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In this article, Professor Sigler analyzes the present state of federal double jeopardy law. He illustrates the need for clarification and revision within each of the five separate policy situations, examining the substantive principles developed in the case law, and concludes with a plea for legislative and judicial response to relate the law to modern social policy needs.

I. Introduction

The fifth amendment provision against double jeopardy is one of the basic protections afforded defendants by the United States Constitution. Its roots are found in early common law,[1] and the policies which it represents have been gradually defined by federal courts to meet various situations of inequality in the position of a criminal defendant confronted by federal prosecuting attorneys. Presently the double jeopardy provision is not incorporated by the fourteenth amendment as a restriction upon state action, but this condition may not prevail much longer. Should double jeopardy become incorporated into the "due process" clause of the fourteenth amendment, states will be forced to consider the total body of federal double jeopardy policies. And even if incorporation is delayed, an overview of federal policy in the area is needed.

Recently, one state court assumed that the fifth amendment double jeopardy provision was applicable to state prosecutions.[2] In 1964 the Supreme Court, in *Malloy v. Hogan*,[3] found the fifth amendment self-incrimination clause applicable to state proceedings thereby overruling two significant cases.[4] Other Supreme Court decisions have extended the federal Bill of Rights into related areas of criminal procedure.[5] There is, therefore, a good chance that double jeopardy may become incorporated as well.[6] Thus, it becomes especially useful to perceive the contours of federal policy in this area.

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1. See Sigler, *A History of Double Jeopardy*, 7 Am. J. of Leg. Hist. 283 (1963).
2. People v. Laws, 29 Ill. 2d 221, 193 N.E.2d 806 (1963).
3. 378 U.S. 1 (1964).
4. Adamson v. California, 332 U.S. 46 (1947); Twining v. New Jersey, 211 U.S. 78 (1908).
5. Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Ker v. California, 374 U.S. 23 (1963) (search and seizure).
6. See Henkin, *Selective Incorporations in the Fourteenth Amendment*, 73 Yale L.J. 74 (1963).

The double jeopardy clause may profitably be viewed as a series of problems in social policy which are usually treated as a single problem. Analyzed in this fashion, double jeopardy law is resolved into five separate policy situations. The first situation concerns the definition of jeopardy, and the question of when jeopardy can be said to attach. The second situation concerns the desirability of a uniform national policy, and is to be clearly differentiated from the third, which involves the legal significance to be accorded traditional jurisdictional lines. The fourth situation, the seope of the criminal act, is the thorniest, and is most closely related to the substantive criminal law. The final problem is that of the significance to be given the use of the criminal appeal, whether employed by the prosecution or the defendant. These separate problems are usually treated together under the rubric "double jeopardy," tending to confuse an already complicated concept.

II. DEFINITION OF JEOPARDY—WHEN JEOPARDY ATTACHES

Once the double jeopardy clause had become an accepted part of American constitutions, the phrase "life or limb" began to receive an interpretation broad enough to apply the protection to any criminal penalty, so that the threat of death or mutilation was removed as a necessary element of the doctrine.[7] While this development was fairly obvious, the further implications of double jeopardy required considerable refinement. History provided some hints with which to guide the judges, but the creation of double jeopardy policy was largely a novel task.

A recent case enunciates the modern formula of federal double jeopardy policy in broad terms:

> Once acquitted or convicted of a crime for his conduct in a particular transaction, a defendant should be able to consider the matter closed and plan his life ahead without the threat of subsequent prosecution and possible imprisonment.[8]

Other objectives of that policy might be: (1) the avoidance of unnecessary harrassment; (2) the avoidance of social stigma incident upon repeated criminal trials; (3) economy of time and money; (4) psychological security.[9] These meanings of double jeopardy are not derived from its history.

7. *Ex Parte* Lange, 85 U.S. 163 (1873). Based upon common law precedents, the case held that both former acquittal and former conviction were comprised in the protection to the accused.

8. United States v. Candalaria, 131 F. Supp. 797 (S.D. Cal. 1955).

9. See Comment 65 YALE L.J. 339 (1956).

10. See Bozza v. United States, 330 U.S. 160 (1947); Fleischer v. United States, 91 F.2d 404 (6th Cir. 1939).

The increasing tendency of modern penal legislation to create more detailed and more numerous criminal offenses has further complicated the problem of setting double jeopardy policy because it has increased the number of offense categories which proscribe a single criminal act.[10] Now one transaction may afford the prosecution a choice of two counts or separate indictments where only one existed previously. This would not be inherently detrimental if the decision to create more overlapping offenses were the fruit of a conscious legislative policy. However, it has been left to the courts to determine the legislative intent and, by implication, to repeal or add to the criminal statutes. This is no easy task since it ultimately determines the powers of the prosecutor's office.

Constitutionally, there is nothing to prevent the legislature from repeatedly incriminating similar acts but there is a limitation on the judiciary, forbidding it from ordering multiple punishment when it appears that the legislature did not so intend.[11] The use of the judge's sentencing power or of the executive's pardoning power may be said to mitigate legislative duplication,[12] but these remedies occur at too late a point in time, that is, after the defendant has been harassed by the state and the damage has been done.

Several distinguishable factual situations account for the overwhelming number of double jeopardy cases. These factual settings have created disparate policy requirements. These situations may be suggested:

1. The trial of a case is stopped at some point short of its final termination.
2. The trial concludes with an acquittal, and the prosecution begins another trial upon another indictment.
3. The trial ends with a conviction, and the defendant appeals and is either later convicted of a greater offense than he was originally indicted for, or is convicted of the same offence as well as on other counts not contained in the original indictment.
4. The trial ends with a conviction, and the defendant is later tried for offenses "arising out of the same transaction," but which are technically different from the original charges, in an entirely new proceeding.
5. Overlapping jurisdictional boundaries may result in repeated punishments for the same act. Thus, civil-criminal distinctions, federal-state, civilian-military, or foreign-domestic jurisdictional

11. See People v. Moore, 143 Cal. App. 2d 333, 299 P.2d 691 (1956).

12. *But see* Samsone v. Zerbst, 73 F.2d 670 (10th Cir. 1934), a case which, in typical fashion avoids judicial responsibility for separation of offenses by relying without question upon legislative determination of multiple sentencing and multiple punishment for the same act.

lines may cause the same action to be tried again as an offense of a different kind, or against a different sovereign.

6. One act may constitute conduct directed at several persons or objects. The question arises: whether each person or object injured represents a criminally punishable act.

It is very common for judges to confuse these separate situations. Double jeopardy law has become so tangled that in some respects the outcome of a plea is in great doubt. Rarely will a court face the critical policy issues which lie deep beneath the surface. This recent policy statement is an exception:

> [The provision of the Fifth Amendment against double jeopardy is] designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . [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.[13]

Approached chronologically, the first question which can arise in double jeopardy law is whether a prior incompleted trial had reached such a degree of maturation as to amount to a "jeopardy." While some early cases held to the contrary, the contention that "jeopardy" referred only to a prior conviction or acquittal was rejected in the federal courts because "there is a wide difference between a verdict given and the jeopardy of a verdict," since "hazard, peril, danger, jeopardy of a verdict cannot mean a verdict given."[14] But this rule remained unsettled as late as 1883, when it was held that in order to bar prosecution a former conviction must be pleaded.[15] A judgment of acquittal based on the operation of a statute of limitations as a bar to a prior case is definitely a former jeopardy.[16]

Once it is agreed that jeopardy does not require a final judgment a host of new issues arise. The most important issue is whether there had been a sufficient amount of risk on the previous trial to amount to a putting in jeopardy. The problem is usually referred to as the "attachment of jeopardy" situation. If there has been no attachment of jeopardy, the prior trial is treated as though it never existed and it is blotted out of legal memory.

13. Green v. United States, 355 U.S. 184, 187 (1957).

14. This Pennsylvania decision, *Commonwealth v. Cook*, 6 S. & R. 577, 596 (1822), became the federal rationale. But in 1823, United States v. Haskell, 26 Fed. Cas. 207 (No. 15,321) (C.C.E.D. Pa. 1823), the federal court still adhered to the English rule requiring final judgment.

15. United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833).

16. United States v. Oppenheimer, 242 U.S. 85 (1916).

Some mystifying results are produced by this theory. For example, in a recent case, the discharge of a jury because of misconduct of a defense counsel was held to bar a retrial.[17] The trial court on its own motion, even over defendant's objection, ordered a mistrial. Subsequently, the defendant moved to dismiss the indictment on the theory that he had been placed in jeopardy. The decision was based on the ground that "dismissing the jury in a criminal action without defendant's consent precludes another trial except where dismissal arises out of circumstances of necessity." As a practical matter, defendant was acquitted virtually because the trial judge had acted hastily in ordering a mistrial.

Despite the complications which are evident, the rule for the attachment of jeopardy has been stated briefly, as follows:

> [A] person has been in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him . . . Undoubtedly in those jurisdictions where a trial of one accused of a crime can only be to a jury, and a verdict of acquittal or conviction must be by a jury, no legal jeopardy can attach until a jury has been called and charged with the deliverance of the accused.[18]

After the impanelling of the jury, jeopardy can be said to attach when any evidence is heard, or testimony received, but before the prosecution presents its opening argument to the jury.[19] However, preliminary examination by a magistrate is not a trial,[20] and arraignment and pleadings are not trials.[21] Interestingly, Congress has provided a double jeopardy protection for military personnel tried under the Uniform Code of Military Justice, but it has stipulated that only final judgments would have the effect of prior jeopardy.[22]

In cases of "manifest necessity," exceptions to the attachment rule permit the trial judge to order a new trial without confronting a double jeopardy plea. If the jury cannot agree, or if it is illegally constituted, there is no trial and no former jeopardy.[23] A leading case confused the doctrines of "attachment" and "waiver" by holding that where a

17. United States v. Whitlow, 110 F. Supp. 871 (D.D.C. 1953).

18. Kepner v. United States, 195 U.S. 100, 128 (1904). This case is better known for Holmes' dissent in which he proposes the concept of "continuing jeopardy" for appeals by the federal government to be upheld.

19. Clawens v. Rives, 104 F.2d 240 (D.C. Cir. 1939).

20. Collins v. Loisel, 262 U.S. 426 (1922).

21. Bassing v. Cady, 208 U.S. 386 (1907).

22. Uniform Code of Military Justice art. 44, 70A Stat. 52, 10 U.S.C. § 844 (1964); S. REP. No. 486, 81st Cong., 1st Sess. 19 (1949); H.R. REP. No. 491, 81st Cong., 1st Sess. 23 (1949). This rule was upheld as not violative of the fifth amendment when applied by a military tribunal, United States v. Zimmerman, 2 C.M.R. 66 (1952).

23. United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824).

conviction was set aside on appeal there had been no jeopardy.[24]

Other instances of "manifest necessity" are a juror's acquaintance with the accused,[25] irregularity in the indictment,[26] absence of witnesses for tactical military reasons,[27] illness of a juror,[28] termination of a court term and other emergencies or unusual circumstances.[29] A double jeopardy plea was not permitted, when the previous trial resulted in a mistrial because the state's witnesses pleaded self-incrimination.[30] However, no "manifest necessity" was discerned sufficient to meet a claim of jeopardy having attached when, on the original action, the prosecution had been unable to secure the presence of needed witnesses.[31]

Generally stated, necessity intervening after attachment mitigates against the operation of double jeopardy.[32] The exceptions are legion. The tendency of the appellate courts to leave the discretion of the trial judge undisturbed has been marked. If the judge at the first trial senses the necessity of premature termination, perhaps it is not desirable to permit a defendant to utilize his double jeopardy plea. The dimensions of the "manifest necessity" exception are definitely, if not logically, indicated by the cases.

Several recent decisions have sought to clarify and simplify the rules concerning attachment. In the most important decision, *Downum v. United States*,[33] it was held that a second trial was barred where, because of the prosecutor's failure to find a principal witness, the original trial judge dismissed the jury before any evidence had been introduced. In *Gori v. United States*,[34] the trial judge had declared a mistrial in order to protect the defendant from irrelevant and prejudicial testimony. On retrial a conviction was obtained and was not considered double jeopardy since the judge was acting in the

24. Trono v. United States, 199 U.S. 521 (1905); CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 213 (1958) (makes the same error, which confuses separate problems).

25. Simmons v. United States, 142 U.S. 148 (1891).

26. Lovato v. New Mexico, 242 U.S. 199 (1916).

27. Wade v. Hunter, 336 U.S. 684 (1949).

28. United States v. Potash, 118 F.2d 54 (2d Cir. 1941).

29. Thompson v. United States, 155 U.S. 271 (1894).

30. Brock v. North Carolina, 344 U.S. 424 (1953).

31. Correro v. United States, 48 F.2d 69 (9th Cir. 1931). *Contra* United States v. Coolidge, 25 Fed. Cas. 622 (No. 14) (C.C.D. Mass. 1815).

32. Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949).

33. 372 U.S. 734 (1963).

34. 367 U.S. 364 (1961). In Fong Foo v. United States, 369 U.S. 141 (1961), *reversing sub. nom., In re* United States, 286 F.2d 556 (1st Cir. 1961), the trial judge, having discovered that during the recess of a long and complicated trial the prosecution had refreshed the memory of a witness, called upon the jury to render an acquittal of the defendant. The judge thus aborted the case and caused jeopardy to attach, barring a retrial. The Supreme Court insisted on a distinction between the effects of a mistrial (not effecting jeopardy) and an acquittal (which does).

defendant's interest even though over his objection. Although the facts of the cases are irreconcilable, the decisions can be reconciled on the ground that the trial judge's determination regarding the impact of questioning and testimony upon a jury is less reviewable than his decision regarding the prosecutor's failure to proceed with trial. However, where the trial judge forces a plea of guilty upon a defendant, a new trial is not barred by double jeopardy.[35] It seems, then, that judicial animosity towards the defendant is to be treated differently than a prosecutor's animosity towards the defendant, because of the supposed neutral role of the judge.

Despite these cases, the doctrine of "manifest necessity" remains confused.[36] The states differ considerably in their views concerning the attachment of jeopardy. The Supreme Court has held as a matter of due process, that a state need not abandon jurisdiction for reasons of double jeopardy because mob violence has rendered a trial abortive.[37] The Court will defer to state law when it permits a new trial in cases where the federal law as to attachment of jeopardy would produce a different result.[38] The case of *Palko v. Connecticut* has been relied upon as a source for this permissive attitude, as long as the criminal defendant is not subjected to "unendurable hardship" or a violation of some "fundamental principle of liberty and justice."[39]

A closely related problem, although rarely treated as such, is that of post conviction sentencing. In such cases it is usually held that jeopardy has not yet attached because the sentencing process is a part of the original trial. It has been held that a second sentence entered after the reversal of a previous sentence, but without a second trial, is no violation of due process, nor does it place a defendant in double jeopardy.[40] Here, correction of a mandatory legal penalty is not double jeopardy and should not give a defendant his release.[41] The accumulation of sentences does not amount to a putting in double jeopardy "and a single sentence for several offenses, in excess of that prescribed for one offense, may be authorized by statute."[42]

It is possible to dissect the attachment cases and discover certain policy features which usually escape the eye. The following competing social interests are at stake:

35. United States v. Tateo, 377 U.S. 463 (1964).

36. See Kaminsky, *Double Jeopardy and the Doctrine of Manifest Necessity*, 20 INTRAMURAL L. REV. 189, 200 (1965).

37. Frank v. Magnum, 237 U.S. 309 (1915).

38. Brock v. North Carolina, *supra* note 30.

39. 302 U.S. 319 (1937).

40. Murphy v. Massachusetts, 177 U.S. 155 (1900).

41. Bozza v. United States, 330 U.S. 160 (1947).

42. Carter v. McClaughry 183 U.S. 365, 394 (1902).

1. The interest in permitting the prosecution to have full and complete opportunity to present all the evidence that the state has available, and in preventing an accused from going free solely by virtue of the operation of the double jeopardy clause, regardless of the merits of the case.

2. The interest in preventing the prosecution from harassing a defendant with repeated trials, any of which may be terminated at the whim of the prosecution. Two considerations are:

(a) the moral impropriety of permitting the state a second chance to prosecute an accused, and

(b) the practical effect of forcing the prosecution to prepare its best case before beginning suit.

3. The interest in preventing an extraneous event, not connected with the merits of a case, from interfering with the prosecuting of a criminal matter (the justification for the exceptions to attachment of jeopardy).

A more realistic and workable distinction in this area would be between extrinsic and intrinsic factors in the presentation of a case which prevent the case from being carried to its normal conclusion. Using this formula, when a case is halted by an event not caused by the defense or the prosecution it should be retried. In those cases where the intervening event is caused by the prosecution, and policy requires the single presentation of the prosecution's case, it can be determined as a factual matter whether the prosecution had a reasonable opportunity to present the state's best case. If the intervening factor is caused by the defendant, he should not be heard to object. This suggestion could help eliminate the arbitrary character of this branch of law.

III. DESIRABILITY OF A UNIFORM NATIONAL POLICY

Another aspect of federal double jeopardy law which deserves discussion is the social desirability of a nationally uniform or a federally disparate system of double jeopardy. This involves some of the most sensitive recent developments in the double jeopardy area. However, when seen as a matter of the need for a uniform national policy, much of the controversy which has raged over these cases dwindles into insignificance. One of the fundamental questions raised is whether federal double jeopardy principles bind the states through the due process clause of the fifth amendment.

Barron v. Baltimore[43] first indicated that the fifth amendment was largely a federal concern and not a limitation upon state criminal

43. 32 U.S. (7 Pet.) 242 (1833).

proceedings. When the fourteenth amendment's due process clause was later substituted for this purpose, it became apparent that the fifth amendment still did not apply to the states.[44] Some earlier cases had indicated the contrary,[45] but in 1847, it was held specifically that the double jeopardy provision did not act as a limitation upon the use of state power.[46] This is still the present rule although considerable criticism has recently developed.[47]

Until 1900, the door was still open to the possibility of imposing some standards for double jeopardy on the states as an aspect of due process. In that year the Supreme Court hinted that states might have varying standards, but until 1937 the Court always avoided the question whether double jeopardy was protected by the fourteenth amendment.[48] In 1902 the Court refused to pass on the issue when it was squarely presented.[49] By 1915 it seemed clear that "the state may conduct successive criminal trials for the same offense" if there was no showing "that the accused has been subjected to unendurable hardships, or violations of fundamental principles of liberty and justice."[50] But the basis of this case was narrow, for the Court held that to rule otherwise would "impair the power of the states to repress and punish crime" in a situation in which mob violence had erupted at the first trial. Before the First World War the Supreme Court was willing to review state criminal trials only to the extent necessary to find that the state court had properly exercised its jurisdiction.[51]

States were allowed to weaken the protection against self-incrimination[52] and to alter the common law trial by jury,[53] even though the

44. Hurtado v. California, 110 U.S. 516 (1884).

45. See State v. Moor, 1 Miss. 134 (1823); *accord* Phillips v. McCauley, 92 F.2d 790 (1937).

46. Fox v. Ohio, 46 U.S. (5 How.) 410 (1847).

47. Justices Blaek and Douglas hold that the federal double jeopardy clause sets the standard for state criminal proceedings, either directly through the fifth amendment, or indirectly through the fourteenth. Black with Douglas dissented in Ciucci v. Illinois, 356 U.S. 571 (1958); Douglas dissented with Black in Hoag v. New Jersey, 356 U.S. 464 (1958); and Black dissented in Brock v. North Carolina, *supra* note 30. Black's dissent in Abbate v. United States, 359 U.S. 187 (1959), shows his relianee on the negative historical inference from Partridge's proposed amendment to the original double jeopardy clause, mentioned above.

48. Graham v. West Virginia, 224 U.S. 616 (1912); Brantley v. Georgia, 217 U.S. 284 (1910); Keerl v. Montana, 213 U.S. 135 (1909); Shoerer v. Pennsylvania, 207 U.S. 188 (1907); McDonald v. Massachusetts, 180 U.S. 311 (1901); Murphy v. Massachusetts, 177 U.S. 155 (1900); Hawker v. New York, 170 U.S. 189 (1898); Moore v. Missouri, 159 U.S. 673 (1895).

49. Dreyer v. Illinois, 187 U.S. 71 (1902), refused to pass upon the effect of the fourteenth amendment upon double jeopardy, "upon which question we need not now express an opinion."

50. Frank v. Magnum, *supra* note 37.

51. MASON & BEANEY, AMERICAN CONSTITUTIONAL LAW 521 (2d ed. 1959).

52. Twining v. New Jersey, 211 U.S. 78 (1908).

53. Maxwell v. Dow, 176 U.S. 581 (1900).

Court had long since agreed that the fourteenth amendment included certain of the first amendment freedoms. In 1937, the Supreme Court, through Mr. Justice Cardozo, reaffirmed its previous assertions that the entire Bill of Rights was not incorporated into the fourteenth amendment. The decision in *Palko v. Connecticut*[54] attempted to justify a selective incorporation and had special reference to double jeopardy.

In *Palko* a Connecticut statute had permitted the prosecution to appeal from the adverse rulings of the state's criminal courts, a practice not permitted in the federal system. Palko, after having been convicted of murder in the second degree and given a life sentence, was retried after a successful state appeal. He was convicted of first degree murder in the second trial and sentenced to death. Palko appealed, claiming that he had been placed twice in jeopardy.

The United States Supreme Court held that the kind of jeopardy to which Connecticut had subjected the defendant "would have to create a hardship so acute and shocking as to be unendurable, and as to violate those fundamental principles of ordered liberty which lie at the base of all our civil and political institutions."[55] In reaching this result the Court placed double jeopardy, as well as most other protections accorded criminal defendants, on a different constitutional plane from certain more fundamental freedoms taken over from the earlier articles of the Bill of Rights.

In effect, each federal court must measure each claim of double jeopardy arising out of state courts to see whether it violates fundamental principles of liberty and justice. The answer in the *Palko* case was "no" because the state was not attempting to wear down the defendant by a multitude of cases, but asking only "that the case against him shall go on until there shall be a trial free from substantial legal error."[56]

It should be pointed out that in no case has the Supreme Court found a due process defect in successive state criminal prosecutions for a single offense. One may ask whether the Court has not ignored a good many other aspects of double jeopardy policy by employing a low standard. Mr. Justice Black has said that he fears "to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights."[57] So far as double jeopardy is concerned, Black's fears are groundless. The Court has imposed such a high degree of self-restraint that many state variations in double jeopardy policy are permitted.

The *Palko* ruling has meant a multiplicity of solutions to the prob-

54. 302 U.S. 319 (1937).
55. *Id.* at 328.
56. Sapir v. United States, 348 U.S. 373 (1955) (by implication).
57. Adamson v. California, 332 U.S. 46 (1947) (dissenting opinion).

lems of double jeopardy and, by later interpretations, prevented the setting of national minimum standards of double jeopardy. Uniformity of American double jeopardy law was made impossible. By withdrawing federal power in the double jeopardy area the *Palko* decision runs counter to a general trend toward greater Supreme Court concern with defendant's rights, for "the enhancement of the relative importance of the federal government in many aspects of criminal law administration is one of the most significant developments in the recent history of criminal justice in America."[58]

The *Palko* decision still represents the basic dividing line between the states and the federal government in the double jeopardy area, and there are prospects of its being overruled. The decision was employed as authority in a case in which the defendant claimed that the prosecution had sought a new trial after a mistrial had been obtained, even though the prosecution had supposedly known that the grounds for the mistrial had been present.[59] The *Palko* case was relied upon because of a supposed factual similarity, so it is not entirely clear that dissimilar factual situations will be treated in the same fashion. However, Mr. Justice Frankfurter, concurring in the majority decision, did say that

> [A] state falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted or prevents a trial from proceeding to a termination in favor of the accused merely in order to allow a prosecutor who has been incompetent or casual or ineffective to see if he cannot do better a second time.[60]

As it is, a sufficiently flagrant example of harassment might result in application of the fourteenth amendment.

What are the states permitted to do under the *Palko* rule? If a statute permits, the state may appeal in case of error since "this merely places the state in a position of equality with the defendant."[61] This is true even though the common law did not permit appeals by the state,[62] and even though the federal government may not have this privilege.[63] But a state may not appeal from an acquittal and obtain a new trial in the absence of a statute, even though a defendant may be retried after obtaining a reversal of a conviction following his own

58. Allen, *The Supreme Court of the United States, Federalism and State Systems of Criminal Justice*, 8 DEPAUL L. REV. 213 (1958).
59. Brock v. North Carolina, *supra* note 30.
60. *Id.* at 499.
61. Palko v. Connecticut, 302 U.S. 319 (1937).
62. United States v. Rosenwasser, 145 F.2d 1015 (9th Cir. 1944).
63. Kepper v. United States, 195 U.S. 100 (1904), *overruling in part* United States v. Sanges, 144 U.S. 310 (1892). See United States v. Janitz, 161 F.2d 19 (3d Cir. 1947), which seems to prefer the *Sanges* dicta.

appeal.[64] It is settled law that there is no denial of due process when a defendant has a conviction set aside and is later retried for the same offense.[65]

A recent case involved the failure of an execution pursuant to a death penalty. The subsequent issuance of a new death warrant was held by the Supreme Court to be no infringement of double jeopardy.

> We see no difference from a constitutional point of view between a new trial for error of law at the instance of the state that results in a death sentence instead of imprisonment for life and an execution that follows a failure of equipment.[66]

The reference to the *Palko* fact situation is really quite strained, unless the holding is taken to mean that only the most heinous transgression of a state prosecutor will be questioned in federal court.

Another case of this type held that a reversal by the Supreme Court of a criminal conviction should be treated in the same way as a reversal of a state court on appeal, and not to serve as a bar to a new trial by the state.[67] Similarly, the discharge of a jury after a failure to agree upon a verdict does not bar the state from beginning a new trial, even in the light of due process requirements.[68]

The Supreme Court has rarely felt hard-pressed to approve a state's version of double jeopardy. Some recent cases have involved such striking state double jeopardy policies that some members of the Court have paused for careful reflection. At times, there are signs that a broader reconsideration may be possible.

In the *Hoag*[69] case, the State of New Jersey indulged in the use of multiple prosecutions with only slight variations in the offense formulas for the purpose of obtaining multiple convictions. The Supreme Court, in rendering a decision favorable to the state, apparently felt that the desirability of leaving the states free to administer their own criminal policies was not outweighed by the unusual severity of the state's policy of double jeopardy. Specifically, the Court held that the fourteenth amendment does not forbid a state from prosecuting separate criminal offenses at separate trials, even though the offenses may arise out of the "same criminal transaction," but the determination of deprivation of due process must be "picked out in the facts and circumstances of each case."[70] The fourteenth amendment does not necessarily prevent a state from allowing different offenses

64. United States v. Ball, 163 U.S. 662 (1896).
65. Murphy v. Massachusetts, 177 U.S. 155 (1900).
66. Lousiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947).
67. Hill v. Texas, 316 U.S. 400 (1942).
68. Keerl v. Montana, 213 U.S. 135 (1909).
69. Hoag v. New Jersey, 356 U.S. 464 (1958).
70. *Id.* at 466-67.

which are phases of the same act or transgression to be prosecuted in separate actions.

Another question considered in *Hoag* was whether the doctrine of "collateral estoppel" applied to these multiple trials. This doctrine, which normally is restricted to civil trials, requires that the determination of a question of fact essential to the judgment of a previous trial should be conclusive in a subsequent trial involving the same parties and the same facts. The Court indicated that the rule might be applicable, but expressed grave doubts as to whether it is a constitutional requirement.[71] The broader civil doctrine of res judicata has not yet been tested by the Court for its constitutional nature, nor has its application to criminal actions been required as a matter of fundamental fairness.[72] If the Court were to overturn the state's decision in the *Hoag* case, it would have to supply an alternative rule, but since no clear federal rule has emerged to solve questions of overlapping offense categories, no alternative is available. Neither res judicata nor collateral estoppel, being civil doctrines, can serve as adequate replacements of double jeopardy.[73]

In *Ciucci v. Illinois*,[74] a companion case to *Hoag*, the Court held that multiple state prosecutions for four murders occurring simultaneously (identical offenses which had been charged in four separate indictments) did not violate the requirements of due process. At each trial the prosecution had introduced evidence of all four deaths. After obtaining two convictions and two jail sentences, the prosecu-

71. *Id.* at 471. The Court said that "despite its wide employment we entertain grave doubts whether collateral estoppel can be regarded as a constitutional requirement [because] certainly this Court has never so held." Mr. Justice Warren said that the civil concept ought to apply: "The first jury's verdict of acquittal is merely an illusion of justice if its legal significance is not a determination that there was at least a reasonable doubt whether petitioner was present at the scene of the robbery," which was the only important contested issue. *Id.* at 476 (dissenting opinion). In a case decided in 1959, Justice Brennan in a separate opinion indicated that collateral estoppel should not apply to criminal cases: "The doctrine of collateral estoppel may not provide adequate protection" in practice, and "furthermore, the protection of an essentially procedural concept such as collateral estoppel . . . is less substantial than the constitutional protection of the Double Jeopardy Clause." Abbate v. United States, 359 U.S. 187, 200 (1959).

72. Justice Holmes concluded that, even absent double jeopardy, res judicata was applicable in criminal as well as in civil cases, United States v. Oppenheimer, 242 U.S. 85, 87 (1916). The existence of the double jeopardy provision of the fifth amendment does not exclude the use of res judicata. See Fall v. United States, 49 F.2d 506, 511 (D.C. Cir.), *cert. denied*, 283 U.S. 867 (1931). This does not mean, however, that res judicata will be required of the states as part of the due process clause. See Mutual Beneficial Life Ins. Co. v. Tisdale, 91 U.S. 238 (1876), which seems to indicate that it could be a due process requirement.

73. It seems to this writer that the doctrines drawn from civil procedure should be inapplicable because of the difference of the burden of proof in criminal and civil cases. There is no "reasonable doubt" doctrine in civil law. See Murray & Sorenson, Inc. v. United States, 207 F.2d 119 (1st Cir. 1953).

74. 356 U.S. 571 (1958).

tion succeeded in obtaining a death sentence. This maneuver was sustained by the Court in a per curiam opinion which relied upon the logic of the *Hoag* case, declaring that the state is entitled constitutionally to prosecute individual offenses at separate trials, and to utilize all relevant evidence even if employed at a previous trial. If there were no showing of "fundamental unfairness" in the state's procedure, due process would not be deemed violated.

Mr. Justice Douglas, one of four justices dissenting, stated that the prosecution had assured a death sentence by using multiple trials, resulting in an oppressive policy of criminal prosecution. Once again, the Court was faced with a case in which no federal standard was available to replace that of the state. Once again, the Supreme Court deferred to state double jeopardy policy.

Some have explained the *Hoag* result as an attempt by the Supreme Court to create a lenient rule for state prosecutions to counterbalance the state's inability to appeal criminal cases.[75] But more fundamental policies are at stake. The important difference between *Hoag* and *Palko*, which is ignored by the Supreme Court, is that the former involves the prosecutor's discretion solely, while the latter involves the deliberate choice of a state legislature to permit criminal appeals. In both cases the Supreme Court failed to impose federal double jeopardy through the due process clause. The fears of Mr. Justice Black have not been realized, for the Court has not substituted its version of concepts of decency and fundamental fairness for the language of the Bill of Rights. Instead, it has failed to act in the double jeopardy area, failed to impose its standards, because it has not yet decided what those standards should be.

The selective incorporation approach of the *Palko* case has the merit of permitting a pragmatic case by case testing of each claim of federal double jeopardy raised in a state court. As a practical matter, though, it has led to a deference to the judgments of state courts and to the actions of state prosecutors as well as to the policies of state legislatures. Once the federal double jeopardy law is itself clarified there may be a reconsideration of the requirements which federal double jeopardy imposes upon the states.

IV. CONFLICT BETWEEN JURISDICTIONAL LINES

The next problem area to be considered is that of the conflict of jurisdictional lines. On one level, this issue concerns the delicate interrelationship between the jurisdiction of state and federal governments. On another level, the lines drawn between the civil and

75. Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 37 (1960).

military areas and the civil and criminal areas deserve attention. It is helpful to treat these problems in the same way because the courts have tended to evolve similar legal rules with respect to them. The policy issue involved is the significance to be accorded traditional jurisdictional distinctions for the purposes of double jeopardy. The cases which fall into this category pose the question: "Is the line drawn between this and that zone so significant that it should permit a man to be incriminated more than once for the commission of a single reprehensible act?"

The problem has been a recurrent one. In one early case a dispute arose concerning jurisdiction over an American who had shot another American in Canada, with death occurring in the United States. The double jeopardy question was never litigated as such because the Canadian officials dropped their demands for extradition once the Michigan courts had agreed to hear the case.[76]

The problem of double jeopardy in international law is often avoided by the use of treaties waiving American claims of jurisdiction.[77] The Supreme Court held, as early as 1820, that a criminal prosecution in the courts of another nation would bar prosecution in the United States federal courts.[78] Since at least the year 1662, England has followed the same rule.[79] The jurisdictional boundaries between nation states have not been given legal significance sufficient to permit double prosecution. It does not matter that several nations have the ability to try a particular defendant. American courts will not try him if he has been tried by courts of another nation. One may ask: "If American courts can trust foreign courts, is it too much to expect them to trust each other?"[80]

Similar situations frequently arise in conflicts between the states of the federal union. In discussing the effect of the concurrent jurisdiction of Washington and Oregon over the Columbia River, the Supreme Court said that "the one first acquiring jurisdiction of the person may prosecute the offense, and its judgment is a finality in both states, so that one convicted or acquitted in the courts of one state cannot be prosecuted for the same offense in the courts of the other."[81] Thus,

76. Tyler v. People, 8 Mich. 320 (1860).

77. See Harvard Research in International Law, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435 (Supp. 1935), Article 13 provides:

"In exercising jurisdiction under this Convention, no State shall prosecute or punish an alien after it is proved that the alien has been prosecuted in another State for a crime requiring proof of substantially the same acts or omissions. . . ." *But see* Rocha v. United States, 288 F.2d 245 (9th Cir. 1961).

78. United States v. Furlong, 18 U.S. (5 Wheat.) 184 (1820).

79. R. V. Thomas, 1 Sid. 179, 1 Lev. 118 (1662).

80. Franck, *An International Lawyer Looks at the Bartkus Rule*, 34 N.Y.U.L. REV. 1096, 1103 (1959).

81. Nielsen v. Oregon, 212 U.S. 315, 320 (1909).

as a matter of federal policy, duplicating prosecutions are eliminated and the criminal defendant protected.

In like fashion, the question of federal jurisdiction over crimes committed on the Great Lakes raises double jeopardy problems of a jurisdictional nature. In a recent case, the court indicated that federal jurisdiction had been extended over the Great Lakes regardless of state jurisdiction and exists even if a state has already prosecuted the offender. But when a crime is committed on a tributary of the Great Lakes, the federal court will have jurisdiction only when a state court does not claim it. Federal criminal jurisdiction seems to depend on the statutes and location of the vessel. Federal admirality law would be applied to vessels plying the Great Lakes, as on the "high seas."[82]

The most famous and most important jurisdictional line is that drawn between state and federal criminal law by the case of *United States v. Lanza*.[83] This case held that persons illegally transporting liquor in violation of a state and federal prohibition law may be prosecuted separately by each authority for violating the law of each. The case treated the question of the constitutionality of a federal prosecution following a completed state prosecution, but on grounds so broad as to include the reverse situation. It was ruled that two separate sovereignties which derive their power from separate sources each have the power to punish the same criminal activity. Each could deal with the same subject matter without interference from the other because each should determine what conduct offends its own peace and dignity.

The double jeopardy clause was held inapplicable since it only restricted federal prosecutions. There had been only one prosecution for the violation of the laws incident to its sovereignty. Similarly, the state double jeopardy provision referred only to the state prosecution. The decision had the effect of placing the significance of the federal-state relationship on a higher plane than the interest against double prosecutions.

Dean Roscoe Pound has criticized the *Lanza* rule because it is "an easy way for prosecutors to make a record for convictions with a minimum of effort."[84] Professor J. A. C. Grant has led the scholarly attack on the decision. Professor Grant maintains that the *Lanza* case is clearly incorrect on historical grounds, wrong in its interpretation of the English and American case law, wrong because of its

82. Hoopengarner v. United States, 270 F.2d 465 (6th Cir. 1959). This was based on United States v. Rodgers, 150 U.S. 249 (1893), except that in *Rodgers* the offense occured on the Canadian side of the Detroit River.

83. 260 U.S. 377 (1922).

84. Pound, *Cooperation in Enforcement of Law*, 17 A.B.A.J. 9, 14 (1931).

inherent contradictions, and wrong on policy grounds.[85] Grant points out that extension of the rule has led to the possibility of triple trials for the same conduct—by the federal government, by the state, and by the municipality.[86]

The *Lanza* rule has been consistently followed in the few cases in which it has been tested.[87] Recently, the federal preemption doctrine of the *Nelson* case[88] cast slight doubt upon its viability. The Court in the *Nelson* case took pains to distinguish *Lanza* in its holding that the Smith Act superseded the enforceability of a state act proscribing conduct aiding the forcible overthrow of the government. This area of criminal conduct was reserved to the control of the federal government as an area of national concern, the federal government having preempted the field by the enactment of the Smith Act. The *Nelson* case was intended to be exceptional, as subsequent decisions have emphasized. Generally, federal and state criminal powers are considered as co-equal.

If there was any doubt created in the *Nelson* ruling, it was dispelled by the recent *Bartkus*[89] case which concerned a situation factually the reverse of the *Lanza* case. In this recent decision the defendant was convicted in a state prosecution which followed a prior federal acquittal, based on substantially the same offense and the same evidence. The Court held, by a five to four vote, that there was no double jeopardy bar to such a threat of double punishment. The decision was justified "in the name of federalism," asserting that it would be in derogation of the federal system to permit the reserved power of the states to be displaced by federal prosecution of minor federal offenses. The majority displays its motives, stating: "Some recent suggestions that the Constitution was in reality a deft device

85. Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309, 1317 (1932). As Grant points out, the Supreme Court had declared, at first, that passage of a national criminal act would necessarily render the state law unenforceable. See Houston v. Morre, 18 U.S. (5 Wheat.) 1 (1820). It would have been in accord with international law and the logic of previous decisions to have applied the double jeopardy principle in the Court's first case of successive state and federal prosecutions. But instead the Court created, in *United States v. Lanza*, the "novel doctrine that dual offenses arise merely from the existence of duplicate laws." Graut, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 U.C.L.A. L. REV. 1, 4 (1956). Grant goes on to demonstrate that the inconsistency of this rule is based upon an incorrect and unjustifiable interpretation of the common law and of the relevant cases in the United States. He points out, very skilfully, that Fox v. Ohio, 46 U.S. (5 How.) 410 (1847), upon which *Lanza* claims to be based, is completely misconstrued by the *Lanza* Court. Grant accuses the Solicitor General and the defense counsel of not having studied the history of the problem.

86. Grant, *Penal Ordinances and the Guarantee Against Double Jeopardy*, 25 GEO. L.J. 299 (1937).

87. Albrecht v. United States, 273 U.S. 1 (1927).

88. Pennsylvania v. Nelson, 350 U.S. 497 (1956).

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

for establishing a centralized government are . . . without factual justification,"[90] hinting that the fears raised by some writers of a possible extension of the *Nelson* rule could be laid to rest.

Criticism of this decision was outspoken. A leading English journal criticized the view of federalism espoused by the case on the ground that "Justice Frankfurter's opinion . . . seemed sometimes to view federalism as an end in itself, not as a means to a better life for individuals."[91] In its practical impact, the decision opened the door to increased cooperation between federal and state prosecutors to the detriment of defendants. Some procedural devices have been suggested to avoid the possible harsh results.[92]

It seems evident that the majority in *Bartkus* did not have to decide as a matter of federalism that state and federal prosecutions for the same offense do not offend double jeopardy. The reserved powers of the state to determine its criminal laws are not threatened by the application of double jeopardy. The effective use of a double jeopardy plea would not nullify any state laws.

On the other hand, federal-state relations have been on a particularly difficult footing since the *Nelson* decision. The feelings of state officials are as important as the reality of the situation. In such a circumstance it is not surprising that concern with federalism would prevail over the right to plead double jeopardy. Mr. Justice Frankfurter was faced with a conflict between the fifth and tenth amendments and sensitively preferred the latter, an act of judicial statesmanship.

Mr. Justice Brennan, writing in *Abbate v. United States*,[93] a companion case to *Bartkus*, discerned the policy issues at stake. He thought that the danger of multiple prosecution was outweighed by the necessities of the federal system which would otherwise permit a defendant to get off lightly if the state or federal penalty were minor.[94] Whatever the merits of these arguments, it seems undesirable to reverse in the criminal area the achievements of *Erie v. Tompkins*[95] in the civil area. There is no federal common law for civil cases, neither should there be a preeminent federal criminal law. Double jeopardy must give way.

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90. *Id.* at 137.

91. *Conflicts in Court*, 1959 THE ECONOMIST 233. The article stresses the division between Frankfurter and Black; the former guided by respect for the political branches of government, the latter by individual rights.

92. Note, 45 CORNELL L.Q. 574, 579 (1960), proposes negotiation between sovereignties, preemptive exclusion, calculation of primary interests, and direct legislative action. None of these seem likely to take place in the foreseeable future .

93. 359 U.S. 187 (1959).

94. *Id.* at 195.

95. 304 U.S. 64 (1938).

The line between civil and criminal law is an important one in double jeopardy law. The federal cases are in conflict on the abstract question of whether a defendant's former acquittal or conviction of a criminal charge bars a civil action against him to recover a statutory penalty for the same course of conduct. The modern federal view is probably that a former acquittal or conviction will not bar a subsequent civil suit.[96] The attempt to reconcile differing case results has been made in terms of a distinction based upon the nature of the penalty. The distinction rests on whether the penalty was intended to be criminal in nature.[97]

Under some circumstances, a civil action to recover taxes may amount to a criminal action because of the nature of the punishment.[98] The distinction can be made on the basis of the statutory exaction between the compensatory or punitive nature of the statute. In some cases neither the defense of double jeopardy nor the defense of res judicata will avail a defendant. This is true under the Federal False Claims Acts.[99]

A suit on behalf of the United States to recover treble damages under the Emergency Price Control Act of 1942[100] was considered to be a civil action involving no double jeopardy.[101] Acquittal on a criminal charge is not a bar to a civil action by the government which is remedial in nature, arising out of the same facts on which the criminal proceedings were based.[102] Double jeopardy does not apply to drug misbranding proceedings.[103] A contumacious witness may be punished for contempt of the United States Senate for a refusal to testify after being subpoenaed, and separately indicted for a misdemeanor for each refusal.[104] Imposition of the civil sentence for the

96. Rex Trailer Co. v. United States, 350 U.S. 148 (1956); United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943); Helvering v. Mitchell, 303 U.S. 391 (1938). *Contra,* United States v. Ulrici, 102 U.S. 612 (1881); United States v. Gates, 25 Fed. Cas. 1263 (No. 15,191) (S.D.N.Y. 1845). This seems a tenuous distinction, at best, since it would imply that any money damages not related to actual damages caused are punitive; hence the proceeding is criminal.

97. Helvering v. Mitchell, *supra* note 96. United States v. Ben Grunstein & Sons, 127 F. Supp. 907 (D.N.J., 1955).

98. United States v. LaFranca, 282 U.S. 568 (1931).

99. United States *ex rel.* Ostrager v. New Orleans Chapter, Associated Gen. Contractors, Inc., 317 U.S. 562 (1943).

100. Emergency Price Control Act, 56 Stat. 33 (1942), as amended, 58 Stat. 640 (1944), as amended, 60 Stat. 676 (1946), as amended, 61 Stat. 619 (1947).

101. United States *ex rel.* Marcus v. Hess, *supra* note 96.

102. Stone v. United States, 167 U.S. 178 (1897).

103. United States v. 42 Jars . . . Bee Royale Capsules, 160 F. Supp. 818 (D.N.J. 1958).

104. *In re* Chapman, 166 U.S. 661 (1897). Doubt was cast upon the availability of a double jeopardy defense, on the peculiar ground that a prosecution through Congress' own process was not the same as statutory prosecution since each is committed "against different jurisdictions."

refusal is no barrier to criminal punishment because "the civil and criminal sentences served distinct purposes, the one coercive, the other punitive and deterrent; that the same act may give rise to these distinct sanctions presents no double jeopardy problem."[105] Obviously, an in rem proceeding is not a criminal action and will not be accorded double jeopardy protection.[106]

The federal courts have made conscious policy judgments in this area of drawing the line between the civil and criminal areas. The difficulty arises with the use of indefinite terms in order to determine whether a statute is "coercive," "deterrent," "remedial," "compensatory," or whatever phrase the court may employ as an aid in delimiting the civil from the criminal. There is an element of artificiality in the use of these concepts, but they are not entirely lacking in meaningful content.[107]

There is considerable doubt whether the fifth amendment double jeopardy provision is a requirement in military courts-martial. It is clear that a soldier committing a crime in a jurisdiction governed by federal law cannot be tried by a federal court if he has been previously exonerated at a court-martial.[108] It is very uncertain just how far this principle can be extended.[109] Thus, double jeopardy protection is not accorded with any certainty in cases overlapping the military-civil jurisdictional lines. The federal courts seem to have developed no sure policy, nor even a consistent attitude, towards the problems inherent in the conflicts of courts-martial with criminal law.[110]

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105. Yates v. United States, 355 U.S. 66 (1957).

106. Various Items of Personal Property v. United States, 282 U.S. 577 (1931).

107. An example of decisive policy making in double jeopardy is to be found in United States v. Williams, 341 U.S. 58 (1951), in which a defendant's acquittal in a criminal prosecution was held not to bar a subsequent prosecution for perjury committed at his former trial on the ground that to decide otherwise would permit a defendant testifying on his own behalf to swear to anything he pleased.

108. Grafton v. United States, 206 U.S. 333 (1907); United States v. Bloek 262 Fed. 205 (D. Ind. 1920).

109. The question of whether the fifth amendment may be invoked in cases arising in the military was unanswered in earlier decisions. See Carter v. McClaughry, 183 U.S. 365 (1902); Wrublewski v. McInerney, 166 F.2d 243 (9th Cir. 1948). It does not now seem to be a requirement in courts-martial. Wade v. Hunter, Warden, 336 U.S. 684 (1949). The Supreme Court has never squarely decided the question of whether the sentence of a court-martial is void, and subject to habeas corpus attack merely because the accused was twice placed in jeopardy. It has been assumed that the federal courts may find a court-martial void for double jeopardy reasons where the former conviction, or acquittal, was in a federal court, since both courts are courts of the same sovereign, but this is only a surmise. See United States *ex rel.* Pasella v. Fenno, 76 F. Supp. 203 (D. Conn.), *aff'd.*, 167 F. 2d 593 (2d Cir. 1947), *cert. denied*, 335 U.S. 806 (1948). The lower federal courts are completely at odds and confused about these problems. *Compare* Sanford v. Robbins, 115 F. 2d 435 (5th Cir. 1940), *with Ex parte* Henkes, 267 Fed. 276 (D. Kan. 1919).

110. Trop v. Dulles, 356 U.S. 86 (1958); Reid v. Covert, 354 U.S. 1 (1957); Schubert sees a fundamental constitutional trend toward the use of judicial review in

If the diverse double jeopardy situations are meaningfully grouped together as problems of policy line-drawing in matters of overlapping jurisdiction, some deficiencies become apparent. Inconsistencies which could be removed from double jeopardy law detract from its significance as a constitutional protection. The federal courts can remedy these defects by a more direct confrontation of the genuine policy issues.

V. Scope of the Criminal Act

The problem of the multiple consequences of a criminal act and of the multiple prosecutions which might be accorded those single acts is the central problem in the double jeopardy area, especially since it is the most commonly contested double jeopardy claim. Confusion is rampant in this branch of double jeopardy law. But before the confusion can be dissipated, the separate and distinct nature of the problem must be perceived.

The first strand which must be disentangled from the skein is the problem of the effect of appeal from the judgment of the trial court. This is patently a different question than the scope of the criminal act, the problem now at hand. Yet, the federal courts have tended to treat these problems alike, often using the same language as rationale.

A single criminal act may present the prosecution with opportunities for securing a conviction under several penal statutes which, even though they may overlap and even though they punish conduct of a single sort, provide alternative legal theories on which conviction may be obtained.[111] To complicate the picture further, a single criminal act may injure several persons or things, multiplying the possibilities of conviction. Beyond this, the prosecution has the option of joining the violations as counts in a single indictment before a single jury, or of splitting the violations into separate indictments before several juries.[112]

Obviously, double jeopardy objections are sure to arise, but how are the courts to resolve them? For the federal system, the Supreme Court and circuit courts have evolved a completely fictitious series of tests: the "same offense," "same evidence," "same transaction," and

this general area, notably in United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955). This may be seen in "scalograms" in Schubert, Constitutional Politics 204-05 (1960).

111. See Horack, *The Multiple Consequences of A Single Criminal Act,* 21 Minn. L. Rev. 805 (1937).

112. This is explored in interesting fashion by Kirchenheimer, *The Act, the Offense, and Double Jeopardy,* 58 Yale L.J. 513 (1949). Kirchenheimer considers the state and federal law together. Indeed, the problems are the same, although a bit different in the significance accorded to double jeopardy itself. Still, the same formulae are employed.

the "same act" tests. The result of the use of these convenient fictions has been to add contradictory and unpredictable elements to double jeopardy law.

The great range of choices presented the prosecution is due to the multiplication of legislatively-created criminal categories. Every new criminal statute further extends the alternatives available to the prosecution while increasing the number of possible convictions and sentences which a defendant may suffer. A deed which might have violated one criminal proscription in 1800 may violate five today. Thus, the problem is partly one of legislative interpretation. It must be determined whether the legislature "intended" to increase the penalty for a single criminal deed, merely to provide another alternative remedy, or to make criminal actions which were previously legal.

Traditionally, the courts have had the task of determining legislative intent. All too often courts must assume that a conscious policy exists where there is none. They must read criminal statutes to discover whether they are "intended" impliedly to repeal or to add to the criminal punishment meted out to a particular activity. This is no easy task. One judge astutely complained:

> The areas in which the legislator has attempted to carve out several offenses from one transaction by varying the legal description so as to embrace all varieties and stages of performance, have created in those areas, a host of semi-independent, yet generally identical offenses.'[113]

The courts have great difficulty with the problem of multiple punishments, leading to considerable confusion:

> The confusion in the decisions is intelligible only as an expression of conflicting views on the desirability of leaving an absolute discretion with the trial court. It is not difficult to understand the considerations which have led many courts to inspect the record carefully and to restrict the use of consecutive sentences.[114]

Normally, the courts will not examine probable legislative intent in situations where new crimes and subdivided old crimes accumulate and apply to the same facts.[115] In the absence of repeal, a legislative intent appears to make all such provisions cumulatively applicable.[116] Congress may separate a conspiracy to commit a substantive offense from the commission of the offense and affix to each a different

113. District of Columbia v. Buckley, 128 F.2d 17 (D.C. Cir. 1942).

114. Note, 45 HARV. L. REV. 533, 540 (1932).

115. Burton v. United States, 202 U.S. 344 (1906).

116. Bozza v. United States, 330 U.S. 160 (1947).

penalty.[117] Only if the substantive offense and the conspiracy "are identical" does a conviction for both constitute double jeopardy.[118] In actuality, the courts cannot merely defer to legislative judgment. The task of interpretation cannot be evaded.

The dilemma is best revealed by the example of a recent case, *Gore v. United States*,[119] where the defendant violated at least three statutes by one criminal act: (1) selling narcotics without a written order; (2) selling in a container other than the original stamped package; and (3) facilitating the concealment and sale of narcotics. By a five to four decision, the majority accepted these similar offense categories as separate offenses. Mr. Justice Douglas entered a vigorous dissent, saying, "I think it is time that the Double Jeopardy Clause was liberally construed in light of its great historic purpose to protect the citizen from more than one trial for the same act."[120]

The federal courts have developed interpretive aids to solve presumed legislative intent. Actually, these tests take the place of conscious policy and provide an arbitrary device to solve the dilemma of overlapping offenses. Even those jurists who prefer not to be legal activists must assert the court's role of interpretation and creation of law.

One test which is employed is the "same evidence" test. Where the act constitutes a violation of two distinct statutory provisions, the test to determine whether there are two offenses or one is whether either statute requires proof of facts which the other does not.[121] In cases involving two violations of congressional enactments, the test would be whether the two offenses are distinguishable by requiring somewhat different evidence in proving each.[122]

Drawing from this rule, it has been said that a person may not be

117. United States v. Bayer, 331 U.S. 532 (1947); Pinkerton v. United States, 328 U.S. 640 (1946). In a relatively reeent decision, Mr. Justice Frankfurter discussed the underlying policy considerations, saying: "We attribute to Congress a tacit purpose —in the absence of any inconsistent expression—to maintain a long-established distinction between offenses essentially different" and "this settled principle derives from the reason of things in dealing with socially reprehensible conduct: collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts . . . ." Callanan v. United States, 364 U.S. 587 (1961). Similarly, separate convictions for a conspiracy to monopolize trade do not amount to double jeopardy, since they are separate statutory offenses, eaeh punishable as separable violations of the Sherman Act. American Tobacco Co. v. United States, 328 U.S. 781 (1946). The courts may uphold attempts to punish as two conspiracies, under separate counts in a single indictment, that which amounts to one conspiracy for the removal of liquor from a bonded warehouse. See Murphy v. United States, 285 Fed. 801 (7th Cir. 1923).

118. Ladner v. United States, 358 U.S. 169 (1958).

119. 357 U.S. 386 (1958).

120. *Id.* at 396.

121. Blockburger v. United States, 284 U.S. 299 (1932).

122. Gavieres v. United States, 220 U.S. 338 (1911).

tried for first degree murder and, after acquittal, be tried for manslaughter.[123] But the "same evidence" test, in requiring that the second accusation utilize substantially the same evidence in order for the defendant to have the benefit of double jeopardy protection, is a very narrow view of double jeopardy. This interpretive rule amounts to a broad grant of discretion to the prosecutor. Accordingly, the test has often been qualified by the use of res judicata and the "lesser included offense" doctrine.[124]

Another frequently employed but narrower test is the "same offense" test which requires a plea of double jeopardy to be based upon a prosecution for the same offense.[125] The test of identity of offenses is whether there is a separate definition in the statutes. One court added to the confusion by ruling that the test of the identity of the offenses is whether the same evidence is required to sustain both charges,[126] a common error.[127]

Until quite recently, the "same offense" dogma has been a very popular one.[128] In its best phraseology, the Supreme Court has declared: "A single act may be an offense against two statutes, and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."[129]

In a 1955 case, however, the Court decided that so far as the Mann Act was concerned, the single offense doctrine did not apply.[130] This case may indicate the Supreme Court's distaste for the "same offense" rule.

The "same transaction" test seems to have been applied in an 1897 case which has never been overruled.[131] This generous test would forbid a new trial based on any occurrence which may be said to arise out of the same criminal transaction. Some of the circuit courts seem to have adopted this rule as their guide in the double jeopardy area.[132] In so doing, they have relied upon dicta appearing in the case of *Holiday v. Johnson.*[133] The "same transaction" test is favorable to the defendant, since it permits a second prosecution only in cases

123. Helvering v. Mitchell, 303 U.S. 391 (1938).
124. See Kirchenheimer, *supra* note 112, at 527-530.
125. Burton v. United States, 202 U.S. 344 (1906).
126. Morgan v. Devine, 237 U.S. 632 (1915).
127. See Albrecht v. United States, 273 U.S. 1 (1927).
128. *Ex parte* Lange, 85 U.S. 163 (1873).
129. Carter v. McClaughry, 183 U.S. 365, 395 (1901).
130. Bell v. United States, 349 U.S. 81 (1955).
131. United States v. Ball, 163 U.S. 662 (1896).
132. Goetz v. United States, 39 F.2d 903 (5th Cir. 1930); Tritico v. United States, 4 F.2d 664 (5th Cir. 1925).
133. 313 U.S. 342 (1940).

in which the proof does not show that the second case concerns the same criminal transaction as the first.

The "same act" test is not easy to isolate as a separate criterion, and is usually posed as a rationale with other tests. No significant Supreme Court case may be found dealing with this point. A similar but vaguer test has been developed by lower courts under the hazy guise of a "common essential element" test.[134]

Lower federal courts have been given no guide by the Supreme Court to resolve this problem in double jeopardy. In this bewildering situation some circuit courts, as indicated above, have adopted the "same transaction" test. Others employ the "same offense" test or some intermediate variation. A few courts have discovered an almost unique formula: "A plea of double jeopardy is unavailing unless the offense to which it is interposed is precisely the same in law and in fact as a former one relied upon under the plea."[135] This test is almost formless and is of little value.

This important area of double jeopardy law seems to be largely in the hands of the trial judge. He is left relatively free to employ the test of his choice and his decision is usually affirmed. This is due to the intangible nature of the tests and the flexibility of their application.[136] The Supreme Court has failed to set a policy in this branch of the law. In cases in which a single physical movement has produced several statutory violations, the "single act," "single transaction," "same offense," and "same evidence" rules have been used more as a justification and rationalization of desired results than as an analytical tool.

The same tests appear again in cases in which a single physical movement has produced several successes.[137] In this area one event injures more than one person or object and the question arises as to the number of theories which are to be made available to the prosecution. In one decision in which the defendant was charged with violating the Mann Act by transporting two different women across state lines for immoral purposes, it was held that only one offense had been committed which could not be subjected to cumulative punishment under two separate counts.[138]

In *Ladner v. United States*, the defendant wounded two federal

134. Copperthwaite v. United States, 37 F.2d 846 (6th Cir. 1930); Lewis v. United States, 4 F.2d 520 (5th Cir. 1925).

135. Bartlett v. United States, 166 F.2d 928, 931 (10th Cir. 1948).

136. Jones, *What Constitutes Double Jeopardy?* 38 J. CRIM. L., C. & P.S. 379, 385 (1947). This article gives a good brief summary of traditional double jeopardy approaches, but is not analytical.

137. Of course, the problem is really more fundamental, requiring formal restrictions on the prosecution as a matter of policy. Now the courts each set the policy for themselves. The language of the tests is similar, but policy decision is really quite different in this sub-area.

138. Bell v. United States, *supra* note 130.

revenue agents with what was alleged to have been a single shotgun blast. The Court held that there was no constitutional issue presented. The question for decision was the construction of a section of the criminal code, which section was interpreted by the court "to mean that the single discharge of the shotgun would constitute an 'assault' without regard to the number of federal officers."[139] The Court avoided the double jeopardy issue by adopting a policy of deference in interpreting the statute, asserting that when choice is to be made between two readings of what conduct Congress has made a crime, it is appropriate that Congress should have spoken in language that is clear and definite.

This approach of direct statutory interpretation is more forthright than the use of the double jeopardy tests. Since most of the problems have been created by multiplicity of criminal legislation, this approach discerns the policy issue. However, it does not necessarily solve the problems better than fictional tests.

VI. USE OF THE CRIMINAL APPEAL

The final aspect of double jeopardy law to be treated is the effect of an appeal by the defendant or the state upon the issues to be litigated at the new trial. This is to be sharply distinguished from the situation treated in the preceding section which was concerned with an entirely different criminal suit, connected with the first only by virtue of the similarity of facts. The problem of appeal is less delicate since it may be said that the voluntary appeal of the defendant has provided the prosecution with a "second crack" at a conviction.

Appeals by the federal government are extremely unusual and are looked upon with disfavor by the Supreme Court.[140] Congress has enacted laws granting the prosecution a right of appeal in criminal cases and such legislation is not directly violative of any constitutional prohibition.[141] A provision of the Criminal Appeals Act of 1907 states that if a demurrer or a motion to quash an indictment is sustained when a federal statute is construed or its validity is denied, the government may then bring the matter of its construction and validity directly to the Supreme Court.[142]

One early case held that the prohibition against double jeopardy applies equally whether the defendant has been acquitted or con-

139. 358 U.S. 169 (1958).

140. Carroll v. United States, 354 U.S. 394 (1957); Peters v. Hobby, 349 U.S. 331 344-45 (1955) (appears even stronger).

141. United States v. Heinze, 218 U.S. 532 (1910); United States v. Bitty, 208 U.S. 393 (1907); United States v. Sanges, 144 U.S. 310 (1892); United States v. Janitz, 161 F.2d 19 (3d Cir. 1947).

142. Act of March 2, 1907 ch. 2564, § 587, 34 Stat. 1246. *Upheld in* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

victed. No exception to the applicability of the double jeopardy clause would be made merely because the new trial had been sought by the defendant for his own benefit.[143] The problem is narrowed to the question of the limitation upon the second indictment.[144]

One of the first formulas to be developed was the "lesser included offense" doctrine. This doctrine states that acquittal or conviction of a greater offense is not a bar to subsequent conviction of a minor offense included within the former whenever, under the indictment for the greater offense, the defendant could have been convicted of the lesser. But if the lesser offense is tried first, this will be a bar to the greater charge on the new trial. Although one-half the states have accepted this defendant-oriented doctrine, or some portion of it, many others have not.[145] The Supreme Court has not expressed its attitude on the matter, but lower federal courts apply the doctrine on occasion. In *Goodall v. United States*,[146] an appellate court held that second degree murder is a lesser offense which can be proven under a charge of felony-murder.

A more troublesome, and more frequently used test is the "waiver" rule. This doctrine rests upon the theory that when a new trial is granted, the defendant is in the same position as if there had been no trial and thus cannot plead his prior conviction as double jeopardy. He is, in effect, held to have waived the plea of former jeopardy by his appeal.

The Supreme Court ruled in 1905, in passing upon a case arising under a Philippine statute prohibiting the infliction of double jeopardy, that by appealing a conviction for assault the defendants had waived the right to plead double jeopardy in a new trial for the charge of murder. In this famous case, *Trono v. United States*,[147] it was not made clear whether the waiver doctrine was accepted as a part of constitutional law, or was merely a matter of statutory interpretation.

Five years later the Court considered the question again. In *Brantley v. Georgia*,[148] it was held that the Supreme Court of Georgia could permit a new trial for murder after an appealed conviction of manslaughter had been reversed without violating the fifth amendment

143. United States v. Gilbert, 25 Fed. Cas. 1287 (No. 15,204) (C.C.D. Mass. 1834).

144. Other limitations upon appeal have been set by Congress which condition the double jeopardy situation. So far as the Supreme Court itself is concerned, only limited criminal appeals by the government are permitted under the Criminal Appeals Act of 1948, 62 Stat. 844, as amended, 28 U.S.C. § 3731 (1949). This statute permits direct appeal by the government from decisions or judgments setting aside an indictment where the decision is based upon the invalidity of a statute.

145. See compilation by Frankfurter, J., in Green v. United States, 355 U.S. 184, 211 (1957).

146. 180 F.2d 397 (D.C. Cir. 1950).

147. 199 U.S. 521 (1905).

148. 217 U.S. 284 (1910).

double jeopardy provision. More recently, in *Hill v. Texas*,[149] the Supreme Court commented that a prisoner whose conviction in a state court is reversed by the state Supreme Court need not go free, for a state may indict and try him again. Thus, the states are granted broad discretion in this area.

The *Trono* case remained the federal law for some time. In 1919, the Supreme Court, relying expressly upon *Trono*, upheld the imposition of the death penalty in a new trial following the successful appeal of the first trial in which the jury had not recommended capital punishment.[150]

Waiver of a plea of double jeopardy, however, must be a voluntary and knowing relinquishment of rights.[151] In its normal meaning, the Court has held that the word "waiver" indicates a conscious gamble; thus it forces the defendant to choose to accept a lesser penalty or to enter an appeal, and to take the risk that the second charge might be much more serious.

In 1957 much of this doctrine was discarded in the important case of *Green v. United States*.[152] Green had been found guilty of the commission of arson and second degree murder in his first trial. The jury had made no finding as to first degree murder. The court of appeals reversed and remanded the case for a new trial.[153] On remand Green was tried again, but this time for first degree murder, when the Court overruled his plea of former jeopardy. The new jury found him guilty of first degree murder and he was given the mandatory death penalty. A divided court of appeals rejected the defense of double jeopardy and affirmed the decision.[154]

The Supreme Court reversed the decision, stating that the conviction of a lesser offense is a bar to any further prosecution for the greater offense on retrial after the appeal by the accused and reversal of the conviction. The Government had contended that the accused had "waived" his constitutional defense by obtaining a successful appeal of his improper conviction.[155] To condition an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another, however, conflicts with the constitutional bar against double jeop-

149. 316 U.S. 400 (1942).

150. Stroud v. United States, 251 U.S. 15 (1919). Frankfurter's dissent in Green v. United States, *supra* note 145, rested in part on this case. The Justice could find no distinction between allowing a man to be retried at the risk of a greater punishment, and being retried at the risk of a greater punishment for a higher crime. *Stroud v. United States* was not overruled.

151. Johnson v. Zerbst, 304 U.S. 458 (1938).

152. *Supra* note 145.

153. Green v. United States, 218 F.2d 856 (D.C. Cir. 1955).

154. Green v. United States, 236 F.2d 708 (D.C. Cir. 1956).

155. Green v. United States, *supra* note 145, at 191.

ardy.[156] Mr. Justice Black, for the majority, distinguished the *Trono* case on the ground that the defendant could not have intentionally consented to be tried for more than was contained in the first prosecution.[157] Mr. Justice Frankfurter insisted that by distinguishing *Trono* the majority was really overruling it indirectly.[158]

In *Forman v. United States*,[159] a 1960 case, the Supreme Court demonstrated that the "waiver" doctrine of the *Trono* case still applied to cases in which the new trial after defendant's appeal was for the same offense. Although the decision rested on other grounds, there is good reason for assuming that if the "waiver" doctrine is still viable, it cannot be used to bar a plea of double jeopardy when the defendant is being retried for an offense greater than that contained in the original indictment. This means that the *Green* case is the most significant precedent in this area. The policy question seems to be in the process of being resolved so as to permit appeal free from coercive risk.

VII. Judicial Behavior in Double Jeopardy Cases

It would be incomplete to leave the case study of federal double jeopardy law without considering the judicial behavior aspects. In this regard, the work of Glendon Schubert has great utility. He creates a "scalogram" of the seven double jeopardy decisions of the Warren court from *Green v. United States* in 1957 through *Williams v. Oklahoma*[160] in 1959. From this he concludes: "During this brief but relatively homogenous period, the attitudes of the justices toward the equity of double jeopardy practices seemed to have a much more important bearing upon their decision-making than did the constitutional theories and concepts with which the opinions of the justices are concerned."[161]

Unfortunately, this study does not seem to support Schubert's conclusions. The Court has rather consistently applied first one, then another series of constitutional tests. If anything, the fault has been that insufficient consideration has been given the "equity of double jeopardy," the policy levels which lie beneath the legal rules.

156. *Id.* at 193.

157. As a matter of fact, the defendant did know the possible consequences of his appeal, but he said that he preferred death to spending the rest of his life in prison.

158. Green v. United States, *supra* note 145, at 213, 214.

159. 361 U.S. 416 (1960).

160. Williams v. Oklahoma, 358 U.S. 576 (1959), is a case concerning the due process meaning of double jeopardy as a restriction on the states. Like every other such case, the fourteenth amendment was no limitation upon the state's interpretation of the double jeopardy protection. The defendant, after having been convicted of murder and sentenced to life, pleaded guilty to a kidnapping charge and was sentenced to death.

161. Schubert, *supra* note 110, at 608-09.

Schubert's analysis is more useful in locating the "swing man" on the Court in double jeopardy questions:

> The separation of the justices into two groups is rather sharply and consistently defined . . . the disposition of the cases is in perfect accord with the voting of only one justice, Whittaker: and in a majority of four of the seven cases, Whittaker's vote was determinative, which made him the equipoise of the Court on this issue. Thus the freshman justice of the 1956 Term became, in the decision of this set of cases, the most powerful justice on the Court.[162]

This is interesting information, even if one need not have constructed a scalogram to discover it. The more important issue of the personal philosophies of the judges tends to be overlooked, however.

VIII. CONCLUSION

Several inconsistencies in federal double jeopardy law appear as a result of this examination. First, the internal inconsistencies inherent in the doctrine of attachment are so great that they immediately give rise to qualifications and exceptions. The intrinsic-extrinsic formula suggested above seems much closer to the real policy considerations in this area. Its adoption would have solved the *Gori* case and similar problems.

Second, the inconsistencies flowing from the effect of the *Palko* case and subsequent failures to define due process limitations upon state double jeopardy has increased the tendency to proliferate double jeopardy rules. Uniformity itself may not be possible, especially in the absence of uniform state procedures, but some standards could be federally established to prevent extreme abuses, as in the *Hoag* situation.

Third, the problem of conflicting jurisdictional zones, as it has been denoted here, must be seen as separate from other double jeopardy problems. The delineation between zones should be made after conscious deliberation and not by means of unconscious traditional distinctions. Better drafting of statutes to indicate their civil or criminal nature would help relieve the courts of the task of guessing at legislative intent.

Fourth, the central confusion surrounding the problem of the scope of the criminal act is so serious that it requires a more exhaustive treatment. Here, too, presumptions of legislative intent have been utilized by the courts, except that the resort to tests of jeopardy has introduced even greater artificiality. Many of these problems would be removed by better legislative drafting, but what is primarily needed is a more complete consideration of the social

162. *Id.* at 607-69.

policies which underlie double jeopardy. In the absence of a broad legislative reconsideration, a single standard should be applied by courts. This would help remove some of the uncertainties in this problem area.

Fifth, the question of the impact of the defendant's appeal should be resolved in such a way that the defendant would not be forced to gamble with his future. Although the *Green* case is a long step in this direction, conflicting precedents still exist which retain some force. This resolution cannot be accomplished by the courts alone.

But the dominant policy issue in double jeopardy is that of the extent of the defendant's protection against state prosecution, represented by the power of the state prosecutor. How many times should the prosecution be permitted a chance to proceed against a criminal defendant? The answer is not simple, especially since the prosecution's advantages are offset somewhat by the burden of overturning the presumption of the defendant's innocence. The language of the double jeopardy clause is definite, if not clear. Ultimately, courts and legislatures must decide if this doctrine is absolute or conditional.

As it is now, the outcome of a double jeopardy plea in the federal courts is not always predictable. Even where it is relatively certain, the legal rule seems often unrelated to any conscious social goal. History will not cure the deficiencies of law. The social policy of double jeopardy requires a more conscious consideration by Congress and the federal courts.