

# Michigan Law Review

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Volume 68 | Issue 2

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1969

## Constitutional Law--Double Jeopardy--Prosecutions by both a City and a State for an Identical Offense as a Violation of the Prohibition Against Double Jeopardy--*Waller v. State*

Michigan Law Review

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### Recommended Citation

Michigan Law Review, *Constitutional Law--Double Jeopardy--Prosecutions by both a City and a State for an Identical Offense as a Violation of the Prohibition Against Double Jeopardy--Waller v. State*, 68 MICH. L. REV. 336 (1969).

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## RECENT DEVELOPMENTS

### CONSTITUTIONAL LAW—DOUBLE JEOPARDY—Prosecutions by both a City and a State for an Identical Offense as a Violation of the Prohibition Against Double Jeopardy—*Waller v. State*\*

Joseph Waller and a group of others detached a mural from a wall of the city hall in St. Petersburg, Florida. They paraded with the mural through the streets until they were confronted by the local police, who recovered the city's property after a brief scuffle. As a result of that incident, Waller was charged with two municipal offenses: destruction of city property and disorderly breach of the peace. He was tried in municipal court, found guilty, and sentenced on both charges. Subsequently, the state of Florida charged Waller with grand larceny under a state statute, and he was tried and convicted again. Waller appealed the larceny conviction on the ground that it was barred by his prior conviction in the municipal prosecution—that he was being placed in jeopardy twice in violation of the Constitution of the United States.<sup>1</sup> In denying his appeal, a Florida district court of appeal ruled that even if it assumed that the municipal offenses were included in the offense of grand larceny<sup>2</sup>—a point it neither conceded nor decided—the double prosecution was allowable under Florida case law.<sup>3</sup> The Supreme Court of the United States has granted certiorari to decide the question.<sup>4</sup>

The Court has not previously considered whether the proceedings in a prosecution for the violation of a city ordinance place a defendant in "jeopardy" so as to preclude prosecution by another

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\* 213 S.2d 623 (Fla. Dist. Ct. App.), *cert. denied*, 221 S.2d 749 (Fla. 1968), *cert. granted*, 395 U.S. 975 (1969). The Supreme Court of the United States has heard argument on *Waller* but has not yet rendered its decision.

1. Brief for Appellant at 14-18, *Waller v. State*, 213 S.2d 623 (Fla. Dist. Ct. App. 1968). The fifth amendment to the Constitution of the United States provides in part: "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . ." Waller claimed that the subsequent prosecution for larceny also violated the Florida Declaration of Rights No. 12: "No person shall be subject to be twice put in jeopardy for the same offense . . ." Brief for Appellant at 6-14, *Waller v. State*, 213 S.2d 623 (Fla. Dist. Ct. App. 1968). This Recent Development deals only with the double jeopardy issue under the Constitution of the United States.

2. An included offense has been defined as a lesser offense, related to a greater offense in such a way that the greater offense cannot possibly be committed without committing the lesser offense. *People v. Greer*, 30 Cal. 2d 589, 597, 184 P.2d 512, 516-17 (1947). For a discussion of the general rule in cases in which double jeopardy is held to apply to cases of included offenses, see note 31 *infra* and accompanying text.

3. *Waller v. State*, 213 S.2d 623 (1968). Since *Waller* was decided before *Benton v. Maryland*, 395 U.S. 784 (1969), discussed in the text accompanying note 13 *infra*, the Florida court was not required to, and did not, reach the question of the application of the fifth amendment double jeopardy provisions. This factor leaves in doubt the ultimate disposition of the *Waller* case by the Supreme Court. See note 42 *infra*.

4. 395 U.S. 975 (1969).

level of government within the state.<sup>5</sup> However, Florida's allowance of both prosecutions is not unusual. The case law of about half of the states conforms to that position,<sup>6</sup> and some federal courts have agreed.<sup>7</sup> All of the cases supporting that position, including the *Waller* case, were decided while the doctrine enunciated in *Palko v. Connecticut*<sup>8</sup> was still good law. That doctrine permitted the states to apply their own constitutional provisions against double jeopardy and to ignore the double jeopardy clause of the fifth amendment to the Federal Constitution. After *Palko*, the only federal constitutional demands that state proceedings were required to meet were the demands of procedural due process under the fourteenth amendment.<sup>9</sup> Thus, the courts have been able to deal with prosecutions by

5. This Recent Development focuses on prosecutions by the city and the state for an identical act, but the discussion is equally applicable to the question of prosecutions by states and their political subdivisions generally.

6. See Comment, *Double Jeopardy Where both City and State Prosecute the Same Act*, 38 WASH. L. REV. 819, 820 n.10 (1963). The following states allow prosecutions by both city and state for the same offense: Alabama [*Pike v. City of Birmingham*, 36 Ala. App. 53, 53 S.2d 394, cert. denied, 255 Ala. 664, 53 S.2d 396 (1951); *Inman v. State*, 39 Ala. App. 496, 104 S.2d 448 (1958)]; Arkansas [*Smith v. State*, 136 Ark. 263, 206 S.W. 437 (1918) (allowing double prosecutions when first trial ends in acquittal)]; Florida [*Hilliard v. City of Gainesville*, 213 S.2d 689 (1968), appeal dismissed, 393 U.S. 321 (1969); *Gilloley v. Vaughan*, 92 Fla. 943, 110 S. 653 (1926); *Theisen v. McDavid*, 34 Fla. 440, 16 S. 321 (1894)]; Georgia [*Sutton v. Washington*, 4 Ga. App. 30, 60 S.E. 811 (1908)]; Idaho [*State v. Poynter*, 70 Idaho 438, 220 P.2d 386 (1950)]; Illinois [*City of Chicago v. Lord*, 3 Ill. App. 2d 410, 122 N.E.2d 439 (1954), aff'd., 7 Ill. 2d 379, 130 N.E.2d 504 (1955)]; Iowa [*Town of Neola v. Reichart*, 131 Iowa 492, 109 N.W. 5 (1906) (dictum)]; Kansas [*State v. Holmes*, 191 Kan. 126, 379 P.2d 304 (1963); *Lawton v. Hand*, 186 Kan. 385, 350 P.2d 28 (1960)]; Louisiana [*State v. Fourcade*, 45 La. Ann. 717, 13 S. 187 (1893)]; Maryland [*Shafer v. Mumma*, 17 Md. 331 (1861)]; Mississippi [*May v. Town of Carthage*, 191 Miss. 97, 2 S.2d 801 (1941); *Johnson v. State*, 59 Miss. 543 (1882)]; Missouri [*City of St. Louis v. Mueller*, 313 S.W.2d 189 (Ct. App. 1958); *State v. Garner*, 360 Mo. 50, 226 S.W.2d 604 (1950)]; Nebraska [*State v. Amick*, 173 Neb. 770, 114 N.W.2d 893 (1962) (dictum); *State v. Hauser*, 137 Neb. 138, 288 N.W. 518 (1939)]; Nevada [*Ex parte Sloan*, 47 Nev. 109, 217 P. 233 (1923)]; New Jersey [*State v. Reid*, 19 N.J. Super. 32, 87 A.2d 562 (1952)]; North Dakota [*State v. Simpson*, 78 N.D. 360, 49 N.W.2d 777 (1951)]; Ohio [*Koch v. State*, 8 Ohio C.C.R. 641 (1894), aff'd., 53 Ohio St. 433, 41 N.E. 689 (1895)]; Oklahoma [*Booker v. State*, 312 P.2d 189 (1957); *McCann v. State*, 82 Okla. Crim. 374, 170 P.2d 562 (1946)]; Oregon [*Miller v. Hansen*, 126 Ore. 297, 269 P. 864 (1928)]; Tennessee [*Greenwood v. State*, 65 Tenn. (6 Baxt.) 567, 32 Am. R. 539 (1873)]; Virginia [*Morganstern v. Commonwealth*, 94 Va. 787, 26 S.E. 402 (1896) (allowing double prosecutions in certain cases but only by statute)]; Washington [*Bellingham v. Schampera*, 57 Wash. 2d 106, 356 P.2d 292 (1960); *State v. Tucker*, 137 Wash. 162, 242 P. 363 (1926)]; West Virginia [*Austin v. Knight*, 124 W. Va. 189, 20 S.E.2d 897 (1942); *State v. Mills*, 108 W. Va. 31, 150 S.E. 142 (1929)]; Wisconsin [*Guinther v. Milwaukee*, 217 Wis. 334, 258 N.W. 865 (1935)]; Wyoming [*State v. Jackson*, 75 Wyo. 13, 291 P.2d 798 (1955) (dictum)].

7. Louisiana *ex rel. Ladd v. Middlebrooks*, 270 F. Supp. 295 (E.D. La. 1967); United States *v. Farwell*, 76 F. Supp. 35 (D. Alas. 1948).

8. 302 U.S. 319 (1937).

9. After *Palko*, then, and before *Benton* (see note 3 *supra* and text accompanying note 13 *infra*), fourteenth amendment due process did not include the prohibition of double jeopardy. But consecutive city-state proceedings could violate the due process clause in other ways, such as if the second trial was considered an attempt to "wear the accused out by a multitude of cases with accumulated trials." *Hoag v.*

both a city and a state for the same offense without regard to the fifth amendment's prohibition against double jeopardy. In doing so, courts have upheld double prosecutions on three basic theories: (1) the analogy to decisions which have allowed both the federal government and a state to prosecute a defendant when one act has violated identical statutes of both;<sup>10</sup> (2) the claim that the only way to prevent the frustration of state law when local law is enforced is to allow both to be enforced;<sup>11</sup> and (3) the claim that the municipal prosecution does not constitute prior jeopardy because only a civil or a petty offense is involved.<sup>12</sup>

Today, however, the foundation upon which this body of case law was built has crumbled. In *Benton v. Maryland*,<sup>13</sup> decided in June of this year, the Supreme Court explicitly extended fifth amendment protection against double jeopardy to the states through the fourteenth amendment. *Palko* was specifically overruled to the extent that it was inconsistent with the *Benton* decision. Thus, the theories traditionally used to defend prosecutions by both a city and a state for the same offense must be examined to determine whether they are still valid when the fifth amendment's prohibition against double jeopardy is applied to state proceedings. This Recent Development examines the implications of the *Benton* decision for those theories.

The most frequently invoked justification for allowing a double prosecution is that a city relates to a state in the same way a state government is related to the federal government. If that premise is accepted, reliance can be placed on the Supreme Court's application of the fifth amendment in *Bartkus v. Illinois*<sup>14</sup> and *Abbate v. United States*.<sup>15</sup> In those two decisions the Court held that consecutive prosecutions by a state court and a federal court under statutes proscribing identical activity are not violative of an individual's right against double jeopardy.<sup>16</sup> Many state courts and some federal district courts have relied on the line of authority represented by those

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New Jersey, 356 U.S. 464, 467 (1958), quoting *Palko v. Connecticut*, 302 U.S. 319, 328 (1937).

10. See, e.g., *Louisiana ex rel. Ladd v. Middlebrooks*, 270 F. Supp. 295 (E.D. La. 1967).

11. See, e.g., *Ex parte Monroe*, 13 Okla. Crim. 62, 162 P. 233 (1917); Gross, *Successive Prosecutions by City and State—The Question of Double Jeopardy*, 43 ORE. L. REV. 281, 296 (1964).

12. See, e.g., *United States v. Farwell*, 76 F. Supp. 35 (D. Alas. 1948); Comment, *supra* note 6, at 820.

13. 395 U.S. 784 (1969).

14. 359 U.S. 121 (1959).

15. 359 U.S. 187 (1959).

16. The vitality of those decisions may be questioned after *Benton*, since application to the states of the fifth amendment bar against double jeopardy may preclude prosecutions by both state and federal governments.

cases to dispose of the question of consecutive prosecutions by a city and a state:<sup>17</sup> "It is not double jeopardy . . . for one to be tried successively in State and Federal prosecutions based upon the same act. . . . This same principle applies to acts denounced as crimes against both a municipality and a state."<sup>18</sup>

It is submitted, however, that this analogy is unsound. The relationship between the states and the federal government is unique. The Union was created by bringing together a group of autonomous governmental units, which ceded some of their powers to a central government, but which retained certain aspects of their sovereignty. Unlike the states, cities do not exercise autonomous authority; they exercise only those powers delegated to them by the states. Their judicial systems are created by, and derive their powers solely from, the state government. Indeed, the Supreme Court itself has recognized the subordinate status of municipalities and has emphasized the inapplicability of the federal-state analogy.<sup>19</sup>

A closer parallel to the city-state relationship is the relationship between a territory of the United States and the federal government,<sup>20</sup> for a territory, like a city, is a completely subordinate administrative unit. The Supreme Court has noted the importance of that subordinate status for purposes of double jeopardy:

The Government of a State does not derive its powers from the United States, while the Government of the Philippines owes its existence wholly to the United States . . . . So that the cases holding that the same acts committed in a State of the Union may constitute an offense against the United States and also a distinct offense against the state do not apply here, where the two tribunals that tried the accused exert all their powers under and by authority of the same government . . . .<sup>21</sup>

17. *E.g.*, *Louisiana ex rel. Ladd v. Middlebrooks*, 270 F. Supp. 295 (E.D. La. 1967); *United States v. Farwell*, 76 F. Supp. 35 (D. Alas. 1948); *McCann v. State*, 82 Okla. Crim. 374, 170 P.2d 562 (1946); *State v. Tucker*, 137 Wash. 162, 242 P. 363 (1926). The holdings in *Barthus* and *Abbate* were not novel. *See United States v. Lanza*, 260 U.S. 377 (1922); *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852) (dictum); *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847) (dictum).

18. *Louisiana ex rel. Ladd v. Middlebrooks*, 270 F. Supp. 295, 296 (E.D. La. 1967).

19. *Reynolds v. Sims*, 377 U.S. 533, 575 (1964):

Political subdivisions of states—counties, cities, or whatever—never were and never have been considered as sovereignties. Rather they have been regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178, these governmental units are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them" and the "number, nature, and duration of the powers conferred upon [them] and the territory over which they shall be exercised rests in the absolute discretion of the state." The relationship of the States to the Federal Government could hardly be less analogous.

20. *See* Comment, *supra* note 6, at 822.

21. *Grafton v. United States*, 206 U.S. 333, 354-55 (1907). *See also Puerto Rico v. Shell Co.*, 302 U.S. 253 (1937).

It is apparent, then, that the concept of dual sovereignty is inapplicable to the city-state relationship. Consequently, it cannot justify prosecutions by both of those two levels of government under separate laws which define identical offenses.

The second justification for allowing prosecutions by both the city and the state for the same offense is based on a fear, on the part of some state courts, that a rule which barred states from prosecuting those previously tried by a city for the identical act would in some instances allow defendants to escape with relatively light sentences, since penalties for municipal offenses tend to be less severe than those prescribed by states.<sup>22</sup> That justification, however, cannot withstand close scrutiny. Since cities are entirely creatures of the states, the latter could establish comprehensive statutory schemes to ensure that their rights to prosecute wrongdoers are not impaired.<sup>23</sup> A state might require, for example, that after an arrest for acts which violate both municipal and state law, the state be notified by the municipality, prior to the municipality's prosecution, in order to afford the state the option of prosecuting the defendant under state law. Such a system would preserve concurrent jurisdiction and would assure municipal officials that a suspect arrested by them would be prosecuted.<sup>24</sup> But whatever the system, thoughtful legislation to meet the problems that arise from overlap between state statutes and municipal ordinances is greatly preferable to the hasty sacrifice of an individual's right to be free from double jeopardy.

However, the problems of overlapping municipal ordinances and state statutes can be met even without establishing statutory schemes. Indeed, such solutions have been reached by the courts of some states that presently disallow city-state prosecutions. Those courts have held that when municipal and state ordinances define the same offense, the municipal ordinance is void.<sup>25</sup> It is clear, then,

22. *Ex parte Monroe*, 13 Okla. Crim. 62, 69-70, 162 P. 233, 236 (1917):

[I]t is generally held that, if the offense [the city] has dealt with is also an offense against the state, the offender may then be turned over to the state, and cannot plead former jeopardy by reason of the penalty imposed by police court. Why is this? One reason is because it is contemplated that the penalty the city may impose is so small that it is tantamount to no punishment for the offense . . . if the city could be permitted to assess a penalty commensurate with the gravity of the offense, then no court and no rule of justice would permit the offender to again be punished for the same offense.

See also Gross, *Successive Prosecutions by City and State—The Question of Double Jeopardy*, 43 ORE. L. REV. 281, 296 (1964).

23. See Note, *Constitutional Law: Successive Municipal and State Prosecutions Found Permissible Despite Assumed Application of Double Jeopardy*, 1968 DUKE L.J. 362, 380-82.

24. *Id.* at 381.

25. *In re Sic*, 73 Cal. 142, 14 P. 405 (1887); *Billings v. Herold*, 130 Mont. 138, 296 P.2d 263 (1956); *State v. Keith*, 94 N.C. 933, 934 (1886). Similar schemes providing for effective pre-emption of local ordinances by state law are embodied in some state statutes. CONN. GEN. STAT. ANN. § 7-154 (1960); GA. CONST. art. I, § 4; IND. ANN. STAT. § 9-2402 (1956); R.I. GEN. LAWS ANN. § 45-6-6 (1956). See also Gross, *Successive Prose-*

that the punishment of serious offenders under state law is not incompatible with the protection of individuals from double jeopardy.

Moreover, consecutive trials of a defendant based upon the same act are not always barred by the fifth amendment. That amendment's prohibition against double jeopardy is violated only when the trials are for the "same offense" or when the first trial is for an included offense.<sup>26</sup> With respect to the "same offense" test, the Supreme Court commented in *United States v. Ewell*:

The Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." That clause, designed to prohibit double jeopardy as well as double punishment, is not properly invoked to bar a second prosecution unless the "same offence" is involved in both the first and second trials. The identity of offenses is, therefore, a recurring issue in double jeopardy cases . . . .<sup>27</sup>

Thus, if the violation of an ordinance and the violation of a statute can be shown to constitute different substantive offenses, consecutive prosecutions are possible, subject to due process limitations,<sup>28</sup> even if both violations arose out of the same physical acts.<sup>29</sup> The test generally employed to determine whether offenses are different or identical, is the "same evidence" test. Under that test, the second offense is considered to be the same as the first when the evidence required to support a conviction in the second case would have been sufficient to sustain a conviction in the first.<sup>30</sup>

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*cutions by City and State—The Question of Double Jeopardy*, 43 ORE. L. REV. 281, 291-94 (1964); Note, *supra* note 23, at 368 n.31.

26. For a discussion of included offenses, see note 2 *supra* and note 31 *infra*.

27. 383 U.S. 116, 124 (1966). See also *Gavieres v. United States*, 220 U.S. 338 (1911).

28. Even if the protection against double jeopardy is not violated, there could theoretically be a denial of due process if the retrial involved an attempt to wear down the accused. See note 9 *supra*.

29. In a series of cases involving drugs, the Supreme Court has found more than one offense arising out of the same acts: *Harris v. United States*, 359 U.S. 19 (1959); *Gore v. United States*, 357 U.S. 386 (1958); *Blockburger v. United States*, 284 U.S. 299 (1932). See also *Gavieres v. United States*, 220 U.S. 338 (1911).

30. The "same evidence" test—sometimes called the "fact" test—is the one that has been traditionally used by the Supreme Court.

It is true that the acts and words of the accused set forth in both charges are the same, but in the second case it was charged, as was essential to the conviction, that the misbehavior in deed and words was addressed to a public official. In this view we are of the opinion that while the transaction charged is the same in each case, the offenses are different.

*Gavieres v. United States*, 220 U.S. 338, 342 (1911). A recent case in the Ninth Circuit, *Barnett v. Gladden*, 375 F.2d 235 (1967), demonstrates how the "same evidence" test can work to limit the effect of applying the fifth amendment. The defendant in *Barnett* accosted two young girls and offered them money if they would have sexual relations with him. He was tried and convicted under a municipal ordinance which prohibited a male from making improper advances or indecent remarks to, or seeking impertinently to attract the attention of, female persons in public. The defendant was

With respect to included offenses, the test is very similar: "[t]he general rule is that a prosecution for a minor offense included in a greater will bar a prosecution for the greater, if on an indictment for the greater the accused can be convicted of the lesser."<sup>31</sup> Again, it is clear that the fact that both prosecutions arise from the same incident is not enough in itself to preclude the second prosecution.

In general, although a prohibition of prosecutions by both a city and a state for the same offense may create some law enforcement difficulties, the legislatures of the states, as previously noted, have the power to act to resolve those problems.<sup>32</sup> Moreover, in view of the limitations on the cases to which the protection against double jeopardy applies, possible problems in law enforcement do not appear to be serious enough to preclude extending such protection to city-state prosecutions.

The final theory which courts have used to uphold double

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subsequently tried and convicted under a state provision that made it a crime for a person over sixteen years of age willfully or wrongfully to entice a child under sixteen years of age to any place of concealment with the intent to commit a prohibited sex act. The petitioner argued that this double prosecution was a violation of his protection against double jeopardy. The court found no support for his claim since the elements essential for conviction under the ordinance and those essential for conviction under the statute were different; each required the proof of an element not needed for conviction under the other. Therefore, the court concluded, two separate offenses were defined and the prohibition of double jeopardy was not applicable.

Some members of the Supreme Court, however, have called for tests other than the "same evidence" test. Justice Douglas, for example, has argued for a "transaction" test. In his dissent in *Hoag v. New Jersey*, 356 U.S. 464, 478 (1958), he contended that since "[t]he criminal transaction . . . was indivisible, [that is,] [t]he time and place was [*sic*] the same," separate prosecutions for multiple robberies should be barred. Another view has been expressed in dissent by former Chief Justice Warren [*Gore v. United States*, 357 U.S. 386, 393-94 (1958)], and has been followed in several cases. *Heflin v. United States*, 358 U.S. 415 (1959); *Ladner v. United States*, 358 U.S. 169 (1958). See also *Bell v. United States*, 349 U.S. 81 (1955). According to that view, there are some instances in which the legislative intent in creating several offenses was to give the prosecution a choice of statutes under which it could prosecute, not the power to prosecute under all the statutes. In such instances, when one transgression violated several of those statutes, double prosecution should not be allowed. See Rosenthal, *Dangerous Drug Legislation in the United States*, 45 TEXAS L. REV. 1037, 1152-53 & n.512 (1967). For a general discussion of these tests, see Notes and Comments, *Twice in Jeopardy*, 75 YALE L.J. 262 (1965).

31. *Giles v. United States*, 157 F.2d 588, 590 (9th Cir. 1946), *cert. denied*, 331 U.S. 813 (1947). For a definition of an included offense, see note 2 *supra*. The included offense situation is illustrated by *People v. Manago*, 230 Cal. App. 2d 645, 41 Cal. Rptr. 260 (Dist. Ct. App. 1964). In that case, the defendant was arrested rummaging through lockers in an employees' locker room at a store. He was also found to be carrying a straight razor. He was convicted under a municipal ordinance making it illegal to hide or loiter upon the premises of another while carrying a concealed weapon; subsequently, he was convicted of burglary under a state statute. The defendant appealed the second conviction claiming that the first conviction was an included offense of burglary and that the second prosecution was thus barred. The California court disagreed, although it did find the prosecution to be barred by a state statute.

32. See text accompanying notes 23-24 *supra*.



prosecutions is that the city's prosecution constitutes either a civil or a petty proceeding, and that the federal constitutional protection against double jeopardy does not apply to such proceedings.<sup>33</sup> The decisions following that line of reasoning have forced the courts to face a very confusing and difficult problem—that of distinguishing civil actions from criminal prosecutions and serious criminal offenses from petty ones.<sup>34</sup> One branch of the civil-petty argument is that prosecutions for violations of a municipal ordinance are civil proceedings and therefore do not raise the specter of double jeopardy. But as cities punish an increasing variety of such offenses with increasingly severe penalties,<sup>35</sup> the civil-criminal distinction becomes illusory. The threat of a prolonged incarceration or deprivation of freedom for the violation of a municipal ordinance constitutes real jeopardy and makes the offense, in effect, criminal for double jeopardy purposes. As one federal judge has commented:

Ineluctable logic leads to the conclusion that the constitutional protection against double jeopardy, as is the case with the right of counsel and the privilege against self-incrimination, is applicable to all proceedings, irrespective of whether they are denominated criminal or civil, if the outcome may be deprivation of the liberty of the person.<sup>36</sup>

But even if a court allows a subsequent state prosecution by applying the term "civil" to prior municipal offenses which carry a jail sentence, the court cannot avoid conflict with the fifth amend-

33. For a discussion of cases employing this principle, see Comment, *supra* note 6, at 822-25. See also *United States v. Farwell*, 76 F. Supp. 35 (D. Alas. 1967); Fisher, *Double Jeopardy: Six Common Boners Summarized*, 15 UCLA L. REV. 81, 94 (1967):

Though the reasoning of these decisions [allowing double prosecution] is palpably unsound, something can be said for the *result*. It can be defended on the entirely different ground . . . that constitutional rights can be disregarded in petty cases. I believe that this is the real reason for the unwillingness of so many courts to respect the criminal judgments of municipalities.

34. For a brief history of the development of this theory and of the problems that have plagued courts in trying to decide which criminal procedural safeguards apply to municipal prosecutions and which ones do not, see Gross, *Successive Prosecutions by City and State—The Question of Double Jeopardy*, 43 ORE. L. REV. 281 (1964).

35. See Gross, *supra* note 34, at 314:

Where once successive prosecutions by city and state could be condoned because of the insignificance of municipal punishment, today that is no longer the case. Municipal prosecutions, exercising authority unparalleled at common law, meting out penalties comparable to those imposed by higher state authority, can be considered as nothing less than prosecutions by the state itself.

See also *Denninger v. Recorder's Court*, 145 Cal. 629, 70 P. 360 (1904); *Ocean Springs v. Green*, 77 Miss. 472, 27 S. 743 (1900); *Komen v. St. Louis*, 316 Mo. 9, 289 S.W. 838 (1926); Notes and Comments, *Reprosecution of Ordinance Violations as Constituting Double Jeopardy*, 45 CHI.-KENT L. REV. 90 (1968). One example of a state statute allowing cities to impose the same penalty that the state imposes for the same offense is ARK. STAT. ANN. § 19-2410 (1956) (applicable only to misdemeanors).

36. *United States v. Dickerson*, 168 F. Supp. 899, 901 (D.D.C. 1958), *rev'd. on other grounds*, 271 F.2d 487 (D.C. Cir. 1959).

ment, which proscribes not only double punishments, but also double trials. The Supreme Court stated in its wide-ranging consideration of double jeopardy in *Green v. United States*:

The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.<sup>37</sup>

An individual confronted with a jail sentence for violation of a municipal ordinance is forced to endure all of those hardships. Hence, to allow the state to indict and try him again for the same offense under a state statute is to subject him to precisely the same evils that the court condemned in *Green*.<sup>38</sup> In short, if a jail sentence may be imposed, there is no cognizable difference between criminal and civil prosecutions for the purpose of fifth amendment protection against double jeopardy.

The other branch of the civil-petty argument is that, even if violations of municipal ordinances are essentially criminal, they are of such a petty nature that constitutional safeguards do not extend to them. In *Duncan v. Louisiana*,<sup>39</sup> the Supreme Court accepted that position with respect to the sixth amendment right to jury trial. But it does not appear to have drawn the distinction for the purposes of fifth amendment protections. It is likely that the major consideration in *Duncan* was the Court's concern for the efficient administration of justice. A guarantee of a jury trial in every criminal case would result in greater expense and in increased congestion in the

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37. 355 U.S. 184, 187-88 (1957). These considerations of double exposure to the rigors of a trial might appear to militate against the settled state of the law in one area. It is clear that the government may prosecute a defendant for the same crime in both a criminal action and a purely civil action. *Helvering v. Mitchell*, 303 U.S. 391 (1938); *State v. Gustin*, 152 Mo. 108, 53 S.W. 421 (1899); *Atkinson v. Parsekian*, 37 N.J. 143, 179 A.2d 732 (1962); *State v. Williams*, 21 N.J. Misc. 329, 34 A.2d 141 (1943). That double criminal-civil prosecution would be permissible, for example, in a case in which the defendant had intentionally injured government property. In such a case, a double prosecution would subject him to the same embarrassment, expense, and ordeal as it would in the situation at hand. But there is a crucial difference between the double prosecution for both a criminal and a purely civil offense and prosecution for the violation of both a municipal ordinance and a state statute. The difference is that in the former case the defendant does not twice risk the possibility of penal sanctions and deprivation of liberty, whereas in the latter he does. It is primarily that double risk of penal sanctions, more than the other considerations, that the fifth amendment seeks to prohibit.

38. See generally *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 169 (1873):

The common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.

39. 391 U.S. 145 (1968).

courts. The consideration of efficiency, however, does not apply to the guarantee of the right to be free from double jeopardy. Indeed, extension of that right could only ease the burden on the courts by eliminating the prosecutions that are presently allowed.

Thus, neither the language of the fifth amendment itself nor the cases that have construed it preclude extending the protection against double jeopardy to all actions in which a defendant is faced with penal sanction. There need be no fear that such universal application of the protection against double jeopardy will allow a defendant to escape state punishment for a serious crime when he has been prosecuted on the municipal level for an included minor offense. As has been demonstrated, both limitations on the use of double jeopardy and the opportunity for state legislation to alleviate law enforcement problems should enable states to see that justice is done.<sup>40</sup>

In conclusion, *Waller* has given the Supreme Court an opportunity for the first time to consider the constitutionality of prosecutions by both a city and a state for the same offense.<sup>41</sup> Since, under *Benton*, the double jeopardy clause of the fifth amendment now applies to the states, the arguments in favor of such prosecutions will have to be considered in light of that clause.<sup>42</sup> The Court, in making its

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40. See text accompanying notes 23-32 *supra*.

41. Although the Florida court in *Waller* relied on the dual sovereignty analogy, rather than the other arguments in favor of permitting double prosecution, the Supreme Court will probably have to deal with all of them in order to dispose completely of the double jeopardy question.

42. It is possible, however, that since the Florida court in *Waller* did not consider the application of the fifth amendment guarantee against double jeopardy, and since that decision was made prior to *Benton*, the Court might refuse to apply *Benton* retroactively and decide *Waller's* appeal without reference to the fifth amendment. But that course of action is unlikely. The fact that the Court set *Waller* for argument immediately after *Ashe v. Swenson*, 399 F.2d 40 (8th Cir. 1968), *cert. granted*, 393 U.S. 1115 (1969) (defendant who had been tried and acquitted of robbing one of six participants in a poker game not deprived of due process by subsequent trial and conviction for robbing another of the participants), suggests that it intends to address itself to the fifth amendment question with respect to the city-state situation.

If the Court applies the fifth amendment to this situation, there are two ways in which it could dispose of the *Waller* case. First, it could apply *Benton* only prospectively, that is, it could decide that the fifth amendment would not apply to *Waller* or to any prior cases, but would apply to city-state prosecutions subsequent to the date of the decision in *Waller*. On the other hand—and it is submitted that this would be the better disposition—*Benton* could be applied retroactively. The Court has taken several approaches in making its constitutional rulings retroactive. For example, it has held, on occasion, that a change in the law will be given effect in cases on direct review. See, e.g., *Linkletter v. Walker*, 381 U.S. 618 (1965). It has also held that a constitutional decision is retroactive if the trial of the case that might be affected by it began before the date of the constitutional decision. See, e.g., *Johnson v. New Jersey*, 384 U.S. 719 (1966). In that case, the Court said that retroactivity does not in any sense turn on the "importance" of the right involved, but instead involves a balancing of how seriously the administration of criminal justice would be disrupted and how adequate the safeguards for the defendants had been under prior case law. 384 U.S. at 728-29. Since *Waller* is a case on direct appeal, and since its decision in

determination, should reject all three theories under which double prosecutions have been upheld, and should apply the double jeopardy provisions to the city-state situation. If it does so, the *Waller* case will turn on the question that the Florida court refused to decide—whether the municipal prosecution was for an offense identical to, or included in, the state crime charged.<sup>43</sup> Exactly how the Court will dispose of that issue is unclear; but the Court should take this opportunity to hold that, at least henceforth,<sup>44</sup> no defendant may be subject to prosecutions both by the city and by the state for the identical offense.

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accordance with *Benton* would probably not present a serious threat to the administration of criminal justice, the court might well apply *Benton* retroactively to the *Waller* case. If it does not wish to make a complete retroactive application, the Court could apply *Benton* only to cases arising on direct appeal, and not to cases collaterally attacking convictions. That course of action would give *Waller* a remedy but would limit the impact on other past city-state prosecutions.

43. See text accompanying note 2 *supra*.

44. See the discussion of the prospective or retroactive application of *Benton* in note 42 *supra*.

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