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Double Jeopardy - Defining the Same Offense

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drug legislation is not an "all or nothing" situation. There exist alternative methods for reducing the social costs besides legalization. Examples of such compromise solutions included in the UCDSA are conditional discharge provisions, civil court actions and fines, reduction of possession penalties and emphasis on the apprehension of traffickers.

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DOUBLE JEOPARDY— DEFINING THE SAME OFFENSE

The ancient laws provided that the state could not twice put a person in jeopardy for the same offense. There was limited expression of this principle in the *Digest* of Justinian, and the proscription was firmly entrenched in English common law by the seventeenth century.[1] A prohibition was incorporated into the fifth amendment of the United States Constitution which provides in part, "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ."[2] This guarantee has recently been applied to state proceedings via the due process clause of the fourteenth amendment in *Benton v. Maryland.* The *Benton* ruling, however, merely affirmed a maxim already accepted in all state constitutions and statutes.[4]

The purpose of this Comment is to examine the various standards used in determining when a second jeopardy exists and to evaluate their effectiveness in terms of the principles underlying the double jeopardy clause. Particular attention will be

1. Comment, 75 YALE L.J. 262 n.1 (1965): "Actually the double jeopardy principle existed in the days of the Greeks and Romans . . . . 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)."

2. U.S. CONST. amend. V.

3. 395 U.S. 784 (1969).

4. *See, e.g.,* LA. CONST. art. I, § 9: ". . . nor shall any person be twice put in jeopardy of life or liberty for the same offense, except on his own application for a new trial, or where there is a mistrial, or a motion in arrest of judgment is sustained." *See also* Comment, 21 LA. L. REV. 615 (1961): "The maxim 'nor shall any person be twice put in jeopardy of life or liberty for the same offense' is incorporated into Article I, § 9, of the Louisiana Constitution. Although the phraseology may differ, this maxim is accepted in all federal and state courts."

devoted to a discussion of the collateral estoppel theory, recently incorporated into the fifth amendment.[5]

Policies Underlying the Double Jeopardy Clause

A judgment of acquittal, whether it results from a jury verdict or from an order by the court, terminates the prosecution, and the double jeopardy clause bars any further criminal proceedings against the defendant[6] for the same offense.[7] However, acquittal in the criminal action does not bar a civil suit based on the same facts, since different standards of proof are involved.[8] The idea that the state, with all its resources and power, should not be allowed to make repeated attempts to convict an individual of an alleged offense[9] is based on several policies. First, reprosecution for the same offense after an acquittal is prohibited because 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 several such panels.[10] Second, reprosecution after a conviction is prohibited to prevent the prosecutor from searching for an agreeable sentence by bringing successive prosecutions for the same offense before different judges.[11] Third, the fifth amendment forbids a second trial, not merely a second conviction, for the same offense in an effort to prevent criminal trials from becoming an instrument for unnecessarily badgering individuals.[12] Finally, courts are prevented from imposing multiple punishments for a single legislatively defined offense.[13]

5. *See* Ashe v. Swenson, 397 U.S. 436 (1970).

6. Fong Foo v. United States, 369 U.S. 141 (1962); United States v. Ball, 163 U.S. 662 (1896).

7. United States v. Bayer, 331 U.S. 532 (1947); Gavieres v. United States, 220 U.S. 338 (1911); United States v. Kramer, 289 F.2d 909 (2d Cir. 1961).

8. United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 492-94 (1950); Helvering v. Mitchell, 303 U.S. 391, 397-98 (1938); Jones v. District of Columbia, 212 F. Supp. 438 (D.C. 1962).

9. Green v. United States, 355 U.S. 184, 187 (1957).

10. Green v. United States, 355 U.S. 184 (1957); United States v. Coke, 404 F.2d 836 (2d Cir. 1968); Murray & Sorenson v. United States, 207 F.2d 119 (1st Cir. 1953); Bryan v. United States, 175 F.2d 223 (5th Cir. 1949), *aff'd*, 338 U.S. 552 (1950).

11. United States v. Coke, 404 F.2d 836 (2d Cir. 1968); United States v. Sabella, 272 F.2d 206 (2d Cir. 1959); Smith v. United States, 177 F.2d 434 (10th Cir. 1949).

12. United States v. Ball, 163 U.S. 662 (1896); Rowley v. Welch, 114 F.2d 499 (D.C. 1940); United States v. Perrone, 161 F. Supp. 252 (S.D. N.Y. 1958).

13. North Carolina v. Pearce, 395 U.S. 711 (1969); United States v. Coke, 404 F.2d 836 (2d Cir. 1968).

Defining the Same Offense

Although courts and writers unanimously agree that it would be deplorable to force a defendant to undergo a second trial for the same offense, a great diversity of opinion exists as to the meaning of the phrase "same offense" as used in the double jeopardy clause. Over the years, the majority of state and federal courts have developed three basic approaches in determining when a second trial will constitute double jeopardy—the same evidence test, the same transaction test, and the collateral estoppel theory. These approaches, however, are not mutually exclusive, and the same court sometimes uses them interchangeably, thus, causing more confusion over the term "same offense."[14]

The Same Evidence Test

Under the same evidence test, a conviction or acquittal upon one indictment does not bar a subsequent conviction and sentence upon another charge "unless the evidence required to support the finding of guilt upon one of them would have been sufficient to warrant the same result upon the other."[15] This test was first enunciated in 1796 in the English case of *Rex v. Vandercomb & Abbott*,[16] and a majority of American jurisdictions have since adopted it.[17] The rule has not always, however, been strictly applied and several modifications of the test have been developed by the courts.

One such modification of the same evidence test was enunciated in *State v. Brownrigg*.[18] Under this "backwards test,"[19] offenses are the same only if the defendant could have been convicted of the second offense on the evidence offered at the first trial. This differs from the original rule in that it is based on the actual evidence presented at the second trial rather than the evidence or facts alleged in the second indictment.[20]

14. *See* Note, 7 BROOKLYN L. REV. 79, 85 (1937).
15. Morey v. Commonwealth, 108 Mass. (12 Browne) 433, 434 (1871).
16. 168 Eng. Rep. 455, 461 (Ex. 1796): "[U]nless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second."
17. *See* Note, 7 BROOKLYN L. REV. 79, 81 (1937).
18. 87 Me. (7 Hamlin) 500, 33 A. 11 (1895); *see also Ex parte Gano*, 90 Kan. 134, 132 P. 999 (1913).
19. *See* Note, 7 BROOKLYN L. REV. 79, 82-83 (1937).
20. *See* note 16 *supra* and accompanying text.

A second variation of the same evidence test was developed in 1911 when the United States Supreme Court, in *Gavieres v. United States*,[21] held that offenses are not the same if each contains an element not included in the other. This "distinct elements test"[22] recognizes that a single act may violate several statutes, and if each statute requires proof of an additional element which the other does not, an acquittal or conviction under one statute will not bar a prosecution under the other.[23] Thus, this test depends upon the minimum proof required by statute to convict the defendant,[24] not the evidence actually introduced at trial as required by the "backwards test."[25]

A third variation was developed in *Burton v. United States*,[26] in which the Supreme Court held that offenses are the same for double jeopardy purposes only if they are identical in law and in fact.[27] This "identity test,"[28] which depends upon the evidence required to convict the defendant, differs from the other two variations[29] of the same evidence test in that it would permit second prosecutions for necessarily included offenses if the defendant were first tried on the greater offense.

It appears that the Louisiana courts have adopted the "backwards test."[30] If we accept the premise that the goal of the double jeopardy clause is to prevent arbitrary reprosecution and harassment, then this test—which is based on the actual evidence presented at the second trial—is fairer than either of the other two variations, depending as they do upon the minimum evidence required by statute or by the evidence alleged in the indictment. To illustrate, suppose *A*, who is unarmed, attacks *B*, beats him senseless and robs him. *B* later dies as a result of the beating. By virtue of his actions, *A* is now subject to charges for simple battery, simple robbery, and murder.[31] If the first trial is for simple battery and *A* is acquitted, the

21. 220 U.S. 338 (1911).
22. Comment, 75 YALE L.J. 262, 273 (1965).
23. Gavieres v. United States, 220 U.S. 338, 342 (1911).
24. *See* Comment, 75 YALE L. J. 262, 273 (1965).
25. *See* note 19 *supra* and accompanying text.
26. 202 U.S. 344 (1906).
27. *Id.* at 380.
28. Comment, 75 YALE L.J. 262, 273 (1965).
29. *See* notes 19-25 *supra* and accompanying text.
30. State v. Roberts, 152 La. 283, 286, 93 So. 95, 96 (1922): "[I]dentity of the offense is an essential element in support of a plea of autre fois . . . the rule is that . . . the evidence necessary to support the second indictment would have been sufficient for the first." *See* State v. Foster, 156 La. 891, 101 So. 255 (1924); State v. McGarrity, 140 La. 436, 73 So. 259 (1916). *See also* Comment, 21 LA. L. REV. 615, 620 (1961).
31. LA. R.S. 14:30, 65 (1950); *id.* 14:35 (Supp. 1968).

prosecutor may want to follow up with an indictment and trial for murder. Under the "identity test" and the "distinct elements test," a second prosecution would be permitted because two additional elements, specific intent and the death of the victim, are required to prove murder; but, if the only proof used at the second trial is the same evidence rejected at the first, then the "backwards test" would bar retrial.[32] However, since one of the major purposes of the double jeopardy clause is to preclude vexatious reprosecutions,[33] it seems senseless to compel a defendant to undergo the second trial in order to determine whether it should have been barred at the outset—a necessary evil under the backwards test.

The Same Transaction Test

Various state and federal courts have developed the theory that double jeopardy attaches when a second trial is attempted for crimes arising out of the same transaction or motivated by the same intent.[34] Those courts which follow this approach examine the defendant's behavior, rather than the evidence presented or the laws governing the offense.[35] Applying this test to the hypothetical case above,[36] *A* must be prosecuted for simple battery, simple robbery, and murder at one trial or the prosecution will be considered as having waived those charges which were not made at *A*'s trial, because all three crimes were committed in one transaction, *i.e.*, the attack on *B*. This is justified in part by the idea "that to take a contrary view would be to permit the prosecutor to obtain successive convictions where several crimes are included within one another, an exception generally recognized where the same evidence test is applied."[37] In *Waller v. Florida*,[38] the United States Supreme Court appeared to be taking the first tentative steps toward incorporating the same transaction theory into the double jeopardy clause,[39]

32. *See* notes 15-29 *supra* and accompanying text.
33. *See* notes 9-13 *supra* and accompanying text.
34. *See* Kirchheimer, *The Act, the Offense and Double Jeopardy*, 58 YALE L.J. 513, 534 (1949).
35. *See* Horack, *The Multiple Consequences of a Single Criminal Act*, 21 MINN. L. REV. 805, 812, 814 (1937).
36. *See* note 31 *supra* and accompanying text.
37. Lugar, *Criminal Law, Double Jeopardy and Res Judicata*, 39 IOWA L. REV. 317, 325 (1954).
38. 397 U.S. 387 (1970).
39. *See* concurring opinion of Justice Brennan in Ashe v. Swenson, 397 U.S. 436, 448 (1970). *See also* Note, 31 LA. L. REV. 540 (1971). *But see* Smith v. Cox, 435 F.2d 453 (4th Cir. 1970); United States *ex rel.* Brown v. Hendrick, 431 F.2d 436 (3d Cir. 1970); Pulley v. Norvell, 431 F.2d 258 (6th Cir. 1970).

but as yet this test has not been given constitutional dimensions. In contrast, the Louisiana courts have rejected this theory.[40]

The same transaction test is more restrictive than any of the other presently accepted approaches, and seems more representative of the layman's idea of fair play under the double jeopardy guarantee. At first glance, it appears that the guarantee would become more meaningful if the same transaction test were given wider acceptance. Admittedly, its application would bar second prosecutions in many cases where neither the same evidence test nor any of its variations would have protected the defendant, but this theory is just as easily circumvented as is the same evidence test. "Transaction" is an amorphous term and the manner in which it is defined will determine its utility. One author has stated the problem as follows:

> "The principal shortcoming of this approach is that any sequence of conduct can be defined as an 'act' or 'transaction'. An act or transaction test itself determines nothing .... 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 the lather to one's face an act? . . . [*ad infinitum*]."[41]

Thus many courts refuse to apply the theory as a bar to a second prosecution by merely ruling that two offenses are not part of one transaction unless the offenses are identical in law and fact[42] —one of the same methods also used to limit application of the same evidence test.[43]

The Collateral Estoppel Theory

" 'Collateral estoppel' . . . means simply that when a [*sic*] issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between

40. *See* Comment, 21 LA. L. REV. 615, 619-20 (1961). For instances where the single transaction test has been expressly rejected by Louisiana courts, *see* State v. Calvo, 240 La. 75, 121 So.2d 244 (1960); State v. Roberts, 170 La. 727, 129 So. 144 (1930); State v. Montcrieffe, 165 La. 296, 115 So. 493 (1928); State v. Hill, 152 La. 711, 48 So. 160 (1909); State v. Barrett, 121 La. 1058, 46 So. 1016 (1908); State v. Faulkner, 39 La. Ann. 811, 2 So. 539 (1887); *see also The Work of the Louisiana Supreme Court for the 1959-1960 Term—Criminal Procedure*, 21 LA. L. REV. 366, 370 (1961). *But see* State v. Batson, 108 La. 479, 481, 32 So. 478, 479 (1902).

41. Comment, 75 YALE L.J. 262, 276 (1965).

42. Harris v. State, 193 Ga. 109, 118, 17 S.E.2d 573, 578 (1941).

43. *See* notes 27-29 *supra* and accompanying text.

the same parties in any future lawsuit."[44] Although the doctrine was originally developed in civil cases, it has been an established rule of federal criminal law, at least since the decision of the Supreme Court in *United States v. Oppenheimer*[45] in 1916. Under this ruling, an acquittal in a case is conclusive as to those issues necessarily determined by that judgment.[46]

The term "collateral estoppel" is often used interchangeably with the term *res judicata* in various state and federal court opinions. It is submitted that this practice should be discontinued. Collateral estoppel differs from *res judicata* in that, under the latter, a judgment rendered on the merits constitutes an absolute bar to a subsequent action upon the same claim,[47] whereas the doctrine of collateral estoppel prevents a second litigation of the same issues between the same parties even in connection with a different claim or cause of action.[48] Thus, under the hypothetical case given above,[49] if *A* were first tried for simple battery, *A* might defend by establishing and proving an alibi that he was elsewhere when *B* was attacked. If the jury accepted the alibi and acquitted *A*, then he could not later be tried for robbing or murdering *B*, since the jury had already ruled that *A* was not present when *B* was attacked. In *Ashe v. Swenson*,[50] the petitioner had been charged with the robbery of six poker players, each robbery being charged in a separate count; at the first trial on one count, the prosecution witnesses could not identify petitioner as one of the robbers and he was acquitted. Later, petitioner was charged with a second count of robbery and was convicted. In reversing his conviction, the United States Supreme Court held that the collateral estoppel theory was a basic and essential part of the prohibition against double jeopardy.

Although the Louisiana courts rejected this theory[51] prior

44. Ashe v. Swenson, 397 U.S. 436, 443 (1970).

45. 242 U.S. 85 (1916).

46. Sealfon v. United States, 332 U.S. 575 (1948); United States v. Kramer, 289 F.2d 909 (2d Cir. 1961); United States v. Simon, 225 F.2d 260 (3d Cir. 1955); United States v. De Angelo, 138 F.2d 466 (3d Cir. 1943).

47. Crowell v. County of Sac, 94 U.S. 351, 352-53 (1876): "It is a finality as to the claim or demand in controversy, concluding the parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

48. *See* K. DAVIS, ADMINISTRATIVE LAW § 18.01 (1959).

49. *See* note 31 *supra* and accompanying text.

50. 397 U.S. 436 (1970).

51. *E.g.*, Town of St. Martinville v. Dugas, 158 La. 262, 103 So. 761 (1925).

to the *Ashe* ruling, *Ashe v. Swenson* must now control since, under the doctrine of *Benton v. Maryland*,[52] federal double jeopardy standards and concepts apply to federal and state proceedings alike. As Justice Brennan noted, "it would be incongruous to have different standards determine the validity of a claim of double jeopardy depending on whether the claim was asserted in a state or federal court."[53] In view of the *Ashe* ruling the remainder of this Comment will discuss the ramifications of the collateral estoppel theory and its effect on existing legal principles.

Elements of the Collateral Estoppel Theory

In civil cases estoppels must be mutual, *i.e.*, a party's claim will be barred by a former adverse judgment only if he could have used it as a protection had the judgment been in his favor.[54] This theory of mutuality has not been adopted in criminal cases:[55] The issue in the previous trial must have been determined in the defendant's favor before that ruling will bar a second trial.[56] Thus, a conviction will not preclude the defendant from litigating the same issue at the second trial, even though a finding in his favor at the first trial would have prevented the prosecutor from contesting that same issue.[57] The reasoning is that when a defendant has been previously convicted, presumably none of his defenses succeeded, and it would be contrary to his interests to bar relitigation of those issues.

The theory that collateral estoppel in civil cases applies in a subsequent trial based on a different cause of action[58] has been adopted in criminal cases, thus barring subsequent trials on the same issues even though the second prosecution may be for a

52. 395 U.S. 784 (1969). *See* note 3 *supra* and accompanying text.

53. Ashe v. Swenson, 397 U.S. 436, 450 (1970). *Cf.* Malloy v. Hogan, 378 U.S. 1, 11 (1964).

54. Mackris v. Murray, 297 F.2d 74 (6th Cir. 1968); Kirby v. Pennsylvania R.R., 188 F.2d 793 (3d Cir. 1951); Iselin v. C. W. Hunter Co., 173 F.2d 388 (5th Cir. 1949); DeLuxe Theater Corp. v. Balaban & Katz Corp., 88 F. Supp. 311 (N.D. Ill. 1950).

55. Ashe v. Swenson, 397 U.S. 436, 464-65 (1970): "[C]ourts that have applied the collateral estoppel concept to criminal actions would certainly not apply it to *both* parties as is true in civil cases . . . ." *Cf.* Coley v. Alvis, 381 F.2d 870 (6th Cir. 1967).

56. Ferina v. United States, 340 F.2d 837 (8th Cir. 1965).

57. Of course the prior conviction may still be used by the prosecution for certain purposes such as the uses allowed under the various rules of evidence. *See* LA. CODE CRIM. P. art. 495.

58. *See* notes 45-49 *supra* and accompanying text.

different offense.[59] The basis of this theory is that to permit the prosecution to force a defendant, after acquittal, to relitigate the same issue in a trial for another crime would cause the same abuses that originally led to development of the prohibition against double jeopardy.[60]

In civil cases, collateral estoppel binds not only the parties to the prior action but also those in privity with the parties.[61] This element is not used in criminal cases since the prosecution is the only party bound by the prior judgment.[62] Also, the issue determined in favor of one defendant will not bar further proceedings on that issue against those charged with him for the same offense.[63]

Under both the civil and criminal theories, collateral estoppel does not arise until there has been a valid and final judgment on the merits.[64] Thus a dismissal of an indictment or an information will not give rise to a defense of collateral estoppel in another action involving the same offense.[65] However, other objections might be raised which would serve to bar the second information or indictment.[66] This rule would also preclude a judgment by a court which lacked jurisdiction from serving as a bar to a subsequent trial.[67]

Collateral Estoppel and Permissive Joinder

Collateral estoppel assumes its greatest significance when it is considered in the context of permissive joinder. The pres-

59. United States v. Davis, 369 F.2d 775 (4th Cir. 1966); United States v. American Honda Motor Co., 289 F. Supp. 277 (S.D. Ohio 1968). *But see* United States v. American Oil Co., 296 F. Supp. 538 (D. N.J. 1969).

60. *See* United States v. Kramer, 289 F.2d 909, 916 (2d Cir. 1961). *See also* notes 9-13 *supra* and accompanying text.

61. *See* notes 45-49 *supra* and accompanying text.

62. *See* notes 55-58 *supra* and accompanying text.

63. United States v. Flowers, 255 F. Supp. 485 (E.D. N.C. 1966).

64. *See* notes 45-49 *supra* and accompanying text. There are indications that collateral estoppel may apply to evidentiary hearings. *See* Floyd v. United States, 365 F.2d 368 (5th Cir. 1966).

65. Robinson v. United States, 284 F.2d 775 (5th Cir. 1960). *See* LA. CODE CRIM. P. art. 595.

66. 7 CRIM. L. REP. 2370 (1970): "Although dismissal of an information . . . does not bar refiling of another information based on the same alleged offense . . . 'Without [*sic*] the production of additional evidence, or the existence of other good cause to justify a subsequent preliminary examination, such a practice can become a form of harassment which may violate the principle of fundamental due process and equal protection of the law, as announced by the United States Supreme Court.' (Nicodemus v. District Court, Oklahoma Court of Criminal Appeals, June 24, 1970)."

67. *See* LA. CONST. art. I, § 9; *see also* LA. CODE CRIM. P. art. 595.

ent trend in the federal courts, in both civil and criminal cases, is toward requiring joinder of related claims. The Federal Rules of Criminal Procedure encourage the joining of parties in a single trial and permit joinder of charges which are similar in character or form part of a common scheme or plan.[68] There are also provisions which allow joinder of separate charges in a single trial where the offenses alleged could have been included in one indictment or information.[69] The same thought is reflected in the Federal Rules of Civil Procedure, which encourage—and require in certain instances—the consolidation of related claims in a single lawsuit.[70] Although these Federal Rules have not been given constitutional dimension and many of them are permissive rather than mandatory,[71] they are significant because they "represent considered modern thought concerning the proper structuring of criminal litigation."[72]

In view of the rulings in *Waller v. Florida*[73] and *Ashe v. Swenson*,[74] it is submitted that rules of permissive joinder should be adopted in all states to enable the prosecution to try a defendant for the various crimes he has allegedly committed. This rule would allow joinder of all offenses which are similar in character or arise from the same transaction.[75] If the Supreme Court should ever actually adopt the same transaction test as part of the double jeopardy clause, then joinder would be compulsory, not merely optional;[76] however, this Comment will examine the proposed permissive joinder rule and its relation only to the collateral estoppel theory.

Permissive joinder[77] would be beneficial to both parties in

68. FED. R. CRIM. P. 8(a).
69. *Id.* 13.
70. *See id.* 13, 14, 18, 19, 20, 23, 24.
71. Ashe v. Swenson, 397 U.S. 436, 455 (1970).
72. *Id.*
73. 397 U.S. 387 (1970). *See also* note 38 *supra* and accompanying text.
74. 397 U.S. 436 (1970). *See also* note 51 *supra* and accompanying text.
75. *See* FED. R. CRIM. P. 8(a).
76. *See* notes 34-44 *supra* and accompanying text. *See also* Note, 31 LA. L. REV. 540 (1971) for a complete discussion of the compulsory joinder rule and the same transaction test.
77. At the outset it is recognized that the criteria for determining when to allow joinder cannot be precisely defined by a mechanical test. However, it is submitted that "recurrent factual patterns will emerge, allowing the court to determine in advance whether reprosecution should be barred . . . . 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." Comment, 75 YALE L.J. 262, 298-99 (1965). The author further states that "[t]here 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. . . ." *Id.* at 298 n.158.

a criminal trial. The defendant would be protected from undue harassment, since second prosecutions would be allowed only where the interests of justice[78] required that joinder not be used in the first trial. The joinder rule would have a more subtle benefit for the prosecution. Under the collateral estoppel theory, issues determined favorably to the defendant at the earlier trial may not be considered by a second jury in a subsequent trial for a different crime.[79] Yet, if the prosecution were allowed to join related charges, then the same jury, in accordance with an established rule of the federal jurisprudence,[80] could acquit on one count and convict on another.[81] The verdict on the various joined charges need not be consistent[82] because each count in a multiple count indictment is treated as a separate indictment.[83] No apparent rational explanation is required for a jury's verdict on several counts[84] so long as there is sufficient evidence to support the conviction on the count on which the guilty verdict was returned.[85] Thus the prosecution could, in effect, litigate the same issue as many times as there were charges in the indictment so long as the multiple count indictment were submitted to the same jury at one trial.[86] This rule of optional joinder[87]

78. *See* FED. R. CRIM. P. 14.

79. *See* notes 45-47, 49-51 *supra* and accompanying text.

80. *See* Dunn v. United States, 284 U.S. 390 (1931).

81. United States v. Godel, 361 F.2d 21 (4th Cir. 1966); United States v. Woodell, 285 F.2d 316 (4th Cir. 1960).

82. Dunn v. United States, 284 U.S. 390 (1931); United States v. Bilotti, 380 F.2d 649 (2d Cir. 1967); United States v. Vastine, 363 F.2d. 853 (3d Cir. 1966); Stein v. United States, 363 F.2d 587 (5th Cir. 1966); United States v. Lester, 363 F.2d 68 (6th Cir. 1966); United States v. Anderson, 362 F.2d 81 (7th Cir. 1966); Maxfield v. United States, 360 F.2d 97 (10th Cir. 1966); Canaday v. United States, 354 F.2d 849 (8th Cir. 1966); O'Rourke v. United States, 347 F.2d 124 (9th Cir. 1965); United States v. Freeman, 286 F.2d 262 (4th Cir. 1961); Gillars v. United States, 182 F.2d 962 (D.C. 1950).

83. Dunn v. United States, 284 U.S. 390, 393 (1931); Robinson v. United States, 175 F.2d 4 (9th Cir. 1949).

84. United States v. Vastine, 363 F.2d 853 (3d Cir. 1966); Hill v. United States, 306 F.2d 245 (9th Cir. 1962); United States v. Cindrich, 241 F.2d 54 (3d Cir. 1957); Grant v. United States, 255 F.2d 341 (6th Cir. 1958). *See* Comment, 60 COLUM. L. REV. 999 (1960).

85. Aggers v. United States, 366 F.2d 744 (8th Cir. 1966); United States v. Russo, 335 F.2d 299 (7th Cir. 1964); United States v. Crosby, 294 F.2d 928 (2d Cir. 1961); Call v. United States, 265 F.2d 167 (4th Cir. 1959); Tri-Angle Club, Inc. v. United States, 265 F.2d 829 (8th Cir. 1959).

86. United States v. Godel, 361 F.2d (4th Cir. 1966); United States v. Woodell, 285 F.2d 316 (4th Cir. 1960). There are indications that inconsistent verdicts will not be upheld in non-jury cases. *See* United States v. Tankel, 331 F.2d 204 (2d Cir. 1964); United States v. Maybury, 274 F.2d 899 (2d Cir. 1960); McElheny v. United States, 146 F.2d 932 (9th Cir. 1944). *See also* Bickel, *Judge and Jury—Inconsistent Verdicts in the Federal Courts*, 63 HARV. L. REV. 649 (1950).

87. This rule will require extensive revision of the Louisiana Code of Criminal Procedure. *See* LA. CODE CRIM. P. art. 493. *See also* FED. R. CRIM. P. 13.

would also lead to a more rational and consistent system of sentencing because the court or jury could consider all the conduct and charges at one time, as opposed to several courts or juries considering and evaluating different aspects of the same conduct at different times.

There are at least four caveats that must be raised should permissive joinder become the general practice in criminal cases. First, if some of the offenses were so complicated that the jury might confuse the issues, then joinder should not be required. Second, there may be situations in which joinder would work a hardship on those trying the case: For instance, where offenses arising from the same transaction are so dissimilar that very little evidence will overlap, both the prosecutor and defense counsel would have to prepare a double case if the charges were joined. The third caveat is that a cumulation of offenses would possibly create prejudice against the defendant, *i.e.*, the jury would feel that since the defendant was charged with a number of crimes he must be guilty of at least one of them. Finally, a jury is likely to use evidence introduced in support of one charge to convict the defendant of another charge not independently or adequately proved,[88] whereas, if the cases were tried separately, then the evidence on each charge might be clearly insufficient to convict the defendant. Thus, where joinder would prejudice the defendant, severance should be granted and the prosecutor should be allowed to subsequently prosecute on the other charges.[89] If, because of any of the above considerations, separate trials are allowed, it is submitted that principles of collateral estoppel should be used to preclude retrying issues which were resolved in the defendant's favor at the first trial.[90]

This proposed rule of permissive 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 crimes since evidence of related crimes would be admissible even in separate trials. Also, since the offenses are closely enough related to require joinder, the same defense will generally be relevant to all of them.[91]

88. Slovenko, *The Accusation in Louisiana Criminal Law*, 32 TUL. L. REV. 47, 71 (1957).
89. *See* FED. R. CRIM. P. 14.
90. *See* Comment, 75 YALE L.J. 262, 293 (1965).
91. *Id.* at 295.

Problems Using Collateral Estoppel in Criminal Cases

The collateral estoppel theory presents problems in a criminal case not usually found in a civil case. Since in a criminal case there are no specific detailed pleadings as in civil cases,[92] the issues are not as sharply drawn and a general verdict of acquittal by the jury usually does not conclusively establish the basis for the verdict.[93] A general verdict of acquittal does not alone establish whether the jury believed defendant or acquitted him because the state had not made out its case beyond a reasonable doubt.[94] As a result of this problem, the doctrine of collateral estoppel has been given only limited approval in many state courts.[95] The Supreme Court has taken a different view and has ruled that when a prior acquittal was based upon a general verdict, the courts should examine the record of the prior proceeding, including the pleadings, evidence, and other relevant matter, and determine whether a rational jury could have based its verdict upon any issue other than that which the defendant seeks to bar from consideration in the subsequent trial.[96] The inquiry "must be set in a practical frame, and viewed with an eye to all the circumstances of the proceedings."[97]

This inquiry has been termed the doctrine of "reasonable speculation"[98] and is practiced in some federal courts. Although it aids in deciding which issues were determined when a general verdict of acquittal was rendered in the earlier trial, many complicated double jeopardy problems are often left unsolved.[99] If alternative theories of defense were raised at the first trial or if there were more than one issue upon which the jury had to pass to reach its decision, any one of which would have supported the verdict, then a review of the record by a second court would probably reflect more guesswork than reasonable speculation.[100] If this problem of guesswork could be solved, then it is submitted that the collateral estoppel theory would become the most

92. *See* LA. CODE CRIM. P. art. 598 and comment thereunder.
93. *See* Lugar, *Criminal Law, Double Jeopardy and Res Judicata*, 39 IOWA L. REV. 317, 334 (1954).
94. *Id.*
95. *See* Comment, 28 U. CHI. L. REV. 142 (1960).
96. Mayers & Yarborough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 38-39 (1960).
97. Sealfon v. United States, 332 U.S. 575, 579 (1948).
98. Comment, 75 YALE L.J. 262, 285 (1965).
99. *Id.*
100. Commonwealth v. Cole, reported in 7 CRIM. L. REP. 2355, 2356 (1970).

successful device for preventing unnecessary reprosecutions after a prior acquittal.

Special verdicts and special interrogatories have become widely accepted in civil cases[101] but they do not seem practical in criminal cases.[102] Admittedly, they would serve to clarify the issues which a jury passes upon in reaching a general verdict of acquittal, and thus make collateral estoppel a forceful doctrine of criminal law. However, the jury would no longer be able to render a compromise verdict on multiple count indictments[103] without revealing the inconsistency of its determinations—a factor which might lead to the eventual extinction of the jury's traditional function of tempering the law with the sympathy of the community.[104]

Conclusion

Although all courts agree that the guarantee against double jeopardy is an absolute necessity in criminal law, there is considerable confusion in attempting to define the term "same offense" as used in the double jeopardy clause of the fifth amendment to the United States Constitution. The three devices which the courts have developed for this purpose—the same evidence test, the same transaction test, and the collateral estoppel theory —have been relatively ineffective in preventing harassment of the defendant or in eliminating the confusion; for example, at least one court has even tried to apply all three tests in one case![105]

The same evidence test has been of little help in avoiding the difficulty because the attempts to define this test have been almost as confusing and unsatisfactory as the efforts to define the "same offense." The second theory, the same transaction test, is more easily defined and would appear to be a better approach for protecting against double jeopardy since it would allow only one trial for all crimes committed in the same course of criminal action. However, this test has, at times, caused the courts to

101. *See* F. JAMES, CIVIL PROCEDURE § 7.15 (1965).

102. If special verdicts were used, then further revision of the Louisiana Code of Criminal Procedure would be required since only one special verdict is allowed in Louisiana. *See* LA. CODE CRIM. P. arts. 641-660.

103. *See* notes 81-87 *supra* and accompanying text.

104. *See* Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18-19 (1910).

105. Estep v. State, 11 Okla. Crim. 103, 143 P. 64 (1914).

engage in a game of semantics since "transaction" is a relatively unmanageable term. Any series of acts may be termed a "transaction" and, until an acceptable system is found for determining its limits, this approach will be of no more value than the same evidence test in preventing double jeopardy.

Since the major principle underlying the prohibition against double jeopardy is the idea that a defendant should be protected from harassment by multiple criminal trials, the collateral estoppel theory, which is a bar to retrial of those issues determined in the defendant's favor at the first trial, seems best suited for fully implementing this principle. However, very few trials hinge on one issue and when several issues are raised by the defendant, the courts will sometimes have difficulty in determining which issue or issues were determined by the jury's general verdict of acquittal in the first trial. The federal courts, in an effort to alleviate this problem, have developed the theory of "reasonable speculation" wherein they inquire into the record of the first trial to determine which issues were decided in the defendant's favor; this theory has also been recently advocated by the United States Supreme Court and it could be just as easily used by state courts. Admittedly, the inquiry into the prior record will involve a certain degree of speculation, but the advantages of the collateral estoppel device in criminal cases far outweigh any arguments against its implementation.

In short, any legal device for determining when a second jeopardy exists will have its shortcomings; but the collateral estoppel theory provides the best method for preventing double jeopardy; it is submitted that the advantages of this theory, both to the prosecution *and* the defense, far outweigh any arguments which could be made against its use. Admittedly, certain aspects of the theory require improvement, but the question then becomes whether there is any legal theory in use today that does not also need improvement. The long and sustained use of the collateral estoppel theory by federal courts and some state courts, coupled with its recent adoption by the Supreme Court in *Ashe v. Swenson*,[106] argues favorably for its full implementation in any modern system for the administration of criminal justice.

W. John English, Jr.

106. 397 U.S. 436 (1970).