no more than 160 felonies. Unlike today, early prosecutors did not enjoy the luxury of employing several separate legal theories to punish one instance of criminal conduct. See Sigler, supra note 2, at 5-6; Note, supra note 44, at 279 n.75.

70. The possible consequences of one criminal act are today far more extensive than they were at the birth of the double jeopardy concept:

A single criminal act may present the prosecution with opportunities for securing a conviction under several penal statutes which, even though they may overlap and even though they punish conduct of a single sort, provide alternative legal theories on which conviction may be obtained. To complicate the picture further, a single criminal act may injure several persons or things, multiplying the possibilities of conviction. Beyond this, the prosecution has the option of joining the violations as counts in a single indictment before a single jury, or of splitting the violations into separate indictments before several juries.

Sigler, supra note 2, at 63 (footnote omitted). See also Note, supra note 44, at 279.


72. Sigler, supra note 2, at 66. This test has been frequently applied as a limitation upon the use of the double jeopardy defense. Another statement of the rule, indicating its practical effect upon the fifth amendment, is found in Harris v. State, 17 S.E.2d 573, 578 (Ga. 1941):

If the same evidence necessary to convict of the one charge would have been sufficient to convict of the other, there would be former jeopardy; but under this rule, if an essential ingredient or necessary element or some additional fact be required in order to convict of either of the two offenses, which is not required to convict of the other, there is no former jeopardy.

although the same criminal act or transaction is involved, a technically different statutory offense is charged.\(^7\)

The belief that the "same evidence" theory has diluted the constitutional protection against double jeopardy has led to widespread criticism\(^4\) and the adoption by a small minority of courts of the "same transaction" test.\(^7\)

Concurring in *Ashe*, Justice Brennan suggested the following formulation of the latter test:

In my view, the Double Jeopardy Clause requires the prosecution, except in most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction.\(^6\)

Justice Brennan's reasoning obviously would broaden double jeopardy protection since even a statutorily different second offense could not be prosecuted if it arose from the same set of facts that had prompted a preceding action. The "same transaction" view, however, was not embraced by a majority in *Ashe* and thus, as *Wingate* correctly recognized, was not adopted as a rule of law by the Supreme Court.\(^7\)

The "same transaction" test generally has been viewed as a proposal to liberalize and extend the protection provided by the double jeopardy clause.\(^7\) Therefore, the failure of the *Ashe* Court expressly

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75. See *Bell v. State*, 30 S.E. 294 (Ga. 1898); State v. Greely, 103 A.2d 639, 642 (N.J. County Ct. 1954).

76. 397 U.S. at 453-54 (footnote omitted).

77. See 464 F.2d at 213. The great majority of lower court decisions have interpreted *Ashe* as retaining the "same evidence" test for defining the "same offense" as an outer limit for the application of the double jeopardy clause. The fact that in *Ashe* only three Justices spoke favorably of the "same transaction" test has led the lower courts to believe that the Court has not yet adopted such an expansion of double jeopardy protection. See United States v. Smith, 470 F.2d 1299, 1302 (5th Cir. 1973); United States v. Davis, 460 F.2d 792, 795 (4th Cir. 1972); United States v. Skillman, 442 F.2d 542, 549 (8th Cir. 1971); United States v. Fusco, 427 F.2d 361 (7th Cir. 1970); Garcia v. Beto, 348 F. Supp. 884 (S.D. Tex. 1972); People v. Hairston, 263 N.E.2d 840 (Ill. 1970). But see United States v. Garner, 451 F.2d 167 (6th Cir. 1971).

78. See Comment, *Double Jeopardy and Criminal Collateral Estoppel in Washington*, 6 Gonzaga L. Rev. 293, 309-13 (1971), wherein the author urges that the "same transaction" test should become a constitutional requirement. See also *Model Penal Code*
to adopt such a test seems to imply a hesitancy to enlarge the scope of double jeopardy protection. The Wingate court, however, apparently regarded Ashe's failure to adopt the "same transaction" test as an indication not that double jeopardy exists only when the narrower "same evidence" test is satisfied, but that double jeopardy can exist even when the "same transaction" test is not satisfied.79 In other words, the Fifth Circuit interprets the Ashe adoption of collateral estoppel as a complete abandonment of both of the traditional tests for determining what constitutes the same offense for double jeopardy purposes. The old tests are replaced with a new constitutional doctrine: collateral estoppel.

This approach by Wingate seems to indicate that double jeopardy does not require reprosecution for the same offense under any test.80 It is unlikely, however, that the Supreme Court intended to remove by implication "same offense" from the language of the fifth amendment. Furthermore, it seems questionable that upon refusing to adopt the liberalizing "same transaction" test, the Court would adopt a version of collateral estoppel that would in fact expand the limits of double jeopardy beyond even the parameters envisioned by that test. Perhaps, however, the Wingate court developed a stronger basis for its position in its alternative rationale, an analysis of jeopardy which equates issue relitigation with reprosecution.

B. The Quality of Jeopardy

The Wingate court developed this alternative rationale by indicating that the resubmission of an issue determined at the first trial, as evidence but not as an ultimate fact in the second action, constitutes sufficient jeopardy to trigger the constitutional guarantee. It is immaterial that the second prosecution may relate to a separate offense, since the defendant still is required to defend himself against charges that he had refuted in an earlier trial. In the court's view the fifth amendment bars the relitigation of those charges and allegations, al-

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79. 464 F.2d at 213.
80. The Wingate court seems to stress the part of Ashe that appears to prohibit relitigation of issues and not only reprosecutions for the same offense. Thus the court interprets Ashe to require at the least that
where an issue has been determined in a prior prosecution, the state is barred from bringing any subsequent prosecution in which a different determination of that issue is necessary to prove the offense charged.
464 F.2d at 213. Thus even the minimal level at which Wingate applies constitutional collateral estoppel goes beyond traditional notions of double jeopardy in that the "same offense" is no longer a necessary ingredient. See note 44 supra.
though the second prosecution itself may proceed if it does arise from a separate offense. The court justified this approach by stating:

We do not perceive any meaningful difference in the quality of “jeopardy” to which a defendant is again subjected when the state attempts to prove his guilt by relitigating a settled fact issue which depends upon whether the relitigated issue is one of “ultimate” fact or merely an “evidentiary” fact in the second prosecution. In both instances the state is attempting to prove the defendant guilty of an offense other than the one of which he was acquitted. In both instances the relitigated proof is offered to prove some element of the second offense. In both instances the defendant is forced to defend again against charges of factual allegations which he overcame in the earlier trial.

This rationale seems more persuasive than the court’s attempt to view Ashe’s rejection of the “same transaction” test as an expansion of double jeopardy. Nevertheless, the court’s reasoning still must confront the traditional limitation of double jeopardy to retrial and re-prosecution, and not to the mere reuse of evidence. Instead of basing its opinion upon a strained interpretation of precedent, however, the court seems to use Ashe as a springboard into an analysis of a basic concept underlying double jeopardy:

It is fundamentally unfair and totally incongruous with our basic concepts of justice to permit the sovereign to offer proof that a defendant committed a specific crime which a jury of that sovereign has concluded he did not commit. Otherwise a person could never remove himself from the blight and suspicious aura which surround an accusation that he is guilty of a crime.

In the end, the Fifth Circuit’s approach to constitutional collateral estoppel finds its best justification not in the strict wording of Ashe, but in the dictates of policy: prosecutors should not be permitted to dilute the “quality” of double jeopardy protection by accusing defend-

82. 464 F.2d at 213-14 (citations omitted). The Fifth Circuit prior to Wingate had itself defined collateral estoppel to require that “[a] question or issue determined by a prior acquittal may not be relitigated in a criminal proceeding against the same person.” Williams v. United States, 179 F.2d 644, 650 (5th Cir. 1950). This broad definition, eliminating any mention of an “ultimate fact” requirement, appears to be the historical basis for the use of collateral estoppel in Wingate. See also Yawn v. United States, 244 F.2d 235, 237 (5th Cir. 1957).
83. See note 44 supra.
84. 464 F.2d at 215.
The continuing majority interpretation of double jeopardy

Although *Ashe* has been followed by a long line of lower court decisions applying its new constitutional mandate, the problem of whether to apply collateral estoppel to foreclose double jeopardy in non-reprosecution situations has arisen in only a handful of cases. Most courts have applied the doctrine in circumstances similar to *Ashe*, where the preclusion of a particular fact bars the subsequent prosecution for a separate offense arising from evidence from the same series of events. A few cases, while maintaining an “ultimate fact” requirement for both prosecutions, have not required that the second prosecution arise from such evidence. The “rational jury” standard has


86. See, e.g., Davis v. State, 277 So. 2d 311 (Fla. 4th Dist. Ct. App. 1975); State v. Boudoin, 243 So. 2d 265 (La. 1971); State v. Cooksey, 499 S.W.2d 485 (Mo. 1973). In *Boudoin* defendant argued that he had been subjected to double jeopardy by the presentation of evidence in a second prosecution for a distinct and separate offense where such evidence had been admitted to show system, intent and motive in a prior prosecution that resulted in his conviction. The court held the *Ashe* version of collateral estoppel inapplicable since there was no reprosecution for the “same offense.” 243 So. 2d at 268-69.


88. See United States v. Nash, 447 F.2d 1382 (4th Cir. 1971); United States v. Drevetzki, 338 F. Supp. 403 (N.D. Ill. 1972). These two cases apparently do not interpret *Ashe* to require that the reprosecution be for the “same offense” for collateral estoppel to bar that prosecution, at least where the issue to be precluded is an ultimate one in the second prosecution. Both cases involved prosecutions for perjury (a distinct offense under both the “same evidence” and “same transaction” tests) based on testimony given in a previous trial which had resulted in acquittal of the defendant on a separate criminal charge. In finding the defendant subject to double jeopardy, the *Nash* court, resting on *Ashe* for authority, derived its conclusion from formulae authoritatively prescribed for ascertaining whether the verdict at the second trial depends upon resolution of any matter previously tested and found in favor of the defendant when acquitted at the first trial. Double jeopardy is a constitutional bar not only to retrial for the same offense, but also to relitigation of adjudicated issues whether they emerge in trials for the same or distinct offenses.
been applied rather begrudgingly in some cases, allowing lower courts to disregard the collateral estoppel requirement when, from the facts available, they cannot definitely determine that a rational jury necessarily would have passed on the issue to be precluded. Running throughout this line of cases has been the traditional double jeopardy defense: a defendant is using his double jeopardy claim, now incorporating collateral estoppel, to bar a subsequent prosecution. Most courts apparently believe that collateral estoppel as required by the fifth amendment is at the most co-extensive with double jeopardy, and by no means stretches beyond the traditional limits of the concept.

A. Resistance to Wingate Itself

The Wingate rule has yet to be embraced even within the boundaries of the Fifth Circuit. On the very same day Wingate was decided, perhaps as an omen of things to come, a state court within the Fifth Circuit rendered a decision at exact odds with the Wingate opinion. In State v. Fisher the Florida Third District Court of Appeal held that relevant "evidence of crimes other than the one with which defendant is charged . . . does not become inadmissible when

447 F.2d at 1384. Similarly, in Drevetzki the court stated: "A subsequent prosecution to constitute double jeopardy need not be for the same offense as long as the determinative issue is the same in both cases," 338 F. Supp. at 407; see id. at 405.

This approach to Ashe significantly expands the use of collateral estoppel to prevent double jeopardy by completely eliminating the same offense requirement. Thus collateral estoppel under the fifth amendment no longer remains bound by the parameters of double jeopardy itself. This step moves in the direction of the Wingate holding, but remains more limited in effect since both Nash and Drevetzki retain the "ultimate fact" requirement in the second prosecution while Wingate does not. These holdings still observe the traditional outer limit of double jeopardy in that they apply collateral estoppel only to bar a subsequent prosecution and not merely to affect the admissibility of evidence.

89. See note 38 and accompanying text supra.
91. Hence, the courts generally have viewed Ashe as incorporating collateral estoppel as an ingredient of double jeopardy, and not as an expansion of the original constitutional concept:

Double jeopardy is a uniquely constitutional concept derived from the Fifth Amendment . . . and res judicata and collateral estoppel both originally civil terms are but two sub-categories or manifestations of that concept.

92. 264 So. 2d 857 (Fla. 3d Dist. Ct. App. 1972).
defendant is acquitted on a trial of a charge of those other crimes." 93

Subsequently, Davis v. State 94 presented the first of the inevitable lower court cases tackling the effect and application of the Wingate holding. In Davis the defendant was charged with possession and sale of heroin. The state presented evidence that defendant had sold heroin on a previous occasion, separate and distinct from that sale for which he was on trial. Defendant previously had been charged both with sale and possession and was acquitted of the sale but convicted of possession. The district court held the evidence of the previous sale admissible, in spite of Wingate, as "similar fact evidence." 95 The Davis court recognized the Wingate holding that "the admission of evidence of a crime on which acquittal has been rendered, violates the collateral estoppel doctrine." 96 The court distinguished Wingate, however, on a factual basis: the defendant in Davis had been convicted of possession in the first transaction, though acquitted of the sale. The court held that "where there has been a conviction of one of two charges tried together though there has been an acquittal of the other charge, the 'similar fact evidence' is admissible." 97 Davis may reflect judicial resistance to change in a longstanding evidentiary rule, surfacing in the form of a meaningless factual distinction: the fact that a conviction on the possession charge was rendered along with an acquittal on the sale charge should not alter the fact that the sale had been finally adjudicated, making evidence of the sale inadmissible in the second prosecution through collateral estoppel. Davis may well be the first intimation of technical resistance to Wingate that will retain verbal acknowledgement of its holding. 98

B. Resistance to the Wingate Approach

Few courts have considered the evidentiary use of prior acquittals since Ashe imposed constitutional considerations upon collateral estoppel. Two lower court decisions interpreting Ashe implicitly have assumed that constitutional collateral estoppel does not operate to bar

93. Id. at 859. The court relied on both the majority rule on admissibility, see notes 46-49 and accompanying text supra, and the original lower court decision in Wingate, Wingate v. State, 232 So. 2d 44 (Fla. 3d Dist. Ct. App. 1970).
95. Id. at 312.
96. Id.
97. Id.
98. Blackburn v. State, 286 So. 2d 30 (Fla. 3d Dist. Ct. App. 1973), presents another possible foreshadowing of such a reaction. In a factual setting similar to Wingate, appellant unsuccessfully argued that the holdings in Ashe and Wingate should apply retroactively.
the admissibility of evidentiary facts when the prosecution itself is not barred. Those courts did not expressly confront the rationale and reasoning in *Wingate.* In at least one court, however, a defendant raised the same argument as approved in *Wingate.* In *State v. Cooksey* evidence was introduced of a prior acquittal arising from the same transaction for which the defendant was on trial, although the evidence was not an "ultimate fact" in the latter proceeding. Thus *Cooksey* seemed to present a sounder framework for the *Wingate* holding than had *Wingate* itself. The Missouri Supreme Court, however, disposed of defendant's collateral estoppel argument quite briskly: "Ashe v. Swenson . . . does not speak to the question of the admissibility of evidence; it speaks only to the question of double jeopardy." The court did not consider whether collateral estoppel under *Ashe* operates to preclude facts of only "evidentiary" importance in the second prosecution. The court was apparently convinced that double jeopardy does not attach when evidence is used merely for the appropriate limited purposes. Therefore, there would be no double jeopardy for the same offense in the *Wingate* situation since the use of the first offense in the second prosecution was merely evidentiary and not sufficient jeopardy under *Ray* for the constitutional protections to attach.

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99. In *State v. Yormark,* 284 A.2d 549 (N.J. Super. App. Div. 1971), the court initially discussed collateral estoppel and double jeopardy claims under *Ashe* in reference to the propriety of the second prosecution, but subsequently held evidence of prior acquittals to have been properly admitted, without making any reference to the double jeopardy or collateral estoppel principles of *Ashe.* The court instead relied on the majority evidentiary rule admitting such evidence and noted that such rule is "upheld by the great weight of authority throughout the country." 284 A.2d at 560. It seems doubtful that the court would have glossed over the collateral estoppel issue so completely when it was raised in a different aspect of the very same case unless the court was completely convinced that double jeopardy has no application where the mere admissibility of evidentiary fact is involved.

In *State v. Ray,* 249 So. 2d 540 (La. 1971), the Supreme Court of Louisiana faced the *Wingate* situation in reverse. The defendants argued that they were being subjected to double jeopardy under *Ashe* in that evidence of the offense charged in the second prosecution had previously been admitted in a prosecution for a different offense to show system and intent. They were subsequently acquitted of the first offense. In rejecting the defendants' plea, the court considered *Ashe* inapplicable because the evidence had been offered only for a limited purpose in the first prosecution—it was not an issue of "ultimate fact" in the first prosecution. As such, the court apparently did not consider whether the use of the evidence at the first trial placed the defendants in "jeopardy" sufficient to require the application of the fifth amendment. Under the strict holding of *Ashe,* which requires that the issue be an ultimate fact in the first prosecution, this holding appears correct. If the reverse is true, then such a holding implies that jeopardy does not attach when evidence is used merely for the appropriate limited purposes. Therefore, there would be no double jeopardy for the same offense in the *Wingate* situation since the use of the first offense in the second prosecution was merely evidentiary and not sufficient jeopardy under *Ray* for the constitutional protections to attach.

100. 499 S.W.2d 485 (Mo. 1973).

101. In a trial for assault with intent to kill with malice aforethought, the defendant attempted to argue that collateral estoppel as required by *Ashe* rendered inadmissible evidence concerning defendant's shooting of a bystander in the "same transaction" since defendant had been previously acquitted of a charge of assault upon the bystander. The second prosecution concerned the shooting of a different person at the same approximate time and place. See 499 S.W.2d at 486-87.

102. *Id.* at 488.
jeopardy as a workable concept does not apply to the mere admissibility of evidence where no bar to prosecution is involved, and that collateral estoppel in the form adopted in Ashe cannot possibly mandate more than the constitutional provision itself requires.\textsuperscript{103}

The issue of the admissibility of evidence of prior acquittals subsequent to Ashe also surfaced in United States v. Castro-Castro.\textsuperscript{104} As in Wingate no identity of offenses existed, even under the same transaction test, and the fact presented at the second trial was merely evidentiary. Without mentioning Ashe the majority admitted the evidence on the basis of the general rule in the federal courts allowing evidence of prior crimes, regardless of the fact of acquittal, if in the discretion of the trial judge the evidence meets the relevancy requirement.\textsuperscript{105} In dissent Judge Ely stated that the evidence should be excluded as highly prejudicial, basing his view on collateral estoppel, which "in most instances should preclude" relitigation.\textsuperscript{106} Judge Ely overcame the evidentiary-ultimate fact problem by finding collateral estoppel applicable to evidence used both "as direct proof of an element of a crime" and "as indirect evidence of criminal intent."\textsuperscript{107} He concluded that while "the prejudice to the defendant may be less blatant in the latter situation, it is of equal magnitude."\textsuperscript{108}

VI. CONCLUSION

The double jeopardy concept has been the object of criticism in that it historically has failed to encompass what many commentators feel to be its desired scope of applicability.\textsuperscript{109} As a result, an extensive

\textsuperscript{103} It is especially significant that the court here even bothers to speak to the issue raised by Ashe and its inapplicability since the opinion goes on to find that the defendant failed to preserve the issue for review. 499 S.W.2d at 488. Thus the evidentiary point could have been disposed of on procedural grounds without speaking to the double jeopardy issue; the fact that the court does in fact consider the contention seems to indicate the certainty of its conclusion that Ashe does not apply.

\textsuperscript{104} 464 F.2d 336 (9th Cir. 1972), cert. denied, 410 U.S. 916 (1973). Defendant was convicted of smuggling marijuana into the United States. Customs officials had discovered the contraband concealed in an automobile in which the defendant had attempted to cross the Mexico-California border. Defendant denied any knowledge of the contraband. At the trial the Government was allowed to introduce evidence, as relevant to the issue of intent, that on a prior separate occasion defendant had been arrested at the Mexico-California border after marijuana was found concealed in the truck he was driving. Defendant also had denied any knowledge of that marijuana, and was acquitted of the charge.

\textsuperscript{105} The court apparently felt that though "the challenged evidence was prejudicial to the defendant," it was also highly relevant to the Government's task of proving the element of specific intent. See 464 F.2d at 337.

\textsuperscript{106} Id. at 338.

\textsuperscript{107} Id. at 338 n.1.

\textsuperscript{108} Id.

\textsuperscript{109} See note 74 and accompanying text supra.
controversy has raged over the wisdom of expanding the "same offense" aspect of the constitutional mandate to include the "same transaction" test so that double jeopardy can reach a greater number of criminal situations.110 Ashe v. Swenson appeared to reflect an effort by the Supreme Court to yield to some of this pressure and to expand the effectiveness of the double jeopardy clause without sufficiently stretching its parameters to enclose the "same transaction" theory. In the wake of Ashe, Wingate v. Wainright has expanded double jeopardy far beyond what the Supreme Court seemed to approve. Moreover, by eliminating any requirement of "ultimate facts" in the second prosecution, the Fifth Circuit has succeeded in expanding the double jeopardy clause beyond its traditional operational limits111 and beyond its traditional policy purposes.112

Wingate is apparently the first decision interpreting the double jeopardy clause to affect the rules of admissibility of evidence, at least where such evidence is not of an "ultimate" nature. If such an approach becomes acceptable in the future it will mean an almost certain end to the evidentiary use of prior acquittals. In addition, the Wingate rationale might bar the use of prior arrest records and indictments for evidentiary purposes when the defendant ultimately was acquitted of the charge on which he was arrested.113 Such consequences almost cer-

110. See notes 74-77 and accompanying text supra.
111. At least one court seems implicitly to recognize the value of the "ultimate fact" requirement in limiting collateral estoppel in most instances to the same offense, a traditionally recognized ground for double jeopardy. See United States v. Fusco, 427 F.2d 361, 362-63 (7th Cir. 1970).
112. The double jeopardy clause embodies a number of value judgments but they all serve to reinforce the central theme that a person should not be subjected to repeated attempts at prosecution for the same offense, whatever the prosecutorial motive. Mr. Justice Black has summarized the moral principle on which the concept is based:
   The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.
   The situation in Wingate, in which the outcome of the second prosecution rested on guilt or innocence in a separate offense, does not seem to be in derogation of these principles. While the "embarrassment, expense . . . ordeal . . . anxiety and insecurity" are present for a second time, there is lacking the "repeated attempts to convict . . . for an alleged offense."
113. The evidentiary use of prior arrest records in order to affect credibility generally is not allowed: "[S]ince innocent people are sometimes arrested and indicted, the fact of arrest or indictment is of such limited probative value on the question of credibility as to be outweighed by the risk of undue prejudice in the eyes of the jury." Note,
tainly will provide the criminal defendant with a wider scope of protection than has heretofore been afforded by the double jeopardy clause. Although the Wingate holding does not square with the history of the double jeopardy clause itself, it appears to be an adequate response to a legal system that has developed to a state far different from that which existed at the birth of the concept.114 Wingate seems to reflect a desire to conform the outdated double jeopardy concept to the needs of a modern criminal justice system, replete with multiple statutory offenses for related acts and the extensive evidentiary use of prior criminal conduct. In addition, Wingate will serve the policy purposes behind the original rule barring the evidentiary use of prior crimes, which a growing list of exceptions has eroded.115 Policy considerations may well deserve priority over the technicalities of history and construction; if such be the case, double jeopardy may well be on its way to attaining a new level of importance in the criminal justice system.

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supra note 46, at 383. See also IIIA J. Wigmore, Evidence § 980a (Chadbourn rev. 1970). However, assuming the court would admit such evidence, the fact of acquittal arguably still may not work an estoppel even under Wingate since, technically speaking, it is the fact of arrest, and not the presence of guilt, which is offered and which, as a matter of public record, is not changed by the fact of acquittal: “To go behind the mere fact of arrest and determine whether defendant did commit the crime for which he was arrested would again raise collateral issues.” Note, supra note 46, at 384.

114. See note 69 supra.

115. See note 48 and accompanying text supra.