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DOUBLE JEOPARDY, TWO SOVEREIGNTIES AND THE INTRUDING CONSTITUTION

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THIS ARTICLE is in large part a study in the American disease of constitutionalism. By that phrase I do not mean that written constitutions are bad. I refer only to our excessive fascination with constitutional questions. Like alcoholism, this fascination makes us oblivious to things that we ought to consider. It prepossesses lawyers, courts, legislators and laymen with the problem of constitutional power to the neglect of the problem of what, apart from the Constitution, the law ought to be, or even is. It makes us feel that the constitutional standard is *the* standard. It makes us forget that the constitutional standard is a low one—a minimum.¹ The victims of this malady forget that what is constitutionally allowable is not necessarily desirable or even legal.

I propose to show how the courts, including particularly the Supreme Court, in spite of its canon to the contrary,² have regularly disposed of an important issue of double jeopardy *as a constitutional question* when it ought to be decided as a matter of common law. That the constitutional question need not have been reached did not occur either to judges or counsel in these cases.

The issue is whether a man who has been acquitted or convicted by one sovereignty (*e.g.*, the State of Illinois) can be tried over again for the same affair by another sovereignty (*e.g.*, the federal government). In 1959, the Supreme Court announced, six to three, in *Abbate v. United States*,³ that nothing in the federal constitution prevented this form of double jeopardy. Even assuming the correctness of that view as constitutional doctrine, the

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¹ Mr. Justice Stewart says that "the Supreme Court of the United States is ultimately concerned only with deciding the absolute minimum standards that the Constitution will tolerate." *Justice Stewart Discusses Right of Counsel*, 19 LEGAL AID BRIEF CASE 92 (1960).

² *Ashwander v. T.V.A.*, 297 U.S. 288, 346 (1936) (Mr. Justice Brandeis concurring).

³ 359 U.S. 187 (1959).

subsequent prosecution is, I believe, still prevented by a *common law rule* developed by the courts—a rule rooted in the same basic concept from which the more limited constitutional protection arises. From this it follows that a man cannot be retried unless the judicially developed common law rule has been affirmatively changed by legislative act. But there is no such statute. The time to consider the constitutional question is when such a statute comes before the court.

An underlying theme of this article is that the doctrine of double jeopardy has more serious implications for the legal order than has commonly been appreciated. Double jeopardy sounds simple. The rule against double jeopardy is generally accepted. Actually it is a troublesome concept. Like other things that are taken for granted, its central importance paradoxically gets overlooked—even by the courts, including the Supreme Court as it weaves its course among “changing fashions in due process.”⁴ I propose to show how cases will be decided differently if the importance of the double jeopardy principle is recognized.

Since the thrust of this article is based on the premise that double jeopardy is an important principle, I shall first discuss at some length the reasons behind the doctrine and the extent to which it is included in due process of law.

IMPORTANCE OF DOUBLE JEOPARDY

Reasons for the Doctrine. Even the man in the street knows what “double jeopardy” means. He is rightly shocked when he hears that somebody has been tried twice for the same thing. He does not question the right against double jeopardy as, for example, he questions the right against self-incrimination. All advanced systems of law agree with him in abhorring the second prosecution of a man who has already been determined innocent.

The reasons usually given by the judges and text writers are weighty but do not seem fully adequate to justify the repugnance of lawyers and laymen. It is usually said that to harass an individual with the anxiety and expense of repeated prosecutions is intolerable. Expense to the public is another reason that is commonly given. It has also been pointed out that repeated prosecutions increase the likelihood of convicting an innocent man;⁵ in fact, on the fanciful hypothesis of an unlimited number of prosecutions⁶ the ultimate conviction of an innocent man approaches a mathematical certainty.

Double jeopardy is, of course, the regular form in which the *res judicata*

⁴ The phrase is F. A. Allen's, *Due Process and State Criminal Procedures: Another Look*, 48 NW. U.L. REV. 16 (1953).

⁵ *Green v. United States*, 355 U.S. 184, 188 (1957).

⁶ This may not be so fanciful. Suppose a man is tried for murder by planting a bomb in an airplane, acquitted a dozen times at separate trials for the different victims, and then finally convicted. See *People v. Allen*, 368 Ill. 368, 389, 14 N.E.2d 397, 407 (1938) (dissenting opinion); Mayers & Yarbrough, *Bis Vexari, New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 38 n.190 (1960).

principle is made applicable to criminal law.⁷ An important reason for the rule against double jeopardy is often given in support of *res judicata*. That reason is the social value of certainty. If I am unable to rely on repose following a judicial determination that I have the status of an innocent man or that my punishment cannot be increased, society is apt to find me an unadjusted and relatively expensive member.⁸

But there would seem to be a stronger reason than any of these: to furnish essential respect and support for the judicial process. Let us assume that a man has been adjudicated innocent in a judicial proceeding that has come to its full conclusion. To try him over again for the same thing is to hold the first trial at naught; it disregards the validity of the first judicial proceeding. Retrial thus undermines the judicial process itself.

Let us examine this undermining more closely. Our judicial system has an established tradition that a criminal trial must be conducted fairly. The courts have vigilantly supported this tradition. They will, for example, reverse a conviction obtained by a confession extorted by use of the rubber hose. The Supreme Court has even set aside a conviction because the prosecutor had remained silent when he knew that his witness was lying.⁹ The question asked of the witness had gone only to his credibility. Although the question was relatively unimportant, the conviction was set aside, thus showing how far the Court will go in insisting that a state comply with notions of what a fair trial should be.

As a result of the efforts of courts, legislators and administrators, a trial may be a model of fairness. If there is no rule against double jeopardy and a second trial is permitted, it likewise may be a model of fairness. And a third trial. Meanwhile what has happened to the first trial? No matter how fair it was, it has decided nothing. It has no effect. The courts will be wasting their time developing standards of fairness in trials if the trial itself may be thus disregarded. Worse than wasting their time, the courts will become discredited. They will be merely polishing the ritual of a dead religion.

If the prosecutor can, at his election, render a previous trial meaningless, serious consequences would follow. In the first place the prosecutor might be tempted to proceed with an inefficiently or incompletely prepared case when

⁷ *Res judicata* affirms that "a controversy which has been determined by a judgment shall not be relitigated." *RESTATEMENT OF JUDGMENTS*, ch. 3, tit. D, Introductory Note (1942). *Res judicata* "is no less applicable to criminal than to civil proceedings." *Sembasivim v. Public Prosecutor of Malaya* [1950] 66 T.L.R. 254, 264 (P.C.). *Res judicata* will sometimes protect the accused when double jeopardy will not. *Sealfon v. United States*, 332 U.S. 575 (1948); *United States v. Oppenheimer*, 242 U.S. 85, 87 (1916); Note, 65 *HARV. L. REV.* 820, 874-80 (1952).

⁸ "Conviction of a felony imposes a status upon a person which . . . affects his reputation and economic opportunities." *Parker v. Ellis*, 362 U.S. 574, 593 (1960) (dissenting opinion). See *Mayers & Yarbrough*, *supra* note 6, at 31; Note, 65 *YALE L.J.* 339, 341 (1956).

⁹ *Napue v. Illinois*, 360 U.S. 264 (1959).

he knows that he will have a chance to do better or to present additional evidence in the second prosecution. Further, he might sometimes be tempted to use improperly obtained confessions, the results of illegal searches and seizures, improper interrogations of witnesses, and other unconstitutional or illegal methods in the hope that he will be successful, all the time planning to put the defendant on trial again in case a conviction should be reversed. Most important of all is the contempt that prosecutors and public would have for judgments that could be relitigated at the election of a participant. Every court would be reduced to the status of a justice of the peace whose decisions are subject to trial de novo.¹⁰ A judge's expression out of court is unimportant; the court's decision, on the other hand, is definitive. It is the business of the courts to decide and settle controversies. That they do so is why the court system works. The system will be stricken at its heart if courts cannot "consider the merits and render a binding decision thereon."¹¹ "It is just as important that there should be a place to end as that there should be a place to begin litigation."¹² That is true even though a court's decisions may be wrong. Finality is indispensable to respect and support for the courts, the judicial process and the law itself. That seems to be the best reason for the res judicata principle.¹³ It seems to be the reason why res judicata has so much weight that it overbalances any concomitant encouragement of overzealous litigation or hampering of judicial flexibility, and outweighs even the desirability of correcting erroneous decisions.¹⁴ Judicial proceedings must be for keeps.¹⁵

¹⁰ Trial de novo is discussed in note 33 *infra*.

¹¹ *General Inv. Co. v. New York Cent. R.R. Co.*, 271 U.S. 228, 230 (1926).

¹² *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938).

¹³ *Warwick v. Underwood*, 40 Tenn. (3 Head) 238, 241-42 (1859), added that reason to those usually given, saying that res judicata "is also intended to give dignity and respect to judicial proceedings. What would be thought of the law and the administration of justice if this kind of game [relitigation] could be successfully played in the courts." These words have received merited repetition. 30A AM. JUR. *Judgments* § 326 (1958) and cases cited. "Effective operation of courts . . . requires that their decisions have the respect of and be observed by the parties, the general public and the courts themselves." Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 340, 345 (1948). Res judicata "fosters reliance on judicial action." Note, 65 HARV. L. REV. 820 (1952).

Professor Millar cites authority that, unlike common law and Roman law, the ancient Frankish law and perhaps early Norse law did not have res judicata and the dispute could always be reopened. Millar, *The Historical Relation of Estoppel by Record to Res Judicata*, 35 ILL. L. REV. 41, 42 n.8 (1940); Millar, *The Premises of the Judgment as Res Judicata in Continental and Anglo-American Law* (pts. 1-2), 39 MICH. L. REV. 1, 238 (1940). Mr. Justice Black, in *Abbate v. United States*, 359 U.S. at 163, cites evidence to show that this is true of Russia today.

¹⁴ "The doctrine of res judicata precludes the parties from showing what is or may be the truth. Why should not the truth prevail? . . . The policy against relitigation is even stronger [than the policy against starting stale actions that is embodied in the statute of limitations]." Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1 (1942).

Obviously I disagree with the unsupported statement in Note, 73 HARV. L. REV. 1616,

¹⁵ I am indebted to Professor John T. McNaughton for the phrase in this context.

Double Jeopardy as Due Process. If double jeopardy is as fundamental as I have indicated, it would necessarily be a part of constitutional due process of law. It would seem to be in that "category of special and extreme objectionableness"¹⁶ which requires the Supreme Court to strike down even state action. It seems clearly to be destructive of *ordered* liberty. Surely nothing could be more disorderly than a criminal procedure by which the same conduct is subjected to successive judicial inquiries which ignore the relevant results of the judicial process itself. The rubber hose is a more brutal and obvious violation of judicial order, but double jeopardy shares with lack of counsel¹⁷ the covert quality of sucking all substance from the right, leaving only the solemn and empty forms.

The Supreme Court has never passed on the precise point, probably because a plain case of double jeopardy, so palpably contrary to accepted views and to state law, is rarely attempted. If it were attempted, Mr. Justice Frankfurter, at least, has said that the fourteenth amendment would be violated: "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. . . ."¹⁸ And again: "A principle so deeply rooted in the law of England, as an indispensable requirement of a civilized criminal procedure, was inevitably part of the legal tradition of the English Colonists in America."¹⁹ Justice Harlan, speaking for the Court in *Hoag v. New Jersey*,²⁰ clearly implies that there are situations where consecutive trials would be a denial of due process. *Palko v. Connecticut*²¹ is sometimes carelessly cited to the contrary. Justice Cardozo's famous opinion pointed out that the Court was only allowing Connecticut a retrial in order to correct errors "all in the same case"²² and was not considering a retrial "after a trial free from error."²³ "To allow the state to go that

1618 (1960) that there is a "broader social interest in bringing accused criminals to justice" than in "preserving respect for the judiciary." Any justice, even justice according to the whim of a despot, is perhaps better than not bringing accused criminals to justice at all. But that is not the issue. The issue is whether letting an occasional criminal escape is worse than an occasional undermining of the court. See Mayers & Yarbrough, *supra* note 6, at 31.

¹⁶ Hastie, *Judicial Method in Due Process Inquiry*, GOVERNMENT UNDER LAW 333 (Sutherland ed. 1956).

¹⁷ The right to counsel was comparatively late in being recognized. It was not even well established in England as late as the Eighteenth Century. Double jeopardy, however, goes far back in history. For the historical background see *Bartkus v. Illinois*, 359 U.S. 121, 151-155 (1959) (Mr. Justice Black, dissenting).

¹⁸ *Brock v. North Carolina*, 344 U.S. 424, 429 (1953) (concurring opinion). This is a natural and proper limitation on the statement in *Phoenix Ins. Co. v. Tennessee*, 161 U.S. 174, 185 (1896), that there is no federal question "if the State court erroneously decides a question of law regarding the weight to be given one of its own judgments. . . ." See also *Francis v. Resweber*, 329 U.S. 459, 469 (1947) (concurring opinion).

¹⁹ *Green v. United States*, 355 U.S. 184, 200 (1957) (dissenting opinion).

²⁰ 356 U.S. 464, 467 (1958).

²² *Id.* at 323.

²¹ 302 U.S. 319 (1937).

²³ *Id.* at 328.

far," says the American Law Institute's comment on its Penal Code, "would probably violate the federal constitution."²⁴

Double jeopardy includes more than former acquittal and former conviction. Those two are the heart, but the double jeopardy concept is wider. Its application in adversary proceedings has given rise to a range of relatively minor additional features. For example, jeopardy has been said to attach as soon as the jury is sworn.²⁵ Thus the statement by the Supreme Court that double jeopardy is one of the "protections which this Court has not required a State to provide"²⁶ is probably intended only to refer to what was decided in *Palko*: namely, that not *everything* included in the double jeopardy principle is binding on the states, and in particular that not all of the double jeopardy concept of the fifth amendment is embodied in the prohibitions of the fourteenth. Similarly, the quotations from Mr. Justice Frankfurter are to be reconciled with what at first sight appears to be his inconsistent statement that double jeopardy, "whose contours are the product of history"²⁷ "is not an evolving concept like that of due process."²⁸ This latter statement echoes what he has said on previous occasions, *e.g.*:

Broadly speaking, two types of constitutional claims come before this Court. Most constitutional issues derive from the broad standards of fairness written into the Constitution (*e.g.* "due process," "equal protection of the laws," "just compensation"), and the division of power as between States and Nation. Such questions, by their very nature, allow a relatively wide play for individual legal judgment. The other class gives no such scope. For this second class of constitutional issues derives from very specific provisions of the Constitution. These had their source in definite grievances and led the Fathers to proscribe against recurrence of their experience. These specific grievances and the safeguards against their recurrence were not defined by the Constitution. They were defined by history.²⁹

The explanation is that *both* classes of issues are found within the double jeopardy concept. The fringe aspects of double jeopardy are in the class of things defined by history. They do not necessarily inhere in due process. But "the purposes behind the Double Jeopardy Clause,"³⁰ being basic to civilized

²⁴ ALI MODEL PENAL CODE § 1.09, comment (Tent. Draft No. 5, 1956). *Bartkus* also points out that *Palko* conceded that at some point multiple prosecutions by a state would offend due process. 359 U.S. at 127.

²⁵ See *Wade v. Hunter*, 336 U.S. 684, 688 (1949); *Brock v. North Carolina*, 344 U.S. 424 (1953).

²⁶ *Kinsella v. Krueger*, 351 U.S. 470, 478 (1956) (*rev'd. after reargument*, 354 U.S. 1, 41 (1957)).

²⁷ *Green v. United States*, 355 U.S. 184, 215 (1957) (dissenting opinion).

²⁸ *Gore v. United States*, 357 U.S. 386, 393 (1958).

²⁹ *United States v. Lovett*, 328 U.S. 303, 321 (1946) (concurring opinion). *Cf.* *United States v. Ullmann*, 350 U.S. 422, 438 (1956).

³⁰ *Green v. United States*, 355 U.S. 184, 219 (1957) (Frankfurter, J., dissenting).

procedure, are part of due process.³¹ The central core of double jeopardy, being due process, is an evolving concept, necessarily changing over the years as the broadly defined offenses of the common law have been fractionalized and proliferated into our present multitude of narrowly defined statutory offenses.³²

This paper, whether we are considering the common law or the constitutional aspects, is concerned only with the second class—that central feature of double jeopardy where a man is being tried over again for the same conduct for which he has already been finally³³ acquitted or convicted. A second prosecution for such conduct *under the same provision of a criminal code* would seem to be so raw as to be a clear violation of due process: it is unlikely to occur in practice. Instead, a second prosecution is brought under a different provision of the criminal code, a provision which seems to create a separate offense but which is in substance the same offense. The man is being retried for the same conduct under a different statutory provision which defines the conduct in different language.

The problem of what is the same offense will be discussed in more detail at a later point.³⁴ All that I am now asserting is that under the fourteenth amendment the Court will strike down a state court conviction when the defendant has been acquitted or convicted by the same state *for what the Court determines* is in substance the same offense. A fortiori the Court will, under the fifth amendment, strike down a *federal* conviction when the defendant has already been acquitted or convicted in a *federal* court for what the Court determines is in substance the same offense.³⁵

Having considered the significance of the double jeopardy principle, let us deal with its application to specific problems.

³¹ *Id.* at 217.

³² Double jeopardy was more easily applied at common law because the offenses were fewer and more broadly defined. The more difficult present-day judicial task is dealt with on p. 604 *infra*.

³³ The judgment must be final. It is not final if it is subject to appeal. It seems that appeal or trial de novo (which is really a kind of appeal) may be made available even to the state without violating the basic principle. (As to state appeal, see Mayers & Yarbrough *supra* note 6, at 8–15.) Trial de novo, as I said in the text at note 10 *supra*, downgrades the first court to the status of a justice of the peace court because the first trial would not be taken seriously, being merely a trial run. Although trial de novo may be appropriated for minor offenses, it seems to me that it must be established by statute and not indirectly—on a different theory—through the common practice of the state courts to retry a man for something of which he had been acquitted or convicted by a municipal court, i.e., a court of different jurisdiction but the same sovereignty. For cases see 15 AM. JUR. *Criminal Law* § 398 (1938). Cf. Mueller, *Criminal Law and Administration*, 35 N.Y.U.L. REV. 111, 122 (1960). Within the federal system the Supreme Court has disapproved analogous procedures (*Grafton v. United States*, 206 U.S. 333 (1907)); even honoring judgments of courts martial (see *Wade v. Hunter*, 336 U.S. 684 (1949)), although they raise the special problem of the primacy of the civil authority.

³⁴ Pp. 608–12 *infra*.

³⁵ *In re Nielsen*, 131 U.S. 176 (1889). See pp. 604–05 *infra*.

DOUBLE JEOPARDY BETWEEN SOVEREIGNTIES

One of the most important problems is that of successive prosecutions by different sovereignties—where the defendant pleads a federal judgment of acquittal or conviction in a state court, a state judgment in a federal court, or a judgment of another state or foreign country. Contrary to what is often said, there would seem to be just as much reason to bar the second prosecution as where only one jurisdiction is involved.

It is all the same to the accused. From his standpoint the situation is the same whether the successive prosecutions are by the same or by different sovereignties; one is as bad as the other. From the standpoint of sustaining judicial action, only a chauvinist would argue that we can flout the final action of civilized foreign courts without in the long term undermining the rule of law in general, and our own courts in particular. It is just as pernicious for Illinois to disregard a federal judgment as to disregard an Illinois judgment. A federal court ought to respect a valid state judgment as much as its own.³⁶ Whatever the weight given to the various reasons for the *res judicata* and double jeopardy principle, all those reasons are fully applicable to double jeopardy as between sovereignties.³⁷

The courts do not deny this. The Supreme Court simply finds that the principle against putting a man in double jeopardy is offset by another principle. That principle is sovereignty, the sovereign power of a nation or state not to be bound by the judgments of other sovereign nations or states.

In *United States v. Lanza*³⁸ and *Abbate v. United States*³⁹ the defendants had first been convicted in a state court. They were retried for the same conduct in a federal court. In *Bartkus v. Illinois*⁴⁰ the defendant, having first been acquitted in a federal court, was retried for the same conduct in an Illinois court. Convictions on all three retrials were affirmed. The Supreme Court did not decide that such double jeopardy is required by due process as normally interpreted. That is, the Court did not find that double jeopardy inflicted by

³⁶ The federal courts are required by statute to give full faith and credit to state proceedings. 28 U.S.C. § 1738 (1958).

³⁷ This is true even though it often has been said that the difference in the prosecuting governments makes *res judicata* or collateral estoppel inapplicable because the *parties* are different. See, e.g., Comment, *Collateral Estoppel in Criminal Cases*, 28 U. CHI. L. REV. 142, 143 n.4 (1960). The hollowness of that distinction is shown by the Assimilative Crimes Act and other examples given on pp. 606-08 *infra*. The real party in both cases is the public—obviously so where the two governments are those of an American state and the nation. The difference in parties is irrelevant to the reasons for the *res judicata* principle. The controversy is the same, just as it is where a party to a lawsuit is changed from one governmental officer to his successor in office, or where a ship and its owner are claimed to be different persons in the effort to avoid *res judicata*. Comment, *Application of the Doctrine of Res Judicata to Successive In Personam and In Rem Actions in Admiralty*, 27 U. CHI. L. REV. 381, 384 (1960); Perkins, *Collateral Estoppel in Criminal Cases*, 1960 U. ILL. L.F. 533, 568 n.221.

³⁸ 260 U.S. 377 (1922).

³⁹ 359 U.S. 187 (1959).

⁴⁰ 359 U.S. 121 (1959).

the combined action of two jurisdictions is any less harsh to the defendants or less contrary to ordered liberty than if it is inflicted by the same jurisdiction. Instead, all three cases rest on the weight given American federalism. Federalism was found to require an exception to the double jeopardy principle. Our federal system was thought to require an unfortunate result.⁴¹ In order not to upset the federal system the Court felt it must decide that the Constitution did not prevent what had been done. The Court found that if due process is to be preserved in this area, it must be preserved by the legislature and not by the judiciary. In effect, that whether judgments of foreign jurisdictions are to be respected is a political question. This leaves it to the states to determine the extent to which they will respect the criminal judgments of other states, nations or the federal courts. It leaves to Congress to determine the extent to which the federal courts will respect the criminal judgments of the states or foreign nations. This outcome does not make it due process to try a man twice, any more than diplomatic immunity, which prevents court action,⁴² makes robbery by a diplomat not robbery. Like diplomatic immunity, this rule has, for practical political reasons, been deemed to create an exception to general principle. The exception blocks the regular procedure but the mischief remains the same.

Let us assume, for the purposes of this article only, that the political reasons are valid, or at least strong enough to overcome the views of the *Bartkus* and *Abbate* dissenting justices and their academic supporters. Let us accept the Court's constitutional theory as reflected in *Lanza*, *Bartkus* and *Abbate*.⁴³ Let us assume, therefore, that under the Constitution the state and the nation each has the power to retry a man who has already been acquitted or convicted by the other.

Having the power, of course, is far different from using it. Powers are not always exercised. State and nation possess much power that they do not deem it wise to exert. Whether it is wise to use the power to put a man in double jeopardy would seem to be a decision for the legislature. In the absence of a statute it ought not to be within the province of a prosecutor, state or federal, to decide that a man will be retried in violation of the ancient common law right against double jeopardy.

⁴¹ One of those "results with which a court is in little sympathy." *Id.* at 138.

⁴² 1 Stat. 117 (1790), 22 U.S.C. § 252 (1958).

⁴³ This does not mean that all these cases were correctly decided even under the Court's theory. I go on to contend that *Lanza* and *Abbate* were not. I do not deal with the weakness of *Bartkus* in making a "doctrinaire absolute" (Smith v. California, 361 U.S. 147, 163 (1959) (Frankfurter, J., concurring)) of the dichotomy inherent in a conceptualistic federalism, nor with *Bartkus*' paradoxical solicitude to protect the finality of a particular state judgment by laying down the rule that state and federal courts can disregard the finality of all the criminal judgments of each other. The weight of law review criticism is heavily against all three decisions. See, e.g., Mueller, *supra* note 33, at 130-31; Franck, *An International Lawyer Looks at the Bartkus Rule*, 34 N.Y.U.L. REV. 1096 1103 (1959); Note, 1959 U. ILL. L.F. 677.

But the courts have regularly allowed prosecutors to do just that. Blinded by our obsession with constitutional issues, the courts have hurried to deal with the question of constitutional power. Finding that the constitutional power to retry a man exists, they have failed to consider that it may not have been exercised according to law. The courts have failed to distinguish between disregard of a foreign judgment when authorized by statute and disregard of a foreign judgment at the unauthorized election of the prosecutor. They have abdicated the role and responsibility of the judiciary to implement common law concepts unless affirmatively directed to act otherwise by the legislative branch of government.

For example, consider *United States v. Lanza*,⁴⁴ the main authority relied on by the Supreme Court in the other two cases. During the period of national prohibition Lanza was convicted in a state court for selling liquor and was fined \$750. To give him more punishment he was then prosecuted for the same transaction in a federal court. The Supreme Court held that this could be done, on the ground that the power of the federal government would be sterilized if it were bound by the state action. But the decision seems wrong, even assuming the correctness of the Court's view of the constitutional question. There was, and is, no federal statute authorizing retrial after a state conviction. Until such a statute has been passed, there is no constitutional principle requiring that dual prosecutions be upheld. As long as the Supreme Court adheres to the theory that Congress or a state has constitutional power to pass such a statute, the balance between state and nation remains undisturbed. Since dual prosecutions are in derogation of a basic principle of ordered liberty, they should not be permitted except where constitutional necessities require. An exception to the fundamental rules of due process should be no larger than necessary.

The constitutional theory expressed in *Lanza* (and *Abbate*) does not require that the exception be any greater than I have suggested. But what those cases decided goes beyond the necessities of the theory. Sovereign power is not sterilized where it has not been exerted. Putting it another way, if double jeopardy is prohibited by a common law principle (applying between jurisdictions as well as within a jurisdiction), there is no constitutional reason why that common law principle cannot be carried out—always assuming that it has not been changed by statute. The constitutional question thus would not be reached.

The final paragraph of *Lanza* stated: "If Congress sees fit to bar prosecution . . . it can, of course, do so. . . ."⁴⁵ The Court would have done better to say: "Until Congress sees fit to provide that a prior conviction shall not be a bar, the common law principle bars double jeopardy, and no constitutional question is raised."

⁴⁴ 260 U.S. 377 (1922).

⁴⁵ *Id.* at 385.

In *Abbate v. United States*,⁴⁶ following an Illinois conviction for damaging a telephone line, a man was convicted under a federal statute⁴⁷ for the same act because the line was used in transmitting United States Government messages. The reasoning in this case is similarly objectionable. Because there was no federal statute permitting retrials, there was no need to reach the constitutional question. The Court, however, and counsel,⁴⁸ never considered that there might be any other issue than that of the fifth amendment. The Court followed the reasoning—which it recognized as dictum⁴⁹—expressed in a long line of pre-*Lanza* cases beginning in 1820 with *Houston v. Moore*⁵⁰ where “all members of the Court agreed that the Fifth Amendment would not prohibit a federal prosecution. . . .”⁵¹ Fascinated with constitutionalism, the judges, in 1820 and in 1959, failed to consider that even if the fifth amendment does not prohibit something, action by Congress may still be required before it can be done. The *Abbate* court would have done better with an approach analogous to that in *McNabb v. United States*:

In the view we take of the case, however, it becomes unnecessary to reach the Constitutional issue pressed upon us. . . . [T]he scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reasons which are summarized as “due process of law” and below which we reach what is really trial by force.⁵²

Congress not having changed it, the common law double jeopardy standard should have been recognized and given effect in *Abbate* as well as in *Lanza*. This would merely mean giving a prior state conviction the same force that would be given a prior federal conviction for what the court determines is in substance the same offense. Whether it *is* in substance the same offense remains a vital issue. The actual decision in *Abbate*, then, can perhaps be sup-

⁴⁶ 359 U.S. 187 (1959).

⁴⁷ 18 U.S.C. §1362 (1958).

⁴⁸ Nor, I confess, did it occur to me, as counsel in *Bartkus*, to urge it as one of the many defects in the superficial opinion in *Lanza*. For others see Grant, *Successive Prosecutions by State and Nation*, 4 U.C.L.A. L. REV. 1, 4-6 (1956); Note, 55 COLUM. L. REV. 83, 87-89 (1955).

⁴⁹ 359 U.S. at 192.

⁵⁰ 18 U.S. (5 Wheat.) 1 (1820).

⁵¹ 359 U.S. at 191.

⁵² 318 U.S. 332, 340 (1943). Dissenting in *Green v. United States*, 355 U.S. 184, 215-16 (1957), Frankfurter, J., had pointed out the advantage of treating double jeopardy as “within our supervisory jurisdiction,” yet in *Abbate* he joined the majority infected with hyper-constitutionalism.

ported on the alternative ground that the gravamen of the federal offense there involved was different from that of the state offense.⁵³

The *Bartkus* case, however, is not open to the same objection. On the assumptions made for the purposes of this article, *Bartkus* was decided correctly by the Supreme Court of the United States. *Bartkus* was first acquitted of bank robbery in a federal court. He was then convicted of the same robbery by an Illinois court. The conviction was affirmed by the Supreme Court of Illinois. Therefore, the United States Supreme Court was bound by the decision of the Illinois Supreme Court as to the interpretation of Illinois law. "In the absence of any prohibition in the Constitution or laws of the United States, it is for the State to decide how far it will go."⁵⁴ It was not open to the United States Supreme Court to find that double jeopardy between jurisdictions was prohibited by either the common law or the Constitution of Illinois. It was the Supreme Court of Illinois that made the wrong decision in the *Bartkus* case.⁵⁵ Since no statute in Illinois authorized two trials for substantially the same crime, there was no necessity for the Illinois court to reach the constitutional question. In the absence of such a statute the court should have followed the common law principle that double jeopardy applies as between jurisdictions. By its failure so to hold, Illinois fouled its own nest.⁵⁶ The duty of cleansing devolved on the state. It was performed a few months after the *Bartkus* decision by the enactment of a statute abolishing double jeopardy as between state and federal courts.⁵⁷

⁵³ The problem of different offenses based on the same conduct is discussed, pp. 608-12 *infra*.

⁵⁴ *Popovici v. Agler*, 280 U.S. 379, 384 (1930) (Holmes, J., in a different context).

⁵⁵ *People v. Bartkus*, 7 Ill. 2d 138, 130 N.E.2d 187 (1955).

⁵⁶ The question in Illinois had not been foreclosed by *Eells v. People*, 5 Ill. (4 Scam.) 498 (1843), *aff'd sub nom.* *Moore v. People*, 55 U.S. (14 How.) 13 (1852), and *Hoke v. People*, 122 Ill. 511, 13 N.E. 823 (1887). They were not double jeopardy cases, there having been no prior prosecution. In discussing congressional intent, the court in the *Hoke* case pointed out that—unlike *Bartkus*—the objects of the state and federal statutes were different. 122 Ill. at 517, 13 N.E. at 825.

In *Bartkus* the Court supports its opinion by listing Illinois and many other states as having done what I describe as fouling their own nests. The Court concedes, however, that among those state cases there was careless reasoning and "offhand dictum." 359 U.S. at 135 n.24. I have not attempted an analysis of the law of each of these states, though I urge it on persons interested in showing that their state is free to follow the line advocated in this article, irrespective of the unthinking dicta of courts not faced with an actual multiple prosecution.

⁵⁷ ILL. REV. STAT. ch. 38, § 601.1 (1959). Fifteen other states already had similar statutes. The California statute is quoted on pp. 607-08 *infra*. Obviously I regard those statutes as declaratory of the common law. Those statutes are in accord with the Field Code and the A.L.I. MODEL PENAL CODE § 1.11 (Tent. Draft No. 5, 1956). (These statutes are cited in Note, 44 MINN. L. REV. 534, 539 n.31 (1960)). Forty states have adopted the similar provision of the UNIFORM NARCOTIC DRUG ACT § 21. Congress has adopted similar provisions to prevent federal retrial for stealing from instrumentalities of interstate commerce. 18 U.S.C. §§ 659, 660, 2117 (1958). Thus the states and Congress have shown a willingness, in my view, to declare the common law rule and so abjure any constitutional power to retry. They never enact the converse statute asserting the power.

It is apparent that the whole of the preceding analysis rests on the proposition that the principle against double jeopardy is a living common law principle, and that it includes not only recognition of a sovereignty's own prior criminal judgments but those of foreign jurisdictions as well.

Let us now look at the authorities.

Double Jeopardy at Common Law. The principle against double jeopardy is ancient and well established at common law.⁵⁸ Although double jeopardy is forbidden by the constitutions of most of the states, it is not mentioned in the constitutions of Connecticut, Maryland, Massachusetts, North Carolina and Vermont. In each of these five states the courts found that common law prohibited double jeopardy.⁵⁹ The Vermont court said: "Constitutional provisions against double jeopardy are regarded as merely declaratory of the common law."⁶⁰ The legislation in Massachusetts, for example, like the constitutions and legislation in the other states, is also declaratory of the common law.⁶¹

Further, the common law authorities dealt specifically with the two sovereignties situation. The principle against double jeopardy, as it applies between jurisdictions, is part of "that branch of private law which is variously termed 'Private International Law,' 'Conflict of Laws,'⁶² 'Comity' . . . in accordance with which the courts of one country or 'jurisdiction' will ordinarily, in the absence of a local policy to the contrary, extend recognition and enforcement to rights claimed by individuals by virtue of the laws or judicial decisions of another country or jurisdiction."⁶³ While it is sometimes called "merely comity," of course comity which the courts enforce, like equity, is law.

It has been established in England since *Rex v. Thomas*⁶⁴ in 1664, *Rex v. Hutchinson*,⁶⁵ 1678, and *Rex v. Roche*,⁶⁶ 1775, that acquittal by one nation prevents retrial in another. Those cases are so confusingly reported that they do not by themselves clearly show what was decided; their authority stems from the fact that *the English, from then until now, have always treated them*

⁵⁸ See the authorities collected in Mr. Justice Black's dissenting opinion in *Bartkus*, 359 U.S. at 151-55.

⁵⁹ For citation see opinion of Mr. Chief Justice Vinson in *Brock v. North Carolina*, 344 U.S. 424, 435 (1953) (dissenting opinion). I find no subsequent change.

⁶⁰ *State v. O'Brien*, 106 Vt. 97, 103, 170 Atl. 98 (1934).

⁶¹ MASS. GEN. LAWS ch. 263, §§ 7-8(a) (1959); *Commonwealth v. Mahoney*, 331 Mass. 510, 512, 120 N.E.2d 645 (1954).

⁶² Conflict of laws is a term not confined to civil liability. See, e.g., LEFLAR, CONFLICT OF LAWS (1959). Cf. JESSUP, TRANSNATIONAL LAW 113 (1956). (Footnote by the author.)

⁶³ CORWIN, THE CONSTITUTION 651 (1953).

⁶⁴ 82 Eng. Rep. 1043 (1664).

⁶⁵ As reported in *Beak v. Thyrrwhit*, 87 Eng. Rep. 124 (1689).

⁶⁶ 168 Eng. Rep. 169 (1775).

as having established the principle. There are many examples.⁶⁷ An early one is Leonard MacNally, who stated in 1802 that "an acquittal on a criminal charge in a foreign country may be pleaded in bar of an indictment for the same offence in England."⁶⁸ An authoritative contemporary example is Kenny, who, in 1958, in his *Outline of Criminal Law*, said: "even though it were in a foreign country that the acquittal or conviction took place, it will none the less constitute a defence in our courts."⁶⁹

Utilizing the Common Law Principle. When a prosecutor jumps to the conclusion that he may retry a man for essentially the same conduct under a different section of the criminal code, he feels authorized to do so by the simple mandate of that different section. It contains no qualification. For example, *In re Nielsen*⁷⁰ dealt with a federal statute which provided: "that whoever commits adultery shall be punished by imprisonment . . ."⁷¹ There is nothing in that statute that says "except when he has previously been acquitted or convicted for the same acts treated as unlawful cohabitation under 22 Stat. 31, c. 47."⁷² So the prosecutor had gone ahead and got a second conviction in spite of the man's previous conviction for unlawful cohabitation. The Supreme Court reversed, holding that the second prosecution was barred be-

⁶⁷ See Grant, *supra* note 48, at 9-10. A footnote to the report of *Rex v. Roche*, 168 Eng. Rep. 169 (1775) contains the following: "It is a bar because a final determination in a court having competent jurisdiction is conclusive in all courts of concurrent jurisdiction."

⁶⁸ RULES OF EVIDENCE ON PLEAS OF THE CROWN 428 (1802).

⁶⁹ OUTLINE OF CRIMINAL LAW 563 (17th ed. 1958). Mr. Justice Frankfurter, in his opinion for the Court in *Bartkus*, fails to mention the English interpretation of the early English cases, overlooking its significance as he dismisses those cases as "dubious" because of (1) "the confused and inadequate reporting" of *Rex v. Hutchinson*, and (2) "because they reflect a power of discretion vested in English judges not relevant to the constitutional law of our federalism." 359 U.S. at 128 n.9. Actually, both reasons are irrelevant to the ground upon which the *Bartkus* decision is based. The opinion clearly shows that it is based on the presumed requirements of American federalism. It decides that whatever the common law of double jeopardy may be, our federal system requires that there be an exception when two sovereignties are involved. (See text accompanying note 41 *supra*.) In the Court's view, its decision would have been the same whatever the English common law at the time of the American Revolution and whatever discretion the English judges had in applying it. Mr. Justice Frankfurter, therefore, did not help his decision by suggesting, in disregard of his normal respect for English authority, that English law is not what the English have always said it was.

Nor, incidentally, did he help it by devoting four pages and a ten-page appendix (359 U.S. at 124-28, 140-49) to a well established point not at issue in the case and which had been conceded in the briefs, namely, that the fourteenth amendment does not incorporate everything in the first eight. This learned exposition will no doubt be helpful to the bar, even to the bench, and particularly to the newer members of the Court who on this occasion put their names to it for the first time. Cf. Note, 1959 U. ILL. L.F. 677, 679 n.20.

⁷⁰ 131 U.S. 176 (1889).

⁷¹ 25 Stat. 635 (1887).

⁷² The defendant in *Nielsen* was also charged with violating 22 Stat. 31 (1882).

cause the two offenses were essentially the same.⁷³ The Court viewed the case as an interpretation of the fifth amendment, but of course its approach would have been the same if, like those states which have neither a constitutional nor a legislative prohibition of double jeopardy, the Court had been interpreting the common law directly.⁷⁴ In either case the prosecution would be barred by the principle against double jeopardy.

It may be worth observing that the mandate of a statute is never expressly qualified by a provision in the statute prohibiting retrial of a man for the same conduct *under the same section* of the criminal code. What prevents the retrial? Constitutional provisions? If the statute were to be construed as authorizing the outrage of retrial, the statute would certainly be unconstitutional *pro tanto*. But surely it is not necessary to treat every criminal statute as unconstitutional *pro tanto* in order to prevent a man from being retried under the same section. Surely the legislature did not intend thus to punish people repeatedly. The issue of statutory construction arises before the constitutional question is reached.

The statute must, of course, be construed in the light of common law principles. There are some analogous situations. Statutes are often interpreted as requiring mens rea or scienter even if they contain no "intentionally" or "wilfully."⁷⁵ Also analogous is the common law rule that statutes shall not be interpreted retrospectively, but only prospectively, even though the statute contains no "hereafter" and is unqualified on its face. Likewise, the defense of entrapment, far less fundamental than double jeopardy, is allowed—in the rare case when it is proper—even though there is nothing about entrapment in any statute. Accordingly, in the absence of an express provision permitting duplicate trials, no statute ought to be construed as abrogating the common law doctrine of double jeopardy any more than statutes couched in general terms should be construed as abrogating the doctrines of mens rea, prospective construction or entrapment.⁷⁶

⁷³ Mr. Justice Brennan, writing in *Bartkus*, seems to be mistaken when he says that in *Nielsen* "a different federal interest was protected by each statute." 359 U.S. at 201. The legislative history shows that both statutes in *Nielsen* were anti-polygamy statutes, the later being an act to amend the first. 18 Cong. Rec. 581-96, 1897-1904 (1887).

⁷⁴ Cf. *State v. Benham*, 7 Conn. 414 (1829).

⁷⁵ In *Smith v. California*, Mr. Justice Frankfurter referred to "the general principle that awareness of what one is doing is a prerequisite for the infliction of punishment." 361 U.S. 147, 162 (1959) (concurring opinion). Of course there are exceptions to the principle.

⁷⁶ Similarly, the doctrine of diplomatic immunity (to which reference has already been made in another context, in text accompanying note 42 *supra*), though embodied in an American statute since 1790 (1 Stat. 117 (1790), 22 U.S.C. § 252 (1958)), was a defense at common law. It has been said that the statute is declaratory of less than the full scope of diplomatic immunity at common law, and, perhaps dubiously, that the wider scope is nevertheless still in effect. See *Bergman v. DeSieves*, 71 F. Supp. 334 (S.D.N.Y. 1946).

Irrespective of what has been said in the text as to double jeopardy, the mandate of the statute may be sufficient to justify cumulating punishment at one trial. *Burton v. United States*, 202 U.S. 344, 377 (1906). As to cumulated punishment, see note 96 *infra*.

A statute prohibiting the sale of narcotics is as silent on the question of entrapment as it is on the admission of illegally obtained evidence. *It is enacted, however, on the basis of certain presuppositions concerning the established legal order and the role of the courts within that system in formulating standards for the administration of criminal justice when Congress has not specifically legislated to that end. Specific statutes are to be fitted into an antecedent legal system.*⁷⁷

The job of fitting them in was overlooked in *Lanza* and *Abbate*, and in the *Bartkus* case in its Illinois stage, by courts bemused with constitutionalism.⁷⁸

A few extreme examples will show the unsoundness of disregarding, as between sovereignties, the common law rule against double jeopardy.

The Federal Assimilative Crimes Act⁷⁹ automatically turns new state laws into the status of federal law in a federal enclave, such as a national park or military reservation. Assume that in some federal enclave where there is concurrent jurisdiction with the state⁸⁰ the state creates a sex offense⁸¹ which ipso facto becomes a federal crime. Therefore, accepting the *Abbate* and *Bartkus* doctrine, it is constitutionally permissible for a man to be tried twice for the same act under two identical statutes. Under the thesis of this article all that means is that it is *constitutionally permissible* for Congress and the state legislatures to pass statutes authorizing the double prosecution. It would be extraordinary for them to pass such legislation; where laws on the subject exist they forbid double prosecutions. Until Congress does the extraordinary thing,⁸² the Assimilative Crimes Act can best be interpreted as embodying

⁷⁷ *Sherman v. United States*, 356 U.S. 369, 381 (1958) (Frankfurter, J., concurring in the result) (emphasis added). On that case and entrapment generally, see Note, 73 HARV. L. REV. 1333 (1960).

⁷⁸ Even though Mr. Justice Frankfurter regarded the common law authorities as unsatisfactory for constitutional interpretation (see note 69 *supra*), there would seem to be enough to have justified the *Abbate* Court in laying down a standard of criminal justice to prevent interjurisdictional double jeopardy until Congress indicates otherwise. There is more reason for a court to do that than, for example, to "mint" the doctrine of entrapment, as Glanville Williams describes it. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 623 (1953). Williams treats entrapment and mens rea as being in "the general part" of criminal law, not mentioning double jeopardy. Apparently he regards double jeopardy as a procedural doctrine. This may have significance for those who believe that procedural due process has a claim on judicial attention superior to that of substantive due process. "Double jeopardy, looked at as a restriction on the rights of the Government . . . is a substantive matter . . .," Steffen, *Double Jeopardy and the New Rules*, 7 FED. B.J. 86 (1945), but it is also procedural in the sense that it does not apply to any particular crime but affects the course of litigation generally.

⁷⁹ 18 U.S.C. § 13 (1958).

⁸⁰ See 18 U.S.C. § 73 (1958).

⁸¹ As in *United States v. Sharpnack*, 355 U.S. 286 (1958).

⁸² Congress might conceivably authorize retrial for some crime where state prosecutions had become so corrupt, inefficient or locally unpopular as to justify that extraordinary procedure. Instead, Congress would be more likely to make a partial or total pre-emption of the field. (See Mr. Justice Black's dissenting opinion in *Abbate*, 359 U.S. at 202 n.2.) But there might be cases where pre-emption could not extend; e.g., to nullify the state's police power over a simple assault.

the common law defense of double jeopardy.⁸³ Similarly, until the state has legislated to the contrary, the original state statute should also be interpreted to recognize the bar of a federal criminal judgment.

Recognition of the common law defense of double jeopardy would silence an unpleasant suggestion that American military authorities might be able "to transfer an accused to a different country in order to try him for an offense for which he has previously been tried by a tribunal of the country in which he has been stationed."⁸⁴

A further example of the patent desirability of construing duplicate statutes as being subject to the common law defense of interjurisdictional double jeopardy is produced by a state criminal statute enacted for the very purpose of protecting a federal right—for example, a statute to enforce a provision of the postal laws which is cast in the same terms as the federal statute. Surely such a statute ought not to be construed as making duplicate trials automatically available.⁸⁵

It is my thesis that the same approach is applicable even when the two statutes are not textually identical—as they rarely are when two jurisdictions are involved. The law of murder is expressed differently in different countries, yet if a man has been tried for murder in Canada and acquitted or convicted, he ought not to be tried over again here just because the homicide took place on the international boundary under circumstances that made jurisdiction concurrent. It is not only the common law, as we have seen, that respects criminal judgments of foreign countries; so does civil law. For example, no prosecution can take place in France if the accused can show that his case has been finally disposed of abroad. In case of conviction, this includes showing that he has served his sentence, that the statute of limitations has run, or that he has been pardoned.⁸⁶

The State of California has proceeded similarly under its statute requiring recognition of foreign criminal judgments: "When an act charged as a public

⁸³ With or without such a statute it would seem to be bad policy to put a conscientious prosecutor under pressure to retry state prosecutions where there is concurrent jurisdiction. In order to prevent federal prosecutors from feeling such pressure, the Attorney General of the United States issued a memorandum instructing them not to do so—unless an exception were made with his approval. See *Petite v. United States*, 361 U.S. 529, 531 (1960). Without exploring (as three justices did, at p. 533) the dubiously wide discretion thus assumed by the Attorney General to determine what *is* an exceptional case, it would seem that both he and the Supreme Court are wrong in thinking that he has any discretion to prosecute before Congress gives it to him.

⁸⁴ Note, 70 HARV. L. REV. 1043, 1064 (1957).

⁸⁵ The early federal statute authorizing state enforcement of the postal laws is still in effect. 17 Stat. 323 (1872), 39 U.S.C. § 825 (1958). (On state enforcement of federal rights see Note, 73 HARV. L. REV. 1551 (1960)). As to the situation where the state offense is literally for violation of the "very" federal statute, see *Bartkus*, 359 U.S. at 130.

⁸⁶ CODE ANNOTÉ DE PROCEDURE PENAL arts. 5,7 (France 1958). See DONNEDIEU DE VABRES, TRAITÉ DE DROIT CRIMINEL 1006-09, §§ 1855-63 (1947).

offense is within the jurisdiction of another state or country, as well as of this state, a conviction or acquittal thereof in the former is a bar to the prosecution or indictment therefor in this state."⁸⁷ A homicide was committed in California by a man named Coumas under circumstances which gave Greece concurrent jurisdiction. He was convicted in Greece and served a prison term of several years. The Supreme Court of California held that further prosecution in California was barred, even though the California charges were "murder" and "assault with a deadly weapon," whereas the Greek conviction had been for "manslaughter" and "unlawful carrying of a firearm."⁸⁸

The California statute—and similar statutes in other states—are apparently declaratory of the common law.⁸⁹ However that may be, the California court interpreted the statute in the light of the common law. There was no narrow dialectic⁹⁰ concluding that the Greek and the California offenses were different because they were expressed differently in the statute books. California refused to try Coumas over again for what was really the same thing.

THE "SAME OFFENSE"

This article is concerned only with situations where the courts are willing to say, as they did in *Coumas* and *In re Nielsen*, that the two trials are for what is in substance the same offense. To decide whether they are or not is a troublesome problem. To help reach a decision in the widely differing classes of cases that come up, the courts no doubt need rules of thumb to subdivide and implement the double jeopardy principle. The rules that have been developed are unsatisfactory and confused.⁹¹

The most popular solution is to permit retrial for the same act if each statute requires proof of an additional fact that the other does not. Though expressed in innumerable cases and the Model Penal Code,⁹² the solution is demonstrably inadequate.⁹³ Suppose, for example, that a statute expressly

⁸⁷ CAL. PENAL CODE § 793.

⁸⁸ *Coumas v. Superior Court*, 31 Cal. 2d 682, 192 P.2d 449 (1948). "Where the foreign [tort] judgment is based on a statute *substantially* similar to one of the forum, recognition will also be granted easily." 1 EHRENZWEIG, *CONFLICT OF LAWS* 216 (1959) (emphasis added). See *id.* at 131 on the status of foreign tort actions.

⁸⁹ See note 57 *supra*.

⁹⁰ As has sometimes come from New York. See cases cited in *Bartkus v. Illinois*, 359 U.S. 121, 138 n.29 (1959), and *People v. Tutuska*, 19 Misc. 2d 308, 192 N.Y.S.2d 350 (1959), *aff'd*, 206 N.Y.S.2d 1006 (1960).

⁹¹ The floundering of the courts has received attention in the literature. For a glance at the chaos see 15 AM. JUR. *Criminal Law* §§ 380-84 (1938) and Comment, 65 YALE L.J. 339, 344-46 (1956). It is beyond the scope of this article to analyze the many facets of the difficult problem of what, for purposes of double jeopardy, is "the same offense."

⁹² § 1.10(1) (b) (Tent. Draft No. 5, 1956).

⁹³ It would be adequate if the "additional fact" were in some way required to be a significant fact, as Judge Friendly discerned. *United States v. Sabella*, 272 F.2d 206, 212 (2d Cir. 1959). This must mean significance in the light of double jeopardy policy, *i.e.*, whether "upon considerations of what constitutes substantial justice in criminal procedure" (Mayers & Yarbrough, *supra* note 6, at 8) it is "fair to subject the defendant to another

makes separate crimes of robbery after nightfall, robbery with a gun, robbery while wearing a mask, and (like the Federal Bank Robbery Act⁹⁴) robbery of a bank and entry of a building used in part as a bank with intent to commit robbery. Each crime has its unique fact to be proved. Thus under the "additional fact" test a man could be tried for robbery with a gun (without mentioning the mask), acquitted, and then retried for the same robbery with a mask (without mentioning the gun).⁹⁵ Even worse, if it is one crime to rob a bank that is a member of the Federal Reserve System and another to rob a member of the Federal Deposit Insurance Corporation, the test would permit a man to be prosecuted twice for one robbery of a bank that is a member of both, though the difference between the offenses is unconnected with any activity on his part. It would deprive the double jeopardy concept of all meaning to use those separate crimes to try a man repeatedly for the same robbery.⁹⁶

criminal proceeding." Note, 74 HARV. L. REV. 752, 754 (1961). "The test [of *autrefois convict*] is not whether the facts relied upon in the two trials are the same. It is whether the prisoner has been convicted of an offence which is the same or *practically the same* offence as that with which he is charged." ARCHBOLD, PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES 155 (34th ed. 1959) (emphasis added).

⁹⁴ 18 U.S.C. § 2113(a) (1958).

⁹⁵ Cf. 28 U. CHI. L. REV. 142, 150 n.36 (1960).

⁹⁶ However, the additional facts required in some of the crimes may embody elements that make the crime more serious and hence justify lumping several of them in one trial in order to increase punishment. But for a man to have the amount of his punishment thus increased by overlapping offenses litigated in one trial is a very different thing from being tried for them *seriatim*. The reasons for the defense of double jeopardy against retrial (described at pages 592-94 *supra*) do not apply to duplication of offenses at one trial. Such duplication lacks the harassment of repeated prosecutions and the attendant anxiety, uncertainty and expense. It lacks the demoralizing feature of undoing what the court has done. It is not double jeopardy. Double jeopardy implies two trials. But sound holdings that two offenses are different so as to permit double punishment has led many judges to the erroneous conclusion that a man may be tried first for one and later for the other. These judges have been tempted by the convenience of treating each offense as an interchangeable unit of the crime, or "unit of prosecution" for purposes of both double jeopardy and multiple punishment. There is no such interchangeable unit. "[N]o single definition of 'same offense' will adequately cover both the double punishment and the double prosecution situations." Note, 11 STAN. L. REV. 735, 746 (1959); Note, 28 U. CHI. L. REV. 308 (1961).

As recently as *Pereira v. United States*, 347 U.S. 1, 11 (1953), the Supreme Court was still using double jeopardy terminology for multiple punishment. But the Court understands that multiple punishment is different and would normally raise no constitutional issue. *Ladner v. United States*, 358 U.S. 169, 173 (1958).

The difference is brought out by *Gore v. United States*, 357 U.S. 386 (1958) (on *Gore* see separate opinion of Brennan, J., in *Abbate*, 359 U.S. at 197-200), where a single sale of narcotics was held to be three offenses for the purpose of determining the amount of punishment: (1) not making the sale pursuant to a written order, (2) not making the sale in the original stamped package, and (3) facilitating the concealment and sale of narcotics. But that decision is a very different thing from the supposititious case where the prosecutor selects only one of the three offenses, resulting in an acquittal or a conviction for that offense. Can the accused then be tried over again for one of the other offenses on the basis of *the same sale*? And a third time? Unthinkable though that is to me, there are judges who will

For our argument it is sufficient that there *are* situations like *Nielsen* where the courts look through the difference between two crimes as they appear in the statute books and reach the conclusion that they are the same crime for the purpose of double jeopardy. One example is the rule of thumb that the greater crime includes the lesser. Another example is the "continuing" crime doctrine, by which separate acts in a continuing crime like unlawful cohabitation constitute but a single crime for purposes of double jeopardy.⁹⁷

A clean-cut solution favored by a few courts, writers and Mr. Justice Brennan⁹⁸ is to look only at the act or conduct of the defendant. Differences in the statutory definitions of crimes are disregarded. The result is simply that the defendant cannot be tried twice for the same act or conduct.⁹⁹ This test has the merit of simplicity. Further, it is in accord with enlightened criminal procedure¹⁰⁰ which requires a prosecutor to prepare and present at one trial one complete case based on every aspect of the defendant's act, instead of allowing the prosecutor to have several tries at a man for various aspects of the same act.

Although the "same conduct" test is a good rule, precedent says that it is not required by the Constitution. The overwhelming mass of decisions authorizes such retrial where the purposes of the two statutes are different.¹⁰¹ Although it is just as great a harassment of the individual as where the retrial is under the same statute, it is less violative of *judicial* order to retry a man under two statutes differing in gravamen. If this "same conduct" test is incorporated in the fifth amendment it would require the Court to set aside a possible act of Congress which expressly provided that a man could be tried separately

approve on the ground that each of the three is "a separate offense." For example, one *Petite* was tried and convicted under 18 U.S.C. §§ 371, 1001 (1958) of conspiracy to make false statements to an agency of the United States in a deportation hearing. *Petite* paid his fine and served a two months sentence, which apparently was not long enough in the judgment of the federal prosecutors. So he was tried and convicted under 18 U.S.C. § 1622 (1958) for suborning the same perjury. *United States v. Petite*, 147 F. Supp. 791 (1957), *aff'd*, 262 F.2d 788 (1958). These two federal court opinions show no trace of realization that double jeopardy might differ from double punishment. The conviction, however, seemed unjust to the Attorney General. On his motion, arguing that the double prosecution was unfair and contrary to the policy of the federal government, the case was dismissed. *Petite v. United States*, 361 U.S. 529 (1960). *Cf.* note 83 *supra*.

⁹⁷ *In re Nielsen*, 131 U.S. 176 (1889). See also 15 AM. JUR. *Criminal Law* §§ 381, 386, 388 (1938).

⁹⁸ See his separate opinion in *Abbate*, 359 U.S. at 196-201; Kirchheimer, *The Act, the Offense and Double Jeopardy*, 58 YALE L.J. 513, 532 (1949); Note, 11 STAN. L. REV. 735, 743-45 (1959).

⁹⁹ Cumulative sentencing for each statute violation would still be available by presenting all the offenses at the same trial. See note 96 *supra*.

¹⁰⁰ MODEL PENAL CODE § 1.08(2), comment (Tent. Draft No. 5, 1956).

¹⁰¹ See 15 AM. JUR. *Criminal Law* § 380 *et seq.* (1938). *Cf.* *Hoke v. People*, 122 Ill. 511, 13 N.E. 823 (1883), referred to in note 56 *supra*.

for an ordinary assault and for interfering with the right to vote.¹⁰² That would seem to be going too far. A fortiori it is not likely that due process under the fourteenth amendment will be found violated by what has failed to shock the conscience of so many judges. Legal history shows that it has not been deemed basically uncivilized to retry a man for the same act when it is for violation of a statute having a different substance, gist, policy or gravamen.¹⁰³

However, it must, as we have argued,¹⁰⁴ violate the fourteenth amendment to retry a man for essentially the same conduct under a statute which is essentially the same as the statute under which he was tried the first time. Surely due process does not depend upon the verbal identity of two statutory provisions. Form must not be allowed to destroy substance—as it would if duplicate prosecutions were permitted by reason of such minor differences as those in my illustrations of overlapping robbery and narcotics offenses.¹⁰⁵

It is beyond the limits of this article to go into the technique of determining whether two statutes are the same in essence, protect the same social inter-

¹⁰² We are thus assuming that the same conduct violates two quite different statutes, as in the classic illustration of selling liquor to a minor on Sunday. So that our topical example may avoid jurisdictional problems between a state and the nation, we will assume that both statutes and both prosecutions are federal and the affray took place in a national park, where citizens may vote. See *Bowen v. Johnston*, 306 U.S. 19 (1939); *Arapajolu v. McMenamin*, 113 Cal. App. 2d 824, 249 P.2d 318 (1952). Therefore, the act on its surface is an ordinary assault in violation of 18 U.S.C. § 113 (1958). We will assume that our defendant has either been acquitted under that section or has been given a small fine. Can he be retired for interference with the right to vote under a court order protected by the Civil Rights Act of 1960, 18 U.S.C. § 1509 (Supp. II, 1959-60)? To do so would obviously violate the "same conduct" test. But here, unlike the bank robbery statutes, the two statutes involved are quite different in gist and purpose. One is essentially to protect the person of the citizen and to promote public order. The other is to prevent interference with the right to vote and to promote its free exercise. The two statutes have different policies and protect different federal interests. Embodying the "same conduct" test in the Constitution would go so far as to require setting aside a possible act of Congress that expressly provided that a man could be tried separately for an ordinary assault under § 113 and for interfering with the right to vote under § 1509. In the absence of such a statute the Court, if it wished to follow Mr. Justice Brennan's advocacy of the "same conduct" test, could prevent double jeopardy by using the common law background as a manifestation of the Court's role "in formulating standards for the administration of criminal justice when Congress has not specifically legislated. . . ." See notes 52 and 77 *supra*. But I believe that the Court, and also state supreme courts in dealing with state law, is only *bound* to do so where the two statutes involved have the same gist and purpose.

¹⁰³ The "same conduct" test has always been deemed inapplicable to the recognition of foreign judgments, civil or criminal, where the local policy is genuinely different from that of the foreign jurisdiction. For example, the provisions of the French Code forbidding international double jeopardy exclude cases of national security. See note 86 *supra*. The judgment of a foreign country must also pass the test of whether the foreign proceedings are sufficiently civilized to give substantial justice "upon an analogy to the requirements of due process of law." *STUMBERG, CONFLICT OF LAWS* 133 (1951); *Coumas v. Superior Court*, 31 Cal. 2d 682, 192 P.2d 449 (1948).

¹⁰⁴ See pp. 595-97 *supra*.

¹⁰⁵ See note 96 *supra*.

ests, or have the same gist, policy or gravamen for purposes of double jeopardy. The task is a heavy one but it cannot be evaded. It must be faced by the courts in interpreting both the common law and the due process provisions of the federal and state constitutions.¹⁰⁶ Otherwise the ancient right against double jeopardy will become an empty formalism. "In passing upon constitutional questions the Court has regard to substance and not to mere matters of form."¹⁰⁷ To prevent a constitutional right from being evaded by indirection is the high function of the Supreme Court of the United States.¹⁰⁸ That function can be performed only if the courts recognize the seriousness of the double jeopardy principle.

DOUBLE JEOPARDY BETWEEN THE STATES

How ought one state of the United States regard the criminal judgments of another? *Bartkus* at first sight seems to be a precedent for disregard. *Bartkus* rests on federalism; the states' relations to each other are part of federalism. But without going into the subject extensively, let us look a little further. This article insists that double jeopardy is a violation of due process; that *Bartkus* and *Abbate*, not denying it, decided that the nation-state relationship requires in those cases a particular exception to principle. Exceptions to principle should, of course, be restricted to the necessary. Is the exception necessary as between state and state? There the balance is less delicate than between state and nation. There, too, the principle of full faith and credit weighs heavily in the other direction. There is good reason for a state to respect the criminal as well as the civil judgments of its sister states.

Here, too, the gist of the statutes is to be examined. The rule of looking solely to the defendant's conduct will again be found to be a good guide for state legislative action, or even for state judicial supervision of its criminal procedure, but as a constitutional rule it is unsuitable, since, as is well established, a state need not respect the civil (or penal) judgments of a sister state when they are contrary to its policy. Whether the statute has a different policy from that of the similar statute of the other sovereignty may be a crucial matter. But it would seem that where there is no difference in policy the Supreme Court should, under the requirements both of due process and of full faith and credit, prevent Illinois, for example, from trying over again a man who had been finally acquitted or convicted in Iowa for a homicide committed on a steamboat in the Mississippi River, where the two states have

¹⁰⁶ Also in interpreting statutes. "The proper solution of that [difficult] problem [whether the federal and state statutes are so much alike as to bar a second prosecution under the New York statute] frequently depends upon a judgment of the *gravamen* of the state statute." *Bartkus*, at 138 (emphasis added). Cf. *Coumas v. Superior Court*, 31 Cal. 2d 682, 192 P.2d 449 (1948).

¹⁰⁷ *Near v. Minnesota*, 283 U.S. 697, 708 (1931) (Hughes, C.J.).

¹⁰⁸ *Smith v. Allwright*, 321 U.S. 649, 664 (1944); *Cooper v. Aaron*, 358 U.S. 1, 17 (1958). It is not as difficult a task for the Court as balancing federalism against due process.

current jurisdiction.¹⁰⁹ Such a constitutional rule was forecast by Justice Brewer in his dictum for a unanimous court:

Where an act is *malum in se* prohibited and punishable by the laws of both States, 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 the one State cannot be prosecuted for the same offense in the courts of the other.¹¹⁰

Implicit in Brewer's statement is a realization of the basic value of the double jeopardy principle. If such realization were general, judges would not be so ready to undermine the principle by subjecting people to retrial on the ground that the Constitution does not prevent it or because two statutes differ in some inconsequential way.

¹⁰⁹ *But see* Phillips v. People, 55 Ill. 429 (1870).

¹¹⁰ Nielsen v. Oregon, 212 U.S. 315, 320 (1909).