

THE ACT, THE OFFENSE AND DOUBLE JEOPARDY

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CRIMINAL legislation necessarily operates on an abstract level, for the statutorily-created offense is only a categorization of the great variety of anti-social acts possessing certain specified characteristics. Inherent in this distinction between the general and the particular, the offense and the act, is the possibility that a single act will fit more than one offense category. For example, if a defendant who has never seen a medical school has committed an abortion, for what shall we bill him—for abortion, for practicing medicine without a license, or both? The mere existence of this act-offense dichotomy provides a resourceful prosecutor with the potential for cumulation of punishment and avoidance of constitutional guarantees against double jeopardy.

If the act-offense dichotomy threatened no more serious consequences than the possible cumulation of consecutive terms of punishment, there might be little cause for complaint. Indeed, such cumulation of punishments provides a useful tool for court enlargement of sentencing power beyond the somewhat mechanical frames laid down in the individual penal statutes. Any injustice which might arise from manipulation of a single fact situation to yield several convictions based on different offense theories (whether brought simultaneously in the separate counts of a single indictment or successively in separate indictments) could then be remedied by either the sentencing judge or the pardoning power: ¹ the former being able to mitigate punishment by making different prison terms run concurrently, the latter being in a position to modify excessive punishment where consecutive terms have been imposed. There is even a slim possibility that the Eighth Amendment, which proscribes "cruel and unusual punishment," might be invoked.²

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1. *Badders v. United States*, 240 U.S. 391 (1916); *Samsone v. Zerbst*, 73 F.2d 670 (10th Cir. 1934).

2. The notion of "cruel and unusual punishment" is an echo of 17th and 18th century doctrine. See BOEHMER, *OBSERVATIONES SELECTE AD BENEDICTI CARRZOVII NOVAE RERUM CRIMINALIUM* (1759) questio 132. In the United States, the Eighth Amendment has found more favor with defense counsel than with the courts. For an extensive discussion of the history of the Eighth Amendment, see Justice McKenna's opinion in *Weems v. United States*, 217 U.S. 349, 357 (1909) (dwells mainly on the amendment as a restraint upon the legislature). The applicability of the Eighth Amendment to the question of the execution of pun-

Unfortunately, however, neither form of scrutiny outlined above can come into play until after the first trial has ended with a conviction. If a new indictment is drawn after an acquittal, the old facts being rearranged to fit a new offense theory, the defendant is forced to stand trial once again.

Thus, not only may prosecutors use one act to fit several separate counts of the same indictment; they may frame successive independent indictments from the variety of offense schemes applicable to the particular facts. If the prosecution was either negligent, or cautious enough not to play its entire hand in the initial prosecution, to what extent is it to be permitted to use the act-offense dichotomy in order to present an acquitted defendant with a brand new indictment? May the same act be seized upon as often as ingenuity can produce a new offense scheme? Or is there a certain point at which the prosecution's right to try the defendant for the same act becomes exhausted? And what of society's interest in avoiding the waste of repetitive litigation? Such problems root deep, yet are regularly confronting our courts as defendants seize them with their pleas of double jeopardy.

Some of these problems might be eliminated by establishing new offense schemes which would fit each fact situation more closely. However, the more the legislator individualizes offenses, the more likely he is to create potential new gaps which will be brought out by slight variations in the fact situation; and the basic problem of simultaneous or alternative application of the different offense categories would be made even more complex.

A more practical solution might be to intrust the entire problem to

ishment is altogether denied in the majority and concurring opinions of *State of Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459, 464, 470 (1947). Theoretically the applicability of the Eighth Amendment to the cumulative enforcement of a "great number of criminal sanctions" has been asserted by Justice Frankfurter, concurring in *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 556 (1942). However, there the matter rests, although opinions have repeatedly stressed the undesirability of cumulative sentences. See *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925); *Beckett v. United States*, 84 F.2d 731 (6th Cir. 1936) (emphasizing, however, that such practice does not constitute error and indicating that relief lies with the pardoning power); *Ginsberg v. United States*, 96 F.2d 433, 437 (5th Cir. 1938). But see *Amendola v. United States*, 17 F.2d 529 (2d Cir. 1927) (a procedural technicality is seized upon *expressis verbis* in order to reverse judgment which had swelled a single offense into several by charging it in different ways). See also Note, 45 HARV. L. REV. 535 (1932). A stricter measure is sometimes adopted when excessive punishment is inflicted on the authority of city ordinances, but the cases turn more on the validity of the ordinances as a justified exercise of police power; the cruel and unusual punishment issue is more in the nature of an auxiliary argument. *Edward & Browne Coal Co. v. Sioux City*, 213 Iowa 1027, 240 N.W. 711 (1932); Note, 138 A.L.R. 1218 (1942). The prohibition of "excessive and unusual punishment" has recently entered German jurisprudence via para. 2(4) of ACC proclamation no. 3 of Oct. 20, 1945; as regards the so far inconclusive results *cf.*, GELHAAR, DIE GRAUSAME UND UEBERMAESSIG HOHE STRAFE DEUTSCHLAND, 2 DIE SPRUCHGERICHTE 338 (1948).

the prosecution which shapes the indictments, the courts acting as final arbiters of the offense schemes to be applied. But the inelastic approach of the judiciary to double jeopardy pleas in the past indicates that they may not prove to be reliable overseers. Courts have generally ignored such pleas, relying on a stereotyped formula, the "same evidence" test, which prescribes denial of the double jeopardy contention if the second charge is so drawn as to be hypothetically provable by different evidentiary facts. As presently used, the test leads not only to unpredictable results, but also is slowly eroding a procedural objective which deserves to be upheld—the finality of criminal judgments. Unavoidable though the act-offense dichotomy may be, we should not permit its being manipulated so as to endanger this objective.

Despite the unsatisfactory interpretation now being given by the courts to the concept of double jeopardy, that approach to the act-offense problem has the distinct advantage of attempting to prevent a second trial for the same criminal act, thereby eliminating the social cost of successive prosecutions. It would seem, therefore, that double jeopardy doctrine is in need of new content. To this task, both substantive law and procedure must make their contributions.³ Substantive law is delegated the problem of disentangling the difficulties of the coexistence of act and offense—the criminal result as it appears in fact and the attempt of the criminal law to put such result in a conceptual straitjacket. Procedure, on the other hand, has the assignment of providing devices which are sufficiently flexible to handle a variety of circumstances ranging, on the one hand, from the application of many offense categories to a single fact situation; and on the other hand, to the application of one offense scheme to many fact situations. Therefore, if only for pedagogical reasons, two questions should be treated separately: first, we shall ask how many offense categories of the criminal law should be applied or excluded from application in a given situation; and second, we shall ask what procedural rules should apply whenever the act-offense dichotomy makes its appearance.

SUBSTANTIVE ANALYSIS OF THE COMPETITION AMONG OFFENSE CATEGORIES

The legislatures or commissions which draft criminal codes are rarely omniscient. Their work is transmitted from one generation to

3. Horack, *The Multiple Consequences of a Single Criminal Act*, 21 MINN. L. REV. 805, 806 (1937). Note, 24 MINN. L. REV. 522, 558 (1940). The concept of double jeopardy and the manifold unsuccessful attempts to determine the concept of same offense by means of a study comparing the old and the new indictments, or the several counts of one and the same indictment, are characteristics of the steady flow of decisions in the field. See RESTATEMENT, DOUBLE JEOPARDY (Official Draft 1935), comment to § 5; Horack, *supra*; Note, 24 MINN. L. REV. 522, 556 (1940).

another in piecemeal fashion, always with the prospect that the next generation will add handsomely to statutes—quite often without bothering to weed out obsolete ones or to harmonize the old with the new.⁴ But even when the bulk of criminal law is laid down in a carefully framed code, it is unlikely that an easy solution will be provided for the problem of competing offense categories.⁵

When such problems have arisen, several paths of interpretation have been followed by the courts in their attempt to find some indication of legislative intent. In most Anglo-American jurisdictions, the mere presence of several distinguishable statutory provisions gives proof of a legislative intent to "place a condemnation upon each distinct, separate part of every transaction."⁶ Such a view does not rest on an articulated legislative intent but on the inference that when the legislature formulated several provisions, each of which could be applied to the same facts, it implicitly ordered that such provisions should be applied cumulatively. But the opposite conclusion may easily be and has been drawn from legislative failure to provide specifically for such contingencies.⁷ Of course, there are some few instances where express provision has been made for separate punishment of individual phases of a criminal undertaking—phases which, though logically separable, seem always to appear in the same configuration.⁸ In the overwhelming number of cases, however, no clear legislative intent exists. The task of ascertaining whether one or several offense schemes should apply then becomes a judicial one which the courts constantly perform behind the veil of their procedural tests.

Unfortunately, courts have not always had a clear-cut classification of offenses ready at hand to assist them in their task. Certain characteristics seem to appear often enough to warrant a classification of criminal statutes into four categories: alternativity, specialty, consumption or subsidiarity, and cumulation or norm competition. Under varying labels, these divisions have been refined, but the advantage of a more detailed subdivision seems to be outweighed by the apparent practicability of these categories.⁹

"Alternativity" refers to the mutually exclusive quality of certain

4. See, e.g., *State v. Calcutt*, 219 N.C. 545, 556, 15 S.E.2d 9, 18 (1941).

5. See note 140 *infra*.

6. *Burton v. United States*, 202 U.S. 344, 377 (1905); *Morgan v. Devine*, 237 U.S. 632 (1914); *Bozza v. United States*, 330 U.S. 160 (1947); *Fleisher v. United States*, 91 F.2d 404 (6th Cir. 1937); *People v. Devlin*, 143 Cal. 128, 76 Pac. 900 (1904).

7. See *State v. Cooper* 13 N.J.L. 361 (1833).

8. E.g., N.Y. PENAL CODE § 406, MISS. REV. STAT. (1939) § 4448; *United States v. Glidden*, 78 F.2d 639 (6th Cir. 1935); *People v. Snyder*, 241 N.Y. 81, 148 N.E. 796 (1925) *aff'g* 214 App. Div. 742, 209 N.Y.Supp. 898 (3d Dep't 1925); for further statutes, see RE-STATEMENT, DOUBLE JEOPARDY (official Draft 1935) comment to sec. 22, IV(a).

9. For a detailed analysis see HONIG, STUDIEN ZUR JURISTISCHEN & NATUERLICHEN HANDLUNGSEINHEIT (1925).

offenses—the application of one logically excludes the application of another to the same factual situation. A defendant has committed either murder or manslaughter;¹⁰ he may have secured control over someone else's property by larceny or by receiving stolen goods,¹¹ by larceny or by false pretenses.¹² Ascertainment of whether the defendant has violated the one or the other proscription¹³ may hinge on little more than a choice between two possible sets of legal constructions. For example, a finding of premeditation rather than negligence is a judicial evaluation of evidence, not an element of the evidence;¹⁴ nevertheless, such a finding will rule out the possibility of manslaughter. Murder and manslaughter are, therefore, mutually exclusive offenses—their relationship is that of "alternativity."¹⁵

While a cumulative application of various offense schemes is logically ruled out in "alternativity" cases, no such clear-cut "either-or" relation exists in the other types of offense categories. Often, several legal prescriptions are applicable to the same factual situation. In such cases, medieval Italian doctrine supplied the principles of "specialty" and "consumption" as the basis for elimination of competition among offense schemes.

The "specialty" principle is grounded in the maxim that if two norms are one to the other as *lex specialis* is to *lex generalis*, only the former applies.¹⁶ Thus, since a bank robbery fits the statutory definition of bank robbery as well as robbery, it might be classified as both. However, the statute which is specifically directed against bank robbery will be applied to the exclusion of the more general robbery statute. To add a number of examples coming under this rule: assault appears to be *lex generalis* if compared with an assault with intent to commit a felony.¹⁷ There may, of course, be a further subdivision, and assault with intent to commit a felony may in its turn take the form of *lex generalis* as compared with assault on a female with intent to commit rape. The same rule would prevail in regard to the relation between larceny

10. 2 HALE, PLEAS OF THE CROWN 246 (1st Am.ed 1847).

11. See *George v. State*, 59 Neb. 163, 80 N.W. 486 (1899); *People v. Bigley*, 178 Misc. 552, 35 N.Y.S.2d 130 (Sup. Ct. 1942).

12. *Queen v. King*, 1 Q.B. 214, 219 (1897); *People v. Weil*, 243 Ill. 203, 90 N.E. 731 (1909) (false pretenses and confidence game); *Griffith v. Ohio*, 93 Ohio St. 294 (1915) (forgery and false check and false pretenses).

13. Childers, Note 32 J. CRIM.L. & CRIMINOLOGY 555 (1942).

14. *People v. Noblett*, 244 N.Y. 355, 155 N.E. 670 (1927); *People v. Stiller*, 255 App. Div. 480, 7 N.Y.S.2d 865 (1st Dep't 1938) *aff'd* 280 N.Y. 519, 19 N.E.2d 923 (1939).

15. *Dunn v. United States*, 284 U.S. 390, 400 (1931) (diss. opinion); *Bargesser v. State*, 95 Fla. 406, 116 So. 12 (1928) (one person cannot be both a thief and a receiver of stolen goods); *McCuiston v. State*, 158 S.W.2d 527 (Tex. Cr. App. 1942).

16. BARTOLUS, 3 ad.D. de accus. 43.2.14; SALICETUS, 10 ad. C.de accus. 9.2.9.

17. *Queen v. Elrington*, 121 Eng. Rep. 370, 373 (1861) (assault and battery—assault and battery accompanied by malicious cutting); 1 BISHOP, CRIMINAL LAW, § 1058,3 (9th ed. 1923).

and robbery,¹⁸ fornication and seduction,¹⁹ being intoxicated on a public highway and driving a vehicle on a public highway while intoxicated.²⁰ And the ill-assorted "necessarily included offense" category of Anglo-American practice²¹ also contains quite a number of cases covered by the rule *lex specialis derogat legi generali*.

The third and last type of case where the concurrent application of different norms should be excluded comes under the rule, *lex consumens derogat legi consumptae*, which, slightly broadened, might be styled, *lex primaria derogat legi subsidiariae*. There are many situations in which criminal behaviour, although apparently an entity, may be divided into different, independent parcels. Illustrative is the difference between attempted and consummated crime. The attempt has independent existence because, so long as a crime is still in the preparatory stage, there remains the possibility of withdrawal or failure.²² But once the crime has been committed, the preparation merges into the completely executed crime.²³ There has been scant acknowledgment of this principle of "consumption" or "subsidiarity" in our criminal practice. The relation between conspiracy and consummated crime, between burglary and larceny, between larceny and receiving stolen goods are instances in which its application has been denied. Conspiracy cases comprise the most important group. In logic, there is no reason why conspiracy should not merge into the consummated crime as under the old doctrine of merger. But, for some time, the conspiracy category has been the prosecutor's most cherished device for multiplying counts and for facilitating proof by establishing a consensus and thus adducing the knowledge of one partner as evidence against all.²⁴ The validity of the principle of vicarious responsibility is thereby accepted in criminal law.²⁵

18. *State v. Mikesell*, 70 Iowa 176, 30 N.W. 474 (1886).

19. *Hewitt v. United States*, 110 F.2d 1 (8th Cir. 1940). *But see* *United States v. Harris*, 26 F.Supp. 788 (S.D. Cal. 1939).

20. *Banks v. State*, 150 Ga. 73, 102 S.E. 519 (1920). *But see* Note 86 A.L.R. 1273 (1933).

21. 2 HALE, *op. cit. supra*, note 10, at 245-6; 4 BL. COMM. *315; for a recent criticism see Rutledge J. concurring in *District of Columbia v. Buckley*, 128 F.2d 17, 21 (D.C. Cir. 1942), *cert. denied*, 317 U.S. 658 (1942).

22. *State v. McLaughlin*, 121 Kan. 693, 249 Pac. 612 (1926).

23. Rules like the one contained in art. 22, § 260 N. Y. PENAL CODE allowing for conviction for an attempt, though the consummated crime was proven in trial, are to be considered as strictly procedural devices which cannot alter existing legal relationships between these norms. *See* *People v. Tavormina*, 257 N.Y. 84, 177 N.E. 317 (1931).

24. *See* *Bannon and Mulkey v. United States* 156 U.S. 464, 469 (1894) ("To require an overt act to be proven against every member of the conspiracy or a distinct act connecting him with the combination to be alleged, would not only be an innovation upon established principles, but would render most prosecutions for the offense nugatory."); Holman, *Evidence in Conspiracy Cases*, 4 AUST. L.J. 247 (1930); as regards the disadvantage for the defendant

None of the legalistic reasons advanced to prove the distinction between conspiracy and consummated crime seem to withstand critical analysis.²⁶ More weight has to be given, however, to the contention that the two offenses belong to a different hierarchy of value. The elevation of joint misdemeanor to the rank of felony by applying to it the sometimes harsher conspiracy statute has thus been defended on the assumption that the criminal combination may be of greater danger to society than the enterprise itself.²⁷ Such an argument would be much more persuasive if the doubling of counts for conspiracy and consummated crime were confined in practice to serious group schemes for cooperative law-breaking.²⁸

Addition of burglary to larceny counts seems only slightly less inveterate than the tendency to cumulate counts for conspiracy and for consummated crimes. The separate punishment of both, in the absence of express statutory authority to this effect,²⁹ is based on the theoretical possibility that the burglar may change his mind after having broken into the premises. He may, thus runs the argument, see his larcenous intentions frustrated and decide to commit rape.³⁰ But the rape which may be committed as a result of the unforeseen opportunity created by the "breaking and entering" should be sharply differentiated from the larceny which is the expected and planned outcome of the chain of interconnected actions which comprise the offense of burglary.³¹ In the first case, two entirely different crimes are involved; in the latter case, the rule *lex consumens derogat legi consumptae* should be applied because the larceny is the consummation of the burglary.³²

The *lex consumens* rule should also apply to the majority of those

see *Weiss v. United States*, 103 F.2d 759 (3d Cir. 1939); for some recent strictures to this practice see Rutledge J. in *Kotteakos v. United States*, 328 U.S. 750, 773 (1945); for a recent restatement of the official doctrine, see *United States v. Bayer*, 331 U.S. 532, 542 (1946).

25. But see *Pinkerton v. United States*, 328 U.S. 640, 648 (1945) (dissenting opinion); Note 16 Ford. L. Rev. 275 (1947); *Freeman v. United States*, 146 F.2d 978 (6th Cir. 1945) (conspiracy to sell narcotics and substantive offense held same offense).

26. *United States v. Rabinowich*, 238 U.S. 78 (1915) (rests on the possibility of non-consummation of the contemplated crime), see also *Rutledge v. United States*, 168 F.2d 776 (8th Cir. 1948) (conspiracy to escape by obtaining blades for sawing bars and attempted escape by sawing bars held different offenses).

27. *Sneed v. United States*, 298 Fed. 911 (5th Cir. 1924).

28. See Recommendations of the Conference of Senior Circuit Judges, in ANNUAL REPORT OF THE ATTORNEY GENERAL FOR 1925, 5, 6.

29. See note 8 *supra*.

30. *People v. Devlin*, 143 Cal. 128, 76 Pac. 900 (1904).

31. *People v. Pickens*, 61 Cal. App. 405, 214 Pac. 1027 (1923); *Mann v. Commonwealth*, 118 Ky. 67, 80 S.W. 438 (1904).

32. The principle is old: comp. Baldus D.9, 2 ad 1. Aquil., additio to l. 32.2: quandoque sunt plura crimina, quorum unum inest alteri vel ut antecedens et minus principale, ut insultus ad percussorem et tunc confunditur insultus, sicut pars confunditur in toto, et non retinet propriam naturam; quandoque crimina sunt distincta et tunc loquitur lex adversus.

cases where the legislator has attempted to carve out a variety of offenses from one and the same transaction. By varying the legal description so as to embrace the totality of possible ways and stages of performance, a host of semi-independent, yet "generically identical offenses," has been created.³³ They do not come under the *lex specialis* rule because this type of offense does not logically presuppose the simultaneous commission of the general offense; theoretically, they can be committed independently:³⁴ liquor may be sold illegally without possessing it,³⁵ narcotics may be shipped without possessing or selling them.³⁶ Thus, whenever one criminal act seems to include a later stage of execution of a particular criminal intent, the offense describing the earlier stage should merge into the offense describing the more complete state of the identical act.³⁷ In the overwhelming majority of these cases, therefore, the *lex consumens* or "consumption" rule would seem to apply.³⁸

Under that phase of the "consumption" rule discussed above, prior acts are merged in the final stages of the same criminal transactions. Such an approach must be contrasted with the cases in which a criminal act unites with, and merges in, a *prior* one. When a thief has stolen cattle, can he be punished a second time for marking the cattle with his brand? The question has been answered in the affirmative.³⁹ But it does not seem fair to punish the thief twice: the first time he is punished for the act of usurping a right; if afterwards he acts as if he were the legitimate proprietor, he is apparently being punished for the exercise of a function the illegitimate usurpation of which has already been the basis for his prior punishment. Individual acts by which he

33. *District of Columbia v. Buckley*, 128 F.2d 17, 21 (D.C.Cir. 1942) (concurring opinion) *cert. denied* 317 U.S. 658 (1942).

34. *Gavieres v. United States*, 220 U.S. 338 (1911); *Ex parte Rhinelander*, 11 F. Supp. 298 (W.D. Tex. 1935). For a criticism of the reliance on a "theoretical possibility of a totally irrelevant fact situation," see Comment, 40 YALE L. J. 462, 468 (1931).

35. *Albrecht v. United States*, 273 U.S. 1, 11 (1926).

36. *King v. United States*, 31 F.2d 17 (9th Cir. 1929), *aff'd* 280 U.S. 521 (1929).

37. *Cain v. United States*, 19 F.2d 472 (8th Cir. 1927); *Michener v. United States*, 157 F.2d 616 (8th Cir. 1946), *rev'd* 331 U.S. 789 (1946) (without opinion, three justices dissenting); *Commonwealth v. Heston*, 292 Pa. 501, 141 Atl. 287 (1928).

38. For a category of cases where the language of the statute allows for commission of one offense without commission of the cognate offense, see *La Page v. United States*, 146 F.2d 536 (8th Cir. 1945) (knowingly cause a girl to be transported for the purpose of prostitution—36 STAT. 825 (1910), 18 U.S.C. § 398 (1946); and knowingly persuade or induce any girl to go from one place to another for the purpose of prostitution—35 STAT. 825 (1910), 18 U.S.C. § 399 (1946)).

39. *People v. Kerrick*, 144 Cal. 46, 77 Pac. 711 (1904). For a recent discussion of the problem to what extent prior and subsequent acts are merged in the principal offense, see PETRZILKA, ZUM PROBLEM DER STRAFLOSEN NACHTAT, 59 SCHWEIZERISCHE ZEITSCHRIFT FÜR STRAFRECHT 161 (1945); HAFETER, LEHRBUCH DES SCHWEIZERISCHEN STRAFRECHTS, ALLGEMEINER TEIL 377 (2d ed. 1946).

asserts his domination would seem to belong to the category of related consequences for which he should be punished separately only if such action would also be prohibited to the legitimate proprietor.⁴⁰ The same argument would appear to apply to the much discussed relationship between larceny and receiving stolen goods.⁴¹

The principle of "consumption" or "subsidiarity" does not necessarily follow from a mechanical comparison of two sets of offenses, as does the "specialty" rule. It is not even necessary that the offense categories under comparison be closely related to each other. In many instances, the allegations seem to show scant connection and yet, the

40. *Spears v. People*, 220 Ill. 72, 77 N.E. 112 (1906).

41. It follows from the purpose of criminal statutes directed against larceny that the criminal attack against property inherent in larceny comes to its conclusion when the act of taking away the goods, has been achieved. The purpose of statutes directed against the receiving of stolen goods is "to provide for cases not included in the prescription against larceny and to punish those—when a larceny has been committed—who receive or conceal fruits of that crime, and to include a thief within that class would subject him for punishment twice for a same criminal transaction." *Smith v. State*, 59 Ohio St. 350, 52 N.E. 826 (1898); see also *People v. Ensor*, 319 Ill. 483, 142 N.E. 175 (1923); *People v. Jacobs*, 73 Cal. App. 334, 238 Pac. 770 (1925); *Bargesser v. State*, 95 Fla. 404, 116 So. 12 (1928); *People v. Bigley*, 178 Misc. 552, 554, 35 N.Y.S.2d 130, 133 (Sup. Ct. 1942) ("To say that one can feloniously again receive from himself to himself what he has already feloniously acquired by himself and taken unto himself is an absurdity. No legalistic formula nor legalistic reasoning can make possible that which is impossible."); *People v. Vitolo*, 271 App. Div. 940, 68 N.Y.S.2d 3 (1st Dep't 1947) (dissenting opinion); Note, 136 A.L.R. 1087 (1942). But see *State v. Webber*, 112 Mont. 204, 116 P.2d 679 (1941); *Application of Lyons*, 272 App. Div. 120, 69 N.Y.S.2d 715 (4th Dep't 1947), *aff'd*, 297 N.Y. 617, 75 N.E.2d 630 (1947). Since the receiver frequently took part in the preparatory stages of the larceny as an accessory before the fact, the question arises whether this exclusionary rule also applies to such situations. The cases are in conflict. See 136 A.L.R. 1087, 1095 (1942). If, as provided in numerous statutes, the accessory before the fact is punished as principal, no additional conviction for receiving stolen goods seems justified. In all other cases, however, the question does not seem to depend so much on the physical presence of the accessory at the moment of the execution of the larcenous act as upon whether the accessory could expect to acquire possession of the goods at some later time. If there was no proof that his taking possession of stolen goods at a later time was part of a scheme established prior to the execution of the larceny, conviction for receiving stolen goods seems justified; otherwise the receiver should be convicted as a principal. *People v. Brien*, 53 Hun 496, 6 N.Y.Supp. 198 (1st Dep't 1889); *Snider v. State*, 119 Tex. Crim. Rep. 635, 44 S.W.2d 997 (1931); *People v. Vitolo*, 271 App. Div. 940, 68 N.Y.S.2d 3 (1st Dep't 1947) (dissenting opinion). But see *People v. Rivello*, 39 App. Div. 454, 57 N.Y.Supp. 420 (1st Dep't 1899); *State v. Webber*, 112 Mont. 284, 116 P.2d 679 (1941); *State v. Sheeley*, 63 Nev. 88, 162 P.2d 96 (1945). In its recent decision in *Paterno v. Lyons*, 334 U.S. 314 (1948) *aff'g* 297 N.Y. 617, 75 N.E.2d 630 (1947), the Supreme Court speaks of "the overlapping nature" of grand larceny and receiving. However, it is no more prepared than the lower courts to go so far as to assert that grand larceny would be necessarily included under a charge of receiving. The result, a refusal to vacate a sentence on a plea of guilty to grand larceny in the second degree resting on an original indictment of receiving, is entirely justified. Yet the decision has been reached by obfuscating the logical relationship between larceny and receiving rather than by frankly abandoning the theory that the defendant cannot be sentenced under any other legal theory than on the one under which he was originally indicted.

maxim *lex primaria derogat legi subsidiariae* may be applied. For example, if a human body is disinterred or a tombstone removed without authorization, the acts may be considered violations of a statute directed against the destruction of personal property or may be considered larceny. If, however, a statute is available for the punishment of illegal disinterment or removal of tombstones, there should be no doubt that the two types of statutes do not compete and that the invocation of one eliminates the other.⁴² The same non-competitive relation would seem to prevail between larceny and a statute penalizing the deflecting of electrical current.⁴³

The unifying element in the cases where "consumption" or "subsidiarity" may be called into play exists in the perpetrator's own mind and in his ultimate goal. Whatever appears to him as the principal object of his criminal endeavors becomes the main object of the law's protection. All other stages or aspects of his action, be they antecedent, simultaneous, or posterior, would assume independent significance only if their perpetration would endanger a different social interest; otherwise, they merge in the offense category protecting the interest towards which the main attention of the perpetrator is directed.

Despite outward appearances, only one offense exists in those situations where the principles of "alternativity," "specialty," and "consumption" or "subsidiarity" can be called into play. There is another class of cases, however, in which different legal norms enter into real competition for the punishment of the same act—only then does a cumulation of punishment seem logically justifiable.

Such a system of true norm competition apparently stems from the greater awareness of the act-offense dichotomy in mature bodies of law.⁴⁴ Illustrative is Mommsen's rationalization of Roman practice as rooted in the attempt to distinguish between the ethical foundations of offenses.⁴⁵ Only one indictment was permitted if the offenses were based on the same ethical foundation; if different ethical foundations were involved, then several indictments would lie. Take the relationship between incest and adultery, or that between robbery and murder.

42. *State v. Jackson*, 218 N.C. 373, 377, 11 S.E.2d 149, 152 (1940); see *People v. Christy*, 20 N.Y.Supp. 278 (Sup. Ct. 1892) (destruction of property vs. poisoning of animals). But see *State v. Magone*, 33 Ore. 570, 56 Pac. 648 (1899).

43. *United States v. Carlos*, 21 Philippine Reports 553, 612 (1911) (dissenting opinion). But see *People v. Menagas*, 367 Ill. 330, 11 N.E.2d 403 (1937).

44. HIS, *GESCHICHTE DES DEUTSCHEN STRAFRECHTS BIS ZUR KAROLINA* 48 (1928). In general, it may be said that the more primitive the law, the smaller the inclination to start such inquiries and the greater the preparedness to make the actor separately responsible for every external result of his activity.

45. MOMMSEN, *ROEMISCHES STRAFRECHT* 889 (1890); however the material from which Mommsen drew his rationalization—D.47.1.2; D.48.2.12; C.9.2.9.1—is in itself not free from contradiction; see also Hoepfner, 1 *Einheit und Mehrheit von Verbrechen* 7 (1901).

Interests are protected by the law for entirely distinguishable reasons. The prohibition of incest rests on the idea that sex relations between close blood relations should be avoided; prohibition of adultery, introduced under Augustus, protects the institution of marriage. Similarly, if a man lends money without a license and in doing so extorts usurious rates of interest, he contravenes two different norms. The public need for supervising money lending leads to its prohibition unless the lender has a license, whereas the proscription against usury serves to protect the individual borrower.⁴⁶ In such instances, legislation is concerned with the enforcement of two entirely distinct sets of rules. If these rules happen to coincide in an individual case, none of them should have precedence.

Of course, it is not always clear whether legislation actually protects different interests or whether a host of apparently independent offenses has been created in an attempt to catch up with new modes of undermining the same interest. If a drunken driver happens to be caught while driving without a license, should he be punishable under two offense schemes?⁴⁷ The answer seems to depend on the purpose of the licensing law. Norm competition would exist if the license were granted on payment of a fee without previous examination. The licensing law would then have a purely fiscal character and therefore be unrelated to and, in fact, compete with the life-protecting norm directed against drunken driving. But if some sort of an examination is required before the license is granted, the law may be considered to be of a mixed nature, both fiscal and life-protecting. It is then open to discussion whether the *lex primaria derogat legi subsidiariae* or the norm competition rule should be applied.⁴⁸

46. *People v. Faden*, 271 N.Y. 435, 3 N.E. 2d 584 (1936). The same relationship would seem to exist between performing an abortion and practicing medicine without a license. *People v. Johnson*, 82 Cal. App. 411, 256 Pac. 273 (1927). *But see People v. Weinstock*, 55 N.Y.S. 2d 309 (1937); and, between making false income tax returns and perjury in regard to the return, see *Levin v. United States*, 5 F.2d 598 (9th Cir. 1925), *cert. denied*, 261 U.S. 562 (1925).

47. *People v. Aldrich*, 191 N.Y.S. 899 (Cty. Ct. 1922). *But see People v. Starczewski*, 178 Misc. 160, 33 N.Y.S.2d 299 (Cty. Ct. 1941), *aff'd*, 287 N.Y. 826, 41 N.E.2d 99 (1942); *Garner v. State*, 31 Ala. App. 52, 11 So. 2d 872 (1943); Note, 172 A.L.R. 1053, 1062 (1948).

48. An interesting problem of norm competition has recently arisen in Germany concerning the relation of allied Control Council Law No. 10 (crimes against humanity) and the existing German provisions for murder, assault, etc. The question is of considerable importance as the A.C.C. law provides for milder punishment than the German law for murder. Judgments of the German courts show considerable variations. As the laws in question do not derive from the same legislature, the provisions may not be easy to harmonize with one another. However, both German and A.C.C. legislation have the goal of protecting life, and therefore the German code, to the extent to which it contains more specific provisions, would seem to have priority as *lex specialis*. On the whole problem see: Lange, *KONTROLLRATSGESETZ NO. 10 UND DAS DEUTSCHE RECHT*, 3 DEUTSCHE RECHTSZEITSCHRIFT, 185, 190 (Deutschland 1948).

Although the solution of such borderline cases may sometimes remain in doubt, their very existence brings into sharper focus the main criterion for determining the presence of true norm competition—the discovery of separable social interests sought to be protected by the different provisions of the law.

Within the field of norm competition, one special situation should be mentioned. If one and the same act adversely affects the interests of different people, the principles governing norm competition should apply. In disposing of mortgaged property to the detriment of the mortgagee, the statutory offense against the mortgagee competes with the fraud against the buyer.⁴⁹ Though both interests affected are property interests, they pertain to two completely unrelated persons and derive from two quite distinct situations. As a result, there exists the possibility of the cumulative punishment inherent in the rule of norm competition.

Plurality of offense and the "act" concept

Hitherto we have dealt exclusively with cases where the actor's behavior presented itself in fact, though not in law, as a single act. It was the artificial device of the law to dismember this natural unity and parcel it out among any legal descriptions which seemed to fit it wholly or in part. But plurality is not always the creation of the law. If a person fires one shot killing three persons, it is not the legal definition but the interpretation of the concept "act" which determines the number of offenses to be attributed to the actor. But this "act" concept is elusive and full of intrinsic difficulties. Is it to be delineated by the muscular movement, the accompanying intent, or the outcome? Austin had difficulty in separating the consequences from the muscular movement and the corresponding will.⁵⁰

It seems preferable to ignore his lead and instead to emphasize the equal share of intent, physical movement and consequences.⁵¹ As Schopenhauer said: "Will and action are different only in the abstract. In reality they are one and the same. Every genuine, spontaneous act of the will becomes immediately apparent as an act of the body."⁵² Sometimes, of course, the law itself commands disregard of consequences and elevates the physical movement itself, regardless of the consequences, to the rank of consummated crime.⁵³ But usually, the

49. *McClure v. State*, 174 Tenn. 140, 124 S.W.2d 240 (1939).

50. AUSTIN, *PROVINCE OF JURISPRUDENCE* 165, 427 (4th ed. 1873).

51. Hitchler, *The Physical Element of Crime*, 39 DICK.L.R. 95, 100 (1934); Husserl, *Negatives Sollen im Burgerlichen Recht*, in *FESTSCHRIFT FUER PAPPENHEIM* 87, 95 (1931).

52. SCHOPENHAUER, *WELT ALS WILLE UND VORSTELLUNG* 120 (4th ed. 1873).

53. Hitchler, *op. cit.* *supra* note 51, at 106, 117.

legislator is silent and attempts at interpretation from the mere wording of the statute prove unsuccessful.⁵⁴

The American Law Institute's commentary on double jeopardy demonstrates that no generally accepted rationale exists for determining when several physical movements with but one success, or one physical movement with several successes or a successive chain of similar acts, should be treated as one or several offenses.⁵⁵ Nor has the steady flow of decisions led to a crystallization in one or the other direction. The granting or refusing of a new trial, the reversal or the affirmance of a conviction on plural counts, has been arrived at through a highly superficial course of rationalization. Courts have relied on single act, single intent, single or multiple consequence theories, not as methods of analytical inquiry, but almost exclusively in order to justify desired results.⁵⁶ However, as the various rationalizations have before been systematized, it would seem desirable to move at once to the procedural level.

PROCEDURE AND THE ACT-OFFENSE DICHOTOMY

Under existing procedure, a skillful prosecutor finds it easy to manipulate offense categories in such a way as to sidestep constitutional guaranties against double jeopardy. By framing indictments without being compelled to elect the particular statutory theory on which the charges are based,⁵⁷ he can provide for all possible contingencies. He may multiply the number of counts drawn from the one criminal act by splitting the single transaction into a string of offenses, each of which might be placed in a separate count; or by using the single act to build separate counts charging commission of different crimes, each count being based upon a slight variation of the fact pattern.⁵⁸

Possibly even more important is the power of the prosecutor to refuse to confront the defendant, in the one trial, with all the possible legal consequences of his anti-social behavior. He may choose from the

54. *Ebeling v. Morgan*, 237 U.S. 625 (1915); *McKee v. Johnston*, 109 F.2d 273 (9th Cir. 1936); *People v. Herbert*, 51 P.2d 456, 462 (1935) (dissenting opinion); *but see Johnston v. Lagomarsino*, 88 F.2d 86 (9th Cir. 1937).

55. RESTATEMENT, *op. cit. supra*, note 3 at 42.

56. See Horack, *op. cit. supra*, note 3.

57. REV. STAT. § 1024 (1875), 18 U.S.C. § 557 (1940), codified in FED. R. CRIM. P., 8, 13, 14; FED. R. CRIM. P. 9a; see also Second Preliminary Draft, FED. R. CRIM. P. 32 (1944). As regards state provisions for joinder of offenses see RESTATEMENT, CODE OF CRIMINAL PROCEDURE § 185 (1931), Commentaries at 588. For the British practice see KENNY, OUTLINES OF CRIMINAL LAW 552 (15th ed. 1936).

58. *Rex v. Hughes*, 20 Crim. App. R. 46 (1927) (if counts were alternative, conviction on all counts "absurd"); *Rex v. Lincoln*, (1944) 1 All Eng. L. R. 604 (decision on alternative counts to be left to jury). The court may, according to present practice, instruct the jury to convict on all or several counts except, of course, in cases falling within the categories of alternativity or specialty.

total fact picture only enough details to fit the offense scheme he wishes to present to the court. And in reserve, ready to be used to beset the defendant in a double jeopardy contest, are the remaining untapped details.

A verdict for the defendant may prompt the prosecution to bring a new trial, proffering a new theory based upon the reserve details mentioned above. To this, the defendant will almost invariably reply with a plea of double jeopardy. In like fashion, double jeopardy will be invoked by the defendant who has been convicted, in one trial, on several counts based upon a single criminal act.⁵⁹ Courts tend to treat both these situations in the same way. However, despite the fact that the basic issue of double jeopardy is identical in either case, the impact of the first situation seems to be more considerable than that of the second. Suffering a complete new trial for substantially the same set of facts would seem to involve a larger question of principle⁶⁰ than the possibility of the defendant's serving an aggravated sentence because the court failed to consider the logical relationship of the various offenses and erroneously made the counts run consecutively. For example, take the case in which the defendant has been acquitted of the manslaughter of A, who was killed by the car the defendant was driving. If a new indictment is brought against the defendant for the killing of B who was also a fatality in the same accident, the defendant has to go through the anguish and expense of a completely new trial; a new jury will pass on a set of facts identical with the one adjudicated in the first trial with the exception of a change in the description of the victim. Should he then be convicted at the second trial, there will be little possibility that executive action can be invoked to nullify such conviction. In contrast, conviction on different counts gives the court

59. For cases where consecutive sentences on plural counts are attacked by a double jeopardy plea compare *Robinson v. United States*, 143 F.2d 276 (10th Cir. 1944) (one count conspiracy, three counts transporting three different girls in the same car for prostitution purposes—*rev'd*: "the same evidence test must be applied with some discrimination"; court applies the category of act rather than the category of offense to which lip service is rendered) with *United States v. St. Clair*, 62 F.Supp. 795 (W.D. Va. 1945) (identical fact situation decided on the basis of traditional distinct offense label and same evidence test). Under "one injury to the state theory," consecutive terms on plural counts of involuntary manslaughter and aggravated assault and also for manslaughter of two occupants of a car have been held improper: *Commonwealth v. McCord*, 116 Pa. Super. 480, 176 Atl. 834 (1935); *Commonwealth v. Carroll*, 131 Pa. Super. 357, 200 Atl. 139 (1938). There is a potential injury to the defendant even in concurrent sentences on different counts insofar as they may later serve as record of a previous offense with the meaning of second or third offender provisions.

60. *People v. Allen*, 368 Ill. 368, 14 N.E.2d 397 (1938), *appeal dismissed for want of jurisdiction*, 308 U.S. 511 (1939). But see Shaw's dissent, *id.* at 389, 407, "it must be borne in mind that under the rule announced a citizen may be tried an indefinite number of times for the same criminal act until a jury is finally found which will render a verdict suitable to the prosecution"; see also *People v. Brooklyn & Queens Transit Corp.*, 283 N.Y. 484, 496, 28 N.E.2d 925, 930 (1940); Note, *CHI-KENT REV.* 386, 388 (1939).

wide leeway to adjust the punishment to the crime; it seems fair to say, therefore, that the courts are treating on the same level two not entirely commensurable problems.

Same evidence test

In both the foregoing typical situations, there is little likelihood that the defendant will succeed in his plea of double jeopardy. Standing in his path is the "same evidence" test which has been a convenient loophole for prosecutors for almost a century. The test goes back to *Rex v. Vandercomb & Abbott*.⁶¹ In that case, the defendants had been charged with nocturnal breaking and entering followed by larceny at that time. As the facts were proven, however, it appeared that the larceny had actually been committed on a prior day. Since they had not been indicted for having stolen the goods at an earlier date, they were acquitted, the court reasoning that "the form of the indictment decides the question."⁶² A second indictment was then brought which charged defendants with breaking with intent to steal—thus, there was no need to prove any actual larceny. A conviction resulted at the second trial. In reply to defendant's contention that he had been placed in double jeopardy, the court ruled that:

"Unless the first indictment was such as the prisoner might have been convicted upon the proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second."⁶³

The motive behind this narrow construction was the desire to allow a changed legal construction to be applied to the same set of facts. The essential elements of the evidence had not changed. It was the same neighbor who testified in both proceedings. The difference lay only in

61. 2 Leach 708, 720, 168 Eng. Rep. 455, 461 (1796). While *Rex v. Sheen*, 2 C.&P. 634, 172 Eng. Rep. 287 (1827) and *King v. Clark*, 1 Brod. & B. 473, 129 Eng. Rep. 804 (1820) do not recognize the authority of the *Vandercomb* case, the doctrine seems firmly established in Great Britain since *Regina v. Reid*, 5 Cox C.C. 104 (1851); see, e.g., *Rex v. Kupferberg*, 13 Crim.App.R. 166 (1918) (conspiracy acquittal no bar for charge of aiding and abetting commission of crime). Later courts have used the converse of the *Vandercomb* rule in order to determine when two offenses are the same; the rule is stated to be that if the fact sufficient to support the second indictment would have warranted a conviction on the first indictment the two offenses are the same; see, e.g., *State v. Brownrigg*, 87 Me. 500, 33 Atl.11 (1895).

62. 2 Leach 708, 711, 168 Eng. Rep. 455, 457 (1796).

63. 2 Leach 708, 720, 168 Eng. Rep. 455, 461 (1796); there are some utterances of eighteenth century legal writers to the same effect: 2 HAWKINS, PLEAS OF THE CROWN c. 35, 3 (1724); for an earlier case using the offense concept for the purpose of allowing a new trial, see *Rex v. Turner*, Kelyng 30, 84 Eng. Rep. 1068 (1664). But see *Rex v. Segar & Potter*, Comb 401, 90 Eng. Rep. 554 (1696) (indictment for burglary—taking money to considerable value—acquittal for variance (daytime); new indictment for breaking during daytime and taking to the value of five shillings; majority held "they could not be indicted anew for the same fact").

the change of the legal qualification—from burglary accompanied by larceny to burglary with *intent* to steal—made necessary by the fact that there was no proof of actual taking. The same evidence test does not purport, therefore, to ferret out any difference in the respective modes of criminal behavior. It compares the two indictments in order to determine whether the second indictment became necessary because the first judge failed to convict when he could have, if he had only explored all possibilities inherent in the first indictment. Only if the purpose of the second indictment could have been reached under the first indictment would double jeopardy attach to the new proceedings under the same evidence test.⁶⁴ As a 19th century decision expresses it:

"The question is not whether the same facts are offered in proof to sustain the second indictment as were given in the first trial, but whether the facts are so combined and charged in the second indictment as to constitute the same offense."⁶⁵

Apart from a number of qualifications and exceptions to be dealt with later, any one of the numerous variants of *Rex v. Vandercomb* is still the majority theory for determining the existence of double jeopardy.⁶⁶ The comparison between separate counts or indictments, as the case may be, remains decisive.

Basic to an understanding of the same evidence test is the idea that the defendant is indicted not for reprehensible action in the past, but only for a definite offense, carved out by the prosecution from the incriminating historical incident. When the allegedly criminal act is brought under the legal theory, it loses its natural character and becomes part of the world of legal fiction. Some of its elements are cut off as legally irrelevant; others of secondary importance in the history of the perpetrator are played up; all this in order to fit the legal jacket in which the prosecution wants to present the crime. This procedure is not without its dangers. The legal theory advanced in the indictment may prove untenable in the light of the partial reenactment of the story in court. But why is this transformation from the realm of the original transaction to the legal category of the specific crime not of a tentative nature only? Why is it not understood only as an attempt at categorization subject to modification at a later stage of the trial so long as the basis, the incriminating act, remains the same?

The answer must be sought in the test's historical development. It belongs to the heritage of extreme formalism transmitted to its heirs

64. This *clausula salvatoria* is already in essence contained in *Rex v. Vandercomb's* criticism of the *Turner* case, 2 Leach 708, 718, 168 Eng. Rep. 455, 460 (1796).

65. *Commonwealth v. Clair*, 89 Allen 525 (Mass. 1863).

66. On these variants see Note, 7 BROOKLYN L. REV. 79, 83, 86 (1937); Comment 57 YALE L. J. 132, 134 (1947).

by 18th century criminal procedure. Invention of the same evidence test furnished courts, hemmed in by a rigid procedure, with an extremely useful technique for allowing new proceedings against those who had been acquitted because of the difference between allegation and proof-variance. Thus, the formalism of procedural devices favoring the defendant,⁶⁷ like variance, was checked by the adoption of the equally formalistic device which favored the prosecution—the same evidence test. Apparently, the test was a tortuous attempt to escape the restrictions inherent in the offense category and instead to assure the prosecution that the totality of criminal activity would be available for use against the defendant.⁶⁸ Comfort was also given to the prosecution by the constitutional doctrine of the time. The “nature and cause” of the accusation which had to be communicated to the defendant were interpreted in the light of the offense concept rather than related to the broader act category.⁶⁹ The prosecuting agency could therefore safely restrict the factual recital of the defendant’s misdeed to those fragments which fitted the theory it chose to proffer in the indictment. Constitutional dogma and judicial creation thus merged—the result was frequent avoidance of the double jeopardy rule by invocation of a new theory in a subsequent indictment.

Limitations of the same evidence test

Courts soon began to realize that strict application of the same evidence test would force them to refuse to grant defendant’s pleas of double jeopardy in the overwhelming majority of cases—often unjustifiably. Some attempt was therefore made to limit the consequences of the test’s application. Four major approaches are discernible: (a) the “necessarily included offense” rule, (b) specific legislative enactments, (c) the “Rutledge doctrine,” and (d) the maxim of *res judicata*.

a) *Necessarily included offense rule*. The first limiting qualification would seem to arise from the various greater-lesser offense and “necessarily included” offense concepts. But it hardly qualifies as an “accepted escape”⁷⁰ because it applies to only a small number of cases, and categories covered by it remain uncertain. For example, it does not encompass those cases in which the commission of one offense ordinarily presupposes the commission of another associated offense⁷¹

67. For the criticism of a then contemporary author, cf. 2 HALE, PLEAS OF THE CROWN 193 (1694).

68. Hall, *Objectives of Federal Criminal Procedural Revision*, 51 YALE L. J. 723, 740 (1942).

69. *Rex v. Wilkes*, 4 Burr. 2527, 2568, 98 Eng. Rep. 327, 351 (1770); *ex parte Bain*, 121 U.S.1 (1886).

70. Rutledge, J. in *District of Columbia v. Buckley*, 128 F.2d17, 21 (App. D.C. 1942) (concurring opinion), *cert. denied*, 317 U.S. 358 (1942).

71. See discussion of “consumption” on page 518 *supra*.

—hence the many attempts to bring the latter class within the purview of the recognized exceptions to the same evidence rule.⁷² So also, this exception to the same evidence test does not seem to include the relation of manslaughter to the cluster of offenses connected with the keeping and driving of motor vehicles, which were created to minimize the danger of manslaughter;⁷³ acquittal on the manslaughter charge does not mean the lesser offenses will not be called into play later.⁷⁴

Moreover, a host of additional difficulties arise whenever the first indictment included only the lesser offense.⁷⁵ Courts have barred prosecutions for the greater offense after a prior trial for the "included" offense; and statutory provisions directing judges to remand cases where the facts proved would constitute a greater crime—in order to have the defendant reindicted for the greater offense⁷⁶—have been ignored. However, a new trial will not be barred if the consequences of the criminal act, which become apparent only after the first trial, are likely to result in a higher qualification of the same act.⁷⁷ A majority of courts likewise refuse to grant double jeopardy pleas in cases in which the lower court lacked jurisdiction for the greater offense.⁷⁸

It seems that the "included offense" rule derives from a laudable attempt to protect the defendant but its lack of sharp logical contours has caused it to flounder in a hopelessly contested field of application.⁷⁹

72. See e.g., the "integrated" offense doctrine expounded in *People v. Weinstock*, 55 N.Y.S.2d 330, (Sup. Ct. 1945) (abortion—practice of medicine without license); see also *Cain v. United States*, 19 F.2d 472 (8th Cir. 1927).

73. *State v. Hiatt*, 187 Wash. 226, 60 Pac. 2d 71 (1936); Notes, 172 A.L.R. 1053 (1948).

74. *People v. Trantham*, 24 Cal. App. 2d 177, 74 P.2d 851 (1937); *Florida v. Bacon*, 30 S.2d 744 (Fla. 1947).

75. *People v. Crupa*, 64 Cal. App. 2d 592, 605, 149 P.2d 416, 424 (1944) (dissenting opinion).

76. *People v. Hunckeler*, 48 Cal. 331 (1874); *People v. Karney*, 81 Misc. 981, 44 N.Y.S. 2d 691 (Supp. Ct. 1943); Note 44 COL.L.REV. 87 (1944). But see *Bone v. State*, 43 Okl. Cr. Rep. 360, 279 Pac. 363 (1929) (implicitly recognizing power of court to discharge defendant for assault and to seek new indictment for murder).

77. *People v. Dugas*, 310 Ill. 261, 141 N.E. 769 (1923); *People v. Harrison*, 395 Ill. 463, 70 N.E.2d 596 (1947), see footnote 98 *infra*.

78. *Commonwealth v. Bergen*, 134 Pa. Super. 62, 4 A2d 164 (1939) (summary conviction for reckless driving in Magistrate's Court no bar against new prosecution for involuntary manslaughter in higher court). But see *People v. Trenkle*, 169 Misc. 687, 9 N.Y.S. 2d 661 (Cty. Ct. 1938) (conviction in city police court for the misdemeanor of corrupting child's morals bars new trial for attempted rape in higher court). Courts' decisions rarely rest exclusively on one or the other theoretical proposition; courts deny the plea if collusion or at least a too great amount of defendant's initiative in bringing the case before the lower jurisdiction is found. In contrast, in *People v. Trenkle*, *supra*, one of the main reasons for upholding the plea was the absence of collusions and the State's full-fledged consent to proceed before the Magistrate's Court. *Id.* at 696, 669.

79. For a survey of some of the exceptions "from the well established principle" of necessary inclusion see *People v. Herbert* 51 P.2d 456, 459 (Cal. Ct. of App. 1936) (dissenting opinion).

In its present state, it merely adds to the cacophony of muddled attempts to solve the act-offense problem.

b) *Legislative enactments.* The second restriction placed on the same evidence test is the outgrowth of specific legislative enactments. Penal codes of several states contain provisions barring a second prosecution for commission of an act which has been made criminal in several ways by separate provisions.⁸⁰ Such provisions do not lay down a rule of interpretation as to what part of the criminal behavior to disregard and what part to put on trial. Nor do they force the prosecuting authorities to elect the theory on which they wish to proceed.⁸¹ Nevertheless, such statutes clearly run counter to the same evidence concept; the category of act, not of offense, is used as a yardstick for excluding a second prosecution. Little wonder that this type of provision has been given little effect. A few scattered decisions take it at its face value, forbidding several sentences for identical acts, whether they are contained in new indictments or in plural counts.⁸² Other decisions have construed it as a legislative confirmation of the necessary inclusion doctrine, ordering the courts to sentence only under the count providing for the greatest punishment.⁸³ But most often, courts have shown a tendency either simply to disregard the statute or to brush it off as incompatible with the same evidence rule.⁸⁴

c) *The "Rutledge doctrine."* A novel attempt to narrow the application of the same evidence test has recently been undertaken by Mr. Justice Rutledge. Criticizing the accepted escape of the included offense doctrine and the prevalent stress on the theoretical rather than the factual separability of evidentiary facts, the Justice insisted on a broadening of the court's function.⁸⁵ He urged courts not to let matters rest with the determination of whether there exists a difference (ascer-

80. RESTATEMENT, DOUBLE JEOPARDY, Commentary to § 22 (Official Draft 1935).

81. An earlier decision to the contrary: *People v. Krank*, 110 N.Y. 488, 18 N.E. 242 (1888) reversing 46 Hun. 632 (Sup. Ct. 1888), dates before the adoption of N.Y. Code Crim. Proc. § 279a (1936).

82. *State v. Gutke*, 25 Id.37, 139 Pac. 346 (1914) (acquittal for selling beer to minors—selling beer in violation of local option statute); *People v. Fitzgerald*, 101 Misc. 695, 163 N.Y.S. 930 (Cty. Ct. 1917) (speeding, general highway law—city ordinance); *Crosswhite v. State*, 31 Ala. App. 181, 13 So.2d963 (1943) (assault with weapon—conspiracy for the purpose of preventing carrying on a lawful business).

83. *People v. Heacox*, 231 App.Div. 617, 247 N.Y.S. 464 (4th Dep't 1931); *People v. Murphy*, *People v. Goggin*, 256 App.Div. 995, 10 N.Y.S.2d 586-7 (2d Dep't 1919), *aff'd* 281 N.Y. 611, 22 N.E.2d 17 (1939); *People v. Green*, 30 Adv. Cal.R. 593, 606, 184 Pac.2d 512, 519 (1947) (lascivious acts and rape—statutory inclusion of any acts or crimes upon the body into lascivious acts for purpose of punishment; Cal. Pen. Code § 288 amend. 1937).

84. *State v. Empey*, 65 Utah 609, 239 Pac.25 (1925) (driving automobile when intoxicated—manslaughter); *People v. Skarczewski*, 178 Misc. 160, 33 N.Y.S.2d294 (Cty. Ct. 1942), *aff'd*, 287 N.Y. 826, 41 N.E.2d 99 (1942).

85. *District of Columbia v. Buckley*, 128 F.2d17, 21 (App. D.C. 1942) (concurring opinion), *cert. denied*, 317 U.S. 658 (1942).

tained via the same evidence test) between the charged offenses. Instead, they should further inquire whether the distinctions thus ferreted out are "strong enough to overcome the constitutional guarantee." The proposal would be attractive if it provided a yardstick as to what distinctions and refinements to consider slight or substantial. But as framed by Justice Rutledge, the test would still permit the difference between driving on the wrong side of the road and driving while intoxicated to be deemed substantial enough to warrant a new trial.⁸⁶ It is, moreover, subject to the basic and disquieting query: what has the number of differences between the various offenses into which a unified action can be split to do with the objective of protecting the defendant against multiple prosecution of the same criminal behavior?

d) *Res judicata*. The maxim of *res judicata* has contributed somewhat to narrowing the field of application of the same evidence test in double jeopardy cases. Few will deny that it is applicable in criminal cases⁸⁷ and that it may be used to support either the state's or the defendant's contentions.⁸⁸ It has been used to exclude multiple prosecutions against defendants who had injured several people by the same act⁸⁹ and has also been resorted to in cases involving both multiple consequence and self-defense aspects.⁹⁰ However, in the majority of multiple consequence cases, courts have failed to apply or even to discuss *res judicata*; instead, variants and combinations of the distinct offense and multiple consequent doctrines have been used to justify new prosecutions;⁹¹ when new prosecutions are not permitted, same transaction or single intent theories have furnished the justifying rationales.⁹²

Application of *res judicata* is hampered further by the fact that,

86. *Ibid.*

87. *United States v. Oppenheimer*, 242 U.S. 85 (1916); *Sealfon v. United States*, 332 U.S. 575 (1947); *Adkins v. Commonwealth of Virginia*, 175 Va. 590, 9 S.E.2d349 (1940); *Harris v. State*, 193 Ga. 109, 121, 17 S.E.2d573, 581 (1941). *But see* *Duvall v. State*, 18 Ohio App. 657, 146 N.E.90 (1924). See also McLaren, *The Doctrine of Res Judicata as Applied to the Trial of Criminal Cases*, 10 WASH.L.R. 198, 202 (1935); Note, 7 BROOKLYN L.R. 79 (1937); Note, 24 MINN. L.R. 522, 558 (1940).

88. *United States v. Meyerson*, 24 F.2d855 (S.D. N.Y. 1928); *People v. Majado*, 22 Cal. App.2d323, 70 P.2d1015 (1937).

89. *Jones v. State*, 66 Miss. 380, 6 So. 231 (1889).

90. *Spannel v. State*, 83 Tex. Crim. App. 418, 434, 203 S.W. 357, 364 (1918) (concurring opinion) (acquittal of bystander for manslaughter implies determination of self-defense in regard to death of person affected by said self-defense).

91. *State v. Taylor*, 185 Wash. 198, 52 P.2d 1252 (1936); *State v. Fredlund*, 200 Minn. 44, 273 N.W. 353, (1937); *People v. Allen*, 368 Ill. 368, 14 N.E.2d 397, (1938) *appeal dismissed for want of jurisdiction*, 308 U.S.511 (1939); *State v. Melia*, 231 Iowa 332, 1 N.W.2d 230 (1941); Note, 30 GEO. L.J. 574 (1942); in all four cases, acquittal for murder or manslaughter of one person was followed by a new trial for killing of another person as part of same act.

92. *State v. Cosgrave*, 103 N.J.L. 412, 135 Atl. 871 (1927) (based on *State v. Cooper*—identical act doctrine see note 7 *supra*).

without a special verdict in the first case, a dispute may arise as to whether the allegations advanced in the second trial had clearly been in issue in the first trial.⁹³ The appellate judge may feel that whether the first court actually decided a controverted question cannot be decided in advance but must be left to the new trial court, sitting at the second indictment.⁹⁴ Especially since Justice Holmes' defense of inconsistent verdicts on different counts, in his last opinion in *Dunn v. United States*, has the prospect of successfully limiting the same evidence test by *res judicata* become remote.⁹⁵ In that case, the Court had been asked to decide whether an acquittal for possessing and selling liquor and a conviction for the unlawful keeping of liquor for sale were compatible with each other. The only proof of the unlawful keeping was based on the one instance of possession and selling which had been conclusively negated in the verdict. Justice Holmes, relying on the same evidence test, brushed *res judicata* aside and arrived at the illogical but convenient solution that verdicts on different counts of the same judgment need not be consistent with each other. He covered up the result by insisting that findings of juries may not be disturbed, intimating at the same time that inconsistency may be convenient where the jury sees no other way to reach a compromise on the punishment they finally agree to inflict. Justice Butler's dissent,⁹⁶ resting on an integral application of the *res judicata* concept to the situation in question, has not left any trace in recent decisions.⁹⁷

Apparently, the hold of *res judicata* over the province of criminal law is an insecure and tenuous one.⁹⁸ It may and has occasionally been

93. *People v. Pearson*, 120 Misc. 377, 199 N.Y.S.488 (Cty. Ct. 1923); *State v. Coblentz*, 169 Md. 159, 180 A. 266 (1935); Note, 27 IOWA L. REV. 649, 652 (1942).

94. *United States v. Dockery*, 49 F. Supp. 907 (E.D. N.Y. 1943).

95. *Dunn v. United States*, 284 U.S. 390, 393 (1931).

96. *Id.* at 398, 403, 407 (dissenting opinion).

97. Although prior to the decision in the *Dunn* case, there was a conflict of opinion as to how far application of *res judicata* would lead to a reversal of inconsistent verdicts—*cf.* *Boyle v. United States*, 22 F.2d 547 (8th Cir. 1927)—the *Dunn* rule seems to have settled the question in favor of maintaining inconsistent verdicts in disregard of *res judicata*. *Pilgreen v. United States*, 157 F.2d 427 (8th Cir. 1946); *Downing v. United States*, 157 F.2d 738 (8th Cir. 1946); *Mogoll v. United States*, 158 F.2d 792 (5th Cir. 1947); *Wesson v. United States*, 164 F.2d 50 (8th Cir. 1947).

98. See *People v. Harrison*, 395 Ill. 463, 70 N.E.2d 596 (1947) (after acquittal of assault with intent to kill, conviction on new murder indictment based on supervening death of victim; approved because the defendant at the time of the first proceeding could neither have been prosecuted nor convicted for homicide; *res judicata* had not been specially pleaded). However, it seems dubious whether public policy would not have required the trial court to take notice of the former adjudication, even if the question had not been raised by the parties. See 2 FREEMAN, JUDGMENTS § 808 (5th ed. 1925). In the individual instance the first acquittal might have rested on the State's failure to prove homicidal intent; under the Illinois statute (Rev. Stat. (1945) c. 38, § 358) murder may be established without proof of intent to kill, so that a second prosecution would not have necessarily been stopped. Note, 47 COL.L.REV. 679 (1947); Note, 25 CHI-KENT REV. 243 (1947). For further restrictions of

resorted to as an escape from some unfortunate consequences of the same evidence test but, like the other limitations already discussed, it does not loom large in the search for a rational solution of the double jeopardy puzzle.

SUGGESTED SOLUTION OF THE ACT-OFFENSE PROBLEM: A MODIFIED
"SAME TRANSACTION" TEST AND LIBERALIZATION OF
AMENDMENT PRACTICE

While all these corollaries of the same evidence test lead only to a haphazard narrowing of its scope, the "same transaction test," adopted in some earlier British decisions⁹⁹ and also in a small and steadily diminishing number of American courts, goes farther¹⁰⁰ and provides an alternative solution. Under this test, a second prosecution is barred when the proof shows that the second case concerns the "same transaction" as the first. It is easily seen that this test, as it now stands, is a "defendant's rule"¹⁰¹ which would result in as much disadvantage for the state as the same evidence test now carries for the defendant.

The apparent disadvantage to the prosecution can be remedied by liberalization of amendment practice in criminal proceedings;¹⁰² the prosecution would then be permitted to amend the indictment as soon as a factual basis therefor is made out at the trial. Such a course would not only aid the court in its fact-finding process but would also assure that all possible legal constructions of the set of facts would be tried in the one proceeding.¹⁰³ Only in this way can development of fool-

the applicability of *res judicata* in cases where the first judgment was tinged with perjury, see *People v. Housman*, 44 Cal. App. 2d 619, 112 P. 2d 944 (1941), *cert. denied*, 314 U.S. 660 (1941); see also Note, 37 A.L.R. 1290 (1925).

99. *Wemyss v. Hopkins*, 10 Q.B. 378, 381 (1875) (cause damage to persons through negligent or willful behavior and assault deemed "same identical matter").

100. *Jones v. State*, 19 Ala. App. 600, 99 So. 770 (1924), *cert. denied*, 211 Ala. 701, 99 So. 926 (1924) (Possession of liquor for sale—possession of liquor); *Trawick v. Birmingham*, 23 Ala. App. 308, 125 So. 211 (1929), *cert. denied*, 220 Ala. 291, 125 So. 312 (1929) (speeding—driving an automobile while intoxicated); *Grumley v. Atlanta*, 68 Ga. App., 22 S.E.2d 181 (1942) (recognizes the same transaction test, but denies its applicability to two instances of disorderly conduct, committed at different places and with two to three hours interval between them); *People v. Webster*, 269 App. Div. 887, 56 N.Y.S.2d 155 (3d Dept. 1945) (Possession of burglary tools—unlawful entry).

101. Note 57 YALE L. J. 132, 137 (1947); see also Jones, *What Constitutes Double Jeopardy?* 38 J. CRIM. L. & CRIMINOLOGY 379, 384 (1947).

102. Note, 53 HARV. L. REV. 122, 127 (1939).

103. *Miller v. United States*, 133 Fed. 337, 347 (8th Cir. 1904). "It is seldom, if ever, that any pleading so clearly and concisely states the alleged facts that it might not be improved after the criticism of the assailant and the trial of a case. . . ." RADIN, *LAW AS LOGIC AND EXPERIENCE* 67 (1940) calls the reconstruction of the facts "the impossible thing"; FRANK, *IF MEN WERE ANGELS* 284 (1942) speaks of the "leaky character of 'facts' in law suits." *Williams v. United States*, 168 U.S. 382, 389 (1897); *United States v. Hutcheson*, 312 U.S. 219, 229 (1941); and *People v. Resnick*, 21 N.Y.S.2d 483 (City Mag.Ct. 1940) carry the principle that incorrect citation of statutes is immaterial if allegation of facts make

proof guarantees against repeated adjudication of the same transaction be assured.

In addition, the scope of permissible variance between allegation and proof—indictment and evidence—must be widened. Materiality of variance should depend exclusively on whether substantial rights of the defendant are affected. The admissibility or inadmissibility of a claim of variance can therefore not be answered in the abstract; it depends on the circumstances of the case, with remote contingencies excluded from consideration.¹⁰⁴ Given increased possibilities of amending charges and defenses, and a liberal allowance of variance, the act-offense problem would be far along the road to solution.¹⁰⁵

Any attempt at remedial action by way of amendment of indictments must meet the traditional requirement of grand jury participation in the formulation of indictments. If grand jury approval is necessary for indictments, any amendment as to substance also has to be submitted to the grand jury.¹⁰⁶ Under the influence of the *Wilke's* case¹⁰⁷ and the *ex parte Bain*¹⁰⁸ doctrine, current practice, illustrated by the federal rules of criminal procedure, differentiates between amendment of indictments and amendment of informations.¹⁰⁹ Only the latter may be amended, though even here the adding of a new offense is usually excluded.¹¹⁰ Occasional attempts have been made

a case under a different statute; not quite in harmony with the heavy emphasis on the offense category, these cases stress the alleged facts, not the cited offense, as controlling factors. Cf. Dession, *The New Federal Rules of Criminal Procedure II*, 56 YALE L. J. 197, 206 (1947).

104. *Berger v. United States*, 295 U.S. 78, 82 (1935). *But cf.* *Kotteakos v. United States*, 328 U.S. 750, 757, 777 (1946) which shows that there may be considerable dispute as to what constitutes "relevant" variance in conspiracy cases, when the attempt is made to establish one conspiracy by way of a "theoretical" consensus; see also *Brooks v. United States*, 164 F.2d 142 (5th Cir. 1947) utilizing the severer yardstick of the Supreme Court majority in the *Kotteakos* case. Outside the contested conspiracy field, no such difficulties exist in differentiating between relevant and irrelevant variance; see, e.g., *Nigro v. United States*, 117 F.2d 624 (8th Cir. 1941); *State v. Myers*, 118 W.Va. 397, 190 S.E. 678 (1937).

105. As far back as 75 years ago, a European observer found one favorable factor on the double jeopardy horizon—a growing insight into the interdependence of the double jeopardy problem and the radius of permissible variance. See Glaser, *Die Durchführung der Regel "ne bis in idem" im Englischen und Französischen Strafprozess*, 22 GERICHTSSAAL 1, 16 (1870).

106. *Commonwealth v. Snow*, 269 Mass. 598, 169 N.E. 542 (1930).

107. *Rex v. Wilkes*, 4 Burr. 2527, 2568, 98 Eng.Rep. 327, 350-1 (1770).

108. *Ex parte Bain*, 121 U.S. 1 (1886); see also *Jones v. Robbins*, 8 Gray 329, 342 (Mass. 1857).

109. *United States v. Fawcett*, 115 F.2d 764 (3rd Cir. 1940); *Edgerton v. United States*, 143 F.2d 697 (9th Cir. 1944); Note, 7 A.L.R. 1516 (1920).

110. FED.R.CRIM.P., 7(c) allows for amendment if no additional or different offense is charged and if substantial rights of the defendant are not affected. See *Muncy v. United States*, 289 Fed. 780 (4th Cir. 1923) (adding sales count to prior count charging unlawful possession of liquor and maintenance of a nuisance); *Walker v. United States*, 7 F.2d 309, (9th Cir. 1925) (adding manufacturing count to count charging possession of property designed for manufacture).

to whittle down the *ex parte Bain* doctrine,¹¹¹ but a frontal attack, based on allowing the court to amend the indictment by adding new counts describing the same transaction, has only been faced in one jurisdiction;¹¹² and judicial interpretation has largely emasculated that particular attempt.¹¹³

Nevertheless, a more liberal practice is beginning to develop in the very area which gave rise to the *ex parte Bain* doctrine—the partial striking of counts. In the *Bain* case, the court rested its opposition to such striking on the purely conjectural contention that the grand jury findings which supported the indictment might have been based on the stricken part.¹¹⁴ In contrast, recent cases look only to possible injury to rights of the accused as the criterion for permitting partial

111. See *Salinger v. United States*, 272 U.S. 542, 549 (1926) (withdrawal of all counts but one from the jury deemed no alteration of indictment); *Ford v. United States*, 273 U.S. 593, 597, 602 (1926) (striking out of a useless averment admissible, even though defense regarded it as the essence of the charge as formulated by the grand jury); *Ralston v. Cox*, 123 F.2d 196, 198 (5th Cir. 1941) (concurring opinion).

112. *Commonwealth v. Snow*, 269 Mass. 598, 169 N.E. 542 (1930) (statute allowing for unspecified amendment of indictment interpreted as intended to authorize only amendment of form). By N. Y. CODE CRIM. PROC. § 295 (j) upon the trial of an indictment, the court may, if the defendant cannot be thereby prejudiced in his defense on the merits, direct the indictment to be amended according to the proof. Postponement of the trial may be ordered—to be resumed before the same or such other jury as the court may deem reasonable and new counts may be added where it is made to appear that the crimes to be charged therein relate to the transaction upon which the defendant stands indicted.

113. Although decisions applying or refusing to apply § 295(j) of N.Y. CODE CRIM. PROC. may be conveniently distinguished from each other, the trend to narrow down its field of application, short of declaring it unconstitutional, is unmistakable. See *People v. La Barbera*, 159 Misc. 177, 287 N.Y.S. 257 (S.Ct. 1936), *rev'd on other grounds*, 249 App. Div. 254, 292 N.Y.S. 518 (S.Ct. 1936) (District Attorney's motion to change indictment from burning uninhabited building to burning building in curtilage of inhabited building denied, as grand jury minutes contain no reference to surroundings of burned buildings—no question of admissibility of change from one to another theory raised). Also see *People ex rel. Prince v. Brophy*, 273 N.Y. 90, 6 N.E. 2d 109 (1937) (discussing § 295(j) but resting mainly on defendant's consent to amendment). *But cf.* *People ex rel. Battista v. Christian*, 249 N.Y. 314, 164 N.E. 111 (1928) (waiver of grand jury indictment inadmissible); *People v. Resnick*, 21 N.Y.S. 2d 483 (City Mag.Ct. 1940) (amendment to complaint so as to embrace different sections of administrative code held admissible under § 295(j)). In addition, see *People v. Miles*, 289 N.Y. 360, 365, 45 N.E. 2d 910, 913 (1942) (new count charging contriving forbidden lottery on May 9th, added to counts charging contriving lottery on May 3d and bribing police officers on May 9th held to charge new transaction and to constitute substantive amendment forbidden by grand jury requirement); *People ex rel. Wachowicz v. Martin*, 293 N.Y. 361, 57 N.E. 2d 53 (1944) (grand larceny second degree indictment to which defendant pleaded guilty not included in receiving for which he was indicted, no amendment was sought therefore, conviction was had for entirely different crime than the one contained in the indictment—however, § 295(j) would at any rate, given grand jury requirement, not have conferred power of amendment).

114. *Ex parte Bain*, 121 U.S. 1, 10 (1887); *Dodge v. United States*, 258 Fed. 300 (2nd Cir. 1919); *Edgerton v. United States*, 143 F.2d 697 (9th Cir. 1944).

striking.¹¹⁵ Striking out part of a count is thus assimilated to the generally permitted withdrawal of the whole or part of the charge.¹¹⁶

Why not extend this liberalized practice of amendment (by striking parts of a count) to the more important area of amendment by adding a new count? Since the grand jury argument is the chief obstacle, it might be useful to inquire for a moment into the part played by that body in the formulation of the indictment. The grand jury takes no interest in anything but the broadest and most cursory outline of the facts as presented by the district attorney. It does not go into the details of the evidence assembled by the prosecution; and any idea that the grand jury, whether in colonial¹¹⁷ or modern days, ever concerned itself with the various theories under which a case may be presented, seems to confound an assembly of bewildered laymen with a law school seminar.¹¹⁸ According to available evidence, the grand jury has nothing to do with the technical drawing up of the charges. Wayne Morse reported in 1929 that in only 2.92% of 7441 cases submitted to the grand jury, did it feel compelled to alter the charge as proposed by the district attorney.¹¹⁹ Significantly enough, most of these few changes had been proposed by the district attorney's office. Motivation for such change was most often the necessity to fit the indictment to the most recent evidence. Next in importance were political pressure and bargaining moves between prosecutor and defendant.¹²⁰ This comprehensive study never even mentioned the possibility that the grand jury, whose scrutiny of the average case takes less than 30 minutes, might develop ideas of its own as to what legal pigeon-holes would best fit the criminal transaction. Whatever disagreement has developed between grand jury and prosecutor appears to have revolved around questions of sufficiency of proof rather than the particular theory of the accusation.¹²¹ Since, apparently, the grand jury does not concern itself with the legal theory applicable to a case, a change in this theory via amendment, accompanied only by a reshuffling of the very evidence

115. *United States v. Krepper*, 159 F.2d 958 (3d Cir. 1946) (striking out of the words "in furtherance of a joint or common scheme or enterprise" from substantive charge admissible, as indictment was filed together with separate conspiracy charge and no doubt could therefore exist as to the definite offense for which the defendant had been tried).

116. *Salinger v. United States*, 272 U.S.542 (1926); *Mellor v. United States*, 160 F.2d 757, 763 (8th Cir. 1947).

117. GOEBEL & NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK* 352, 353 n.97, 355 (1944) ("The task of transmitting the informal compositions of the grand jurors into the stiff and resistant phrases of an indictment was allotted to the attorney general." *Ibid.* at 352).

118. Note 53 HARV.L.REV. 122, 129 (1939).

119. Morse, *A Survey of the Grand Jury System*, 10 ORE. L. REV. 101, 217, 295 (1931).

120. *Id.* at 158-160.

121. In 5.39% of the cases submitted, the grand jury adjudged the proofs to be insufficient. *Id.* at 154.

presented to the grand jury, would not result in any disadvantage to the accused.

The grand jury argument as a barrier to amendments of substance should be reduced to its correct proportions. It should not be construed as an absolute impediment, but should only lead to the prohibition of variance where there exists a reasonable presumption that the grand jury might not have brought the particular indictment if the amended version had been originally presented to it. The constitutional guarantee should enter into play only if the amendment attempts to extend the scope of the indictment to a transaction which had not been examined by the grand jury. Invocation of constitutional doctrine to prohibit changes which the grand jury would never notice seems like creating a constitutional issue out of a small procedural niche.¹²²

122. The liberal amendment practice of FED. R. CIV. P., 15 (a) allows a party to amend his pleading by leave of court, freely to be given, "when justice so requires." The test of "a departure from law to law" as the boundary line of permissible amendment had earlier been abandoned; see Justice Cardozo in *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 68 (1933); *International Ladies Garment Workers Union v. Donnelly Garment Co.*, 121 F.2d 561 (8th Cir. 1941). In Great Britain, the Indictment Act had provided that an amendment was, for the purposes of all proceedings, to be treated "as having been found by the grand jury in amended form" 5 & 6 GEO. V, c. 90, § 5 (2) (1915); the liberal amendment allowance of c. 90 § 5 had, however, been restricted in the court practice; see *Rex v. Errington*, 16 Cr. App. R. 148 (1922), *Rex v. Hughes*, 20 Cr. App. R. 4 (1927). More recently, the grand jury has altogether been abolished from the largest province of criminal law. MISCELLANEOUS PROVISIONS ACT c. 36, § 2 (1933); for the amendment practice under this act see *Rex v. Cleghorn*, 3 All Eng. 398 (1938) (one count of conspiracy may be divided up into several); *Halsted v. Clark*, K.B. 250 (1944) (court refuses to grant leave to amend because no evidence has been adduced to prove charge if amended, no new indictment resting on refused amendment admissible).

The Anglo-American dichotomy between act and offense with its ensuing consequences of legal insecurity and repetitious litigation has a counterpart in the French distinction between "fait matériel et fait juridique." It was early recognized that all courts, including the assizes, have the right to consider an accusation under new viewpoints which may come up during the trial and which may lead to a legal characterization different from the one used in the accusation. 4 GARRAUD, INSTRUCTION CRIMINELLE 344-347 (1926); 2 POITTEVIN, CODE D'INSTRUCTION CRIMINELLE 288 (1926). However, courts have sanctioned new accusations deriving from the identical facts both after prior conviction and acquittal; *Cour de Cassation*, 19. XII. 1935, S 37.1.237; 30.1.1937 S 39.1.193. As to jury acquittals, courts have argued that the president of the jury, though authorized to submit subsidiary questions not contained in the original accusation, has no duty to do so. As a matter of fact, this rationalization served the purpose of combating the laxity of the juries by allowing the same charge to be taken to a lower court though not to a new jury. The law of November 25, 1941 has replaced the old assizes with a more bureaucratized institution where judges and jurors deliberate together on questions of guilt and sentence, submitted by the president. In consequence, the finality of judgments could now be restored and article 359, now 360 cod. proc. crim. has been changed so as to exclude the possibility of bringing an acquitted defendant to trial again for the identical facts. DONNEDIEU DE VARBRES, TRAITÉ DE DROIT CRIMINEL ET DE LEGISLATION PÉNALE COMPARÉE 820, 884-887 (3d ed. 1947).

Under German law the court has the duty of examining the facts on which the accusation rests under all legal viewpoints as they appear during the trial; the court is not limited

Moreover, the grand jury argument should have lost some of its power since the arrival on the scene of the short form of indictment which may be supplemented by a bill of particulars. Under this practice, both the theory of the indictment and specific allegations may be relegated to the bill of particulars. Legislatures have effected this shift of emphasis in spite of the theoretical possibility that the prosecution might abuse its right and smuggle into the bill of particulars some material which had never been covered by the grand jury.¹²³ It would seem that the only limits upon utilization of short form indictments rest not upon the grand jury requirement, but rather upon the need to keep a precise statement of facts to satisfy the constitutional double jeopardy guarantee.¹²⁴ In the light of such developments, there would seem to be no reason why admission or prohibition of amendments should not depend exclusively on the presence or absence of disadvantage to the defendant.

The Continuous Offense Concept

There remains one more obstacle to the concentration of all proceedings for one act in the same trial and the consequent replacing of the same evidence by the same transaction test. The "transaction" as a yardstick of double jeopardy remains vague when the criminal

by the theory of the accusation; the rights of the accused are preserved by the court's duty to allow the defendant all latitude for preparing a new defense including, if need be, the possibility of a continuance. STRAFRECHTSPFLEGE VERORDNUNG 1946 (U.S. Zone of Occupation) STRAFPROZESSORDNUNG ¶¶ 264, 265. On the other hand, this principle is accompanied by a rather strict application of *ne bis in idem*, the prohibition of a second accusation for the same identical fact; on the whole problem as well as in the recognized exceptions of the *ne bis in idem* rule, see GUENDEL—HARTUNG—LINGEMANN—NIETHAMMER, STRAFPROZESSORDNUNG 504-514 (19th ed. 1934); HIPPEL, DER DEUTSCHE STRAFPROZESS 369 (1941).

Though German law does not control the procedure before allied tribunals against German defendants, it might be useful to point out that German law, like Anglo-American law, would not allow a second trial for identical facts aimed at correcting possible administrative mistakes of a reviewing officer authorized to scale down sentences. Whether military tribunals are exercising German jurisdiction via the assumption of German sovereignty or whether they are deemed to remain foreign authorities, German law would seem to exclude a new trial before German criminal courts under either circumstance. FRANK, STRAFGESTZ-BUCH 3 b to ¶ 5 (18th ed. 1931). To what extent different considerations may apply when the subsequent proceedings are of administrative rather than of criminal nature is discussed in MITTELBACH, DER VERBRAUCH DER STRAFELAGE BEIM ORGANISATIONSVERBRECHEN, 2 DIE SPRUCHGERICHTE 310 (Deutschland, 1948).

123. *People v. Bogdanoff*, 254 N.Y. 16, 39, 171 N.E. 890, 899 (1930) (dissenting opinion).

124. *United States v. Cruikshank*, 92 U.S. 542, 558 (1875); *People ex rel. Hirschberg v. Supreme Court of New York*, 269 N.Y. 392, 199 N.E. 634 (1936) (grand jury minutes' inspection may become necessary under short form indictment in order to identify subject of charge); *State v. Varnado*, 208 La. 319, 358, 23 So. 2d 196, 119 (1945) (dissenting opinion); see also Comment, *Indictment Forms—A Technical Loophole for the Accused*, 6 LA.L.REV. 461, 466 (1946).

objective is not planned to be executed within a more or less definite time limit or within a narrow area but extends over a considerable time or space.¹²⁵ It contrasts unfavorably in this regard with the easy delimitation of the offense concept utilized in the same evidence test. Where, for double jeopardy purposes, should the boundary line be drawn between several independent acts for which several prosecutions should lie and one continuous transaction consisting of several acts antedating the indictment?

It is the concept of "continuous offense" which remedies the vagueness of the transaction category. Within this category are cohabitation with more than one wife,¹²⁶ maintaining a nuisance,¹²⁷ desertion and neglect to provide,¹²⁸ receiving stolen goods,¹²⁹ engaging in professional activities without a license,¹³⁰ connecting a burner with a pipe of a gas company,¹³¹ driving a car while under the influence of liquor,¹³² continued agreement to commit several substantive crimes.¹³³ All involve a state of affairs created by defendant in violation of the law. In some of these cases, the defendant, after having once acted, would have to take positive measures to terminate a situation which he had created in the past. Such offenses are continuing by the very nature of the action or inaction involved.¹³⁴ Others, like larceny and embezzlement, may be described as continuing offenses only under certain circumstances, i.e., if performed at regular intervals with the same technique and exploiting the same general opportunity.¹³⁵

When trying to define the limits of the continuing offense concept and therewith the limits of double jeopardy protection, jurists have tended to emphasize the importance of uninterrupted action.¹³⁶ But

125. *Harris v. State*, 193 Ga. 109, 116, 17 S.E. 2d 573, 578 (1941).

126. *In re Snow*, 120 U.S. 274 (1887).

127. *People v. Brooklyn & Queens Transit Co.*, 283 N.Y. 484, 28 N.E. 2d 925 (1940).

128. *Commonwealth v. McClelland*, 109 Pa.Sup. Ct. 211, 167 Atl. 367 (1933).

129. *State v. Schneller*, 199 La. 811, 822, 7 So. 2d 66, 70 (1942) (concurring opinion).

130. *People ex rel. Seligson v. Anderson*, 50 N.Y.S. 2d 856 (County Ct. 1944).

131. *Woods v. People*, 222 Ill. 293, 78 N.E. 607 (1906); Note, 113 A.L.R. 1282 (1938).

132. *State v. Licari*, 132 Conn. 220, 43 A. 2d 450 (1945); but see *Hall v. State*, 73 Ga. App. 616, 618, 37 S.E.2d 545, 546 (1946).

133. *Braverman v. United States*, 317 U.S. 49 (1942).

134. *State v. Peters*, 43 Idaho 564, 253 Pac. 842 (1927); Note, 40 MICH.L.REV. 429 (1942).

135. Sometimes a further differentiation is made between continuous offense and continuing offense, *délit continu et délit permanent*, *fortgesetzte Handlung und Dauerdelikt*. The first one would include repeat performances of roughly similar nature, whereas the second one would rest on one action with a continuing result. See DONNEDIEU DE VABRES, *TRAITÉ DE DROIT CRIMINEL ET DE LÉGISLATION PÉNALE COMPARÉE* 108 (3d ed. 1947) SCHOENKE, *STRAFGESETZBUCH* 235 (3d ed. 1947); HAFETER, *LEHRBUCH DES SCHWEIZERISCHEN STRAFRECHTS*, allgemeiner Teil 345 (2d ed. 1946).

136. The Italian doctrine has extensively considered the problem of continuous crime. For most of the writers, the problem of time interval was of primordial importance. Comp. BALDUS C.VI. 2.4. Bartolus seems to have been the first to have emphasized the problem of

it is rather the subjective element, the fact that the specific intent loses its independence and becomes as mechanical and repetitious as the sequent acts themselves, which should help to define the boundary between separable and inseparable offenses.¹³⁷ In addition, if the external situation varies and new elements enter into the picture, terminating the mechanically repeated performance, continuity would clearly be interrupted. Another dividing line is drawn by the indictment itself. The protection afforded by the application of the continuing offense concept extends only to the period prior to the first indictment. Acts occurring after the framing of the indictment, even if they constitute nothing more than a direct continuation of the activ-

"impetus" rather than the time element. BARTOLUS D. XLVII. 1.2.5. As to the influence which the doctrine exercised on Italian statutory law comp. DAHL, *DAS STRAFRECHT ITALIENS IM AUSGEHENDEN MITTELALTER* 245-248 (1931). The present Italian Code (1931) deals explicitly with continuous offenses. Art 87 (3) decrees: in case the same provision of the criminal law has been violated several times with the same purpose, although at different times, one single punishment applies, even if the different acts have been of varying gravity. In this case, the punishment of the most serious violation may be increased threefold. See 3 MANZINI, *DIRITTO PENALE* 541 (1931). In France, the continuous crime is regarded as a plurality of criminal offenses. However, art. 351 of the CODE CRIM. PROC. allows only for one punishment in case of a plurality of criminal acts, to be taken from the severer law. See 3 GARRAUD, *DROIT PENAL FRANCAIS* 183 (1913); DONNEDIEU DE VABRES, *TRAITÉ DE DROIT CRIMINEL ET DE LÉGISLATION PENALE COMPARÉE* 463 (3d ed. 1947).

The new Swiss Penal Code (1937) provides the same treatment for the competition of norms as well as of acts—invocation of the heaviest punishment. Continuous crime, treated more extensively in the now abrogated cantonal penal codes, is only mentioned by way of the statute of limitation. Art. 71, III. The practice recognizes and applies the concept whenever unity of intention and a certain time connection prevails. See 1 THORNHANN-OVERBECK, *SCHWEIZERISCHES STRAFGESETZBUCH* ¶ 68 (1940).

The German theory and practice has recognized continuous crime without express statutory authority. But relatively early, the practice developed the significant restriction that in matters of life, health and honor, claim of continuity is not admissible. See 31 *ENTSCHEIDUNGEN DES REICHSGERICHTS IN STRAFSACHEN* 150 (May 13, 1898); 70 *id.* at 243 (June 11, 1936); 70 *id.* at 283 (Aug. 13, 1936); SCHOENKE, *STRAFGESETZBUCH* 234 (3d ed. 1947). These courts which are disapproved by the framers of the theory—FRANK, *STRAFGESETZBUCH* 240 (18th ed. 1931); MEZGER, *STRAFRECHT* 466 (1931)—try to differentiate between an intention directed from the very beginning towards the execution of several similar acts and a mere general scheme of using any available opportunity for repeat performances. 70 *ENTSCHEIDUNGEN DES REICHSGERICHTS IN STRAFSACHEN* 51 (Jan. 13, 1936). A further restriction derives from the exclusion of a continuity relation between negligent and intentional acts. 73 *ENTSCHEIDUNGEN DES REICHSGERICHTS IN STRAFSACHEN* 230 (Aug. 6, 1939). All these restrictive devices together with "the healthy feeling of the people" have been used by the former Supreme Court in order to stop a noticeable lower court trend towards making extensive or, as the Supreme Court puts it, "immoderate" use of the continuous offense concept. 73 *ENTSCHEIDUNGEN DES REICHSGERICHTS IN STRAFSACHEN* 164 (Mar. 31, 1939).

137. *People v. Dillon*, 1 Cal. App. (2d) 224, 36 P. 2d 416 (1934) (intent vs. time element, —adding value of received goods so as to constitute higher degree of larceny or keeping them separate so as to justify conviction for petit larceny). *People v. Cox*, 286 N.Y. 137, 36 N.E. 2d 84 (1941); *Contra: Smith v. State*, 59 Ohio 350, 52 N.E. 826 (1898).

ities previously charged, would not be protected against a new prosecution.¹³⁸

CONCLUSION

Procedural tools for concentrating adjudication are being found or created in increasing number and are the necessary preliminary to adoption of the transaction test. Counts describing the same transaction as various offenses may now be cumulated in a single indictment and no premature election need be made.¹³⁹ In addition, "lumping statutes,"¹⁴⁰ designed to cover closely connected types of criminal behavior, are contributing towards the same goal. What is still missing, however, is the adoption of a more liberal amendment practice, allowing the prosecution full freedom to change the legal theory on which the accusation rests. Such a change would be far from disadvantageous to the defendant. It would give him a firm legal basis for protection against any attempt of the prosecution to utilize the act-offense dichotomy for a new prosecution, since all its legitimate aims could have been reached by way of amendment. Under such practice, double jeopardy would attach to any attempt to frame a new indictment for the identical transaction adjudicated in the prior proceedings, without regard to whether the prosecution did or did not make use of the liberalized procedural devices to adjudicate the whole transaction in the same trial.

But, would not the iron-clad guarantee against a new trial for the identical set of facts, which the application of the transaction test would provide, require a second protective device for the state in addition to a liberalization of amendment practice? Is it not a well known fact that prosecutors often utilize the "different offense"—"same evidence" technique only in order to further the goals of justice, i.e., where the previous proceedings have ended with a legally unjustifiable acquittal which cannot be reversed due to statutory prohibition of state appeals? The argument is surely not without merit.¹⁴¹ Since the *Palko* case, however, states without a constitutional double jeopardy clause may institute state appeals without having to meet the

138. *Wilson v. Cooper*, 249 Ky. 132, 60 S.W.2d 359 (1933) (previous conviction for obstructing the passway with a fence no bar to new prosecution for maintaining the fence after the first conviction).

139. *Pierce v. United States*, 160 U.S. 355 (1896); *State v. Baily*, 50 Ohio St. 636, 36 N.E. 233 (1893); *People v. Weill*, 243 Ill. 208, 90 N.E. 731 (1909); *People v. Tinnell*, 385 Ill. 537, 53 N.E.2d 427 (1944).

140. See, e.g., KAN. GEN. STAT. ANN. § 21-553 (Corrick, 1935); MICHAEL-WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION 546-47 (1940); for the corresponding British practice see KENNY, OUTLINES OF CRIMINAL LAW 553-54 (15th ed. 1936).

141. Steffen, *Concerning Double Jeopardy and the New Rules*, 7 FED. B. J. 86 (1945). See Peters, *Double Jeopardy—Appeals by Prosecution*, 9 DETROIT L.J. 93 (1946); Jones, *What Constitutes Double Jeopardy?* 38 J.CRIM.L. & CRIMINOLOGY 379 (1947).

objection that such procedure would contravene the guarantees of the 14th amendment.¹⁴² Even in the majority of states which possess such a clause, Justice Holmes' "continuing jeopardy" argument might serve as a convenient rationale for establishment of state appeals.¹⁴³

The question then becomes one of determining whether we should wait until the long drawn-out move to institute state appeals has crystallized before abandoning the same evidence test. The answer should be in the negative. Holmes' reasoning that "at the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny,"¹⁴⁴ though probably still justified in a narrow technical sense, is much less self-evident when viewed against the political background of our times. The rapid change of the political climate occurring before our very eyes strengthens the necessity of eliminating any possible misuse of procedural devices for oppressive purposes. The "different offense"—"same evidence" technique, as it operates now, might easily become such a device. It deprives criminal judgments of their finality and thus makes the double jeopardy guarantee meaningless.¹⁴⁵ The need for assurance that judgments will stand, once the admissible legal remedies are exhausted, requires the dropping of the same evidence test.¹⁴⁶

Far-fetched statutory changes are not needed to close the loopholes now threatening the finality of criminal judgments. The problem is rather one of awareness of the ultimate issues involved. Once the

142. *Palko v. Connecticut*, 302 U.S. 319 (1937).

143. *Kepner v. United States*, 195 U.S. 100, 134 (1904) (dissenting opinion).

144. *Ibid.*

145. A recent report of an Argentina case provides an excellent illustration: a number of women had been sentenced to 30 days in jail for "unauthorized meeting." Their provisional release had been ordered by the judge. Instead of releasing them, the police "loaded them into a patrol wagon and took them to a different court" where "they were sentenced to 30 days for violation of local ordinances against making noise and obstructing traffic," N.Y. Times, Sept. 13, 1948, p.6, col. 2.

146. The odyssey of the defendants in *Cole v. Arkansas*, 333 U. S. 196 (1948) illustrates the runaround which might result from segmented offense charges under the present practice: an initial indictment had been reversed (210 Ark. 433, 196 S.W. 2d 582 (1946)) because use of force and violence to prevent from engaging in lawful vocation had been charged (Arkansas, Act 193, § 2 (1943)). Instead of (1) threat of violence under the same paragraph or (2) unlawful assembly at the place of labor dispute with the purpose of using force or violence to prevent others from engaging in a lawful vocation according to par. 2, a new information under par.2 was sustained by the Arkansas Supreme Court (211 Ark. 836, 202 S.W. 2d 770 (1947)) under par. 1 which constitutes a cognate offense; however, it cannot be considered *lex generalis* in relation to par. 2 because par. 2 omits the use of threats. The reversal by the Supreme Court was probably unavoidable as the Arkansas Supreme Court did not give the defendants a chance to defend themselves against the modified charge. However, the result, trial before three jurisdictions with five individual instances, could have been avoided either by multiplication of counts or by a liberal amendment practice. The jury could have been left with the problem of which counts it wanted to use for the acts of the defendants.

fictitious character of the grand jury obstacle is generally recognized and the prohibition of amendments restricted to those cases where a possible disadvantage to the defendant becomes discernible, no further impediments to abandonment of the same evidence test seem to exist. The test is a child of judicial interpretation; courts have gained enough experience in juggling, interpreting and interchanging act and offense concepts to be relied on to come forward with good and sufficient reasons justifying its demise.

Hand in hand with the adoption of the transaction test should go the radical separation of the two distinct issues fused in present double jeopardy practice: the prohibition of new indictments arising out of the same fact situation, and the propriety of cumulating counts and sentences as the result of one and the same trial. The transaction test should be reserved to shield a defendant against a second prosecution started *de novo*. It should not serve as a means for raising, often belatedly, by habeas corpus,¹⁴⁷ the propriety of a sentence.

But there must be some yardstick by which to gauge the propriety of cumulative sentences based on different counts of the same indictment. In many cases, substantive analysis of the offenses involved might provide the answer—thus, cumulation would be eliminated in all situations which do not satisfy the requirement of norm competition.¹⁴⁸ Where a true case of norm competition does occur, then the question of whether terms should run consecutively or concurrently will remain a matter for the discretion of the sentencing court.

147. Peters, *Collateral Attack by Habeas Corpus*, 23 WASH. L. REV. 87, 91 (1948) approves the raising of the double jeopardy issue in habeas corpus proceedings. However, if the cumulation of sentences on plural counts is treated as a problem of the correct application of substantive law, the issue should be raised on appeal.

148. The principle is applied in: *Durrett v. United States*, 107 F. 2d 438 (5th Cir. 1939); *Holiday v. United States*, 44 F.Supp. 747 (N.D. 1942) aff'd, 130 F. 2d 988 (8th Cir. 1942), cert. denied, 317 U.S. 691 (1943), rehearing denied, *ibid.* (first count bank robbery by force and violence, second count bank robbery by use of dangerous weapons with jeopardy of life—consecutive sentences of 10 years on first and 15 on second count; sentence on first count vacated).