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ble."[98] Unfortunately, a complete record is not always available. In addition, the concept of "abuse of discretion" is shadowy and is used in a variety of ways in a variety of contexts.[99] Furthermore, the language of section 701(a)(2)[100] compounds the confusion by purporting to preclude review of "abuse of discretion."[101]

What is apparently needed is for courts to recognize that "abuse of discretion" is in and of itself an empty concept. The same can be said for "agency action committed to agency discretion by law." The requirements of a balance between efficient administrative apparatus on one hand and protection of individual interests on the other require the sort of analysis and attitude taken by the First Circuit in *Hahn*. Using as a starting point the recognition of both the presumption of reviewability and the necessity of clear congressional intent to preclude review of administrative action, factors such as appropriateness of the issues for judicial determination, the need for judicial supervision for the protection of the plaintiff's interests, and the impact of the review on agency effectiveness can serve as guideposts for a fuller analysis in holdings of reviewability and nonreviewability. Although "guideposts" can evolve into "magical categories," these at least encourage probing and examination. The result in *Littell* may have been correct, but the method involved can be criticized as perpetuating a semantic debate as well as fostering the ensuing confusion.

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A RECONSIDERATION OF LIMITING PERJURY PROSECUTIONS BY COLLATERAL ESTOPPEL

The acquittal on a criminal charge secured by the defendant's false testimony suggests the possibility of his prosecution on a subsequent charge for perjury. Since perjury is a separate crime, it technically avoids the double jeopardy prohibition of a second trial for the same offense.[1]

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[98]445 F.2d at 1209.

[99]Text accompanying notes 38-52 *supra*.

[100]5 U.S.C. § 701(a) (1970).

[101]K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.16 at 964 (Supp. 1970).

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[1]Double jeopardy prohibitions are typically defined as enunciated in Calvaresi v. United States, 216 F.2d 891 (10th Cir. 1954), *rev'd on other grounds*, 348 U.S. 961 (1955):

> The Fifth Amendment provides "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." That in plain language means that one may not be tried a second time for the same offense . . . .

Id. at 902. *See also* Pinkerton v. United States, 328 U.S. 640, 644 (1946); M. FRIEDLAND, DOUBLE JEOPARDY 157 (1969).

The rules of collateral estoppel, however, are encompassed by the double jeopardy provisions[2] and may operate to foreclose the perjury action if the matter can be said to have been decided in the previous trial.[3] How such a determination is to be made is the result of the court's weighing of two countervailing considerations. The first is the desire to prevent harassment of innocent victims by multiple prosecutions, and the second is the desire to prevent deliberate false testimony from enabling defendants to remain unpunished for two crimes, the original crime and that of perjury.

United States v. Nash,[4] decided by the Fourth Circuit Court of Appeals in September, 1971, explores one approach to resolving the problems and policies presented when deciding what matters are foreclosed by a previous court's determination. Estelle O. Nash had been found in possession of three marked coins[5] allegedly obtained from a specially prepared decoy letter used by postal authorities to aid in the detection of mail thefts by postal employees.[6] According to the observation of government witnesses, Nash had removed this test letter from a postal mail box immediately prior to the discovery of the coins in her possession.[7] After an acquittal on a charge for mail theft, Nash was indicted for perjury regarding her explanation at the theft trial that she had obtained possession of the coins from a change machine.[8] To challenge that testimony, the Government in the perjury trial produced essentially the same evidence as that offered in the previous trial, but added an elaborate explanation showing the impossibility of obtaining these particular coins from the change machine.[9] Convicted on the perjury charge, Nash appealed claiming that the issues and proof in the second trial constituted a repeti-

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

[3]Cromwell v. County of Sac, 94 U.S. 351 (1876). The Court noted that where the actions are upon different claims, "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." *Id.* at 353. Collateral estoppel applies to criminal as well as civil proceedings, United States v. Oppenheimer, 242 U.S. 85 (1916). *Oppenheimer,* however, applied collateral estoppel principles to criminal cases before the subsequent embodiment of collateral estoppel as part of double jeopardy. This discussion will use the terms "collateral estoppel" and "double jeopardy" in their strict rather than overlapping sense.

[4]447 F.2d 1382 (4th Cir. 1971).

[5]*Id.* at 1383. *See also* Wilson v. United States, 162 U.S. 613 (1896); United States v. Smith, 446 F.2d 200, 204 (4th Cir. 1971), where the court observed that an "inference of guilty knowledge may be drawn from the possession of recently stolen property . . . ."

[6]447 F.2d at 1383.

[7]*Id.*

[8]*Id.* at 1383-84; Brief for Appellant at a3, United States v. Nash, 447 F.2d 1382 (4th Cir. 1971).

[9]447 F.2d at 1384, 1387.

tion of the first trial and thus violated the double jeopardy protection of the fifth amendment.[10] This contention was accepted by the Fourth Circuit which reversed the decision of the district court.

Although the appellate decision was ostensibly grounded upon theories of double jeopardy,[11] the court's approach and technique in so deciding were actually those of collateral estoppel in the traditional and precise use of the term.[12] This is because double jeopardy in the strict sense looks to the similarity of the two offenses, here quite distinct, but collateral estoppel looks to issues actually determined.[13] Double jeopardy would completely bar the second trial if the offenses were alike, but collateral estoppel bars only relitigation of the issues previously determined.[14] As double jeopardy has been expanded in the recent case of *Ashe v. Swenson*,[15] to include collateral estoppel, a court may now consider both the offenses charged and the issues determined to detect violations of double jeopardy.[16] In *Nash* it was only the relitigation of issues determined which was violated by the second trial. Consequently, to overrule the perjury conviction, the *Nash* court must have based its reasoning on the collateral estoppel aspect of the enlarged double jeopardy provisions.

A frequent approach previously used to determine the validity of a perjury trial was based upon the policy that a defendant acquitted of a criminal charge should not be immune from the crime of perjury because of collateral estoppel principles.[17] This philosophy provided blanket permission to proceed with all perjury trials and was widely adopted by the state courts[18] on the theory, as expressed by the Virginia court, that perjury is contrary to the proper administration of justice and "holds the courts up to contempt when they allow the perjurer to go unpunished."[19]

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[10]Id. at 1383.

[11]*Id.* at 1384.

[12]The court's decision was based on tests prescribed by Sealfon v. United States, 332 U.S. 575, 579 (1948), which were evolved for res judicata standards and on res judicata dicta in United States v. Williams, 341 U.S. 58, 63 (1951).

[13]Notes 1 and 3 *supra.*

[14]Gershenson, *Res Judicata in Successive Criminal Prosecutions*, 24 BROOKLYN L. REV. 12, 13-14 (1957).

[15]397 U.S. 436 (1970).

[16]447 F.2d at 1384. As the alleged false testimony of Nash was the only issue in question, the fate of the perjury trial would be identical if it violated either theory.

[17]People v. Barnes, 240 Cal. App. 2d 248, 49 Cal. Rptr. 470 (1966). The court stated:

> To apply collateral estoppel would only immunize him from the crime of perjury and reward his falsehood. Thus, the doctrine of collateral estoppel is not available to the defendant in a prosecution for perjury.

Id. at 473; *see* Jay v. State, 15 Ala. App. 255, 73 So. 137 (1916); People v. Niles, 300 Ill. 458, 133 N.E. 252 (1921); State v. Leonard, 236 N.C. 126, 72 S.E.2d 1 (1952).

[18]Note 17 *supra.*

[19]Slayton v. Commonwealth, 185 Va. 371, 38 S.E.2d 485, 491 (1946).

It was felt that public policy did not condone granting immunity to criminals and that this was the inevitable result of extending collateral estoppel doctrines to perjury.[20] The courts which agreed with this position, but did not categorically desire to always allow perjury trials, simply found that the issue in question was not decided by the fact finders in the previous trial.[21]

The Fourth Circuit's application of the *Ashe v. Swenson* rationale to a perjury trial situation would seem to preclude consistently allowing perjury trials without giving due regard to collateral estoppel principles. As part of the fifth amendment, the collateral estoppel principles of double jeopardy are applicable to the states.[22] In addition to this constitutional mandate, there were inherent difficulties with the concept of always allowing perjury trials. First was the emphasis on the complete separateness between the original criminal offense and the perjury offense.[23] In the extreme, this would ignore any meaningful consideration of what the jury may have decided in reaching its verdict and would fail to preclude subsequent trials even if the evidence presented in both trials was identical. Secondly, there appeared to be no concern about the possibility that two verdicts arising out of similar facts may be inconsistent.[24] The resulting consequence seemed to be that the one policy overshadowed all other considerations and failed to give adequtae reasons for its total denial of the policy protecting defendants from undue multiple prosecutions.[25]

Although *Ashe* invalidated this strict policy treatment of perjury, the

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[20]Jay v. State, 15 Ala. App. 255, 73 So. 137, 139 (1916); *see* Hyman v. Regnestein, 258 F.2d 502, 510 (5th Cir. 1958).

[21]State v. Noble, 2 Ariz. App. 532, 410 P.2d 489 (1966); People v. Di Giacomo, 193 Cal. App. 2d 688, 14 Cal. Rptr. 574 (1961); *see* Commonwealth v. Rose, 214 Pa. Super. 50, 251 A.2d 815 (1969).

[22]Ashe v. Swenson, 397 U.S. 436 (1970); Benton v. Maryland, 395 U.S. 784 (1969).

[23]People v. Niles, 300 Ill. 458, 133 N.E. 252, 254 (1921); Commonwealth v. Rose, 214 Pa. Super. 50, 251 A.2d 815 (1969). In *Rose* the court noted that "[t]he offense of perjury is committed and completed at the time the false testimony is given, regardless of the outcome of the proceeding in which it occurs." *Id.* at 817, *quoting* Commonwealth v. Hilton, 265 Pa. 353, 355, 108 A. 828 (1919).

[24]People v. Niles, 300 Ill. 458, 133 N.E. 252 (1921); State v. Leonard, 236 N.C. 126, 72 S.E.2d 1 (1952); *cf.* Adams v. United States, 287 F.2d 701, 704 (5th Cir. 1961). *See also* MODEL PENAL CODE § 1.07(1)(c)(Proposed Official Draft 1962).

[25]The court in People v. Niles, 300 Ill. 458, 133 N.E. 252 (1921) dismissed the possible abuses that might arise in always allowing perjury trials by stating:

> [S]uch situations are no more probable than that an innocent man might be convicted of any other crime by perjured testimony of his enemies conspiring against him, or that he might be harrassed by a corrupt prosecuting attorney. The possibility of such wrong is too remote to have any controlling influence on the important principle at stake.

Id. at 254.

opinion did offer some guidelines for determining if collateral estoppel forecloses subsequent perjury actions. Such a determination is to be made with "realism and rationality" by looking to "all the circumstances of the proceedings."[26] The objective of this approach is to avoid the "hypertechnical"[27] application of collateral estoppel rules. Included within these guidelines are two traditional theories for determining what issues were decided at the first trial, the "same evidence" test and the "necessarily adjudicated" test.[28]

The "same evidence" theory focuses on what new and additional evidence the Government produces to support its perjury claim.[29] As set forth by the Fourth Circuit in the leading case of *Allen v. United States*,[30]

> it is very hard to imagine any state of things which would justify an indictment for perjury of an acquitted defendant against whom the government offers no other substantial evidence than that which had been before the jury which had found him not guilty.[31]

The only direct acknowledgement of this test in the *Nash* decision is by Judge Winter in his concurring opinion in which he based his conclusion solely on the "identity of the evidence at both trials."[32] The effect of this approach would be to limit the majority's conclusion, as understood by Judge Winter, "that the government is forever foreclosed from prosecuting [Nash] for perjury."[33] If new evidence were produced, the perjury trial would be held permissible on the basis that the additional proof would not have been decided by the previous jury.[34]

Advantages of the "same evidence" test appear to be twofold. First is the relative clarity and ease of application of the test to any particular set of facts. This aids judicial economy by reducing needless litigation. Second, the test permits perjury trials when the Government demon-

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[26]397 U.S. at 444, *quoting in part* Sealfon v. United States, 332 U.S. 575, 579 (1948).

[27]Note 26 *supra.*

[28]397 U.S. at 443-46.

[29]447 F.2d at 1387 (Winter, J., concurring); *see* Kuskulis v. United States, 37 F.2d 241, 242 (10th Cir. 1929); Youngblood v. United States, 266 F. 795 (8th Cir. 1920).

[30]194 F. 664 (4th Cir. 1912).

[31]*Id.* at 667. The court continued by saying:

> The government and its prosecuting officers should not discredit the verdicts and judgments of its own courts by seeking to induce one jury to find that another gave a wrong verdict upon what is in all material respects the same testimony.

Id.

[32]447 F.2d at 1387 (Winter, J., concurring).

[33]*Id.*

[34]*Id.*

strates that it has obtained new evidence. The proper administration of justice is thus protected by discouraging defendants from offering false testimony at the first trial.

A weakness of the "same evidence" test may be its dependence upon distinguishing exactly what is new evidence from what eventually proves to be merely cumulative evidence. For example, in the *Nash* case the impossibility of receiving the marked coins from the change machine was conclusively proved in the perjury trial but was not so proved in the mail theft trial.[35] If this impossibility of receiving the coins had been treated as new evidence, then the perjury conviction would have had a foundation on which to have been upheld under the "same evidence" test. The concurring judge, however, felt the testimony contained nothing new or different.[36] When only cumulative evidence is presented, the courts cannot sanction any rule which would permit a prosecutor a second chance simply because he discovers a better and more convincing method to bolster his case.[37]

This difficulty of distinguishing new evidence from merely new approaches to the same evidence may produce unfortunate results not only in the validity of the second trial, but also in the protection of constitutional guarantees. Just as the proper administration of the laws may be frustrated by labeling new evidence merely cumulative, the right of a defendant to be free from undue multiple prosecutions may also be frustrated by labeling cumulative evidence as something new or different. Thus *Ashe* seems justified in adopting a more general approach to collateral estoppel inquiries than merely an exclusive and strict "same evidence" rule.[38] The difficulties with this rule, however, do not suggest that

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[35]*Id.* at 1384; Brief for Appellee at 2-3; Brief for Appellant at 3-4. The change machine could not recycle the marked coins into change for dollars as was implicit in the defendant's claim.

[36]Judge Winter noted that the impossibility of getting the coins from the machine was in evidence at the first trial and continued:

> It is true that, at the perjury trial, the government sought to bolster this aspect of its case by offering a corroborating witness. But his testimony was not new or different; it was merely cumulative.

447 F.2d at 1387 (Winter, J., concurring).

[37]Ashe v. Swenson, 397 U.S. 436, 447 (1970); Hyman v. Regenstein, 258 F.2d 502 (5th Cir. 1958); Kuskulis v. United States, 37 F.2d 241, 242 (10th Cir. 1929); *see* Green v. United States, 355 U.S. 184, 187-88 (1957).

[38]The "same evidence" test meets sharp criticism from some courts who would exchange it for the "same transaction" test. *See* United States v. Rollerson, 449 F.2d 1000 (D.C. Cir. 1971); United States v. Butler, 38 F. 498 (E.D. Mich. 1889). This view is strongly espoused by Justice Brennan in his concurring opinion in *Ashe*, 397 U.S. at 448-60. Justice Brennan summarized:

> In my view, the Double Jeopardy Clause requires the prosecution . . . to join at one trial all the charges against a defendant that grow out of a

its usefulness is diminished, but only that a broader approach is desirable in cases not readily adaptable to a mere comparison of the evidence.

This broader approach is the "necessarily adjudicated" test, as advanced by the Supreme Court in *Sealfon v. United States*.[39] The case involved the question of whether an acquittal on a conspiracy charge would preclude a subsequent prosecution for the substantive offense. The Court promulgated a test declaring that if a matter which was "crucial" and "necessarily adjudicated"[40] at the first trial is an identical matter in the second trial, then the Government is precluded from obtaining a conviction on the second charge. This determination "depends upon the facts adduced at each trial and the instructions under which the jury arrived at its verdict at the first trial."[41] The circuit court in *Nash* directly applied this test to its view of the evidence.[42] The potential difficulties of the *Sealfon* approach become apparent, however, when observing that this is the identical test used by the district court in reaching the opposite result.[43]

In determining if the change machine story was an adjudicated issue at the previous trial, the circuit court arrived at the conclusion that only

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> single criminal act, occurrence, episode, or transaction. This "same transaction" test of "same offense" not only enforces the ancient prohibition against vexatious multiple prosecutions embodied in the Double Jeopardy Clause, but responds as well to the increasingly widespread recognition that the consolidation in one lawsuit of all issues arising out of a single transaction or occurrence best promotes justice, economy, and convenience.

Id. at 454-54. *See* MODEL PENAL CODE §§ 1.07(2), 1.09(1)(b)(Proposed Official Draft 1962). The "same transaction" test protects the defendant against undue multiple prosecutions, but it creates uncertainties in determining if perjury on the witness stand is part of the original transaction or whether it is a new and separate offense. If it is part of the original transaction then all future perjury prosecutions would be foreclosed by definition. Yet if it is a completely separate offense, then all perjury trials would have to be permitted. This conclusion would seem to weaken the effectiveness of the test for perjury situations.

[39]332 U.S. 575 (1948).

[40]*Id.* at 580.

[41]*Id.* at 579, *cited in*, 447 F.2d at 1385. The instructions under which the jury arrived at its verdict in the *Nash* theft trial stated "that the Government was required to prove beyond a reasonable doubt that defendant did steal, take or abstract the letter from the mails before she could be convicted." Brief for Appellant at a9.

[42]After citing the Supreme Court decision, the court stated:

> Following the prescriptions in *Sealfon* and *Ashe*, we conclude that the jury in the first case undoubtedly passed upon the believability of Estelle Nash's statements made under oath.

447 F.2d at 1385.

[43]The district court principally relies on Adams v. United States, 287 F.2d 701 (5th Cir. 1961) and to a lesser degree on United States v. Davis, 369 F.2d 775 (4th Cir. 1966) both of which rely on the *Sealfon* test. Brief for Appellant at a8-a13.

"two conflicting explanations of her possession [were] considered."[44] There was the testimony of the defendant and that of the Government. It was thus "inconceivable that there would have been an acquittal if the jury had not accorded truth to her testimony."[45] This conclusion diametrically opposed the viewpoint of the district court in the perjury case; the district court noted that the record of the theft trial indicated it would have been "difficult, if not almost impossible"[46] for the government's witness to have observed Nash take the letter and, further, that there was "serious issue"[47] as to whether she even had the opportunity to remove the letter. Thus the district court concluded that the Government may have failed to prove its mail theft case without the jury having to decide the veracity of the defendant's story as to the change machine.[48] Moreover, there are other questions not mentioned by either court which seemingly might have led a jury to believe that there were more than two explanations for Nash's possession of the coins.[49]

The question then arises, because of these different conclusions, whether the *Sealfon* test itself is faulty or whether there was error in its application by one of the two *Nash* courts. The first explanation for the diverse results is the differing views held by each court as to the significance of the evidence.[50] The test is subjective and cannot determine which matters were considered "essential"[51] in the previous trial, as this decision can only be made by each court as it looks to all the circumstances.

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[44]447 F.2d at 1385.

[45]*Id.*

[46]Brief for Appellant at a9.

[47]*Id.* at a10.

[48]*Id.* at a9. The district court concluded:

> All the jury decided was that the government had not established beyond a reasonable doubt that the defendant was the person who took the letter in question from the mails. That was not a finding that she obtained the quarters from the change machine, or that the quarters did not come from the letter.

Id.

[49]The coins were marked with a fluorescent powder but the results of tests to disclose the powder on defendant's clothing were not given. There were also two marked bills along with the coins in the test letter, but their whereabouts were not disclosed. Furthermore, another woman was in the rest area where the defendant was discovered with the coins. This may be important considering the credibility of the witness who claimed to have seen Nash take the letter. Also there was no mention if the coffee was found that Nash purportedly purchased with one of the quarters allegedly obtained from the change machine. 447 F.2d at 1384; Brief for Appellant at 3. *See also* Dunn v. United States, 284 U.S. 390, 394 (1932).

[50]Text accompanying notes 16 & 47 *supra.*

[51]Sealfon v. United States, 332 U.S. 575, 578 (1948); Adams v. United States, 287 F.2d 701, 704 (5th Cir. 1961). In *Adams* the court also stated:

> In this situation the authorities dealing directly with perjury prosecutions clearly hold that when the fact is not *necessarily* determined in the former

Whether or not the circuit court in *Nash* properly looked to all the circumstances or whether it merely adopted the result of *Sealfon,* that only one explanation existed to support the charges in each trial,[52] is open to question.[53]

A second explanation for the diverse results is that most courts applying the "necessarily adjudicated" test look to what the jury determined as the basis for concluding what matters were adjudicated,[54] while other courts imply that they look directly to what the verdict itself determined.[55] The circuit court in *Nash* felt that the first jury could not escape passing upon the credibility of Nash's change machine story,[56] while the district court in the perjury action noted that the verdict necessarily determined only the exact issue of mail theft.[57] In this latter "verdict" interpretation of the *Sealfon* test, only those matters which were material for the government's case can be considered in determining the consistency of the perjury verdict.[58] To determine if the verdict as to perjury would be inconsistent with the earlier holding, a trial court must revert to its own interpretation of all the facts to decide which of those facts the verdict determined, as opposed to those which were collateral and not necessarily

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> trial, the possibility that it may have been does not prevent re-examination of that issue (emphasis in original).

Id. at 705. *See* United States v. Davis, 369 F.2d 775 (4th Cir. 1966); *see also* Annot., 147 A.L.R. 1000-01 (1943).

[52]After looking at the facts of each trial, the Court in *Sealfon* summarized:

> As we read the records of the two trials, petitioner could be convicted of either offense only on proof that he wrote the letter pursuant to an agreement with Greenberg. Under the evidence introduced, petitioner could have aided and abetted Greenberg in no other way. Indeed, respondent does not urge that he could.

332 U.S. at 580.

[53]*See* Sealfon v. United States, 332 U.S. 575, 579 (1948), *see also* Ashe v. Swenson, 397 U.S. 436, 443 (1970). *Sealfon* noted that the inquiry must be set in a "practical frame and viewed with an eye to all the circumstances of the proceedings." 332 U.S. at 579. Note 49 *supra.*

[54]*See* Ashe v. Swenson, 397 U.S. 436, 446 (1970); Sealfon v. United States, 332 U.S. 575, 578-79 (1948).

[55]*See, e.g.,* United States v. Williams, 341 U.S. 58, 65 (1951); Adams v. United States, 287 F.2d 701, 704 (5th Cir. 1961); Wheatley v. United States, 286 F.2d 519, 520 (10th Cir. 1961). In *Williams* the defendants were not found to be within the res judicata protection of *Sealfon* as the charge of aiding and abetting was distinct from the charge of abuse of a prisoner by police officers under color of state law. 341 U.S. at 64.

[56]447 F.2d at 1385.

[57]Brief for Appellant at a9.

[58]*Id.* at a13; *see* Adams v. United States, 287 F.2d 701, 704-05 (5th Cir. 1961); Kuskulis v. United States, 37 F.2d 241, 242 (10th Cir. 1929); RESTATEMENT OF JUDGMENTS § 68(o), (p) (1942).

decided.[59] Thus the "jury" and "verdict" variations on the theme of "necessarily adjudicated" explain the flexibility that is available to courts in applying the *Sealfon* test.

This flexibility, however desirable as an aid to avoiding the technical applications of collateral estoppel, may cause the "necessarily adjudicated" test to be inadequate when applied to perjury situations. As the *Nash* situation demonstrates, two different conclusions may be supported by the test of issues "necessarily adjudicated" depending on the court's particular viewpoint or emphasis. Thus the choice and interpretation available to the courts would allow for a possible abuse of the safeguards set down under the broadened double jeopardy concept. Moreover, this flexibility precludes any attempt to predict the outcome of future cases and thereby necessitates needless litigation.

A possible solution for this unpredictability may be the direct inclusion of the "same evidence" test into the "necessarily adjudicated" test. While the "necessarily adjudicated" standards parallel those of collateral estoppel, the "same evidence" rule parallels that of double jeopardy.[60] This results from the former test looking only to a particular issue to see if it is barred from a subsequent relitigation, while the latter looks to the entire case to see if the subsequent action must be completely foreclosed. Consequently, a combination of these two tests would seem logical as together they would emphasize both the collateral estoppel and double jeopardy aspects of the *Ashe* decision.

Moreover, the advantages of both tests would be fully utilized. The "same evidence" test would be invoked as a preliminary examination of the previous trial, and it may often prove to be dispositive of the issue. In more complicated situations, the "same evidence" approach would serve as one of several indications of what may have been "necessarily adjudicated". Thus the "necessarily adjudicated" test would gain a sharper focus while still preserving its flexibility. Although not explicitly stated, the combination of these two tests may have been utilized by some federal courts. Admittedly, many of these courts adhere to the same

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[59]Adams v. United States, 287 F.2d 701 (5th Cir. 1961). The court considered "as a 'collateral issue' any fact which, if established on the perjury trial to have been false, is not inconsistent with the prior determination of innocence." *Id.* at 704.

[60]Adams v. United States, 287 F.2d 701 (5th Cir. 1961). The court felt, especially when the evidence is the same in both trials, that

> some apprehension exists that allowing prosecution for perjury will actually give the state a second shot at the defendant for the same wrong. . . . This, we see, approaches closely, whether acknowledged or not, an intuitive feeling akin to double jeopardy despite the fact that the two are distinct.

Id. at 703.