Notes

Constitutional Collateral Estoppel: A Bar to Relitigation of Federal Habeas Decisions

'But it may happen, for hundreds of reasons, that the Judges are in a different frame of mind about the case, even from a legal viewpoint, and one’s efforts to obtain a second acquittal must consequently be adapted to the changed circumstances, and in general must be every whit as energetic as those that secured the first one.'

'But this second acquittal isn’t final either,' said K., turning away his head in repudiation. 'Of course not,' said the painter. 'The second acquittal is followed by the third arrest, the third acquittal by the fourth arrest, and so on. That is implied in the very conception of ostensible acquittal.' K. said nothing. 'Ostensible acquittal doesn’t seem to appeal to you,' said the painter.

The Supreme Court decisions which established that the doctrine of res judicata does not prevent federal habeas courts from re-examining state court decisions have been the subject of exhaustive discussion, but

2. See p. 1232 infra.
3. Res judicata means literally “thing (or matter) decided.” The common law doctrine of res judicata consists of two principles, (1) bar and merger, and (2) collateral estoppel. The former describes the effect of a prior judgment whenever the “matter decided” was a cause of action (or offense charged), barring a losing party from relitigating the same action, and merging the claim of a victorious party into the judgment obtained. It also bars the relitigation of any issue arising out of that particular cause of action which might have been presented at the prior trial.
   Collateral estoppel applies when the “matter decided” is a specific factual issue, rather than the cause of action itself, and bars the relitigation of that issue, whether or not the cause of action in which it is raised is identical to the prior cause of action. F. James, Civil Procedure, 549-584 (1965). On res judicata and collateral estoppel generally, see Polsky, Collateral Estoppel—Effects of Prior Litigation, 59 Iowa L. Rev. 217 (1924); Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1 (1942); Note, Developments in the Law—Res Judicata, 65 Harv. L. Rev. 818 (1952). The conditions under which collateral estoppel is applicable are discussed more fully pp. 1241-44 infra.
   The constitutional counterpart of res judicata is, of course, the prohibition against double jeopardy, presently consisting of the traditional concept of double jeopardy which is roughly analogous to bar and merger, see note 78 infra, and constitutional collateral estoppel, which has the same effect as the common law principle, but is apparently to be applied with less technicality, see pp. 1249-44 infra.
virtually no attention has been given the reciprocal question of whether state courts may subsequently relitigate the issues decided by federal habeas courts. This Note will argue that such relitigation is constitutionally impermissible under the rule of collateral estoppel recently incorporated within the Double Jeopardy Clause of the Fifth Amendment. The constitutional question of the permissibility of such relitigation in state courts did not arise until the Supreme Court's recent decision in Ashe v. Swenson. In that case, the Court held that the rule of collateral estoppel was applicable to the states as part of the Fifth Amendment guarantee against double jeopardy and that the state was prohibited from relitigating an issue which had been determined in an earlier state trial of the same defendant. The question examined in this Note—whether collateral estoppel also prohibits retrial of an issue

5. The operation of res judicata as a bar to such litigation seems to have been recognized at common law, John McConologue's Case, 107 Mass. 154 (1871), and in writing for a unanimous Court in Collins v. Loisel, 262 U.S. 426 (1923) Mr. Justice Brandeis stated, at 430: "A judgment in habeas corpus proceedings . . . may operate as res judicata. But the judgment is res judicata only that he was at the time illegally in custody, and of the issues of law and fact necessarily involved in that result." Retrial of prisoners released on habeas does not seem to have been the usual practice in the past. See note 75 infra.


9. Although collateral estoppel has been applied to federal criminal trials in the past, see p. 1242 infra, only a minority of states had recognized its applicability prior to the Ashe decision, and then generally rendered the doctrine ineffective by placing highly technical requirements on its use, see, e.g., pp. 1243-44 infra. The state cases are collected in Annot., 9 A.L.R. 3d 203 (1966).

10. 397 U.S. 436, at 445. Until 1969, the Supreme Court had never held the Double Jeopardy Clause of the Fifth Amendment to be applicable to the states. See cases cited in Benton v. Maryland, 395 U.S. 784, 793-796 (1969). Nor had the Court indicated that collateral estoppel was a part of the Double Jeopardy Clause. See Hoag v. New Jersey, 356 U.S. 464, 471 (1958) (expressing "grave doubts" that collateral estoppel could be regarded as a constitutional requirement).

11. The sole factual issue in dispute at defendant's first trial had been his identity as one of a number of persons who robbed the participants in a poker game. His acquittal in that trial for robbery of one of the card players was held to have conclusively determined this issue and to have barred its relitigation when defendant was tried for the robbery of a second person at the poker game. 397 U.S. 436 (1970).
Constitutional Collateral Estoppel

where the prior determination is made by a federal habeas court—has not been settled by the Supreme Court.12

This Note will first discuss the scope of modern federal habeas corpus and the doctrinal basis for the present state practice of relitigating issues decided by federal habeas courts. Attention will then be given to the federal and state interests which would be affected by the application of collateral estoppel to state retrial following a habeas proceedings.

I. Federal Habeas Proceedings and the Present Practice of Retrial by State Courts

The expressed purpose of federal habeas corpus13 is to insure an effective means of relief for individuals held in custody in violation of their constitutional rights,14 and modern habeas procedures are designed to provide the fullest opportunity to both the state and the habeas petitioner for the litigation of the constitutional issues presented in the petition for habeas relief.15


13. The writ of habeas corpus, also known as the “Great Writ” or simply as “Habeas Corpus,” is the common law writ of habeas corpus ad subjiciendum. Ex Parte Bollman, 8 U.S. (4 Cranch) 75, 84, 95 (1807). It is a civil proceeding brought by one in custody against those restraining him to test the legality of his confinement. See, e.g., A Handebok of Federal Habeas Corpus, §§ 1-3 (1965) [hereinafter cited as Sokol]. Other forms of the writ of habeas corpus are occasionally used today, e.g., United States v. Smith, 310 F.2d 121 (4th Cir. 1962) (writ of habeas corpus ad testificandum, to compel delivery of prisoner for purposes of hearing his testimony); Carbo v. United States, 364 U.S. 611 (1961) (writ of habeas corpus ad prosequendum, to compel delivery of prisoner for purpose of prosecuting him). On the varieties of the forms of the writ at common law, see 3 Blacestone, Commentaries, * 129-30. On the history of the writ generally, see W. Church, A Treatise on the Writ of Habeas Corpus (21 ed. 1893); glass, Historical Aspects of Habeas Corpus, 9 St. John’s L. Rev. 55 (1952); D. Meador, Habeas Corpus & Magna Carta (1959); Walker, The Constitutional and Legal Development of Habeas Corpus as the Writ of Liberty (1960).

14. See, e.g., Fay v. Noia, 372 U.S. 391, 402 (1963): “If the States withhold effective remedy, the federal courts have the power and duty to provide it.”

15. In federal habeas corpus hearings, limited discovery is available to both parties, and neither side is restricted to evidence contained in the record of the prior proceedings in presenting its case. See 28 U.S.C. § 2246 and Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1179-1187 (1970) [hereinafter cited as Developments]. Both the petitioner and the state must be given an opportunity to present additional testimonial and documentary evidence on the issues in dispute. See, e.g., United States ex rel Molloy v. Follette, 391 F.2d 231 (2d Cir. 1967), cert. denied, 391 U.S. 917 (1968) (remanded for evidentiary hearing in which state is to have opportunity to show probable cause for arrest). Moreover, petitioner may be represented by counsel, and may at the court’s discretion have counsel appointed to represent him. See, e.g., United States ex rel. Wissenfeld v. Wilkins, 281 F.2d 707, 715 (2d Cir. 1960); Cerniglia v. United States,
The scope of modern federal habeas jurisdiction has been broadened by two relatively recent trends. The first of these is the increased applicability of provisions of the federal Constitution's Bill of Rights to state criminal processes. This has expanded the class of claims for which relief may be sought on habeas. As a result, the number of petitions filed seeking habeas relief has increased sharply in recent decades from an average of just over 500 per year during 1945-1955 to over 12,000 in the single year of 1969. The second trend affecting modern habeas practice has been the line of decisions concerning the power of federal habeas courts to re-examine issues of law and fact determined in state court proceedings.


The Supreme Court has not extended the right to appointed counsel to habeas proceedings. Johnson v. Avery, 393 U.S. 483, 488 (1969). While the availability of appointed counsel might increase frivolous claims, it might also screen them out; see President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 139-40 (1967); ABA Project on Minimum Standards for Criminal Justice: Standards Relating to Post-Conviction Remedies, 64-86 (1968); Developments, supra, at 1197-1204; Note, The Burden of Federal Habeas Corpus Petitions from State Prisoners, 52 Va. L. Rev. 486, 504 (1966).

16. Under 28 U.S.C. § 2254, any claim that a prisoner's detention is in violation of the Constitution is cognizable by a federal district court on habeas corpus. Thus, a prisoner may be released if his conviction rests on violations of the exclusionary rule with respect to illegally seized evidence, Mapp v. Ohio, 367 U.S. 643 (1961), the privilege against self-incrimination, Malloy v. Hogan, 378 U.S. 1, 6 (1964), the right of confrontation, Pointer v. Texas, 380 U.S. 400 (1965), the right to counsel, Gideon v. Wainwright, 372 U.S. 335 (1966), or other constitutional guarantees applicable to the states.

17. Perhaps critically in the view of a number of commentators, e.g., Friendly, supra note 4, at 143-4.


19. See Annual Report of the Director of the Administrative Office of the United States Courts 141-144 (1969) [hereinafter cited as Annual Report 19XX]. There were 2,187 petitions challenging conviction or sentence from federal prisoners, 7,359 from state prisoners; the balance were petitions challenging the conduct of prison officials. The effect of the decisions cited in note 16 supra, is evidenced in the increase in petitions from state prisoners, from 127 in 1941 (Annual Report 1964, at 45), to the figure of 7,359 in 1969.

20. In Brown v. Allen, 344 U.S. 443 (1953), the Supreme Court held that the doctrine of res judicata did not prevent federal habeas courts from re-examining issues decided in prior state proceedings, and that federal habeas courts could conduct de novo evidentiary hearings for such purposes. Then, in Townsend v. Sain, 372 U.S. 293 (1963), the Court held that federal habeas courts were required to conduct such hearings "unless the state-court trier of fact has after a full hearing reliably found the relevant facts." Id. at 318. Also, despite a state court hearing, a federal habeas court was required to hold a hearing in certain specific situations: where (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination was not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state was not adequate to afford a full and fair hearing; (4) there was a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing. Id. at 313. 28 U.S.C. § 2254(d) (Supp. V, 1969) provides that the state findings shall be presumed correct unless certain (essentially identical) indicia appear. The statute has been treated as codifying Townsend. See, e.g., Maxwell v. Turner, 411 F.2d 805, 807 (10th Cir. 1969). The Townsend criteria are discussed in Developments, supra note 15, at 1122-45.
Although hearings are held on less than ten per cent of the petitions filed,\(^{21}\) approximately half of the hearings held result in the release of the petitioner.\(^{22}\) Such relief is almost completely illusory,\(^{23}\) however, since the successful petitioner will generally be retried in a state court,\(^{24}\) absent unusual circumstances,\(^{25}\) and since the state is not presently prohibited from relitigating upon retrial the issues decided in petitioner's favor at the federal habeas hearing.\(^{26}\) Typically, the habeas court will order the prisoner to be discharged from custody unless the state retries him within thirty (or sixty) days.\(^{27}\) In the case of Chambers \(v.\) Cox,\(^{28}\) for example,\(^{29}\) the petitioner was originally convicted of illegal possession of narcotics. On habeas, he contended that the narcotics seized from him had been improperly admitted into evidence since there was no probable cause for the search. The federal habeas judge agreed, and ordered his release if he were not retried within thirty days. The state retried the

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\(^{21}\) The data for 1970 are not yet available. However, just under 500 hearings were held on 6,500 state prisoner petitions in 1968, approximately 8%. Annual Report 1968, supra note 19, at 208 (table C-4). Assuming a relatively constant ratio, the number of hearings for 1969 would approximate 1,000 on the basis of 12,000 petitions (see p. 122 supra) and the number would be expected to rise for 1970. Justification for the assumption of a reasonably constant ratio is borrowed by analogy to the apparent constancy of the rate of release. See note 22 infra.

\(^{22}\) In 1964, 125 applicants were released, out of 3,220 petitions, approximately 4% or half of the 8% to whom hearings were afforded. S. Rep. No. 1797, 89th Cong., 2d Sess. 14, 22 (1966) (Apps. II, III). A figure of 4% was also reported in Wright & Sofair, Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility, 75 Yale L.J. 895, 899 n.16 (1966). See also Developments, supra note 15, at 1941 n. 9.

\(^{23}\) The paradigm illustration is the case of Hobbs v. Peperack, 206 F. Supp. 301 (D. Md. 1962). After 48 unsuccessful petitions for habeas corpus, petitioner was released on the 49th attempt, only to be retried, reconvicted, and given a longer sentence than that originally imposed. Hobbs v. State, 231 Md. 533, 191 A2d 238 (1963).

\(^{24}\) Federal habeas courts are empowered under 28 U.S.C. §§ 2243, 2255 to direct new trials, and it has been held that such retrial does not violate the Double Jeopardy Clause. See, e.g., North Carolina v. Pearce, 395 U.S. 711, 720 (1969); United States v. Tateo, 377 U.S. 463, 465 (1964). The habeas court may also stay the order of release for a reasonable period to permit the state to retry the prisoner. Sokol, supra note 13, at 83-84.

\(^{25}\) The frequency of retrial is not known, but the assumption of most commentators is that retrial is the common practice. See Sokol, supra; Judge Friendly, in a recent article, assumed that virtually all of the petitioners who were successful on habeas were subsequently retried, and that at least half were reconvicted. Friendly, supra note 4, at 148 n.23. Id., at 147: "Successful attack usually entitled the prisoner only to a retrial."

\(^{26}\) E.g., where the petitioner has served most of the original sentence. Cf. United States v. Keogh, 391 F.2d 138, 148 (2d Cir. 1968). A long delay between the original trial and subsequent habeas relief may also make retrial unlikely. See Friendly, supra note 4, at 147; and see p. 1225 infra.

\(^{27}\) This precise point does not appear to have been decided by the Supreme Court.

\(^{28}\) Although earlier decisions suggest a contrary rule, see note 5 supra, the prevailing doctrine is that such relitigation is permissible. See Chambers v. Cox, cert. denied, 400 U.S. 870 (1970) and Section II infra.

\(^{29}\) The case discussed would appear to be typical, since the exclusionary rules are a fertile source of habeas litigation. See Amsterdam, Search, Seizure & Section 2255: A Comment, 112 U. Pa. L. Rev. 378 (1964).
petitioner and repaired the deficiency in its probable cause showing by introducing additional evidence not offered at either the first trial or the habeas hearing.\textsuperscript{30} The additional evidence consisted of further testimony by the police officers who had testified at the first trial. The evidence largely contradicted their earlier testimony.\textsuperscript{31} Reconviction followed.\textsuperscript{32}

Had the operation of collateral estoppel been recognized with respect to the federal habeas court's decision, the state would not have been able to introduce the narcotics seized from the defendant since the prosecutor would not have been allowed to controvert the habeas court's determination that the evidence seized from the defendant was inadmissible.

II. The Analogy of Habeas Corpus to Direct Appeal

A. The Ambiguity of Present Law

The settled rule that the state may retry an accused following reversal of his conviction by an appellate court\textsuperscript{33} has been held to permit retrial following habeas relief,\textsuperscript{34} and courts in the past have not recognized any distinction between direct appeal and habeas corpus with respect to the application of the traditional prohibition against double jeopardy. This analogy of habeas corpus and direct appeal has in the past been an accurate one since, as will be shown, both procedures have limitations which justify permitting retrial of the offense. However, the recent Supreme Court holding that collateral estoppel is also a part of the double jeopardy prohibition necessitates a more sophisticated analysis of the habeas and appellate functions to determine whether the analogy drawn between the two for purposes of retrial extends to the relitigation of specific issues.

The leading case in which the Supreme Court has drawn the analogy between direct appeal and habeas corpus for purposes of retrial for the entire offense is \textit{United States v. Tateo},\textsuperscript{35} in which petitioner had

\textsuperscript{30} The federal habeas court had offered to hold a hearing to augment the trial record, but both parties stipulated that the record contained all the necessary facts. 400 U.S. 870 (1970).
\textsuperscript{31} See note 185 infra.
\textsuperscript{32} A subsequent petition for habeas relief was denied by the district court in an unreported opinion, Chambers v. Cox, Civil Action No. 5154 (E.D. Va. May 12, 1969), the Court of Appeals affirmed (4th Cir. Oct. 8, 1969) (unreported), and the Supreme Court denied certiorari, 400 U.S. 870 (1970). See note 185 infra.
\textsuperscript{34} United States v. Tateo, 377 U.S. 463 (1964).
\textsuperscript{35} 377 U.S. 463 (1964). This decision is generally cited for the proposition that the prohibition of the Double Jeopardy Clause is not applicable to habeas proceedings, just
Constitutional Collateral Estoppel

pleaded guilty to and had been convicted of certain federal charges\(^{36}\) arising out of a bank robbery. On habeas, he successfully contended that his guilty plea had been improperly induced and had not been voluntarily made. On retrial for the original charges, his plea of double jeopardy was upheld by the trial court, but reversed by the Supreme Court, which explained its holding in broad language that equated the functions of direct appeal and habeas corpus:

That a defendant’s conviction is overturned on collateral rather than direct attack is irrelevant for these purposes [i.e., whether double jeopardy prohibits retrial] . . . it would be incongruous to compel greater relief for one who proceeds collaterally than for one whose rights are vindicated on direct review.\(^{37}\)

The Supreme Court here held that retrial following habeas relief did not violate the constitutional prohibition against double jeopardy, but it did not consider whether relitigation of specific issues decided by the habeas court was permissible. Thus, although the state could retry Tateo for bank robbery, the question of whether it could re-introduce his confession (supported by additional evidence of voluntariness not before the habeas court) was left open.

This decision was rendered before \(Ashe v. Swenson\)^{38} placed collateral estoppel within the Double Jeopardy Clause.\(^{39}\) However, the Court’s language in \(Tateo\) at least suggests that relitigation of the issues decided on habeas is also permissible,\(^{40}\) since any bar to such relitigation might result in “greater relief for one who proceeds collaterally.”\(^{41}\)

as United States v. Ball, 163 U.S. 662 (1896), limits its application in the appellate process. See, e.g., Mulreedy v. Kropp, 425 F.2d 1095, 1101 (6th Cir. 1970); Houp v. Nebraska, 427 F.2d 254, 255-6 (8th Cir. 1970); Sokol, \(supra\) note 13, at 83. The \(Tateo\) decision in effect merely approves the prior practice of lower courts. See, e.g., Robinson v. United States, 144 F.2d 392, 397 (6th Cir. 1944), aff’d, 324 U.S. 282 (1945); Bryant v. United States, 214 F. 51, 53 (8th Cir. 1914), stating that it is “immaterial that his attack was collateral, as by habeas corpus, instead of direct, by appeal or writ of error.”

36. Defendant was charged with taking and carrying away bank money, receiving and possessing stolen bank money and conspiracy to commit these offenses. United States v. Tateo, 377 U.S. 463, 464 (1964).


39. The difference between double jeopardy, as traditionally conceptualized, and collateral estoppel are discussed at Section II-c \(infra\) and at note 3 \(supra\).

40. \(And see North Carolina v. Pearce, 395 U.S. 711, 720 (1969)\) stating that the double jeopardy clause “imposes no limitations whatever upon the power to retry a defendant who has succeeded in getting his first conviction set aside.” Clearly, prohibiting the relitigation of issues decided on habeas can be viewed as limiting to some degree the state’s power to retry. Yet the above language cannot mean to give the state an absolute power to retry all issues decided on habeas, e.g., whether a prisoner had waived his right to appeal, or was the victim of racially discriminatory jury selection, or whether a prosecutor had made a promise to recommend probation. See Kearns v. Field, 432 F.2d 63 (9th Cir. 1970).

41. “Greater relief” would have been the outcome in \(Chambers v. Cox, see pp. 1233-34\).
On the other hand, the Tateo decision was premised on the congruity of the habeas and appellate functions, and the Supreme Court has frequently emphasized the differences in the procedures. There is, therefore, some uncertainty as to whether the Tateo holding as to double jeopardy should extend to collateral estoppel.

B. Double Jeopardy: Direct Appeal and Habeas Corpus

The fact that appellate review and habeas corpus serve different functions and employ markedly different procedures suggests that although the double jeopardy guarantee is correctly held not to prevent retrial following either form of relief, the reasons for this limitation on double jeopardy in the case of appellate review are substantially different from the reasons which justify the same limitations in the habeas context. The different rationales, when applied to collateral estoppel, suggest in turn the appropriateness of different results—the prohibition of relitigation of specific issues in the habeas setting but not in the context of a direct appeal.

The principle that the Double Jeopardy Clause does not bar retrial of an accused following reversal of his conviction on appeal was established in United States v. Ball.

The Ball principle traditionally has been justified in terms of three theories: that there is a single continuing jeopardy, within which the

**supra,** if collateral estoppel had been applied, since effective retrial would have been prevented because the critical evidence against the defendant had been ruled inadmissible by the habeas court. Even where the issue was not one vital to the state's case, a defendant might obtain "greater relief" from a prohibition which barred the relitigation of issues decided in his favor on habeas, since the issue raised on habeas must have been more than a "harmless error," see notes 159-160 **infra,** and therefore of some probative value to the state. Thus the chance of creating a reasonable doubt on retrial might be greater for a defendant who succeeds on habeas than for one "whose rights are vindicated on direct review." United States v. Tateo, 377 U.S. 463, 466 (1964).

42. "The whole history of the writ—its unique development—refutes a construction of the federal courts' habeas powers that would assimilate their task to that of courts of appellate review. The function on habeas is different. It is... an original civil proceeding, independent of the normal channels of review of criminal judgments." Townsend v. Sain, 372 U.S. 293, 311-12 (1963).

43. 163 U.S. 662 (1896). In this case, defendants were convicted of murder and were retried for that offense after the original conviction was set aside for a deficiency in the indictment. The Supreme Court rejected a plea of double jeopardy with the bald statement that:

> It is quite clear that a defendant, who procures a judgment against him to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted. Id. at 672.

44. The authorities discussing waiver and continuity are collected in State v. Schmear, 28 Wis. 2d 126, 134-36, 135 N.W.2d 842, 847-48 (1964). See also United States v. Green, 355 U.S. 184, 189 (1957).
accused remains until there is a final adjudication free from error;\(^{45}\) that the convicted accused, in seeking to set aside his conviction on appeal, \textit{waives} his constitutional protection against double jeopardy;\(^{46}\) or that considerations regarding the \textit{fair and efficient administration of justice} permit retrial after a reversal for error.\(^{47}\) Neither of the first two theories receive much credence today.\(^{48}\) In \textit{United States v. Tateo},\(^{49}\) the Court emphasized that the \textit{Ball} principle was the product not of ineluctable logic but of a necessary accommodation of competing interests: society would be injured to the extent that persons apparently guilty in fact but convicted at a procedurally defective trial were thus able to avoid reprosecution and punishment; and all defendants, innocent or guilty, would suffer to the extent that appellate (or habeas) courts, concerned with this immunity,\(^{50}\) would tend to overlook revers-


\(^{47}\) \textit{See pp. 1239-39 infra.}

\(^{48}\) The continuity theory was explicitly rejected by the Supreme Court in Kepner v. United States, 195 U.S. 100 (1904). \textit{See also} Green v. United States, 355 U.S. 184, 191-93 (1957). \textit{But see} Mayers and Yarbrough, \textit{Bis Vexari: New Trials and Successive Prosecutions}, 74 HARV. L. REV. 1, 6-7 (1960) wherein the authors view Holmes' defense of continuity doctrine in \textit{Kepner} as much more consistent with double jeopardy than the waiver view implicit in the majority opinion. The continuity theory was held \textit{not} to violate due process in state criminal procedure in Fallo v. Connecticut, 352 U.S. 319 (1937), but that decision has been overruled by Benton v. Maryland, 395 U.S. 784 (1969) which applied the Fifth Amendment to the states, and with it the \textit{Kepner} rule.

The waiver theory was sharply criticized by the Supreme Court in Green v. United States, 355 U.S. 184, 191-7 (1957) (the Court characterizing the waiver theory as "wholly fictional" and "totally unsound and indefensible"), but recently was revived by North Carolina v. Pearce, 395 U.S. 711, 720-21 (1969).

\(^{49}\) 377 U.S. 463 (1964) (on appeal from a reconviction following habeas relief, the Court held that the retrial did not violate double jeopardy; the Court's language referred to both habeas and appellate relief). \textit{See note 50 infra.}

\(^{50}\) "[O]f greater importance than the conceptual abstractions employed to explain the \textit{Ball} principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error. ... From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties. ... In reality, therefore, the practice of retrial serves defendants rights as well as society's interests." 377 U.S. 463, 466 (1964).

\(^{51}\) Not only convicted defendants might suffer, but also an uncertain proportion of those accused but presently acquitted, and even of those presently not accused. To the extent that appellate courts might begin overlooking erroneous trial conduct, such conduct might increase, and with it the probability of conviction. Further, the increased possibility of obtaining convictions in cases which would be questionable under present standards might lead to more prosecutions.

\(^{52}\) \textit{Cf.} Gori v. United States, 367 U.S. 364, 369 (1961) (the Court describing the problems which confront the trial courts if double jeopardy invariably prevents retrial fol-
ible error. Thus, fairness to both society and the class of persons accused of crimes requires an acceptably *accurate* determination of the accused's guilt (or innocence) in fact prior to any dispositive decision on his status (i.e., whether he should be set free or punished).

Because of the limited information before it in the form of the record on appeal, an appellate court is ill-equipped, in those cases where reversible error occurred at trial, to decide which of the final alternatives of acquittal or conviction is the correct substitute for the decision below. The deficiency in the evidence may be the result of the appellate court's ruling that certain evidence was improperly admitted, or it may be due to the trial judge applying an improper standard of law (or improperly applying a proper standard) which the prosecution met. In either case, the prosecution may have had additional evidence which was not offered because of the trial court's rulings. The appellate court has no means of evaluating the probative value of such evidence. Thus, if retrial were not available, the appellate court would be forced to speculate on what the evidence might have been, had there been no error. Further, it must speculate, in effect, not only on whether the hypothetical evidence would be sufficient to

lowing a mistrial as "compelling them to navigate a narrow compass between Scylla and Charybdis").

53. The term "acceptably accurate" is used in the same sense as Professor Jaffe put it: "The question then is not whether the fact exists in an absolute sense but whether the evidence is adequate to justify the exercise of power: ultimately, whether the evidence is a sufficient moral predicate in the sense that society will accept it as sufficient for the exercise of the power in question." Jaffe, *Judicial Review: Question of Law*, 69 HARRY L. REV. 239, 244 (1955).

54. Cf. Gori v. United States, 367 U.S. 364, 367 (1961): "Certainly, on the skimpy record before us it would exceed the appropriate scope of review were we ourselves to attempt to pass an independent judgment upon the propriety of the mistrial . . . ." Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957).


56. See, e.g., Pea v. United States, 397 F.2d 627 (D.C. Cir. 1968) (lower court did not find defendant's confession to be voluntary "beyond a reasonable doubt"); Fisher v. United States, 382 F.2d 31 (5th Cir. 1967) (lower court did not make a "clear cut determination" of the voluntariness of defendant's confession). As these decisions suggest, there exists considerable disagreement on the standard of proof required on various issues in the criminal process. There is, therefore, a real possibility that an erroneous standard might be applied to an issue at some stage between arrest and conviction. See the collection, discussion, and analysis of decisions in United States v. Schipani, 289 F. Supp. 13 (E.D.N.Y. 1968) and cf. Rideout v. Superior Court, 67 CAL.2D 471, 432 P.2d 197 (1967). (The California Supreme Court split 4-3 over the question of the amount of evidence which must be shown at a preliminary hearing to establish probable cause for an arrest. The majority test was whether a "man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused;" the minority would require only "some evidence" upon which equally prudent men "might believe the accused to be guilty.")

57. See, e.g., Sykes v. United States, 373 F.2d 607, 612-13 (1966) (indicating that counsel's failure to object on some issues will almost inevitably produce an incomplete record since the appellate court can never know what justification would have been offered by the state if the point, e.g., a search, had been challenged).
support a verdict but also on whether a jury would have reached the same verdict, given the different evidence.

The fairness of permitting retrial following appellate reversal is strikingly illustrated when the conviction overturned was based on defendant’s plea of guilty, a plea which is then held on appeal to have been coerced.\(^\text{58}\) Here, there may have been no trial at all on the merits and therefore no evidence in the record before the appellate court on the issue of guilt or innocence. Clearly, it would be undesirable to force the appellate court to choose between the alternatives of acquittal and conviction on the basis of such a record. Thus, permitting\(^\text{59}\) the appellate court to order a retrial following reversal does fairly accommodate the competing interests involved, by referring the dispositive determination of a defendant’s status to the process (trial) better equipped to adduce all the evidence relevant to his guilt or innocence.

The Supreme Court also has held that the Double Jeopardy Clause does not prevent retrial of an accused who successfully attacks his conviction on habeas rather than by direct review.\(^\text{60}\) Justification for this limitation on the constitutional guaranty against double jeopardy is not based on a “continuity” theory since the habeas function is not a continuation of previous litigation,\(^\text{61}\) nor is the waiver theory applicable to retrial following habeas relief.\(^\text{62}\)

The justification for permitting retrial after habeas relief is similar to the justification for permitting retrial following appellate reversal:


\(^\text{59}\) Under 28 U.S.C. § 2105 the appellate court does not have to allow retrial, but may do so in its discretion; see Bryan v. United States, 338 U.S. 552 (1950) and decisions cited therein.

\(^\text{60}\) See note 35 supra.

\(^\text{61}\) As has been noted, habeas corpus is a civil suit independent of the prior criminal trial. Townsend v. Sain, 372 U.S. 293, 312 (1963). It may be based on a constitutional violation which occurred before trial, such as improper jury selection, or after trial, in the sentencing, Bryan v. United States, 214 F.2d 51 (1954).

\(^\text{62}\) As applied by the Supreme Court in several decisions, the permissibility of retrial under the waiver theory turns on whether the accused requests a new trial. See Sapir v. United States, 348 U.S. 373 (1956) (per curiam, Douglas, J., concurring); Bryan v. United States, 338 U.S. 552, 560 (1950); Forman v. United States, 361 U.S. 416, 425 (1960). The petitioner on habeas cannot seek a new trial, since the only remedy available on habeas is release from custody. Sokol, supra note 13, § 15. Regardless of the form of the prayer, however, the court is also empowered by 28 U.S.C. § 2255 (1964), relating to federal prisoners, to correct a sentencing error or order a new trial. As to state prisoners, 28 U.S.C. § 2243 (1964) empowers the court to “dispose of the matter as law and justice require.” Although the Act of 1867 contained the same wording (see Act of Feb. 5, 1867, ch. 23, 14 Stat. 335), it was apparently not construed to authorize remedies other than outright release prior to the decision in In re Bonner, 151 U.S. 242 (1893), discussed in note supra. Thus, treating the habeas petition as a waiver would be inconsistent with traditional waiver theory. In United States v. Tateo, 377 U.S. 463 (1964), the district court had held that seeking habeas relief did not constitute a waiver, and dismissed the second prosecution. The Supreme Court, in reversing, avoided reliance on the waiver theory. See p. 1237 supra.
fairness in the administration of justice to both society and the accused. However, the reasons why such fairness requires retrial following habeas relief are not the same as those discussed earlier with regard to the appellate process. By contrast to the appellate process the habeas proceeding is a distinct and separate cause of action brought by the petitioner against his custodian charging "unlawful imprisonment." The petition for habeas may allege any constitutional violation which renders the custody unlawful, whether or not the issue is related to or was raised at the trial. The habeas hearing is premised on the inadequate development of the factual issues, and is held for the purpose of receiving evidence to resolve those issues. Both sides may introduce testimonial and documentary evidence on the issues raised by the petition, and the petitioner has the burden of proving his allegations by a preponderance of the evidence, although the burden of proof may shift to the state once a prima facie case is made out by the petitioner. Thus, while the appellate function is based on a presumption of the sufficiency of the trial record as a basis for the disposition of the issues presented, the habeas function is based on the opposite presumption, the insufficiency of previous factual determinations which may necessitate a trial de novo on the issues presented in the petition. The habeas court does not, therefore, suffer from any informational deficiency which renders it incompetent to adjudicate the issue before it. The reason for permitting retrial is that the issue before the habeas court is not the guilt or innocence of the petitioner, nor the sufficiency of the evidence to support the general verdict because such issues are not cognizable on habeas. The habeas court deals only with narrow

63. See pp. 1238-39 supra.
65. See generally Sokol, id., § 9.
66. See p. 1233 supra.
67. See p. 1231 supra.
68. Johnson v. Zerbst, 304 U.S. 458, 468-9 (1938); Kress v. United States, 411 F.2d 16, 20 (8th Cir. 1969); White v. McHan, 386 F.2d 817, 818 (5th Cir. 1967).
70. See p. 1232 supra.
71. Such issues are not cognizable on habeas, nor is it the function of habeas to retry the prisoner. Ex Parte Watkins, 28 U.S. (2 Pet.) 193, 202-203 (1830); Holt v. United States, 303 F.2d 791, 794 (8th Cir. 1962); and see note 73 infra. But see the strong argument by Judge Friendly that habeas relief should be denied absent a "colorable claim of innocence." Friendly, supra note 4.
72. Again, not cognizable on habeas. Casias v. Patterson, 398 F.2d 486 (10th Cir. 1968).
73. Habeas jurisdiction is predicated upon an alleged violation of a constitutional right. Although the statutory provision, 28 U.S.C. § 2244 (1964), confers jurisdiction as to violations of the Constitution "or laws" of the United States, the courts have declined to grant the writ for nonconstitutional federal questions. See Townsend v. Sain, 372 U.S. 293, 312
Constitutional Collateral Estoppel

issues of fact concerning specific violations of constitutional rights.\textsuperscript{74} The habeas court is competent to examine and make determinations regarding the factual basis of such issues, but such issues are not necessarily dispositive of, and may be wholly unrelated to, the question of petitioner’s guilt or innocence. With respect to that question, the habeas court is in no better position to make a dispositive determination than is an appellate court.\textsuperscript{76}

C. Collateral Estoppel: Direct Appeal and Habeas Corpus

As defined in \textit{Ashe v. Swenson},\textsuperscript{70} collateral estoppel “means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future lawsuit.”\textsuperscript{77} As noted, collateral estoppel differs significantly from the traditional double jeopardy prohibition. The latter operates only to bar a retrial of the “same” offense.\textsuperscript{78} Collateral...
estoppel, on the other hand, may be raised as a defense where two separate and distinct offenses are involved, and bars only the relitigation of specific issues. This may, of course, in some cases prevent retrial as effectively as would double jeopardy.

In order to bar the relitigation of an issue of fact or the legal consequences of specific facts by collateral estoppel, the party asserting it as finding the defendant guilty on the "same evidence" on which a prior jury acquitted him. The difficulties with this test are that it permits successive prosecutions for what is arguably a single "act," e.g., the robbery of several individuals. Cf. Ashe v. Swenson, 397 U.S. 436 (1970). The opportunity for such multiple prosecutions has led to the proposal of a "same transaction" test which would in effect require the state to join all its claims against an individual for any one transaction in a single prosecution, and would bar any subsequent prosecution based on a charge arising out of the earlier "transaction." See Ashe v. Swenson, 397 U.S. 436, 448-60 (1970) (Brennan, J., concurring).

This would make the double jeopardy prohibition more analogous to the res judicata principle of bar and merger, which compels the parties to present all the issues arising out of a single "cause of action" in a single suit. See note 3 supra. However, the use of the "same transaction" test would also invite the difficulties encountered in determining what constitutes a single cause of action in a civil suit. See F. James, Civil Procedure 553-567 (1965); Cleary, Res Judicata Reexamined, 87 Yale L.J. 539 (1978); Schopflocher, What is a Single Cause of Action for the Purpose of the Doctrine of Res Judicata, 21 Ore. L. Rev. 319 (1942).


80. The difference between double jeopardy and collateral estoppel is illustrated by United States v. DeAngelo, 138 F.2d 465 (3rd Cir. 1943). Defendant was tried and acquitted of the volume of bank robbery, although several of his co-defendants were convicted of that offense at the same trial. Defendant was then brought to trial for conspiring with the others to commit the robbery and convicted. At the trial on the conspiracy charge, the government introduced evidence of his presence and participation in the robbery as part of its case for conspiracy. On appeal, the conviction was set aside and the case remanded for a new trial. The Third Circuit held that while the separate trial for conspiracy was not barred by double jeopardy since the offense was not the same for which defendant had been previously tried, the prior trial had fully determined the issues of defendant's presence at and participation in the actual robbery, and the government was therefore collaterally estopped from presenting these issues at the separate trial for conspiracy. Although the government was not precluded from successfully prosecuting for conspiracy by the decision in DeAngelo (if other evidence of conspiracy was available), collateral estoppel may prevent successful prosecution for separate offenses where the issue previously determined in defendant's favor is a necessary element of the second offense. See, e.g., Sealfon v. United States, 332 U.S. 575 (1948); Yates v. United States, 354 U.S. 298 (1957); United States v. Fusco, 427 F.2d 361 (7th Cir. 1970); State v. Cormier, 46 N.J. 494, 218 A.2d 158 (1966).

81. E.g., where the second prosecution is for the same offense as the first and the issue barred from the second prosecution is dispositive of guilt or innocence, as in Chambers v. Cox, 400 U.S. 870 (1970). The significance of this point is discussed pp. 1253-54 infra. In some cases, the effect of collateral estoppel may be broader than double jeopardy; see note 79 supra.

82. Collateral estoppel may apply to either an issue of fact or a determination of the legal consequences of certain facts. F. James, Civil Procedure 575-584 (1965). The distinction is discussed further at p. 1244 and note 107 infra.
Constitutional Collateral Estoppel

a defense has traditionally been required to show that: the precise issue in question was litigated by the present parties in a prior action; the issue was determined by the prior tribunal; and the determination of the issue was necessary to the disposition of the prior action. This usage has long been approved by the Supreme Court in criminal decisions prior to Ashe v. Swenson, and these were the criteria adopted in Ashe. The Ashe Court also indicated that these were the only criteria by which the applicability of the constitutional rule of collateral estoppel was to be tested, and that they were to be applied "not . . . with the hypertechnical approach of a 19th century pleading book, but with realism and rationality." This caveat was directed particularly at past use of the third criterion, the necessity of an issue's determination,

86. The first two criteria were explicitly articulated, note 77 supra, and the third criterion was implicit in the Court's reasoning that since the issue in question was the "single rationally conceivable issue in dispute," its determination was necessary to the jury's verdict, 397 U.S. 436, 443 (1970).
87. The common law rule of collateral estoppel is encrusted with a variety of additional requirements, and exceptions to these requirements which are recognized in varying degree by different states and have led to general confusion and disagreement regarding the application of collateral estoppel in criminal cases. One example is the requirement of mutuality of estoppel, a rule that neither party is bound unless both are bound. See 1 Freeman, Judgments § 428 (5th ed. 1929); F. James, Civil Procedure 585-603 (1965). This rule would require that a defendant in the Ashe situation, p. 1230 supra, would be able to raise collateral estoppel as a defense only if the state could also raise it to bar the defendant from disputing the issue of his identity where the prior trial had resulted in a conviction. Cf. United States v. Bower, 95 F. Supp. 19 (E.D. Tenn. 1951); People v. Mojado, 22 Cal. App. 2d 929, 70 P.2d 1015 (1937). There is a similar rule at common law, that non-parties to the prior litigation are not bound by collateral estoppel, subject to exceptions for vouches, bailors-bailies, successors in interest and privies. F. James, Civil Procedure, 585-595 (1965).
88. The confusion and inconsistencies resulting from the incorporation of such requirements into the criminal law is shown by the decisions collected in Annot., 9 A.L.R. 3d 203 (1966), and the current dissatisfaction with and discarding of such requirements in civil litigation are discussed in F. James, Civil Procedure 599-603 (1965) and Currie, Mutuality of Collateral Estoppel: Limits on the Bernhard Doctrine, 9 Stan. L. Rev. 521 (1957). Nevertheless, a recent Fifth Circuit decision has suggested the continued viability in criminal law of such requirement, mutuality of estoppel. Willard v. United States, 422 F.2d 810 (1970). Since non-parties are generally not bound by prior litigation, James Id., 585-603, this requirement would be particularly destructive of collateral estoppel in the habeas context. Technically, a prisoner's adversary on habeas is his custodian, usually the prison warden. Sorol, supra note 13, § 7. On retrial, however, the prisoner faces the prosecuting attorney. In Ashe, however, the Supreme Court quoted with approval the following statement from United States v. Kramer, 289 F.2d 909, 913 (9th Cir. 1961): "It is too late to suggest that [estoppel] is not fully applicable . . . in a criminal case . . . because of a lack of mutuality . . .
89. Id., at 444-45 n.9. The Court's language makes it clear, however, that the passage quoted applies generally to the use of collateral estoppel.
which has generally been subjected to a highly restrictive interpretation
that had frequently prevented the application of collateral estoppel.  

The rule of collateral estoppel, thus defined, is inapplicable to issues
decided by an appellate court. Collateral estoppel arises only with
respect to issues of fact or of the legal consequences of a given set of
facts but not as to pure issues of law. The issues submitted to an
appellate court are generally of the third category, issues of law (on
which its decision is binding on the lower court), to which collateral
estoppel does not apply.

It is true that an appellate court may decide, as a matter of law, that
specific factual evidence in the record is or is not sufficient to constitute
a necessary element of the case, for example, the voluntariness of a
confession or guilty plea, whether defendant's flight constituted prob-
able cause, or if police conduct established the defense of entrapment.
Such decisions would seem to fall within the second category above, to
which collateral estoppel traditionally has been held to apply. It is at
least arguable, therefore, that relitigation of such issues should be pre-
cluded from a retrial of the defendant. However, the same rationale
which precludes the operation of the Double Jeopardy Clause in the
appellate process is applicable in barring the use of collateral estoppel

90. For example, an acquittal on a charge of armed robbery may be based on the jury's
reasonable doubt that the defendant was armed, or that anything was robbed, or that
the defendant was involved at all. See State v. Barton, 5 Wash. 2d 234, 241, 105 P.2d 63,
67 (1940). In such situations, courts have frequently refused to allow the defendant the
benefit of collateral estoppel in a later trial, asserting that it was impossible to determine
what issues the jury “necessarily” decided in the defendant's favor. See Lugar, Criminal
Jeopardy, 75 YALE L.J. 262, 283-86 (1965). This difficulty could be diminished by the use
of special interrogatories to the jury which would require specification of findings, but it
is possible this “intrusion” into the jury's deliberations might distort the “dispensing”
or “nullifying” function of the jury, Note, Twice in Jeopardy, supra. See also F. JAMES,
CIVIL PROCEDURE § 7.15 (1965); Pound, Law in Books and Law in Action, 44 AMER. L. REV.
12, 18 (1910).

The rationale for resolving such doubts in favor of the state rather than the defendant
has never been articulated. One explanation would be that if the issue was resolved in
defendant's favor by a prior jury, it will presumably be similarly resolved by a subsequent
jury, and there is therefore no prejudice to the defendant; on the other hand, if the
issue was not resolved in the defendant's favor by the prior jury; there is a clear preju-
dice to the state in treating the issue as if it had been so resolved.

91. See note 82 supra.

92. These distinctions may be illustrated as follows: whether or not an individual was
apprehended by the police while running away from a store which had been robbed is a
question of fact; whether or not the facts of his flight constitute “probable cause for a
search” is a question of the legal consequences of a given set of facts; and whether or not
“probable cause for a search” is a prerequisite to the admissibility of evidence seized
from any defendant is a question of law.

93. F. JAMES, CIVIL PROCEDURE 383-84 (1965); Scott, Collateral Estoppel by Judgment, 56
HARV. L. REV. 1, 10 (1942); Note, Development in the Law—Res Judicata, 65 HARV. L.
REV. 818, 849-47 (1952). See also Commissioner of Internal Revenue v. Sunnen, 335 U.S.
591 (1949).

Constitutional Collateral Estoppel

as to this type of issue. The appellate court must make its decision on the basis of the record only. That record may be deficient in that it does not contain some of the available evidence on the issue in question, because of error by the trial court, or the conduct of counsel. Yet, the appellate court cannot hear such additional evidence in order to reach an informed decision. Thus, if collateral estoppel were applied and the appellate decision barred effective retrial, the appellate court would, on the basis of sheer speculation, be forced to choose between two alternatives: leaving a defendant in jail and freeing him unequivocally. The practice of remanding for retrial is an equitable compromise, since it allows the defendant a fair trial but permits the state to convict defendants who apparently are in fact guilty by introducing evidence which the state did not introduce before. Thus, the final disposition of the defendant's status is grounded on a full factual finding.

The habeas court, by contrast, has available to it all the evidence before the trial court on the issue in question, and the additional evidence, if any exists, which it was the purpose of the hearing to adduce. Clearly, the habeas court does not face the difficulty of making an inadequately informed decision, and the analogy of habeas corpus to direct appeal, although accurate for purposes of double jeopardy, is thus inapposite with respect to collateral estoppel.

It might nevertheless be argued that the differences between the trial process and habeas corpus preclude the application of collateral estoppel in the latter context. The principal differences between the trial and habeas processes are illustrated by Ashe v. Swenson: (1) in Ashe, the estoppel arose from a determination made by a jury, whereas on habeas the decision is made by the judge; (2) in Ashe, the estoppel arose pursuant to a general verdict of guilt, whereas on habeas the issue is not guilt or innocence but the legality of the custody.

However, it is clear from other decisions that the requirement of a "valid and final judgment" does not mean that a jury verdict is

95. See pp. 1238-39 supra.
96. See note 56 supra.
97. See note 57 supra.
98. I.e., by foreclosing an issue necessary to the state's case; see pp. 1235-36 and note 81 supra.
99. See p. 1292 supra.
100. See pp. 1238-39 supra.
101. See p. 1235 supra.
103. See note 77 supra. In other decisions the phrasing has varied. See, e.g., Frank v. Mangum, 237 U.S. 309, 333 (1915) (dictum): "a question of fact or law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed . . . ."
necessary to recognition of an estoppel where the issue in question has been determined by a court of competent jurisdiction. Indeed, in many cases, the issues cognizable on habeas are issues normally decided by a judge rather than a jury, as a procedural necessity (e.g., the admissibility of evidence), and in some instances (e.g., the voluntariness of a confession) this may be a constitutional requirement.

It is also clear that a general verdict of guilt or innocence (as in Ashe) is not a prerequisite for the application of collateral estoppel, since traditionally the "judgment" which creates the estoppel may be merely a finding of fact. For example, in United States v. Oppenheimer, which established the rule of collateral estoppel in federal criminal law, it was held that a decision by a trial judge that an action was, on the facts stated, barred by the statute of limitations precluded the bringing of the same action on amended pleadings which avoided the statute of limitations. Similarly, in Mulreed v. Kropp, the defendant pleaded guilty to unarmed robbery pursuant to an agreement by the state prosecutor not to prosecute for armed robbery. The conviction was later set aside and the defendant retried, but on the charge of armed robbery. Defendant sought federal habeas relief contesting that the first conviction depended upon an affirmative finding that the defendant was not armed. Under state law, the trial court which had accepted the plea of guilty to unarmed robbery was required to determine the factual basis for the plea. The issue, therefore, was whether the doctrine of res judicata applied to findings made pursuant to entering judgment on a guilty plea, as clearly it would have ap-

Moreover, the decision of a habeas court is a final judgment on the issue of illegal custody, and appealable as such—under FED. R. CIV. PRAC. 73. See Developments, supra note 15, at 1192-96.

104. See Frank v. Mangum, 237 U.S. 309 (1915); Green v. United States, 426 F.2d 651 (D.C. Cir. 1970) (defendant was tried on separate counts of robbery and unauthorized use of a motor vehicle. A mistrial was declared, and the judge directed a verdict of acquittal on the second count. At retrial of the single robbery count, the court ruled that the prosecution was collaterally estopped from introducing evidence relating to the theft of the automobile (which was used in the robbery) to show that defendant had stolen the car in order to commit the robbery). It is also well settled that a jury verdict is not required in order for double jeopardy to apply. See, e.g., Kepner v. United States, 195 U.S. 100, 128 (1904); Green v. United States, 355 U.S. 184, 188 (1957); accord, Wemyss v. Hopkins [1875] L.R. 10 Q.B. 378.


107. This is also another illustration of applying collateral estoppel to a determination of the legal consequences of a given set of facts. See note 82 supra.


110. Id., at 1102.

111. Id., at 1100-01.

112. Id., at 1100.
Constitutional Collateral Estoppel

plied to a jury verdict premised on identical findings. The Sixth Circuit held that it did, and that retrial on the armed robbery count was therefore impermissible. The determination made by the trial judge in Mulreed would appear to be indistinguishable from those made by habeas judges, for the purposes of collateral estoppel. In both situations, the issue is a narrow one of fact and the concomitant legal consequences; and in both situations the determination is that of a finding of fact made by the court rather than a jury verdict of acquittal. It would be inconsistent to extend res judicata to the findings of

113. E.g., if the defendant had been tried for armed robbery, and the jury returned a verdict of guilty of unarmed robbery. Cf. Green v. United States, 355 U.S. 184 (1957).

114. The recent Tenth Circuit decision in Ward v. Page, 424 F.2d 491 (1970) is apparently contra. There, defendant was charged with first degree murder and pleaded guilty to manslaughter. The conviction was set aside, and a retrial on the first degree murder charge was upheld by the Tenth Circuit, which stated, at 493: "The double jeopardy implications reverberating from a guilty plea and a jury verdict are not identical," and that a "guilty plea does not operate as an acquittal to all greater offenses."  

115. Similarly, in State v. Heitter, 203 A.2d 69 (Del. Sup. Ct. 1964), the rule of collateral estoppel was held to bar the relitigation by the state of defendant's drunken and reckless driving in a manslaughter case, where those issues had previously been determined favorably to defendant on misdemeanor charges before a Justice of the Peace.

Although the point is not elaborated in the Mulreed opinion, the Court appears to have rejected an interpretation of Tatco which would apply the Ball principle to collateral estoppel. See Mulreed v. Kropp, 425 F.2d 1095, 1101 (6th Cir. 1970).

116. As noted earlier, it is frequently difficult, in dealing with general verdicts of acquittal, to establish that the issue in question was "necessarily" determined because a jury might have proceeded on several alternative theories of acquittal. See pp. 1243-44 supra. There would be no such difficulty with respect to habeas, since the issues presented to the habeas court are specific claims of constitutional violations (see p. 1241 supra) and since the habeas court makes specific findings of fact and conclusions of law rather than general verdicts of guilt or innocence. See, e.g., Sokol, supra note 13, at 83-85 and the opinions cited in note 185 infra.

It is possible that the petition for relief will present several claims, each of which would alone justify relief, and the habeas court may rule favorably to the petitioner on more than one such claim. Sokol, id. In such a situation, it may be questioned whether a particular claim was "necessarily" determined. There is no reason, however, why all the determinations made by the habeas court as to claims raised by the petitioner should not be considered "necessary to the disposition of the petition." The function of the "necessity" requirement in applying collateral estoppel to issues cloaked by a general verdict is to insure that the issues were in fact determined; if the issue was not "necessary" to the verdict, it may not have been fully considered, or even considered at all, by the trier of fact. See F. James, Civil Procedure 582-83 (1965). The only issue obviously determined by a general verdict is that of guilt or innocence. By contrast, each determination by a habeas court is analogous to a verdict of "guilt or innocence" as to the specific claim in question. There is, therefore, no danger of treating as determined a claim which was not considered.

The relevance of the necessity criterion would, therefore, be limited to questions concerning determinations of the factual allegations made by the petitioner in support of his claimed denial of a constitutional right. It is possible, for example, that a habeas judge might on the evidence presented make findings of fact that several state police officers broke into defendants apartment, seized defendant and forcibly removed from him some obscene photographs (as in Mapp v. Ohio, 367 U.S. 43 (1961) and Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966)), and proceeded to beat him severely about the head and shoulders with their "batons" (Scres v. United States, 325 U.S. 91 (1946) (handcuffed prisoner beaten to death)), and reach the conclusion that the evidence was illegally obtained and therefore inadmissible. The state would be estopped from relitigating the admissibility of the evidence, but could relitigate the facts of the
III. The Consequences of Applying Collateral Estoppel to Habeas Corpus Decisions

The preceding sections have shown that the analogy between habeas corpus and direct appeal does not support the current state practice of relitigating issues decided by federal habeas courts. The present section will show that this practice serves no legitimate state interest, needlessly duplicates judicial effort, encourages the falsification of evidence by the state, irrationally delays a final determination of guilt or innocence, and frustrates the important policies underlying both the federal habeas structure and the constitutional guarantee of freedom from double jeopardy.

A. The Application of Collateral Estoppel to Habeas Corpus Would Implement Fundamental Federal Policies

Two fundamental federal policies would be served by the application of collateral estoppel to federal habeas corpus. The first is the "manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review." The purpose of federal habeas corpus is to provide

beating if a subsequent action were brought against the state, e.g. in tort, or for injunctive relief, cf. Lankford v. Gelston, supra, since the beating took place subsequent to the seizure and the question "beating vel non" was not necessary to the finding by the habeas court on the question of admissibility. This is analogous to the problem of deciding which issues were necessary to a general verdict and would therefore, on the infrequent occasions in which the situation arose, present no greater obstacle to the use of collateral estoppel than does a jury verdict.

A similar situation might arise where the parties proceed on stipulated facts. The rule of collateral estoppel would be applicable to determinations made on habeas both where an evidentiary hearing was held and where the parties declined such a hearing and proceeded on a stipulation that the trial record was adequate, as in Chambers v. Cox, 400 U.S. 870 (1970). Under traditional res judicata doctrine, facts stipulated are not themselves put in issue and may therefore be controverted in later proceedings. However, the legal consequences of those facts are in issue, and a determination of the consequences, e.g., the admissibility of evidence, becomes res judicata. F. James, supra note 83, at 578, 584. (This point does not embody an addition to the Ashe criteria, see p. 1243 supra, but rather a definition of those criteria, i.e., what constitutes an "issue in question"). Neither party need rely solely on the trial record, however; see note 15 supra. Again, such situations would appear to be rare.

117. See Section II-A supra.
118. Fay v. Noia, 372 U.S. 391, 424 (1963); see also Kaufman v. United States, 394 U.S. 217 (1969) (reaffirming Townsend and applying it to federal prisoners); Brown v. Allen, 344 U.S. 500 (1952); "Prior state determination of a claim under the United States Constitution cannot foreclose consideration of such a claim, else the state court

1248
Constitutional Collateral Estoppel

every defendant an effective means of asserting his constitutional rights. There are several interrelated considerations informing this policy which are frustrated when a binding effect is not given to the judgment of a federal habeas court. The first consideration is that the evaluation of constitutional claims may be more accurately performed within the federal judiciary than at the state level. This view assumes that while a federal judge may be no more competent than his state counterpart, he is more insulated from local pressures and continuing relationships. Moreover, the state judge may be inclined to give greater weight in his decisions to the substantive goals of the state criminal law and its undisrupted operation than to effectuating the constitutional mandates issued by the Supreme Court. A second reason for federal habeas review is to provide greater equality of protection to those prisoners whose convictions may be as erroneous, but not as constitutionally significant, as those reviewed on certiorari. In many instances, if federal habeas were not available, state prisoners would have no effective means at all of asserting their constitutional rights.

Yet, all of these policies are greatly undermined and the resources committed to their implementation inefficiently used due to the present practice of allowing the state to controvert the decisions of the federal habeas court by the introduction of additional evidence on

would have the final say which the Congress, by the Act of 1867, provided it should not have” (concurring opinion of Justice Frankfurter). For a criticism of this view of the 1867 Act, see Mayer, The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian, 33 U. Chi. L. Rev. 31 (1966); Oaks, Legal History in the High Court—Habeas Corpus, 65 Minn. L. Rev. 451 (1981). In Fay v. Noia, 372 U.S. 391, 402 (1963), the Court stated: “If the States withhold effective remedy, the federal courts have the power and duty to provide it.” See Bator supra note 4, at 510, 521; Amsterdam, Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial, 113 U. Pa. L. Rev. 793, 802-03 (1965) (“Justice is likely to be impeded by the provincialism of the local judge and jury, the tendency to favor one of their own against an outsider, and the machinations of the local 'court-house gang'”).

121. See Schaefer, supra note 4, at 7; and see especially Amsterdam, supra note 120, at 800, where the author concludes “[t]he processes of state criminal administration are designed to ignore or destroy . . . federal guarantees of civil liberty . . . .” See also Johnson v. Virginia, 373 U.S. 61 (1963) as an example of local pressure.

122. Bator, supra note 4 at 512-14.

123. See Bator supra note 4 at 521, referring to the “notorious inadequacies in the states' criminal procedures.” The need for federal remedies, if federal constitutional rights are to be protected, is illustrated by the case of Case v. Nebraska, 381 U.S. 335 (1965). There a state prisoner unsuccessfully sought state habeas relief on the ground he was denied counsel. The Nebraska Supreme Court recognized that the allegation, if true, clearly established a violation of the prisoner’s constitutional rights, but affirmed the denial of habeas on the ground that state habeas relief was not available if the sentencing court had proper jurisdiction. Following the granting of certiorari, Nebraska passed a statute providing for habeas hearings in such cases and the Supreme Court remanded. On the increasing availability of state relief, see note 126 infra.
retrial. It was clearly not the intent of either the Supreme Court or Congress to grant such an option to the states. Application of the rule of collateral estoppel to habeas decisions would compel the states to proceed in good faith and curb these abuses.

The second federal goal which would be served by the application of collateral estoppel to habeas proceedings is that of finality:

If tolerated, our federal system would afford fine opportunities for needlessly multiplying litigation. . . . The doctrine of res judicata reflects the refusal of law to tolerate needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion.

The above statement concerned civil litigation, but it is equally applicable to the criminal process. The doctrines of res judicata and double jeopardy both derive from a complex of values which society

124. One purpose of the Townsend hearings, see p. 1232 supra, is to insure that the federal habeas courts, and not the state courts, have the “final say.” See note 118 supra.
126. As the discussion at pp. 1256-60 infra indicates, there is no apparent reason why a state proceeding in good faith would not offer all its evidence on the issue before the habeas court. Thus, there is little concern that the coercive effect of the rule of collateral estoppel would pinch anyone undeservedly.

A significant concomitant of the federal habeas policy has been the Court’s concern with the effect of that policy on federal-state relations. See, e.g., Townsend v. Sain, 372 U.S. 293, 319 (1963), and that policy is currently under severe criticism (see, e.g., Newsweek, Feb. 1, 1970, at 12; Friendly, supra note 4). The inability of the states to effectively retry some successful habeas petitioners because of collateral estoppel may add to the present stress. Nevertheless, this consideration would not seem to outweigh the necessity for applying collateral estoppel to habeas corpus. Such criticism is not new. See, e.g., the concern over “the prostitution of the writ of habeas corpus, under which the decisions of the state courts are subjected to the superintendence of the federal judges,” in Federal Abuses of the Writ of Habeas Corpus, 25 Am. L. Rev. 149, 153 (1891). And see also the comments of the Court in In re Bonner, 151 U.S. 242 (1894); more recently, the attorneys-general of 41 states sought to have the federal habeas statute declared unconstitutional as it applied to state prisoners. See United States ex rel. Elliott v. Hendricks, 213 F.2d 922 (3d Cir. 1954), cert. denied, 348 U.S. 851 (1954); and the Judicial Conference of the United States has proposed effective repeal of the statute (28 U.S.C. § 2254) in Annual Report of the Judicial Conference of the United States 25 (1954). The conference in later years modified its position; see 1959 Annual Report 513; 1965 Annual Report 83-4, and with the states increasingly establishing adequate procedures to safeguard rights guaranteed by the Federal Constitution, it should lessen with the decreased need for federal habeas relief. Georgia, for example, has recently enacted procedures which largely duplicate the federal habeas structure. Habeas Corpus Act of 1967, Ga. Code Ann. § 50-127 (Supp. 1970). See also Ohio Rev. Code Ann., §§ 2953, 21-24 (1970 Supp.); Minn. Stat. Ann., § 596.01 (1970 Supp.). In some states the change has been affected by Court rule, see, e.g., Missouri Supreme Court Rule 27.26. The possible ways by which a state trial judge may insure an adequate record so as to preclude any need for relitigation on habeas are discussed in McAdoo, The Impact of Federal Habeas Corpus on State Trial Procedures, 52 Va. L. Rev. 286, 293-300 (1966).

Indeed, applying the rule of collateral estoppel may add to the impetus to improve state procedures as did the decisions which created the present habeas structure.

Constitutional Collateral Estoppel

places on finality in the legal process. Although the expression of these
finality values assumes different forms, it is a commonplace that:

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 com-
pelling him to live in a continuing state of anxiety and inse-

The present state practice of relitigating issues decided on habeas
permits just such “repeated attempts” and is particularly repugnant to
these basic values since it represents the suspension of finality at the
discretion of the prosecutor, an abuse which has not been previously
tolerated.

The constitutional rule of collateral estoppel enunciated in Ashe was
clearly intended to protect the finality values inherent in the prohibi-
tion against double jeopardy. Ashe presented the situation of a
defendant, being forced to “run the gantlet a second time,” when
the issue in question had previously been determined in his favor and
the Court held this impermissible.

Traditionally, of course, some limits have been placed on the pro-
tection afforded by the prohibition against double jeopardy. The Ball and Tateo decisions are examples, and the prohibition has been held
inoperative in cases involving a disqualified juror, the death of the

129. See, e.g., J. Stigler, Double Jeopardy, 156 (1969) (“avoidance of unnecessary
harassment, the avoidance of social stigma, the economy of time and money, and the
interest in psychological security”).
131. This discretion is exercised not only in the decision whether to reprosecute, but
also in the previous decision of whether to fully participate in the habeas hearing.
132. See p. 1252 infra.
133. The point that collateral estoppel protects the same values as the double
jeopardy prohibition was recognized prior to the Ashe decision, in United States v. Rach-
mil, 270 F. 869, 871 (S.D.N.Y. 1921):
Upon a trial of the present indictment, the issue as to whether the return filed
was false and fraudulent, would be a fundamental proposition. That issue was
involved in the previous trial [where defendant was acquitted of conspiracy charges
involving the same substantive offense], and to permit it to be litigated again would
come so close to an encroachment upon the constitutional rights of the defen-
dants as to warrant me to quash the present indictment.
134. See p. 1256 supra.
135. The same point is reflected in several state decisions, e.g., People v. Cunningham,
62 Misc. 2d 515, 308 N.Y.S.2d 990 (Sup. Ct. Kings County 1970) (noting that collateral
estoppel can play a critical role in protecting defendants from harassment when double
jeopardy is inapplicable).
136. See p. 1256 supra.
trial judge, there is one basis on which the courts have consistently refused to limit that prohibition, however, and that is the prosecutor's discretion:

To admit the exercise of discretion on such grounds would be to throw open the door for the indulgence of caprice and partiality.

The reason is plain: it is the prosecutor against whom the double jeopardy prohibition is intended to operate.

It has been said that "the prosecutor has more control over life, liberty, and reputation than any other person in America," and the danger of abuse of prosecutorial discretion is well-recognized. To give this official a discretionary power to suspend the double jeopardy prohibition subverts the complex of finality values which underlie that prohibition. Yet, it is precisely such discretion which the prosecutor can presently exercise with respect to the issues decided by federal habeas courts. Under present practice, the prosecutor can decide to what extent he will participate in the habeas hearing, or perhaps whether he will participate at all; and he retains the option of whether to treat the decision of the habeas court as final. This is only ostensible justice.

B. The Proposed Application of Collateral Estoppel Would Not Prejudice Legitimate State Interests

Although the proposed application of collateral estoppel to habeas decisions would serve important federal policies, a necessary consideration is whether any state interest would be harmed.

140. United States v. Watson, 28 F. Cas. 499, 500-01 (1868); see also Downum v. United States, 332 U.S. 734, 736 (1968).
141. "[D]ouble jeopardy is ... a principle employed by the state to control one of its own officials in the interest of a greater community concern ... ." J. Stigler, DOUBLE JEOPARDY, 155 (1969).
144. Although there is no reported case on this point, there is apparently no present bar to the prosecutor's "defaulting" at the habeas hearing and nevertheless relitigating the very issues before the habeas court upon retrial of the defendant in a state court. Presumably, the habeas judge would not stay the order of release in such a case, but there is nothing to prevent the prosecutor from having the prisoner re-arrested upon his release from custody.
145. See Kafka, supra p. 1229.
Constitutional Collateral Estoppel

1. Possible Prejudice to the State from Petitioner's Delay in Seeking Relief

One possible source of prejudice to the state is the fact that habeas relief may be sought at any time during the petitioner's stay in custody.\(^{146}\) Thus, if the prisoner should delay seeking relief, the practical difficulties of reassembling the evidence may prevent the state from attempting a retrial, or even effectively contesting the habeas petition.\(^{147}\) The difficulty seems more apparent than real, however, since presumably prisoners will seek their release at the earliest opportunity. Moreover, in those cases of delay calculated to disable the state from either sustaining its case or showing the error to be harmless, the state may invoke the doctrine of laches.\(^{148}\) Laches has been successfully raised by the state where, for example, the petitioner waited eighteen years after his conviction before seeking habeas relief.\(^ {149}\)

More to the point, however, is the fact that the difficulties which arise from delay are at least equally attendant upon any subsequent state relitigation of the habeas court's determination. Thus, in such cases, the only effect of adopting the rule of collateral estoppel would be to prevent the state from trying to prove on retrial that which, ex hypothesi, it could not prove at the habeas hearing.\(^ {150}\)

2. Possible Prejudice to the State if Prevented from Retrying Effectively Successful Habeas Petitioners

Although the foreclosure of issues by collateral estoppel will not result in every successful habeas petitioner being "granted immunity from punishment," effective retrial will be precluded where the issue determined unfavorably to the state is vital to its case.\(^ {151}\) Thus, the

\(^{148}\) Laches is a doctrine, also known as the doctrine of stale demand, by which equitable relief is denied to one who has been guilty of such delay, neglect or omission in asserting a right as to unfairly prejudice an adverse party. See Annot., 34 A.L.R. 2d 1314 (1954). Although laches is an equitable doctrine, and habeas a legal remedy, Sokol, supra note 13, at 4, the Supreme Court has recently indicated that equitable principles may govern habeas relief: "A suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." Sanders v. United States, 373 U.S. 1, 17 (1963).
\(^{150}\) These objections are properly addressed to the policy of empowering federal habeas courts to reopen prior state adjudications, and have in fact been frequently so used. See articles cited in note 4 supra.
\(^{151}\) See Chambers v. Cox, 400 U.S. 870 (1970). Clearly, the potential for effective im-
states will find it necessary to release some portion of the prisoners who would be retried and reconvicted under present practice.

However, any objection on this basis to the proposed application of collateral estoppel to habeas corpus is misdirected, since collateral estoppel is a procedural rule and does not embody any substantive constitutional doctrine. The rule of collateral estoppel in and of itself only bars the relitigation; it does not address the question of whether an accused should be allowed to go free when the only evidence against him was seized in violation of his constitutional rights. The answer to this question flows from the decision that an accused may be convicted only upon the evidence presented at his trial, and the decision that evidence illegally obtained may not be so presented. It is therefore misleading to say with respect to those cases where the state is barred from relitigating a critical issue that the prisoner is set free because of the rule of collateral estoppel. Collateral estoppel does not alter the accommodation of competing interests and policies reached in the substantive criminal law but instead implements whatever accommodation exists.

munity by habeas relief, but not by appellate relief, might lead to greater use of the habeas process by prisoners. However, the increased burden on federal habeas courts, although it would be offset with respect to the load on the federal judiciary as a whole by the decreased work-load of federal appellate courts, might lead to a tendency in some federal judges to "broaden" the concept of harmless error, particularly in those instances where petitioner's guilt was patent. Cf. the views of Judge Friendly, note 4 supra. To the extent that states begin to provide adequate procedures, see note 126 supra, and thus lessen the number of hearings necessary, this difficulty would be avoided. In any event, the federal judiciary remains a better prospect for the protection of constitutional rights than present state procedures, as discussed p. 1249 supra.

152. This is also true where the issue as to which collateral estoppel operates is the voluntariness of a confession. Miranda v. Arizona, 384 U.S. 436 (1966); McNabb v. United States, 318 U.S. 332 (1943); Mallory v. United States, 354 U.S. 449 (1957), or racial dis. crimination in jury selections, note 165 infra.

153. That is, the application of collateral estoppel would be equally consistent with a criminal process considerably less favorable to the accused than presently exists, such as the "Crime Control Model" of Professor Packer, in The Limits of the Criminal Sanction 149-249 (1968), or with a requirement that the habeas petitioner present a "colorable claim of innocence" as advocated by Judge Friendly supra note 3, and Justice Black in Kaufman v. United States, 394 U.S. 217, 225-226, 232 (1969) (dissenting opinion). Collateral estoppel does not alter but merely implements whatever underlying values inform the criminal process. Thus, recognition of collateral estoppel in the habeas context is entirely consistent with United States v. Tateo, 377 U.S. 465, 466 (1964) (see note 50 supra). That decision cannot be read as repudiating the accommodation of interests within the criminal process represented by the decisions with respect to search and seizure, or confessions. On the contrary, the court recognized in Tateo that the existing accommodation would be distorted by forcing either an appellate court (which lacked the necessary information) or a habeas court (which did not have cognizance of all the relevant issues) to make a final choice between acquittal and conviction.
Constitutional Collateral Estoppel

3. Possible Prejudice to the State Arising from its Inability to Present a Full Case and Seek Appellate Review

In a federal habeas proceeding, the state has the opportunity to remedy any defects in its case on the issue before the court by presenting additional evidence not contained in the trial record.154 Indeed, the state's task may be less formidable on habeas than at a criminal trial. The level of proof required is a preponderance of the evidence, rather than "beyond a reasonable doubt,"155 and the petitioner has the initial burden of establishing a prima facie case that his rights were violated.156 The state thus is afforded two opportunities (at the original trial and at the habeas hearing) to meet the constitutional standard, and no legitimate interest would be served by allowing it a third.157

The doctrine of "harmless error"159 further reduces any possible prejudice to the state's interests, since even if the petitioner's claim of constitutional error is sustained, the state may "save" the conviction by showing that the error was harmless, and therefore does not affect the legality of the custody.160 Finally, the habeas court's decision is subject to appellate review.161

154. Townsend v. Sain, 372 U.S. 293, 322 (1963). ("The State must be given the opportunity to present other testimonial and documentary evidence relevant to the disputed issues."). See also United States ex rel. Mitchell v. Follette, 358 F.2d 922 (2nd Cir. 1966) (error to order habeas petitioner's release without allowing state to offer evidence relevant to issue of denial of counsel).

155. This would not be true, of course, where the lesser standard had been applied at the original trial. Cf. notes 56-57 supra.

156. See p. 1240 supra.

157. Possible state abuse of the retrial process is discussed at pp. 1256-60 infra.

158. The rule would presumably bar any reopening of the issue by the state, whether it had considered available but not offered or later discovered new evidence. This rule would merely produce the same result as would occur at trial if the evidence on the issue were insufficient and an acquittal resulted. The prisoner, on the other hand, would presumably be entitled to reopen an issue on the basis, e.g., of new evidence, as he now can under Townsend v. Sain, 372 U.S. 293 (1963) (see p. 1232 supra), and under 28 U.S.C. § 2244 (1964). As the New Jersey Supreme Court stated in a recent unanimous opinion: "The State's resources are sufficient to enable it to prepare and present its case thoroughly [at the first trial]." State v. Cormier, 46 N.J. 494, 509, 218 A.2d 138, 146 (1966). Cf. Downum v. United States, 372 U.S. 734 (1963).

159. The application of this doctrine as enunciated in Chapman v. California, 386 U.S. 18 (1967), and Harrington v. California, 395 U.S. 250 (1969) to habeas corpus is discussed in Note, Harmless Constitutional Error: A Reappraisal, 83 Harv. L. Rev. 814 (1970). The doctrine of harmless error would presumably be of little use where the issue was critical to the state's case, save in marginal situations. However, the state might not be precluded from reexercising for a lesser offense, e.g., where a confession as to the sale of narcotics was ruled inadmissible, but the narcotics themselves admissible so that a charge of possession could be sustained. Further, the view that a "colorable claim of innocence" ought to be a prerequisite to successful habeas attack, see note 71 supra, may result in a widening of the scope of "harmless error" to the extent that the issue is vital if there is much evidence of petitioner's guilt.


4. Possible Prejudice to the State if Barred from Relitigating Habeas Decisions

The dispositive issue with respect to state interests in the efficient administration of criminal justice is whether there is any state interest which requires not recognizing the finality of habeas decisions. If the state has no such interest, applying collateral estoppel to habeas decisions would clearly make more efficient use of judicial resources, since whether or not the state chooses to retry the prisoner, there is no reason to expend additional resources in relitigating the issue which was decided by the habeas court.

Clearly, the state cannot retry an issue on the same evidence presented to the habeas court and obtain an opposite result.162 The state's successful relitigation of such an issue depends, therefore, upon the introduction of additional evidence on retrial. Such evidence must have been available to the state at the time of the habeas hearing, but not offered at that hearing, or have been discovered by the state between the time of the hearing and the second trial. A third possibility is that the state may fabricate evidence to cure the defects in its case.

Where the state is at the time of the habeas hearing in possession of evidence not offered at the original trial, there are two rational motives for not offering the evidence at the habeas hearing. The first is essentially economic; the state may conclude that the costs163 of fully contesting every petition for habeas which reaches the hearing stage are greater than the costs of retrying the substantially lesser164 number of cases in which the petitioner succeeds. This is particularly so in those situations where the trial record offers at least a semblance of support for the constitutionality of the state's conduct, and where the infirmity, if shown, may be arguably harmless error.165 There are no objections to the state exercising its discretion (i.e., to present less than its strongest case), but there are convincing reasons for preventing the state from later changing its mind and avoiding the consequences of its first choice by relitigating the issue and introducing the previously withheld evidence. First, this practice disregards completely the burden and expense placed on the individual who succeeds on habeas and then must on retrial meet not only the state's additional evidence on the specific

162. See note 3 supra (statement by Brandeis, J.); cf. note 118 supra.
163. E.g., the physical preparation of the case; presentation of witnesses, especially police officers who must be removed from duty; the prosecutor's time; possible travel time and expense.
164. See note 22 supra.
165. See note 160 supra.
Constitutional Collateral Estoppel

issue decided on habeas, but must repeat the entire presentation of his case on the original offense. When the state is a party-defendant in a civil suit, it has no discretion to impose such a burden on a successful plaintiff, and it would be anomalous to permit such discretion following a habeas corpus action.\textsuperscript{166} Second, allowing the state to “change its mind” and introduce additional evidence against petitioner at a later state trial treats lightly the role of the federal judiciary because the habeas hearing is viewed as a form of “post-trial preliminary hearing” in which the state has a \textit{non-binding option} of participating to an extent determined by a consideration of state resources, rather than by considerations of federal policy.\textsuperscript{167} Finally, the practice of permitting the state to introduce at retrial evidence withheld at an earlier habeas hearing only compounds the injustice already perpetrated on the individual who obtains habeas relief since it is predicated on the following elements: the state violated the constitutional rights of the accused in the first instance;\textsuperscript{168} the state failed to provide an adequate remedy for that violation;\textsuperscript{169} the state chose not to make use of the federal judicial resources available in such cases\textsuperscript{170} and the state then decided to subject the accused to the entire process all over again.\textsuperscript{171}

The second reason why a state may choose to withhold evidence from the habeas court is the belief that a more favorable ruling will be obtained from a state court on subsequent retrial. Such a ruling might result either through the state trial court’s interpretation of the constitutional provision in question,\textsuperscript{172} or the state court’s giving greater weight to the evidence in question.\textsuperscript{173} The arguments against permitting state relitigation of habeas decisions under this rationale are conclusive. The state’s conduct in withholding evidence from the habeas court in hopes of obtaining a more favorable outcome in a state forum

\textsuperscript{166} See United States v. Oppenheimer, 242 U.S. 85, 87-8 (1916).
\textsuperscript{167} It is possible that some increase in the workload of the federal judiciary would result from applying collateral estoppel to habeas proceedings, since states may be less likely to rely on a stipulation that the trial record is accurate. However, there should be a slight reduction in the state burden on retrial. Moreover, the federal burden was clearly countenanced by the Court, and Congress, in providing for mandatory hearings. Further, continuing improvement in state procedures may obviate the need for federal habeas corpus; see notes 126, 151 supra.
\textsuperscript{168} Federal habeas jurisdiction extends only to alleged violation of constitutional rights; see note 73 supra.
\textsuperscript{169} The federal habeas hearing is premised on the inadequacy of state proceedings; see note 20 supra.
\textsuperscript{170} The state may offer evidence both on the issues in dispute, the harmless nature of any error, and assert laches; see notes 148, 149, 154, 155 supra.
\textsuperscript{172} See p. 1249 supra.
\textsuperscript{173} See p. 1249 supra, p. 1259 infra.
at best reflects an intent to harass the accused by forcing him to "run the gantlet" again, and at worst suggests a conspiracy to prevent the accused from obtaining effective redress for the constitutional violations which render his custody unlawful. In either case, such conduct is objectionable for the same reasons adduced with respect to the prior rationale, and there is here the added element of an impermissible motive.

It is possible that the additional evidence offered by the state on retrial was not previously withheld, but was discovered subsequent to the habeas hearing. Although the state's motives may not be questionable in such cases, there are nevertheless compelling reasons for not permitting the relitigation of issues on this basis.

First is the policy underlying the prohibition against double jeopardy; the very purpose of that prohibition is to insure the protection of the individual from the oppressive burden of successive trials. The principle applies with equal logic to both the reopening of the case and to the reopening of any issue within that case. While the constitutional safeguard may be displaced in a particular context by other considerations, the mere fact that the state later finds evidence which might have, or even clearly would have, resulted in a conviction at the first trial has never been considered adequate justification for permitting a second trial.

Second, on a more practical level, the recognition of an exception to the rule against relitigating issues on the basis of newly discovered evidence would present an unacceptable risk of abuse. The lapse of time between the original investigation (or trial) and the habeas hearing may be considerable; conversely, the delay between the habeas hearing and any retrial is normally slight, generally thirty to sixty days. The state would therefore have only a relatively short time to discover new evidence concerning a relatively old transaction. However, the possibility that such evidence could be presented (if a distinction were recognized between "newly discovered" and "withheld" evidence) might create a tendency in prosecutors to withhold evidence, for the reasons

176. See p. 1257 supra.
177. See p. 1251 supra.
178. See pp. 1257-61 supra.
180. See p. 1253 supra.
181. Sokol, supra note 13, at 84.
Constitutional Collateral Estoppel discussed earlier, with the intention to use it later since it could not be distinguished from "newly discovered" evidence.

As noted, a third possible explanation for evidence not offered on habeas but available at retrial is that it was fabricated in the interim. It is impossible to ascertain the incidence of such fabrication, since it may vary in form from outright perjury to a more subtle "suggestive reinforcement" of a witness' recollection. Evidence relating to an issue such as probable cause or the voluntariness of a confession is particularly susceptible of fabrication and difficult to disprove. The risk of such evidence being injected into the judicial process is clear.

182. See, e.g., Mooney v. Holohan, 294 U.S. 103 (1935) ("deliberate deception of court and jury by presentation of testimony known to be perjured"); Napue v. Illinois, 360 U.S. 264 (1959) (prosecutor's knowing use of perjury); Curran v. Delaware, 229 F.2d 707 (3rd Cir. 1955) (defendants made several statements to police; police destroyed all but one, and testified that it was the only statement which defendants had made); cf. Alciotta v. Texas, 368 U.S. 22 (1962) (inadmissible suppression of testimony by prosecutor); see generally Annot., 2 L.Ed. 2d 1575 (1964); E. Borchard, Convicting the Innocent (1932).

183. A striking illustration is provided by the case of Miller v. Pate, 386 U.S. 1 (1967), where a police chemist testified, with the prosecutor's knowledge, that the stains on a pair of undershorts found in a barn near the scene of the crime and alleged to belong to the defendant were of the same blood type as that of the rape victim. In fact, as a later investigation showed, and as was admitted by the state on appeal, the stains were red paint. The police were aware that the stains were paint, and had prepared a written memorandum to that effect, of which the prosecutor was aware. Where the evidence consists of testimony rather than physical objects, such fabrication may be difficult, if not impossible, to detect.


Six weeks later the petitioner was brought to trial again. . . . The witnesses were for the most part the same, though this time their testimony was substantially stronger on the issue of the petitioner's identity. For example, two witnesses who at the first trial had been wholly unable to identify the petitioner as one of the robbers, now testified that his features, size, and mannerisms matched those of one of their assailants. Another witness who before had identified the petitioner only by his size and actions now also remembered him by the unusual sound of his voice. . . .

185. See, e.g., Chambers v. Cox, 400 U.S. 870 (1970). In this case, the testimony on record at the first (state) trial was to the effect that "the police officers did not know Chambers either by sight, name or reputation; that they did not have any description of any person who might be bringing narcotics to the apartment; that no narcotics had been found in the apartment prior to Chambers' entry; . . . and that no actions occurred in the presence of the officers to indicate that Chambers had committed or was in the process of committing any crime whatsoever . . . [The] residence did not belong to Chambers nor was he residing there temporarily." Chambers v. Cox, Civil Action No. 5154, at 2-3 (E.D. Va. Feb. 16, 1968) (memo. opinion).

On (state) retrial, the record contained testimony on the basis of which the evidence was admitted, that "the [same] police officers had the word of two reliable informants that a man known as Porky Pig . . . would deliver narcotics to the apartment . . . [and] the man who entered the . . . apartment during the search had, on a prior date, been pointed out to Detective Doe . . . as being the man known as Porky Pig . . . Detective Doe recognized the man who came into the . . . apartment as the man identified to him." Chambers v. Cox, Civil Action No. 5154, at 2-3 (E.D. Va. May 12, 1969) (memo. opinion).

186. See notes 182-83 supra. The harm resulting from the use of such evidence may seem tempered by the appearance of guilt in fact, as in Chambers v. Cox, but the same risk exists where the issue is one of police coercion, or racial discrimination in jury selection. The protection of collateral estoppel cannot be selectively applied on the basis of a subjective evaluation of the petitioner's guilt.
A federal habeas court is not necessarily in a better position to guard against such fabrication than a state court, but it is at least arguable that prohibiting the relitigation of issues decided on habeas would lead to some reduction in the incidence of fabricated evidence. Under current procedures, a prosecutor may await the results of the habeas court to see just which issues, if any, need bolstering. If collateral estoppel prevents such bolstering, a prosecutor will have to either offer the fabricated evidence at the habeas hearing, or at the original state trial. Offering such evidence at the habeas hearing may be less successful (than at retrial) because the federal judiciary is to some extent less susceptible to local pressures than are state trial judges and because it will be impossible to ascertain in advance what issues the state must bolster. This relative insulation may make federal judges less likely to be receptive to questionable evidence than state trial judges who may be anxious not to appear to favor the defendant by making evidentiary rulings which impair the state’s case.

The other alternative open to the prosecutor is to offer the evidence at the original trial. However, at this point, a prosecutor will not know which issues (or even which defendants) will be questioned on habeas, and therefore the prosecutor would have to “cover” all the possible issues on which all the potential habeas petitioners might prevail. This would require a substantial commitment to a policy of fabrication, whereas the present procedure presents only an occasional temptation to “save” a conviction by filling in a clearly defined gap. Thus, restructuring the process to force the prosecutor to offer such evidence “in the dark” or before the habeas court may result in less of this kind of evidence being received in the judicial process.

In sum, none of the three possible explanations for the state’s introduction at retrial of evidence not offered in a prior habeas hearing provide a sound basis for permitting the relitigation of issues decided on habeas.

187. See p. 1249 supra.
188. But see note 185 supra.
189. This is true unless it is also assumed that prosecutors as a class are incredibly energetic and wholly dishonest rather than reasonably competent but occasionally weak-willed; in which case it makes little difference.
190. As the Supreme Court stated in Ashe:
No doubt the prosecutor felt the state had a provable case on the first charge, and, when he lost, he did what every good attorney would do—he refined his presentation in light of the turn of events at the first trial. But this is precisely what the constitutional guarantee [of freedom from double jeopardy] forbids.