form federal law.[64] It could provide a uniform test of perfection and could settle multistate conflicts of law.[65] The choice of a test will depend on the attitude taken toward secured lending, which in turn depends upon a judgment about the effect of a severe economic downturn on our credit economy. The adoption of notice filing provisions such as those of the Uniform Commercial Code would appear to merit serious consideration. In making a judgment as to the extent to which secured lending should be protected, the great amount of credit extended on all of the security devices cannot be ignored. Since the last depression, accounts receivable have moved from last ditch to normal financing. With this great reliance on secured lending, a rash of bankruptcies could snowball into an economic crisis. In such a situation the faults of our present system of security devices, resulting from reliance upon encumbered assets and from inequalities among creditors, would appear too late.

[64] U.S. CONST. art. I, § 8: "The Congress shall have Power . . . to establish . . . Uniform Laws on the subject of Bankruptcies throughout the United States."

[65] Koessler, *supra* note 49, at 614.

COLLATERAL ESTOPPEL IN CRIMINAL CASES

A judgment settles certain issues between the parties to an action. The issues so settled are those which must have been settled in order to reach the judgment. According to the doctrine of collateral estoppel, such issues are conclusively determined and cannot be raised again in a different action between the same parties.[1] The doctrine of collateral estoppel has received most attention in civil cases. Various courts, including the United States Supreme Court, have, however, stated that the doctrine applies also to criminal cases.[2]

The recent case of *Hoag v. New Jersey*[3] furnishes a classic example of the kind of criminal case in which the doctrine of collateral estoppel may become important.[4] In this respect, *Hoag* sets the stage for a discussion of the prob-

[1] Commissioner v. Sunnen, 333 U.S. 591 (1948); United States v. Moser, 266 U.S. 236 (1924); Crowell v. County of Sac, 94 U.S. 351 (1876); see RESTATEMENT, JUDGMENTS § 45, comment c (1942).

[2] Sealfon v. United States, 332 U.S. 575 (1948); United States v. Oppenheimer, 242 U.S. 85 (1916); United States v. Kenny, 236 F.2d 128 (3d Cir. 1956), *cert. denied*, 352 U.S. 894 (1956); Cosgrove v. United States, 224 F.2d 146 (9th Cir. 1954); Harris v. State, 193 Ga. 109, 17 S.E.2d 728 (1941); State v. Erwin, 101 Utah 365, 120 P.2d 285 (1941); State v. Heaton, 56 N.D. 357, 217 N.W. 531 (1927).

[3] 356 U.S. 464 (1958), *affirming* 21 N.J. 496, 122 A.2d 628 (1956).

[4] There are at least two types of situations in which participation in a given transaction may bring prosecution for more than one crime and more than one trial. In the first type, represented by Hoag v. New Jersey, 356 U.S. 464 (1958), the perpetration of the same act against two or more people at the same time violates the same criminal statute several times. The second type is represented by the case where a given transaction violates two different

lems involved in the use of collateral estoppel in criminal law. The defendant was accused of participating in the armed robbery of five tavern patrons at one time. He was tried for the robbery of three of the victims and was acquitted when four of the five victims failed to identify him as one of the hold-up men. The state then tried him for the robbery of a fourth victim. This time he was convicted.

According to the jury instructions at the first trial, the state had to prove beyond a reasonable doubt that (1) the victims had been put in fear, (2) property had been taken from them, and (3) the defendant was one of the robbers. The defense at the first trial did not deny the state's allegations that the victims had been put in fear and that property had been taken from them. The sole defense was that the accused could not have participated in the crime because he had been elsewhere when it was committed.[5]

Upon the second trial, the defendant contended that his prior acquittal established his non-participation in the crimes. He argued that he was therefore entitled to a directed verdict of acquittal under the doctrine of collateral estoppel. This plea was denied, and his conviction followed. The New Jersey Supreme Court upheld the conviction.[6] The United States Supreme Court affirmed,[7] the Justices dividing five to three.

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criminal statutes. See, *e.g.*, Blockburger v. United States, 284 U.S. 299 (1932); Gore v. United States, 357 U.S. 386 (1958). The possibility of using collateral estoppel can arise in either kind of situation. All that is necessary is that there be two trials and that the crime charged in one trial have an element in common with the crime charged in the other trial which must be proved for conviction. Under such circumstances the same issue can arise in both trials. (Of course, the second type of situation described may involve a federal statute and a state statute. In that case there will be no possibility of applying collateral estoppel because the parties will not be the same in the two trials. The prosecutor in one will represent the state and the prosecutor in the other the federal government. See, *e.g.*, Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959).)

[5] State v. Hoag, 21 N.J. 496, 506, 122 A.2d 628, 634 (1956) (dissenting opinion); Brief for Petitioner, pp. 5, 8, 12, 15, Hoag v. New Jersey, 356 U.S. 464 (1958).

[6] State v. Hoag, *supra* note 5.

[7] Hoag v. New Jersey, 356 U.S. 464 (1958). Perhaps the most important aspect of the Supreme Court's decision is its disposition of the question of whether due process requires collateral estoppel. The defendant raised the due process issue by arguing that the New Jersey court had erred in failing to find that the prior acquittal established his absence from the scene of the crimes. A 5-3 majority declined to answer the question, saying only that although the doctrine was widely used, there was "grave doubt" as to whether it was a requirement of due process. The Court would not examine the basis of the New Jersey court's findings in the matter because it lacked "corrective power over state courts." There was no need, therefore, the majority said, to go into the question of due process.

This reasoning is cause for some wonder. If collateral estoppel is required as an element of due process, it would seem that the Court could examine the basis of the state court's decision. That is, the Court could reopen the question of whether the prior acquittal established any specific facts in the defendant's favor. For, had the New Jersey court denied due process by denying the use of collateral estoppel, the Supreme Court would have had the necessary "corrective power." The Supreme Court made the question of whether due process requires collateral estoppel depend upon the existence of the "corrective power." It would have seemed more logical to have said the reverse.

The New Jersey Supreme Court opinion emphasized one of the most important problems in the application of collateral estoppel to criminal law. The state court based its opinion upon the theory that the general verdict of acquittal at the first trial decided no specific issues. The jury, said the court, might have acquitted, even though it believed the defendant was a participant, because it believed either that the victims had not been put in fear or that property had not been taken from them.

Whether a general verdict of acquittal can ever be said to decide any specific issues is a question which runs throughout the cases on collateral estoppel in criminal law. The effort here will be to analyze in practical terms the difficulty in determining upon what grounds a jury bases a general verdict. Moreover, the *Hoag* case indicates another important problem which appears to inhere in the application of collateral estoppel to criminal cases. This problem is whether the prosecution as well as the defense should be allowed to use collateral estoppel. That is, even if one can argue that the defendant should be entitled to use the doctrine—which means resolving the problem of the general acquittal verdict in his favor—should the doctrine of mutuality, as enunciated in civil cases, carry over into criminal law?[8]

I. The General Verdict

When a defendant obtains an acquittal in the first trial and the state attempts a second trial for another offense committed at the same time, the question is what issues have been conclusively decided. The New Jersey court's decision in *Hoag* is an application of the theory that a general acquittal verdict establishes no specific facts. In effect, the theory is that a general verdict of acquittal means no more than that the prosecution has failed to establish guilt beyond a reasonable doubt.[9] All but one of the small number of

[8] Generally, the rule of mutuality requires that collateral estoppel cannot be used against a person unless he could have used the doctrine had the prior decision gone the other way. See Iselin v. C. W. Hunter Co., 173 F.2d 388 (5th Cir. 1949); Ericson v. Slomer, 94 F.2d 437 (7th Cir. 1938); Schafer v. Robillard, 370 Ill. 92, 17 N.E.2d 963 (1938). Thus, if it can be urged that a court can somehow determine upon what grounds a jury in a prior criminal trial based a general acquittal verdict, so that the accused in a trial following such a verdict can take advantage of collateral estoppel, application of the rule of mutuality would require that the prosecution be able to utilize the doctrine of collateral estoppel against the defendant where the prior trial ended in conviction.

[9] An interesting question about this point arises from a comparison of criminal and civil cases. A verdict for the defendant in a civil case can be said to mean that the jury has found at least a preponderance of the evidence to be in the defendant's favor. An acquittal verdict in a criminal case can be said to mean that the jury has found at least only so much evidence in defendant's favor as to create a reasonable doubt of guilt. Consequently, the civil verdict signifies a greater probability, in the jury's judgment, that what the defendant maintains is true than does the criminal verdict. In the framework of collateral estoppel, can it be concluded then that the prior civil verdict can be used to prevent relitigation of an issue with more reliance than a prior criminal verdict? Can one even go so far as to argue that collateral estoppel has no place in criminal law because a prior acquittal verdict in a criminal

state courts which have spoken directly on the subject support this position.[10] The Georgia Supreme Court, however, has taken the opposite viewpoint and has held that a court can infer the basis of a prior general jury verdict by looking at the record.[11] This view apparently was endorsed and then later rejected by the Third Circuit Court of Appeals.[12] The United States Supreme Court seems to have approved the principle that the basis of a jury verdict in a prior criminal trial can be inferred from the record.[13]

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case shows less jury certainty as to the truth of the defendant's contentions than does a prior verdict for defendant in a civil case?

Such reasoning would be fallacious, except under limited circumstances. The reasoning would be valid where, for instance, there was first a criminal trial ending in acquittal, followed by a civil trial raising an issue or issues clearly concluded in defendant's favor in the criminal trial. In such a situation, the more lenient (to defendant) standard of proof in the criminal trial should preclude use of collateral estoppel by defendant in the later civil trial. For, by the prior acquittal, the jury need have found only enough truth in the defendant's contentions to create a reasonable doubt as to his culpability. The civil standard of proof would require greater jury certainty about the truth of defendant's contentions before an issue could be decided in his favor.

But where both trials are criminal trials, the fact of a less demanding (on defendant) standard of proof should create no trouble. The standard in both criminal trials would be the same. It is true that an acquittal in a criminal case may represent less jury certainty as to the truth of defendant's contentions than does a verdict for defendant in a civil case. But the degree of jury certainty about defendant's contentions which will justify acquittal in one criminal case will justify acquittal in another criminal case.

[10] These states are Maryland, New Jersey, Oregon, South Dakota and Utah. See State v. Hoag, 21 N.J. 496, 122 A.2d 628 (1956); State v. Dewey, 206 Ore. 496, 292 P.2d 799 (1956); State v. Erwin, 101 Utah 365, 120 P.2d 285 (1941); State v. Coblentz, 169 Md. 159, 180 Atl. 266 (1935); State v. Barnes, 26 S.D. 268, 128 N.W. 270 (1910); Bell v. State, 57 Md. 108 (1881). New York may also support the majority position. A lower court opinion in that state states the majority rule, and that rule was favorably mentioned in an opinion upholding the lower court on other grounds. People v. Rogers, 102 Misc. 437 (Sup. Ct. 1918), *aff'd.*, 184 App. Div. 461, 171 N.Y. Supp. 451 (1918), *aff'd. mem.*, 226 N.Y. 671, 128 N.E. 882 (1919).

[11] Harris v. State, 193 Ga. 109, 17 S.E.2d 728 (1941).

[12] In United States v. DeAngelo, 138 F.2d 466 (3d Cir. 1943), and in United States v. Simon, 225 F.2d 260 (3d Cir. 1955), the court held that evidence was inadmissible when it tended to show an element that was part of a crime of which the defendants had been previously acquitted. Both decisions made clear the court's feeling that the prior acquittals settled the specific issues involved in favor of the defendants. In United States v. Kenney, 236 F.2d 128 (3d Cir. 1956), however, the court held that the basis of a jury's acquittal in a prior trial for another crime could not be ascertained.

[13] Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951); Sealfon v. United States, 332 U.S. 575 (1948). It should be noted that the Court's affirmance of the New Jersey court's position in *Hoag v. New Jersey* does not represent a departure from the position taken in the *Emich* and *Sealfon* cases. For in *Hoag v. New Jersey* the Court specifically refused to go into the question of the meaning of a general jury verdict. Furthermore, some question about the reliability of the *Emich* and *Sealfon* opinions may arise from the Court's decision in Stein v. New York, 346 U.S. 156 (1953). In that case the Court, discussing a conviction then under review, stated by way of dictum that there is no way of knowing the specific ground upon which a jury bases a general verdict when more than one ground could conceivably have been relied upon by the jury.

Jury behavior is probably the basic issue involved in determining whether any specific conclusions can be drawn from a general jury verdict of acquittal. For before it can be argued that a court should search the record of a previous trial to determine what specific issues were decided by a general jury verdict, it must be presumed that juries base verdicts upon logical inferences drawn solely from the evidence in the record. This conclusion follows from the fact that a court, in attempting to distill specific findings from a prior general verdict, would have to infer such findings from the record. If no such presumption about jury behavior is possible, courts which tried to infer from the record the specific bases of a prior general verdict would be making use of data and mental processes different from those used by the jury.

Can it be presumed that juries base verdicts upon the evidence in the record and upon the logical inferences to be drawn therefrom? And more precisely, can it be presumed that juries base verdicts upon the same inferences which judges would draw from the evidence? Probably no absolute answer is possible because jury deliberations are kept secret. But the likely answer is that juries neither rely solely upon what is evident from the formal record nor reason as judges might. Jurors are laymen. Their verdicts may frequently be the result of "horse-trading" or compromise.[14] Due weight must also be given to the consideration that the demeanor of witnesses, often considered important in reaching a verdict,[15] can be observed by jurors but not by subsequent courts.

There is substantial support in civil cases, however, for a rule that a court presented with the plea of collateral estoppel may examine the entire record of the previous case to decide what specific issues an ambiguous judgment has decided.[16] To the extent that this rule is accepted, it would appear that the uncertainty about jury behavior has been overcome to judicial satisfaction. One commentator, impliedly assuming such a solution of the problem of jury

[14] See generally Stein v. New York, *supra* note 13; Jorgensen v. York Ice Mach. Corp., 160 F.2d 432 (2d Cir. 1947); United States v. 4,925 Acres of Land, 143 F.2d 127 (5th Cir. 1944); State v. Lawrence, 120 Utah 323, 234 P.2d 600 (1951); Kindy v. Willingham, 146 Tex. 548, 209 S.W.2d 585 (1948). In Jorgensen v. York Ice Mach. Corp., *supra*, L. Hand, J., said: "[I]t would be impracticable to impose the counsel of absolute perfection that no verdict shall stand, unless every juror has been entirely without bias, and has based his vote only upon evidence he has heard in court. It is doubtful whether more than one in a hundred verdicts would stand such a test. . . ." And in State v. Lawrence, *supra*, we find the statement that "under our jury system, it is traditional that in criminal cases juries can and sometimes do, make findings that are not based on logic, nor even common sense." *Id.* at 330, 234 P.2d at 603.

[15] State v. Clark, 77 Vt. 10 (1904); Georgia Home Ins. Co. v. Campbell, 102 Ga. 106, 29 S.E. 148 (1897); 2 WIGMORE, EVIDENCE § 946 (2d ed. 1923); BODIN, FINAL PREPARATION FOR TRIAL (1946).

[16] Oklahoma v. Texas, 256 U.S. 70 (1921); Packet Co. v. Sickles, 72 U.S. (5 Wall.) 580 (1866); Mueller v. Mueller, 124 F.2d 544 (8th Cir. 1942); Hollingsworth v. Hicks, 57 N.M. 336, 258 P.2d 724 (1953).

behavior, has, in fact, suggested that the practice in civil actions of looking to the record of the previous case should be adopted in criminal law.[17]

The difficulty is that very often the civil cases in which the practice has been followed or endorsed have not involved general jury verdicts. In fact, in several relatively recent civil cases in which the prior judgments between the same parties on different causes of action were based upon general jury verdicts, the courts have refused to follow the practice.[18] But there is by no means unanimity of judicial opinion on this issue.[19] One may conclude, then, that the same conflict of opinion about the use of collateral estoppel in criminal cases because of the existence of general verdicts also exists in civil cases. As a result, reference to the application of collateral estoppel in civil cases, as it bears on the problem of the general verdict, is inconclusive. The question of jury behavior remains to becloud the picture.

The uncertainty about jury behavior and the inconclusiveness of reference to practices in civil cases need not, however, always render collateral estoppel worthless in jurisdictions whose courts refuse to draw inferences from general jury verdicts. Using the *Hoag* situation as a framework, one might assume, for instance, that the indictment for armed robbery of one victim alleges that the accused was present, that property was taken, and that the victims were put in fear. At the first trial, the defense might anticipate the possibility of further prosecutions for the robbery of the remaining victims and might intend to assert only that the accused was elsewhere at the time of the crimes. Absent contrary statutory provisions, the defense might stipulate that property was taken and that the victim was put in fear, but plead not guilty on grounds that the accused was not present. Such a plea would narrow the number of issues for the jury to one.[20] Under these circumstances, at least in some states, a general verdict of acquittal would resolve the issue of the accused's presence, because that issue would be the only one submitted to the jury.[21] The way would then be clear for the use of collateral estoppel if the state subsequently attempted to prosecute for the other robberies.

The suggested procedure would avoid the problem of the general verdict only under the limited circumstances where defense counsel is willing to con-

[17] See *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 874–78 (1952).

[18] Atlantic Coast Line R.R. v. Boone, 85 So.2d 834 (Fla. 1956); Rufener v. Scott, 46 Wash. 2d 240, 280 P.2d 253 (1955); Haack v. Lindsay Light & Chemical Co., 393 Ill. 367, 66 N.E. 2d 391 (1946); Wolfson v. Northern States Management Co., 221 Minn. 474, 22 N.W. 2d 545 (1946).

[19] See Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951).

[20] An appropriate analogy might be the provisions in the Federal Rules of Civil Procedure which encourage a narrowing of issues before trial through pleadings and pre-trial conferences and orders. FED. R. CIV. P. 7, 8, 16. See especially, on the subject of pre-trial conferences and orders, Clark v. United States, 13 F.R.D. 342 (D. Ore. 1952).

[21] See 5 WHARTON, CRIMINAL LAW & PROCEDURE § 2047 (1957 ed.).

test only one of possibly many issues. The question remains whether there is any general solution. One writer has suggested the institution of special verdicts in criminal trials.[22] But the idea of special verdicts has not been well received by the criminal courts.[23] And an apparently well-established rule against any questioning of, or revelation by, jurors as to the basis for their verdicts would appear to militate against the related solution of post-trial interrogatories.[24]

The *Model Penal Code* proposes avoiding the jury behavior problem by compulsory joinder. This proposal certainly merits legislative consideration. The *Code* would compel the state to prosecute in one trial all offenses arising out of certain situations which typically have led to multiple trials and defense pleas of collateral estoppel.[25] In such situations, the failure of the state to join, coupled with the acquittal of defendant in the first trial, would entitle the defendant to collateral estoppel under the *Code*.[26] On the one hand, compulsory joinder would be an advantage to defendants by removing the possibility of judicial unwillingness to infer specific findings from a general acquittal verdict. Joinder would also prevent the state from using multiple trials to harass the defendant. On the other hand, compulsory joinder might in some cases be unduly disadvantageous to the defense or the prosecution. It would be unfair to deny the state a subsequent trial where the prosecutor did not know of the commission of a second crime in time to follow the joinder requirement. And the defendant might be entitled to object to joinder where prosecution for several crimes at once would unduly prejudice the jury against him. The *Code* meets these problems by placing in the court the discretion to waive the prohibition of a second trial if justice will be served thereby.[27]

Of course, in a case where the court foregoes the joinder requirement and the defendant is acquitted at the first trial, the problem of the general verdict remains. Under these circumstances, the difficulties about jury behavior will probably prevent the defense from claiming collateral estoppel. But such a case would probably arise infrequently, so that most defendants would reap an advantage from the joinder provisions. And since the interests of both state and defendant must be considered, the *Code* proposals probably go as far as possible toward resolving the issue of the general verdict.

[22] *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 874–78 (1952).

[23] See Stein v. New York, 346 U.S. 156 (1953); People v. Tessmer, 171 Mich. 522, 137 N.W. 214 (1912); State v. Boggs, 87 W. Va. 738, 106 S.E. 47 (1921).

[24] See generally Stein v. New York, *supra* note 23; McDonald v. Pless, 238 U.S. 264 (1915); Hyde v. United States, 225 U.S. 347 (1912); Packet Co. v. Sickles, 72 U.S. (5 Wall.) 580 (1866); Commonwealth v. Greevy, 271 Pa. 95, 114 Atl. 511 (1921).

[25] MODEL PENAL CODE § 1.08 (Tent. Draft No. 5, 1956).

[26] *Id.* § 1.10.

[27] MODEL PENAL CODE § 1.08(3) (Tent. Draft No. 5, 1956).

II. The Mutuality Question

If the first of two criminal trials results in a guilty verdict, it will be certain what issues were concluded. To have convicted, the jury must have resolved all essential matters against the defendant. What these matters were will normally be evident from the jury instructions in the first trial.[28]

A prior conviction would be of little use to the defense. Perhaps only where the conviction was based upon facts which negative the possibility of guilt in the second prosecution would the defendant find collateral estoppel useful.[29] But the doctrine would be useful to the prosecution under certain circumstances. For example, if the first trial in the *Hoag* situation had resulted in conviction, and if the prosecution had been permitted to use collateral estoppel in the second trial, the defendant would have been unable to contend that he was not present when the crimes were committed. The prior verdict would have adjudicated the issue of his presence against him.

A few courts have allowed the prosecution to use collateral estoppel after a prior conviction.[30] The argument in support of such courts is that if the defendant can use a prior acquittal to establish facts in his favor, the prosecution should be allowed to use a prior conviction for the opposite purpose. This argument makes use of the rule of mutuality, which exists in civil cases.[31]

It could be argued that the prosecution's use of collateral estoppel would effectively deny a defendant's right to a jury trial and would violate the presumption of his innocence in the second case. If, in the *Hoag* situation, the prosecution could prevent the defendant from contending that he was absent from the scene, the jury in the second case would not be free to decide all the essential elements of the case. The defendant's guilt of crime B would have been proved, for all practical purposes, in his trial for crime A, before a jury not sitting in judgment upon crime B.

Furthermore, the prohibition against double jeopardy[32] bears upon the

[28] One exception to this general rule would be the situation where the first trial was for conspiracy and the prosecution charged several means of conspiring. It has happened that the jury in such a trial has returned a general guilty verdict. In a succeeding trial, the question may be upon which means of conspiring the prior jury's verdict had rested. See Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951).

[29] See United States v. J. R. Watkins Co., 127 F. Supp. 97 (D. Minn. 1954).

[30] People v. Majado, 22 Cal. App. 2d 323, 70 P.2d 1015 (1937), held that a conviction in the first of two trials for failure to support a child concluded the issue of parentage, so that defendant could not have the parentage issue retried. Commonwealth v. Ellis, 160 Mass. 165, 35 N.E. 773 (1893), held that, as a matter of law, a previous conviction for neglect to support a child was conclusive evidence of paternity and that defendant was estopped from setting up illegitimacy of the child as a defense in a subsequent trial concerning the same child. Commonwealth v. Evans, 101 Mass. 25 (1869), held that a conviction of assault established conclusively that defendant's attack on his victim was unjustified, so that defendant could not plead self-defense in a subsequent trial for manslaughter after victim died.

[31] See note 8 *supra*.

[32] The principle that one may not be put twice in jeopardy for the same offense is guaranteed as against the federal government in the fifth amendment to the Constitution, and as

question of whether the prosecution should be permitted to use collateral estoppel. Under the prevailing view, the defense of double jeopardy has been strictly limited to successive trials for the same offense, with the words "same offense" interpreted to mean identical offense both in law and in fact.[33] This doctrine requires use of the "same evidence" test. Under this test, two offenses are not the same unless the evidence necessary to convict for one offense is the same as that necessary to convict for the other.[34] Thus, where one's participation in a given transaction may result in commission of more than one crime,[35] a plea of double jeopardy will usually fail to prevent a separate trial for each offense.[36]

A major policy reason for the prohibition of double jeopardy is protection of defendants against the harassment of successive trials instituted by a state commanding superior resources.[37] The "same offense" doctrine and the "same evidence" test have the obvious advantages of easy comprehension and easy administration. But they severely limit the protection of the prohibition against double jeopardy, thereby tending to thwart the policy behind the pro-

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against the states by constitutional provisions in most states and by common law in the others. See Bartkus v. Illinois, 359 U.S. 121 (1959) (dissenting opinion of Black, J.).

[33] See Sealfon v. United States, 332 U.S. 575 (1948); Bacom v. Sullivan, 200 F.2d 70 (5th Cir. 1952), *cert. denied*, 345 U.S. 910 (1953); 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 So. 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); Ford v. State, 229 Ind. 516, 98 N.E.2d 655 (1951), *cert. denied*, 342 U.S. 873 (1951); Burton v. State, 226 Miss. 31, 79 So. 2d 242 (1955); State v. Barefoot, 241 N.C. 650, 86 S.E.2d 424 (1955); State v. Anderson, 172 Kan. 402, 241 P.2d 742 (1952); State v. Barnes, 26 S.D. 268, 128 N.W. 170 (1910).

[34] See Hoag v. New Jersey, 356 U.S. 464 (1958); Blockburger v. United States, 284 U.S. 299 (1932); Bacom v. Sullivan, *supra* note 33; Moorehead v. United States, *supra* note 33; State v. Ciucci, *supra* note 33; State v. Barefoot, *supra* note 33; State v. Anderson, *supra* note 33; Ford v. State, *supra* note 33; McHugh v. State, 160 Fla. 823, 36 So. 2d 786, *cert. denied*, 336 U.S. 918 (1949); State v. Cowman, 239 Iowa 56, 29 N.W.2d 238 (1947).

[35] See note 4 *supra*.

[36] Thus, one accused of holding up both A and B at one time is accused of two robberies. If he is tried for the robbery of A and then of B, his defense of double jeopardy will fail, since robbing A is not the same offense as robbing B, and since the evidence needed to convict him of robbing A is not the same as that needed to convict him of robbing B. See Hoag v. State, 21 N.J. 496, 122 A.2d 628 (1956).

Likewise, if the accused's act violates two different statutes which require different elements for conviction, the "same evidence" test will block his use of the double jeopardy plea. See Bacom v. Sullivan, 200 F.2d 70 (5th Cir. 1952) (violation of two statutes—one regarding drunken driving and one regarding driving in willful and wanton disregard for safety of persons and property); State v. Barefoot, 241 N.C. 650, 86 S.E.2d 464 (1955) (forcible rape and statutory rape); McHugh v. State, 160 Fla. 823, 36 So. 2d 786 (1948) (same as *Bacom v. Sullivan*); State v. Cowman, 239 Iowa 56, 29 N.W.2d 238 (1947) (breaking and entering, and larceny from a building at night).

[37] See Green v. United States, 355 U.S. 184 (1957); Bizzell v. State, 71 So. 2d 735 (Fla. 1954).

hibition. Allowing a defendant to claim collateral estoppel in a criminal case enables him to overcome these limitations on double jeopardy protection. The law therefore comes closer to achieving its policy objectives. It is reasonable, then, to suggest that collateral estoppel be viewed in criminal cases as a rule designed to further the policy of the double jeopardy prohibition through the avoidance of limitations imposed upon the prohibition by judicial desire for the simplicity of the "same offense" doctrine.

Under the suggested rationale, there is no reason for permitting the prosecution to use collateral estoppel. Permitting such use would not prevent successive trials. It might even encourage them by decreasing the number of facts that the prosecution would have to prove in a second trial. Denying collateral estoppel to the prosecution while allowing it to the defendant would, however, tend to discourage successive trials. The prosecutor, knowing that he would have no special advantage in a second trial if he obtained a conviction in the first, would be facing a defendant who would have a decisive advantage in the second trial if the first ended in acquittal. Under such circumstances, the prosecutor probably would consider it wise to join all charges in one trial and to work hard on convicting in that trial.

But even if the rule of mutuality withstands the arguments against prosecution use of collateral estoppel, then, precisely because of the mutuality rule, the prosecution should not be allowed to use collateral estoppel in courts which hold that general acquittal verdicts decide no specific issues. For in such courts the defendant cannot use collateral estoppel, and the rule of mutuality should be brought into play against the prosecution's use of the doctrine.[38]

[38] See note 8 *supra*.

VOTING RIGHTS IN THE STOCK OF A PARENT CORPORATION HELD BY A SUBSIDIARY

Proper allocation of voting rights in the stock of a parent corporation held by a subsidiary has long posed a seemingly insoluble problem for courts and commentators alike.[1] Ordinarily such stock has been disfranchised on the

[1] BALLANTINE, CORPORATIONS § 176 (rev. ed. 1946), states the general rule: "The corporation cannot vote shares of its own issue acquired by it, nor can a wholly owned or dominated subsidiary or affiliate vote shares in its parent or controlling corporation, as the management of the parent could control the vote on its own behalf." *Id.* at 402.

In accord with Ballantine are Levy, *Purchase by a Corporation of Its Own Stock*, 15 MINN. L. REV. 1, 6 n.28 (1930); FLETCHER, CYCLOPEDIA CORPORATIONS § 2040 (1952); *Ex parte* Holmes, 5 Cowen (N.Y.) 426 (1826); American Railway-Frog Co. v. Haven, 101 Mass. 398 (1869); O'Connor v. International Silver Co., 68 N.J. Eq. 67, 59 Atl. 321 (1904), *aff'd*, 68 N.J. Eq. 680, 62 Atl. 408 (1905); Thomas v. International Silver Co., 72 N.J. Eq. 224, 73 Atl. 833 (1907); Italo Petroleum Corp. v. Producers' Oil Corp., 20 Del. Ch. 184, 174 Atl. 276