NOTES AND COMMENTS

TWICE IN JEOPARDY

It is ancient common law that the state cannot twice put a man in jeopardy for the same offense.[1] The prohibition was entrenched in English justice several hundred years before its incorporation into the Fifth Amendment[2] and the constitutions of most of the states.[3] But

1. Actually, the double jeopardy principle existed in the days of the Greeks and Romans, finding limited expression in the *Digest of Justinian*. Canon law contained a similar principle. There is evidence that a plea similar to double jeopardy may have appeared in English law as early as the fourteenth century, but the earliest conclusive evidence of the principle appears in writings of Hale (seventeenth century), and Coke (seventeenth century), and later in Blackstone (eighteenth century). See generally, Sigler, *A History of Double Jeopardy*, 7 AM. J. LEGAL HIST. 283, 283-97 (1963).

At common law there were five rules which dealt with the problem with which double jeopardy deals today. Four were special pleas in bar, and two of them, *autrefois attaint* and *former pardon*, were idiosyncratic to a different criminal procedure and have little relevance today. See 2 HAWKINS, PLEAS OF THE CROWN 524-52 (8th ed. 1824). The two other pleas in bar, *autrefois acquit* (former acquittal) and *autrefois convict* (former conviction) prevented reprosecution after a verdict. 4 BLACKSTONE, COMMENTARIES 335-38; 2 HAWKINS, *supra*, at 515-29. In addition, there was, at common law, a rule barring discharge of the jury prior to verdict. 3 COKE, INSTITUTES 110 (E. and R. Brooke ed., 1797). This rule appears, however, to have been honored more in the breach than in the observance. Whitebread and Fenwick, 7 How. St. Tr. 120 and 315; Regina v. Windsor, 10 Cox C.C. 276 (Q.B. 1865, Ex. Ch. 1866); Brief for the United States, Downum v. United States, 372 U.S. 734 (1963). See generally for discussion of the history of common law double jeopardy: *Ex parte* Lange 85 U.S. (18 Wall.) 163 (1873); Bartkus v. Illinois, 359 U.S. 121, 150-55 (1959) (dissenting opinion of Mr. Justice Black); Comment, 65 YALE L.J. 339, 339-44 (1956).

2. U.S. CONST. amend. V. "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." The Supreme Court has construed the protection as applicable to both felonies and misdemeanors. *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873).

The Supreme Court has twice refused to extend, by incorporation within the Fourteenth Amendment, federal double jeopardy standards to the states. Palko v. Connecticut, 302 U.S. 319 (1937); Brock v. North Carolina, 344 U.S. 424, 426 (1953). In *Palko*, however, the Court left open the possibility that a more flagrant violation of the double jeopardy principle might violate the Fourteenth Amendment. 302 U.S. 319, 328. Recently, the Court of Appeals for the Second Circuit applied the implied acquittal rule, note 11, *infra*, to the law of the state of New York, declaring sections 464 and 544 of the N.Y. Code of Criminal Procedure inconsistent with the Fourteenth Amendment to the extent that they authorize reprosecution in this situation. United States *ex rel.* Hetenyi v. Wilkins, 348 F.2d 844, 863 (1965). This is the first modern case in which federal double jeopardy standards have been incorporated into the Fourteenth Amendment and applied to the states. *But see Ex parte* Ulrich, 42 Fed. 587 (1890); *Cf.*, Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963).

3. Though the phraseologies vary, all states except Connecticut, Maryland, Massa-

today the rule is more commonly revered than understood.[4]

Two features complicate our law of double jeopardy. The prohibition is not one rule but several, each applying to a different situation; and each rule is marooned in a sea of exceptions. Thus a general rule shields a convicted man from retrial for the same offense.[5] But the state

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chusetts, North Carolina and Vermont have constitutional double jeopardy provisions. The five states that do not, consider protection from double jeopardy a part of their common law. See ALI, ADMINISTRATION OF THE CRIMINAL LAW: DOUBLE JEOPARDY 56-59 (Tent. Draft No. 2, 1932) (hereafter cited as ALI (1932)). There are, however, two crucial questions which these double jeopardy provisions leave unanswered: (1) after what point in the trial process has defendant been in jeopardy? (2) When are offenses the same?

The first question is the traditional one of "when does jeopardy attach." Frequently it is said that jeopardy does not attach at all if the court hearing the case did not have jurisdiction, Johnsen v. United States, 41 F.2d 44 (9th Cir.), *cert. denied*, 282 U.S. 864 (1930); ALI MODEL PENAL CODE § 1.12, comment (Tent. Draft No. 5, 1956), or if the indictment did not charge a crime, State v. Keating, 223 Mo. 86, 94-95, 122 S.W. 699, 700-01 (1909). In such cases a subsequent prosecution in the proper court or on a cured indictment is permitted on the theory that, since there could have been no valid conviction, the defendant was never "in danger" or jeopardy. This legal fiction ignores the fact that often punishment has been imposed by courts lacking jurisdiction, or following conviction on a defective indictment. See, *e.g.*, United States v. Tyler, 15 F.2d 207 (D. Del. 1926). Some courts have reasonably concluded that an acquittal on the merits in such cases bars reprosecution, and this seems to be the rule in the federal system. See United States v. Lewis, 173 F. Supp. 674 (D. Colo. 1959), *aff'd*, 277 F.2d 378 (10th Cir. 1960) (the affirmance was only of convictions on counts not subject to the double jeopardy defect).

Assuming a requisite jurisdiction, most courts hold that jeopardy in the first prosecution does not attach until the jury is empanelled, Cornero v. United States, 48 F.2d 69 (9th Cir. 1931), or, in non-jury trials, until the first evidence is presented or a guilty plea accepted, Markiewicz v. Black, 138 Colo. 128, 330 P.2d 539 (1958). This rule overlooks the very real possibility that successive indictments, though dismissed before trial, may be used as instruments of oppression and may be nearly as vexatious to the defendant as a series of trials. See, *e.g.*, United States v. Lattimore, 215 F.2d 847 (D.C. Cir. 1954); Note, 4 STAN. L. REV. 537 (1952). For an excellent discussion of the inadequacy of these double jeopardy rules, see Comment, 65 YALE L.J. 339, 357-59 (1956). Nevertheless, it may be that drawing the line where most courts do represents a reasonable compromise between protecting the accused from the harassment of repeated insufficient indictments, and protecting the state's interest in bringing alleged offenders to trial. See Note, 77 HARV. L. REV. 1272, 1275 (1963).

This Comment will not address itself to all these questions, but will rather attempt to provide guidelines for answering the second question: when are offenses the same? Throughout the comment the phrase "double jeopardy provisions" refers to both state and federal constitutions.

4. "The riddle of double jeopardy stands out today as one of the most commonly recognized yet most commonly misunderstood maxims in the law, the passage of time having served in the main to burden it with confusion upon confusion." Note, 24 MINN. L. REV. 522 (1940). And it is not always revered. One writer has called it a "quaint relic of medieval jargon." Comley, *Former Jeopardy*, 35 YALE L.J. 674, 675 (1926).

5. See note 12, *infra*.

may retry a defendant whose conviction was reversed on appeal.[6] Even if the defendant was entitled to a directed verdict of acquittal, he is said to have "waived" his double jeopardy right by appealing.[7] Similarly, a rule prohibits retrial when the first trial was prematurely terminated.[8] But if the trial is curtailed because the judge coerced a guilty plea, the judge's action is labeled "reversible error" rather than "premature termination."[9] These fictions and rationalizations are the characteristic signs of doctrinal senility.[10]

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6. United States v. Ball, 163 U.S. 662, 672 (1896). For a discussion of the rationales which courts have used to explain why retrial after conviction does not constitute double jeopardy, see Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 6-8 (1960). In England the policy of finality was so strongly felt that the convicted defendant was not entitled to a writ of error or request for a new trial, and the state was not entitled to appeal acquittals. In this country, the English rule was followed by Mr. Justice Story, sitting on circuit, in United States v. Gibert, 25 Fed. Cas. 1287 (No. 15204) (C.C.D. Mass. 1834) but was rejected by other federal courts, *e.g.*, United States v. Harding, 26 Fed. Cas. 131, 137 (No. 15301) (C.C.E.D. Pa. 1846), and has been consistently rejected ever since. The English rule that an appeal is not available to the state after an acquittal persists in all but three states; and it was squarely held in Kepner v. United States, 195 U.S. 100 (1904) that appeal by the federal government would violate the fifth amendment prohibition against double jeopardy. Commentators have criticized the opinion for both its logic and for its practical effect. See note 126, *infra*.

7. Bryan v. United States, 338 U.S. 552 (1950).

8. Cornero v. United States, 48 F.2d 69 (1931). Downum v. United States, 372 U.S. 734 (1963). The states also take a dim view of reprosecution after a premature termination of the original trial. See Mr. Justice Vinson's dissent in Brock v. North Carolina, 344 U.S. 424, 436 (1953). See generally Note, 77 HARV. L. REV. 1272 (1964).

9. United States v. Tateo, 377 U.S. 463, 468 (1964).

10. Another exception in double jeopardy doctrine, and one not dealt with in this Comment, is that of dual sovereignty. At common law, it seems that the pleas in bar operated to prevent a second prosecution or punishment even when the laws of different sovereigns were involved. 2 HAWKINS, PLEAS OF THE CROWN 515, at 517, 522 (acquittal in Wales a bar in England). In the United States this problem is most acute with respect to conduct that offends both the law of a state and that of the federal government, though occasionally the problem is one of concurrent state and municipal jurisdiction, State v. Hansen, 137 Neb. 138, 288 N.W. 518 (1939) and, even more rarely, concurrent state and state jurisdiction, Nielson v. Oregon, 212 U.S. 315 (1909).

With respect to the federal-state overlap, in the early cases federal law was said to supersede state law. See Jett v. Commonwealth, 59 Va. (18 Gratt.) 933, 937-39 (1867) for a discussion of the early rule. Subsequently the Supreme Court indicated its willingness to alter the former rule. Fox v. Ohio, 46 U.S. (5 How.) 410 (1847); United States v. Marigold, 50 U.S. (9 How.) 560 (1850). Then, in 1922, the Supreme Court clearly adopted the "rule of successive prosecutions," in United States v. Lanza, 260 U.S. 377. Recently this rule was affirmed in Bartkus v. Illinois, 359 U.S. 121 (1959), where a defendant who had been acquitted of bank robbery in a federal court was prosecuted and convicted in the state court for the same robbery, and Abbate v. United States, 359 U.S. 187 (1959), where a defendant who had been convicted in a state court was then prosecuted and convicted in a federal court for the same destruction of property. Since 1959, however, it has been the policy of the Justice Department not to duplicate state prosecutions.

Three rules are central to the double jeopardy prohibition: the rules which bar retrial for the same offense after acquittal,[11] retrial for the same offense after conviction,[12] and multiple punishment for the

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MEMORANDUM TO THE UNITED STATES ATTORNEYS, Department of Justice Press Release, April 6, 1959. This policy has been somewhat grudgingly acquiesced in by the Supreme Court. *Cf.*, Petite v. United States, 361 U.S. 529 (1960).

The problem of state prosecutions duplicating federel prosecutions has been somewhat alleviated by the statutes of about 15 states which prohibit a subsequent state prosecution. ALI MODEL PENAL CODE 61 (Tent. Draft No. 5, 1956).

Various solutions to the problem of dual sovereignty are suggested in, Note, 45 CORNELL L.Q. 574 (1960). See generally, Grant, *The* Lanza *Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309 (1932); Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 U.C.L.A.L. REV. 1 (1956); Frank, *An International Lawyer Looks at the Bartkus Rule*, 34 N.Y.U.L. REV. 1096 (1959); *The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 157 (1959).

11. *Nemo debet bis vexari pro una et eadem causa*; "no one should be twice vexed for one and the same cause." Retrial after an acquittal was barred at common law by the plea of *autrefois acquit*. Under the Fifth Amendment a verdict of acquittal is final and even if "not followed by any judgment, is a bar to a subsequent prosecution for the same offense." United States v. Ball, 163 U.S. 662, 671 (1896). The federal government may not appeal a verdict of acquittal even though it may appear to be erroneous. Kepner v. United States, 195 U.S. 100 (1904).

Although the Fifth Amendment has been held not to preclude government appeals with respect to the states, Palko v. Connecticut, 302 U.S. 319 (1937), many state courts have held government appeal unconstitutional. *E.g.* People v. Swift, 59 Mich. 529 (1886). *Cf.*, ALI (1932) section 28.

In 1957, the federal rule was extended to bar reprosecution after an "implicit acquittal." Green v. United States, 355 U.S. 184, 190 (1957). In this case, defendant was tried for first and second degree murder and convicted of second degree. The Supreme Court held that this verdict constituted an implied acquittal of first degree murder, and that defendant, in appealing his second degree conviction, did not waive his double jeopardy claim with respect to first degree. *Cf.* Trono v. United States, 199 U.S. 521 (1905), distinguished and in effect overruled by the *Green* court. While some states already had such a rule, many did not. 355 U.S. 184, 216 n.4 (dissenting opinion of Mr. Justice Frankfurter); Annot., 61 A.L.R.2d 1141 (1958).

In *Green*, the Supreme Court pointed out that compelling the defendant to waive his former jeopardy with respect to the greater offense would discourage him from appealing an erroneous conviction. Either he went to prison on a possibly erroneous conviction or took the chance that upon retrial after a successful appeal, he would be found guilty of the greater offense. The court concluded that the law "does not place the defendant in such an incredible dilemma." 355 U.S. 184, 193. The Supreme Court of California, following this "incredible dilemma" rationale, has recently extended the implied acquittal doctrine to punishment as well as offenses. In People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677 (1963), defendant was convicted of first degree murder and sentenced to life. He successfully appealed and on retrial was again convicted and this time sentenced to death. Judge Traynor found it immaterial to the basic purpose of double jeopardy whether the implied acquittal was for a legislatively or a judicially graded crime. Since the first jury had "acquitted" defendant of the death sentence, the court held he could not subsequently be "convicted" of the sentence. For a general discussion of the case, see Van Alstyne, *In Gideon's Wake*, 74 YALE L.J. 606 (1965). *Cf.*, Stroud v. United States, 251 U.S. 15 (1919).

12. *Nemo debet bis puniri pro uno delecto*,—"one punishment for one wrong." Retrial after a conviction was barred at common law by the pleas of *autrefois convict* and

same offense at one trial.[13] The courts understand these rules as expressions of self-evident moral principles: it is wrong to retry a man for a crime of which he previously has been found innocent, wrong to harass him with vexatious prosecution, and wrong to punish him twice for the same crime. Inquiry usually stops here. We are rarely told why it is wrong to retry for the same crime or punish twice. We never learn precisely what constitutes harassment, nor when it will bar reprosecution. The judiciary is content to apply the double jeopardy prohibition with only a reverent nod to its policies.

Several policies underlie the double jeopardy prohibition.[14] First,

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autrefois attaint. See note 1 *supra.* In *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 173 (1873), the Supreme Court explained why reprosecution is barred following a conviction: it is not the danger or jeopardy of being a second time found guilty, but the punishment that would legally follow the second conviction.

There is little question that the framers were concerned with multiple punishment. Indeed, Madison's first double jeopardy proposal read:

> No person shall be subject . . . to more than one punishment or one trial for the same offense.

1 ANNALS OF CONGRESS [1789-91] at 433 (1834). And Mr. Benson, of New York, understood the provision as embodying the "humane intention . . . to prevent more than one punishment." *Id.* at 753. Some courts have expressed greater disapproval over reprosecution after a conviction than after an acquittal, Wright v. State, 17 Tex. Ct. App. R. 152 (1884); *In re* Nielson, 131 U.S. 176 (1889), and one commentator has concluded that former conviction, as distinguished from former acquittal, is based upon natural law. Bigelow, *Former Conviction and Former Acquittal,* 11 RUTGERS L. REV. 487, 492 (1957).

13. It is clear that preventing multiple punishment for the same offense was foremost in the minds of the framers of the double jeopardy clause. Note 12, *supra.* Until joinder became permissible and commonplace, however, multiple punishment could result only from multiple trials.

The Supreme Court has indicated that multiple punishment for the same offense at a single trial is forbidden by double jeopardy. In *Ex parte* Lange, the Court stated that "the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried. . . ." 85 U.S. (18 Wall.) 163, 173 (1874), approved in United States v. Benz, 282 U.S. 304, 307-09 (1931). In a line of cases, the Supreme Court has assumed that multiple punishment for the same offense would violate the double jeopardy provision, but has generally found the offenses to be distinct. Morgan v. Devine, 237 U.S. 632, 641 (1915); Gavieres v. United States, 220 U.S. 338, 341-42 (1911); Burton v. United States, 202 U.S. 344, 378-81 (1906); Carter v. McClanghry, 183 U.S. 365, 388-90 (1902). See also, Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 462 (1947 ("Our minds rebel against permitting the same sovereignty to punish an accused twice for the same offense.") But see *contra:* Holiday v. Johnston, 313 U.S. 342, 349 (1941).

14. The "policies of double jeopardy" discussed in this Comment are drawn from diffuse sources. Some are clearly historical policies, as old as the principle itself. Others may or may not be of such ancient stock; they have been developed over many years, chiefly by the judiciary. But since policy confusion is the chief confusion in double jeopardy law, one of the aims of this Comment will be to distinguish between and to order different sorts of policy considerations. Some of these are recommended more by the realities of current criminal procedure than by history. But no apology is in order. Double jeopardy cannot be so unalterably affixed to history as some have suggested. See, Green v. United States, 355 U.S. 184, 215 (1957) (dissenting opinion of Frankfurter, J.). For double

guilt should be established by proving the elements of a crime to the satisfaction of a single jury, not by capitalizing on the increased probability of conviction resulting from repeated prosecutions before many juries. Thus reprosecution for the same offense after an acquittal is prohibited.[15] Second, the prosecutor should not be able to search for an agreeable sentence by bringing successive prosecutions for the same offense before different judges.[16] Thus reprosecution after a conviction is prohibited. Third, criminal trials should not become an instrument for unnecessarily badgering individuals.[17] Thus the Constitution forbids a second trial—a second jeopardy—and not merely a conviction at the second trial. Finally, judges should not impose multiple punishment for a single legislatively defined offense.[18] Thus multiple punishment for the same offense at a single trial is prohibited.

For a time it was thought that the rules prohibiting retrial and multiple punishment at one trial were doctrinal twins, and that therefore the same test should be used to determine whether either rule was violated. More recently, some commentators have concluded that retrial and multiple punishment are different problems to be resolved differently.[19] The problems *are* different and *do* require different resolutions. But the two rules have a common core policy. They prevent prosecutors and courts from prosecuting and punishing arbitrarily, without legitimate justification.

Discovering The "Same Offense"

The rules which bar retrial and multiple punishment have a crucial similarity. Their scope depends on what is meant by "the same offense." Consider the following criminal activities. Defendant robs two banks on different days.[20] Defendant enters a tavern, holds twelve pa-

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jeopardy, in its early days, was integral to a different society and different criminal procedure. See, *e.g.*, texts cited in note 1, *supra*, for discussion of *autrefois attaint*. Sigler, *A History of Double Jeopardy*, 7 AM. J. LEGAL HIST. 283, 283-98 (1963). The author of an exhaustive history of double jeopardy aptly concludes that:

> The policy and purpose of double jeopardy must be a function of the criminal law and procedure of a social system. Double jeopardy, even when established as a general principle, may be empty of specific content.

Id. at 309.

15. See notes 81-87, *infra*, and accompanying text.
16. See notes 88-103, *infra*, and accompanying text.
17. See notes 115-25, *infra*, and accompanying text.
18. See notes 271-73, *infra*, and accompanying text.
19. Note, 11 STAN. L. REV. 735 (1959); Comment, 65 YALE L.J. 339 (1956); ALI, MODEL PENAL CODE 66 (Tent. Draft No. 5, 1956); Kirchheimer, *The Act, the Offense and Double Jeopardy*, 58 YALE L.J. 513 (1949).
20. United States v. Koury, 319 F.2d 75 (6th Cir. 1963).

trons at gunpoint, and robs them.[21] Defendant fires a gun and injures two victims.[22] Defendant transports across a state border two forged securities.[23] In these four situations, each defendant has transgressed a single statute several times. In the first case the violations were temporally distinct; in the third and fourth cases the violations were simultaneous; in the second case the violations were temporally proximate but not simultaneous. Next, consider the following criminal activities. Defendant murders on July 10 and rapes on August 10. Defendant conspires to commit a crime and subsequently commits the crime.[24] Defendant sells moonshine liquor which is in his possession.[25] Defendant rapes his sister.[26] Defendant assaults and murders his victim.[27] In these five situations, each defendant has transgressed two statutes.[28]

The critical double jeopardy question is clear. In which of these cases should the offenses be deemed the same for purposes of reprosecution? For multiple punishment at a single trial? The answer may also at first appear to be clear. According to ordinary language, two offenses are the same offense only if they are identical in law and fact, only when one statute has been violated once. One may commit an offense against humanity, against our aesthetic or moral sensibility, against God, or against the law. The phrase "has committed an offense" is used as a substitute for "has failed to comply with some important standard"; and the number of offenses depends upon the number of stan-

21. Hoag v. New Jersey, 356 U.S. 464 (1958). Or he cuts open nine mailbags in the course of one robbery. Ebeling v. Morgan, 237 U.S. 625 (1915).

22. Ladner v. United States, 358 U.S. 169 (1958); Gunter v. State, 111 Ala. 23, 20 So. 632 (1895). Or he negligently runs down two pedestrians at one time. Smith v. State, 159, Tenn. 64, 21 S.W.2d 400 (1929).

23. Castle v. United States, 287 F.2d 657 (5th Cir.), *vacated*, 368 U.S. 13 (1961). Or, in one trip, he transports several women across state lines for immoral purposes. United States v. St. Clair, 66 F. Supp. 795 (D.C. Va. 1945) (permitting separate punishment for each woman); Robinson v. United States, 143 F.2d 276 (10th Cir. 1944) (permitting just one punishment). Or he transports, in one trip, a gun and ammunition. Mercado v. United States, 183 F.2d 486 (1st Cir. 1950).

24. Pinkerton v. United States, 328 U.S. 640 (1946); United States v. Callanan, 274 F.2d 601 (8th Cir.), *aff'd*, 364 U.S. 587 (1959).

25. Albrecht v. United States, 273 U.S. 1 (1927). Or he buys and conceals narcotics knowing them to have been illegally imported. United States v. Brown, 207 F.2d 210 (7th Cir. 1953).

26. Stewart v. State, 35 Tex. Crim. Rep. 174, 32 S.W. 766 (1895) (multiple punishment permitted). Or he commits sodomy upon his sister. People *ex rel.* Porter v. Jackson, 303 N.Y. 680, 102 N.E.2d 837 (1951). *Contra*: State v. Price, 127 Iowa 301, 103 N.W. 195 (1905).

27. Diaz v. United States, 223 U.S. 442 (1911); State v. Jellison, 104 Md. 281, 71 Atl. 716 (1908).

28. For a discussion of the various ways multiple offenses can be committed and of the courts' reactions, see Horack, *The Multiple Consequences of a Single Criminal Act*, 21 MINN. L. REV. 805 (1937).

dards violated. In the criminal law, as distinguished from aesthetics, the standards are discrete and precise. Each legal offense category (that is, whatever the legislature says is an offense) is a distinct standard, and each failure to comply with a standard constitutes, in ordinary language, an offense.[29]

But the courts have never used such a narrow definition of offense. Most courts sense that the policies of double jeopardy embrace closely related or overlapping offenses as well. This insight has led to the application of a mechanical test for defining an offense, a test which is more generous than ordinary language, but arbitrarily so.

This Comment will examine briefly the most popular offense-defining tests, and then reconstruct them to conform to the policies of the double jeopardy prohibition.[30] It will be suggested that offenses should be deemed the same for the purpose of reprosecution whenever they could have prosecuted at a single trial. And it will be suggested that the double jeopardy clause compels a rule of strict construction in determining whether multiple punishment may be imposed at a single trial.

The Offense-Defining Tests

Two approaches have been used in formulating offense-defining tests: the evidentiary, and the behavioral. Each of these, in turn, may be subdivided. *Required evidence tests* hold that offenses are "the same" if the elements of one are sufficiently similar to the elements of another.[31] *Alleged evidence tests* find offenses the same if there is sufficient similarity between the allegations of the two indictments.[32]

29. Thus even a criminal who in one assault violates a statute proscribing assault with intent to kill and a statute proscribing simple assault (necessarily included offenses) has committed two offenses. In this respect, the ordinary language meaning of offense would seem to correspond to the meaning indicated by the identity test. However, the identity test, ordaining that offenses are not the same unless identical in law and fact, makes an exception for necessarily included offenses. See note 53 *infra*.

30. See note 14 *supra*.

31. Required evidence tests are the most popular variety. This majority view was stated in United States v. Brimsdon, 23 F. Supp. 510, 512 (W.D. Mo. 1938), as follows: "The constitutional guaranty is against double jeopardy for the same offense. There is no constitutional guaranty against a repetition of evidence in trials for different offenses." See ALI (1932) 28-35.

32. See, *e.g.*, People v. Brannon, 70 Cal. App. 225, 233 Pac. 88 (1924). This test falls somewhere between the required and actual evidence tests. If the allegations are examined with a view to the essential facts it is much like the elements test. If, on the other hand, the evidential allegations are considered, it begins to resemble more the actual evidence test. That is, it bars or permits a second prosecution on the basis of the *anticipated* actual evidence. The evidentiary factual allegations formulation has been criticized because it

Actual evidence tests find the offenses the same if there is a similarity between the evidence presented at the two trials.[33] The behavioral approach focuses on the defendant's conduct rather than on the prosecutor's evidence. Courts which use this second approach adopt *an act, transaction, or intent test.*[34]

The evidence approach is older and more popular.[35] The original "same evidence" test was designed to compensate for an absurdity of common law pleading. At common law the slightest variance between the allegation and proof was fatal to the prosecution.[36] Since a plea of former acquittal barred reprosecution for the same offense,[37] this vari-

makes the issue of double jeopardy turn upon the "accidental inclusion of superfluous allegations." Comment, 40 YALE L.J. 462, 463 (1931).

33. *E.g.*, Estep v. State, 11 Okla. Crim. 103, 109, 143 P. 64 (1914). In the recent famous New York case of Martinis v. Supreme Court, 15 N.Y.2d 240, 206 N.E.2d 165 (1965), three of the seven justices felt that the required evidence test permitted reprosecution for vehicular homicide after an acquittal for reckless driving, and three felt that the same test prohibited it. The swing man, Judge Burke, felt that the second trial should proceed but that the actual evidence test should be applied to the evidence presented at the second trial to see if it would have been sufficient to convict of the offense charged at the first. The case was remanded for a new trial on the vehicular homicide charge. In order that a new trial might be avoided if his double jeopardy ruling were overruled, Judge Silverman, of the N.Y. Supreme Court, allowed the case to go to the jury before passing on that issue. The jury was unable to agree. Addressing himself to the double jeopardy question, the judge applied the actual evidence test authorized by Judge Burke and concluded that the second trial did violate Martinis' right not to be twice placed in jeopardy because the state's evidence to prove vehicular homicide, though not identical, was much the same as that presented in the earlier trial to show reckless driving. People v. Martinis, 46 Misc. 2d 1066, 261 N.Y.S.2d 642 (1965).

34. A minority of the states apply these tests—Alabama, Georgia, New Jersey, Oklahoma and Texas. Even in these states the tests are applied sporadically and inconsistently. *Compare* Burnam v. State, 2 Ga. App. 395, 58 S.E. 683 (1907) *with* Harris v. State, 193 Ga. 109, 17 S.E.2d 573 (1941). *Compare* State v. Cooper, 13 N.J.L. 361 (Sup. Ct. 1833) *with* State v. Hoag, 35 N.J. Super. 555, 114 A.2d 573 (1955), *aff'd*, 21 N.J. 496, 122 A.2d 628 (1956), *aff'd*, 356 U.S. 464 (1958).

Sometimes offenses are considered "the same" where there is but one motivating intent or a single ultimate goal, *e.g.*, Smith v. State, 159 Tenn. 674, 682, 21 S.W.2d 400, 402 (1929), while at other times they are considered the same only if there is but one physical act, *e.g.*, Landers v. State, 26 Ala. App. 506, 162 So. 550 (1935). Also, about a dozen states have enacted statutes which forbid multiple trials and punishment for offenses arising from a single act. See statutes cited in ALI (1932) 128-29. See also New York, N.Y. PEN. LAW § 1938. Virginia has forbidden multiple prosecution for one act only when the first trial results in an acquittal. VA. CODE ANN. § 19.1-259 (1950). These "same act" statutes do not provide the defendant with substantial protection. See, *e.g.*, Bullock v. Commonwealth, 205 Va. 867, 140 S.E.2d 821 (1965). In fact, Wisconsin's "same act" statute seems to do no more than enact the required evidence test. WIS. STAT. ANN. § 939.71. See also note 62 *infra*.

35. See ALI (1932) 28-35.

36. See Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1173-74 & nn. 76 & 77.

37. The plea was *autrefois acquit*. *Supra* note 1.

ance rule might have set criminals free simply because of the prosecutor's ineptness—an ineptness engendered more by the pedantry of the pleading system than by the prosecutor's negligence.

In *Vandercomb's* case, (1796) the source of the same evidence test, the indictment charged a nocturnal breaking followed by a larceny.[38] At the trial it developed that the larceny had actually been committed a day earlier, and this variance led to acquittal.[39] Since defendants had been found in the house which they had previously robbed bare, a "technical acquittal" would have been especially intolerable.[40] When the defendants were reprosecuted for the crime they had actually committed, Judge Buller pronounced the famous test: since evidence of the offense charged in the second, accurate indictment would not convict on the first indictment, the offenses were different and the second prosecution permissible.[41] By 1865, this construction of the double jeopardy prohibition had become so universal that Bishop could state as a rule that: "When an indictment fails at the trial by reason of a variance, a subsequent one wherein it is avoided is not barred."[42]

Subsequent versions of the same evidence test have not been so functionally designed as the original. In *Morey v. Commonwealth*, the first court to apply the test in this country modified it significantly.[43] As formulated by Morey:

> A *conviction* or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence *required* to support a conviction upon *one of them* would

38. 2 Leach 707, 168 Eng. Rep. 455 (1796). It is perhaps worth noting that the "same evidence test" was formulated *after* the Fifth Amendment became a part of the United States Constitution.

39. *Id.* at 711, 168 Eng. Rep. at 457.

40. Courts in this country have also been known to alter the scope of the prevailing offense defining test to fit their own conception of the equities of the case before them. For instance, in State v. Fredlund, 200 Minn. 44, 273 N.W. 353 (1937), the court permitted a manslaughter prosecution following acquittal for the manslaughter of a different victim in the same accident. The court did not mention in its opinion, as did the prosecutor in his brief, that two of defendant's witnesses in the first trial had subsequently pleaded guilty to perjury. Discussed in Note, 24 MINN. L. REV. 522, 553-55, 560 (1940). See also Lugar, *Criminal Law, Double Jeopardy and Res Judicata*, 39 IOWA L. REV. 317, 344-46 (1954). Unfortunately, doctrines twisted to fit the court's conception of the equities in a particular case have a way of becoming precedents which compel results in subsequent cases contrary to different equities.

41. The King v. Vandercomb & Abbott, 2 Leach 707, 720, 168 Eng. Rep. 455, 461 (1796). Courts using Buller's formulation have invariably extended it to cover the case where the offense charged in the second indictment is one which was necessarily included in the offense charged in the first. *E.g.*, People v. Raymond, 87 Cal. App. 510, 262 Pac. 442 (1927).

42. 1 BISHOP, NEW COMMENTARIES ON THE CRIMINAL LAW § 1052 (8th ed., 1892).

43. 108 Mass. (12 Browne) 433 (1871).

have been sufficient to warrant a conviction upon the other. (Emphasis supplied.)[44]

Morey changed the original test in two ways. First, prior convictions were held to give no more immunity from reprosecution than prior acquittals, even though the policy of preventing variances from causing binding acquittals is irrelevant in prior conviction cases. Second, if the evidence of *either* offense would be sufficient to convict of the other, the later prosecution is barred. Under the *Vandercomb* test reprosecution would not be barred unless evidence necessary to convict under the second indictment would be sufficient to convict under the first indictment. Further, *Morey* underscores that the crucial evidence is not the evidence actually presented, but rather that minimally necessary to prove the crime charged.

After *Morey*, same evidence tests grew fruitful and multiplied. Virtually every species has had its day.[45] Among courts which follow either the original formulation or the *Morey* "two-way" revision, most agree that the relevant evidence is that required by the statutes,[46] but some rely on the evidence alleged or actually presented.[47] Frequently, however, it is difficult to determine whether a court is using the required or alleged evidence test.[48] Some jurisdictions find the same evidence test suitable for prior acquittals but not prior convictions;[49] others reserve it for multiple punishment questions.[50]

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44. *Id.* at 434.

45. See generally ALI (1932) 28-36; Note, 7 BROOKLYN L. REV. 79, 81-93 (1937); Lugar, *supra* note 40, at 321-23.

46. In United States v. Kramer, 289 F.2d 909, 913 (2d Cir. 1961), Judge Friendly, following the *Morey* formulation, expressly rejected the argument that the same evidence test barred reprosecution because the evidence actually presented to prove an illegal agreement at the second trial had also been presented at the first trial. He endorsed the required evidence test.

47. Justice Rutledge (then sitting on the D.C. circuit) preferred to rely on the actual evidence rather than either the alleged or required evidence.

"The test [same evidence test] therefore is useful only in relation to the evidence *actually offered*, not in relation to that *required to prove* the greater offense." District of Columbia v. Buckley, 128 F.2d 17, 21 (D.C. Cir.) (concurring opinion), *cert. denied*, 317 U.S. 658 (1942).

48. See, *e.g.*, People v. Defoor, 100 Cal. 150, 155, 34 Pac. 642, 643 (1893), where the court, quoting 1 BISHOP, NEW COMMENTARIES ON THE CRIMINAL LAW § 1052 (1892), said the test is "'whether, if what is *set out* in the second indictment had been proved under the first, there could have been a conviction,'" (emphasis added) and then apparently went on to apply the required evidence test. Similarly, it may be difficult to tell whether the court is using an actual evidence test or a transaction test. *E.g.*, People v. Martinis, 46 Misc. 2d 1066, 261 N.Y.S.2d 642 (1965). See note 33 *supra*.

49. Wright v. State, 17 Tex. Ct. App. R. 152 (1884). The Texas court felt that the same transaction test should be used in former acquittal cases, and the same evidence test only where the first trial resulted in conviction. See also *In re* Nielson, 131 U.S. 176 (1889).

50. See Note, 11 STAN. L. REV. 735, 743 & n.37 (1959), where the transaction test is

The courts have developed three additional formulations of the same evidence test. First, according to the "backwards" test, offenses are not the same unless the defendant could have been convicted of the second offense on the evidence required (or alleged or offered) at the first trial.[51] Second, according to the "distinct elements" test, offenses are not the same if each contains an element not included in the other.[52] And third, according to the "identity" test, offenses are the same for double jeopardy purposes only if they are identical in law and fact.[53] Both the distinct elements and identity tests depend upon the evidence required to convict, not the evidence actually introduced at trial.[54]

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approved for multiple prosecutions but not for multiple punishment at a single trial. See also separate opinion of Mr. Justice Brennan in Abbate v. United States, 359 U.S. 187, 196 (1959).

51. State v. Brownrigg, 87 Me. 500, 33 Atl. 11 (1895). See generally, 7 BROOKLYN L. REV. 79, 83 (1937). Courts using Buller's rule backwards usually permit an exception where the offense charged in the first indictment is necessarily included in the second. *E.g.*, Franklin v. State, 85 Ga. 570, 11 S.E. 876 (1890). If there is an acquittal at the first trial, reprosecution for the greater offense should be barred by collateral estoppel. See notes 104-14 *infra* and accompanying text.

52. This formulation has been the rule in the federal system since Gavieres v. United States, 220 U.S. 338, 342 (1911), where it was held that:

> A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt defendant from prosecution and punishment under the other.

Many states follow this rule, frequently citing *Gavieres*, but since 1960 it has been the policy of the Attorney General to request the Court to vacate sentences resulting from a second prosecution, even if the prosecution was permissible under the *Gavieres* rule, rather than risk review of the rule, *e.g.*, Petite v. United States, 361 U.S. 529, 530-31 (1960). This has been the practice even if the first trial resulted in an acquittal not on the merits, *e.g.*, Marakar v. United States, 370 U.S. 723 (1962), *vacating per curiam*, 300 F.2d 513 (3rd Cir. 1962). While recognizing the unfairness of two prosecutions in such situations, the Attorney General insists that the procedure is constitutional. Justices Black, Douglas, and Brennan, however, felt that the constitutional question should have been reached, and that double jeopardy barred the second proceedings. See separate opinion of Mr. Justice Brennan in Abbate v. United States, 359 U.S. 187 (1959).

In its application to multiple punishment at a single trial, the distinct fact test is the prevailing test in the federal system and in most of the states. Harris v. United States, 359 U.S. 19 (1959); Blockburger v. United States, 284 U.S. 299 (1932); Ebeling v. Morgan, 237 U.S. 625 (1915). The test is equivalent to the *Morey* rule when that rule is applied using the required evidence approach.

53. Burton v. United States, 202 U.S. 344, 380 (1906). Some courts seem to consider this test equivalent to the distinct elements test. But the distinct elements test would not permit prosecution for necessarily included offenses, while the same in law and fact test would. However, courts using the latter test usually make exception for necessarily included offenses, and thus it is functionally equivalent to the distinct elements test. Similarly, Buller's rule and Buller's rule backwards are functionally equivalent to the distinct elements test, if they are applied on the basis of *required* evidence and if the usual exceptions are made. See notes 41 and 51 *supra*.

54. Because of the various presumptions which the Federal Narcotics statutes es-

Attempting to choose which version of the same evidence test would best implement the double jeopardy prohibition is like deciding which of five lumberjacks would be most handy with a violin. Even the best same evidence test is insensitive to the policies of the double jeopardy clause. The original same evidence test had an intelligible policy. But the variance problem for which the test was apposite has largely vanished.[55] And even if the variance problem had not disappeared, there is no apparent reason to apply the test in former conviction cases, since variance is a harmful technicality only when the defendant is *acquitted* because of the variance.

If the goal of the same evidence test is to prevent arbitrary reprosecution, then the tests based on the actual evidence presented at the second trial are fairer than those which depend upon the minimum of evidence required by the statute, or that alleged in the indictment. Suppose the first trial is for drunken driving, and results in acquittal. The prosecutor follows up with a manslaughter charge. Under the required evidence test, the second prosecution would be permitted because manslaughter *can* be proved without drunkenness. But if the prosecutor's proof amounts only to the evidence of drunkenness rejected at the first trial, the actual evidence test would bar relitigation.[56]

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tablish, the distinction between required evidence and actual evidence may have a bizarre significance. In Harris v. United States, 359 U.S. 19 (1959), for example, the government's evidence consisted solely of some heroin and the testimony that it had been in the possession of the defendant. The statutes provide that such evidence raises the presumption that (1) defendant purchased the heroin from an unstamped package in violation of 26 U.S.C. § 4704(a) and (2) received and concealed it knowing it to be illegally imported in violation of 21 U.S.C. § 174. In *Harris*, the accused's defense was an alibi and he did not try specifically to rebut either of the presumptions. He was convicted on both counts. *In fact* the same evidence was required to convict on both counts and, in this case, did. Presumably, however, because the offenses charged had distinct elements the proof of which *might have* required different evidence had the defendant tried to rebut the presumptions, the Court considered the offenses different and punished for both. The Court felt bound to follow the precedent established by Gore v. United States, 357 U.S. 386 (1958). But see dissenting opinion of Brennan, J. at 357 U.S. 397.

55. See Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1175-78 & nn.82-93 (1960). See generally ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 194-265 (1947).

56. That is, the judge, after hearing the evidence, would decide if that evidence would have convicted of the offense charged at the first trial (or was substantially the same evidence, or tried to prove the same conduct, whichever standard is employed). If he finds the requisite similarity in evidence, he might uphold the double jeopardy plea, never submitting the case to the jury. In the *Martinis* case, however, the trial judge at the second trial submitted the case to the jury, even though he had decided that the double jeopardy plea should be sustained, because he felt that if his double jeopardy

Unfortunately, the best that can be said for the actual evidence test is that it is not the worst. Since a major purpose of the double jeopardy prohibition is to preclude vexatious reprosecution, it is senseless to compel a defendant to undergo the second trial in order to determine whether it is barred.

Since none of the evidence tests define an offense in accordance with ordinary language,[57] it is apparent that the courts have recognized that offense is a term of art, to be shaped by policies. But, as we shall see, none of the tests is adequate to implement the basic policies of double jeopardy. Bishop aptly describes the same evidence approach as one "which, if fully adopted, could render practically void the constitutional inhibition."[58]

Some state courts, and legislatures, searching for a more generous approach to the double jeopardy prohibition, have focused on the "criminal transaction."[59] The tests which follow this approach, the same act,[60] same transaction,[61] and same intent tests,[62] depend upon the

ruling were reversed, all would be saved the burden of still another trial. As it turned out, the jury was hung. 261 N.Y.S.2d 642, 643 (Sup. Ct. 1965).

57. See note 29, *supra* and accompanying text.

58. 1 BISHOP, CRIMINAL LAW § 1048 (9th ed. 1923).

59. Because many double jeopardy multiple conviction claims have arisen in multiple trial situations (the plea was entered in bar at the commencement of the second prosecution), it is difficult to determine whether the courts using a transaction test were concerned over the harassment resulting from multiple prosecution or the multiple punishment resulting from multiple convictions. Many courts have not realized that a transaction test may be appropriate for the multiple trial problem, but not for multiple punishment at a single trial. They have felt that the same test must be applied in both situations. See, *e.g.*, Jones v. State, 19 Ala. App. 600, 99 So. 770 (1924). On the assumption that the transaction test would permit only one punishment for a series of acts violating several statutes, it has been criticized as a "defendant's rule." Comment, *What Constitutes Double Jeopardy?*, 38 J. CRIM. L., C. & P.S. 379, 384 (1947); note 19, *supra*.

60. Worley v. State, 42 Okla. Crim. 240, 275 Pac. 399 (1929) (conviction of arson for burning goods in a store barred prosecution for destroying insured goods); Sexton v. Commonwealth, 193 Ky. 495, 236 S.W. 956 (1922) (conviction or acquittal of breach of the peace bars prosecution for assault and battery, if based on the same act of defendant); and see note 34, *supra*.

61. Crumley v. City of Atlanta, 68 Ga. App. 69, 22 S.E.2d 181 (1922); Fews v. State, 1 Ga. App. 122, 58 S.E. 64 (1907); State v. Greely, 30 N.J. Super. 180, 103 A.2d 639 (1954); Spannell v. State, 83 Tex. Crim. 418, 203 S.W. 357 (1918).

62. United States v. Adams, 281 U.S. 202, 204 (1930). State v. DeGraffenreid, 68 Tenn. (9 Baxt.) 287 (1878).

Because the limits of an act or transaction cannot be determined until we know the level of abstraction at which we are to parcel a course of conduct, courts applying the act and transaction tests have had to find another concept with which to give these terms content. Many courts have chosen "intent" as the proper standard. For each activity motivated by a distinct intent there is said to be a different act.

defendant's behavior, rather than the evidence or laws. Reprosecution and multiple punishment will be barred if the defendant's conduct constituted a single act or transaction, or was motivated by a single intent. The principal shortcoming of this approach is that any sequence of conduct can be defined as an "act" or a "transaction." An act or transaction test itself determines nothing.

> The beginning of sense, not to say wisdom, is to realize that "doing an action" . . . is a highly abstract expression—it is a stand-in used in place of any (or almost any?) verb with a personal subject, in the same sort of way that "thing" is a stand-in for any (or when we remember, almost any) noun substantive. . . . So we come easily to think of our own behavior over any time, and of a life as a whole, of consisting in doing now action A, next action B, then action C, and so on, just as elsewhere we come to think of the world as consisting of this, that, and the other substance or material thing, each with its own properties. All "actions" are as actions equal, composing a quarrel with striking a match, winning a war with sneezing: worse still, we assimilate them one and all to the supposedly most obvious and easy cases, such as posting letters or moving fingers, just as we assimilate all "things" to horses or beds.[63]

Whether any span of conduct is an act depends entirely upon the verb in the question we ask. A man is shaving. How many acts is he doing? Is shaving an act? Yes. Is changing the blade in one's razor an act? Yes. Is applying lather to one's face an act? . . . Yes, yes, yes.

We should not be surprised that presenting a forged check to the cashier and accepting the cash, for example, are two acts in Virginia,[64] though they would be one in California.[65] And since the term "transaction" is equally chameleonic, it is not shocking that in Georgia, a so-

Thus, in Fews v. State, 1 Ga. App. 122, 125, 58 S.E. 64 (1907), for example, where the defendant had shot two people in a scuffle, the court found two transactions, holding that ". . . the intent to kill was directed against them individually; the fact that the interval between the shootings was slight does not make the transactions identical." Similarly, the courts of New York and California, in construing statutes which provide that an act or omission made punishable by different provisions of the criminal law may be punished under any one provision, but not under more than one, have usually defined act by intent. "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of actor." Neal v. California, 55 Cal. 2d 11, 19, 357 P.2d 839, 84 (1960). People v. Savarese, 1 Misc. 305, 114 N.Y.S.2d 816 (1952). See also note 34 *supra*.

63. J. L. Austin, *A Plea for Excuses*, in ORDINARY LANGUAGE, 41, 44 (1964).

64. Bullock v. Commonwealth, 205 Va. 867, 140 S.E.2d 821 (1965), *cert. denied*, 34 U.S.L. Week 3180 (Nov. 23, 1965).

65. The conduct would probably be considered one act because the defendant had a single objective, to cash a forged check. *E.g.*, People v. Keller, 212 C.A.2d 210, 27 Cal. Reptr. 805 (1963). (Defendant who conspired to commit burglary and attempted to commit burglary could be punished for only one offense.) See note 62 *supra*.

called transaction state, two offenses do not constitute one transaction unless the offenses are the same in law and fact.[66]

To say that "transaction" is a shapeless term is not to say that it is useless. Its utility depends upon the way we define it. But before undertaking such a definition, we must understand what we are trying to accomplish.

REPROSECUTION

In its traditional application, double jeopardy is a rule of finality: a single fair trial on a criminal charge bars reprosecution. Double jeopardy shares the purposes of civil law rules of finality;[67] it protects the defendant from continuing distress,[68] enables him to consider the matter closed and to plan ahead accordingly,[69] and saves both the public and defendant the cost of redundant litigation. But double jeopardy is not simply res judicata dressed in prison grey.[70] It was called forth more by oppression than by crowded calendars.[71] It equalizes, in some

66. Harris v. State, 193 Ga. 109, 118, 17 S.E.2d 73, 78 (1941).

67. For a discussion of the policies of res judicata, the civil law analogue to double jeopardy, see Angel v. Bullington, 330 U.S. 183 (1947); Note, 64 YALE L.J. 436 n.43 (1955); 1B MOORE, FEDERAL PRACTICE ¶¶ 0.405-0.422 (2d ed. 1965); *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818 (1952).

68. Palko v. Connecticut, 302 U.S. 319, 328 (1937) (the constitutional provision serves to prevent the state from wearing out the accused by a multitude of trials).

69. Manifestly, reprosecutions after an acquittal, even if they do not result in a conviction, may frustrate the accused's attempt to order his life with a reasonable expectation about his future. In some cases, this may be true even when the first trial results in conviction. In United States v. Candelaria, the court pointed out that, with respect to an incarcerated prisoner, the threat of a second prosecution may interfere with rehabilitation. 131 F. Supp. 797, 805 (1955). "The inmate who has a detainer against him is filled with anxiety and apprehension and frequently does not respond to a training program." Quoted from Handbook on Interstate Crime Control in *Candelaria*, at 806.

70. The underlying idea [of the double jeopardy prohibition] . . . is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957). For an excellent discussion of the policies upon which the prohibition rests, see Comment, 65 YALE L.J. 339, 340-41 (1956).

71. See *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 171 (1873), quoting with approval from the Kentucky case of Commonwealth v. Olds, 5 Littell 137 (1824):

. . . every person acquainted with the history of governments must know that state trials have been employed as a formidable engine in the hands of a dominant administration. . . . To prevent this mischief the ancient common law . . . provided that one acquittal or conviction should satisfy the law. . . . To perpetuate this wise rule, so favorable and necessary to the liberty of the citizen in a government like ours, so frequently subject to changes in popular feeling and sentiment, was the design of introducing into our Constitution the clause in question.

measure, the adversary capabilities of grossly unequal litigants.[72] It reflects not only our demand for speedy justice, but all of our civilized caution about criminal law—our respect for a jury verdict and the presumption of innocence, our aversion to needless punishment, our distinction between prosecution and persecution. Distilled, these diffuse considerations yield three rules designed to implement three particular policies. First, the double jeopardy bar on reprosecution after an acquittal makes the status of innocence meaningful and minimizes the chance that innocent men will be convicted.[73] Without a rule of finality no procession of juries could effectively acquit a defendant, but a single jury could convict.[74] The prosecutor could keep trying until he found an accommodating panel. Second, the rule prohibiting reprosecution after a conviction denies the prosecutor the same control over punishment. Without the rule the prosecutor could continue to prosecute until he found a judge willing to give an "appropriate" sentence. And if the subsequent judge imposed his sentence cumulatively the defendant would be punished twice for the same offense. The double jeopardy rule forces the prosecutor to accept the first judge's decision on sentencing just as he must accept the first jury's verdict on guilt. Finally, and most importantly, rules against reprosecution, after either prior acquittal or prior conviction, prevent the prosecutor from using criminal prosecutions to inflict unnecessary suffering upon defendants.

See also, Brief for the United States, pp. 14-15, Downum v. United States, 372 U.S. 734 (1963) (discussion of jury discharge rule as aimed at preventing government oppression).

72. For a comparison of the adversary capabilities of the state with those of the accused as they stand today, see generally Goldstein, *supra* note 55.

73. Though several cases have acknowledged this as a policy of double jeopardy (for example, in State v. Cooper, 13 N.J.L. 361, 370 (1833), the court acknowledged the increased "danger of an erroneous conviction from repeated trials") the importance of this consideration has been uniformly underestimated. It is true that the criminal procedure is laced with "safeguards"—the "pre-trial screens"—which in theory help insure that only "guilty" individuals will be brought to trial. But the efficacy of these screens as they exist today has been widely questioned. See Goldstein, *supra* note 55. Professor Goldstein contends that "the minimal standards of proof employed by these agencies give very little assurance that persons passed on by them to a later screen are indeed guilty. . . ." *Id.* at 1163. Experience has corroborated this position. We cannot know how many innocent men have been found guilty. But the numerous discovered wrongful convictions should give us reason to wonder. See, *e.g.*, BORCHARD, CONVICTING THE INNOCENT (1932); FRANK, NOT GUILTY (1957).

74. For instance, if the evidence were such that one in four juries would convict, and three in four acquit, the probability of conviction if the defendant is tried once is, of course, one in four (4/16). If two trials were permitted the defendant would have to convince two juries of his innocence and the probability of one of the two convicting would be $1 - (3/4 \times 3/4) = (7/16)$; assuming the independence of each jury and the absence of other variables. If he had to convince five juries his probability of conviction by one would rise to over three in four.

A criminal trial warps the defendant's life and consumes his money. The Constitution allows this ordeal to be imposed only once and for reasonable cause, not repeatedly at the prosecutor's whim.

Before and during the time of Coke, when the rules prohibiting reprosecution for the same offense were formulated, prosecutors did not evade its ban by retrying the defendant on closely related offenses. Offense categories were relatively few and distinct:[75] the law distinguished among rape, arson, and murder, but not between "intimidating any person from voting" and "interfering with his right to vote."[76] The conviction rate was so high that reprosecution was rarely necessary.[77] The ancient plea of *autrefois attaint* generally barred all further felony trials after the defendant had been convicted once.[78] But the profusion of offense categories, and the courts' willingness to discern separate offenses in essentially unitary behavior,[79] have made it possible for the prosecutor to frustrate the three policies of double jeopardy.[80]

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75. At the time of Henry III there were only eleven felonies. In Coke's time the number had risen to thirty. Even at the time of our Constitution there were only 160. 2 STEPHEN, CRIMINAL LAW OF ENGLAND 219 (1883). Most of this increase is accounted for by multiplication of offenses in the larceny, quasi-theft category. The statutes generally related to thefts of different kinds of goods and thus a particular theft would usually amount to only one offense.

76. Sec. 11(a) No person acting under color of law shall fail or refuse to permit any person to vote . . . .

Sec. 11(b) No person, whether acting under color of law or otherwise, shall intimidate, threaten or coerce . . . any person for voting or attempting to vote . . . .

Sec. 12(a) Whoever . . . shall violate section 11(a) or (b), shall be fined not more than $5,000, or imprisoned not more than five years, or both.

Sec. 12(c) Whoever . . . interferes with any right secured by section . . . 11(a) or (b) shall be fined not more than $5,000, or imprisoned not more than five years, or both.

77. 78 Stat. 443 (1965). See Note, 57 YALE L.J. 132 & n.1 (1947).

78. The penalty for all felonies was death or deportation. PUTNAM, PROCEEDINGS BEFORE JUSTICES OF THE PEACE, at CXXXIV (1938); 1 STEPHEN, *op. cit. supra* note 75 at 291. Even when punishment was not actually imposed, the convicted man was considered "dead in law" and could not be brought to trial. Note 1, *supra* for sources discussing the plea of *autrefois attaint.*

79. At first the courts refused to allow a second prosecution on an indictment alleging the same facts as the first, but rearranged to fit a different legal theory. Rex v. Segar, Comb. 401, 90 Eng. Rep. 554 (K.B. 1696). Then, when the state was frequently deprived of a chance to try the accused on the merits, the courts began to permit reprosecution on the same facts, but under different legal theory. Note, 57 YALE L.J. 132, 133 (1947). Comment, 65 YALE L.J. 339 (1956).

80. It therefore appears that . . . an overzealous prosecuting attorney can, by assiduously using his Thesaurus and statute-book and continually redefining the crime, each time requiring slightly different criminal elements, secure repeated convictions for the same offense.

Note, 7 BROOKLYN L. REV. 79, 82 (1937). And see instances discussed therein.

Protecting the Innocent

In *Hoag v. New Jersey*,[81] for example, the Supreme Court undercut the status of innocence by allowing the prosecutor to ignore one jury's acquittal and obtain a second's conviction. Hoag was first tried for three counts of robbing A, B, and C in a single transaction. His defense was an alibi, and he was acquitted.[82] Subsequently, he was reprosecuted for robbing D in the same transaction.[83] The Court reasoned that since the offenses were distinct under the New Jersey same evidence test, reprosecution was not a second jeopardy for the same offense.[84] But the policies of double jeopardy were violated almost as surely as if Hoag had been retried for precisely the same charge.[85] If, as seems most likely, the first jury believed Hoag's alibi, the second verdict flatly contradicted the first. Since the alibi provided a valid defense against the charges of robbing A, B, C, *and* D, the probability that Hoag was convicted wrongfully in the second trial was exactly as high as if he had been tried again for robbing A, B, and C.[86]

Hoag involved multiple victims, but cases involving overlapping offense categories may raise the same problem. Suppose, for example, defendant is acquitted of reckless driving, when his sole defense was that he was not driving the vehicle. Subsequently, he is prosecuted for manslaughter arising out of the same conduct, and he offers the same defense.[87] The second jury convicts. Of course, we cannot know whether or not the first jury believed his defense; it may have felt that some other aspect of the prosecutor's case was weak. But if the first jury did believe his defense, then retrial on the manslaughter charge was tantamount to a second jeopardy. Double jeopardy should guarantee that the defendant need convince only one jury of his innocence.

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81. 356 U.S. 464 (1958).

82. *Id.* at 465.

83. *Id.* at 466.

84. *Id.* at 467.

85. Of course, Hoag's former acquittal was not a complete nullity. He could not subsequently be proved guilty of having robbed A, B, and C. But as a practical matter, Hoag was in no better position at the second trial than if he had been charged with the same offence. The sole difference was that at trial for only D, he could receive no more than a single sentence for robbery, whereas at trial for A, B, and C, he might have been given cumulative sentences. However: first, it is unlikely that New Jersey would permit cumulative sentences in this situation, State v. Cooper, 13 N.J.L. 361 (1833); State v. Mowser, 92 N.J.L. 474, 106 Atl. 416 (1919) and second, even if cumulative sentences were permitted, the vast majority of judges who impose multiple sentences impose them concurrently.

86. See note 74, *supra*.

87. Dykeman v. Commonwealth, 201 Va. 807, 113 S.E.2d 867 (1960).

Multiple Punishment

In *Ciucci v. Illinois*,[88] the court undermined the second policy of double jeopardy. Ciucci murdered his wife and three children, seriatim. First he was prosecuted for the murder of his wife, and the state introduced evidence about the children's deaths.[89] The jury convicted and gave Ciucci twenty years.[90] The prosecutor, dissatisfied with the penalty,[91] charged him with murdering one of his daughters, again introduced testimony of all four murders, and won a forty-five year sentence.[92] Still unhappy,[93] the prosecutor brought a third trial for the murder of one of the sons, again displaying all four murders. Ciucci was sentenced to death.[94]

In sentencing Ciucci each jury probably responded to the evidence of all the murders. To assume otherwise is to credit the jury with making almost scholarly distinctions in imposing punishment—distinctions between the offense and the context in which it is committed. Such a chaste determination is not only emotionally incredible, but indefensible. Suitable punishment for a crime cannot be determined in the abstract. The totality of the conduct is relevant to motive, character, and culpability.[95] If, as we have assumed, each jury sentenced for all four murdered Ciuccis, then the prosecutor was permitted to choose among three sentences for the same offense.

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88. 8 Ill. 2d 619, 137 N.E.2d 40 (1956). The Supreme Court affirmed, per curiam, 5-4 on the double jeopardy issue, but granted petitioner leave "to institute such further proceedings as may be available to him for the purpose of substantiating the claim that he was deprived of due process." 356 U.S. 571, 573 (1958).

89. *Id.* at 572.

90. Illinois is one of eleven states that permit jury sentencing. RUBIN, THE LAW OF CRIMINAL CORRECTION, Ch. 4 § 9 at 122 (1963).

91. The State's Attorney declared:

"The verdict is a moral injustice to society when a man is guilty of killing his wife.

"To give a sentence like this, it's just like slapping him on the wrist."

Chicago American, March 19, 1954, p. 1 (4 star final ed.) cited in Brief for the Petitioner, App. B, p. 43, 356 U.S. 571 (1958).

92. 356 U.S. at 572.

93. Ciucci will be tried for the murder of the other children, said Irwin D. Block, acting States' Attorney.

"We are very disappointed, as we were in the first trial," Block declared. "We are going to try the two other cases.

"Nothing short of the death penalty will satisfy the State and we hope to get a jury which will realize the magnitude of this crime."

Chicago Daily News, July 29, 1954, p. 1 (Final Markets Red Streak ed.) cited in Brief for the Petitioner, App. E, p. 51, 356 U.S. 571 (1958).

94. 356 U.S. at 572.

95. *E.g.*, note 103 *infra*. See generally RUBIN, THE LAW OF CRIMINAL CORRECTION, Ch. 3 (1963).

But *Ciucci* violated the double jeopardy policy against retrial after conviction even if only one of the penalties was affected by evidence of the related crimes. Suppose, for example, that the first jury sentenced twenty years for murdering the wife without considering the other murders. And suppose the second jury sentenced for murdering the daughter in the context of the murder of wife and son. Suppose further that the penalty was five years stiffer because of the wife-killing. Ciucci would then have been sentenced twice for killing his wife: twenty years by the first jury, and five by the second.

Prosecution after a conviction on overlapping offenses may raise similar problems of double punishment. Consider, for example, the case of *Williams v. Oklahoma.*[96] After robbing a gas station, defendant commandeered a car and driver in order to make a getaway. He forced his captive to drive out of town, and killed him. Williams pled guilty to murder and was sentenced to life.[97] He was then prosecuted for the kidnapping, and pled guilty to an indictment which made no mention of the murder.[98] Prior to sentencing, however, the prosecutor, pursuant to Oklahoma law,[99] presented evidence regarding the murder.[100] The court sentenced defendant to death, and the judge's statement made clear that the murder aggravated the punishment.[101] The United States Supreme Court affirmed. The Court reasoned that Williams had not been twice punished for the same offense because the offenses were separately punishable in Oklahoma,[102] and that proper sentencing requires consideration of all the circumstances of the crime.[103] The first argument begs the question. The sec-

96. 321 P.2d 990 (1957), *aff'd*, 358 U.S. 576 (1959).

97. 358 U.S. at 577-78.

98. No. 16911; INFORMATION FOR KIDNAPPING—Filed December 17, 1956; State of Oklahoma v. Edward Leon Williams; Transcript of the Record, pp. 16-17 (Print, pp. 3-4).

99. OKLA. STAT. ANN. tit. 22, §§ 973, 974, 975 (1951).

100. Record, pp. 28-48 (Print, pp. 10-21), 358 U.S. 576 (1959).

101. The Court has been very deliberate in the matter of this case . . . investigation of the facts which have been alleged, which have been stated, and which you admit were part of this crime which you have committed in Tulsa County, which resulted in the murder . . . to which you have pled guilty and been sentenced in Muskogee County, and which the court takes into consideration, that murder as being a part and parcel of the crime which is here, as a continuing thing. It is the Court's opinion, that there has never been in the history of Tulsa County, a more brutal, vicious crime committed. . . .

Records, pp. 64-5 (Print, p. 29).

102. The Oklahoma statutes separately create and define the crimes of murder and of kidnapping, and it is evident from their terms that, as held by the Oklahoma court in this case, they create "separate and distinct offenses."

358 U.S. 576, 584-85.

103. In discharging his duty of imposing a proper sentence, the sentencing judge

ond accurately describes the sentencing process, but leads to the opposite conclusion. The second court clearly punished Williams for a murder for which he had been previously convicted and punished.

Collateral Estoppel

These violations of double jeopardy policy occurred because the courts followed vague and abstract offense-defining tests, instead of using tools designed particularly to cure the evils of reprosecution. For example, to solve the problems raised by reprosecution after an acquittal, the courts might use the civil law doctrine of collateral estoppel.[104] Collateral estoppel bars relitigation between the same parties of issues actually determined at a previous trial.[105] Some courts are willing to apply the doctrine in criminal cases.[106] But many of these courts refuse to apply it unless it is mathematically certain that the same issues were determined at the previous trial.[107] Thus, in

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is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime.

Id. at 585.

104. For a general discussion of collateral estoppel, see 1B MOORE, FEDERAL PRACTICE, ¶¶ 0.441-0.448; 2 FREEMAN, JUDGMENTS Ch. XI 1322, (5th ed. 1925); Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1 (1942).

105. The term res judicata is often used to denote two things in respect to the effect of a valid, final judgment: (1) that such a judgment when rendered on the merits, is an absolute bar to a subsequent action, between the same parties or those in privy with them, upon the same claim or demand; and (2) that such a judgment constitutes an estoppel, between the same parties or those in privity with them, as to matters that were necessarily litigated and determined, although the claim or demand in the subsequent action is different.

1B MOORE, ¶ 0.405[1], p. 621. Though both doctrines have as their objective judicial finality, Moore concludes that the operational difference between them requires that different terms be used for each. He uses "res judicata" to embrace only the first, "collateral estoppel" the second.

In the civil law the suggested terminology is normally used, see, *e.g.*, Lawlor v. National Screen Service Corp., 349 U.S. 322, 326 (1955) but in the criminal law "res judicata" is often used to describe collateral estoppel. See, *e.g.*, Harris v. State, 193 Ga. 109, 17 S.E. 2d 573 (1941); State v. Coblentz, 169 Md. 159, 180 Atl. 266 (1935).

106. Regina v. Miles, L.R. 24 Q.B.D. 423 (1890) which the Supreme Court relied on in United States v. Oppenhiemer, 242 U.S. 85 (1916). In the old English case of Rex v. Duchess of Kingston, 20 How. St. Tr. 355, 583 (1776), a conviction in the Ecclesiastical Court for ejactitation of marriage barred prosecution in another court for bigamy. See also Mayers and Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, at 29-31 for a discussion of the history of collateral estoppel in the criminal law.

107. There are three reasons why mathematical certainty is nearly impossible: the defence is usually a general denial; several theories of acquittal are usually offered in the instructions; and the verdict is a general one. People v. Rogers, 102 Misc. 437, 170 N.Y. S. 86 (Sup. Ct. 1918), *aff'd*, 184 App. Div. 461, 171 N.Y. S. 451 (1st Dep't 1918), *aff'd*, 226 N.Y. 671, 123 N.E. 882 (1919). For instance, in State v. Barton, 5 Wash. 2d

Hoag, the Supreme Court upheld the New Jersey Supreme Court's ruling that the first jury might not have believed the defendant's alibi, but might have acquitted on some element which he did not contest.[108] The court would not look behind the general verdict to speculate about which issues were decisive, however obvious this question appeared from the record. Under this strict rendering of collateral estoppel, a second indictment will be barred only when it is certain that some element necessary to conviction of the second offense has been adjudicated in favor of the defendant at the first trial.[109] But whenever there is substantial overlap between offenses, there is a significant danger that a defendant tried separately on both will be twice required to prove the same defense. In all these cases the current collateral estoppel doctrine violates the double jeopardy policy against retrying a man who has proved his innocence once.

A more realistic version of collateral estoppel is practiced in some of the federal courts.[110] In criminal cases, some courts examine the

234, 105 P.2d 63 (1940), the court allowed a subsequent prosecution for a robbery which had been the underlying felony in a felony-murder charge of which defendant had already been acquitted, his sole defense having been an alibi. The court said,

> It is not possible to determine whether the jurors returned a verdict of acquittal because they credited the testimony in support of appellant's alibi, or for the reason that they found the states evidence insufficient as to one or more essential elements of the offense charged.

Id. at 241, 105 P.2d 67. See Note, 27 IOWA L. REV. 649 (1942); Note, 25 CHI.-KENT REV. 243 (1947); Note, 47 COLUM. L. REV. 679 (1947).

In addition some courts have held that unless the offenses are the same, no form of res judicata (including collateral estoppel) is applicable. The confusion may arise because the courts in criminal cases use the generic term "res judicata," which in the civil law, is used specifically to describe a doctrine applying only when the causes of action are the same. Duvall v. State, 111 Ohio St. 657, 146 N.E. 90 (1924). See Luger, *supra* note 40, at 330-31.

108. [W]e cannot say that the New Jersey Supreme Court exceeded constitutionally permissible bounds in concluding that the jury might have acquitted petitioner at the earlier trial because it did not believe that the victims of the robbery had been put in fear, or that property had not been taken from them, or for other reasons unrelated to the issue of 'identity.'

356 U.S. 464, 472.

109. Under the prevailing offense-defining test, which holds that offenses are not the same if each has a distinct element, any pair of offenses that is not screened out as the same by the test will not be affected by a version of collateral estoppel requiring mathematical certainty, at least not where the verdict is a general one. It is always conceivable that the jury's acquittal was based on reasonable doubt as to the first offense's distinguishing element.

110. Sealfon v. United States, 332 U.S. 575 (1948). In *Sealfon* the Court considered the record of the first trial and the instructions given to the jury that acquitted the defendant of conspiracy. On the basis of this examination it concluded that the acquittal for the conspiracy represented an adjudication which must have been based on the belief that the defendant was innocent of the substantive offense as well.

record of the previous prosecution, evaluate the pleading, defenses, evidence and jury charge, and determine the issue upon which a rational jury must have rested its verdict.[111] This doctrine of "reasonable speculation" saves a general verdict of acquittal from complete impotence. But it leaves most complicated double jeopardy problems unsolved. Whenever there is a substantial defense at the first trial on two elements, only one of which is included in the second charge, no amount of reasonable speculation will tell us whether the second trial would relitigate issues settled at the first. Suppose, for example, the defendant is prosecuted for uttering a false check. The prosecutor alleges (1) that defendant presented and cashed the check, and (2) that defendant knew it was forged because he forged it. The defenses are (1) that defendant was not the person who cashed the check, and (2) that he did not forge it. The jury acquits. Whether a subsequent trial for forging the check would be collaterally estopped depends upon whether the jury acquitted on the basis of the first or second defense; and the determination will usually reflect guesswork rather than reasonable speculation.[112] If there were an acceptable way of taking some of the guesswork out of the collateral estoppel device it would successfully cure the evils of reprosecution after prior acquittal.[113]

Some state courts also have applied collateral estoppel in this more realistic way. People v. Grzesczak, 77 Misc. 202, 137 N.Y. Supp. 538 (County Ct. 1912). *Cf.*, Dunn v. United States, 284 U.S. 390 (1932) which held that inconsistent verdicts imposed at a single trial should stand. Unfortunately, even in the jurisdictions which recognize collateral estoppel in criminal cases, the courts frequently ignore the principle, or apply it inconsistently. See, *e.g.*, Fall v. United States, 49 F.2d 506, 511 (D.C. Cir. 1931). See generally, Note, 27 TEXAS L. REV. 231, 235 (1948). McLaren, *The Doctrine of Res Judicata Applied to the Trial of Criminal Cases*, 10 WASH. L. REV. 198 (1935).

111. See United States v. Kramer, 289 F.2d 909, 913-14 (1961). But collateral estoppel may not be of constitutional dimension, for Mr. Justice Harlan, writing for the court, said in *Hoag*, "We entertain grave doubts whether collateral estoppel can be regarded as a constitutional requirement." 356 U.S. 464, 471 (1958). However, he decided the case on the ground that the Court could not overrule the state court determination of "controverted or debatable factual issues." *Ibid.* For an interesting discussion suggesting that collateral estoppel may have a constitutional basis and that it should have been applied by the Supreme Court in *Hoag*, see Mayers and Yarbrough, *supra* note 106, at 39-41.

112. This difficulty may also arise when, at the first trial, the acquitted defendant pleaded inconsistent defenses, one of which would also acquit on the subsequent charge. *Autrefois Acquit and Issue Estoppel* CXIV L.J. (No. 5143) 547-50 (1964). See also Mayers and Yarbrough, *supra* note 106, at 1-3, 41-3, for a discussion of United States v. Maybury, 274 F.2d 899 (2d Cir. 1960) where the judge rendered inconsistent verdicts in a forging-uttering case.

113. While special interrogatories would divulge some of the mystery behind a general verdict and make collateral estoppel a potent, workable doctrine of the criminal law, they would probably hamper the jury in its performance of what many commentators believe to be its justifying function, tempering the rigors of harsh or unpopular laws

However, the device would be totally inadequate as a tool for the two other double jeopardy policies. First, when the defendant has been convicted previously, presumably none of the defenses succeeded at the first trial, and it would be contrary to his interest to bar relitigation of these issues.[114] Second, collateral estoppel frequently will not prevent reprosecution which violates double jeopardy's anti-harassment policy. Suppose, for example, in the uttering-forging case, defendant raised only the first defense in a prosecution for uttering. An acquittal could not possibly collaterally estop a subsequent prosecution for forging. But separate prosecution might still be arbitrary and burdensome. We must look further, then, to a solution which better implements the policy against harassment.

Harassment

Harassment is not a synonym for inconvenience. All repeated prosecutions distress defendants.[115] Harassment, at least in double jeopardy law, involves misconduct by the prosecutor as well as hardship to the defendant. The mistrial cases show that a second prosecution will be deemed harassing when it is not absolutely necessary—when the first trial could have been determinative but for illegitimate prosecutorial behavior.

Retrial following discharge of a jury is prohibited unless the mistrial was granted with the defendant's consent[116] or out of manifest neces-

with the sympathy of the community. The jury would no longer be able to render a compromise verdict without exhibiting the inconsistency of its determinations, and this it might be reluctant to do. "Jury lawlessness is the great corrective of law in its actual trial administration." Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18 (1910); United States v. Maybury, 274 F.2d 899, 902-03 (2d Cir. 1960). For a discussion of special verdicts and special interrogatories in civil law cases, see generally, JAMES, CIVIL PROCEDURE, § 7.15, at 293 (1965).

114. Where there is a conviction, the general verdict is not inscrutable; every essential element has been determined against the defendant. While some state courts have held that adverse determinations of issues litigated at the first trial are binding on the defendant at the second, Commonwealth v. Evans, 101 Mass. 25 (1869), dicta in more recent federal decisions indicate that the defendant may have a constitutional right to a trial before the immediate jury on every issue raised in the second prosecution. United States v. Carlisi, 32 F. Supp. 479, 482 (E.D.N.Y. 1940); United States v. DeAngelo, 138 F.2d 466, 468 (3d Cir. 1943).

115. In fact two of the most frequently occurring classes of cases where a second prosecution is permitted, (1) following a hung jury, and (2) following reversal of a conviction, probably involve greater inconvenience to the defendant than most forms of mistrials because in these instances the first trial is a complete one.

116. Downum v. United States, 372 U.S. 734, 736 (1963); Raslich v. Bannan, 278 F.2d 420 (6th Cir. 1959). Though sometimes the defendant's consent will be implied from his failure to object, Harlan v. State, 190 Ind. 322, 130 N.E. 413 (1921), usually such silence is not held to constitute consent, and the defendant is not deemed to have waived his

sity.[117] The courts have recognized necessity when there is a breakdown of judicial machinery[118]—when the first jury is hung,[119] a juror is disqualified,[120] the trial judge dies,[121] or war closes the courts.[122] But the prosecutor's intentional precipitation of a mistrial bars reprosecution.[123] He may not, without prejudice, have the jury discharged because it is unsympathetic, or because he has poorly prepared his case.[124] Thus double jeopardy forbids the prosecutor to use the first

double jeopardy objection to a trial following such mistrial. See, *e.g.*, United States v. Himmelfarb, 175 F.2d 924 (9th Cir. 1949), *cert. denied*, 338 U.S. 860 (1949); Commonwealth v. Gray, 249 Ky. 36, 60 S.W.2d 133 (1933). There is frequently considerable difficulty in determining whether the defendant has consented.

117. The classic case is United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824), where Mr. Justice Story said:

> [t]he law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.

Although the Supreme Court has refused to extend the federal mistrial rule to the states, Brock v. North Carolina, 344 U.S. 424 (1952), most states have a standard similar to the federal one. *Id.* at 436-37 (dissenting opinion of Mr. Chief Justice Vinson); Comm. v. Fitzpatrick, 121 Pa. 109, 15 Atl. 466 (1888); People v. Webb, 38 Cal. 467, 478 (1869) (and cases cited). See also, 2 WHARTON, CRIMINAL PROCEDURE (10th ed.), §§ 1427-57.

118. Gori v. United States, 367 U.S. 364, 372 (1961) (Douglas, J., dissenting).

119. United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824); *Ex parte* McLaughlin, 41 Cal. 211, 219 (1871).

120. *E.g.*, Simmons v. United States, 142 U.S. 148 (1891).

121. Freeman v. United States, 237 Fed. 815 (2d Cir. 1916); United States v. Bigelow, 14 D.C. 393, 401 (D.C. Cir. 1884) (dictum).

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

123. In the recent case of Downum v. United States, 372 U.S. 734 (1963), the Supreme Court reversed a conviction secured following a mistrial on the same charges. The first trial was terminated because a government witness, who was to testify on two of the six counts charged in the indictment, was not present when the trial was to begin. The defendant moved to dismiss the two counts for lack of prosecution. His motion was denied and over his objections the judge discharged the jury. Two days later he was reprosecuted before a different jury, and, after his plea of double jeopardy was denied he was convicted. The appellate court affirmed, 300 F.2d 137. Justice Clark in his dissent interpreted the majority as holding that the inadvertent as well as the intentional precipitation of a mistrial will bar reprosecution. (*Id.* at 739). But the majority opinion may simply stand for the proposition that where the actions of the state *may have been* designed to deprive the defendant of a determination by the initial jury and were not simply the result of negligence, doubts will be resolved "in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion." *Id.* at 738.

The decision has been criticized on the grounds that it may result in prejudice to the defendant. Judges will now be reluctant to declare mistrials even where desirable since they know retrial will not be permitted. Instead, the judge will try to elicit the defendant's consent to a termination and if refused may allow the trial to proceed. In this case the defendant faces, at best, reprosecution following a reversal on appeal, and at worst, affirmance of his conviction. Note, 77 HARV. L. REV. 1272, 1279 (1964).

124. This [the rule that reprosecution following a mistrial not required by manifest

proceeding as a trial run of his case or as an opportunity to test and select his jury.

These mistrial cases establish a definition of harassment which should apply also to reprosecution on related offenses. Reprosecution burdens and disadvantages the defendant more after he has completed a full first trial than if it ends prematurely.[125] And motives which are illegitimate bases for reprosecution after a mistrial are no more savory in the multiple offense context. Harassment should be found whenever the prosecutor reprosecutes without legitimate justification. The reprosecution should be prohibited, and the prosecutor who wants to prosecute on more than one count should be told that he must join all the counts at the first trial, or forfeit those which he might have joined.

The chief justification offered for reprosecuting on reserved counts after an acquittal is that there was a "mistake" prejudicial to the state at the first trial.[126] "Mistake" may signify any of the three kinds of disadvantage to the state: (1) the first jury was sympathetic to defendant; (2) the first acquittal was based on a "technicality"; (3) the judge erred against the state.

Jury sympathy is no more proper a basis for reserving counts than for precipitating a mistrial. Sympathy is hard to distinguish from jury prerogative; and, in any case, unreasoning compassion is one of the selling points of the jury system.[127] The right to a jury trial is defeated if the prosecutor has his pick of two juries.

> necessity will not be permitted] prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict.

Green v. United States, 355 U.S. 184, 188 (1957). See also Downum v. United States, 372 U.S. 734 (1963).

125. A complete trial will generally consume more of the defendant's time and money than will an aborted one. In addition it will force him to divulge more of his case while enabling the prosecutor to have a trial run. On the other hand, defendant's knowledge of the government's case does not seem to affect adversely its capacity to secure convictions. *The Problems of Long Criminal Trials*, 34 F.R.D. 155, 161 (1964). Finally, if there is a substantial delay between trials, the defendant may incur the financial and psychological hardship of imprisonment while waiting trial.

126. Among those who have argued that the state ought to be permitted an appeal to correct prejudicial errors at the first trial are: Dissenting opinion of Mr. Justice Holmes in Kepner v. United States, 195 U.S. 100, 134 (1904); ALI, ADMIN. OF CRIM. LAW: DOUBLE JEOPARDY § 13 (1932); Kirchheimer, *The Act, the Offense and Double Jeopardy*, 58 YALE L.J. 513, 542-43 (1949); Note, 65 YALE L.J. 339, 362-63 (1956); Mayers and Yarbrough, *supra* note 106, at 13-16; Jones, *What Constitutes Double Jeopardy?*, 38 J. CRIM. L., C. & P.S. 379, 387 (1947). See generally Note, 24 MINN. L. REV. 522 (1940).

127. Jury sympathy and jury compromise have long been recognized and accepted as inherent in the jury system. "The justices seem to feel that if they analyzed the verdict they would miss the very thing for which they are looking, the opinion of the

A "technical acquittal" can never justify reprosecution on a related offense. If the technicality is such that we wish to allow the prosecutor to correct it at a subsequent trial, we should allow him to reprosecute on the same offense. For example, the present law is that when the defendant is acquitted because the prosecutor brought the case in the wrong jurisdiction, reprosecution for the same offense is allowed in the correct jurisdiction.[128] However, when the technicality is such that

country." 2 POLLACK AND MAITLAND, HISTORY OF ENGLISH LAW 624 (2d ed. 1905). In Horning v. District of Columbia, 254 U.S. 135 (1920), Mr. Justice Holmes acknowledged that ". . . the jury has the power to bring in a verdict in the teeth of both law and fact." *Id.* at 138. In United States v. Maybury, 274 F.2d 899 (2d Cir. 1960), Judge Friendly recognized that this power to mitigate punishment through inconsistent verdicts would be frequently exercised so long as the vogue for repetitious multiple count indictments continue, in order "to prevent the punishment from getting too far out of line with the crime." *Id.* at 902. Other courts, while granting that juries have the power to render compromise verdicts, view the exercise of such power as illegitimate. Steckler v. United States, 7 F.2d 59 (2d Cir. 1925).

128. United States v. Ball, 163 U.S. 662, 669 (1895) (dictum); Johnsen v. United States, 41 F.2d 44 (9th Cir.), *cert. denied*, 282 U.S. 864 (1930); Paulson v. People, 195 Ill. 507 (1902); MODEL PENAL CODE § 1.12 Comment (Tent. Draft No. 5, 1956). Though prosecution brought in the wrong jurisdiction may inconvenience the defendant, see note 3, *supra*, such an error will generally be discovered early in the proceeding. Society's interest in bringing alleged offenders to trial may require that the rule remain as it is. Nevertheless the rule that reprosecution is permitted following an acquittal on the merits in the wrong jurisdiction, Commonwealth v. Peters, 53 Mass. (12 Met.) 387, 397 (1847), undermines double jeopardy objectives. If retrial in such cases is barred, and the defendant permitted to demand that the trial continue even if in the wrong jurisdiction, then the state could not prosecute in the wrong jurisdiction to vex the defendant, for it could not thereby establish a valid conviction, but would be bound by an acquittal. Since the state was responsible for choosing the wrong jurisdiction, it should bear the risk of an unfavorable verdict where trial proceeds on the merits. See Note, 77 HARV. L. REV. 1272, 1282 (1964).

Reprosecution is also permitted following a conviction in the wrong jurisdiction. United States v. Tyler, 15 F.2d 207 (D. Del. 1926); State v. Rountree, 127 S.C. 261 (1924). Even where part of the sentence has been served. Ogle v. State, 45 Tex. Cr. 219 (1901). If reprosecution is to be permitted in such cases, certainly the portion of the first sentence which has been served should be credited and deducted from any new sentence imposed.

There are two other categories of cases where reprosecution on the same offense is permitted. First, where a defective indictment or information is dismissed before the jury is impanelled or an indictment or information that fails to allege a crime is dismissed any time during the proceedings, and second, where the verdict is secured through fraud or collusion. Though defective indictments can be purposely used to oppress, see note 3, *supra*, society's interest in bringing the accused to trial should not be negated because of what may only be carelessness. Instead the prosecutor should, where the constitution permits, be able to amend his indictment or information at the time the defect is noticed. In this way the prosecutor will not be able to persecute by indictments, but will be able to correct oversights at little or no cost to the defendant. If the amendments raise problems of fair notice to the accused, a continuance should be permitted. For a discussion advocating liberalized amendment procedures, see Kirchheimer, *supra* note 126, at 534-39.

the prosecutor cannot reprosecute for the same offense, he should not be allowed to reprosecute on a related offense either.

The most common argument for allowing reprosecution on related offenses is that the judge may have erred against the state at the first trial. Since the prosecutor cannot appeal in the federal system and in most states, the argument runs, he must have the option to "correct" the error by prosecuting on reserved counts.[129] The policy premise that the state's interest requires some sort of appeal may or may not be sound. The logic is not. If we refuse to permit the state to correct errors properly, we should not permit it to correct them deviously.

Offense-splitting allows the prosecutor to decide whether he was defeated fairly.[130] A prosecutor who alleges error as a basis for charging a second offense should, at the least, be required to prove error to the court before the second proceeding. But even this procedure would be irrational. The state's interest in reprosecuting to correct error is independent of the number of offenses which can be concocted from the defendant's behavior. If the interest is to be recognized at all the state should be permitted to appeal all cases. Not only would the decision to retry be made visible, but the state would be permitted to prosecute for the proper offense rather than an incidental and probably less serious one. We should prefer changing the Constitution, if necessary, to circumventing it by practices more arbitrary than it forbids.[131]

Where the defect is not noticed, and there is an acquittal on the merits, retrial should be barred since in such cases the defect will have been irrelevant to the adjudication of innocence. This rule has been enacted by statute in about half the states and is judicially recognized in most others. See ALI (1932), at 153-55.

Where the adjudication is secured by the fraud of the defendant, none of the double jeopardy policies are defeated by reprosecution for the same offense and it should be permitted, as it generally is. State v. Howell, 220 S.C. 178, 66 S.E.2d 701 (1951); Smith v. State, 219 Miss. 741, 69 So. 2d 837 (1954); ALI (1932) at 160-62.

129. Generally it is suggested that reprosecution on related counts should be barred, but not until a procedure of state appeals to correct error is established. See sources cited in note 126, *supra*. See also, Steffen, *Concerning Double Jeopardy and the New Rules*, 7 FED. B.J. 86 (1945); Note, 11 STAN. L. REV. 735, 758-59 (1959).

130. What little empirical evidence there is available on reserving counts and reprosecuting on them, indicates that the practice is rare. The evidence also indicates that such decisions are based on unilateral determinations by the prosecutor or police that the defendant was guilty, and have little to do with technical aquittals.

> Several assistant prosecuting attorneys stated that the prosecutor stands ready to bring a second charge if a defendant is acquitted on the first and the prosecutor and the police are convinced of the defendant's guilt, but all acknowledged that resort to this practice is very rare.

The Administration of Criminal Justice in the United States, 3 AMERICAN BAR FOUNDATION 611 (Pilot Project Report) [cited hereafter as AMERICAN BAR FOUNDATION]; see also 5 AMERICAN BAR FOUNDATION III-57.

131. It has been suggested that the decision in *Kepner* disallowing appeals by the

For similar reasons, reprosecution on reserved counts after conviction is illegitimate. A second prosecution cannot be excused as an attempt to secure a "fairer" sentence because the second trial does not, in fact, review the first sentence. Nor can reprosecution be justified because the first trial was for a less serious offense and the prosecutor feels the defendant should be penalized for the more serious offense. Nothing prevented the prosecutor from trying the more serious charge first.[132]

The prosecutor might wish to try counts separately in order to avoid the possibility that the jury will compromise by convicting for the less serious count. But compromise is a justifying purpose of the jury system.[133] Since our law allows the prosecutor to grant leniency by charging a lesser count, surely it is proper for the jury to have the same option. In any event, there is no reason to let the prosecutor choose joinder or severance to suit his tactical advantage.

Other reasons for reprosecution are even more illicit. Prosecutors sometimes reserve counts to threaten or punish uncooperative defend-

federal government may not have been a constitutional one, but rather a decision based on legislative intent; if this is correct, a statute authorizing state appeals might not be unconstitutional. 65 YALE L.J. 339, 362-63 (1956). Generally, however, even those advocating state appeals admit that *Kepner* was a constitutional decision and that, "Realistically, it must be conceded that stare decisis will no doubt prevent a broad reinterpretation of the fifth amendment from ever taking place." Mayers and Yarbrough, *op. cit. supra* note 106, at 15.

Appeals by the states, however, have been held not to violate the Fourteenth Amendment. Palko v. Connecticut, 302 U.S. 319 (1937). There are presently three states that permit state appeals. In two of them, Connecticut and Vermont, statutes permitting such appeals were held not to violate the double jeopardy prohibition which was recognized as part of their common law. State v. Lee, 65 Conn. 265, 30 Atl. 1110 (1894); State v. Felch, 92 Vt. 477, 105 Atl. 23 (1918). A similar statute in Wisconsin (WIS. STAT. ANN. § 918.12(1)(d) (1958)) was held not to violate that state's constitutional provision prohibiting double jeopardy (Wis. Const. art I, § 8), State v. Witte, 243 Wis. 423, 10 N.W.2d 117 (1943). See generally ORFIELD, CRIMINAL APPEALS IN AMERICA 55-76 (1939).

132. Where one act constitutes two offenses, and the defendant is first tried for one of them in a court which does not have jurisdiction over the other offense, a subsequent prosecution in a court having such jurisdiction has sometimes been permitted, State v. Goodson, 54 N.M. 184, 217 P.2d 262 (1950), and has sometimes been prohibited, State v. Labato, 7 N.J. 137, 80 A.2d 617 (1951). By requiring joinder of such causes for trial before the court having jurisdiction over both, the burden on such courts will not be significantly increased since a trial on both offenses will be virtually identical to a trial on just one.

A comparable problem arises where the defendant has been tried for an offense such as assault, but subsequent events alter the nature of the offense, *i.e.*, the victim dies of injuries inflicted during the assault. A subsequent trial for manslaughter should not be permitted unless the trial for assault resulted in a conviction. If the defendant is then convicted of manslaughter the unserved segment of his sentence for assault should be vacated and the segment already served should be credited toward his sentence for manslaughter.

133. See note 127 *supra*.

ants,[134] and in highly publicized cases to increase the possibility of conviction or exercise control over the punishment.[135] But neither the cooperativeness of the defendant nor the notoriety of the crime is a legitimate reason to bully the accused. Double jeopardy was designed to thwart government tyranny. A disgruntled prosecutor or an inflamed democracy can be just as tyrannical as a monarch.

Proliferating offenses for reprosecution also may give the prosecutor considerable control over plea bargaining and the parole process. When reprosecution is the trump in plea bargaining, the defendant faces not only the possibility of increased punishment, but an increased likelihood of conviction if he refuses the bargain. And even if the prosecutor does not intend to bring a second proceeding, he may prejudice the convicted defendant's parole eligibility by "holding open" related counts.[136] Neither of these advantages to the prosecutor justify allowing him to withhold counts from the first trial for possible reprosecution. If for some reason it is thought beneficial to grant the prosecutor more power over plea bargaining and parole, the power should be granted directly.

Constitutionally Compelled Joinder

Dismissing these invalid reasons for reprosecution leaves the prosecutor with only two legitimate objections to compulsory joinder.[137]

134. One case was observed in which the assistant district attorney stated if the defendant did not cooperate in the making of restitution that he would hold some warrants open until a later time and would subsequently prosecute him for the additional offenses.

5 AMERICAN BAR FOUNDATION III-57.

However, this defendant "reneged on his "deal" with the sheriff's department and the sheriff's department is now going to file two extra charges against him.

6 AMERICAN BAR FOUNDATION 133.

135. *E.g.*, People v. Martinis, 46 Misc. 2d 1066, 261 N.Y.S.2d 642 (1965); Cuicci v. Illinois, 356 U.S. 571 (1958).

136. It was indicated, however, that occasionally a case is preserved by filing a complaint concerning it alone, while a later case is tried on another complaint charging the later case alone. In that way a twofold purpose is served . . . secondly, that where a case is filed and pending, it constitutes a hold on a convicted defendant, thereby preventing later parole.

6 AMERICAN BAR FOUNDATION 133. See also 9 FED. PROB. 1 (Issue 3, 1945) and note 69 *supra*.

137. This does not mean that the prosecutor must charge all known offenses, but only that if he is ever going to charge them, he *must* do so at a single trial.

Required joinder of related offenses is suggested in MODEL PENAL CODE § 1.08(2) (Tent. Draft No. 5, 1956), which reads as follows:

Offenses must be prosecuted in a single prosecution when:

(a) the offenses are based on the same conduct; or (b) the offenses are based on a series of acts or omissions motivated by a purpose to accomplish a single criminal objective, and necessary or incidental to the accomplishment of that objective; or

If the offenses are so complicated that the jury will confuse them, then joinder should not be required. This objection is valid in particular cases and must be recognized by any compulsory joinder rule. Further, there may be cases in which joinder would not confuse the jury, but in which the prosecutor would be prejudiced. For example, suppose a defendant is charged with a murder committed on May 15, and a robbery committed on Nov. 15. An argument can be made that these two offenses are so dissimilar that no jury would confuse evidence about each. But since very little evidence will overlap, the prosecutor will have to prepare a double case if he is required to join the counts. Time pressures necessitate that the prosecutor not be required to do double work for one trial. Also the defendant will gain very little if joinder is required since the trial on two counts will probably be almost as long as two separate trials.

If the prosecutor prevails on either of his two legitimate objections, and he is allowed to reprosecute, principles of collateral estoppel should apply. If the first trial results in an acquittal, double jeopardy should preclude relitigation of issues which were resolved; and the second court should speculate about the probable basis of the first acquittal, and perhaps even make reasonable presumptions in favor of the defendant. If the first trial results in conviction and the second trial results in acquittal, the court should speculate about the grounds of the second verdict. If it can be inferred that the second jury found an issue crucial to the defense of both charges in favor of the defendant, the first conviction should be vacated. Of course the prosecutor will usually be satisfied after one conviction. If, however, he wants to cumulate punishment he must take the chance that the first conviction will be vacated.

(c) the offenses are based on a series of acts or omissions motivated by a common purpose or plan and which result in the repeated commission of the same offense or affect the same person or the same persons or the property thereof.

The tentative draft 5 proposal is discussed and commended in Knowlton, *Criminal Law and Procedure,* 11 RUT. L. REV. 71, 88-95 (1956).

The ALI MODEL PENAL CODE, Proposed Official Draft (1962) § 1.07(2), requires joinder only of offenses which are based on the same conduct or arise from the same criminal episode.

Illinois has enacted a version of the Model Act proposal in its revised statute ILL. ANN. STAT., ch. 38, § 3.3 (Smith-Hurd 1961). Though the section may mean only that where one act constitutes several offenses, these must be joined, the committee comments following this section definitely indicate that joinder is to be required of all offenses arising from the same conduct.

Professor Dession also proposed required joinder in similar situations. Dession, *Final Draft of the Code of Correction for Puerto Rico,* 71 YALE L.J. 1050, 1115 (1962). Like most other authors who have suggested required joinder, he also provides for appeals by the state. *Id.* at 1116.

As a general matter, though, the proposed compulsory joinder rule will probably not prejudice the state. Joinder is permitted in almost all jurisdictions,[138] it has become virtually automatic in many, and it is compulsory, under certain circumstances, in a few.[139] The little empirical evidence available indicates that prosecutors will generally join their two or three best counts for a single trial, and will not prosecute for spun-out offenses after either an acquittal or conviction.[140] This evidence, along with the many joinder cases, indicates that joinder has not been thought prejudicial to the state. Since joinder has proven workable and not prejudicial to the state, there is no legitimate reason to permit a prosecutor to reserve for reprosecution counts which could have been joined. A second prosecution, with only the two exceptions, constitutes harassment and should be barred by double jeopardy.

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138. See, *e.g.*, FED. R. CRIM. P. 8; N.Y. CODE CRIM. PROC. § 279; CAL. PENAL CODE § 954. Joinder need not be authorized by statute to be permitted. Price v. State, 127 Iowa 301, 103 N.W. 195 (1905). Virtually all states permit joinder of offenses which arise from one course of conduct and about one third of the states permit it where the offenses are similar, even if committed on separate occasions. Commentators, however, have generally been critical of similar offense joinder. Note, 74 YALE L.J. 553, 560 n.39 (1965). But if the defendant prefers joinder in such cases, and the state cannot legitimately object, there seems no reason why it should not be permitted. The defendant, however, will usually prefer severance, and, if he can show probable prejudice, it should be granted. Even if the defendant secures severance, an acquittal at the first trial should be given reasonable estoppel effect.

139. *E.g.*, ILL. ANN. STAT., ch 38, § 3-3 (Smith & Hurd 1961) The purpose of the statute are discussed in People v. Mullenhoff, 52 Ill. App. 2d 369, 202 N.E.2d 128 (1964).

140. When the criminal act of the defendant gives the county attorney one or more alternatives in selecting the nature of the charge, he will select the charge which is easiest to prove.

6 AMERICAN BAR FOUNDATION 129.

> If a defendant, by an act, commits what might be two felonies. . . . They would try only one, however, and if the defendant is convicted, they would forget the other charge. If the defendant was acquitted, they would probably also forget the other charge unless they felt aggrieved by the decision.

3 AMERICAN BAR FOUNDATION 611.

> It is the policy of the district attorney's office to charge the multiple offender with more than one offense. Common practice limits the number of charges to two regardless of the number of offenses which the defendant may have committed. . . .

5 AMERICAN BAR ASSOCIATION III-55.

> Those offenses will be charged which are the best in the sense that they are the most aggravated, carry the higest penalty, and are cases where the evidence is most sufficient including availability of witnesses or victims who are willing to testify. . . . Though the police indicated that holding some charges back makes it possible to prosecute a person previously acquitted, it is clear that this would be a most unusual practice and no member of the police department or the district attorney's staff could recall such a case.

Id. at III-57.

Of course the defendant might claim legitimately that compulsory joinder would prejudice him. In these cases, severance should be granted, and the prosecutor should be allowed to reprosecute on the severed count. Compulsory joinder, at least when the offenses overlap, will generally not prejudice the defendant. He loses no protection against the introduction of evidence about the related counts, since evidence of related crimes would be admissible even in separate trials.[141] Nor would joinder seriously trim the defendant's fifth amendment rights when the counts related to the same transaction. Joinder would preclude the defendant from choosing to testify on only one of the counts—he must talk about all or none. But even at separate trials, this choice would be available only if the prosecutor decided to prosecute first on the count about which the defendant wished to be silent. If the defendant were first tried on the count about which he wanted to talk, the prosecutor could force him to testify about the entire transaction, and therefore about the second count. This testimony would be admissible at the second trial.[142]

Conceivably the defendant may be prejudiced in subtle ways because of factors peculiar to *required* joinder. Now, a prosecutor who is primarily interested in convicting rather than piling up sentences, may charge only his best offense, knowing that if it fails he has others in store. Limiting him to but one crack at the defendant may force him to join all conceivable offenses, resulting in several convictions rather than one. But this is an unlikely hypothesis. Since the offenses are closely enough related to require joinder, the defense will generally be relevant to all of them. The prosecutor will realize that charging all of the counts will not substantially increase the probability of conviction, and if he were interested in but one conviction he would probably continue to charge only his best counts. The American Bar

141. Under the other crimes rule, evidence relating to the whole transaction is admissible even at a trial for an offense constituting only a part of it. See McCormick, Evidence § 157 (1954); 1 Wigmore, Evidence §§ 193-94 (3d ed. 1940). See generally Comment, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 Yale L.J. 763 (1961); Note, 74 Yale L.J. 553, 561 (1965).

142. Note, 74 Yale L.J. 553, 561 (1965); McCormick, Evidence § 230 (1954); 4 Wigmore, Evidence § 1066 (3d ed. 1940); see 5 Wigmore, Evidence § 1414 (3d ed. 1940). In fact, separate trials may prejudice the defendant, for if he is convicted at the first trial and wishes to testify at the second, evidence of the conviction is admissible to impeach his testimony. 3 Wigmore § 926 (3d ed. 1940); McCormick § 43 (1954). Although both authors contend that only prior convictions of crimes which show a tendency to lie, such as perjury or false pretenses, ought to be admitted to impeach the defendant's testimony, virtually all jurisdictions admit evidence of all prior convictions to impeach. See discussion of Rule 21 of the proposed Uniform Rules of Evidence in McCormick at § 50.

Foundation project indicates that prosecutors will not amass more counts under a required joinder rule than when joinder is permissive.[143] Except in those rare cases, then, in which the defendant or the prosecutor can prove prejudice, double jeopardy law should deem offenses the same when they could have been prosecuted at a single trial.[144]

The Civil Law Analogy

The civil law provides a helpful analog in its doctrine of res judicata, which, like our proposed rule, insists on some measure of compulsory joinder. At one time the law of res judicata resembled the modern law of double jeopardy. But res judicata matured in a way that double jeopardy must now follow. Since res judicata bars all further action on a litigated claim, its effectiveness depends on the meaning given "claim." A claim can be defined either by the legal theories it asserts, or by the set of facts it covers.[145] The civil law is progressing towards a broad factual definition;[146] but the prevailing criminal law test holds claims to be different whenever they involve even slightly distinguishable issues of fact or law.[147] Historically, the narrow conception

143. Even in Kansas, where the prosecutors interpret KAN. GEN. STAT ANN. § 67-1449 (1949) as requiring joinder of all known counts,

> When the criminal act of the defendant gives the county attorney one or more alternatives in selecting the nature of the charge, he will select the charge which is easiest to prove.

6 AMERICAN BAR FOUNDATION 129.

144. Compulsory joinder will also promote consistent and rational sentencing. One sentencer, judge or jury, will evaluate *all* the conduct, rather than several sentencers evaluating different aspects of it.

145. 1B MOORE, FEDERAL PRACTICE ¶ 0.410[1], at 1157-60 (2d ed. 1965). JAMES, CIVIL PROCEDURE, § 11.10, at 552-57 (1965).

146. The emphasis which, in earlier times, was upon forms, rather than upon causes, of action, is fast disappearing if it has not already disappeared, giving place to emphasis upon the facts which when pleaded and proved in support of a claimed right, will entitle claimant to relief.

Wilson Express Co. v. Atlantic Coast Line R. Co., 109 F.2d 623, 627 (5th Cir. 1940), *cert. denied*, 310 U.S. 653 (1940);

> A reading of the early cases as compared with recent ones makes it clear that the meaning of "cause of action" for res judicata purposes is much broader today than it was earlier.

Williamson v. Columbia Gas & Electric Corp., 186 F.2d 464, 469 (3d Cir. 1950), *cert. denied*, 341 U.S. 921 (1951); 2 MOORE, FEDERAL PRACTICE ¶ 2.06[6] at 378-88 (2d ed. 1964); 1B MOORE, ¶ 0.410[1] & [2], at 1151-84 (2d ed. 1965);

> Wherever there will be a large overlap of issues or evidence if two trials are held, it is wasteful to society and harassing to the adversary to have more than one, and there should be no more than one unless there is some very good reason.

JAMES, CIVIL PROCEDURE § 11.10, at 555 (1965).

147. See notes 41-53, *supra*, and accompanying text.

of "claim" was based on modes of thinking now antiquated. And the obstinacies of procedure which helped maintain that narrow conception have since largely disappeared from both civil and criminal law.

At common law a claim or cause of action was a set of facts which would support a judgment under a particular writ. "The emphasis was upon forms of action rather than 'causes of action.' "[148] One set of facts could be shuffled to fit into several groupings each of which would support an appropriate writ.[149] Since forms of action could not be joined,[150] a plaintiff who bungled the technicalities of pleading on a particular writ would be out of court.[151] But because suit on a different writ was not barred by res judicata, he was often assured of another opportunity for a trial on the merits.

Under modern procedures, most technical pleading requirements have been dismantled, and the plaintiff can be quite certain of a trial on the merits on his first try.[152] Thus he is now required to join all facets of his claim and he may not bring a second suit to redress the same grievance under a different legal theory. The definition of "claim" or "cause of action" has changed to allow res judicata to implement this functional rule of joinder. A cause of action, once defined as a particular writ or legal theory, or as all claims arising from the breach of a single duty (conceptually a single "wrong") is now by the preferred view, simply that set of facts which can conveniently be litigated at one trial.[153]

The parallel to the criminal process is striking—up to the point

148. 2 MOORE, FEDERAL PRACTICE ¶ 206[2], at 360 (2d ed. 1965).

149. The cause of action was not identical with the facts which occurrence had grouped together. Such a segment of life often produced several causes of action . . . .
Ibid.

150. Joinder was permitted on the basis of legal similarity between the actions, not on factual similarity.

Claims which arose out of the very same occurrence could not be joined if they required different forms of action for their redress.
JAMES, CIVIL PROCEDURE § 10.2, at 447 (1965).

151. The inquiry was not whether plaintiff should recover under the law of the land, but whether he had proved a case *in trespass, or in covenant*, or in whatever form of action he had brought. If not, he lost the case, whatever the merits of it were.
Id., § 1.3, at 10.

152. . . . it was inevitable that federal procedure along with substantially all other modern systems should eventually jettison the unseemly practice of turning a suitor out of court because he had come in at the wrong door. . . .
2 MOORE ¶ 2.05, at 331 (2d ed. 1965).

153. Moore suggests we adopt

the concept of one procedural cause of action for a set of operative facts which group themselves together conveniently for trial. . . .
2 MOORE ¶ 2.06[3], at 361 (2d ed. 1965).

where the civil law straightens out leaving its criminal twin twisted in a categorical maze. Although today only a connoisseur can discriminate between debt and assumpsit, many jurisdictions still consider offenses different if they are based on different legal theories. Thus possession and transportation of moonshine liquor are considered separate "causes of action" even though they are merely alternative means of catching the same group of offenders.[154] Offenses, as well as causes of action, may be distinguished when they involve separate "wrongs," even if the wrongs arise from exactly the same conduct of the defendant—as, for example, rape and incest.[155] Joinder is no longer prohibited,[156] and an alternative writ or an alternative offense is no longer necessary to assure the prosecutor of a chance for a trial on the merits.[157] Today there is no reason why counts which could conveniently be tried together should be severable at the prosecutor's option. The criminal law test should be simple and functional, like the emerging civil doctrine—joinder should be required of offenses which substantially overlap, unless likely prejudice is shown.

The rule of joinder does not lend itself to mechanical tests. But recurrent factual patterns will emerge,[158] allowing the court to determine in advance whether reprosecution should be barred. When the plea is made, the court should compare the record of the first proceeding with the second indictment. If the indictment does not provide adequate information for the judge to decide whether or not the second prosecution should be barred, the prosecutor should be required to submit to the court a more detailed statement of his case. Of course, greater certainty could be achieved if the second trial were actually held. But double jeopardy should aim at preventing, not merely cen-

154. State v. Peck, 146 Wash. 101, 261 Pac. 779 (1927); see notes 239-41 *infra* and accompanying text.

155. State v. Learned, 73 Kan. 328, 85 Pac. 293 (1906).

156. At common law, felonies could not be tried together. See note 217, *infra*. But joinder is now permitted in virtually all jurisdictions. See note 138, *supra*.

157. Liberalization in the specificity required in an indictment and the amendment of indictments have made variance between allegation and proof less likely. In addition, variance is permitted if it does not affect the substantial rights of the parties. Berger v. United States, 295 U.S. 78, 82-83 (1935); See Goldstein, *supra* note 55, at 1173-80 for a critical discussion of these procedural reforms. Also the multiple count indictment may charge a crime in a variety of forms in order to avoid fatal variance of the evidence. United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 223 (1952). No longer is such an indictment considered "bad for duplicity."

158. There are only a limited number of ways in which multiple offenses can be committed. Just as in the civil law, recurring kinds of fact situations will eventually yield helpful criteria for deciding when joinder should be required. See JAMES, CIVIL PROCEDURE § 11.10, at 554 (1965).

suring, needless reprosecution. In difficult cases the judge will have to decide, without rules or precedent, whether the offense could conveniently have been tried at once. But this is a typical criterion for judicial discretion. Under current rules of federal criminal procedure the judge must decide whether severance is "in the interest of justice" after the prosecutor has joined counts.[159] A constitutional rule of joinder would apply the same test, but shift the burden when the prosecutor seeks multiple trials on kindred counts.[160]

MULTIPLE CONVICTION AND PUNISHMENT AT A SINGLE TRIAL

The urge to punish cumulatively[161] is not of recent birth. In 1305, when Edward I sat upon the throne of England, the notorious traitors

159. FED. R. CRIM. P. 14.

160. Actually, the joinder test is not entirely dissimilar to some formulations of the backwards same evidence test. Thus, for example, in State v. Brownrigg, 87 Me. 500, 503 (1895), the court held that the second proceeding would be barred if the facts which *might have been proved* under the first indictment would warrant a conviction of the second offense. The court expressly held that the evidence which the prosecutor chose to offer at the first proceeding was not determinative, but rather that he was estopped from bringing a subsequent proceeding upon evidence which he might have offered at the first trial. The shortcoming of this approach is that it depends upon the manner in which the prosecutor frames the first indictment, whereas the joinder requirement does not permit him to frame an unnecessarily narrow first indictment.

161. Today, cumulative punishment may take many different forms. The multiple offender may be sentenced to concurrent terms of imprisonment, to cumulative penalties, (including fines, *e.g.*, Badders v. United States, 240 U.S. 391 (1916)), or to a single penalty greater than that to which the criminal might have been sentenced for a single offense but less than to which he might have been cumulatively sentenced. The aggregate penalty technique, which does not keep the punishment for each offense distinct, is used in the federal system, *e.g.*, Johnson v. United States, 276 F.2d 84 (4th Cir. 1960) (permitted but disapproved); but *contra* see, *e.g.*, United States v. Rose, 215 F.2d 617 (3d Cir. 1954). It is permissible in the District of Columbia, Scott v. District of Columbia, 122 A.2d 579 (Mun. Ct. App. 1956); Maryland, Vandergrift v. State, 226 Md. 38, 171 A.2d 713 (1960); New York, People v. Luciano, 227 N.Y. 348 (1938). It is not permissible in Illinois, Nebraska, New Jersey, and Pennsylvania. See generally 91 A.L.R.2d 511 (1963). Such sentences, although disapproved by a few courts, have generally been upheld so long as the aggregate does not exceed the total which the court could have imposed consecutively. If the court does not specify, multiple sentences are construed to run concurrently. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 576 (1947).

Cumulative or aggregate penalties obviously constitute multiple punishment as well as multiple conviction. In order to sentence concurrently, there also must be multiple convictions, but the question whether concurrent sentences in addition constitute multiple punishment is a more complex one.

It has been argued that concurrent sentencing is tantamount to cumulative punishing because it delays parole eligibility and in this way increases the penalty. This argument has been accepted by some courts and rejected by others. In California, where such sentences affect the judgment of the correctional agency that determines parole eligibility, the argument has been accepted. People v. Craig, 17 Cal. 2d 453, 458, 459, 110 P.2d 403 (1941); People v. Kehoe, 33 Cal. 2d 711, 204 P.2d 321 (1949); People v. Keller, 27 Cal.

William Wallace and David of Wales were punished. Wallace was "drawn for treason, hanged for robbery and homicide and disembowelled for sacrilege, beheaded as an outlaw and quartered for divers depredations."[162] David enjoyed a similar fate.[163] Since the fourteenth century, courts have exercised considerably more self-restraint. Michigan courts have held that they can never cumulate sentences without legislative authorization.[164] In some jurisdictions, courts deny themselves power to punish cumulatively when offenses arise out of a single act or transaction.[165] In others, statutes accomplish the same end.[166]

Reptr. 805 (1963). For same result in Illinois, see People v. Schlenger, 13 Ill. 2d 63, 147 N.E.2d 316 (1958). The New York Courts, under the aegis of a different correctional system, have rejected the argument. People *ex rel.* Maurer v. Jackson, 2 N.Y.2d 259, 140 N.E.2d 282, 159 N.Y.S.2d 203 (1957); but see, People v. Ciaverelli, 11 App. Div. 2d 741, 204 N.Y.S.2d 553 (1960).

The federal courts generally do not treat concurrent sentences as greater punishment than a single sentence of equal length. Claassen v. United States, 142 U.S. 140 (1891); Green v. United States, 365 U.S. 301, 306 (1961); see cases cited in Note, 107 U. PA. L. REV. 726 n.4 (1959). However, these cases fail to consider the questions raised by the parole and pardon argument. Once they have determined that the judgment and sentence on one count of a multi-count indictment are valid and that the maximum permissible sentence on this count alone exceeds the sentence actually given, they refuse to pass on the validity of other disputed counts. By thus avoiding making the determination that the judgment on one of several counts on which concurrent sentences have been given is invalid, they never reach the question of whether the imposition of an invalid concurrent sentence is prejudicial to a prisoner.

Other federal courts have rejected the *Claassen* presumption that the judge imposed sentence solely on the good count and have thus left open the possibility of considering the parole and pardon argument. Putnam v. United States, 162 U.S. 687 (1896); United States v. Hines, 256 F.2d 561 (2d Cir. 1958); see cases collected in Smith v. United States, 335 F.2d 270, 272 n.2 (D.C. Cir. 1964). In the *Hines* case Judge Clark directly considered the parole argument:

> Obviously the Claassen rule, especially as it applies to cases involving concurrent sentences, presumes that . . . a defendant's punishment is no greater so long as he must stay in prison for the same period of time. The validity of this presumption is questionable. . . . [I]t does not take into account the stigma which attaches to an accused from the conviction of two or more crimes, rather than one, or the practical effect on a prisoner now that the parole system is so widely applied. 256 F.2d at 563; see Note, 107 U. PA. L. REV. 726, 728 (1959).

This argument has also been recognized by the Sixth Circuit: ". . . they [concurrent sentences] were still prejudicial, for it is well understood that a multiplicity of sentences impairs a prisoner's opportunities for pardon or parole." Hibdon v. United States, 204 F.2d 834, 839 (6th Cir. 1953).

162. 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 501 (2d ed. 1905).

163. *Ibid.*

164. *E.g., In re* Allison, 322 Mich. 49, 33 N.W.2d 917 (1948). See note 226 *infra*, and the accompanying text.

165. *E.g.*, People v. Duszkewycz, 27 Ill. 2d 257, 189 N.E.2d 299 (1963); Jones v. State, 19 Ala. App. 600, 99 So. 770, *appeal dismissed*, 19 Ala. App. 685, 99 So. 926 (1924); Clem v. State, 42 Ind. 420 (1873). For general discussion of same act and transaction tests, see notes 34 and 62 *supra*.

166. Note 34 *supra*.

Some courts remain harsh, though.[167] In the federal system, where the Supreme Court has placed moderate limitations on the power to cumulate punishments,[168] many lower courts have refused to restrain themselves, even in cases which seem to fit the rationale of the Supreme Court's limitation.[169] Other courts purport to limit their power to punish cumulatively for similar offenses, but define similar offenses to allow cumulative punishment whenever offenses differ according to the distinct elements test—whenever each has a distinct element not included in the other.[170] Finally even the courts which appear gentle are sometimes harsh because they do not apply consistent standards to determine when conduct constitutes a single punishable offense. For example, the courts in the "same act" states have had considerable difficulty in determining when conduct constitutes a single act.[171] And courts which seek the same transaction or same intent fare no better.[172]

Neither the impulses of liberality nor those of harshness have been justified upon consistent doctrinal bases. Both sets of courts apply the double jeopardy principle blindly. Neither stops to ask what is wrong with punishing cumulatively.

Cumulating punishments for closely related offenses is wrong for the same reason as reprosecuting for related offenses. Both practices grant prosecutors and judges power which cannot be justified. The

167. *E.g.*, Commissioner *ex rel.* Miller v. Maroney, 179 Pa. Super. 305, 116 A.2d 755 (1955) (entering with intent to commit a felony and robbery with offensive weapon); Copeland v. Manning, 234 S.C. 510, 514, 109 S.E.2d 361 (1959) (breaking and entering with intent to steal and grand larceny).

The harshness of cumulative punishment has occasionally been commented upon by appellate courts. But they refuse to review the trial court's sentence discretion. Judge Learned Hand said in Nash v. United States, 54 F.2d 1006, 1008 (2d Cir. 1932) that:

> . . . this case does not present a situation . . . which . . . may fairly be regarded as justifying cumulative sentences, and, therefore, though the power existed, it seems to us here to have been plainly abused. We are not ourselves able to intervene, though if we could, we should not hesitate to do so; but we have several times in the past felt it to be within the proprieties to express our disapproval in similar cases . . . and we do so again.

Judge Hand had used similar language in Amendola v. United States, 17 F.2d 529, 530 (2d Cir. 1927), and Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925).

Some defendants have argued that cumulative sentences violate the Eighth Amendment (cruel and unusual punishment). Usually, this argument is unsuccessful. *E.g.*, O'Neil v. Vermont, 144 U.S. 323 (1892); Smith v. United States, 273 F.2d 462, 467 (10th Cir. 1959). *Contra*, State *ex rel.* Garvey v. Whitaker, 45 L.R.A. 561 (La. 1896).

168. See notes 248-258 *infra* and accompanying text.

169. See notes 268 and 269 *infra* and accompanying text.

170. *E.g.*, Chambers v. State, 394 P.2d 778, 780 (Alaska 1964); United States v. Bauer, 198 F. Supp. 753, 754 (D.D.C. 1961). For discussion of the distinct elements test, see note 52 *supra*, and accompanying text.

171. See notes 62-65 *supra* and accompanying text.

172. See notes 62 and 66 *supra* and accompanying text.

double jeopardy principle provides a sensible way of limiting arbitrary discretion. But since each practice is arbitrary for different reasons, and each raises very different problems, one rule or one offense-defining test should not apply to both.

Substantive Double Jeopardy Is Not a Limitation on the Legislature

In the multiple punishment context, the courts have tended to avoid applying double jeopardy or have used the restrictive distinct elements test because many have a mistaken view of its purpose. Many courts understand the rule to be a restraint on the legislature's power to define and punish offenses, and are naturally reluctant to give teeth to the prohibition. But the primary purpose of double jeopardy is to limit discretion of courts and prosecutors. Indeed, double jeopardy's prohibition of multiple punishment would be absurd as a substantive limitation on the legislature.

Suppose that an eccentric legislature chose to enact this statute:

> The sentence for robbery shall be five years' imprisonment. Anyone who commits robbery shall be twice convicted and sentenced.

Can it be said that this statute is outside the power of the legislature? In form the statute commands that criminals be convicted and punished twice for a single offense. But in reality, the legislature has merely exercised its legitimate penological power in a preposterously roundabout fashion. It could have accomplished exactly the same doubling of the penalties simply by doubling the penalty for robbery. The doubling of convictions is likewise illusory. This statute could not result in a defendant's being convicted twice for the same offense because the second conviction is not a conviction at all. It is not an independent determination of guilt, but rather an automatic consequence of having been found guilty already. The only real significance of the hypothetical statute is that the penalty has been doubled, and increasing penalties is clearly within the power of the legislature. A judicial veto of this statute would operate not as a substantive or penological restriction but as a literary critique of the legislature. There is no doubt that the legislature can define offenses to provide explicitly the penalty which will attach to a given kind of conduct. Double jeopardy does not limit the legislature's power in this respect. Rather, it limits the courts' power to cumulate convictions and punishment when the legislature's will is not explicit.[173] Judicial timidity on the

173. Frequently, the legislature does make explicit its intent to cumulate convictions and punishment. *E.g.*, 66 Stat. 228 (1952), 8 U.S.C. § 1324 (1958) provides that anyone who

issue of multiple punishment thus arises from unfounded fear of limiting the penological power of the legislature.

The relationship between legislative imprecision and double jeopardy's bar against multiple punishment shows up clearly in the celebrated case, *Gore v. United States*,[174] where the Court upheld six convictions and three consecutive sentences for three statutory crimes arising out of two sales of narcotics.

Gore had been convicted on a multiple count indictment charging him with violations of three statutes which, in brief, made it a crime to:

> [1] sell . . . narcotic drugs except in pursuance of a written order . . .[175]
> [2] sell . . . narcotic drugs except in the original stamped package . . .[176]
> [3] sell . . . any such narcotic drug . . . knowing the same to have been imported or brought into the United States contrary to law.[177]

Gore argued that all three statutes proscribed the same offense, and that the double jeopardy clause permitted only one conviction.[178] He contended that the same evidence test for the distinctness of an offense did not provide adequate double jeopardy protection. Mr. Justice Frankfurter, erroneously but consistently with tradition, construed this argument as necessarily an attack upon the power of the legislature. He responded for the Court:

> Suppose Congress, instead of enacting the three provisions before us, had passed an enactment substantially in this form: "Anyone who sells drugs except from the original stamped package and who sells such drugs not in pursuance of a written order of the person to whom the drug is sold, and who does so by way of facilitating the concealment and sale of drugs knowing the same to have been unlawfully imported, shall be sentenced to not less than fifteen years imprisonment. *Provided, however,* That if he makes such sale in pursuance of a written order of

aids an alien to enter the United States unlawfully "shall be punished by a fine . . . for each alien . . . ." For interpretation of this section, see Sepulveda v. Squier, 192 F.2d 796 (1951). See also, N.Y. PENAL LAW § 406 (1944) (punishment for separate crime comitted in building by burglar). For other examples, see RESTATEMENT, DOUBLE JEOPARDY § 22, IV(a), comment (Official Draft 1935).

174. 357 U.S. 386 (1958).

175. Internal Revenue Code of 1954, § 4705(a).

176. Internal Revenue Code of 1954, § 4704(a).

177. Narcotic Drugs Import & Export Act, 35 Stat. 614 (1909), 21 U.S.C. §§ 171-185 (1958) as amended, 65 Stat. 767 (1951), 21 U.S.C. § 174 (1958).

178. Gore argued that both legislative intent, Brief for Petitioner, pp. 17-51, Gore v. United States, 357 U.S. 386 (1958), and the double jeopardy clause, *id.* at pp. 53-73, precluded multiple punishment.

> the person to whom the drug is sold he shall be sentenced to only ten years' imprisonment: *Provided further,* That if he sells such drugs in the original stamped package, he shall also be sentenced to only ten years' imprisonment: *And provided further,* That if he sells such drugs in pursuance of a written order and from a stamped package, he shall be sentenced to only five years' imprisonment." *Is it conceivable that such a statute would not be within the power of Congress? And is it rational to find such a statute constitutional but to strike down the Blockburger doctrine* [same evidence test] *as violative of the double jeopardy clause?*[179] [Emphasis in part supplied.]

The fallacy of this argument should be clear: the statutes in *Gore* were *not* the functional equivalent of the Court's hypothetical statute. Indeed, Mr. Justice Frankfurter's statute embodies the wisdom of the very constitutional limitation it was designed to disparage. It is not offensive precisely because it is definite, and leaves no room for arbitrary administration. It clearly relates specific conduct to its punishment. In short, the answer to Mr. Justice Frankfurter's first question is clearly "no," his statute would certainly be within Congress' power; but the answer to his second question is "yes," the convictions could violate the double jeopardy prohibition nevertheless.

Double Jeopardy Limits The Discretion of Courts and Prosecutors

The irony of the current interpretation of the bar against multiple punishment is that in taking care not to "limit" the legislature's prerogative, many courts have usurped a power constitutionally vested in the legislature and have failed to apply the limitation where it is required, namely, to themselves and to prosecutors. Current cumulative punishment doctrine in many jurisdictions allows both courts and prosecutors an utterly whimsical kind of discretion.

The profusion of modern statutory offense categories has given the prosecutor vast discretion at every stage of the criminal process. He may characterize, at will, the same criminal behavior as one or many offenses.[180] Frequently he chooses the judge who will hear the case,[181] and the judge follows his sentencing recommendation in many jurisdictions.[182] Parole rules frequently amplify the consequences of the prosecutor's choice.[183] Thus, if the court is willing to cumulate punish-

179. 357 U.S. at 392-93.

180. Remington and Joseph, *Charging, Convicting, and Sentencing the Multiple Criminal Offender,* 1961 WIS. L. REV. 528, 530 and sources cited therein, n.6.

181. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 383-84 (1947).

182. *Id.* at 535; Note, *Identity of Offenses,* 45 HARV. L. REV. 535, 536, n.4 (1932).

183. See note 161 *supra,* and note 197 *infra.*

ment, the prosecutor can decide on the punishment and choose the crime to fit.

The prosecutor's decision to proceed in few or many courts is not reviewable,[184] and need not be based on legitimate tactical or penological considerations. Indeed, there is evidence that defendants who have gained notoriety[185] and those who have offended the police[186] are frequently selected for multiple punishment. The power to effect cumulative punishment gives the prosecutor a coercive weapon which he may freely brandish in plea bargaining.[187] Given the choice of contesting guilt and risking crushing sentence, or pleading guilty to one of the offenses, an uncertain defendant may well capitulate.[188]

The doctrine of prosecutorial discretion has become wed to our criminal procedure, but it is a marriage of convenience, and we need not welcome the in-laws.[189] Only recently have courts begun to speak seriously of limiting prosecutorial discretion, and the first limitation suggested was upon arbitrary choice of offense categories.[190] All agree that some discretion is unavoidable. But the compelling reasons for letting the prosecutor allocate his limited resources and determine whether the evidence warrants prosecution do not support his discre-

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184. Remington and Joseph, *Charging, Convicting, and Sentencing the Multiple Offender*, 1961 WIS. L. REV. 528, 530.

185. He [the assistant District Attorney] pointed out that the particular case involved armed robbery and was one as to which there was a great deal of public interest. Therefore it is fair to assume that the number of warrants issued in this case represents, in general, the maximum which would be brought under any circumstances. 5 AMERICAN BAR FOUNDATION 56; Ciucci v. Illinois, 356 U.S. 571 (1958).

186. 6 AMERICAN BAR FOUNDATION 133. State v. Jefferson, 40 N.J. Super. 466, 123 A.2d 579 (App. Div. 1956) (19 years for a drunken brawl which included assaulting the arresting officers).

187. Note, *Guilty Plea Bargaining*, 112 U. PA. L. REV. 865, 868 (1964); Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J. CRIM. L., C. & P.S. 780, 784 (1956).

188. Actual examples are naturally rare. However, in Heideman v. United States, 281 F.2d 805 (8th Cir. 1960), defendant alleged that the prosecutor had coerced a guilty plea by threatening to ask for consecutive sentences. *Id.* at 807. Defendant was charged in a six-count indictment with transporting, on one occasion, six forged money orders. He contended that the prosecutor threatened to ask for sixty years imprisonment and a sixty thousand dollar fine. Defendant then switched his plea to guilty. This case was in and out of the courts for several years. 173 F. Supp. 574 (D.N.D. 1959); 189 F. Supp. 224 (D.N.D. 1960); 303 F.2d 563 (8th Cir. 1962). See also note 194 *infra*.

189. See SCHWARTZ, PROFESSION RESPONSIBILITY AND THE ADMINISTRATION OF CRIMINAL JUSTICE 34-35 (1961) for general statement on scope of prosecutor's discretion.

190. Hutcherson v. United States, 345 F.2d 964, 972-77 (D.C. Cir. 1965) (dissenting opinion of Bazelon, C.J.). *Cf.*, Berra v. United States, 351 U.S. 131, 135-40 (1956) (dissenting opinion of Black, J.).

tion to seek multiple punishment.[191] Nothing about the prosecutor's role makes him fit to pass sentence.[192]

Of course, the ultimate sentencing determination is made by the court, not the prosecutor. But the power to cumulate sentence may be abused by courts as well. In *United States v. Tateo*,[193] for example, the judge coerced a guilty plea at trial by threatening defendant with cumulative punishment.[194] Whether and to what extent lower court judges have quietly used the power to cumulate sentence for "persuasive" purposes we cannot know. But certainly the power lends itself well to subtle coercion or vindicative punishment. The arbitrariness inherent in the power to cumulate convictions and punishment is not limited to these opportunities for latent oppression. By its nature, it is an arbitrary power.

Judicial discretion to convict and punish cumulatively for closely related offenses is not the same as the discretion usually granted judges to determine the length of a sentence. The two kinds of discretion differ in source, scope, and purpose. To begin with, the former is rarely granted explicitly; the latter always is. When a discretionary power is assumed by inference, its extent is all the more uncertain. Secondly, cumulated convictions allow the trial judge to impose fearfully long prison terms, terms much stiffer than normally permitted by statute.[195] Since there is no appellate review of sentencing, the trial judge's power will be totally unchecked.[196] Beyond its power over prison terms, the court may brand the defendant a multiple offender and prejudice his position with respect to parole.[197]

191. For a discussion of policies concerning prosecutorial discretion, see Note, *Discretion to Prosecute Federal Civil Rights Crimes*, 74 YALE L.J. 1297, 1301 (1965).

192. Congress may vest the judge and jury with broad power to say how much punishment shall be imposed for a particular offense. But it is quite differrent to vest such powers in a prosecuting attorney. . . .

Berra v. United States, 351 U.S. 131, 140 (1956) (dissenting opinion of Black, J.); Hutcherson v. United States, 345 F.2d 964, 973 (D.C. Cir. 1965) (citing with approval dissenting opinion of Black, J. in *Berra v. United States, supra*).

193. 377 U.S. 463 (1964).

194. *Id.* at 464. Tateo was tried on a five-count indictment. On the fourth day of the trial, the judge threatened to sentence him, if he persisted with the trial, to a life sentence plus consecutive sentences on the other charges. Tateo pled guilty.

195. *E.g.*, Smith v. United States, 273 F.2d 462 (10th Cir. 1959) (52 year sentence); State v. Jefferson, 40 N.J. Super. 466, 123 A.2d 579 (App. Div. 1956) (19 years for a drunken brawl). The lengthy terms are significant not only because they represent a possible term of incarceration, but also because the defendant's parole eligibility may be adversely affected. See note 161 *supra* and note 197 *infra*.

196. Note, *Appellate Review of Sentencing Procedure*, 74 YALE L.J. 379, 380 (1964). The note, however, discusses an emerging line of cases which run contrary to the old rule. *E.g.*, Leach v. United States, 334 F.2d 945 (D.C. Cir. 1964).

197. Some courts have held that concurrent sentencing is tantamount to cumulative

Finally, and most importantly, power to cumulate punishments involves an irrational kind of discretion. The aim of sentencing discretion is individualized punishment.[198] The judge must determine the criminal's capacity for rehabilitation, and society's appetite for retribution, in each case.[199] All species of psychological and biographical information are relevant to both decisions. But one fact which is not relevant is the number of closely related or overlapping offenses that can be spun out of the defendant's conduct. If the pre-sentence investigation of two criminals indicates them to be identical in all respects except that one of them has been convicted of selling narcotics not in the original package and with knowledge that they were illegally imported, while the second defendant has been convicted only of the latter offense, why should the judge be permitted to tailor the sentence only for the "multiple offender"? The "rehabilitative logic" would allow the judge absolute discretion in both cases; if he feels the statutory penalty for the offense at hand is inappropriate for the offender, he should be free to double the sentence in either case. Similarly, the multiplicity of offenses is not relevant to individual characteristics, for example intelligence or motive, which determine the retributive component of a sentence.

Cumulative punishments probably more often reflect the judge's evaluation of the offense than of the offender. Thus, in *O'Neil v.*

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punishing because it delays parole eligibility. See note 161 *supra*. Consecutive sentencing may even more obviously affect parole eligibility. Thus, in a jurisdiction where a prisoner does not become eligible until the expiration of a percentage of his maximum sentence, *e.g.*, 18 U.S.C. § 4202 (1964) (one-third), cumulated maximums may delay parole eligibility. Newcombe v. Carter, 291 F.2d 202 (5th Cir. 1961); Brown v. United States, 256 F.2d 151 (5th Cir. 1958); Williamson v. Hardwick, 135 F. Supp. 463 (N.D. Ga. 1955), *aff'd*, 227 F.2d 168 (5th Cir. 1955); United States v. Howell, 103 F. Supp. 714 (S.D.W. Va. 1952), *aff'd*, 199 F.2d 366 (4th Cir. 1952). Similarly, when a prisoner does not become eligible until the expiration of his minimum term, cumulated minimums may delay parole eligibility. State v. Maxey, 42 N.J. 62, 66-67, 198 A.2d 768, 771 (1964).

Obviously, judges may use their power to cumulate sentences to interfere with the parole process. *Cf.*, RUBIN, THE LAW OF CRIMINAL CORRECTION 119 (1963). The current trend in penological thinking is therefore to abolish completely the "minimum sentence" to which parole keys. *Id.* at 130 and 416; MODEL SENTENCING ACT § 1 (reprinted in 9 CRIME AND DELINQUENCY 339 (1963)). For proposed treatment of multiple offenders, see MODEL SENTENCING ACT §§ 19-22 ("Separate sentences of committment imposed on a defendant for two or more crimes constituting a single criminal episode shall run concurrently." *Id.* § 22).

198. RUBIN, THE LAW OF CRIMINAL CORRECTION 680 (1963).

199. Of course many modern penologists exclude retribution as a legitimate purpose of the criminal law. See, *e.g.*, RUBIN, THE LAW OF CRIMINAL CORRECTION 691 (1963). For the opposite view, see, Lewis, *The Humanitarian Theory of Punishment*, RES JUDICATAE VI (1953) p. 224 (reprinted in part in DONNELLY, GOLDSTEIN, AND SCHWARTZ, CRIMINAL LAW 499-503 (1963)).

Vermont,[200] where defendant received a 54 year sentence for trafficking in liquor, the judge probably cumulated the punishment because he hated Demon Rum, not because the poor devil made a bad impression. But judicial discretion is completely inappropriate when the sentence reflects only general judgments about the crime.

The Legislature Should Determine Appropriate Sentences

The legislature is the proper institution to determine what punishment, or range of punishment, is appropriate for different offenses.[201] It alone can evaluate the complex considerations which determine the punitive valuation given an offense. A proper penalty must reflect elements of retribution, deterrence, restraint, and rehabilitation.[202] Retributive considerations require sensitivity to the community's moral sentiment. Deterrence considerations demand analysis of the relative deterability of different offenses. An informed judgment about scientific methods of prediction and treatment must precede any decision about restraint or rehabilitation. The different theories of punishment are not harmonious, and often one must be preferred over others.[203] Finally, the prescription of penalties requires continuing awareness of the capabilities of the prison-treatment system. Determination of penalties, perhaps even more than the creation of offenses, demands perspective and talent unavailable to a court.

Aside from its superior facilities, the legislature is the politically appropriate institution to choose among theories of penology. The only criteria for choice are public needs and moral sensibility, which are normally evaluated by the legislature. The judiciary is expected to veto punishments which offend its sense of civilization,[204] but has no mandate to make routine political compromises.

Historically, the separation of legislative and judicial power in the criminal law has been a major feature of the "principle of legality,"

200. 144 U.S. 323 (1892).

201. In United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 93 (1820), Marshall, C.J., said:

> [T]he power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment.

202. See generally DONNELLY, GOLDSTEIN, AND SCHWARTZ, CRIMINAL LAW 304-520 (1963).

203. Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. PA. L. REV. 378, 386 (1952).

204. This power is vested in the judiciary by virtue of the Eighth Amendment (cruel and unusual punishment). See, *e.g.*, Trop v. Dulles, 356 U.S. 86, 102-03 (1958). Weems v. United States, 217 U.S. 349, 380-81 (1910) (overly lengthy sentence in proportion to the offense held unconstitutional).

or "rule of law" which sustains constitutional government.[205] In Great Britain, before Parliament became supreme, the criminal courts legislated at will.[206] With the rise of Parliament came gradual subordination of this common law power.[207] American judges, especially conscious of the demands of the new constitutional system, were ready to abjure all power to invent crimes. In 1812 the United States Supreme Court determined that the federal courts were creatures of statute possessing no common law criminal jurisdiction.[208] Even earlier, the Supreme Court of Errors of Connecticut, trumpeting that the Founders had no more love for the common law than they had for the Star Chamber, disclaimed any such power.[209] The justices were expressly concerned about the arbitrary power that would otherwise fall into the hands of individual judges. The court took heed of the aims of the Constitution: "to *separate, define,* and *limit* the constituent powers of government. . . ."[210]

It is generally recognized today that a legislature is the appropriate institution to define conduct as criminal.[211] The federal courts have no power to supplement Congress' catalogue of offenses.[212] A few state courts cling to some vestige of the common law of crimes.[213] In these states, the court's exercise of its common law power has been reined by constitutional limitations,[214] and is confined to petty offenses.[215] Even this withered common law power has been soundly criticized.[216]

With the limited view of their power to invent crimes the courts could not consistently claim broad power to punish cumulatively. Until Parliament changed the law, the English common law forbade cumulative punishment for felonies.[217] On the other hand, the English

205. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 31-32 (2d ed. 1960).

206. 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 358-60 (1883).

207. *Ibid.*

208. United States v. Hudson and Goodwin, 11 U.S. (7 Cranch) 31, 34 (1812).

209. State v. Danforth, 3 Conn. 112 (1819).

210. *Id.* at 120-21.

211. See note 201 *supra.*

212. See note 208 *supra* and accompanying text.

213. *E.g.,* Commonwealth v. Mochan, 177 Pa. Super. 454, 110 A.2d 788 (1955); Note, *Common Law Crimes in the United States,* 47 COLUM. L. REV. 1332 (1947).

214. Note, 47 COLUM. L. REV. *supra,* at 1335.

215. *Id.* at 1336.

216. *Id.* at 1337.

217. Rev v. Albury [1951] 1 All. E.R. 491. At common law a defendant could be tried for only one felony at a trial. 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 291-92 (1883); STEPHEN, DIGEST OF CRIMINAL LAW 18 n.4 (1894). When most felonies were punishable by death, the pleas of *autrefois convict* and *autrefois attaint* barred all felony prosecutions after a conviction. 2 HAWKINS, PLEAS OF THE CROWN 524 (8th ed. 1824). If a criminal was convicted at common law of a felony and a mis-

courts were often said to have had "inherent" power to cumulate punishments for multiple misdemeanors.[218] But this power was justified by, and in some measure dependent upon, the broad misdemeanor sentencing discretion available to common law judges.[219] The *Wilkes* case,[220] which is said to be the source of this inherent power, allowed cumulative sentencing on the argument that the total sentence was less than the court could have imposed on either count alone.[221]

Even in misdemeanor cases, the English courts could be quite fastidious in taking care not to exceed their power. In *Crepps v. Durden*,[222] decided a few years after *Wilkes*, a baker had been convicted of selling four "hot loaves of bread" on Sunday, and had been fined for each of four convictions. Lord Mansfield held that since the legislature intended "activity on Sunday" not "loaves of bread" to be the unit of prosecution, the sentencing court had exceeded its jurisdiction. "If the Act of Parliament gives authority to levy but one penalty, there is an end of the question, for *there is no* penalty at common law."[223]

Many courts in this country incorrectly found in these cases a common law rule for the inherent power to punish cumulatively for felonies and misdemeanors alike.[224] In some states, the legislature enacted authorizing statutes.[225] And in several states the courts ruled that when the legislature has not spoken, the courts have no power to cumulate punishments, even for distinct offenses.[226] The question was raised in the federal system in 1887, and the Third Circuit stated:

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demeanor, the misdemeanor was said to merge with the felony for purposes of punishment.

218. STEPHEN, DIGEST OF CRIMINAL LAW 18 n.4 (1894); Rex v. Albury [1951] 1 All E.R. 491, 492; see also Queen v. Cutbush L.R. [1867] 2 Q.B. 379.

219. RUBIN, THE LAW OF CRIMINAL CORRECTIONS 23 (1963); for precisely this analysis of their "inherent power," see James v. Ward, 59 Ky. (2 Met.) 271 (1859).

220. Wilkes v. Rex, 4 Brown, Parl. Cas. 360 (1767).

221. *Id.* at 366.

222. 2 Cowper's Reports 640, 98 Eng. Rep. 1283 (K.B. 1777).

223. *Id.* at 646.

224. *E.g.*, People v. Forbes, 22 Cal. 136 (1863); State v. Smith, 5 Day 175 (Conn. 1811); State v. Mahaney, 73 N.J.L. 53, 62 Atl. 265 (1905); and State v. Maxey, 42 N.J. 62, 198 A.2d 768 (1964).

225. Missouri, for example, enacted such a statute, but the State Supreme Court did not seem anxious to permit the imposition of consecutive sentences under it. *Ex parte* Meyers, 44 Mo. 279 (1869).

226. *E.g.*, Miller v. Allen, 11 Ind. 389 (1858); James v. Ward, 59 Ky. (2 Met.) 271 (1859); *Ex parte* Meyers, 44 Mo. 279 (1869); Bloom's Case, 153 Mich. 597, 19 N.W. 200 (1884); Lamphere's Case, 61 Mich. 105, 27 N.W. 882 (1886); *In re* Allison, 322 Mich. 491, 33 N.W.2d 917 (1948); and Pulaski v. State, 23 Wis. 2d 138, 126 N.W.2d 625 (1964). *But cf. Ex parte* Huber, 334 Mich. 100, 53 N.W.2d 609 (1952), and *In re* Illova, 351 Mich.

> Perhaps these terms might have been lawfully made to take effect successively . . . although *there is no United States statute authorizing it to be done.*[227] [Emphasis added.]

A few months later in the Supreme Court, in *In re Henry,*[228] adopted, without discussion, the common law "rule" of inherent power. Congress has never enacted a statute authorizing cumulative sentences even for distinct offenses. But the rule of *In re Henry* is well established.[229]

It would be rather late in the day to challenge the rule that a court has inherent power to punish cumulatively for distinct offenses, although such a claim continues to be made occasionally. Moreover, the power to punish or refrain from punishing offenses which the legislature intended the courts to punish is no more offensive to double jeopardy or due process than any other sort of discretionary power. However, when the legislature has not expressly created separately convictable and punishable offenses, the judiciary usurps legislative authority when it assumes the power to convict and punish cumulatively.

Legislative Intent Determines the Number of Convictable Offenses

At least since *Crepps v. Durden*[230] some courts have recognized their institutional limitations, and have looked to legislative intent in determining how many convictable and punishable offenses have been created by the relevant statutes. The Supreme Court began to be sensitive to legislative intent in *In re Snow.*[231] The defendant was sentenced consecutively for three counts of plural cohabitation. Each count charged cohabitation with the same two women in a different year. The Supreme Court, noting that the prosecutorial and judicial offense-splitting were "wholly arbitrary," permitted only one sentence to stand.[232] The Court implicitly relied on Congress' intent to punish the entire course of conduct as a unit; indeed, the principal precedent was *Crepps v. Durden.*[233] Later cases confirmed the idea that legislative

204, 88 N.W.2d 589 (1958), *cert. denied,* 356 U.S. 962, which were overruled by *In re* Carey, 372 Mich. 378, 126 N.W.2d 727 (1964).

227. United States v. Patterson, 29 Fed. 775, 778-79 (1887).

228. 123 U.S. 372 (1887).

229. For an example of the current inherent power theory in the federal system see Hill v. United States, 306 F.2d 245 (9th Cir., 1962).

230. See note 222 *supra.*

231. 120 U.S. 274, 283-86 (1887). The court did not rely upon express legislative intent. But it relied upon the principle of Crepps v. Durden, note 222, *supra,* a legislative intent case. Actually, the "continuing offense" rule seems to be a rule of statutory construction.

232. *Id.* at 282.

233. *Id.* at 283-85.

intent should determine the "unit of prosecution," and that this unit and not its component parts ought to be punished.[234]

So long as the defendant violated a single statute, the courts could recognize the course of conduct as the convictable offense. But when a single transaction involved violations of several statutes, the court felt obliged to allow at least one conviction per statute.[235] In *United States v. Universal C.I.T. Credit Corp.*,[236] for example, where the defendant was charged on a 32 count indictment for violations of three statutory provisions of the Fair Labor Standards Act,[237] the Court refused to find 32 distinct offenses, one for each short-changed employee. It decided that the course of conduct was the offense, but that each of the three statutory offenses was distinct; in other words, there were three convictable offenses.[238]

It should be obvious that legislative intent is also relevant to multiple statutory offense cases. The mere existence of two statutory offenses does not establish that the legislature intended each to be independently convictable and punishable when both are committed in a single course of conduct. It is just as likely that the legislature intended only to provide two avenues of prosecution or create alternative classes of wrongdoers differentiated by gradations in punishment.[239] Thus, the Voting Rights Act of 1965 contains overlapping criminal sections which subject a precinct official who intimidates a voter to conviction on four counts, each punishable by five years and five thousand dollars.[240] Congress probably intended to facilitate prosecution by covering all species of wrongdoing and to ensure federal jurisdiction, rather than to pyramid punishment. Similarly, Mr. Chief Justice Warren, dissenting in *Gore*, thought Congress' purpose in enacting the three narcotics statutes was to provide the prosecutor with three methods of proceeding against a single category of wrongdoers—narcotics peddlers.[241]

In cases involving repeated violations of a single statute, the courts

234. See text accompanying note 238 *infra*. *But see*, Ebeling v. Morgan, 237 U.S. 625 (1915), where the court permitted cumulative punishment for each of six mailbags appellant had ripped open during a robbery.

235. *E.g.*, Morgan v. Devine, 237 U.S. 632 (1915) (cumulative punishment for breaking and entering U.S. Post Office, and stealing property from that Post Office).

236. 344 U.S. 218 (1952).

237. Ch. 676 §§ 6, 7, 11, 52 Stat. 1060 (1938), as amended 63 Stat. 910, 29 U.S.C. § 215, 216(a) (1949).

238. 344 U.S. at 224-25.

239. Prince v. United States, 352 U.S. 322, 328 (1957); Ingram v. United States, No. 18568 (D.C., Nov. 4, 1965).

240. 78 Stat. 443 (1965).

241. 357 U.S. 386, 395 (1958).

have used the term unit of prosecution[242] to mean "the offense which the legislature intended to create."[243] Thus, if the unit of prosecution for cohabitation[244] is held to be all the cohabitating perpetrated before indictment the courts will not allow the conduct to be severed for purposes of *either* prosecution or punishment.[245] But the distinction between units of prosecution and units of punishment must be observed in multiple statute cases.[246] Statutes which create only one punishable offense—like the Voting Rights Act—are usually meant to permit various theories of prosecution.

When the legislature clearly indicates in a statute its intent with respect to the cumulation of convictions, the court's task of construction is at an end. And if legislative intent, though not proclaimed in the statute, is nonetheless perfectly clear from legislative history, the legislature's purpose should be honored. But in the vast majority of cases, unequivocal legislative intent cannot honestly be found in the statute or its official history.[247] Thus the court must ordinarily resort to presumptions about legislative intent—canons of construction—to determine the unit of conviction created by a statute.

The Rule of Lenity and the Rule of Gore

The Supreme Court has devised a rule of construction for use in the single statute context. According to this "rule of lenity"[248] doubts should be resolved against the creation of multiple units of conviction. The rule was born in *Bell v. United States*[249] which construed the Mann Act to create but one unit of conviction even when more than

242. *E.g.*, opening sentence of Bell v. United States, 349 U.S. 81 (1955); Ladner v. United States, 358 U.S. 169, 174-75 (1958).

243. The "unit of prosecution" phraseology may be confusing because it implies that a unit of prosecution equals a "unit of conviction." But the number of ways that an individual may incur criminal liability does not necessarily correspond to the number of times he should be convicted and punished: the unit of prosecution need not be the same as the unit of conviction or punishment.

244. See notes 231 and 232 *supra*, and accompanying text.

245. *E.g.*, Guffe v. United States, 310 F.2d 753 (1962); United States v. Woody Fashions, Inc., 190 F. Supp. 709, 711-12 (1961); United States v. Personal Finance Co., 174 F. Supp. 871 (1959).

246. Permitting a liberal joinder of offenses increases the likelihood that the case will be decided on the merits. United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 225 (1952).

247. Nevertheless, the majority will frequently discover one intent and the dissent another. Gore v. United States, 357 U.S. 386, 390 and 394.

248. Ladner v. United States, 358 U.S. 169, 178 (1958) (referred to as the "policy" of lenity). In addition to the rule of lenity cases discussed in the text accompanying notes 249-258 *infra*, see Castle v. United States, 368 U.S. 13 (1961); Milanovich v. United States, 365 U.S. 561 (1961).

249. 349 U.S. 81 (1955).

one woman is transported at once in interstate commerce.[250] Later, the rule was applied by the Court to overlapping sections of the Federal Bank Robbery Act. In *Prince v. United States*,[251] the crime of entry with intent to rob was held not cumulatively convictable with the consummated robbery;[252] in *Heflin v. United States*,[253] feloniously receiving and feloniously taking were viewed as a single offense.[254] In *Ladner v. United States*,[255] the Court unanimously used the rule of lenity to prohibit multiple punishment when the defendant injured two officers with one blast from a shotgun.[256] The Court found that the statute could have been read to mean that the single discharge of the shotgun would constitute an "assault" without regard to the number of federal officers affected, as reasonably as it could have been read to mean that as many "assaults" would be committed as there were officers affected.[257] Neither the wording of the statute nor its legislative history pointed clearly to either meaning. Under these circumstances, the Court applied a policy of lenity and adopted the less harsh meaning.

> When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.[258]

The rule of lenity is in complete discord with the counterpoint theme of substantive double jeopardy law—the rule of *Gore*.[259] The federal courts, following the lead of Mr. Justice Frankfurter in *Gore*, have exempted federal narcotics statutes from the rule of lenity and have constructed a presumption of legislative harshness.[260] From the observation that

> If the legislation [here] reveals anything, it reveals the determination of Congress to turn the screw of the criminal machinery—

250. *Id.* at 83.
251. 352 U.S. 322 (1957).
252. *Id.* at 328-29.
253. 358 U.S. 415 (1959).
254. *Id.* at 419-20. See also, Milanovich v. United States, 365 U.S. 561 (1961).
255. 358 U.S. 169 (1958).
256. *Id.* at 178.
257. *Id.* at 177.
258. *Id.* at 177-78, quoting from United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-22 (1952).
259. See text accompanying notes 174-179 *supra*.
260. The cases in the aftermath of *Gore* are legion. *E.g.*, Williams v. United States, 332 F.2d 308 (1964); Pellom v. United States, 321 F.2d 646 (1963); Loya v. United States, 310 F.2d 304 (1962).

> detection, prosecution and punishment—tighter and tighter [on narcotics offenders].[261]

Mr. Justice Frankfurter deduced that each of the statutes created a separate unit of conviction.[262] The same presumption of harshness has allowed the courts to discover multiple units of conviction in the overlap of substantive and conspiracy offenses.[263] In *Pinkerton v. United States*,[264] the common law rule that a conspiracy merges in the substantive offense[265] was rejected by a unanimous Court largely on grounds of a presumption of harshness. The same result was reached in *Callanan v. United States*,[266] on grounds of a "tacit purpose" attributed to Congress to create multiple units of conviction.[267] Finally, many of the lower federal courts have shown far more affection for the rule of harshness than for the rule of lenity, and some have refused to apply the latter to virtually any statute to which the Supreme Court has not previously applied it.[268] In *Carlson v. United States*,[269] for

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261. 357 U.S. at 390.

262. *Id.* at 391.

263. See notes 265 and 281 *infra*.

264. 328 U.S. 640 (1946).

265. There seems to be some confusion as to which merges into which. Pinkerton argued that the substantive offense merged into the conspiracy, *Id.* at 642, and the court, treating this contention as the common law rule, rejected it. *Id.* at 643. Other courts and commentators have stated that at common law the conspiracy, a misdemeanor, merged into the substantive offense. See, *e.g.*, *Developments in the Law-Criminal Conspiracy*, 72 HARV. L. REV. 920, 968 (1959).

The rationale for permitting cumulative punishment for conspiracy and the substantive offense in the federal system is that they are directed at different evils. United States v. Rabinowich, 238 U.S. 78, 88 (1914). Other jurisdictions treat conspiracy as an inchoate offense—according to the analysis proposed in the comment, a preparatory offense. In these jurisdictions, a defendant cannot be cumulatively convicted and punished for conspiracy and substantive offense. See, *e.g.*, 38 Ill. Stat. Ann. §§ 8-2 and 8-5.

266. 364 U.S. 587 (1961).

267. *Id.* at 594. The lower federal courts naturally follow this rule. *E.g.*, Hill v. United States, 306 F.2d 245 (1962), receiving stolen money and conspiracy to commit that offense.

268. For example, in Carlson v. United States, 274 F.2d 694 (8th Cir. 1960), defendant was sentenced to four consecutive four year terms (16 yrs.) for transporting, on one occasion, four forged checks in interstate commerce. See also Heideman v. United States, 281 F.2d 805 (8th Cir. 1960) (twenty five years for simultaneous transportation of six forged money orders). For subsequent history of this case, see note 188 *supra*. Then, in Castle v. United States, 368 U.S. 13 (1961) the Supreme Court agreed, *per curium*, with the representations of the Solicitor General that these forged security cases are governed by the rule of lenity, note 248 *supra*. See also Kessel v. United States, 303 F.2d 563 (8th Cir. 1962) (following *Castle*).

Also *compare* Hiller v. United States, 252 F.2d 54 (9th Cir. 1958), *cert. denied*, 356 U.S. 963 (1958), *with* Bell v. United States, 349 U.S. 81 (1955), discussed in text accompanying note 250 *supra*. Apparently, the sole distinction between *Bell* and *Hiller* is that in the former case defendant transported two women in his car, while in the latter he

example, the court sentenced defendant to four consecutive four-year terms for transporting in interstate commerce four forged checks. Three were for seventy-five dollars and one for fifty, and all were transported on one occasion.[270]

The rule of lenity is not a casual presumption about legislative intent, but a constitutionally compelled canon of construction. It requires the legislature to specify clearly when overlapping statutes are to allow cumulative sentences. It forbids courts to proliferate sentences out of legislative silence. The rule of lenity is designed to prevent multiple judicial punishment for a single legislative offense—to preclude substantive double jeopardy.

The rule of lenity is a penological analog to the rule of strict construction. Together they require that liberty be forfeited only if the legislature has clearly indicated that it should be, and only to the extent that it has plainly authorized. Both rules dictate that the punitive powers of the state may be invoked only pursuant to a definite, general and prospective prohibition, not at the arbitrary behest of public officials.[271] Punishing convicted men is no less serious business than deciding whether they can be convicted.[272]

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caused two women to "go and to be transported . . . upon . . . a common carrier." 252 F.2d at 55.

Some cases involve overlapping statutes rather than multiple violations of the same statute, and are therefore less similar to the rule of lenity cases. *E.g.*, Marshall v. United States, 299 F.2d 141 (1962), *cert. denied*, 370 U.S. 958 (1962) (forging a check and uttering it); Smith v. United States, 312 F.2d 119 (10th Cir. 1963) (breaking into Post Office with intent to commit larceny and stealing government property); United States v. White, 156 F. Supp. 37 (1957) (possession of distilling apparatus, carrying on business of distilling, making mash for distillation). See also, United States v. Trumblay, 286 F.2d 918 (7th Cir. 1961), *cert. denied*, 368 U.S. 852 (1961) (bank robbery and assault with deadly weapon).

269. 274 F.2d 694 (8th Cir. 1960). Presumably, after Castle v. United States, 368 U.S. 13 (1961), such a sentence would be improper. See note 268, *supra*.

270. 274 F.2d at 695.

271. The Supreme Court has frequently construed statutes strictly in order to limit the arbitrary power which would otherwise be vested in administrative officials. In Kent v. Dulles, 357 U.S. 116 (1958), for example, the Court narrowly construed the statutes which authorized the Secretary of State to issue passports. 66 Stat. 190 (1952), 8 U.S.C. § 1185 (1965) and 44 Stat. 885 (1926), 22 U.S.C. § 211(a) (1965). The Director of the Passport Office had refused to issue passports to the petitioners on the ground that they were sympathizers with and members of the Communist Party. Since the right to exit (from the nation) was within the liberty guaranteed by the Fifth Amendment, *id.* at 129, the Court was reluctant to impute to Congress an intent to give the Secretary "unbridled discretion to grant or withhold a passport . . . for any substantive reason he may choose." *Id.* at 128. The Court concluded that "if that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress." *Id.* at 129. A judge is no more fit to decide *ad hoc* how many offenses a criminal has committed than is the Secretary of State to determine capriciously who may leave the country. In both cases, standards should be clearly enunciated by the body which is institutionally and politically the

Double jeopardy precludes a judge from convicting and punishing twice for the same offense. If a court creates multiple units of punishment *ad hoc* when, from all that appears in the statutes and their history, the legislature created only multiple units of prosecution, the court offends double jeopardy by punishing twice for a single legislative offense. Double jeopardy therefore requires that in determining the unit of punishment for related offenses, doubts should be resolved against punishing twice for what may be a single offense.

In a similar way, and for the same purpose, the ordinary rule of strict construction requires that doubts in the construction of a penal statute be resolved against including borderline conduct. Neither the rule of lenity nor the rule of strict construction is a prospective limitation on the legislature's penological power. Both are concerned with limiting the arbitrary power of judges, not with supervising the kinds of conduct a legislature can make criminal nor the penalties it may impose. Both rules are judicial corollaries to the *ex post facto* clause. They ensure that neither a greater range of conduct is criminal nor a greater range of punishment permissible after a defendant has acted than clearly was before.[273]

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proper law-maker—the legislature. A criminal's liberty is no less arbitrarily infringed upon than was Kent's, if the criminal is sent to prison for a term longer than the legislature has authorized. Both kinds of liberty should be regulated by the legislature.

It has been pointed out that the "void for vagueness" doctrine has been used by the Supreme Court to protect "individual freedom from arbitrary and discriminatory governmental action . . . ." Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. PA. L. REV. 67, 80 (1960). A vague statute confers *carte blanche* powers upon administrators and judges. They fill in the blanks which the legislature has deliberately or inadvertently left. The offensiveness of the "delegated" power will differ, naturally, with the liberty infringed upon and the institutions to which it is delegated. "Power given to courts appears more tolerable than power given to administrative agencies. . . ." *Id.* at 940. The offensiveness may also vary with the necessity of the delegation —the infeasibility of any other sort of regulatory scheme. *Id.* at 95. The "delegation" to, or more accurately, the "usurpation" by, the courts of the power to fill in the blanks with respect to the numbers of punishable offenses is not at all necessary to the administration of criminal justice. More than that, it is irrational. And the liberty infringed upon is perhaps the most sacred of all liberties—the right not to be arbitrarily imprisoned.

272. The prevailing attitude today seems to be that punishing is less serious, or at least requires less official supervision, than determining whether conduct comes within the criminal provision. (Thus, the trial court's sentence is not subject to review. See note 196 *supra.*) It has been suggested, probably quite correctly, that the latter judicial activity has been scrutinized more carefully than the former because the latter concerns "the mass of respectable citizens," while the former "affects only proven criminals." HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 55 (2d ed. 1960). Hall concludes that "if anything can be done to any convicted person, the guarantee of legality has in fact vanished entirely." *Id.* at 55-56.

273. It has long been recognized that the *ex post facto* limitation applies not only to

Other Rules of Construction

The most serviceable rules of construction have been developed by Kirchheimer.[274] He identifies three relationships between offenses which indicate that multiple punishment was not clearly intended. Two statutes are *alternatives* if conviction under one is inconsistent with conviction under the other for the same criminal conduct.[275] For example, larceny and receiving stolen goods are alternative offenses—a defendant may have secured control over another's property by one or the other means, but not by both.[276] Secondly, an offense is *included* in another if violation of the second always involves violation of the first.[277] An attempt, for example, is necessarily included in the consum-

laws which make "an action done before the passing of the law, and which was innocent when done, criminal," but also to laws which "aggravate the crime; or increase the punishment . . . ." Calder v. Bull, 3 U.S. (Dall.) 386, 390 (1798), *cited with approval* in Bouie v. City of Columbia, 378 U.S. 347, 353 (1964).

The Court has recently clearly stated the relationship between the *ex post facto* clause and the rule of strict construction.

> If a . . . legislature is barred by the *Ex post Facto Clause* from passing such a law, it must follow that a . . . [c]ourt is barred by the Due Process Clause from achieving precisely the same result by judicial construction. Bouie v. City of Columbia, *supra* at 353-54 (1964).

The traditional rationale for the rule of strict construction, like the "void for vagueness" doctrine, is that individuals must be given fair warning. See, *e.g.*, Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). Though with respect to a limited class of crimes—that of the white collar variety—"fair warning" may be an important consideration, most observers have found the fair warning rationale in general unsatisfactory. Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 82-83 n.79 (1960). Holmes, J., recognized that the warning rationale, conceived of as necessary for informing robbers and murderers, was unrealistic. McBoyle v. United States, 283 U.S. 25, 27 (1931). Its "unrealism" is underscored by the fact that "mistake of law"—a defense concerning fair warning—is commonly not recognized in the criminal law. But insofar as warning is a tenable rationale with respect to the conduct which a statute prohibits—particularly in the white collar cases—it is no less tenable with respect to the deprivation to which an offender becomes liable.

A better explanation of the strict construction doctrine, however, is that it limits the power of courts to create offenses and prescribe penalties. This rationale has been proposed for the vagueness doctrine, at least as a supplement to the warning theory. See note 271 *supra*. The vagueness doctrine is analogous to the rule of strict construction. See generally, Quarles, *Some Statutory Construction Problems and Approaches in Criminal Law*, 3 VAND. L. REV. 531 (1950). And both doctrines have the common aim of preventing arbitrary governmental action.

274. Kirchheimer, *The Act, the Offense and Double Jeopardy*, 58 YALE L.J. 513 (1949).

275. *Id.* at 516-17.

276. *E.g.*, Milonavich v. United States, 365 U.S. 551 (1965); Bargessor v. State, 95 Fla. 404, 116 So. 12 (1928). Another pair of statutes bearing the relationship of alternativity are manslaughter and murder. The defendant may have acted either negligently or with premeditation, but it is logically imposible that he acted negligently and with premeditation.

277. Kirchheimer uses the term "speciality" to encompass statutes bearing this relationship of inclusivity. Kirchheimer, *supra* note 274, at 517-18.

mated crime;[278] lower grades of the same kind of conduct are necessarily included in the more serious grades,[279] and inclusive offenses may be constructed using lesser offenses as elements. Finally, one offense is *preparatory* if it is ordinarily committed in preparation for another.[280] This category, unlike the others, does not involve a definitional relationship between the offenses. Thus possessing liquor is a usual, but not necessary, prerequisite to selling it.[281] The preparatory relationship between some offenses is so strong that one offense is almost necessarily included in the other—for example, entry into a bank with intent to rob and bank robbery.[282] When a strong connection exists, it is more sensible to assume that the legislature created the preparatory offense in order to punish the unsuccessful criminal rather than to cumulate punishment for the successful criminal.[283]

The principle underlying the preparation rule can be generalized. When separate offenses are commonly committed together, they should be construed to create a single unit of conviction. This canon is sharpened by Kirchheimer's fourth category: distinctness of evil.[284] If several statutes are not only usually violated together but also seem designed to protect the same social interest, the inference becomes very strong that the function of the multiple statutes is only to allow alternative means of prosecution. Selling narcotics in an unstamped package and selling the same narcotics not pursuant to a written order

278. *E.g.*, Commonwealth v. Moon, 151 Pa. Super. 555, 30 A.2d 704 (1943).

279. For instance, simple assault is necessarily included in assault with intent to kill. People v. Thames, 59 Cal. App. 2d 585, 139 P.2d 359 (1943). And assault with intent to commit rape is necessarily included in the crime of rape. State v. Birckhead, 124 S.E.2d 838 (1962). This pair of offenses also fits Kirchheimer's category of "consumption" or "subsidiarity." See note 280 *infra*.

280. Kirchheimer terms the relationship between offenses, one of which applies to an earlier stage of unitary criminal behavior than the other, "consumption" or "subsidiarity." He includes in this category: attempt and the consummated crime (though it would appear that this pair fits more appropriately into the category designated "speciality"), conspiracy and the substantive offense, and burglary and larceny. Kirchheimer, *supra* note 274, at 518.

281. *But see* Albrecht v. United States, 273 U.S. 1, 11 (1926). The conspiracy-substantive offense case should also come within the preparatory classification. See note 265 *supra*.

282. *E.g.*, Prince v. United States, 352 U.S. 322 (1957).

283. For a discussion of the different but related doctrine of "necessarily included act" which emerges from some recent California decisions, *e.g.*, People v. Marshall, 48 Cal. 2d 394, 309 P.2d 456 (1957), see Note, 11 STAN. L. REV. 735, 746-53 (1959).

284. Kirchheimer, *supra* note 274, at 522-23. If, by one act of intercourse, the defendant commits incest and rape, Kirchheimer would permit multiple punishment on the theory that each statute was designed to protect a different societal interest: deterring sex relations between close blood relatives; and protecting women from sexual assaults. This analysis is not entirely satisfactory. See text accompanying notes 288 and 289 *infra*. See, *e.g.*, Burdue v. Commonwealth, 144 Ky. 428, 138 S.W. 296 (1911).

would not be cumulatively convictable if it could be shown that the statutes were both designed to prevent the same "distinct evil": "the nonmedicinal sale and use of narcotics."[285]

Many cases can be resolved easily using the distinct evil test. A defendant consecutively sentenced for taking a letter from an authorized mail depository and possessing the contents of that letter has been punished twice for what should have been construed as one punishable offense.[286] It seems clear that both statutes[287] were aimed at the same evil —stealing mail—and were intended to provide the prosecutor with an alternative method of proving a violation.

Kirschheimer expected too much of the distinct evils canon, failing to recognize that "evils" can be as prolific or inclusive as "acts."[288] Thus, even in a case where Kirschheimer thought the evils were clearly distinct—adultery and incest committed in a singe intercourse—it is possible to argue that only one evil—aberrant sexual behavior—was being protected against. Similarly, Gore contended that only the single social interest of preventing the ultimate sale and use of narcotics underlay the three statutes pursuant to which he was convicted. But at least on their faces, the three statutes were aimed at quite different problems, two at evasion of a federal tax and one at the illegal importation of narcotics.[289] In short, the quest for a statute's distinct evil often begins with the conclusion.

The distinct evil test can be applied with the help of subsidiary canons. Inferences can often be made from the penalty scheme of various statutes. If the punishment attached to an offense is exaggerated to allow kindred crimes to be avenged, these related offenses should not be punishable separately. Kidnapping usually carries a death sentence be-

285. Brief for the petitioner, p. 16, Gore v. United States, 357 U.S. 386 (1958).

286. *E.g.*, Creed v. United States, 283 F.2d 646 (10th Cir. 1960).

287. 18 U.S.C.A. §§ 1702, 1708.

288. In United States v. Beene, 4 U.S.C.M.A. 177, 15 C.M.R. 177 (1954), the Court of Military Appeals rejected the same evidence test in favor of the distinct evil or separate norms test. The court then went on to hold that statutes authorizing punishment for drunken driving and for manslaughter "are characterized by two gravamina, two ethical norms, two duties . . . ," and thus that the defendant could be cumulatively punished for a negligent killing which resulted from his drunken driving. The court could just as easily have held that the statutes were aimed at preventing the same evil: negligent or reckless killing. The drunken driving statute was arguably designed to permit the arrest of potential manslaughterers before they commit the ultimate offense, in the same way as an attempt statute permits arrest before the consummated crime. Even to the extent that the drunken driving statute is intended to deter driving while inoxicated, the ultimate evil it is designed to prevent is maiming or killing resulting from careless driving.

289. See notes 175, 176, and 177 *supra*.

cause kidnappers often are not content to share candy. Thus, rape and kidnapping or murder and kidnapping should not be punished cumulatively. Finally, when offenses differ only because they have different jurisdictional bases they should not be punished cumulatively. Robbing a federally insured bank and transporting the stolen property across state lines should not be punished twice.[290]

All of these canons of construction will be useful in discovering the relationships amongst overlapping offenses. However, difficult cases will remain. In these the rule of lenity must prevail. For example, in *Ingram v. United States*,[291] defendant was consecutively sentenced for assault with intent to kill and assault with a dangerous weapon. The Criminal Code set out four kinds of assault: Assault with intent to kill, rob, rape, or poison (fifteen years); Assault with intent to commit mayhem or with a dangerous weapon (ten years); Assault with intent to commit any other offense (five years); and Simple Assault (one year).[292] This statutory scheme might suggest that the legislature did not intend Ingram to be sentenced consecutively since both the offense categories prevent the same evil—infliction of serious injury. Further, when a defendant assaults with intent to kill he usually does so with a dangerous weapon, and when a defendant assaults with a deadly weapon he often does so with intent to kill, rob, rape, or poison. Since the two offenses occur together so often, a court should not presume that the legislature intended multiple punishment. A legislature which wanted multiple conviction could have said so explicitly.[293] On the other hand, the two offenses might be construed as directed against distinct evils, namely, inflicting serious injury and using a particular kind of weapon which increases the chance of serious injury. The legislature might have felt that intending to kill with a dangerous weapon is worse than intending to kill with no weapon. The conflict between these two theories can not be resolved by using the suggested methods of statutory construction. The categories involve no jurisdictional elements. Nor does the penalty scheme help. When a conflict like this one occurs the presumption must be in favor of lenity. Cumulative punishment should be permissible only when the legislature has clearly provided for it in order to serve some legitimate purpose, not because the ancient urge to punish smoulders in a judge.

290. *E.g.*, Johnson v. United States, 334 F.2d 280 (6th Cir. 1964), *cert. denied*, 380 U.S. 935 (1965) (consecutive sentences upheld).

291. Ingram v. United States, No. 18568, (D.C. Cir., Nov. 4, 1965).

292. D.C. Code § 22-501; § 22-502; § 22-503; § 22-504.

293. See note 173 *supra*.