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I. INTRODUCTION

Few matters of criminal jurisprudence trigger so many diverse visceral reactions as the use in a trial of evidence of a defendant's criminal background. Persuasive arguments have supported the proposition

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that a criminal defendant's record ought to be available both to a trier of fact and to a sentencing judge so that the general character of the man on trial can be evaluated in light of the charge. At least equally persuasive, however, are the arguments that are being heard with increasing frequency that an unrelated prior offense has no legitimate place in the methodology of proof of a specific offense in a criminal trial and that evidence of a previous crime is so prejudicial that it makes a fair trial on the present charge all but impossible.

Of even greater interest to the legal profession is the variety of constitutional protections upon which the use of prior crimes evidence might also impinge. Those constitutional provisions and related concepts of near constitutional stature are surprisingly varied as revealed by recent decisions. The evidentiary rules traditionally relied upon for admitting or excluding evidence of prior offenses have been found to be mechanical, vulnerable and subject to great potential for abuse. In any given case the defense can muster a series of precedents supporting the argument that the prior crime in question is too prejudicial and unrelated to permit its use as evidence. But the prosecution, too, can always find precedents that provide at least an evidentiary basis for admitting even the most highly prejudicial evidence of prior offenses. The result of such ambivalent rules of evidence is that they seem to have failed to generate uniform support for any single set of criteria by which to evaluate prior offenses evidence. The extremes—complete admissibility or complete exclusion—have little support from the courts, but both have been advocated by factions of the Advisory Committee drafting the proposed Federal Rules of Evidence.[1] Current decisions reveal serious divisiveness over such basic questions as whether the starting point should be an exclusionary rule, and whether the evidence of an unrelated prior crime can be used to prove an element of the offense, including even the corpus delicti of a murder charge.[2]

The appellate courts, reacting strongly to the introduction of prior crimes evidence in a case, have turned increasingly to constitutional considerations in fashioning a resolution. Rarely today do courts base their decisions as to the admissibility of prior crimes evidence on mechanical rules of recentness, similarity to the charge or relationship to credibility. Instead, decisions are frequently based upon the fifth amendment due process clause,[3] a state constitution's guarantee of a right to testify,[4]

1. Proposed Fed. R. Evid. 609 (Advisory Comm. Notes).

2. United States v. Woods, 484 F.2d 127 (4th Cir. 1973) (Widener, J., dissenting). The court held that "proof of the incidents involving other children was admissible to prove the corpus delicti of murder and other acts of child abuse." *Id.* at 136. However, when a prosecutor uses a prior conviction of a defendant, not solely for impeachment, but for substantive purposes, some courts may require exclusion. *See, e.g.*, People v. Russell, 266 N.Y. 147, 194 N.E. 65 (1934); People v. Moore, 20 App. Div. 2d 817, 248 N.Y.S.2d 739 (1964).

3. United States v. Burkhart, 458 F.2d 201 (10th Cir. 1972).

4. State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1972) [hereinafter referred to as *Santiago*].

the sixth amendment right to effective assistance of counsel,[5] the fifth amendment double jeopardy clause,[6] and the prohibition against ex post facto laws.[7] In short, a body of constitutional doctrine concerning the use of prior offenses evidence is in the making. That network of constitutional decisions will very likely form the basis for increasing consideration of the constitutional limits of the use of prior offenses evidence.

II. Due Process and Fair Trial

The most obvious constitutional provision touched by allowing a jury to hear evidence that the defendant committed a prior crime is the right to a fair trial guaranteed by the fifth amendment due process clause. Prejudicial matters that are not clearly relevant to some genuine issue in the trial are not admissible under rules of evidence and are barred by the due process clause if their impact is sufficient to deprive the defendant of a fair trial on the charge for which he stands indicted.[8]

Evidence of an unrelated crime can turn the most fair-minded juror completely and irretrievably against the defendant. Many eminent jurists acknowledge that evidence of prior crimes is so prejudicial that cautionary limiting instructions should immediately be given,[9] yet they also realize the ineffectiveness of such instructions.[10] The possibility of such general prejudice is the most likely result of prior crimes evidence, yet, it is the most difficult to detect, articulate or demonstrate on appeal. As a result, appellate claims that evidence of one or more prior crimes generally prejudiced the jury against the defendant to an intolerable degree seldom meet with success.[11] Instead, the more successful appellate attacks on the use of prior crimes evidence have been those that focus on some specific issue, feature or constitutional right of the defendant.

III. The Right to Testify

Prior convictions have historically been admissible into evidence under so-called "vehicle rules" for three purposes: First, to impeach a testifying defendant's credibility;[12] second, to show a similar offense to

5. Loper v. Beto, 405 U.S. 473 (1972); Gideon v. Wainwright, 372 U.S. 335 (1969).

6. Wingate v. Wainwright, 464 F.2d 209 (5th Cir. 1972).

7. United States v. Henson, 486 F.2d 1292 (D.C. Cir. 1973) (en banc).

8. Lane v. Warden, 320 F.2d 179 (4th Cir. 1963).

9. United States v. Henson, 486 F.2d 1292 (D.C. Cir. 1973) (Bazelon, J., concurring).

10. As Justice Jackson observed in Krulewitch v. United States: "The naive assumption that pre-judicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." 336 U.S. 440, 453 (1949) (concurring opinion). The similarity of the prior offense to the one in issue is perhaps the principal feature which will prevent jurors from conscientiously following curative instructions or instructions limiting the use of the evidence to some specific issue such as credibility or identity. United States v. Bailey, 426 F.2d 1236, 1240 (D.C. Cir. 1970); *see* United States v. Hildreth, 387 F.2d 328, 329 (4th Cir. 1967).

11. *See* United States v. Woods, 484 F.2d 127 (4th Cir. 1973); United States v. Baldivid, 465 F.2d 1277 (4th Cir. 1972); United States v. Mastrotatoro, 455 F.2d 802 (4th Cir. 1972).

12. Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965).

evidence handiwork or a common pattern that is uniquely the defendant's;[13] and third, to disclose a prior conviction as a test of the knowledge and constancy of a character witness.[14] Formerly all three[15] were evaluated largely by similar evidentiary criteria. But since courts have begun to evaluate the impact of such evidence on a defendant's constitutional rights, differing rules have resulted to govern the three different situations.

A. *Impeaching the Defendant's Credibility*

The first of these three bases for admitting evidence of a prior crime has led to the formulation of the constitutional concept of an accused's right to testify in his own behalf. In *State v. Santiago*,[16] the Supreme Court of Hawaii recently recognized that the threat of impeachment by evidence of a prior conviction often prevents a defendant from taking the stand to testify in his own defense. That court ruled that the

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13. United States v. Mastrotatoro, 455 F.2d 802 (4th Cir. 1972); United States v. Bobbitt, 450 F.2d 685 (D.C. Cir. 1971). In United States v. Woods, 484 F.2d 127 (4th Cir. 1973), the court acknowledged that the other offenses did not seem to fit under the

> scheme or continuing plan exception because there was no evidence that defendant engaged in any scheme or plan, or, if so, the objective or motive. The evidence may have been admissible under the lack of accident exception, although ordinarily that exception is invoked only where an accused admits that he did the acts charged but denies the intent necessary to constitute a crime, or contends that he did the acts accidentally.

Id. at 134.

The court did conclude that the evidence would be admissible under the "accident" and "signature" exceptions, but preferred to place its decision on the broader ground that such evidence should not have to comply with an exception but should be presumed to be admissible unless it is offered purely for the purpose of showing a propensity to wrongdoing.

14. Michelson v. United States, 335 U.S. 469 (1948).

15. There are, of course, more than three reasons why evidence of another uncharged crime may be admissible. For example, a tax evasion charge may reveal evidence of an unreported bribe or unreported stolen funds. Such "res gestae" evidence that is intimately related to the proof of the indicted offense is materially different from the peripheral evidence discussed in this article.

Another example is the admissibility of evidence of bribe attempts, threats to witnesses or flight as evidence of consciousness of guilt. United States v. Turner, 485 F.2d 976, 983 (D.C. Cir. 1973) (separate opinion); Austin v. United States, 414 F.2d 1155 (D.C. Cir. 1969).

A number of states have recidivist statutes under which a multiple offender can receive greater punishment once he is proven to be a recidivist. Spencer v. Texas, 385 U.S. 554, 586, n.11 (1967) (reciting a list of state statutes and decisions adopting the Connecticut method of holding bifurcated trials for determinations of recidivist status). In some jurisdictions, use of the common law method of admitting prior offenses during the guilt portion of the trial has been held to be error and a denial of the defendant's right to a fair trial by an impartial jury. United States v. Banmiller, 310 F.2d 720 (3d Cir. 1962), *cert. denied*, 374 U.S. 828 (1963); Lane v. Warden, 320 F.2d 179 (4th Cir. 1963). These decisions were subsequently overruled by *Spencer*, which upheld the constitutionality of the common law procedure. The preferred procedure has been to stage a bifurcated trial. Guilt or innocence on the charge in issue is determined first. After a verdict is returned, then a separate recidivist hearing is held to determine punishment and it is only during this later proceeding that evidence of a prior crime is received. There is little justification for not holding a bifurcated hearing under recidivist procedures.

16. 53 Hawaii 254, 492 P.2d 657 (1972).

state constitution's due process clause forbids a rule of evidence whose *in terrorem* effect is to silence a defendant whose only defense may be his own testimony. Hawaii thus became the first state to bar completely the use of evidence of prior offenses for impeachment purposes.

There is a certain novelty presented by the concept of a constitutional right to testify, especially in view of our preoccupation with the historical fifth amendment right to refrain. But the rationale used by the Supreme Court of Hawaii in *Santiago* is really quite sound.[17] Furthermore, the opportunity for a defendant to testify in his own defense is crucial to most criminal cases. It is often vital to be able to present the testimony of that one person who may have first hand knowledge of the defense, and it may be even more necessary to prevent the trier of fact from leaping to the legally impermissible but logically irresistible conclusion that the defendant is afraid to testify for fear of exposure.[18]

But what of the exceptional case of a testifying defendant who has once pleaded guilty to perjury? When his testimony contradicts a reputable battery of witnesses, does the fair trial requirement mean that a jury must be kept in the dark about his prior perjury? Admittedly, in a case where two stories are in conflict and neither can be independently corroborated the interests of justice may require some independent sign pointing toward the truth. Evidence that one of the parties is an admitted perjurer would surely tip the balance. Yet, the perjurer may be right, not because he is generally more honest, but because he happens to be right. But upon admission of the perjury evidence the prosecutor will be able to ride the credibility issue and instructions to a conviction.

B. *The Requirement of Crimen Falsi*

Few cases present such a delicate balance between the testimony of the accused and that of one other witness, and very few cases involve evidence of prior perjury. There is widespread disagreement among different jurisdictions as to whether an offense must relate directly to a trait of honesty, so-called *crimen falsi*, in order to be used for impeachment.[19] Some who favor permitting a broad spectrum of offenses to be

17. *See, e.g., In re* Oliver, 333 U.S. 257, 273 (1948); Morgan v. United States, 304 U.S. 1, 15 (1938); Hovey v. Elliott, 167 U.S. 409, 417 (1897).

18. Although the prosecutor may not comment on the defendant's failure to testify, Griffin v. California, 380 U.S. 609 (1965), prosecutors have many ways of emphasizing that the government's evidence is uncontradicted, thereby focusing the jury's attention on the defendant's avoidance of the witness stand.

19. Most courts list various frauds, forgery, embezzlement and even theft offenses in the category of offenses related to credibility. Many jurisdictions, by statute, have abandoned any need for the impeaching offense to relate to fraud or falsification. The crimes which reflect on the witness' credibility and which may be introduced for impeachment purposes vary among the states and federal circuits. *See, e.g.*, MO. REV. STAT. § 491.050 (1973) which admits any criminal offense. The Seventh Circuit admits forgery and counterfeiting, but not theft, robbery, or breaking and entering. United States v. Moorefield, 411 F.2d 1186, 1188 (7th Cir. 1969). The Third Circuit admits felonies or misdemeanors amounting to *crimen falsi*. United States v. Remco, 388 F.2d 783 (3d Cir. 1968). The D.C. Circuit admits con-

used for impeachment reason that although murder, for example, does not require the commission of a falsehood, many people would sooner believe a tax evader or a perjurer than a murderer. This view may have some basis in human experience if not in logic. Others who favor the use of evidence of any prior offense for impeachment simply cannot tolerate testimony by a defendant who has a record without disclosure of such record. This rationale is dangerously close to advocating bad character evidence, and for that reason, is unpersuasive.

In any event, whenever evidence of a prior offense is usable, but prejudice outweighs probative value, the trial judge should be permitted, if not required, to exclude that evidence. The *Santiago* decision correctly observed that too often the proffered crime has little to do with credibility

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victions which rest on dishonest conduct. United States v. Gordon, 383 F.2d 936, 940 (D.C. Cir. 1967). *See also* United States v. Chapman, 455 F.2d 746, 749 (5th Cir. 1972); United States v. Bedgood, 453 F.2d 988, 990 (5th Cir. 1972); United States v. Thomas, 452 F.2d 1373, 1374-75 (D.C. Cir. 1971); Sinclair v. Turner, 447 F.2d 1158, 1162 (10th Cir. 1971). Under the Proposed Federal Rules of Evidence, a prior offense may be used for impeachment "only if the crime involved dishonesty or a false statement." Proposed Fed. R. Evid. 609(a).

Similarity of the prior offense to the charge in issue is a two edged sword. It has been held to be a factor both favoring and militating against admission of that prior offense. In United States v. Scarborough, 452 F.2d 1378 (D.C. Cir. 1971), the court held that it was not error to impeach an alibi witness by a prior forgery conviction, where that witness had received her final release from probation over ten years previously, in view of the close relevancy between a prior forgery conviction and a witness' credibility. An old prior narcotics conviction was held to be used improperly to impeach the credibility of a witness in United States v. Puco, 453 F.2d 539 (2d Cir. 1971). The court said that narcotics convictions had little probative value as to the veracity of the witness. The rule, however, is quite different where a narcotics addict is used as a police informant. In United States v. Kinnard, 465 F.2d 566 (D.C. Cir. 1972), the court held that such narcotics informers had special unreliability and wide latitude should be permitted in cross-examination because of their peculiar motive to lie to avoid the agonizing imprisonment they face as an addict. It is also a different matter when a defendant himself creates some specific issue. Often, by denying a certain type of wrongdoing or by asserting a prior unblemished record, a defendant can pull an otherwise inadmissible prior offense in against himself. United States v. Gray, 468 F.2d 257 (3d Cir. 1972); United States v. Belperio, 452 F.2d 389 (9th Cir. 1971).

Once a conviction qualifies as the type usable for impeachment the jurisdictions divide sharply over whether a court can exercise its discretion and evaluate whether the prejudice to the defendant substantially outweighs the probative value of the evidence and thus exclude it. *See* United States v. Williams, 445 F.2d 421 (10th Cir. 1971); United States v. Vigo, 435 F.2d 1347, 1351 (5th Cir. 1970), *cert. denied*, 403 U.S. 908 (1971); United States v. Greenberg, 419 F.2d 808 (3d Cir. 1969) (per curiam); United States v. Allison, 414 F.2d 407, 411-12 (9th Cir. 1969), *cert. denied*, 397 U.S. 944 (1970); United States v. Palumbo, 401 F.2d 270, 273 (2d Cir. 1968), *cert. denied*, 394 U.S. 947 (1969); United States v. Hildreth, 387 F.2d 328, 329 (4th Cir. 1967). The remaining jurisdictions admit all prior convictions. United States v. Scanpellino, 431 F.2d 475, 478-79 (8th Cir. 1970); United States v. Escobedo, 430 F.2d 14, 18-20 (7th Cir. 1970), *cert. denied*, 402 U.S. 951 (1971); United States v. Griffin, 378 F.2d 445, 446 (6th Cir. 1967) (per curiam). The District of Columbia Court Reform and Criminal Procedure Act of 1970 does not allow judicial discretion in determining the admissibility of prior convictions. D.C. CODE § 14-305 (1973). The Advisory Committee's version of the Proposed Federal Rules of Evidence was in accord with the District of Columbia statute. Proposed Fed. R. Evid. 609. *But see* United States v. Henson, 486 F.2d 1292 (D.C. Cir. 1973) (en banc) as to the constitutionality of retroactive application of D.C. CODE § 14-305 (1973). The House Committee version of the rule favors the *Luck* doctrine and grants discretion to the trial judge to exclude prejudicial offenses. *See* Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965).

as an isolated issue, and yet it carries so high a risk of poisoning a jury against the defendant that responsible defense counsel must reluctantly advise a defendant to sacrifice the right to testify to avoid the impact of such evidence.

The *Santiago* rationale of a constitutionally protected right to testify precludes any evidentiary rule of case law or statute which admits prior crimes evidence against a testifying defendant solely for the purpose of impeaching his credibility as a witness. However, there are other situations in which prior crimes evidence is presently admissible, and which might remain unaffected by an exclusionary rule fashioned to protect the right to testify.

C. *The Similar Crimes Rule*

There are great differences between the use of prior crimes evidence to impeach the credibility of a testifying defendant and the use of such evidence under the "similar crimes" exception to the general rule that character evidence is not admissible simply to prove guilt or to show a disposition to crime. That exception provides that evidence of other crimes, wrongs or acts is admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.[20]

The "credibility impeachment" rationale for telling a jury the defendant committed another crime differs in four respects from the "similar crimes" rule: (1) impeachment crimes are used only against a testifying defendant;[21] (2) their admissibility and usage relate to the general sub-

20. Proposed Fed. R. Evid. 404(b):

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. This subdivision does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The extensive list of vague categories under which prior crimes evidence may be admitted has been summarized in United States v. Bobbitt, 450 F.2d 685 (D.C. Cir. 1971). The following array of rationales for use of prior crimes evidence is available to an imaginative prosecutor: to complete the story of the crime by proving its immediate context of happenings close in time and place (as in "res gestae"); to prove the existence of a larger continuing plan, scheme or conspiracy of which the present crime is part; "signature" crime so nearly identical in method as to earmark them as the handiwork of the accused; propensity for illicit sexual relations with the particular person concerned in the trial to indicate that the similar acts were not unintentional or accidental; to establish motive which in turn can serve to establish identity, deliberateness, malice or specific intent; to show by immediate inference malice, deliberation, ill will or the specific intent required for a particular crime; or to prove identity. In *Bobbitt* the court held that the evidence (an incident of wielding a shotgun) was proper and that defendant was not entitled to a limiting instruction since the evidence related to a state of mind (motive) which is so closely related to proof of the commission of the act that the crime is probative of identity as well as state of mind. Although the failure to limit the jury's use of other crimes was said to be error in some cases and "may even be plain error," the court held it was not error in this case.

21. State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1972). Of course, any witness may be impeached by evidence of a prior conviction of a crime involving dishonesty. In fact, in a civil case in the tax court where the taxpayer did not even testify, the court still allowed

ject of credibility, not to a specific fact issue or element of the offense;[22] (3) the type of crime required need not be similar to the offense charged, but it must be based on a conviction and must be related, in most courts, to a trait of honesty;[23] and (4) an instruction on the limited use of the evidence is uniformly required.[24]

The "similar crimes" rule, by comparison, is used even against a non-testifying defendant as part of the government's case in chief.[25] The prior offense must be similar in some fashion to the crime charged but need not be based on a conviction.[26] The right to an instruction on limited use of

"impeachment" of his sworn tax return, which was in evidence, by showing a prior conviction. Masters v. Commissioner, 243 F.2d 335 (3d Cir. 1957). The credibility-impeachment rule is similar but not identical to the rule relating to the cross-examination of a character witness under which the character witness may be asked about matters, including convictions of the defendant, relating to the specific character trait in issue. That trait may or may not be credibility. Michelson v. United States, 335 U.S. 469 (1948).

22. Michelson v. United States, 335 U.S. 469 (1948). Evidence of the defendant's general character is not admissible when he testifies, however, prior convictions evidencing lack of credibility are admissible. United States v. Augello, 452 F.2d 1135, 1139-40 (2d Cir. 1971); Proposed Fed. R. Evid. 608(a).

23. Michelson v. United States, 335 U.S. 469 (1948). Impeachment of the credibility of a witness can be done by reputation testimony or by use of a criminal act that resulted in a conviction, but not by use of a prior criminal act that did not result in conviction. Derrick v. Wallace, 217 N.Y. 620, 112 N.E. 440 (1916). In this regard, a mere witness is less impeachable than a defendant who may have a prior crime admitted in the government's case in chief. Also, the extrinsic proof cannot be offered for credibility impeachment unless the witness has been asked about the conviction on cross-examination. People v. Cardillo, 207 N.Y. 70, 100 N.E. 715 (1912).

24. *See* Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965). *See generally* Gordon v. United States, 383 F.2d 936, 939 (D.C. Cir. 1967). Evidence of offenses committed subsequent to the crime charged in the indictment is generally inadmissible. Bracey v. United States, 142 F.2d 85 (D.C. Cir.), *cert. denied*, 322 U.S. 762 (1944). In McHale v. United States, 398 F.2d 757 (D.C. Cir. 1968), a mail fraud prosecution, the court ruled that evidence of fraud which occurred after the indictment could be admitted only after the application of a "balancing process." The factors to be balanced are (1) the relevance of the subsequent crime to the issue of intent; (2) the quantity of the evidence adduced to establish the counts charged in the indictment; and (3) the relative volume of testimony presented on subsequent misconduct. Here, the court found prejudicial error in the admission of such extensive testimony of events subsequent to the indictment.

25. Mastrotatoro v. United States, 455 F.2d 802 (4th Cir. 1972); United States v. Smith, 446 F.2d 200 (4th Cir. 1971); C. McCORMICK, LAW OF EVIDENCE, § 157, at 328 (1st ed. 1954). Proposed Fed. R. Evid. 404(b).

26. United States v. Bussey, 432 F.2d 1330 (D.C. Cir. 1970). The court reversed a conviction where evidence of other robberies had been admitted in a robbery prosecution since they were not so similar as to show a particular pattern. The court criticized the fact that the instruction was given only at the conclusion of the case and disapproved the text of the instruction since it advised the jury that "evidence has been introduced that the defendant committed an offense similar in nature" to the one for which he is now on trial. *Id.* at 1334 n.17. Whether or not the alleged prior offense is "similar" is, of course, for the jury to determine. United States v. Woods, 484 F.2d 127 (4th Cir. 1973). Where the defendant in an infanticide trial has never been prosecuted for other alleged child murders, the court acknowledged that

> [t]he evidence of what happened to the other children is not, strictly speaking, evidence of other crimes. There was no evidence that defendant was an accused with respect to the deaths or respiratory difficulties of the other children except for Judy. . . .

Id. at 133.

Dissenting Judge Widener stated that although a record conviction was not necessary,

the evidence, though generally required, is not uniformly recognized for the entire list of exceptions.[27]

The significance of these differences is considerable both procedurally and in the constitutional considerations that arise under each of the rules. For example, the precise *ratio decidendi* of the *Santiago* decision does not extend to the use of "similar crimes" evidence since similar offenses are admissible whether or not the defendant testifies. But even evidence of similar offenses introduced during the government's case can under some circumstances keep the defendant off the stand.

It is entirely conceivable that a defendant may be quite willing to testify in his defense on the charge in issue, but have good reasons for not testifying about the prior offense. Where, for example, a defendant facing a multi-count indictment is willing to testify about one count but not another, he may be entitled to a severance of the counts.[28] Likewise, there may be a case where the introduction of a "similar" crime into evidence would prevent the defendant from testifying. For example, the similar crime, if admitted, might subject him to further prosecution or present such a risk of it that in the midst of his testimony he would have to invoke the fifth amendment as to the similar offense.[29]

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the proof of the prior act must be of a "sufficient quality to permit its admissibility." He stated that "evidence of prior merely suspicious occurrences is no substitute for clear and conclusive proof." *Id.* at 140-41.

Often the prior offense used as evidence is not represented by a conviction. Prior similar criminal acts are deemed to be admissible under the same evidentiary standards of relevance as prior convictions for similar offenses though they obviously lack the quality of a prior record conviction. However, there is also additional prejudice involved when a record conviction is used since the conviction reflects to the jury that the state or federal government was sufficiently affected by the conduct that it prosecuted, and a court or jury was sufficiently convinced by their case that the defendant was convicted. In United States v. Bobbitt, 450 F.2d 685 (D.C. Cir. 1971), the court adhered to the general rule that evidence of a prior criminal act is not admissible to show a predisposition to crime, but is admissible to show a motive, intent, absence of mistake or accident, or common scheme or plan. It upheld admission of a shotgun threatening incident twelve years earlier between the defendant and a murder victim as relevant to their prior relationship, which in turn was relevant to motive.

27. In United States v. Bobbitt, 450 F.2d 685 (D.C. Cir. 1971), the court indicated that where the past pattern of criminal acts introduced into evidence is offered not only for intent but also on the issue of identity, an instruction limiting the use of the evidence need not be given. In fact, the court indicated that there is a category of cases where the evidence of a prior criminal act is related to a state of mind, such as motive, which itself is so closely related to proof of commission of the act on trial that the prior crime is probative of identity as well as state of mind. In such cases, it held, the jury is not to be prevented from drawing the further inference that it was defendant who committed the crime, and therefore no limiting instruction need be given. *But see id.* at 694 (Fahy, S.J. dissenting). While the lack of an instruction must be considered harmful, the giving of a limiting instruction certainly is little assurance that a lay jury will appreciate it.

28. Baker v. United States, 401 F.2d 958 (D.C. Cir. 1968); Cross v. United States, 335 F.2d 987 (D.C. Cir. 1964).

29. While such a claim by a defendant on the witness stand would be highly prejudicial, he would be entitled to assert it and not have waived it by testifying on some matters. *See* Baker v. United States, 401 F.2d 958 (D.C. Cir. 1968). Under the Proposed Federal Rules of Evidence, rule 513(b), so far as possible, all claims of privilege are to be made outside of the presence of the jury.

Where defendant testifies, if he is asked about a prior criminal act for which he has

D. *The Supervisory Power of Appellate Courts*

The chief restrictions on the use of "similar crimes" evidence fall short of actual constitutional stature for they have occurred in the higher-than-evidentiary field that is sometimes called the supervisory power of appellate courts. The Supreme Court of Louisiana recently reversed a robbery conviction because of the use of other crimes evidence. Louisiana's statutes permitted introduction of evidence of other uncharged offenses if relevant to show intent, knowledge or system. However, the case involved the robbery of a bus driver and there was no question that whoever did it knew what he was doing and intended to do it. Therefore, inadvertence or lack of intent was not seriously in issue, yet that was the purported justification for admission of evidence that the defendant had earlier robbed a service station.[30]

The court not only reversed the conviction, but under its supervisory power, it promulgated a rule requiring the state to comply with five requirements before it can introduce evidence of other crimes:

> 1. Defendant must be given a statement of the acts to be offered within a reasonable time before trial and they must be described with the particularity required of an indictment. The court said no such notice is required as to evidence of offenses which are simply part of the res gestae, or for impeachment convictions.
> 2. The government must specify the exception to the exclusionary rule upon which it relies.
> 3. It must show that the evidence is not repetitive or cumulative and is not a subterfuge for depicting the defendant's bad character or his propensity for bad behavior and that it serves the actual purpose for which it was offered.
> 4. Defendant is entitled to an immediate limiting instruction upon introduction of the evidence.
> 5. The final charge to the jury must also contain a limiting instruction, and the court must advise the jury that the defendant cannot be convicted for any charge other than the one named in the indictment.[31]

Other courts have used their supervisory power to fashion rules that limit the circumstances under which evidence of similar crimes can be introduced, but few have imposed restrictions as effective as the Louisiana court.

Just as there is an apparently compelling need to introduce a prior perjury conviction against a testifying defendant who squarely contra-

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not been tried or granted immunity, and which is not barred by the statute of limitations, he would be entitled to invoke the fifth amendment and will not have waived the privilege by testifying, even about his own character. *See* People v. Johnson, 228 N.Y. 332, 127 N.E. 186 (1920).

30. State v. Prieur, ___ La. ___, 277 So. 2d 126 (1973).

31. *Id.* at ___, 277 So. 2d at 130.

dicts the only witness against him, the similar crimes rule also presents a few examples where the "need" for the similar crimes evidence is particularly strong and therefore highly tempting. In prosecutions for especially heinous crimes, it is often unusually difficult to find evidence. In cases of child abuse and infanticide, for example, the victim is incapable of testimony; there are no eye witnesses; no evidence of a struggle; and no logical motive—only highly suspicious circumstances. Under these circumstances it is not difficult to appreciate the temptation a trial judge must face if there is competent evidence that the defendant has, not once but several times, committed physical abuse against infants or actually killed them. Should he exclude them and risk an acquittal? Realizing that infanticide by oxygen deprivation (smothering) is one of the most difficult to prove crimes yet one of the most horrendous, the Fourth Circuit Court of Appeals, in a recent case in which the defendant was charged with the murder of her eight month old adopted son and attempted murder and mistreatment of her two year old daughter, acknowledged that there was a "critical need" for evidence of prior offenses. In that case, nine children had suffered cyanosis or oxygen deprivation after having been left alone with defendant, and seven of them had died over a period of many years. The Fourth Circuit was tempted by such important evidence of prior criminal acts and it succumbed to the temptation. The prior acts, though similar, fit no clear exception to the exclusionary rule. Therefore, the court of appeals completely discarded the exclusionary rule. It held that "the evidence is so persuasive and so necessary in case of infanticide or other child abuse by suffocation if the wrongdoer is to be apprehended, that we think that its relevance clearly outweighs its prejudicial effect on the jury."[32]

E. *Rebuttal of Character Testimony*

The third purpose for which evidence of prior crimes may be used is "character witness rebuttal." When the defendant calls a character witness to testify to his favorable reputation for the trait of character relevant to the criminal charge, he puts that reputation in issue and the character witness may then be asked whether he is sufficiently well informed concerning the defendant's reputation that the jury ought to believe his testimony. Pursuant to such an inquiry he may be asked whether he is aware of prior convictions, prior criminal acts or the general reputation of the defendant for certain adverse conduct in the community, so long as that conduct is relevant to the trait to which the character wit-

32. United States v. Woods, 484 F.2d 127, 135 (4th Cir. 1973). Dissenting Judge Widener severely chastised the majority for overemphasizing the "need for the evidence" as a factor to be considered. He stated that "[t]he infirmity in this formulation is that as the need for the evidence increases, the probative value may decrease and still the evidence will be admissible." In addition, this rationale may produce a rule of evidence that "the end may justify the means." *Id.* at 141 n.5.

ness testifies.[33] This rule, even when applied with discretion and restraint, can serve to prejudice a defendant by effectively depriving him of the opportunity to produce evidence of his good reputation. What is lacking in this situation is any constitutionally protected right to produce evidence of good character.[34]

F. *Evidence Rules Lack Consistency*

There is a great anomaly revealed by a comparison of the type of evidence admissible against a defendant with evidence which is not admissible against a mere witness. A witness generally cannot be impeached by prior criminal acts unless he has been successfully prosecuted for them. However, a defendant who does not even testify can have introduced against him evidence of prior acts for which he was not prosecuted. And while the good character of a defendant cannot be proven in most jurisdictions by evidence of specific instances of good conduct, the government is permitted to prove his bad character, criminal intent or common scheme by evidence of specific instances of uncharged and unproven criminal misconduct.

G. *The Common Bond of Prejudice*

The above three vehicle rules share in common the sensational and prejudicial impact of a disclosure that the man on trial has been there before for something else (or that he should have been).[35] Each injects the issue of recidivism into the trial. Additionally, due to the vagueness of the standards defining the admissibility of each type of evidence, only

33. Michelson v. United States, 335 U.S. 469 (1948). *See also* United States v. Roland, 449 F.2d 1281, 1282 (5th Cir. 1971); United States v. Davenport, 449 F.2d 696 (5th Cir. 1971); Proposed Fed. R. Evid. 404(a)(1). However, it is generally held that a defendant's character may be proven only by a statement of a witness concerning the defendant's reputation in the community and not by a witness's statement of an opinion as to the defendant's character or by recitation of a specific instance of conduct. United States v. Bishton, 463 F.2d 887 (D.C. Cir. 1972); United States v. Davenport, 449 F.2d 696, 699 (5th Cir. 1971). The Proposed Federal Rules of Evidence, rules 405(a) & (b), would permit both opinion testimony and evidence of specific instances of conduct as proof of a trait of character when the trait is a specific element of the charge.

34. *See* United States v. Fox, 473 F.2d 131 (D.C. Cir. 1972). The D.C. Circuit reversed a conviction where the trial judge ruled that if defendant produced a character witness, that witness could be asked about a prior conviction of defendant's. The court held that the trial judge's ruling was erroneous and that its effect was to keep the character witness off the stand, thus improperly depriving the defendant of a substantial right to produce evidence of good character. Though not of constitutional proportions, the right is important enough to produce a reversal.

35. While no case has been found dealing with the attempted use of evidence of a criminal act as an alleged similar offense for which a defendant has been granted immunity, courts clearly preclude the "use" of such evidence against defendants. Kastigar v. United States, 406 U.S. 441 (1972). *See also* United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973). In United States v. Hockenberry, 474 F.2d 247 (3d Cir. 1973), the court reversed a conviction where the government introduced immunized grand jury testimony to show the falsity of defendant's statements. This supports the conclusion that all uses of immunized testimony are barred by 18 U.S.C. § 6002 (Supp. 1973).

a modicum of probative worth on the vehicle issue is required in actual practice. As a result, their marginal worth as legitimate evidence is frequently overwhelmed by their prejudicial impact.

Despite this common bond of prejudice, the courts have more heavily criticized the similar crimes rule,[36] while the "credibility-impeachment" rationale, which directly chills a defendant's wish to testify, has received more attention in legislative efforts. Thus, as courts now turn to the constitutional issues raised by these three rules, the situational differences they entail demonstrate that no single principle necessarily governs all three uses of this evidence, and that the precise details and history of the evidence itself are germane to the constitutional issues of the right to counsel, ex post facto laws and, most importantly, double jeopardy.

IV. The Right to Counsel

In *Loper v. Beto*,[37] the Supreme Court recently ordered issuance of a writ of habeas corpus where a conviction was obtained by the use of evidence of prior crimes to impeach the testifying defendant. Evidence of prior offenses could not be used against the defendant where the convictions were constitutionally invalid due to a denial of the right to counsel. The Court based its decision on the concept of fundamental fairness and stated: "the conclusion is inescapable that the use of convictions constitutionally invalid under *Gideon v. Wainwright* to impeach a defendant's credibility deprives him of due process of law."[38]

The *Loper* rationale opens the validity of the prior conviction, if there is one, to inquiry. It suggests, in fact, that other fundamental defects in a prior conviction should serve as a basis for exclusion on grounds of "fundamental fairness." For if the denial of the right to counsel in the prior trial taints both the prior conviction and the present one, it is clear that the Supreme Court shares the view that prior crimes evidence plays a major role in the trial of a case, ranking only slightly below an outright confession.

Yet under some circumstances prior crimes evidence is received

36. *Contra*, United States v. Burkhart, 458 F.2d 201 (10th Cir. 1972) (en banc). The Tenth Circuit, in reversing a Dyer Act conviction obtained by the introduction of two other Dyer Act convictions, acknowledged the tendency of courts to equate the similar crimes rule with the rule allowing impeachment of a defendant after he testifies, but concluded the operation of the rules is vastly different. Although that case was decided on evidentiary grounds, the court's language contains clear constitutional overtones. The court said that the similar crimes rule should not be applied by rote since it involved not merely a rule of evidence but an issue of "fundamental fairness and justice of the trial itself." *Id.* at 205.

37. 405 U.S. 473 (1972) [hereinafter referred to as *Loper*]. Although the convictions erroneously admitted in this case occurred before the Supreme Court's decision in Gideon v. Wainwright, 372 U.S. 335 (1963), they were rendered invalid by its retroactive application.

38. 405 U.S. at 483; *accord*, Howard v. Craven, 446 F.2d 586 (9th Cir. 1971). Burgett v. Texas, 389 U.S. 109 (1967) held that convictions without the assistance of counsel cannot be used against the defendant to support a finding of guilt. United States v. Tucker, 404 U.S. 443 (1972) held that prior convictions without counsel could not be used to enhance punishment.

where there has been no conviction at all, not even a defective one. Some cases, in fact, permit such evidence where there has actually been an acquittal. Wholly aside from the double jeopardy and collateral estoppel problems raised by this latter situation, if "fundamental fairness" and due process require exclusion of constitutionally defective convictions from evidence, those same concepts should certainly require exclusion of an alleged offense of which defendant was acquitted or for which prosecution was declined.

V. Fourth Amendment Rights and Pending Appeals

In permitting inquiry into the validity of the prior conviction, the Court has opened up the broader question of what position a trial judge should take when the proffered conviction is on appeal. The proposed Federal Rules of Evidence would permit the use of those prior offenses which are on appeal for purposes of impeachment, regardless of and without any inquiry into the grounds for appeal.[39] The United States Court of Appeals for the First Circuit, in *United States v. Penta*,[40] appears to have adopted the same approach. The court specifically said that it did not mean to suggest that it would condone introduction of state convictions that had already been overturned on the basis of an illegal search prior to the time of the federal trial. The court even suggested that there is authority against that procedure. However, carefully restricting its opinion to the question of what to do when convictions on which an appeal is pending on constitutional grounds are offered by the prosecution, it concluded that they should be admitted and the federal conviction would not be reversed later if the state convictions are subsequently reversed on grounds unrelated to the integrity of the fact finding process, *i.e.*, on the basis of unlawfully obtained evidence.[41] While an accused will

39. Proposed Fed. R. Evid. 609(e).

40. 475 F.2d 92 (1st Cir. 1973). The majority rule is that a conviction on which an appeal is pending is nevertheless admissible despite the pendency of the appeal. United States v. Allen, 457 F.2d 1361 (9th Cir. 1972); *see* United States v. Griffin, 434 F.2d 978 (9th Cir. 1970), *cert. denied*, 402 U.S. 955 (1971). *Contra*, Beto v. Stacks, 408 F.2d 313 (5th Cir. 1969); Campbell v. United States, 176 F.2d 45 (D.C. Cir. 1949).

41. United States v. Penta, 475 F.2d 92 (1st Cir. 1973). Defendant was tried for possession of counterfeit bills and his defense was entrapment. To impeach that defense the prosecution introduced prior state convictions. Those state convictions were subsequently overturned by the Supreme Court of Massachusetts because some of the evidence resulted from an illegal search. Defendant contended that the use of invalid convictions to impeach his testimony required reversal of his federal conviction. The First Circuit upheld his federal conviction on the grounds that his case was distinguishable from Loper v. Beto, 405 U.S. 473 (1972), but was in accord with Walder v. United States, 347 U.S. 62 (1954) and Harris v. New York, 401 U.S. 222 (1971). Under the same circumstances, the Fifth Circuit held that it was error to admit such pending convictions which were ultimately reversed for the reason that the evidence was unlawfully obtained. Beto v. Stacks, 408 F.2d 313 (5th Cir. 1969). However, the First Circuit concluded that the policy of the fourth amendment's exclusionary rule had already been carried out by the reversal of the prior convictions, and that since the use of the illegally obtained evidence did not in any way vitiate the culpability or the fact finding process, there was no need to carry the punitive effect of the fourth amendment

generally be permitted to show that an appeal is pending on the impeaching conviction, that is far from an impressive reply to the use of the conviction.[42]

VI. Equal Protection

A felon has a greatly increased risk of conviction in any subsequent prosecution merely because he has a record. He may be presented to the jury as a man with a record during the government's case in chief if the prior offense is similar to the offense in issue. If, instead, it is an offense admissible for impeachment, he may not enjoy the right or the ability to testify in his own defense. Even if the prior offense is dissimilar to the indicted offense and does not relate to credibility, it may be employed to test the validity of any character testimony and, therefore, may prevent him from presenting character testimony for fear of poisoning the jury by disclosure of the prior conviction. Any of these drawbacks might itself be sufficient to deny due process; but they clearly make the status of convicted felons unequal to that of other defendants.

Indeed, in questionable investigations convicted felons stand a far greater chance of being indicted than do suspects without a record who might be faced with similar evidence. The presence of an admissible prior conviction is a significant factor in leading prosecutors to decide whom to indict in the first place. With a weak or marginal charge, the prior offense will give them the confidence to take a chance at convicting the previously convicted suspect.

No decision has been found which attaches constitutional significance to this inequality since it is not based on race, creed or national origin; however, the equal protection clause is no longer restricted to such denials. Cases have held that the clause is violated if unequal treatment is based upon a factor that does not qualify as rational. Although no case has been found holding that a prior conviction is either a rational or irrational factor within the meaning of equal protection decisions, writers have suggested that it is not a sufficiently rational factor to withstand the test of the fourteenth amendment.[43] It has at least been suggested that if use of prior convictions is not a denial of equal protection per se, statutes which permit cross-examination of the defendant concerning all prior convictions, constitute an invidious discrimination due to the lack of a reasonable connection between credibility and a prior crime and that such statutes are therefore a denial of equal protection. Furthermore, the

any further by having it reverse a subsequent federal conviction in which evidence of the defective prior conviction was used. United States v. Penta, 475 F.2d 92 (1st Cir. 1973).

42. An accused impeached by a conviction may try to explain, and, in some jurisdictions, protest his innocence. United States v. Boyer, 150 F.2d 595 (D.C. Cir. 1945). But in some he may not protest his innocence. Sims v. Sims, 75 N.Y. 466 (1878). A pardon, annulment or certificate of rehabilitation, however, may destroy admissibility. *See* Proposed Fed. R. Evid. 609.

43. Note, 37 U. Cin. L. Rev. 168, 179 (1928).

argument made in *Furman v. Georgia*[44] that implementation of the death penalty falls disproportionately and, therefore, improperly on southern, black, rape defendants may provide the kernel of an equal protection argument in the area of prior offenses evidence also.

VII. Ex Post Facto Laws

The constitutional issue most recently presented by the use of prior offenses is the violation of the prohibition against ex post facto laws. The United States Court of Appeals for the District of Columbia formulated what has become nationally known as the *Luck* doctrine.[45] Under this rule, the trial judge is given broad discretion to admit or exclude evidence of prior convictions, when used to impeach, if their prejudicial impact outweighs their probative value.

Evaluations of the *Luck* rule have uniformly acknowledged that it has greatly decreased the use of prior offenses evidence. Then, in 1971, Congress enacted the District of Columbia Court Reform and Criminal Procedure Act.[46] That Act contained a provision which makes mandatory the admission of prior offenses that meet the statute's tests. Under the Act, if the conviction occurred within the last ten years and relates to credibility, it must be admitted.[47] However, in *United States v. Henson*,[48] the constitutionality of the Act was challenged on several grounds and the Court of Appeals for the District of Columbia Circuit, sitting en banc, recently ruled that the effect on the accused of this procedural change is so significant and so alters the situation to his disadvantage, that retroactive application of the new rule is unconstitutional as an ex post facto law. In addition, the court spoke of the deterrent effect of prior crimes on the defendant's willingness to testify. It said that "[t]o the extent this deterrence is determinative in a situation where an accused's testimony is his only defense, its effect is self-evident even if it may not be unconstitutional."[49]

The court declined to reach the broader question of the overall constitutionality of the Act since retroactive application was an adequate basis for decision. It noted, however, that the statute before it was highly similar to rule 609 of the proposed Federal Rules of Evidence now before Congress, which if enacted in that form, would present the identical problem.[50]

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44. 408 U.S. 238 (1973).

45. The name derives from Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965). *See* H.R. 5463, 93d Cong., 1st Sess. (1973), amending the Proposed Federal Rules of Evidence by the Subcommittee on Criminal Justice of the House Judiciary Committee.

46. 14 D.C. Code § 305 (1971).

47. *Id.*

48. 486 F.2d 1292 (D.C. Cir. 1973) (en banc) [hereinafter referred to as *Henson*].

49. 486 F.2d at 1308.

50. *Id.* Rule 609 has both embraced and rejected the *Luck* rule from time to time during its gestation. The March 1971 draft of the Advisory Committee on the Federal Rules of

VIII. The Right to Require Proof Beyond a Reasonable Doubt

The *Henson* case mentioned, as one reason for its result, the great effect evidence of a prior offense has on easing the government's burden of proof. Defendants have a constitutional right to require proof of guilt beyond a reasonable doubt.[51] *Henson* raised but did not answer the question whether a conviction aid such as prior crimes evidence might not actually destroy that right.[52]

The reasonable doubt requirement is intimately connected with prior crimes evidence in several ways. The historical reluctance to permit use of juvenile delinquency adjudications for impeachment has been grounded in large part on the lesser burden of proof required for such adjudications.[53] Yet in order to admit evidence of prior crimes which did not result in conviction, it is only required that the prosecution prove by clear and convincing evidence that defendant committed that offense. Such a lowered standard is wholly inappropriate for evidence of this type.[54]

A converse analogy exists under present law where an acquittal in a criminal tax evasion case does not bar the government from asserting the existence of fraud in a civil tax case against the same taxpayer for the same years because, though it failed to prove criminal tax evasion beyond a "reasonable doubt," it may still be able to sustain the lesser burden of proving civil fraud by only "clear and convincing evidence."[55]

If the use of a prior crime as evidence does nothing more than permit a conviction, where the evidence on the charge itself when fairly viewed, does not rise to the level of proving guilt beyond a reasonable doubt, this alone should be a basis for exclusion on constitutional grounds. At the very least, introduction of such evidence should require a threshold determination that the evidence could satisfy the reasonable doubt standard.

Evidence provided that no conviction is admissible if "the judge determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice." This provision which essentially embodies the *Luck* rule was abandoned in October, 1971. However, in H.R. 5463, 93d Cong., 1st Sess. (1973) the rule was changed back to the discretionary *Luck* rule.

51. *In re* Winship, 397 U.S. 358 (1970).

52. 486 F.2d at 1292.

53. *See* Cotton v. United States, 355 F.2d 480 (10th Cir. 1966); Thomas v. United States, 121 F.2d 905 (D.C. Cir. 1941).

54. Lego v. Twomey, 404 U.S. 477 (1972); United States v. Bussey, 432 F.2d 1330 (D.C. Cir. 1970); Smith v. United States, 361 F.2d 74 (D.C. Cir. 1966); Wrather v. State, 179 Tenn. 666, 169 S.W.2d 854 (1943). Judge Widener, dissenting in United States v. Woods, said that the defendant was denied a fair trial because "the evidence of prior occurrences, fitting no recognized exception to the general rule, was so highly inflammatory and prejudicial, as well as being neither plain, nor clear, nor convincing, that it should not have been admitted for any purpose, much less for all purposes." 484 F.2d 127, 139 (4th Cir. 1973).

55. Helvering v. Mitchell, 303 U.S. 391 (1938).

IX. Double Jeopardy

By far the most complex and interesting constitutional objection, and the one that goes to the essence of use of prior convictions evidence, is the plea of double jeopardy. While there would still remain the possibility of introducing other criminal acts that have not been prosecuted, the double jeopardy clause of the fifth amendment,[56] if read broadly, would dispose of the great bulk of prior crimes evidence. If a defendant has once been put in jeopardy for an offense, that prior offense should not be used against him again in a criminal prosecution.

However it has not been liberally construed. The double jeopardy clause may rank as the most narrowly and restrictively interpreted clause of the Bill of Rights. The remainder of this article analyzes at length the history of Supreme Court litigation which has permitted double prosecutions and, therefore, evidentiary use of offenses for which the defendant once stood trial, and the significance of recent decisions and writings which in several major respects suggest that prior offenses may run afoul of the double jeopardy clause.

A. *The Narrowness of the Double Jeopardy Clause*

This constitutional prohibition that ostensibly denies the government the luxury of requiring a defendant to stand trial twice for the same offense[57] is currently so riddled with exceptions that it is sometimes difficult to determine whether the historical distaste for harassing, repetitious prosecutions which fathered the double jeopardy clause is reflected any longer in the American law of double jeopardy.[58] Decisions of every court in the nation require criminal defendants in one form or another to endure a second time the agony, risk, expense and notoriety that collectively mean jeopardy. Only a few federal and state courts seem to wince at the sizeable list of exceptions to the double jeopardy clause.[59]

56. The fifth amendment to the United States Constitution provides in part that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."

57. *Id.*

58. There are some countries that allow the dangerous practice of trying people twice. I am inserting below a recent news item about a man who was tried, convicted, sentenced to prison, and then was tried again, convicted and sentenced to death. Similar examples are not hard to find in lands torn by revolution or crushed by dictatorship. I had thought that our constitutional protections embodied in the Double Jeopardy and Due Process Clauses would have barred any such things happening here. Unfortunately, last year's holdings by this Court . . . , and today's affirmance of the convictions of Bartkus and Abbate cause me to fear that in an important number of cases it can happen here.

Bartkus v. Illinois, 359 U.S. 121, 163-64 (1959) (Black, J., dissenting).

59. The clause not only prevents double punishment, but also prohibits double jeopardy as well. United States v. Ewell, 383 U.S. 116 (1966). Mr. Justice Brennan, concurring in Ashe v. Swenson, called the many possibilities for double prosecutions "frightening." He said: "In my view, the Double Jeopardy Clause requires the prosecution, except in most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." He listed a variety of circum-

The variety of local, state and federal criminal statutes and ordinances that can be broken by a single episode of criminal conduct make an impressive list. Successive prosecutions are frequently begun by the local,[60] state[61] and federal[62] governments for the same act. Yet after the first prosecution, the second tribunal finds it must apply highly technical tests to the vagaries of the particular offense, and that it must thoroughly study the precise history of the prior prosecution before it can begin to tell whether double jeopardy is a bar. Such an exercise seems quite a departure from the absolute bar apparently intended by the brief and simple double jeopardy clause; but the numerous issues developed by the case law make such a complex analysis necessary in almost every case.

The following host of issues represents only a few of the double jeopardy questions commonly litigated: Does double jeopardy in fact attach upon the impanelling of a jury?[63] Must there be a "manifest necessity" for declaration of a mistrial so that a retrial is permissible?[64] Did the defendant cause or consent to the declaration of a mistrial?[65] Can the

stances under which an overly technical interpretation of the evidence required for two prosecutions "virtually annuls the constitutional guarantee." 397 U.S. 436, 451 (1970). Under the narrow "same evidence" test he noted that crimes against several victims could be prosecuted separately; crimes where a single transaction is divisible into chronologically discrete crimes could be prosecuted separately; and a single criminal act may lead to multiple prosecutions if it is viewed from the perspective of different statutes.

60. Waller v. Florida, 397 U.S. 387 (1970).

61. Bartkus v. Illinois, 359 U.S. 121 (1959).

62. Abbate v. United States, 359 U.S. 187 (1959).

63. Illinois v. Somerville, 410 U.S. 458 (1973). The defendant had been indicted by a grand jury and brought to trial. The jury was sworn, but before any evidence was taken, the state moved to dismiss the indictment because it failed to allege criminal intent. Defendant was subsequently reindicted, tried and convicted. The Seventh Circuit concluded, in light of United States v. Jorn, 400 U.S. 470 (1971), that jeopardy had attached and, in the absence of any affirmative action on the part of the defendant requesting or requiring a mistrial, a retrial was barred on grounds of double jeopardy. The argument is largely related to the question whether the defect in the indictment was jurisdictional. See Illinois v. Somerville, 410 U.S. 458, 459 (1973).

64. United States v. Lansdown, 460 F.2d 164 (4th Cir. 1972). The court held that the declaration of a mistrial precluded a retrial where the jury, though reporting it had been deadlocked, advised the court it was near a verdict if it could deliberate ten more minutes. Defendant objected to the court's declaring a mistrial. The court of appeals found no "manifest necessity" for declaration of a mistrial and held that a retrial was barred.

65. A defendant's request for a mistrial generally waives the claim of double jeopardy. Sapir v. United States, 348 U.S. 373 (1955). Thus, if a defendant moves for a mistrial or his interest was the exclusive motivation for declaring it, a retrial is permissible. United States v. Pappas, 445 F.2d 1194 (3d Cir. 1971). Retrial after a hung jury is, of course, proper. United States v. Phillips, 431 F.2d 949 (3d Cir. 1970). And in United States v. Walden, 448 F.2d 925 (4th Cir. 1971), *reconsidered en banc*, 458 F.2d 36 (1972), a panel of the Fourth Circuit reversed a conviction after a second trial for several defendants whose first trial ended in a mistrial because two jurors had seen defendants in handcuffs. The trial judge had invited requests for mistrial. Some defendants filed motions, but others did not. The conviction was reversed by the panel on double jeopardy grounds as to all defendants, even those who requested a mistrial, reasoning that the request was virtually thrust upon them by circumstance. 448 F.2d at 929-31. On reconsideration en banc, an equally divided court affirmed the district court's ruling on double jeopardy and remanded to the panel for disposition of the remaining issues. 458 F.2d at 37.

state appeal a dismissal[66] or acquittal[67] and retry the defendant? Do consecutive sentences for different counts of an indictment constitute a form of double punishment for essentially the same offense?[68] After a successful defense appeal, is a retrial[69] or a harsher sentence permissible?[70] Are successive prosecutions permitted if not based on exactly the same evidence,[71] or is any prosecution based on the same transaction[72] prohibited?

66. United States v. Brewster, 408 U.S. 501 (1972). A dismissal of the indictment before jeopardy attaches does not prevent an appeal and trial by the government.

67. In Palko v. Connecticut, 302 U.S. 319 (1937), the Court held that federal double jeopardy standards were not applicable against the states. Thus, the state of Connecticut was permitted, under a state statute, to appeal the acquittal Palko had won at trial and to retry him. *Palko* was subsequently overruled by Benton v. Maryland, 395 U.S. 784, 794 (1969).

68. In United States v. Hughes, 195 F. Supp. 795 (S.D.N.Y. 1961), 18 counts of an indictment charged the defendant with violating the Securities Act Mail Fraud Statute, 15 U.S.C. § 77q(a) (1973). The separate counts differed only as to the person to whom material was sent by mail. The Court ruled that the separate counts must be consolidated since they charge but a "single fraudulent course of conduct alleged and realleged 18 times in the indictment." *Id.* at 798. Such a consolidation prevents 18 separate punishments for what is but a single crime. However, the issue of multiplicity of indictments is a highly technical one and the same court refused to order consolidation of several counts charging violation of the Mail Fraud Statute, 18 U.S.C. § 1341 (1973) on the theory that the gravamen of the mail fraud offense is not the fraudulent scheme but each use of the mails and thus each mailing can be separately charged and separately punished. *See* United States v. Brandom, 320 F. Supp. 520 (W.D. Mo. 1970). *See also* United States v. Universal C.I.T. Cred. Corp., 334 U.S. 218 (1952). Must the prosecution join at one trial all charges against a defendant? Justice Brennan, joined by Justices Douglas and Marshall, recently dissenting from the denial of a petition for writ of certiorari stated:

> In my view the Double Jeopardy Clause applicable to the states through the Fourteenth Amendment, Benton v. Maryland, 395 U.S. 784 (1969), requires the prosecution, except in most limited circumstances not present here, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction.

Miller v. Oregon, 405 U.S. 1047 (1972).

69. After a successful appeal by a defendant, the double jeopardy clause is no bar to a retrial. United States v. Ball, 163 U.S. 662 (1896).

70. The double jeopardy clause is not an absolute bar to increased punishment. North Carolina v. Pearce, 395 U.S. 711 (1969). *Pearce* forbids unexplained increases in a sentence after a retrial, but it is clear that it does not forbid an increase in punishment when, for example, the accused's conduct between trials warrants additional punishment. Rivera v. Rose, 465 F.2d 727 (6th Cir. 1972). A harsher sentence under a "two tier" misdemeanor trial system which permits a de novo retrial in a court of record after the first trial does not violate the double jeopardy clause. Colten v. Kentucky, 407 U.S. 104 (1972); McClung v. Weatherholtz, 351 F. Supp. 5 (W.D. Va. 1972).

71. It is claimed that the United States Supreme Court has given some credence to the "same evidence" test by applying it to certain situations. *See* Blockburger v. United States, 284 U.S. 299 (1932). However, the cases in which the court has used the test all seem to involve the *Blockburger* situation of multiple count convictions at a single trial.

72. It is likewise claimed that the Supreme Court has given credence to the "same transaction" test. *See, In re* Nielsen, 131 U.S. 176 (1889) (*semble*). In *Nielsen*, the Court held that an initial conviction precluded prosecution even for a second crime which required proof of different elements than were required in the first trial, since the illegal conduct was essentially the same.

Whatever may be the import of prior decisions of the Court, it is the present Court membership that will likely decide the issue. Justices Brennan, Douglas and Marshall favor the "same transaction" test. *See* Ashe v. Swenson, 397 U.S. 436, 448 (1970) (Brennan, J., joined by Douglas, J. and Marshall, J., concurring). Justice Blackmun, though not on the Court at the time of the *Ashe* decision, wrote the opinion for the Eighth Circuit Court

Does acquittal of a substantive crime prevent conviction for a conspiracy to commit the crime[73] or for a lesser included offense?[74] After a successful habeas corpus proceeding, is the prosecution free, because of the civil nature of the habeas proceeding, to relitigate in a second prosecution the issues decided in defendant's favor in the habeas proceeding?[75]

The reason such issues raised by the plea of double jeopardy are so greatly varied and highly refined by a large body of case law is simply that double prosecutions are by no means a rarity. No state or federal prosecuting arm has evidenced the least shyness in attempting a second prosecution where the first aborted, failed entirely or failed to produce a satisfactory sentence.[76]

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of Appeals, using language that seemed to approve the "same evidence" test. Any ambiguity in Justice Blackmun's position was removed by his dissent in Harris v. Washington, 404 U.S. 55 (1971), wherein he not only expressed disagreement with the "same transaction" theory, but also disagreed with the Court's holding in *Ashe*. The Chief Justice, as indicated in *Ashe*, currently favors the "same evidence" test. 397 U.S. at 461 (dissenting opinion). Though he was a member of the *Ashe* Court, Justice White must be ranked as unannounced. He joined the majority in *Ashe* that failed to use the same transaction test as the basis for its decision, but he also declined to join Justice Harlan's concurring opinion which expressly rejected the "same transaction" test. Justices Rehnquist and Powell have not yet spoken on the issue.

The Court's division, as well as its patience in selecting the right case for defining the "same offense" was sharpened in its decision in Robinson v. Neil, 409 U.S. 505 (1973). The majority opinion by Justice Rehnquist held Waller v. Florida, 397 U.S. 387 (1970) to be fully retroactive. All state prosecutions are barred after a municipal prosecution for the same offense. Justices Brennan, Douglas and Marshall agreed with the retroactive aspect of the decision, but dissented from the majority's remand as to whether the three municipal assault and battery counts were the same offense as the three state counts of assault with intent to commit murder. This perception of an "issue" concerning the "same offense" question by Justices Rehnquist, White and Powell, portends their narrow definition of the issue, if not their express acceptance of the "same evidence" as opposed to the "same transaction" test. Subsequently, when the *Waller* case was returned to the Florida court on remand, the double jeopardy plea was rejected on the grounds that the two prosecutions did not involve the same offense.

73. Sealfon v. United States, 332 U.S. 575 (1948). Res judicata prevented a trial on a substantive charge of fraud after acquittal of a conspiracy to commit the fraud.

74. In Price v. Georgia, 398 U.S. 323 (1970), defendant was tried for murder but convicted of the lesser included offense of manslaughter. On appeal, the conviction was reversed and the case remanded for a new trial. He was tried again for murder but was convicted in the second trial only of manslaughter. Nevertheless, the Court held that he could not be retried for murder because of the "implicit acquittal" (Green v. United States, 355 U.S. 184 (1957)) of the murder charge. Even though in *Green* the defendant was convicted of the greater charge, not the lesser one as in *Price*, the Court held that it made no difference since the potential risk of conviction was protected by the double jeopardy clause. *See also* Spidle v. State, 446 S.W.2d 793 (Mo. 1969). *Contra*, Jackson v. Denno, 378 U.S. 368 (1964); Jackson v. Follette, 462 F.2d 1041 (2d Cir. 1972).

75. *See* Collins v. Loisel, 262 U.S. 426 (1923). There the Court stated: "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." *Id.* at 430. The issue has not been decided by the Supreme Court and current state practice is to relitigate issues decided by federal habeas corpus courts. See Note, *Constitutional Collateral Estoppel: A Bar to Relitigation of Federal Habeas Decisions*, 80 YALE L.J. 1229, 1231 (1971).

76. *See* Ashe v. Swenson, 397 U.S. 436, 477 (1970). After defendant was acquitted of robbing one of several members of a poker game, the prosecutor simply sharpened up his

B. *The "Same Offense"*

The leading issue on which the Justices are currently split is a fundamental one: does the bar of double prosecution for the "same offense" mean that the defendant can be prosecuted only once for the same criminal "transaction" or that he cannot be prosecuted twice with the same "evidence"? The initial report of the National Commission on Reform of Federal Criminal Laws (the "Brown Commission"), after prolonged study made an attempt to codify a rule barring subsequent prosecutions for "the same offense," which it defined as a prosecution "based upon the same facts as the former prosecution."[77] The report conceded that "[f]ederal case law is far from clear at present as to what constitutes 'the same offense' for double jeopardy purposes."[78] In what is at least an oversimplification, the Brown Commission Report claimed that its rule extended double jeopardy protection well beyond the existing protection, which "applies only when offenses are 'identical.' "[79] Some court applications of the same evidence test have been so rigid, in fact, that for all practical purposes, the result is just what the Brown Commission stated—short of an "identical" offense, double jeopardy offered no protection.[80] However, under the broader "same transaction" test, some lower courts now bar a second prosecution though it is neither "identical" to nor based solely upon the "same evidence"[81] as the initial prosecution. Spurred on by the persuasive endorsement of Mr. Justice Brennan,[82] the "same transaction" test is gaining acceptance.[83] If ultimately accepted by the Supreme Court, it would clearly extend double jeopardy protection beyond the identical offense to include any other definable offense occurring within the same criminal episode.

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evidence and tried again in a prosecution for the second victim. The Court realized that, if allowed, this is what "every good attorney would do . . . ."

77. REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS § 703 (comment) [hereinafter referred to as the Brown Commission].

78. *Id.* at § 705 (comment).

79. *Id.*

80. *See* People v. Kernanen, 178 Colo. 234, 497 P.2d 8 (1972).

81. The same evidence test is said to have its origin in The King v. Vandercomb, 168 Eng. Rep. 455, 461 (Crown 1796), *quoted in* Ashe v. Swenson, 397 U.S. 436, 451 (1970). Even the same evidence test permits prosecution for two offenses only if one "requires" proof of a fact which the other does not. However, the prosecution will not be successful merely because a piece of evidence is deemed "admissible" at a second trial after having been ruled inadmissible at the first trial. Harris v. Washington, 404 U.S. 55 (1971).

82. The "same transaction" test was recently adopted by the Michigan Court of Appeals, which ruled that where defendant had already been convicted of rape and assault, he could not be separately prosecuted for the kidnapping of the victim since they were all part of a single course of criminal conduct, namely, the abduction and asportation of the defendant from the suburbs to a location in Detroit where she was raped. People v. White, 41 Mich. App. 370, 200 N.W.2d 326 (1972); *accord*, 262 Ore. 442, 497 P.2d 1191 (1972) (a defendant who had been convicted of the misdemeanor of carrying a concealed weapon could not thereafter be prosecuted for the felony of possessing a gun).

83. Ashe v. Swenson, 397 U.S. 436, 448 (1970) (concurring opinion). The three concurring Justices—Brennan, Douglas and Marshall—are still on the Court.

C. *Can Evidence of a Prior Conviction Amount to Double Jeopardy?*

The history of the use of impeachment and similar crimes evidence has convinced the Supreme Court that the purpose in some of the cases that have come before the Court is merely to blacken the image of the defendant rather than to establish a probative logical nexus between the indictment and the other crime.[84] Despite the lip service paid by all jurisdictions to the rule that other crimes are inadmissible to show a disposition to crime or a propensity for evil, a fair evaluation of the history of the rule shows that very few courts and almost no prosecutors have resisted the temptation to show the jury one or more prior crimes if at all similar to the charge in issue.[85] Thus, even if the "same transaction" test is adopted it may still be too little to prevent the normal usage of prior offenses evidence in most criminal prosecutions.

However, there may be many cases where sensational features of the prior offenses evidence are coupled with a weak charge or when heavy attention is paid to the prior offense at trial which violate even the strictest double jeopardy test.

D. *The Manner of Using Other Offenses*

The United States Court of Appeals for the District of Columbia recently reversed a conviction where a testifying defendant on trial for robbery was asked about his prior robbery conviction in such a way as to suggest a propensity for stealing. Though the conviction was deemed admissible, the court condemned the "manner in which the evidence was adduced."[86] The Fourth Circuit has criticized the spending of excessive trial time on other crimes evidence and has issued an unmistakable warning to prosecutors that "lavish treatment" of such evidence would produce reversals.[87]

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84. State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1972). *See also* Loper v. Beto, 405 U.S. 473, 482 n.11 (1972); United States v. Mastrotatoro, 455 F.2d 802 (4th Cir. 1972).

85. See Lovely v. United States, 169 F.2d 386 (4th Cir. 1948) where, in a rape case a similar rape offense was introduced despite the absence of any logical reason for showing it. The prosecution offered it as relevant to "identity." Yet the defendant admitted he had perpetrated the act, but claimed consent. Thus, no identity issue was present.

Similarity, in many cases, actually militates against admission of such offenses unless "handiwork" is the logic for admission. One court has observed that the very similarity of another offense has an especially prejudicial effect. The similarity "can only serve to increase 'the inevitable pressure on lay jurors to believe that if he did it before he probably did so this time'." *Accord*, Gordon v. United States, 383 F.2d 936, 941 (D.C. Cir. 1967) (opinion of Judge Burger (now Chief Justice)); United States v. Bussey, 432 F.2d 1330, 1333, n.7 (D.C. Cir. 1970) (dictum); United States v. Hildreth, 387 F.2d 328, 329 (4th Cir. 1967).

86. United States v. Carter, 482 F.2d 738, 740 (D.C. Cir. 1973).

87. United States v. Mastrotatoro, 455 F.2d 802, 804 (4th Cir. 1972). The same judge shortly thereafter repeated the warning in United States v. Baldivid, 465 F.2d 1277 (4th Cir. 1972) (Sobeloff, J., dissenting). "Since the publication of *Mastrotatoro*, this frail precedent has apparently been given a vigorous workout by prosecuting attorneys who, in my view, have failed to take full cognizance of that opinion's limiting language and restricted scope." *Id.* at 1290.

Admission of another crime even remotely like the one in issue generally will produce an easy conviction, as such evidence is more than prejudicial. Evidence of recidivism in virtually any form is almost inevitably dispositive. Leaving such matters to prosecutorial discretion is transparently unsound,[88] since prosecutors have the same personal desire to win cases as other lawyers, and hence, tend to use evidence of similar offenses to appeal to the fears a juror feels when faced with a proven criminal character.

E. *The Use of Unrealistic Evidentiary Hypotheses*

Spending excessive trial time on prior offenses is less frequently a problem than the concocting of an unrealistic issue to which a prior offense is said to be relevant. The list of hypotheses contained, for example, in the proposed Federal Rules of Evidence that will in the future, if adopted, justify use of a prior crime is so general that the prior crimes rule can now scarcely be termed an "exception" to an exclusionary rule.[89] Although the Fourth Circuit[90] has come to that conclusion in advance of any formal rules of evidence, the other ten circuits have not. The underlying definition of relevancy[91] in the proposed rules is so expansive that it is difficult to glean from the rules themselves any limit on the admissibility of a prior crime, though hopefully some limit was intended.[92]

The classic rationale of relevancy justifying admission of a prior crime is the handiwork or distinctive pattern crime (often called a "signature" crime) which exists only in rare cases and relates almost entirely to the issue of identity.[93] Cautioning that the vague rules allowing evi-

88. Mr. Justice Brennan, concurring in Ashe v. Swenson, 397 U.S. 436 (1970) observed with reference to the numerous charges a prosecutor might bring based on the same conduct that this, too, was a matter not to be left to the whim of the prosecutor: "[G]iven our tradition of virtually unreviewable prosecutorial discretion concerning the initiation and scope of a criminal prosecution, the potentialities for abuse inherent in the 'same evidence' test are simply intolerable." *Id.* at 452.

89. *See* Proposed Fed. R. Evid. 404(b). One court has observed that the exceptions are so numerous that "it is difficult to tell whether the doctrine or the acknowledged exceptions are the more extensive." United States v. Deaton, 381 F.2d 114, 117 (2d Cir. 1967). Even the fact that an appeal is pending will not be an obstacle to using a trial conviction as impeachment. Proposed Fed. R. Evid. 609(e). *Contra*, Campbell v. United States, 176 F.2d 45, 46-7 (D.C. Cir. 1949).

90. United States v. Woods, 484 F.2d 127 (4th Cir. 1973).

91. Proposed Fed. R. Evid. 601 provides: " 'Relevant evidence' means evidence having *any tendency* to make the existence of *any fact* that is of consequence to the determination of the action *more probable* or *less probable* than it would be without the evidence." (emphasis added).

92. Proposed Fed. R. Evid. 403 provides that: "Although relevant, evidence is not admissible if its probative value is substantially out-weighed by the danger of unfair prejudice . . . ." Rule 404(a) provides: "Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion . . . ." It is this exclusionary rule to which the other crimes rule began merely as an exception.

93. *See* United States v. Bobbitt, 450 F.2d 685 (D.C. Cir. 1971); United States v. Bussey, 432 F.2d 1330 (D.C. Cir. 1970).

dence of prior crimes "should not be applied by rote," Judge Sobeloff has written that the handiwork exception applies if the prior crime and the one in issue fit a "pattern which is uniquely the defendant's."[94] Yet this rarely found criterion has mushroomed into a general doctrine which may soon become codified in the broadest possible terms that would enable prosecutors to justify the admission of a prior crime on even the most transparent pretexts of relevancy. What must rank as the classic pretext is the rape case in which intercourse by the defendant was not disputed, but the defense claimed "consent." Nevertheless, the trial court permitted evidence of a prior rape to prove "identity."[95] The court of appeals charitably labeled the identity justification an "unrealistic hypothesis" and reversed.[96]

The common use of such unrealistic hypotheses strongly militates at the very least in favor of a rule requiring that introduction of other crimes evidence await the raising of a genuine dispute by the defendant over the vehicle issue.[97] But a fair and responsible appellate administration of the present rules relating to so-called similar offenses would require even more.

A start toward a tighter approach was recently made by the United States Court of Appeals for the Tenth Circuit, sitting en banc, when it ruled that other crimes evidence raised an issue of "fundamental fairness and justice of the trial itself" and should not be handled merely as a rule of evidence.[98] Generic similarity between the offenses (admission of prior Dyer Act convictions in a Dyer Act prosecution) was not sufficient to satisfy the handiwork requirement. The court stated: "The lack of showing of a common plan, scheme, design or intent is of itself a fatal deficiency here."[99]

The dramatic or lavish use of arguably relevant prior similar crimes, as well as the moderate use of irrelevant but potentially fatal evidence of a prior crime, is indeed fundamentally unfair. Plainly due process is denied in some instances. But worse than general prejudice, where the instant charge is an exceedingly weak one and the prior crime actually serves to tip the scales, the defendant has, in reality, been prosecuted twice for the prior crime. However, the relative impact of evidence relating to the indictment and to prior crimes is virtually immeasurable and has, therefore, been left to the trial judge's subjective view of the prejudicial impact of the prior crime.

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94. United States v. Baldivid, 465 F.2d 1277, 1287 (4th Cir. 1972) (separate opinion).

95. Lovely v. United States, 77 F. Supp. 619 (E.D.S.C. 1948).

96. Lovely v. United States, 169 F.2d 386, 391 (4th Cir. 1948).

97. The use of such evidence is limited to rebuttal under some circumstances. *See* United States v. Bussey, 432 F.2d 1330 (D.C. Cir. 1970).

98. United States v. Burkhart, 458 F.2d 201, 205 (10th Cir. 1972) (en banc).

99. *Id.* at 208.

F. *Justice Brennan and De Facto Double Jeopardy*

The number of trials which are in reality prosecutions for previous offenses has been considered by the Supreme Court. In *Bartkus v. Illinois*,[100] after an acquittal in federal court, the defendant was convicted in state court. Though the Supreme Court upheld the conviction, Justice Brennan called the state prosecution, in reality, a second federal prosecution.[101] By the same token, if the second prosecution is for a different offense, but the evidence is weak, and the second prosecutor succeeds in making the case by use of evidence of a dramatic prior offense, clearly some fundamental right is violated. But what right? If the principal charge is extremely weak in comparison to an ostensibly relevant prior offense, there would seem to be little difference between the "guise" of a state prosecution used as cover for a second federal trial and the guise of the use of persuasive prior crimes evidence to convict in a weak case. Collateral estoppel, discussed *infra*, would be of no assistance since the prior determination by conviction was unfavorable.[102] Rather the pure double jeopardy bar would seem to be the only basis for preventing such prosecutions. Prosecutors now have little reason to fear any adverse consequences of lavish use of other crimes evidence. Until the shield of "harmless error" gives way to the presumptive prejudice connected with error of constitutional magnitude,[103] the use of other crimes evidence will continue in a steadily increasing degree.

Such de facto analysis of the role of the prior prosecution in bringing about a second conviction is highly appropriate in many cases. However difficult it might be to perform, such an analysis may well lead in many cases to the conclusion that the defendant has in reality endured double jeopardy for and been convicted on the strength of the prior crime.

When the prior "crime" is conduct of which defendant was acquitted, the jury may also be seduced by the added temptation to correct the wrong that occurred when the culprit slipped through the law's grasp the last time. This bizarre and troublesome use of a prior offense of which defendant was acquitted also raises one of the most intriguing of all constitutional questions.

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100. 359 U.S. 121 (1959) [hereinafter referred to as *Bartkus*].

101. 359 U.S. at 165-66 (dissenting opinion). Bartkus was acquitted in federal court in December. Then in early January a meeting was held in the United States Attorney's office to which the Assistant State's Attorney for Cook County was invited. The state prosecution planned there resulted in a conviction. Justice Brennan stated that the Court's task was to determine how much the federal authorities must participate in a state prosecution "before it so infects the conviction that we must set it aside." *Id.* at 168. He characterized the state prosecution as "actually a second federal prosecution" merely in the "guise" of a state prosecution. If the conviction were not overturned, he thought, there would be no restraints on "the use of state machinery by federal officers to bring what is in effect a second federal prosecution." *Id.*

102. Ashe v. Swenson, 397 U.S. 436, 459 n.13 (1970) (Brennan, J., concurring).

103. *See* Chapman v. California, 386 U.S. 18 (1967).

X. Constitutional Collateral Estoppel

In 1971, the United States Court of Appeals for the Fourth Circuit affirmed a federal conviction obtained in part by the use of evidence of a similar offense of which a defendant had been acquitted by a state court jury.[104] Clinging to what the Supreme Court has called the "anachronism" of dual sovereignty as its justification, the circuit court noticeably hedged its approval of the use of such an "offense," stating that the record below was inadequate to demonstrate the precise grounds of the state acquittal. Additionally, the court expressed awareness and even a hint of appreciation of the persuasive literature predicting the abandonment of the dual sovereignty rule, but deferred to the Supreme Court for such a ruling.[105] Other courts have indicated, at least in dicta, that an acquittal would not stop admission of the episode as a prior criminal act.[106]

A. *Double Prosecutions for the "Same Offense"*

The Supreme Court has sanctioned second prosecutions after both convictions[107] and acquittals.[108] And it is that same route and rationale by which the Court sanctioned such prosecutions that has led lower federal courts to permit the evidentiary use of acquittals as criminal acts.[109] *Benton v. Maryland*[110] forbade retrial of an accused in a state court for the same offense of which he was acquitted at a previous trial in the state court. Successive prosecutions by one federal court after a prior federal trial for the "same offense" have long been held impermissible.[111]

B. *Dual Sovereignty*

Where different sovereigns attempt successive prosecutions, however, even the "identical" act could be prosecuted based on the very "same evidence." No constitutional bar of any sort exists under current

104. United States v. Smith, 446 F.2d 200 (4th Cir. 1971).

105. *Id.* at 202 n.11.

106. United States v. Burkhart, 458 F.2d 1330 (D.C. Cir. 1970); *see also* II J. Wigmore, Evidence, § 317 at 218 and n.4 (3d ed. 1940). Courts suggest that an acquittal is something that should at least be heavily weighed before a prior "offense" is admitted in evidence, but the fact of acquittal is not conclusive. United States v. Smith, 446 F.2d 200 (4th Cir. 1971); United States v. Burkhart, 458 F.2d 1330 (D.C. Cir. 1970). Acts that do not in fact constitute an offense, however, are not admissible. Haywood v. United States, 268 F. 795, 806 (7th Cir. 1920). Also, evidence of arrests, without more, is not admissible. Michelson v. United States, 335 U.S. 469, 482 (1948). *See also* note 26 *supra.*

It is preferable to have the trial judge determine out of the jury's presence whether the proof shows that defendant was connected with the other crime by "clear and convincing evidence" before allowing the jury to hear the details. United States v. Bussey, 432 F.2d 1330, 1335 (D.C. Cir. 1970) (dictum).

107. Abbate v. United States, 359 U.S. 187 (1959).

108. Bartkus v. Illinois, 359 U.S. 121 (1959).

109. United States v. Smith, 446 F.2d 200 (4th Cir. 1971).

110. 395 U.S. 784 (1969) [hereinafter referred to as *Benton*].

111. *See* Grafton v. United States, 206 U.S. 333 (1907).

case law. The Supreme Court held in *Bartkus* that an acquittal in a federal court does not preclude a retrial in a state court and in *Abbate v. United States*,[112] that a conviction in a state court does not bar a federal trial on the same facts.

Only a party to a judgment is bound by that judgment.[113] Thus, when a state loses in its attempt to convict a defendant, the federal government, not having been a party to the loss, is not bound by it. Moreover, since the federal and state governments are different sovereigns with different policies and interests of their common citizens to protect, to cheat the federal government out of its right to relitigate that loss in federal court, it is said, emasculates the sovereign power of that government.

Until recently, it was even possible to try and convict a defendant in a municipal or city court and then try him again for a felony in the state court for the identical act. Then, in *Waller v. Florida*,[114] the Supreme Court held that the "dual sovereignty" rule it followed earlier was an "anachronism" when applied to states and municipalities and reversed a conviction based on a state prosecution which followed a conviction based on the same matter by a municipality. In *Waller* the state attempted through reliance on *Bartkus* and *Abbate* to justify the second prosecution on grounds of dual sovereignty. It argued that the relationship between a municipality and the state is analogous to the relationship between a state and the federal government. The analogy was rejected.

C. *How Dual Sovereignty Spreads to Other Crimes Evidence*

Even in advance of a rule preventing a second sovereign from prosecuting a defendant separately for the same act, dual sovereignty is clearly inapplicable as a policy justification when one jurisdiction seeks to introduce as evidence an episode that resulted in an acquittal in a different jurisdiction. The right of the second jurisdiction to prosecute offenses perpetrated against itself is in no way vitiated by barring such evidence since the prior offense is seldom also an offense against that second sovereign. In the rare case where the forum jurisdiction might also have had jurisdiction to prosecute, such as for an offense which violates both state and federal law, failure to prosecute waives the objection. Plainly, these concepts are of highly dubious validity, for the result they produce is anomalous. Conduct for which a defendant was acquitted should never be used against him as a prior crime.

D. *The Double Jeopardy Cases*

Ashe v. Swenson,[115] which raised collateral estoppel to constitutional stature was a landmark decision, but it would be a mistake to think that

112. 359 U.S. 187 (1959) [hereinafter referred to as *Abbate*].
113. RESTATEMENT OF JUDGMENTS §§ 83, 85 (1942).
114. Waller v. Florida, 397 U.S. 387 (1970) [hereinafter referred to as *Waller*].
115. 397 U.S. 436 (1970) [hereinafter refered to as *Ashe*].

the doctrine has its most important application in the multi-victim crime situation involved in that case. In fact, in creating constitutional collateral estoppel, the Court sacrificed an opportunity to bar second prosecutions on grounds of due process and double jeopardy, which concepts are equally as narrow and judicially restrained as collateral estoppel. Due process and double jeopardy were clearly far more appropriate grounds for disposing of the multi-victim situation in *Ashe*. Why then did the Court strain to avoid the due process ground for decision, and create instead an entirely new constitutional doctrine of collateral estoppel, applicable to a far greater variety of fact situations?

The answer lies in a decision only 12 years prior to *Ashe*. In *Hoag v. New Jersey*,[116] a divided Supreme Court refused to reverse a conviction under facts virtually identical to *Ashe*. The court struggled with the issue whether the second prosecution for the simultaneous robbery of a second victim violated due process, but upheld the conviction. Then, in 1969, *Benton* paved the way for the decision in *Ashe* by holding that the fifth amendment protection against double jeopardy was applicable to the states. A year later when *Ashe* came before the Court, it was a simple matter to rely on the double jeopardy tool provided by *Benton* and avoid overruling its recent *Hoag* decision. It was far easier to fashion a sound rule by elevating collateral estoppel to constitutional stature.[117]

However, there can be little doubt after a careful reappraisal of *Hoag*, that the principal reason for the Court's refusal to strike down Hoag's conviction on due process grounds was the rule of *Palko v. Connecticut*[118] that the double jeopardy concept was not so fundamental that it applied to the states. But in 1969, the Court expressly overruled *Palko* when it decided *Benton*.[119] While it declined to overrule *Hoag* on the due process issue, *Benton* cut the very heart out of *Hoag*. Later, in deciding *Ashe*, the Court again concluded it was no longer necessary to reach the due process issue of *Hoag*, but held, on facts which were conceded to be "virtually identical"[120] to those in *Hoag*, that the double jeopardy clause was an absolute bar to the second prosecution, foregoing the chance and

116. 356 U.S. 464 (1958) [hereinafter referred to as *Hoag*].

117. In United States v. Oppenheimer, 242 U.S. 85 (1916), the Court held that federal law recognizes in criminal cases the principle of collateral estoppel. In Hoag v. New Jersey, 356 U.S. 464, 471 (1958), the Court entertained grave doubts, despite the widespread employment of the doctrine of collateral estoppel, whether the doctrine can be regarded as a constitutional requirement. In Ashe v. Swenson, 397 U.S. 436 (1970), the Court held that it was a constitutional requirement.

118. 302 U.S. 319 (1937) [hereinafter referred to as *Palko*].

119. In *Benton*, the Court said (395 U.S. 784 at 794): "[W]e today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the states through the Fourteenth Amendment. Insofar as it is inconsistent with this holding, *Palko v. Connecticut* is overruled." 395 U.S. at 794.

120. 397 U.S. at 441.

avoiding the need to re-examine the fairness issues of due process.[121] The court said that:

> [T]he question is no longer whether collateral estoppel is a requirement of due process, but whether it is a part of the Fifth Amendment's guarantee against double jeopardy. And if collateral estoppel is embodied in that guarantee, then its applicability in a particular case is no longer a matter to be left for state court determination, within the broad bounds of "fundamental fairness," but a matter of constitutional fact . . . .[122]

E. *Erosion of Separate State Sovereignty*

The sovereign barriers between the prosecutorial jurisdiction of state and federal governments are becoming increasingly difficult to find. In many cases the federal government stands in the shoes of the state government, or has a near identical aim in prosecuting. Statutes prohibiting the use of the mails to defraud,[123] theft of goods from an interstate shipment,[124] the use of interstate facilities to promote an activity illegal under state law,[125] and interstate transportation of women for immoral purposes,[126] all involve federal prosecutions on behalf of state interests or situations where the state's practical ability to prosecute successfully is doubtful. Likewise, in wiretapping,[127] kidnapping,[128] and other areas,[129] the federal government has pre-empted the field and represents not only

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121. Justice Blackmun, dissenting in Harris v. Washington, 404 U.S. 55, 57 (1971), said he disagreed with the elevation of collateral estoppel to a constitutional guarantee, but could have understood a square overruling of *Hoag*.

122. 397 U.S. at 442-43. *See also* Erickson, *The ABA Standards for Criminal Justice*, in 2 CRIMINAL DEFENSE TECHNIQUES § .08 at App. 23 (Bernstein ed. 1973).

123. 18 U.S.C. § 1341 (Supp. 1973).

124. 18 U.S.C. § 2117 (1970).

125. 18 U.S.C. § 1952 (1970), *as amended*, 18 U.S.C. (b), (c) (Supp. 1973).

126. 18 U.S.C. § 2421 (1970).

127. 18 U.S.C. § 2511 (1970).

128. 18 U.S.C. § 1201 (Supp. 1973).

129. While federal jurisdiction has been broadened tremendously in recent years, it is about to undergo an even further dramatic expansion. The proposed Federal Criminal Code, introduced January 4, 1973, S. 1, 93d Cong., 1st Sess. (1973), adds major new definitions of federal jurisdiction which will create many more instances of overlap between possible state and federal prosecutions. Section 1-1A4(2) of the draft bill introduces a concept of "piggy back" jurisdiction which provides federal jurisdiction for any offense committed in the course of committing a federal crime or while fleeing from that act. *See* Liebmann, *Chartering A National Police Force*, 56 A.B.A.J. 1070 (1970). Federal jurisdiction is also broadened by § 1-1A4(3) to include any offense which "affects commerce, directly or indirectly . . . ." If property which is the subject of an offense is property "moving in interstate . . . commerce" or if the offense involves "movement of any person across a state or United States boundary" either during commission of or flight from the offense, or if an interstate facility is used in connection with the offense or the flight, federal jurisdiction attaches under § 1-1A4(12). Federal jurisdiction exists under § 1-1A4(2) for offenses connected with property which is owned by or in the custody or control of the United States, or which is being manufactured or stored for the United States. And any offense connected with a building owned or leased to the United States or involving a program which is receiving federal financial assistance comes within federal jurisdiction under § 1-1A4(58) of the proposed criminal code.

itself but also the state. Under these circumstances it is unsound to speak of the state and federal roles in prosecutions as dual sovereigns, for the dual sovereign rationale can be employed in a number of ways. An unsuccessful state prosecution for a morals offense can be followed by a prosecution under the Mann Act for the interstate transportation of the woman even if the entire episode is a brief tryst. Only by treating the two governments as separate sovereigns could a plea of double jeopardy be prevented. Yet the underlying rationale is contrary to the rationale used 60 years ago to sustain the validity of the Mann Act when the Court said:

> Our dual form of government has its perplexities . . . but it must be kept in mind that we are one people . . . and the powers [granted to the federal government] are adapted to be exercised, whether independently or concurrently, to promote the general welfare . . . .[130]

Moreover, dual sovereignty is supported by the shakiest of precedent. The authorities relied upon by the Court in *Bartkus* and *Abbate* have been widely questioned.[131] After the government won the *Abbate* case, the Attorney General quickly announced a policy highly restrictive of subsequent federal prosecutions.[132]

Ironically, even the precepts of international law do not appear to support that position. An acquittal in one country can be pleaded as a bar in another country.[133] If the dual sovereignty concept is an "anachronism"[134] as between state and local governments, it is no less anachronistic as applied to state and federal governments. Unquestionably, further procedures are needed to assure that where peculiarly federal or state purposes are present, they will be fairly represented in a prosecution. Numerous solutions have been proposed, such as joint trials of state and federal charges. Some of these solutions are better than others, but all are most certainly better than perpetuating the concept of dual sovereignty and the tradition of tolerable double jeopardy which it nourishes.

Even the abandoned attempt of the Brown Commission to frame a rule under which prosecution by one jurisdiction would bar prosecution by the federal government[135] offered some worthy concepts. The proposal would have recognized that a prosecution in another jurisdiction would prevent prosecution by the federal government under some circumstances

130. Hoke v. United States, 227 U.S. 308, 322 (1913).

131. Schaefer, *Unresolved Issues in the Law of Double Jeopardy: Waller and Ashe*, 58 CALIF. L. REV. 391, 400 (1971) [hereinafter cited as Schaefer]. *See also* Franck, *An International Lawyer Looks at the Bartkus Rule*, 34 N.Y.U.L. REV. 1096 (1959); Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 U.C.L.A.L. REV. 1 (1956); Pontikes, *Dual Sovereignty and Double Jeopardy: A Critique of Bartkus v. Illinois and Abbate v. United States*, 14 W. RES. L. REV. 700 (1963).

132. N.Y. Times, April 6, 1959, at 1, col. 4 (city ed.).

133. *Cf.* United States v. Furlong, 18 U.S. (5 Wheat.) 86 (1820).

134. Waller v. Florida, 397 U.S. 387 (1970). *See also* Grafton v. United States, 206 U.S. 333 (1907).

135. *See* Schaefer, *supra* note 129.

—a considerable improvement on *Abbate*. If the subsequent federal prosecution were based on the same conduct or arose from the same criminal episode as the prior prosecution, it would be barred, under the Brown Commission's proposal unless the state law under which the defendant was tried was "intended to prevent a substantially different harm or evil" from the federal offense.[136] Obviously a better definition is necessary since the argument could always be made that the federal statute relates to some different evil. Furthermore, the Brown Commission's concept was fundamentally insufficient since it would have made such prosecutions, ultimately, a matter of prosecutorial discretion rather than constitutional right. The Attorney General would have been permitted to certify, in exceptional cases, that the interests of the United States would be unduly harmed if the federal prosecution were barred and, thus, could have defeated entirely the bar of double jeopardy.[137]

Any solution that makes double jeopardy protection depend on prosecutorial discretion, or on the application of a poorly articulated standard, comparing the goals of the federal and state statutes is unsatisfactory.[138] New trial procedures that will permit a single prosecution are needed to deal with those instances when both sovereigns have compelling reasons for prosecuting a defendant for the same criminal episode. The jurisdiction of federal courts should be expanded to include pendent jurisdiction over the state crime. Expansion of state court jurisdiction to give it pendent jurisdiction to try the federal crime along with the state crime clearly presents greater problems of constitutionality, uniformity and policy. Wherever possible, however, the prosecutions should proceed together, or the second try should be barred. The defendant should face the full jeopardy for his crime and be exposed to both state and federal punishment where the two have unique interests, but he should endure it

136. REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS §§ 704-05 (comment). *See* Erickson, *The ABA Standards for Criminal Justice*, in 2 CRIMINAL DEFENSE TECHNIQUES § .08 at App-23 (Bernstein ed. 1973) [hereinafter cited as Erickson], which discusses the proposals contained in the Model Penal Code and in the ABA's Minimum Standards for Criminal Justice relating to joinder of offenses. Both adopt the position that a defendant should be protected against successive prosecution for the same conduct. The ABA Standards adopt the procedure of permitting a defendant who has been charged with two or more offenses to move that they be joined for trial or, after an unsuccessful joinder motion and after being tried for one of the offenses, the defendant would then be permitted to move to dismiss any other closely related offense.

137. REFORM OF FEDERAL CRIMINAL LAWS, HEARINGS BEFORE SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES, 92d Cong., 2d Sess. (1972).

138. The task of determining such similarity under federal and state statutes was termed "a difficult one," even 14 years ago. Bartkus v. Illinois, 359 U.S. 121, 138 (1959). The next 14 years proved it almost impossible as attested to by the Brown Commission's capitulation. Some 27 states have refused to recognize a former prosecution in another jurisdiction as a bar. *See* Bartkus v. Illinois, 359 U.S. 121, 134 (1959). Presently, very few federal statutes recognize the bar of a prosecution in another jurisdiction. *But see* 18 U.S.C. § 2117 (1970), which is one of a rare breed of federal statutes prohibiting a federal prosecution for burglary of a vehicle carrying an interstate shipment after prosecution for the same conduct by a state.

only once. Even the Brown Commission's legislative solutions were abandoned,[139] however, and any solutions are for now left to the courts.

F. *The Dissents of Mr. Justice Black*

What was said of the dual sovereignty rule in the context of local and state prosecutions is equally applicable to successive state and federal prosecutions. In *Waller*, Justice Black stated that even the state and federal governments should not be viewed as separate sovereigns for the purpose of justifying successive prosecutions.[140] In his decade of double jeopardy dissents,[141] Justice Black repeated several times and supported with scholarly historical analysis four themes which may yet prevail: First, double jeopardy must be viewed from the perspective of the rights of the defendant rather than the purported sovereign rights of the prosecuting authority;[142] second, the rule of collateral estoppel in criminal cases is not to be applied with rigid technical adherence to rules applied in civil cases;[143] third, retrials after a prior acquittal have been viewed throughout legal history as being especially obnoxious and offensive to fundamental concepts of fairness;[144] and fourth, application of the bar of double jeopardy should not be left to subjective notions of what is fair but should be an absolute bar to a second trial for the same offense.[145] The inroads made recently by lower courts in the outmoded concepts so long and so solidly opposed by Justice Black are quite dramatic. His impact on the development of the concepts of double jeopardy and estoppel, though almost entirely in dissent, is clearly historic.

One state supreme court, embracing this philosophy, has announced that it will no longer tolerate successive federal and state prosecutions for

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139. Sections 704-08 relating to the bar of a former prosecution were eliminated from the Senate bill prior to introduction. S. 1, 93d Cong., 1st Sess. (1973).

140. 397 U.S. at 395 (separate opinion).

141. Bartkus v. Illinois, 359 U.S. 121, 150 (1959); Abbate v. United States, 359 U.S. 187, 201 (1959); Ciucci v. Illinois, 356 U.S. 571, 575 (1958). *See also* Greene v. United States, 355 U.S. 184 (1957).

142. Justice Black, speaking of the dual sovereignty justification for a double prosecution, said:

> Looked at from the standpoint of the individual who is being prosecuted, this notion is too subtle for me to grasp. If the double punishment is what is feared, it hurts no less for two "Sovereigns" to inflict it than for one. If danger to the innocent is emphasized, that danger is surely no less when the power of State and Federal Governments is brought to bear on one man in two trials, than when one of these "Sovereigns" proceeds alone. In each case, inescapably, a man is forced to face danger twice for the same conduct.

Bartkus v. Illinois, 359 U.S. 121, 155 (1959) (dissenting opinion).

143. *Id.* In at least one context this view had been adopted by the Court. Speaking of the technique to be followed in determining what facts were finally determined in a prior case, the Court said in *Ashe* that in criminal cases, the rule of collateral estoppel should not be applied with the "hypertechnical and archaic approach of a 19th century pleading book . . . ." Ashe v. Swenson, 397 U.S. 436, 444 (1970).

144. Bartkus v. Illinois, 359 U.S. 121, 162 (1959) (dissenting opinion).

145. Ashe v. Swenson, 397 U.S. 436, 447 (1970) (Black, J., concurring).

the same act unless it appears that their interests are "substantially different."[146] This policy decision from a state court suggests that where the Supreme Court failed to complete the breakthrough, some other less vulnerable tribunals are willing to pick up the standard. Still other courts, though more reluctant to innovate where the Supreme Court balked, have at least acknowledged that the dual sovereignty twins, *Bartkus* and *Abbate*, cannot long withstand the chafing effect of decisions like *Benton* and have openly predicted the abandonment of the dual sovereign rule.[147]

Absent the dual sovereignty justification, the use of evidence of a prior offense of which defendant was acquitted violates the *Ashe* constitutional collateral estoppel rule. The United States Court of Appeals for the Fifth Circuit, in a habeas corpus proceeding, ruled that the introduction into evidence in a state trial of "other crimes" conduct of which the defendant had been acquitted was prohibited by *Ashe*.[148] In doing so, the federal court showed no reluctance to fashion for the states a rule interpreting *Ashe* to provide that such an "evidentiary fact," once adjudicated, is protected by the constitutional principle of collateral estoppel. The fact that it was a federal court which ruled that a state cannot use a prior state acquittal demonstrates the crumbling of the border between such sovereigns. If due process forbids the use of an invalid conviction, as the Supreme Court held in *Loper v. Beto*,[149] the use as an alleged "crime" of a transaction for which the defendant once stood trial and was cleared is a far more fundamental, constitutionally offensive violation of due process. An acquittal brings to the court the additional constitutionally offensive element of badgering the defendant with the historically most abhorred feature of double jeopardy—the requirement that he defend himself again after once being acquitted.[150]

G. *The Supreme Court's Own Erosion of Dual Sovereignty*

Although not yet abandoned in all circumstances,[151] the dual sovereignty principle has suffered considerable erosion in recent years and has been expressly abandoned by the Court in at least three situations. In *Elkins v. United States*,[152] the Court ruled that evidence illegally seized by state authorities could not be used by federal authorities; in *Murphy v. Waterfront Commissioner*,[153] the Court held that a grant of immunity to a witness by a state authority barred the federal government from

146. Commonwealth v. Mills, 447 Pa. 163, 171-72, 286 A.2d 638, 642 (1971).

147. United States v. Smith, 446 F.2d 200, 203 n.1 (4th Cir. 1971).

148. Wingate v. Wainwright, 464 F.2d 209 (5th Cir. 1972).

149. 405 U.S. 473 (1972).

150. Bartkus v. Illinois, 359 U.S. 121 (1959) (Black, J., dissenting).

151. *See* Murray, *Collateral Estoppel in Criminal Prosecutions: Time to Abandon the Identity of Parties Rule*, 46 S. CAL. L. REV. 922 (1973); REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, comment to § 704 at 61; Erickson, *supra* note 136, § .08 at App. 23.

152. 364 U.S. 206 (1960).

153. 378 U.S. 52 (1964).

using the testimony compelled under the state's immunity grant; and in *Waller v. Florida*,[154] the Court most recently rejected the "dual sovereignty" theory calling it an "anachronism" as applied to successive prosecutions by a municipality and a state. Prior to these three decisions, a second prosecution would have been allowed in each of those situations under the dual sovereignty rule.

XI. Conclusion

The full impact of seemingly unrelated constitutional decisions on grounds of due process, double jeopardy, ex post facto laws and a constitutional right to testify may not be appreciated for quite some time when appellate courts have had time to develop these issues in different contexts.

The direct impact of the Supreme Court's holding in *Ashe v. Swenson*, for example, was merely to prevent repetitious attempts at prosecution after a defendant was once acquitted of a crime against one of several victims. However, the ripple effect of the decision was far more significant and should ultimately produce a complete re-evaluation of the double jeopardy, collateral estoppel and due process implications of the use of evidence to prior offenses. Likewise, the direct impact of the court of appeals' decision in *United States v. Henson*[155] is to outlaw retroactive application of adverse significant statutory changes in the use of prior crimes evidence. What these courts share in common is the determination to treat this traditionally evidentiary and procedural question as a matter of fundamental fairness of the trial, worthy of consideration under a variety of constitutional provisions.

Perhaps this common theme of *Henson, Loper, State v. Santiago*,[156] *Wingate v. Wainwright*[157] and other recent decisions will lead other courts to discard the myth that prior convictions are truly used only to impeach credibility or to bolster some other remote and unlikely issue, and will enlighten other jurisdictions to review convictions involving prior crimes by the standards applicable to the issues which the law's changing wisdom ultimately comes to realize as fundamental and, therefore, of constitutional stature.

154. 397 U.S. 387 (1970).
155. 486 F.2d 1292 (D.C. Cir. 1973).
156. 53 Hawaii 254, 492 P.2d 657 (1972).
157. 464 F.2d 209 (5th Cir. 1972).