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Double Jeopardy: Its History, Rationale and Future

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DOUBLE JEOPARDY: ITS HISTORY, RATIONALE AND FUTURE

Nor shall any person be subject for the same offense to be twice put in jeopardy for life or limb.[1]

The effectiveness of this utilitarian maxim protecting an individual from multiple punishment for the commission of a single offsnse is limited by legal fictions, anomalies and sophisticated distinctions.[2] This Comment analyzes some important double jeopardy problems and forecasts the handling of these controversial areas in light of the United States Supreme Court's recent decisions.

DUE PROCESS

During the past few years, the United States Supreme Court has reevaluated its position on the application to the states of the Bill of Rights.[3] The Court has found it imperative in many situations expressly to overrule prior decisions in an effort to extend constitutional protections to individuals.[4] Whether this emerging liberal approach to criminal procedure will be extended to encompass the double jeopardy provision is worthy of consideration.

In 1937 the Supreme Court in *Palko v. Connecticut*[5] held that

1. U.S. CONST. amend V. The referral to the antiquated jeopardy of limb has been held to signify felonies, Commonwealth v. Roby, 12 Pick. 496 (Mass. 1832); People v. Goodwin, 18 Johns 187 (N.Y. 1820), but the doctrine is also applied to misdemeanors. Ex parte Lange, 18 U.S. 163 (1873).

2. Even the Supreme Court in 1873 thought the double jeopardy provision to be an undecided defense. It stated in Ex parte Lange, 18 U.S. 163 (1873): "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense." *Id.* at 168. The Court obviously did not envision the numerous problems created by the courts in interpreting this clause.

3. Pointer v. Texas, 380 U.S. 400 (1965) (confrontation of witnesses); Griffin v. California, 380 U.S. 609 (1965) (judge commenting on defendant failure to testify); Malloy v. Hogan, 378 U.S. 1 (1964) (compelled self-incrimination); Escobedo v. Illinois, 378 U.S. 478 (1964) (right to counsel during interrogation). Gideon v. Wainwright, 372 U.S. 335 (1963) (right to trial counsel); Robinson v. California, 370 U.S. 660 (1962) (cruel and unusual punishment); Mapp v. Ohio, 367 U.S. 643 (1961) (unreasonable search and seizure).

4. Pointer v. Texas, *supra* note 3, overruled West v. Louisiana, 194 U.S. 258 (1904); Malloy v. Hogan, *supra* note 3, overruled Twining v. New Jersey, 211 U.S. 78 (1908) and Adamson v. California, 332 U.S. 46 (1947); Gideon v. Wainwright, *supra* note 3, overruled Betts v. Brady, 316 U.S. 455 (1942); Mapp v. Ohio, *supra* note 3, overruled Wolf v. Colorado, 338 U.S. 25 (1949).

5. 302 U.S. 319 (1937). Mr. Justice Cardozo noted that the purpose of the Court's holding was to allow Connecticut a retrial in an effort to correct errors and was not permitting a relitigation of the trial after a

the double jeopardy prohibition was not applicable to state proceedings. The defendant in *Palko*, although indicted for first degree murder, was found guilty of second degree murder and sentenced to life imprisonment. The State appealed[6] and the highest court of Connecticut reversed the judgment and ordered a new trial. The jury in the second trial returned a death sentence verdict of murder in the first degree despite the defendant's objection of having been subjected to double jeopardy. On appeal the United States Supreme Court phrased the issue: "Does it [double jeopardy] violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?"[7] After surveying the various cases imposing provisions of the Bill of Rights upon the states, the Court concluded that double jeopardy was not one of these fundamental principles to be extended to the states.

The decisions relied upon by the *Palko* Court have been either seriously undermined or expressly overruled by the Supreme Court in recent years.[8] Prior to *Palko* the Court in *Twining v. New Jersey*[9] had refused to extend the fifth amendment guarantee against compulsory self-incrimination to the states. Consequently, the *Palko* Court was moved not to apply the double jeopardy prohibition to the states. The *Twining* issue was reconsidered in 1964 by the Supreme Court in *Malloy v. Hogan*.[10] The *Malloy* Court abandoned the *Twining* rationale ruling that the fourteenth amendment prohibits state infringement on the privilege against self-incrimination just as the fifth amendment prevents the federal government from denying the privilege. The *Palko* Court also referred to *West v. Louisiana*[11] on which the sixth amendment right to confrontation of witnesses was held not applicable in state proceedings. Re-examining this issue in 1965, the Court in *Pointer v.*

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trial free from error. Nevertheless, the language of the opinion obviously dealt with the extension of the double jeopardy provision upon the states.

6. CONN. GEN. STAT. ANN. § 54.96 (1960) "Appeals from the rulings and decisions of the superior court or of the court of common pleas, upon all questions of law arising on the trial of criminal cases, may be taken by the state, with the permission of the presiding judge, to the supreme court of errors, in the same manner and to the same effect as if made by the accused."

7. 302 U.S. at 328.

8. The right to a trial by jury and the immunity from prosecution except as the result of an indictment are arguments advanced in *Palko* which have not been overruled or circumvented by the Supreme Court. The *Palko* Court relied on Weeks v. United States, 232 U.S. 383 (1914), for the application to the states of the fourth amendment. This decision, however, dealt exclusively with the federal courts. When a similar argument, i.e., excluding evidence obtained by an unreasonable search and seizure, was discussed in Mapp v. Ohio, 367 U.S. 643 (1961), the Court concluded that the rule should be extended to the states.

9. 211 U.S. 78 (1908).

10. 378 U.S. 1 (1964).

11. 194 U.S. 258 (1904).

Texas[12] expressly overruled *West*. The *Pointer* Court placed great emphasis on *Gideon v. Wainwright*[13] which imposed the sixth amendment right to counsel provision on the states. If the Supreme Court were confronted with a *Palko* fact situation today, it could parallel the reasoning used in *Pointer* that in view of *Malloy v. Hogan*, now extending part of the fifth amendment upon the states, *Palko* should no longer be considered the law.[14]

The *Palko* Court admitted that the dividing line appeared to be wavering, but in the final analysis more cases did not extend federal amendments to the states. If this reasoning were used today, the Court would reach an opposite result. With the weight of authority now shifted and with part of the fifth amendment now applicable to the states, the application of the double jeopardy clause upon the states should be reconsidered. There are three possibilities open to the Court: Refuse to extend the double jeopardy provision to the states as done in *Palko*; rule that the fifth amendment prohibits double jeopardy in the states through the fourteenth amendment by overruling *Palko*; or, hold that the double jeopardy provision is imposed on the states for it is violative of the fourteenth amendment's due process of law provision.[15]

In attempting to foresee how the *Palko* issue would be decided today, an analysis of recent cases reveals guidelines used by the Court in ascertaining whether a provision of the Bill of Rights should be extended to the states. One standard imbued in all of the recent cases and even considered in *Palko* is: Are the rights protected by the amendment in question among those "fundamental principles of liberty and justice which are at the base of all our civil and political institutions."[16] The application of this standard

12. 380 U.S. 400 (1965).

13. 372 U.S. 335 (1963).

14. It should be noted that Justices Black and Douglas who concurred in the decision written by Mr. Justice Cardozo in *Palko* have now firmly expressed their disagreement with the decision. They state that "double prosecutions for the same offense are so contrary to the spirit of our free country that they violate even the prevailing view of the fourteenth amendment, expressed in *Palko v. Connecticut*." Bartkus v. Illinois, 359 U.S. 121, 151 (1959).

15. The Court could ignore the fifth amendment and look exclusively to the fact situation to ascertain whether the second trial shocks the conscience of the Court. This procedure was employed in Rochin v. California, 342 U.S. 165 (1952), in which state officials had information that petitioner was selling narcotics. The agents forced their way into petitioner's bedroom and discovered two capsules lying on a table. Petitioner swallowed the capsules and the agents took him against his will to a hospital where his stomach was pumped. He vomited two capsules containing morphine. These were admitted in evidence over his objection and he was convicted. The Supreme Court reversed the decision because the evidence was obtained by methods violative of the due process clause of the fourteenth amendment.

16. Brown v. Mississippi, 297 U.S. 278, 285 (1935); Snyder v. Massachusetts, 291 U.S. 97, 105 (1933); Herbert v. Louisiana, 272 U.S. 312, 316 (1926).

is dependent on the reaction of the Supreme Court as evidenced by the varying conclusions reached by the Court in applying this standard.

In 1949 the Supreme Court in *Wolf v. Colorado*[17] held that the admission of evidence obtained by an unreasonable search and seizure was not forbidden in a state court prosecution. The Court did not consider the exclusionary rule essential to the right of privacy. Only twelve years later, *Mapp v. Ohio*[18] expressly overruled *Wolf*. It held all evidence obtained by searches and seizures in violation of the Constitution inadmissible in a state court. The Court applied the same standard as *Wolf*, but in 1961 it "was logically and constitutionally necessary that the exclusionary doctrine—an essential part of the right of privacy—be also insisted upon as an essential ingredient . . ."[19]

An analogous situation exists in the right to counsel cases. In *Betts v. Brady*[20] the Court held that the lower court's refusal to appoint counsel under the particular case at issue was not so "offensive to the common and fundamental idea of fairness"[21] as to amount to a denial of due process. In 1962 the Supreme Court in *Gideon v. Wainwright*,[22] a case similar to *Betts*, agreed with *Betts'* basic premise that provisions of the Constitution which are "fundamental and essential to a fair trial" are made obligatory upon the states by the fourteenth amendment. The Court, however, disagreed with *Betts* in its conclusion that the sixth amendment guarantee of right to counsel is not such a fundamental right.[23]

The historical development of a right or liberty is helpful to determine whether it is fundamental to our judicial system. The doctrine of double jeopardy may be found in the common law as early as 1250[24] and in the Spanish *Fuero Real* of 1255.[25] By the thirteenth century England recognized double jeopardy as a uni-

17. 338 U.S. 25 (1949).
18. 367 U.S. 643 (1961).
19. *Id.* at 648.
20. 316 U.S. 455 (1942).
21. *Id.* at 463.
22. 372 U.S. 335 (1963).
23. The reasons advanced for the Court's change in interpretation of this standard are many. One argument is that Mr. Justice Frankfurter, the only Justice still sitting who had joined the majority in *Betts v. Brady*, retired from the bench in April 1962. Another reason is that the "special circumstances" test of *Betts v. Brady* was riddled with numerous exceptions and not workable. A third reason is that at the time of *Gideon* thirty-seven states expressly provided for appointment of counsel in felony cases; consequently, the Court was not concerned with the problem of intruding upon states rights. Finally, the Court was convinced that an accused needed the assistance of a trained counsel to receive a fair trial. See Krash, *The Right to a Lawyer: The Implications of Gideon v. Wainwright*, 39 NOTRE DAME LAW 150 (1964).
24. 1 STAUND. P.C. 106.
25. Lib. IV, tit. XXI, pp. 1, 13, cited in Kepner v. United States, 195 U.S. 100, 120, 121 (1924).

versal maxim of the common law.[26] It was not unusual, therefore, that the doctrine was brought to America by the early settlers as part of their laws. By the time of the American Revolution and the early days under the Constitution,[27] there seemed to be a tendency that a trial in a court of another nation or state would bar a prosecution.[28] Today, such a provision appears in the Federal Constitution, in all but five state constitutions[29] and in the criminal procedure of most foreign nations.[30]

There are numerous reasons for the prohibition against an individual being tried twice for engaging in the same criminal conduct. Although the rules of double jeopardy and res judicata are

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26. The first case in which the subject arose, The King v. Thomas, 1 Sid. 179, 82 Eng. Rep. (K.B. 1662) concerned a prosecution for murder under a 1534 statute which provided that the neighboring English country had jurisdiction over felonies committed in Wales. The defendant who had been acquitted by the Welsh tribunal contended that "Wales are to have the same immunities as English born, who on acquittal cannot be tried again." The case was referred to the Kings Bench by the assize court and it was resolved that the defendant should be discharged.

The next and leading case, The King v. Hutchinson, was unreported except for references to it in the reports of other cases. See The King v. Roche, 1 Leach 134, 168 Eng. Rep. 169 (K.B. 1775). The facts as they come from the reports of other cases indicate that the defendant killed a man in Portugal and was acquitted by that sovereignty. Upon his return to England, he was apprehended and brought before the King's Bench. He produced an exemplification of the record of the acquittal in Portugal and the court stated that he could not be tried again for the same act in England.

> In the twelfth century avoidance of double punishment was a major element in the celebrated controversey between St. Thomas Becket and King Henry II. Henry wanted clerics who had been convicted of crimes in church courts turned over to lay tribunals for their punishment. Whether Becket was in fact correct in his assertions that Henry's proposal would result in double punishment for the clerics has been much debated by historians.

Bartkus v. Illinois, 359 U.S. 121, 152 n.5 (1959) (dissenting opinion).

27. The Body of Liberties of Massachusetts (1641), clause 42 reads: "No man shall be twice sentenced by Civil Justice for one and the same crime, offence, or Trespasse." The pleas of former conviction and acquittal were recognized in colonial Virginia. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA, 81-82, 102.

28. In State v. Antonio, 3 Brev. 562 (S.C. 1816) it was stated:

> As to the second objection, 'A man may be twice tried' this could not possibly happen. First, because it is the established *comitas gentium*, and it is not infrequently brought into practice to discharge one accused of a crime, who has been tried by a court of competent jurisdiction. If this prevails among nations who are strangers to each other, could it fail to be excused with us who are so intimately bound by political ties.

Id. at 564.

29. Only five states retain the common law rule in its pure form as interpreted by judicial decision. See State v. Benham, 7 Conn. 414 (1829); Gilpen v. State, 142 Md. 464, 131 Atl. 354 (1924); Commonwealth v. McCan, 277 Mass. 199, 178 N.E. 633 (1931); State v. Clemons, 207 N.C. 276, 176 S.E. 760 (1934); State v. O'Brien, 106 Vt. 97, 170 Atl. 98 (1937).

30. Batchelder, *Former Jeopardy*, 17 AM. L. REV. 735 (1882).

distinguishable, it is the principle of res judicata that gives substance to the defense of double jeopardy.[31] Mr. Justice Holmes described the application of res judicata in civil cases as a fundamental principle of justice[32] demanding that an adjudication be considered final and binding between the same parties where the same question arises.[33] This fundamental principle is infinitely more essential in criminal trials than in civil suits. The overpowering resources of the prosecutor, the stigma inherent in defending against a criminal action, the threat to freedom making the anxiety of repeated prosecution greater than in a civil suit,[34] the realization that if a state can try the issue before enough juries, conviction is almost inevitable,[35] and the unnecessary costs and vexations of repeated trials[36] are cogent reasons for regarding double jeopardy a fundamental principle of justice.

Another guideline extracted from some of the recent Supreme Court decisions as to the application of a Bill of Rights provision upon the states is: How would federal courts determine the question at issue? The Court in *Malloy v. Hogan*[37] defined this guideline:

> It would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in a state or federal court. Therefore, the same standards must determine whether an accused's silence in either a federal or state proceeding is justified.[38]

The Court in *Mapp v. Ohio*[39] felt that the success of federalism de-

31. RESTATEMENT, JUDGMENTS § 62, comment f (1942), in dealing with res judicata, states:

> Where there are a number of successive acts which are substantially simultaneous or which, although occurring over a considerable period of time, are all substantially of the same sort, public convenience and fairness to the defendant may require that they be dealt with in one proceeding. Thus, where in a series of rapidly successive acts a person breaks into the house of another, beats him and takes his chattels, a judgment based upon a claim for any one of these harms is a bar to a subsequent action.

32. United States v. Oppenheimer, 242 U.S. 85 (1915).

33. Harding v. Harding, 352 Ill. 417, 186 N.E. 152 (1933).

34. Lugar, *Criminal Law, Double Jeopardy and Res Judicata,* 39 IOWA L. REV. 317 (1953).

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

36. Double jeopardy is calculated to protect individuals from "the unnecessary costs and vexations of repeated trials," and to protect an innocent person from the risk "of an erroneous conviction from repeated trials." State v. Cooper, 13 N.J.L. 361, 370-71 (Sup. Ct. 1833).

37. 378 U.S. 1 (1964).

38. *Id.* at 11.

39. 367 U.S. 643 (1961). In 1914, Weeks v. United States, 232 U.S. 383 (1914), the Court for the first time held that in a federal prosecution the fourth amendment barred the use of evidence secured through an illegal search and seizure. This decision was a matter of judicial implication and not derived from explicit requirements of the fourth amendment. Relying on *Weeks,* the *Mapp* Court stated:

pended on the avoidance of needless conflict between state and federal courts.

Reference should be made to the recent case of *Green v. United States*.[40] Green was tried for first degree murder in a federal court. The jury returned a guilty verdict of second degree murder mentioning nothing about first degree murder. On appeal, his conviction was reversed and remanded for a new trial. At the second trial after his defense of former jeopardy was rejected, Green was convicted of murder in the first degree. The Supreme Court held that Green's second trial for first degree murder placed him in jeopardy twice for the same offense in violation of the fifth amendment. The conviction was reversed. If the present Supreme Court were to give serious consideration to the federal-state cooperation standard alluded to in recent cases, it would probably overrule *Palko v. Connecticut* in light of the federal approach espoused in *Green*.

The federal approach as espoused in *Green* and the recent absorbtion by the fourteenth amendment of certain fundamental guarantees of the Bill of Rights led the court of appeals in *United States v. Wilkins*[41] to distinguish *Palko*.[42] The court said that this case differs from *Palko* and other similar decisions on the ground that the Supreme Court has not decided whether the double jeopardy guarantee should have applied to it the doctrine of selective incorporation under which certain federal guarantees are absorbed by the fourteenth amendment and, therefore, made applicable to the states. Defendant in *Wilkins* was tried in a state court for the murder of his wife and found guilty by the jury of second degree murder. On appeal the court unanimously reversed the judgment because of error in the judge's charge to the jury.[43] Defendant was tried again under the same indictment charging first degree murder. This time the jury returned a verdict of guilty of murder in the first degree and sentenced to death. The conduct of and statements made by the district attorney at the trial caused the court on appeal to reverse the judgment of conviction.[44] At the

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> Presently, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus the State, by admitting evidence unlawfully, seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold.

367 U.S. at 657.

40. 355 U.S. 184 (1957).

41. 348 F.2d 844 (2d Cir. 1965).

42. The dissent was of the opinion that *Wilkins* overruled *Palko* and several other long standing Supreme Court decisions and that such action is only within the province of that Court.

43. 277 App. Div. 310, 98 N.Y.S.2d 990 (1950). The State appealed from this reversal but the order was affirmed by the Court of Appeals of New York, 301 N.Y. 757, 95 N.E.2d 819 (1950).

44. 304 N.Y. 80, 106 N.E.2d 20 (1952). The district attorney made

third trial and with the use of the same indictment, the jury returned a verdict of guilty of second degree murder and sentenced defendant to prison for forty years to life.[45] On a writ of habeas corpus the circuit court held that the state transgressed the limitations of reprosecution of an individual for the same offense imposed by the due process clause of the fourteenth amendment. The reasoning and rationale advanced by the *Wilkins* court would be a strong and equitable foundation for the Supreme Court to use in constructing its next double jeopardy decision in which state reprosecution was involved. The federal view as to fact situations different from *Palko* can be seen in the following discussion of other double jeopardy problems when the federal courts have decided cases concerning successive prosecution by different sovereignties, multiple crimes on a single occasion and the attachment of jeopardy.

Successive Prosecution By Different Sovereignties

Successive prosecution by different sovereignties, i.e., where a person is convicted or acquitted in a state court and then tried in a federal court, is the most acute double jeopardy problem. The first recorded indication that our two sovereign judicial processes posed a double jeopardy problem was in 1820 in *Houston v. Moore*[46] where a militia man refused to serve in the army. The Court was confronted with deciding whether a person accused of committing a federal offense could be requested to stand trial before a state court martial. In questioning the state's jurisdiction, the Court said:

> It was contended, that if the exercise of this [state] jurisdiction, be admitted, that the sentence of the court would either oust the jurisdiction of the United States court martial or might subject the accused to be twice tried for the same offense. To this I answer, that, if the jurisdiction of the two courts be concurrent, the sentence of either court, either of conviction or acquittal, might be pleaded in bar of the prosecution before the other. . . .[47]

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repeated reference to defendant's failure to testify and to his religious affiliations.

45. Decision affirmed, 282 App. Div. 1008, 125 N.Y.S.2d 689 (1953).

46. 18 U.S. (5 Wheat) 1 (1820).

47. *Id.* at 4. In consanance with this reasoning is the following excerpt from the annals of Congress recording the proceedings on August 17, 1789 in which Congress rejected a specific amendment permitting successive prosecutions by federal and state governments:

> The fifth clause of the fourth proposition was taken up, viz: 'No person shall be subject, in cases of impeachment, to more than one trial or one punishment for the same offence. . . .'
>
> Mr. Benson thought the committee could not agree to the amendment in the manner it stood, because its meaning appeared rather doubtful. It says that no person shall be tried more than once for the same offense. This is contrary to the right heretofore established; he presumed it was intended to express what was

Permitting double jeopardy to be a defense in these situations was short lived, for subsequent cases enunciated the concept of one act being two wrongs—one against the state and the other against the federal government.[48] The courts noted that the same crime does not give rise to multiple punishment; rather, the single conduct constitutes two separate offenses.[49] The Court combined the two-sovereignties doctrine with the common law concept of a crime as an offense against the sovereignty in *United States v. Lanza*.[50] It was the first case to squarely hold that a federal prosecution was not barred by defendant's previous conviction for violating a state statute proscribing the identical act. The fifth amendment's double jeopardy provision was limited to successive federal prosecutions.

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secured by our former Constitution, that no man's life should be more than once put in jeopardy for the same offense; yet it was well known, that they were entitled to more than one trial. The humane intention of the clause was to prevent more than one punishment; for which reason he would move to amend it by striking out the words 'one trial or . . .'

Mr. LIVERMORE thought the clause was essential; it was declaratory of the law as it now stood; striking out the words would seem as if they meant to change the law by implication, and expose a man to the danger of more than one trial. . . .

Mr. SEDGWICK thought, instead of securing the liberty of the subject, it would be abridging the privileges of those who were prosecuted.

The question on Mr. BENSON's motion being put, was lost by a considerable majority.

Mr. PARTRIDGE *moved to insert after 'same offence.' the words 'by any law of the United States.' This amendment was lost also.*

1 ANNALS OF CONG. 753 (1789). (Emphasis added.)

48. In Fox v. Ohio, 46 U.S. (5 How.) 410 (1847), the Court held that even though there was a federal statute covering the same conduct, the state still had a right to try the accused under the similar state statute. The Court rejected defendant's argument that the fifth amendment would prevent a subsequent federal trial and concluded that it was a state function and duty to punish a violator of its criminal statutes.

Conversely, the Court held in United States v. Marigold, 49 U.S. (9 How.) 560 (1850), that the federal government had the power to enforce its criminal statutes even though the act also violated a state statute and that a defendant might be punished under both laws.

49. The defendant in Moore v. Illinois, 55 U.S. (14 How.) 13 (1852), the defendant was convicted of protecting an escaped slave in violation of an Illinois statute. Argument was advanced that the statute was unconstitutional because of a similar federal statute. The Court said that "by one act he has committed two offenses, for each of which he is justly punished." *Id.* at 14.

From the outset this view has been subject to vigorous dissent. Mr. Justice McLean in Moore v. Illinois observed:

> It is contrary to the nature and genius of our government, to punish an individual twice for the same offense. Where the jurisdiction is clearly vested in the federal government, and an adequate punishment has been provided by it for an offense, no state, it appears to me, can punish the same act.

Id. at 15.

50. 260 U.S. 377 (1922).

The most recent Supreme Court decisions dealing with this problem are *Bartkus v. Illinois*[51] and *Abbate v. United States*.[52] In *Bartkus* petitioner was tried and acquitted in a federal court for violation of a federal statute making it a crime to rob a federally insured bank. On substantially the same evidence, he was later tried and convicted in an Illinois court for violation of a comparable Illinois statute. The Court concluded that the state conviction after a prior acquittal for a federal offense on substantially the same evidence, did not violate the Constitution. In *Abbate*, where the same problem in reverse was involved, the defendant was convicted in an Illinois court for damaging a telephone line and later convicted under a federal statute for the same act because the line was used in transmitting United States Government messages. The Court held that the later federal prosecution was not barred by the double jeopardy clause of the fifth amendment.

Given the *Abbate* decision which is historically justified and not violative of the due process clause, it is futile to argue the unconstitutionality of *Bartkus*. To permit the overruling of *Bartkus* would be on the basis that the double jeopardy provision is obligatory upon the states by the fourteenth amendment which would extend broader protection in this area than is provided for by the double jeopardy provision of the fifth amendment. The imposition of the due process clause in *Bartkus* is further hindered because twenty-seven states have refused to rule that the second prosecution should be barred.[53] To compel the states to bar the second action would be inconsistent with the demands of federalism granting the states the right to prescribe their own court procedures.

Mr. Justice Black dissenting in *Bartkus* was of the view that the majority apparently felt it less offensive to try a man twice for the same offense if one of the trials is conducted in the federal courts and the other in a state court. If double jeopardy is to be avoided, certainly it hurts no less for two sovereignties to inflict it than for one to inflict it twice. With two of the five Justices favoring the *Bartkus* decision no longer on the Court[54] and in light of the Supreme Court's emerging liberal view regarding the application of the Bill of Rights upon the states[55] a new approach to successive prosecution cases is foreseeable.[56] In the meantime, tem-

51. 359 U.S. 121 (1959).

52. 359 U.S. 187 (1959).

53. States that deny the bar are: Arizona, Arkansas, California, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, South Carolina, Tennessee, Vermont, Virginia, Washington, West Virginia, and Wyoming. The only state raising the bar is Florida.

54. Justices Frankfurter and Whittaker.

55. See cases cited note 3 *supra*.

56. For suggested solutions see Newman, *Double Jeopardy and the Problem of Successive Prosecutions: A Suggested Solution*, 34 So. CAL. L. REV. 252 (1961).

porary protection may be afforded by the Attorney General's policy statement in 1959 declaring:

> After a state prosecution there should be no federal trial for the same act . . . unless the reasons are compelling.
>
> We should continue to make every effort to cooperate with state and local authorities to the end that the trial occur in the jurisdiction, whether it be state or federal, where the public interest is best served. If this be determined accurately, and is followed by efficient and intelligent cooperation of state and federal law enforcement authorities, the consideration of a second prosecution very seldom should arise.[57]

At least seventeen states have taken more effective steps by adopting statutes barring prosecution after a prior conviction or acquittal in another jurisdiction.[58]

MULTIPLE CRIMES ON A SINGLE OCCASION

The judicial application of the fifth amendment's prohibition against multiple jeopardy for the same offense has given rise to the vexing problem of defining what constitutes "the same offense." The oldest and most widely used test to ascertain whether successive trials are in fact for the same offense is whether the evidence necessary to sustain a second indictment would have been sufficient to convict under the first.[59] This "same evidence" test has been a convenient vehicle whereby prosecutors may circumvent its requirements by changing an insignificant fact or name on the indictment.[60] Many states apparently disturbed by this impairment of the double jeopardy defense applied what has been called the "same transaction" test under which the plea of double jeopardy will be sustained if two or more offenses were part of the same

57. Statement of Attorney General William P. Rogers, Press Release, New York Times, April 6, 1959, p. 1, col. 4; *Id.* at p. 19, cols. 1, 2.

58. ALASKA STAT. § 66-3-4 (1949); ARIZ. REV. STAT. ANN. § 13-146 (1956); CAL. PEN. CODE § 656; IDAHO CODE ANN. § 19-315 (1949); ILL. REV. STAT. c. 38 § 601.1 (1959); IND. ANN. STAT. § 9-215 (1933); MINN. STAT. § 610.23 (1957); MISS. CODE ANN. § 2432 (1942); MONT. REV. CODES ANN. §§ 94-4703, -5617 (1947); NEV. REV. STAT. § 2080, 20 (1960); N.Y. PEN. LAW § 33, and N.Y. CODE CRIM. PROC. § 139, N.D. CENT. CODE §§ 12-0505, 29-0313 (1943); OKLA. STAT. tit. 21, § 25, tit. 22, § 130 (1951); ORE. REV. STAT. § 131.240(1) (1959); S.D. CODE §§ 13.0506, 34.0813 (1939); UTAH CODE ANN. §§ 76-1-25, 77-8-8 (1953); WASH. REV. CODE § 10.43.040 (1951). See Model Penal Code, § 1.11 (Tent. Draft No. 5, 1956.)

59. The test goes back to Rex v. Vandercomb & Abbott, 2 Leach 708, 168 Eng. Rep. 455 (1796). See, Knowlton, *Criminal Law and Procedure,* 10 RUTGERS L. REV. 97 (1955).

60. See Sealfon v. United States, 332 U.S. 575 (1948); Bacom v. Sullivan, 200 F.2d 70 (5th Cir. 1952); Coy v. United States, 5 F.2d 309 (9th Cir. 1925); Moorehead v. United States, 270 Fed. 210 (5th Cir. 1921); Kilpatrick v. State, 257 Ala. 316, 59 S.2d 61 (1952); Harris v. State, 193 Ga. 109, 17 S.E.2d 573 (1941); State v. Ciucci, 8 Ill.2d 619, 137 N.E.2d 40 (1956), *aff'd,* Ciucci v. Illinois, 356 U.S. 571 (1958).

criminal transaction.[61] The obvious deficiency in the application of this test lies in the wide differences among state courts as to what constitutes the same transaction.[62]

It is apparent that the courts were faced with the problem of achieving justice in a particular case regardless of the test applied. Since there was no satisfactory test formulated to determine what constitutes the same offense the Supreme Court in *Hoag v. New Jersey*[63] and *Ciucci v. Illinois*[64] adopted the concept of "fundamental unfairness" in determining the constitutionality of consecutive trials. In *Hoag* the issue was the identity of the accused who simultaneously held up five customers in a tavern. Charged with the robbery of three of the victims, Hoag was tried and acquitted in a New Jersey Court. He was subsequently indicted, tried and convicted for robbing a fourth victim on the same evidence used in the prior trial. The Supreme Court observed that the fourteenth amendment does not always forbid a state from prosecuting different offenses at consecutive trials even though they arise out of the same occurrence. The Court held, five to three with Mr. Justice Brennan not participating, that the procedure used had not led to fundamental unfairness. It went on to say: "Thus, whatever limits may confine the right of a State to institute separate trials for concededly different criminal offenses, it is plain to us that these limits have not been transgressed in this case."[65]

Subsequently, in *Ciucci*, a five to four decision, the "fundamental unfairness" concept was again invoked. The defendant was indicted for the murder of his wife and two children found in a burning building with bullet holes in their heads. The husband

61. The states which generally follow the "same transaction" test are Alabama, Georgia, Indiana, Michigan, New Jersey, Oklahoma, Tennessee, Texas, Vermont and West Virginia. *See,* ALI, ADMINISTRATION OF CRIMINAL LAW: DOUBLE JEOPARDY 29 (1935).

62. *E.g.,* in Illinois the supreme court has ruled that manslaughter of two persons in a single automobile accident is a multiple crime, whereas in New Jersey it has been held a single offense. *Compare* People v. Allen, 368 Ill. 368, 14 N.E.2d 397 (1938), *with* State v. Cosgrove, 103 N.J.L. 412, 135 Atl. 871 (Ct. Err. & App. 1927). The Illinois court classified the robbery of several at one time as a single offense, whereas New York and California consider it multiple offenses. *Compare* People v. Perrello, 350 Ill. 231, 182 N.E. 748 (1932), *with* People v. Rodgers, 171 N.Y. Supp. 451 (App. Div. 1918) *and* People v. Sagomarsino, 97 Cal. App.2d 92, 217 P.2d 124 (1950).

63. 356 U.S. 465 (1958). Petitioner also raised the defense of collateral estoppel. He states that the sole disputed fact in the earlier trials related to his identification as a participant and the verdict of acquittal resolved that issue in his favor. The collateral estoppel argument is based on basic fairness to the accused; thus, a state declining to apply the rule in favor of a criminal defendant deprives him of due process. The Court recognized the validity of collateral estoppel as a defense but felt it inapplicable as a constitutional requirement.

64. 356 U.S. 571 (1958).

65. 356 U.S. at 470.

was tried successively by three juries for each murder and sentenced successively from twenty years for the wife to forty-five years for the first child, to death for the second child. The Court relying on *Hoag* held that the State was constitutionally entitled to prosecute these individual offenses at separate trials.[66]

A similar sentencing technique was used in *Gore v. United States*[67] where defendant was indicted on six counts for narcotic offenses, convicted and sentenced cumulatively on three counts for violating three different sections of federal law by one sale of narcotics. One court was for failing to fill out a treasury form on the person to whom the drugs were sold;[68] one was for selling narcotics not on the original stamped package;[69] and, the final court was for defendant concealing the sale.[70] Defendant filed a motion to vacate the sentences on the grounds that only one sentence could be imposed for all the violations. Mr. Justice Frankfurter speaking for the majority upheld the consecutive sentence since defendant, under the statute, had committed three distinct offenses notwithstanding the fact that the violations were compendiously committed in a single transaction.

The Court's decision in *Ciucci* is difficult to justify. Defendant received a substantial imprisonment sentence in the first trial making it appear that the subsequent trials were the result of the prosecutor's determination to secure a death sentence regardless of the effort necessary.[71] This would appear to be a double jeopardy situation because of the prosecution's harassment, the inordinate vexation and great expense to defendant. The elements indicative of undue harassment on a defendant are the prosecutions use of similar indictments with only defendant's name changed, his offering of similar testimony, his employment of the same theory in the case and his contesting the same or similar facts.[72] The presence of these elements in *Ciucci* should have been sufficient warning to the Court that defendant's constitutional rights were violated. Even if the Court were not disposed to make the double jeopardy clause obligatory on the states this would appear to have been an ideal case for the Court to make the prosecution's conduct violative of

66. 356 U.S. at 573.

67. 357 U.S. 386 (1958). A reading of *Gore* reveals the Court's apparent desire to aid in the prosecution of the illegal narcotics trade. In the Court's zeal to accomplish this purpose, it could be concluded that it ignored or aborted the double jeopardy provision of the fifth amendment. Because of this possible ulterior motive, *Gore's* application is limited.

68. Int. Rev. Code of 1954 § 4705.

69. Int. Rev. Code of 1954 § 4704.

70. 2(c) of the Narcotic Drug Import and Export Act, 35 Stat. 614 as amended.

71. The dissenting opinion of Mr. Justice Douglas, with whom Mr. Chief Justice Warren and Mr. Justice Brennan concur, states in two places that the prosecutor was not satisfied with the result and continued to press for a death sentence verdict.

72. Note, 107 U. PA. L. REV. 109 (1958).

the due process clause for such harassment shocked the conscience of the Court.[73]

The arguments advanced in the dissenting opinions in *Hoag* reveal the liberal view toward double jeopardy as a defense. Mr. Chief Justice Warren doubted that two different juries should hear the same issue on the same evidence with a man's innocence or guilt at stake.[74] Mr. Justice Douglas, with whom Mr. Justice Black concurred, stated: "Since petitioner was placed in jeopardy once and found not to have been present or a participant, he should be protected from further prosecution for a crime growing out of the identical facts and occurring at the same time."[75] Although it is probable that this liberal approach may someday become the law, there is also the possibility of protection to the extent that a state may adopt the relevant provision of the *Model Penal Code*.[76] The *Code* would compel the state to prosecute in one trial all offenses arising out of certain situations which have led to multiple prosecution and defense pleas of double jeopardy. Should the state fail to join the offenses, and defendant was acquitted at the first trial, he would be entitled to collateral estoppel under the *Code*.[77]

When Does Jeopardy Attach?

The concept that no man should be put in jeopardy before a criminal court more than once for the same offense is necessarily dependent upon an interpretation as to what constituted jeopardy.[78] The federal courts have held that jeopardy attaches when the defendant has been placed on trial before a court of competent jurisdiction with the jury duly impaneled and sworn in which defendant has a valued right to go to the original jury for its verdict.[79] There are, of course, situations where premature termination of

73. See Brown v. Mississippi, 297 U.S. 278, 285 (1935); Snyder v. Massachusetts, 291 U.S. 97, 105 (1933); Herbert v. Louisiana, 272 U.S. 312, 316 (1926).

74. 356 U.S. at 475.

75. *Id.* at 479.

76. Model Penal Code § 1.08 (Tent. Draft No. 5, 1956).

77. Model Penal Code § 1.10 (Tent. Draft No. 5, 1956).

78. The *Model Penal Code* proposes that jeopardy attaches in all cases upon the swearing of the first witness. The drafters were of the opinion that no distinction should be made between jury and nonjury trials. *Model Penal Code* § 1.08(4) (Proposed Official Draft 1962); See *Model Penal Code* § 1.09, Comment (Tent. Draft No. 5,1956).

79. See Downum v. United States, 372 U.S. 734 (1963); United States v. Oppenheimer, 242 U.S. 85 (1916); Cornero v. United States, 48 F.2d 69 (9th Cir. 1931). For a compilation of similar decision, see 22 C.J.S. *Criminal Law* § 241 (1961).

In a nonjury case, jeopardy attaches when the court commences to take evidence. See Lovato v. New Mexico, 242 U.S. 199 (1916); Clawans v. Rives, 104 F.2d 240 (D.C. Cir. 1939); McCarthy v. Zerbst, 83 F.2d 640 (10th Cir. 1936). For a compilation of similar decisions, see 22 C.J.S. *Criminal Law* § 241 (1961).

the trial does not bar retrial[80] such as the classic example of permitting a second trial in the case of a hung jury.[81] Each time a second trial was allowed, the decision to dismiss the jury was left to the sound discretion of the judge in accordance with the decision of *United States v. Perez*.[82] In *Perez* it was held that a judge may discharge a jury from giving a verdct when in his opinion such an act is necessary to satisfy the ends of justice.[83]

In 1963 the Supreme Court extended the rule that jeopardy attaches when the jury is sworn in *Downum v. United States*.[84] Before any evidence was taken, the prosecution asked that the jury be discharged because its key witness was not present. The judge discharged the jury over defendant's objection. Two days later when the case was called again and a second jury impaneled, defendant pleaded former jeopardy. His plea was overruled, and he was tried and convicted. The court of appeals affirmed on the ground that the dismissal of the jury was within the sound discretion of the trial judge in preserving the ends of justice,[85] but the Supreme Court reversed the judgment. The effect of *Downum* is much broader than a reading of the opinion reveals. For the first time the Justices who had been dissenting in the prior double jeopardy cases were not joining in the majority opinion. The Court could have followed either of two possible lines of cases—those cases stating that a defendant has a right to be tried by the first jury impaneled,[86] or the decisions granting to the trial judge almost

80. See Greyer v. Illinois, 187 U.S. 71 (1962) (hung jury); Gore v. United States, 367 U.S. 364 (1961) (improper line of questioning after admonition by the judge); Wade v. Hunter, 336 U.S. 684 (1949) (military movement during time of war); Keerl v. Montana, 213 U.S. 135 (1909) (hung jury); Thompson v. United States, 155 U.S. 271 (1894) (disqualification of a juror); Logan v. United States, 144 U.S. 263 (1892) (hung jury); United States v. Perez, 22 U.S. 579 (1824) (hung jury); United States v. Cimino, 224 F.2d 274 (2d Cir. 1955) (prejudiced juror); Lynch v. United States, 189 F.2d 476 (5th Cir. 1951) (apparent insanity of a juror); United States v. Potash, 118 F.2d 54 (2d Cir. 1941) (illness of a juror); Blair v. White, 24 F.2d 323 (8th Cir. 1928) (consent of defendant); Freeman v. United States, 237 Fed. 815 (2d Cir. 1916) (illness of the judge); United States v. Giles, 19 F. Supp. 1009 (W.D. Okla. 1937) (prejudicial remarks made by the judge); United States v. Montgomery, 42 F.2d 254 (S.D.N.Y. 1930) (prejudicial articles in newspapers).

81. Dreyer v. Illinois, *supra* note 74; Logan v. United States, *supra* note 74; United States v. Perez, *supra* note 74.

82. 22 U.S. 579 (1824).

83. See Downum v. United States, 372 U.S. 734 (1963); Cornero v. United States, 48 F.2d 69 (9th Cir. 1931) (discharge of jury on absence of prosecution witness); Jackson v. Superior Court, 10 Cal.2d 350, 74 P.2d 243 (1937) (mistrial for erroneous ruling on challenge); Cliett v. State, 167 Ga. 835, 147 S.E. 35 (1929) (mistrial on separation of jury before verdict); People *ex rel.* Blue v. Kearney, 181 Misc. 981, 44 N.Y.S.2d 691 (Sup. Ct. 1943).

84. 372 U.S. 734 (1963).

85. 300 F.2d 137 (5th Cir. 1962).

86. In Cornero v. United States, 48 F.2d 69 (9th Cir. 1931), a trial was first continued because prosecution witnesses were not present, and when

unlimited discretion in prematurely terminating the trial to protect the public's interest.[87] It favored the decisions protecting the rights of the defendant.[88]

In contrast to the cases following *Perez's* termination-before-verdict rule, a determination by the jury is an absolute bar to a subsequent prosecution for the same offense. The leading case of the after-judgment rule is *Ball v. United States*[89] in which the Court held that acquittal frees the defendant from any further litigation of the matter at hand, even if the trial included error. A defendant, however, who successfully attacks his conviction on appeal waives his right to plead double jeopardy.[90]

The most recent application of the after-judgment rule, *United States v. Tateo*,[91] may reverse the liberal trend of *Downum*. Defendant was tried before a jury in a federal court on four counts of bank robbery and one kidnapping count under the Federal Bank Robbery Statute.[92] On the fourth day of the trial, at the suggestion of the trial judge, defendant changed his plea to guilty and the prosecution dropped the kidnapping charge. The change of plea was accepted, the jury dismissed, and Tateo was sentenced to twenty-two years and six months in prison. Seven years later he successfully moved to set aside the judgment on the ground that his guilty plea had been coerced by remarks of the judge to his counsel.[93] Upon retrial defendant pleaded former jeopardy under the

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they had not been found at the time the case was again called, the jury was discharged. A plea of double jeopardy was sustained when a second jury was selected.

87. See Gore v. United States, 367 U.S. 364 (1961), involving a declaration of a mistrial by the trial judge when he believed that the prosecuting attorney, while questioning a witness, was about to prejudice the defendant by disclosing former crimes. The Court allowed reprosecution, refusing to review the trial judge's use of discretion in declaring the mistrial.

88. The Court resolved any doubt, "in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion." 322 U.S. at 738.

89. 103 U.S. 662 (1896).

90. Murphy v. Massachusetts, 177 U.S. 155 (1900). Other cases use the rationale that the original jeopardy continues until the case is finally disposed of. Kepner v. United States, 195 U.S. 100 (1903).

91. 377 U.S. 463 (1964).

92. The indictment read: Bank robbery, 18 U.S.C. § 2113(a) (1958); taking and carrying away bank money, 18 U.S.C. § 2113(b) (1958); receiving and possessing stolen bank money, 18 U.S.C. § 2113(c) (1958); conspiracy, 18 U.S.C. § 371 (1958); and kidnapping in connection with the robbery, 18 U.S.C. § 2255 (1958).

93. United States v. Tateo, 214 F. Supp. 560 (S.D.N.Y. 1963). The trial judge said to Tateo's counsel:

> I think I ought to tell you this. If you finish the trial and your clients are found guilty, I'm going to start off by imposing a life sentence on the kidnapping charge and then I'm going to add consecutive maximum sentences on the other counts on which they are found guilty.

Id. at 563.

fifth amendment and his motion was granted with all counts dismissed. The district court in sustaining the defendants' former jeopardy defense relied heavily on *Downum* as a termination-before-verdict case.

The United States Supreme Court applied the after-judgment rule of *Ball* rather than the rule of *Downum*. The Court rejected Tateo's contention that his situation was distinguishable from one in which an accused has been found guilty by a jury, since his involuntary plea of guilty deprived him of the opportunity to obtain an acquittal verdict.[94] It justifies its decision with the observation that if every accused were granted immunity from punishment because of a defect sufficient to constitute reversible error in the proceedings leading to conviction society would pay a high price. Mr. Justice Goldberg dissented because he felt that the majority unjustifiably limited *Downum* to its particular facts.[95] It is submitted that the better solution would be for *Tateo* to be restricted to a fact situation where a judge coerces a defendant to plead guilty and for *Downum* to be extended to all other termination-before-verdict and after-judgment cases.

CONCLUSION

The Supreme Court's increasing trend to absorb the first eight amendments into the fourteenth and the constant fight of Justices Black and Douglas to incorporate the double jeopardy clause itself makes it likely that the Court will be persuaded to impose the fifth amendment's double jeopardy clause on the states. This will undoubtedly benefit the accused from multiple punishment for the commission of a single offense in the orthodox jeopardy situation. The possibility of harassment of the defendant, the financial burden upon him and the psychological pressure of criminal proceedings weigh heavily as factors favoring a broad application of the double jeopardy principle.

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94. 377 U.S. at 466.
95. *Id.* at 474.