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PRECLUSION OF DUPLICATIVE PROSECUTIONS: A DEVELOPING MOSAIC

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I. INTRODUCTION

A. *Civil Litigation Parallelism*

The concept of res judicata—once the thing has been adjudged, that is the end—has been part of the common law for more than five hundred years.[1] In recent years the concept has been used in the United States with increased frequency. The United States Supreme Court has put its imprimatur on the expansion of the concept in three recent cases. In *Blonder-Tounge Laboratories, Inc. v. University of Illinois Foundation*,[2] the Court rejected the mutuality requirement and allowed a stranger to the first suit to use issue preclusion defensively against the party who lost in the first proceeding.[3] The Court noted:

1. A. VESTAL, RES JUDICATA/PRECLUSION, at V-28 (1969).
2. 402 U.S. 313 (1971).
3. *Id.* at 350.

> Undeniably, the court-produced doctrine of mutuality of estoppel is undergoing fundamental change in the common-law tradition. In its pristine formulation, an increasing number of courts have rejected the principle as unsound. Nor is it irrelevant that the abrogation of mutuality has been accompanied by other developments—such as expansion of the definition of "claim" in bar and merger contexts and expansion of the preclusive effects afforded criminal judgments in civil litigation—which enhance the capabilities of the courts to deal with some issues swiftly but fairly.[4]

In *Parklane Hosiery Co. v. Shore*,[5] the Court allowed a stranger to the first suit to use issue preclusion offensively against the losing party in the first suit. In addition, the Court allowed the first proceeding in equity to preclude the trial of fact issues to the jury in the second action.[6] Finally, the Court in *Montana v. United States*[7] held that the United States was bound by the first adjudication because it was a participating nonparty. It controlled the litigation to some extent and supported the activities of the losing party in the suit.[8] This decision is noteworthy because (1) issue preclusion was applied against the United States, (2) a participating nonparty was precluded, and (3) it suggested that a party—even the United States—might be bound by an adjudication of a matter of law.

At the same time that the federal courts have been using issue preclusion with greater frequency on the civil side, the state courts also have been expanding its application and have been declaring that mutuality of estoppel is no longer required.[9] On the criminal side, the courts have awakened to the possibilities that preclusion offers. As soon as the requirement for mutuality disappeared, courts could view a criminal conviction as generally preclusive on a fact issue in a subsequent civil action.[10]

Issue preclusion is now recognized as arising from criminal proceedings so that further litigation may be precluded in subsequent criminal or civil actions. Courts have evidenced a growing willingness to use issue preclusion on the criminal side. Again, federal courts have taken a leading role in using issue preclusion in successive criminal prosecutions.[11] Issue preclu-

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4. *Id.* at 327.
5. 439 U.S. 322 (1979).
6. *Id.* at 332-33, 337.
7. 440 U.S. 147 (1979).
8. *Id.* at 155, 164.
9. *See, e.g.*, Hossler v. Barry, 403 A.2d 762, 765 (Me. 1979).
10. *See* Vestal, *Issue Preclusion and Criminal Prosecutions*, 65 IOWA L. REV. 281, 321 (1980).
11. *See* Ashe v. Swenson, 397 U.S. 436, 445 (1970); *Hernandez-Uribe v. United States*, 515 F.2d 20, 22 (8th Cir. 1975), *cert. denied*, 423 U.S. 1057 (1976); *Pena-Cabanillas v. United States*, 394 F.2d 785, 786-87 (9th Cir. 1968).

A recent Supreme Court case prevents the federal courts from expanding issue preclusion to cover the situation of a stranger to the first prosecution claiming issue preclusion against the state. *See* Standefer v. United States, 447 U.S. 10 (1980).

sion arising from a criminal proceeding is now perceived as perhaps precluding, under the full faith and credit clause, further litigation in a civil or criminal proceeding in another jurisdiction.[12]

Claim preclusion—the other aspect of res judicata—also has been given a greater role in minimizing repetitive litigation.[13] The Second Restatement of Judgments has articulated the concept in a manner that should result in an even greater expansion of its application,[14] although its use in some areas has not yet been firmly established.[15]

B. *Problems Posed*

When an individual engages in criminal conduct, he may commit more than a single crime. Multiple crimes may arise from a single event when (1) the criminal commits several crimes against one individual, (2) the criminal commits multiple crimes against different individuals, (3) a single event constitutes crimes under the laws of several jurisdictions, or (4) a combination of these possibilities occurs.

1. One Victim—Multiple Crimes

When an offender kidnaps a single victim, the offender probably commits several crimes. For example, the defendant may have tampered with the car to force the victim to stop in the countryside where the victim then was kidnapped. Although there might be some question, most authorities would hold that this involves separate, not included, crimes. Two distinct crimes were committed against a single individual. If the crimes committed against the one individual are not related, except in time and location, multiple prosecutions may be possible.[16]

On the other hand, a defendant might be charged with attempting to kidnap as well as kidnapping. The former is an included offense. The defendant can be convicted of only one of the offenses, *i.e.*, either the principal offense or the included offense.[17] A crime is an included offense under the Model Penal Code when

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12. Vestal, *Criminal Prosecutions: Issue Preclusion and Full Faith and Credit*, 28 KAN. L. REV. 1, 7-9 (1979).

13. *See* Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313 (1971). The Court referred to the "expansion of the definition of 'claim' in bar and merger contexts" as a development that enhances "the capabilities of the courts to deal with some issues swiftly but fairly." *Id.* at 327.

14. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 61 (Tent. Draft No. 1, 1973).

15. Vestal, *The Restatement (Second) of Judgments: A Modest Dissent*, 66 CORNELL L. REV. 464, 498-500 (1981).

16. *See generally* Part II.B. *infra*.

17. *See generally id.*

(a) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
(b) it consists of an attempt or solicitation to commit the offense charged or to commit an offense otherwise included therein; or
(c) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.[18]

The problem of the lesser included offense primarily arises in the jury instructions concerning the crimes for which the defendant can be found guilty. It also may arise when the prosecutor attempts to try a defendant for a crime that was an included offense in an earlier prosecution.

2. Multiple Victims—Multiple Crimes

A criminal commits different crimes against different victims when, for example, he holds up a group of individuals and robs them. Each robbery is a separate crime and the criminal could be tried for any one of the crimes committed. When this occurs, the prosecutor may prosecute the defendant for one of the robberies and learn about the witnesses and the possible defenses. Whether the state wins or loses, the prosecutor is better-prepared to prosecute the defendant for robbing the other individuals. Under the developing law, the prosecutor may even be able to claim issue preclusion against a losing defendant because of fact determinations made in the first prosecution.[19] Is this serial prosecution of the defendant for a single event essentially unfair? Certainly it deserves the very careful consideration of the legal profession.

3. Crimes Against Laws of Several Jurisdictions

Some wrongdoers may violate, by a single act, the laws of several jurisdictions and, thus, can be prosecuted by several different governments.[20] The existence of the federated government in the United States makes this situation possible. One example is robbery of a store that has a postal substation, which may involve both a federal and state offense and which may lead to prosecutions by both the affected state and the federal government.

The problem of duplicative prosecutions has always involved a number of different, unrelated situations. Nevertheless, it is disturbing that the criminal courts usually have not invoked an approach similar to that used on the civil side. The concept of requiring that all criminal aspects of a fact

18. MODEL PENAL CODE § 1.07(4) (Prop. Official Draft, 1962).
19. Vestal, *supra* note 10, at 312.
20. The problem of prosecutions by different jurisdictions for a single act arose early in the life of the republic. *See, e.g.*, Fox v. Ohio, 46 U.S. (5 How.) 447 (1846); *id.* at 450-56 (McLean, J., dissenting); State v. Brown, 2 N.C. (Mart.) 73 (1794).

situation be handled in a single prosecution is relatively foreign to the courts and legal scholars. Admittedly, the parallelism to the civil side is not complete; the underlying principles are not precisely the same. Nevertheless, it is profitable to examine criminal procedure in light of the preclusive concepts of the civil side to see if lessons may be learned and similarities may be identified.

C. *Underlying Principles and Purposes Served*

Apparently no one has attempted to consider the problem of duplicative or multiple prosecutions in any rational, comprehensive way. No analysis has examined the relevant considerations, the purposes served by repetitive prosecutions, and the negative impact of the practice.

Duplicative prosecutions, as indicated above, can occur in a number of quite different situations. One may involve simply the prosecutor's attempt to try a defendant on the same charge after the defendant has been tried once. At this point the concept of double jeopardy becomes significant. The second situation involves an individual who, in one episode, has committed a number of criminal acts. Is society best served by allowing a prosecutor to try the defendant serially for all of the crimes committed? Or should consideration be given to the defendant? Should society insist that the prosecutor try the defendant only once for all of the crimes that the prosecutor wishes to join? The third situation arises when a single act is a crime under the laws of more than one jurisdiction. Should each jurisdiction be allowed to prosecute the defendant? Or is society best served by allowing only a single prosecution? If the latter serves society best, which jurisdiction will be allowed to prosecute? Will it be simply a race to trial? The fourth situation involves multiple crimes and multiple jurisdictions. This simply compounds the problems related above and the solution must be a composite of those reached in dealing with the simpler problems.

Do common problems or common threads join the different situations together? The defendant, it can be said, is interested in having society deal expeditiously with the alleged criminal episode and decide what sanctions are to be invoked. Is the defendant's interest in having the matter terminated at some reasonable point an overriding consideration that should weigh heavily in any ultimate determination of what is to be done? What of the interest of society? Obviously punishment of the defendant is important. But what of the waste of the time of the courts, the bar, the witnesses, and the defendant in repetitive litigation of the same factual situation? Should society demand that punishment be meted out in a single proceeding? Or can issue preclusion minimize the waste of valuable resources, so that repetitive prosecutions become less obnoxious? Does society lose if it allows the harassment of a defendant? Is the criminal justice system being used for something other than the adjudication of guilt and the application of rational sanctions?

A consideration of the principles involved could indicate that prior proceedings under the same circumstances should have some preclusive effect in criminal prosecutions. It may be appropriate for a criminal court to consider earlier proceedings and the possibly preclusive effect on any subsequent attempt to prosecute for any part of the criminal episode.

II. SINGLE JURISDICTION—DOUBLE JEOPARDY

A. *Introduction*

The problem of double jeopardy arises when the defendant is tried more than once for an occurrence involving one offended party. The multiple prosecutions may involve a second prosecution after a conviction, after an acquittal, or after a proceeding that ended without a final determination of guilt or innocence, *e.g.*, when the court declares a mistrial.

The primary emphasis of this Article is not the United States Supreme Court's interpretations of federal constitutional double jeopardy protections. Some discussion of the protections, however, is warranted. The fifth amendment double jeopardy protections will serve as a useful backdrop to the array of further protections against multiple prosecutions supplied by the states. The discussion here of federal double jeopardy protections will be brief; no comprehensive treatment is attempted.[21]

The concept of double jeopardy in criminal prosecutions is similar to that of claim preclusion in civil cases.[22] Both concepts share a common ancestry in Roman law,[23] but they have developed differently. On the one hand, claim preclusion generally has developed to prevent a civil plaintiff from asserting, in a second suit, any claim arising out of the same core of operative facts giving rise to an invasion of his legally protected rights.[24] For example, a plaintiff in a suit for personal injury in an automobile accident generally must join a claim for property damage in a single proceeding against a defendant. Failure to join the property damage claim in the first proceeding will preclude the plaintiff from raising it against the same defendant in a subsequent suit.[25] Double jeopardy differs from claim preclusion in several

21. An excellent statement of the principles of double jeopardy is contained in Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001 (1980). *See also* Gilday & Gillen, *Jeopardy—Meandering Through Mandates and Maneuvers*, 6 N. KY. L. REV. 245 (1979); Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81.

22. Claim preclusion, a part of res judicata, can be defined as foreclosing further litigation on a claim. A claim, in turn, can be defined as the core of operative facts constituting a wrong against a single plaintiff. *See generally* A. VESTAL, *supra* note 1, at 43-48.

23. M. FRIEDLAND, DOUBLE JEOPARDY 6 (1969).

24. A. VESTAL, *supra* note 1, at 43-48.

25. *Id.* at 62-67.

respects. First, the parties in criminal cases differ from those in civil suits. The state takes the place of the civil plaintiff and represents the interests of all parties injured by the criminal episode, unlike civil plaintiffs who each represent their own interests. Second, different terminology is used. Instead of a lawsuit there is a prosecution; a claim is a criminal transaction or episode. Finally, the preclusive effect of the judgment varies. As shown below, the state can bring multiple prosecutions for events in the same criminal transaction without violating double jeopardy protections.

The basis of double jeopardy protection is the fifth amendment to the United States Constitution, which provides, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . ."[26] The double jeopardy protection applies to the states through the fourteenth amendment.[27] Although the double jeopardy clause appears to be a simple, straightforward provision, its application is difficult. The United States Supreme Court has described the language of the fifth amendment as "deceptively plain."[28] The language, however, has caused problems "both subtle and complex."[29] Not the least of these problems is the long series of Supreme Court opinions interpreting the provision, which opinions "can hardly be characterized as models of consistency and clarity"[30] and amount to "conceptual confusion."[31] The Supreme Court expressed the purposes of double jeopardy protections as follows:

> [T]he 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 . . . .[32]

To determine whether the purposes of the protection will be served, two issues must be resolved. First, at what stage in a criminal proceeding is a defendant put in jeopardy so as to invoke the protections of the amendment? Second, what constitutes the same offense for purposes of the amendment? In dealing with the first question, the Supreme Court has adopted a straightforward rule. Jeopardy attaches when the jury is sworn in,[33] or when the judge begins to hear the evidence in a nonjury trial.[34] The rule becomes more complex when a decision is appealed or a mistrial is declared.[35] Thus,

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26. U.S. CONST. amend. V.
27. Benton v. Maryland, 395 U.S. 784, 794-96 (1969).
28. Crist v. Bretz, 437 U.S. 28, 32 (1978).
29. *Id.*
30. Burks v. United States, 437 U.S. 1, 9 (1978).
31. *Id.* at 13.
32. Green v. United States, 355 U.S. 184, 187 (1957).
33. Serfass v. United States, 420 U.S. 377, 388 (1975).
34. *Id.*
35. Whether the prosecution has a right to appeal is not always clear. For a discussion of this problem, see Westen & Drubel, *supra* note 21, at 122-55. When

the determination of when jeopardy attaches "begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial."[36] Once that issue has been resolved, there remains the issue of the meaning of "same offense" as used in the double jeopardy clause.

B. *Defining the Same Offense*

1. Basic Concepts

The phrase "same offense" in the double jeopardy clause readily lends itself to two interpretations. The offense described can refer to either (1) the statutory description of a crime or offense[37] or (2) the course of the defendant's actions in violating any of a number of criminal statutes.[38] When fewer criminal prohibitions existed, the distinction in defining "offense" often was not of great importance; when a defendant engaged in wrongful conduct he probably violated only one criminal prohibition.[39]

The advent of a greatly expanded range of criminal violations and sanctions caused the distinction to become crucial. A single act or series of acts of a defendant may violate several criminal prohibitions.[40] Defining an offense by reference to statutory definitions of prohibited conduct would not necessarily preclude multiple prosecutions for the same act. On the other hand, keying the definition to the defendant's conduct would preclude successive prosecutions based on the same act or series of acts. Definition of an offense by statutory elements commonly is called the "same evidence" test while the conduct-based definition is termed the "same transaction" test.

2. The Supreme Court's View of the Same Offense

In *Blockburger v. United States*,[41] the Supreme Court adopted the same evidence test to determine when there is a successive prosecution for the same

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the defendant appeals a conviction seeking a declaration of a mistrial, the concept of waiver of double jeopardy protection as continuing jeopardy may prevent a finding of double jeopardy. *See* Gilday & Gillen, *supra* note 21, at 255-65.

36. Illinois v. Somerville, 410 U.S. 458, 467 (1973).

37. The crucial variant is the legislative delineation of the elements of the crime, not the actual proof required in a particular prosecution. *See* Illinois v. Vitale, 447 U.S. 410, 416 (1980).

38. An individual in a single criminal episode or transaction may violate several statutes, as in the case of a bank robbery followed by a high speed getaway. The robber may have violated federal and state bank robbery statutes, assault statutes, weapon registration statutes, traffic laws, and conspiracy statutes.

39. M. FRIEDLAND, *supra* note 23, at 14-15.

40. For example, a defendant improperly selling a prescription drug could violate three statutes by a single sale: selling narcotics without a physician's prescription, selling an improperly labeled container, and facilitating the concealment and sale of narcotics. *See* Gore v. United States, 357 U.S. 386, 387 (1958).

41. 284 U.S. 299 (1932).

offense for purposes of the double jeopardy clause.[42] The Court quoted *Morey v. Commonwealth*[43] to define a single offense as follows:

> "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 the defendant from prosecution and punishment under the other."[44]

Thus, the double jeopardy protection afforded against successive prosecutions extends no further than duplicative prosecutions for identical statutory offenses or for greater and lesser included offenses.[45] For example, if a defendant robbed a liquor store and assaulted a passerby on the street while exiting the store, successive prosecutions would be permitted. Therefore, double jeopardy protection does not rise to the level of claim preclusion on the civil side of the court.

3. Included Offenses

When one individual engages in criminal conduct involving another person, the criminal may commit several crimes. For example, when *A* murdered *B*, *A* may have inflicted great bodily harm on *B* prior to the murder. *A* also might have taken property from *B*. All of these criminal acts may have been part of a single group of operative facts. When *A* is prosecuted for the criminal conduct, the question arises whether he can be prosecuted for each act serially or whether prosecution for one act will bar prosecution for another. This involves the distinction between separate and included offenses.

The concept of included offenses has two variants: (1) prosecution for the greater offense[46] before prosecution for the lesser included offense[47] and (2) prosecution for the lesser included offense before prosecution for the greater offense. Prosecution of the lesser included offense after the greater offense is not permitted under the double jeopardy clause.[48] By definition the greater offense contains all the elements of the lesser included offense; thus, a determination of guilt or innocence of the greater offense precludes prosecution for the lesser included offense.[49]

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42. *Id.* at 304.

43. 108 Mass. 433 (1871).

44. 284 U.S. at 304 (quoting 108 Mass. at 434).

45. *See* Part II.B.3. *infra*.

46. A greater offense is an offense that includes all the elements of another offense. For example, first degree murder includes all the elements of second degree murder.

47. A lesser included offense is an offense, all the elements of which are included in another offense. For example, all the elements of second degree murder are included in first degree murder.

48. Jeffers v. United States, 432 U.S. 137, 150-51 (1977) (citing Brown v. Ohio, 432 U.S. 161, 168 (1977)).

49. Jeffers v. United States, 432 U.S. 137, 150-51 (1977).

Prosecution of the greater offense after the lesser included offense also is prohibited by the double jeopardy clause,[50] but the determination of the relationship of the two offenses is more complex. The test recently laid down by the Supreme Court seems to differentiate between precluded and not precluded offenses based on whether the purported greater offense necessarily must be proved in the same mode as the lesser.[51] For example, a prosecution arising out of an automobile-pedestrian accident for failure to reduce speed would not bar a subsequent prosecution for reckless manslaughter if the reckless manslaughter charge could be proved without using the proof of failure to reduce speed. A second prosecution may be brought if proof of the lesser included offense charged in the first prosecution is not necessary to prove the greater offense charged in the second prosecution.[52] Thus, the protection from duplicative prosecutions when the lesser included offense is prosecuted before the greater offense appears severely limited.[53]

C. *The Same Transaction Test*

In his concurring opinion in *Ashe v. Swenson*,[54] Justice Brennan expressed his view that the same evidence test is not constitutionally mandated.[55] He severely criticized the same evidence test for failing to protect adequately the interests represented by the double jeopardy clause.[56] Recognizing the

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50. Brown v. Ohio, 432 U.S. 161, 168-69 (1977). Considerations of issue preclusion may arise even though double jeopardy is not implicated. *See id.* at 166 n.6 (citing Ashe v. Swenson, 397 U.S. 436 (1970)).

51. *See* Illinois v. Vitale, 447 U.S. 410, 418-20 (1980).

52. *Id.*

53. *Id.* MODEL PENAL CODE § 1.07 (Prop. Official Draft, 1962) provides a similar limitation on multiple prosecutions:

> (1) *Prosecution for Multiple Offenses; Limitation on Convictions.* When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:
>
> (a) one offense is included in the other, as defined in Subsection (4) of this Section . . . .
>
> (4) . . .
>
> An offense is so included when:
>
> (a) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
>
> (b) it consists of an attempt or solicitation to commit the offense charged or to commit an offense otherwise included therein; or
>
> (c) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

54. 397 U.S. 436 (1970).

55. *Id.* at 452-54 (Brennan, J., concurring).

56. *Id.* (Brennan, J., concurring).

validity of these concerns, several states protect against the harms resulting from successive prosecutions. This has been done through case law, court rules, and statutes prohibiting or severely limiting successive prosecutions arising out of the same transaction. Some of the state case law adopting the same transaction test has been based on state constitutional prohibitions against double jeopardy.[57] The Supreme Court has approved the states' affording greater protections as a matter of state law than those afforded by federal constitutional law. This protection may result from a state provision with identical wording to that of the federal provision; a state may not, however, interpret a federal provision to afford greater protection than an interpretation given it by the Supreme Court.[58]

What is the same transaction? Is the number of victims relevant? Does the elapsed time or the number of crimes committed limit the transaction? How does it compare with a claim in civil suits? The same transaction may be described as a criminal episode or an "[uninterrupted] continuing course of conduct."[59] The outer limits of a criminal transaction are not always clear, but certain trends emerge from the case law.[60] The limits of the same transaction ultimately will turn on the facts of each case. Accordingly, as more appellate cases are reported, the limits of the test will develop.

As the foregoing discussion illustrates, the same transaction test used in barring serial prosecutions closely resembles a claim in the context of claim preclusion in a civil suit. Courts in civil cases often speak of a claim constituting a "core of operative facts,"[61] a concept quite similar but not completely analogous to the criminal "transaction." When a civil defendant's conduct wrongs multiple individuals, each individual has a separate claim against the defendant. The harming of more than one individual by a criminal in a single transaction does not result in multiple claims.

D. *The Dual Sovereign Problem*

When an individual engages in criminal conduct, he may violate both federal and state criminal laws. In rare occasions, he may violate the criminal prohibitions of both a domestic jurisdiction and a foreign country. An example of the former is when a defendant robs a small town store that also contains the post office. He has violated state robbery statutes as well as federal criminal statutes dealing with the post office. Both the state and the federal government may wish to prosecute; should one prosecute, the other is not barred by double jeopardy from prosecuting.[62] This phenomenon is

57. *See* Part III.B. *infra*.

58. *See* Oregon v. Hass, 420 U.S. 714, 719 (1975); Cooper v. California, 386 U.S. 58, 62 (1967).

59. MODEL PENAL CODE § 1.08(1)(e) & Comment (Tent. Draft No. 5, 1956).

60. *See* Part III.C.1. *infra*.

61. *See, e.g.*, Clark v. Taylor, 163 F.2d 940, 942-43 (2d Cir. 1947).

62. *See* Speed v. United States, 518 F.2d 75, 76 (8th Cir. 1975).

termed the "dual sovereignty" doctrine. Double jeopardy limitations do not apply to situations where dual sovereigns are involved.[63]

III. SINGLE JURISDICTION—SUCCESSIVE PROSECUTIONS FOR CRIMES COMMITTED AGAINST DIFFERENT INTERESTS IN THE EPISODE

A. *Introduction*

When a criminal act either violates several criminal statutes or involves several victims, the government might decide to prosecute the defendant serially for each crime against each victim. For example, if the defendant robbed *A, B, C,* and *D* at the same time, the government might prosecute the defendant four times to insure at least one conviction.

On the civil side, when a single individual asserts rights arising from a single transaction or occurrence against a single defendant, only one action is allowed. In a typical tort case, for example, the injured party may sue the tortfeasor one time and recover but once for all damages and injuries sustained.[64]

When this concept is carried over to the criminal side, it can be posed in terms of a single prosecution by the state for a single episode. When the defendant commits multiple, not included, crimes aginst a single person, it may be urged that the prosecutor must include all the crimes he wishes to prosecute in a single prosecution.

The application of this principle becomes more troublesome when multiple victims are involved. When a robber holds up several people at the same time, the question is whether multiple prosecutions for the single episode are allowed. Can the state prosecute the defendant serially for the several crimes committed, or must the state prosecute all the crimes in one trial? If the latter is not done, should the state be barred from prosecuting the defendant after the first trial?

In civil cases, each wronged individual has a separate claim against the defendant. An adjudication of one injured person's claim would not preclude a subsequent proceeding by another injured person.[65] On the criminal side, however, the state has the right to proceed against the wrongdoer; the victim may not prosecute the criminal. Since the state has a single right, the appropriate question might be whether the state can split its right against the defendant.

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63. Abbate v. United States, 359 U.S. 187, 194-95 (1959) (state prosecution followed by federal prosecution on substantially same facts); Bartkus v. Illinois, 359 U.S. 121, 132-39 (1959) (federal prosecution followed by state prosecution on substantially same facts).

64. *See* notes 24 & 25 and accompanying text *supra*.

65. *See generally* 1B J. MOORE, FEDERAL PRACTICE ¶ 0.411[1] (2d ed. 1980).

The advantages of reduced harassment of the defendant and a more efficient allocation of judicial resources are achieved by requiring joinder in the criminal context. Wasting resources through unnecessary litigation is a greater problem in the criminal context because society must bear the cost of the prosecution and, often, the defense as well. Moreover, just as on the civil side,[66] there are many advantages in handling legal controversies in the largest units possible.

An example of multiple crimes against a single individual is presented in *Walton v. State*.[67] The defendant broke into a woman's house and, on finding the woman at home, raped her.[68] The possibility of multiple crimes against multiple victims is presented by *Commonwealth v. Lockhart*,[69] wherein the court posed the following hypothetical:

> [I]f five individuals are robbed in a room at gunpoint, five separate robberies have occurred since each victim was placed in apprehension by the acts of the assailant. We have previously held that where separate crimes are committed against different individuals, *a defendant is not placed in double jeopardy by being tried for each crime*, even though the crimes took place at the same place and approximately the same time.[70]

Ashe v. Swenson[71] involved the same situation posited by the *Lockhart* court. The United States Supreme Court held that the concept of collateral estoppel or issue preclusion was embodied in the protection against double jeopardy. The Court was willing to apply *issue* preclusion in the multiple victim situation, but it refused to apply some principle analogous to *claim* preclusion.[72] Three concurring Justices, however, referred to "one criminal episode" and urged the use of such a principle.[73] They suggested that "the Double Jeopardy Clause requires the prosecution, except in most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction."[74]

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66. A major thrust of modern practice is to force or allow litigation in the largest units possible. The broadening of the definition of "claim," for preclusion purposes, makes this possible. Expanding the use of the class action allows more encompassing suits. Permissive joinder of plaintiffs and defendants, and the use of counterclaims, cross-claims, and impleader, all allow larger units of litigation. In the federal courts, the handling of complex litigation under 28 U.S.C. § 1407 (1976) expands the size of the litigation handled by a single court.

67. 448 S.W.2d 690 (Tenn. Crim. App. 1969).

68. *Id.* at 694-95.

69. 223 Pa. Super. Ct. 60, 296 A.2d 883 (1972).

70. *Id.* at 63, 296 A.2d at 884-85 (citations omitted) (emphasis added).

71. 397 U.S. 436 (1970).

72. *Id.* at 445-46.

73. *Id.* at 449 (Brennan, J., concurring).

74. *Id.* at 453-54 (Brennan, J., concurring) (footnotes omitted).

Although serial prosecution in the above situations is not prohibited by the federal double jeopardy clause, such prosecution may be barred by state law. How have the states dealt with these situations? Have state constitutions been interpreted to counter this problem? Have states enacted statutes on the subject? Does any state's common law protect against serial prosecutions?

B. *Modern Statutes and Case Law*

Federal double jeopardy protection is limited by the same evidence test.[75] Several states have expanded protections against duplicative prosecutions to cover an entire criminal transaction. Some states use case law to accomplish this, while others use statutes or court rules. The following presents the basic state trends in the use of the same transaction test.

1. Statutory Solutions to Duplicative Prosecutions

a. Proposals by the American Law Institute, the American Bar Association, and the National Conference of Commissioners on Uniform State Laws

The American Law Institute (ALI), the American Bar Association (ABA), and the National Conference of Commissioners on Uniform State Laws have proposed provisions that, if adopted, would require a single prosecution for all crimes arising out of a single criminal transaction. The ALI proposal is found in the Model Penal Code. Section 1.07(2)-(3) of the Model Penal Code prohibits separate prosecutions as follows:

> (2) Limitation on Separate Trials for Multiple Offenses. Except as provided in Subsection (3) of this Section, a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court.
> (3) Authority of Court to Order Separate Trials. When a defendant is charged with two or more offenses based on the same conduct or arising from the same criminal episode, the Court, on application of the prosecuting attorney or of the defendant, may order any such charge to be tried separately, if it is satisfied that justice so requires.[76]

Section 1.07(2) begins with the premise that multiple offenses arising out of the same criminal episode should be tried together. This result will follow unless the defendant or the prosecutor applies to have the offenses tried

75. *See* Part II.B.2. *supra*.
76. MODEL PENAL CODE § 1.07 (2)-(3) (Prop. Official Draft, 1962).

separately. Several states have adopted the Model Penal Code approach, either by statute[77] or as a guide in case law determination.[78]

In this formulation of the compulsory joinder rule, the criminal episode serves as the boundary of the same transaction. The exact limits of a criminal episode are not clearly established in the commentary to section 1.07, but the history of the section is helpful. As originally proposed, section 1.07(2) required joinder 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 accomplishment of that objective; or
(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.[79]

The advisory committee had favored broadening this test to include all offenses "based on a course of conduct having a common criminal purpose or plan or involving repeated commission of the same kind of offense."[80] The council concluded that both this proposal and the section as it had been proposed originally were too broad.[81] Accordingly, the section was changed to include the criminal episode language to limit the scope of the section.

The difference between the proposals and the section as enacted is illustrated in *People v. Tulipane*,[82] wherein the defendant was charged with nine crimes against property, all arising out of a two day crime spree.[83] In such a case, if the original version of section 1.07(2) or the advisory committee's recommendation governed, the prosecutor would have had to try all nine counts in a single proceeding. Under section 1.07(2) as originally proposed, all nine crimes probably would be viewed as pursuant to plans that resulted in repeated offenses against the same people or property.[84] The advisory committee's proposal presents a clearer case because the group of offenses were likely to be pursuant to a plan and were repetitions of the same kind of offense.[85] It is, however, unlikely that the two day spree would be considered

77. *See, e.g.*, COLO. REV. STAT. § 18-1-408(2) (1973); HAWAII REV. STAT. § 701-109(2) (1976); OR. REV. STAT. §§ 131.505-.525 (1979).
78. *See, e.g.*, State v. Gregory, 66 N.J. 510, 333 A.2d 257 (1975).
79. MODEL PENAL CODE § 1.08(2) (Tent. Draft No. 5, 1956).
80. MODEL PENAL CODE § 1.07, Status of Section, at 13 (Prop. Official Draft, 1962).
81. *Id.*
82. 192 Colo. 476, 560 P.2d 94 (1977).
83. *Id.* at 477-78, 560 P.2d at 95.
84. *See* MODEL PENAL CODE § 1.08(2) (c) (Tent. Draft No. 5, 1956).
85. *See* MODEL PENAL CODE § 1.07, Status of Section (Prop. Official Draft, 1962).

one criminal episode under section 1.07(2) as enacted.[86]

The ABA approach to compulsory joinder of criminal prosecutions is nearly identical to that of the Model Penal Code. Section 1.3(c) of the ABA Standards Relating to Joinder and Severance provides:

> A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense, unless a motion for joinder of these offenses was previously denied or the right of joinder was waived as provided in section (b). The motion to dismiss must be made prior to the second trial, and should be granted unless the court determines that because the prosecuting attorney did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.[87]

Related offenses are defined in section 1.3(a) as offenses "within the jurisdiction of the same court and . . . based on the same conduct or . . . [arising] from the same criminal episode."[88] Thus, the ABA standard, like Model Penal Code section 1.07(2), protects against multiple *prosecutions* for the same offense. Acquittal or conviction is irrelevant; the fact of prosecution triggers the section.[89] At least three states have followed the ABA approach.[90]

The difference between the ABA standard and Model Penal Code section 1.07(2) lies in the effect of the defendant's failure to move for joinder. The ABA standard, section 1.3(b), provides that "[a] defendant's failure to so move constitutes a waiver of any right of joinder as to related offenses with which the defendant knew he was charged."[91] On the other hand, Model Penal Code section 1.07(2) imposes no such requirement on the defendant; joinder is automatic, unless the court orders otherwise.[92] Drafters of the ABA standard preferred to place the burden on the defendant because he, as the party intended to be protected by the standard, should have the choice whether to use the protection. In addition, the difference in burden would obviate the need for severance hearings as required under Model Penal Code section 1.07(2).[93]

Uniform Rule of Criminal Procedure 471,[94] proposed by the National Conference of Commissioners on Uniform State Laws, offers a more limited

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86. *See id.* § 1.07(2).

87. ABA STANDARDS RELATING TO JOINDER AND SEVERANCE § 1.3(c) (Approved Draft, 1968) [hereinafter cited as ABA STANDARDS].

88. *Id.* § 1.3(a).

89. *Id.*, Commentary, at 23-24.

90. *See* N.C. GEN. STAT. § 15A-926 (1978); FLA. R. CRIM. P. 3.151; WASH. SUPER. CT. CRIM. R. 4.3(c).

91. ABA STANDARDS, *supra* note 87, § 1.3(b).

92. MODEL PENAL CODE § 1.07(2) (Prop. Official Draft, 1962).

93. *See* ABA STANDARDS, *supra* note 87, § 1.3(b), Commentary, at 22.

94. UNIFORM RULE OF CRIMINAL PROCEDURE 471.

protection. The rule bars a second prosecution for a related offense if the prior prosecution resulted in an acquittal or conviction.[95] A "related offense" is defined as one arising out of the same criminal episode.[96] As under the ABA standard, the burden is on the defendant to move for joinder of the related offenses. If the defendant does not know of all the crimes charged, he is not required to move for joinder.[97] To date, no state has adopted the Uniform Rule.

Of the three proposed approaches, the ABA standard is preferable. The Model Penal Code proposal introduces inefficiency by requiring severance hearings. The ABA standard, however, reduces the need for hearings because the failure to move for joinder involves no hearing and motions for joinder are to be granted perfunctorily. The Uniform Rule does not provide adequate protection because the defendant must be either convicted or acquitted before the protection attaches. A trial may terminate in some manner other than an acquittal or a conviction, *e.g.*, a mistrial. Thus, the literal wording of Uniform Rule 471 appears to offer less protection than either the Model Penal Code or the ABA standard.

b. Other Statutory Solutions

Most of the states that have adopted same transaction compulsory joinder by statute have departed from the ABA, Model Penal Code, and Uniform Rule approaches. The statutes represent two trends in wording. The first trend involves statutes prohibiting reprosecution for the "same act or offenses." At least two states follow this trend.[98] Literally, such wording does not mandate the use of the same transaction test. Courts can construe the words "same act" to reduce substantially the potential protection afforded by the statute. For example, in *Beckley v. State*,[99] the Alabama Court of Criminal Appeals considered rape and burglary to be different acts and, thus, separately prosecutable.[100] If state legislatures intended to offer anything beyond federal double jeopardy protection, a broader reading of these statutes seems warranted.

A second trend in the compulsory joinder statutes is evidenced by states that have adopted statutes containing "same transaction" or similar language. At least three states have followed this approach.[101] The most notable of these approaches is employed by Montana. Montana prohibits

95. *Id.* 471(c).
96. *Id.* 471(a).
97. *Id.* 471(c)(1).
98. *See* ALA. CODE § 15-3-8 (1975); ILL. ANN. STAT. ch. 38, § 3-3 (Smith-Hurd 1972).
99. 357 So. 2d 1022 (Ala. Crim. App. 1978).
100. *Id.* at 1024.
101. *See* MINN. STAT. ANN. § 609.035 (West 1964); MONT. CODE ANN. § 46-11-503 (1981); N.Y. CRIM. PROC. LAW § 40.40 (McKinney 1971).

reprosecution for crimes arising out of the "same transaction."[102] Unlike other states, Montana defines "same transaction" as follows:

> (1) The term "same transaction" includes conduct consisting of:
> (a) a series of acts or omissions which are motivated by a purpose to accomplish a criminal objective and which are necessary or incidental to the accomplishment of that objective; or
> (b) a series of acts or omissions which are motivated by a common purpose or plan and which result in the repeated commission of the same offense or affect the same person or persons or the property thereof.[103]

Such an expansive definition truly offers a defendant protection from serial prosecutions. Minnesota bars reprosecution for crimes arising out of the "same conduct,"[104] while New York uses the "same transaction" language.[105] State legislatures should define the bounds of the transaction or the conduct giving rise to the bar to prevent the courts from having to search for a suitable definition.

2. Judicial Solutions

When state legislatures have not barred duplicative prosecutions by statute, some courts have established such a rule by interpreting state double jeopardy clauses, by finding a common law doctrine requiring joinder, or by invoking the administrative power of the court. The following describes the efforts of various state appellate courts.

a. Interpretation of State Constitutions

A state may provide greater protection to criminal defendants than does the Federal Constitution.[106] This protection may take the form of the state's interpretation of its constitution. The identical wording of a federal provision found in a state constitution, *e.g.*, a double jeopardy clause, may produce this result. State supreme courts, however, may not interpret federal constitutional provisions to provide greater protections than those provided by the interpretations of the United States Supreme Court.[107]

State constitutions frequently contain a double jeopardy clause. The Michigan Supreme Court in *People v. White*[108] interpreted the double jeopardy clause of the Michigan Constitution to require a single prosecution for crimes arising out of the same transaction.[109] In *White*, the defendant abducted a

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102. MONT. CODE ANN. § 46-11-501(1) (1981).
103. *Id.*
104. MINN. STAT. ANN. § 609.035 (West 1964).
105. N.Y. CRIM. PROC. LAW § 40.40 (McKinney 1971).
106. *See* cases cited note 58 *supra*.
107. Oregon v. Hass, 420 U.S. 714, 719 (1975).
108. 390 Mich. 245, 212 N.W.2d 222 (1973).
109. *Id.* at 257-58, 212 N.W.2d at 227-28.

woman and later assaulted and raped her. The defendant was first tried and convicted of kidnapping, and in a second trial he was convicted of rape and felonious assault.[110] In sustaining a plea of double jeopardy based on the Michigan Constitution[111] with respect to the second trial, the court summarized its reasoning as follows:

> The use of the same transaction test in Michigan will promote the best interests of justice and sound judicial administration. In a time of overcrowded criminal dockets, prosecutors and judges should attempt to bring to trial a defendant as expeditiously and economically as possible. A far more basic reason for adopting the same transaction test is to prevent harassment of a defendant. The joining of all charges arising out of the same criminal episode at one trial " * * * will enable a defendant to consider the matter closed and save the costs of redundant litigation." It will also help " * * * to equalize the adversary capabilities of grossly unequal litigants" and prevent prosecutorial sentence shopping. "In doing so, it recognizes that the prohibition of double jeopardy is for the defendant's protection."[112]

Texas also has followed the same transaction test since 1876.[113] The Texas rule is the constitutional "carving doctrine," which allows the state to "carve the minor part of the transaction and convict on that, or . . . carve the major part of the transaction and convict on that. However, the State can carve only the one time."[114] Texas also prohibits by statute multiple same transaction prosecutions for property offenses.[115]

Oregon has adopted the same transaction doctrine as part of its state constitutional double jeopardy protection.[116] Defendants are also protected from multiple prosecutions by a statutory same transaction test.[117] West Virginia adopted the same transaction test in 1979 as a matter of state constitutional law.[118]

b. State Common Law

State courts may not always be able to interpret the state constitution to provide the same transaction test. In addition, the state legislature may

110. *Id.* at 250-51, 212 N.W.2d at 223-24.

111. MICH. CONST. art. 1, § 15.

112. 390 Mich. at 258-59, 212 N.W.2d at 228 (quoting People v. White, 41 Mich. App. 370, 378, 200 N.W.2d 326, 330 (1972)).

113. *See* Quitzow v. State, 1 Tex. Crim. 47 (1876).

114. Paschal v. State, 49 Tex. Crim. 111, 114, 90 S.W. 878, 880 (1905).

115. TEX. PENAL CODE ANN. tit. 1, §§ 3.01-.02 (Vernon 1974).

116. State v. Brown, 262 Or. 442, 457-58, 497 P.2d 1191, 1198 (1972) (result overruled, but not rationale, in State v. Hammang, 271 Or. 749, 756, 534 P.2d 501, 505 n.4 (1975)).

117. OR. REV. STAT. §§ 131.505-.525 (1979).

118. State *ex rel.* Dowdy v. Robinson, ____ W. Va. ____, 257 S.E.2d 167 (1979).

not have enacted protective legislation. In such cases, the state may, as a matter of common law, prohibit multiple prosecutions for crimes arising from the same transaction. Tennessee has followed this approach beginning with *State v. Covington*.[119] The common law test in Tennessee functions on a case-by-case basis; the overriding consideration is whether the state indirectly is trying to impose multiple punishments.[120] Thus, some play is left in the joints because an acquittal in a first proceeding followed by a conviction in a second proceeding would not impose multiple punishments for crimes arising out of the same transaction.

c. General Supervisory Powers of Courts

The final method by which state appellate courts may provide extended protection is through their general supervisory powers over rules of criminal procedure. The courts may follow two approaches. First, the rules of criminal procedure may require joinder of offenses arising out of the same transaction. At least two states have followed this approach by adopting rules similar to the ABA standard.[121]

Second, state appellate courts may require joinder of offenses by exercising the general judicial supervisory power. The Supreme Court of New Jersey followed this approach in *State v. Gregory*.[122] The defendant was charged with the sale of one envelope of heroin to an undercover agent. When the prosecution began, the prosecutor knew that the defendant at the time of the sale possessed enough envelopes "to yield between four and five hundred decks of heroin."[123] The defendant was convicted on the sale charge and the conviction was affirmed. The state then prosecuted the defendant for both possession and possession with intent to distribute. At the second trial, he was convicted on both counts and received "concurrent State prison sentences to run consecutively to the sentence imposed . . . for the sale."[124] On appeal, the superior court, with the consent of the state, set aside the conviction for possession and affirmed the conviction for possession with intent to distribute. The New Jersey Supreme Court considered, on appeal of the superior court's decision, whether the doctrine of double jeopardy barred the second prosecution. The court stated, "For present purposes we need not rest on constitutional grounds for the just result we seek may readily be attained by our exercise of the broad administrative and procedural powers vested in us by our State Constitution."[125] The court considered the Model Penal Code and concluded that the case was the appropriate vehicle for the

119. 142 Tenn. 659, 663-64, 222 S.W. 1, 2 (1920).
120. Walton v. State, 448 S.W.2d 690, 696 (1969).
121. *See* FLA. R. CRIM. P. 3.151; WASH. SUPER. CT. CRIM. R. 4.3.
122. 66 N.J. 510, 333 A.2d 257 (1975).
123. *Id.* at 511, 333 A.2d at 257.
124. *Id.* at 512, 333 A.2d at 258.
125. *Id.* at 518, 333 A.2d at 261.

adoption of a rule dealing with the "compulsory joinder of known offenses based on the same conduct or arising from the same criminal episode."[126] The court concluded that the interests of fairness, reasonable expectations, economy, and convenience would be promoted by such a rule. The court examined the facts of the case and reversed the decision of the superior court, which had affirmed the conviction.[127] Such a use of the supervisory power of the court has been recognized in other states,[128] as well as in Canada.[129]

C. *Problems and Limitations of the Compulsory Joinder Doctrine*

While compulsory joinder of offenses has several advantages, its application is not simple. Problems arise in defining the bounds of a criminal transaction, in handling situations when a defendant pleads guilty to one offense included in the transaction, when different courts have jurisdiction over crimes in the criminal transaction, and when the prosecutor does not know of all the offenses at the time of prosecution.

1. Definition of a Transaction

Defining the same transaction is difficult, but some lines can be drawn. The Texas carving doctrine[130] illustrates the problem. According to one writer, the Texas courts have not consistently applied the doctrine. The courts have at different times defined a criminal transaction as "(1) all acts committed at the same time and place; (2) one act; (3) one act and one violation; (4) one continuous transaction; [and] (5) all offenses involving the same evidence, facts and elements."[131] The confusion in Texas is illustrated by the statement in *Staples v. State*[132] that "both transactions are based on the same transaction."[133]

One consideration when the crimes in the transaction are intentional crimes is whether a common criminal intent is involved.[134] For example,

126. *Id.* at 521, 333 A.2d at 263.

127. *Id.* at 521-23, 333 A.2d at 263-64.

128. *See, e.g.*, Commonwealth v. Campana, 455 Pa. 622, 314 A.2d 854, *cert. denied*, 417 U.S. 969 (1974).

129. Under the Canadian doctrine, a court, through its own inherent power, can terminate proceedings that abuse the process of the court. This can result in a practice similar to barring multiple prosecutions for the same transaction. *See* Wray, *The Abuse of Power Doctrine in Canadian Criminal Law*, 34 U. TORONTO FACULTY L. REV. 159, 170-75 (1976).

130. *See* notes 113-15 and accompanying text *supra*.

131. Comment, *One Transaction—One Conviction, The Texas Doctrine of Carving*, 25 BAYLOR L. REV. 623, 630-31 (1973).

132. 76 Tex. Crim. 367, 175 S.W. 1056 (1915).

133. *Id.* at 375, 175 S.W. at 1060 (Davidson, J., dissenting).

134. *See* State v. Ahuna, 52 Hawaii 321, 324, 474 P.2d 704, 706 (1970) (court stated that same transaction test "looks to a person's behavior . . . and treats the consequences of the same transaction, episode, or conduct as constituting one offense for the purpose of a double jeopardy plea").

if a defendant burglarized a house with no intent to rape its occupant, the crimes of burglary and rape, should a rape occur, may be held to arise from separate transactions with no common criminal intent.[135]

When two offenses requiring proof of intent or one intentional offense and one unintentional offense are part of a course of conduct, common intent may not indicate accurately the bounds of the same transaction. In these cases, the limits of the transaction typically turn on the elapsed time between different acts in the transaction. For example, an individual may violate several traffic laws, which do not require intent, and subsequently assault a police officer, which requires intent.[136] All the offenses would be part of the same transaction if they were part of a "continuous course of conduct."[137] Two hours between the traffic offenses and the assault might indicate separate transactions while a few minutes would indicate a single transaction.[138] As in the definition of a claim on the civil side, the geographical location of the various events also would be relevant in deciding whether they are parts of the same transaction.[139]

When a legislature prohibits multiple prosecutions for the same transaction without defining a transaction, the courts must define the term. Similarly, when the courts interpret a state constitution or the common law or exercise the general supervisory powers of the courts to prohibit same transaction multiple prosecutions, the transaction must be defined.

2. Pleas of Guilty and Nolo Contendere

A second problem created by the same transaction doctrine is the treatment of a plea of guilty or nolo contendere to less than all of the offenses committed in the episode. For example, a defendant who committed theft and murder in the same episode may plead guilty to the theft charge and claim a bar to subsequent prosecution on the murder charge. Some states would not allow such a bar.[140] The Model Penal Code requires the opposite result.[141] Courts that allow no bar to arise from a plea of guilty or nolo con-

135. *See* Walton v. State, 448 S.W.2d 690, 696 (Tenn. Crim. App. 1969).

136. *See* Crampton v. 54-A Dist. Judge, 397 Mich. 489, 499-502, 245 N.W.2d 28, 32-33 (1976); State v. Krech, 312 Minn. 461, 463-64, 252 N.W.2d 269, 271-72 (1977).

137. State v. Krech, 312 Minn. 461, 467, 252 N.W.2d 269, 273 (1977).

138. *See* State v. Aiu, 59 Hawaii 92, 93-98, 576 P.2d 1044, 1046-48 (1978) (car theft and police chase in close time proximity held part of same transaction); State *ex rel.* Johnson v. Hamilton, ____ W. Va. ____, 266 S.E.2d 125, 127-29, *cert. denied*, 449 U.S. 1036 (1980) (two murders in close time proximity constitute part of same transaction).

139. *See, e.g.*, People v. Tulipane, 192 Colo. 476, 478-79, 560 P.2d 94, 96 (1977) (burglaries at different locations constitute separate transactions).

140. *See, e.g.*, State v. Hammang, 271 Or. 749, 534 P.2d 501 (1975).

141. This result is reached through a three-step analysis. First, MODEL PENAL CODE § 1.09(1)(b) (Prop. Official Draft, 1962) bars subsequent prosecutions for crimes when the first prosecution resulted in an acquittal or conviction and the se-

tendere rely on policy analysis. The defendant has not been forced to present his defense more than once nor to endure the burden of a prosecution.[142] Furthermore, allowing the defendant to control the prosecution by the entry of a plea to a lesser charge has been termed an "absurd result."[143]

Some courts allow subsequent prosecution only if the court in which the guilty plea was taken did not have jurisdiction over all the crimes in the transaction.[144] For example, if a defendant were charged with a traffic violation and manslaughter arising from the same episode, a plea of guilty to the traffic violation in a traffic court that did not have jurisdiction over the manslaughter charge would not preclude a manslaughter prosecution. This result is consistent with the Model Penal Code approach.[145]

When the plea of guilty is entered in a court of limited jurisdiction, a no-bar rule can be justified by an analogy to claim preclusion on the civil side. When a plaintiff brings a civil suit in a court of limited jurisdiction, claim preclusion does not extend to any causes of action outside the jurisdiction of the court, even if those causes of action arose from the same aggregation of facts.[146] Similarly, the state should not be barred from prosecuting a second time when the defendant enters a plea in a court without jurisdiction to entertain a prosecution for the whole transaction.

Arguments in favor of barring all subsequent prosecutions after a plea of guilty are based on policy justifications of reduced harassment of the defendant and more efficient use of judicial resources.[147] This approach seems appropriate in cases in which the prosecutor has discretion to plea bargain and approves a plea of guilty.

Determining whether a bar or a no-bar rule is best is not simple; policies favoring a bar do not clearly outweigh those against a bar. When a court has jurisdiction over all the crimes arising out of a transaction, a bar seems justified, particularly when the prosecutor has some influence over whether the court can accept a guilty plea, such as in a plea bargaining context. The

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cond prosecution should have been joined in the first prosecution under *id.* § 1.07. Second, a conviction, as defined in *id.* § 1.08(3), for purposes of *id.* § 1.09(1)(b), includes a guilty plea. Third, *id.* § 1.07(2) acts as a same transaction joinder rule. Thus, *id.* § 1.09(1)(b) bars subsequent prosecution for a crime arising out of the same transaction when the defendant pleads guilty to one of the crimes.

142. *See* State v. Hammang, 271 Or. 749, 756-57, 534 P.2d 501, 504 (1975).

143. *Id.* at 757, 534 P.2d at 505.

144. *See, e.g.*, State v. Tamburro, 137 N.J. Super. 51, 55, 347 A.2d 796, 798 (App. Div. 1975).

145. MODEL PENAL CODE § 1.07(2) (Prop. Official Draft, 1962).

146. *See* A. VESTAL, *supra* note 1, at 415-16.

147. *See* State v. Brown, 262 Or. 442, 449, 497 P.2d 1191, 1195 (1972) (result overruled, but not rationale, in State v. Hammang, 271 Or. 749, 756, 534 P.2d 501, 505 n.4 (1975)).

involvement of the prosecutor in the plea negotiations comes close to an actual prosecution and justifies the bar. On the other hand, in the absence of prosecutorial involvement in the plea decision, the potential for abuse of the bar rule becomes more important. A defendant may try to avoid prosecution for a serious offense based on a plea to a minor offense. In the absence of prosecutorial involvement, a bar could leave the defendant substantially in control of the prosecution of his case. Concerns about such abuse weigh heavier in the two-court situation in which one court has limited jurisdiction. If allowed to bar reprosecution, a plea of guilty in the limited jurisdiction court would give a defendant an even more powerful tool to prevent prosecution for serious offenses.

3. Jurisdiction in Different Courts

Some courts may not have jurisdiction to try all the offenses in a criminal transaction. The authorities almost universally hold that a prosecution in a court of limited jurisdiction does not bar a later prosecution for crimes arising from the same transaction that were beyond the jurisdiction of the first court.[148] This is a logical extension of the civil side's concept whereby claim preclusion does not extend to issues that were beyond the subject matter jurisdiction of the first court.[149] For example, a prosecution in a limited jurisdiction municipal court for a fire code violation should not bar a negligent homicide prosecution for deaths resulting from a fire caused by conduct constituting the code violation. The state has never had the opportunity to prosecute for the negligent homicide.

4. Offenses Unknown to the Prosecutor

When a prosecutor brings a prosecution, he may not know of all the crimes that arose from the transaction. Several factors may contribute to this situation. For example, an assault victim may die after the proceeding has terminated; thus, the transaction would include homicide as well as assault.[150] In another case, the defendant may have concealed facts or evidence from the authorities. In either case, a second prosecution should not be barred.

A more troubling situation arises when the prosecutor's lack of knowledge results from the failure of the police to forward a full report of

148. This situation commonly occurs either when court systems are bifurcated in jurisdiction between misdemeanors and felonies or by types of offenses. *See, e.g.*, State v. Gosselin, 117 N.H. 115, 370 A.2d 264 (1977) (misdemeanor/felony distinction); State v. Tamburro, 137 N.J. Super. 51, 347 A.2d 796 (App. Div. 1975) (traffic court/criminal court distinction).

149. *See* A. VESTAL, *supra* note 1, at 415-16.

150. *See In re* Dennis B., 18 Cal. 3d 687, 692, 557 P.2d 514, 518, 135 Cal. Rptr. 82, 86 (1976) (construing a same transaction statute that barred multiple punishments but not multiple prosecutions).

the events. If the knowledge of the prosecutor includes that of the police, subsequent prosecutions for the same transaction would be barred; if not, the prosecutor could later reprosecute. The Hawaii Supreme Court in *State v. Solomon*,[151] in interpreting a Hawaii statute that required knowledge by the "appropriate prosecuting officer,"[152] held that police officers were not prosecutors.[153] In *Solomon*, the police neglected to tell the prosecutor of all the thefts of a defendant. As a result, the prosecutor charged only second degree theft and not first degree theft. The court stated that the knowledge requirement was "not intended to enable a defendant who gets to the courthouse faster than the prosecution to thereby eliminate a charge, or to allow a defendant to take advantage of the fact that he has successfully concealed part of his criminal activity from the prosecuting officers."[154]

If the prosecutor should have been aware of the other offenses and was not, courts will bar a second prosecution based on the same transaction. Although no statute speaks of "facts the prosecutor knew or should have known," courts will read such language into the statute.[155] This appears to prevent harassment by multiple prosecutions when a prosecutor fails to investigate the case adequately.

D. *Summary*

The problem of multiple prosecutions arising from a situation when one individual commits several crimes has not been resolved. The problem is a discrete one involving (1) a single prosecutor, (2) a single episode, (3) a single wrongdoer, (4) multiple criminal acts, and possibly (5) multiple persons as targets of the acts. For example, one person intentionally may drive his car into a crowd and injure several people. How should this situation be handled? Are there any constitutional, statutory, or common law principles that govern the prosecution of this criminal?

Proposals have been advanced to bar duplicate prosecutions for events arising out of the same criminal transaction. Several states have adopted one of these proposals either by statute, court rule, or case law. Other states, acting independently, have reached the same result.

These states have provided protection beyond that required by the Federal Constitution double jeopardy clause. In extending this protection, those states have recognized the desirability of reduced harassment of criminal defendants and the efficient use of judicial resources. Civil courts have long recognized and employed these policy considerations through the doctrine of claim preclusion.

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151. 61 Hawaii 127, 596 P.2d 779 (1979).
152. HAWAII REV. STAT. § 701-109(2) (1976).
153. 61 Hawaii at 131, 596 P.2d at 782.
154. *Id.* at 134, 596 P.2d at 784.
155. *See id.* at 132, 596 P.2d at 782.

A body of law is building up in the United States that deals with this problem by barring multiple prosecutions for a single criminal episode. An examination of the statutes and the decided cases, however, suggests that the law still is not established. An examination of the practices of prosecuting authorities seems to indicate that multiple prosecutions for a single episode are relatively rare. Society seems to feel that multiple prosecutions for a single criminal episode ordinarily should not occur. The interests of the defendant, the courts, and society generally are best served by a single prosecution. Multiple prosecutions in such a situation are viewed with suspicion.

IV. MULTIPLE JURISDICTIONS—SINGLE ACT

A. *Introduction*

When an individual commits a criminal act, he may violate the laws of more than one jurisdiction. Several sovereigns may wish to prosecute the individual for the single episode. The following situations will be examined separately: (1) successive prosecutions in different states, (2) state prosecution followed by federal prosecution, (3) federal prosecution followed by state prosecution, (4) foreign prosecution followed by prosecution in the United States, and (5) prosecution in an Indian court followed by federal prosecution.

B. *Successive Prosecutions in Different States*

Although considerations of time and location usually will separate conduct in different states into separate crimes, occasionally a single act will violate the laws of two states.

Marshall v. State[156] is such a case. The defendant was prosecuted in Illinois for forgery and counterfeiting school district bonds and pleaded guilty. When he was prosecuted in Nebraska for the same crime, he urged the Illinois prosecution as a bar to the Nebraska prosecution.[157] The court rejected the claimed bar. This case suggests that, absent a statutory provision, a state is not barred from prosecuting an individual because of a prior prosecution in another state.[158]

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156. 6 Neb. 120 (1877).

157. *Id.* at 121.

158. Several state statutes bar prosecution in that state after prosecution in another state for the same act. *See* ALASKA STAT. § 12.20.010 (1980); ARIZ. REV. STAT. ANN. § 13-112 (1978); ARK. STAT. ANN. §§ 41-108, 43-1224.1 (1977); CAL. PENAL CODE §§ 656, 793 (West 1970); COLO. REV. STAT. § 18-1-303 (1978); DEL. CODE ANN. tit. 11, § 209 (1974); HAWAII REV. STAT. § 701-112 (1976); IDAHO CODE § 19-315 (1979); ILL. ANN. STAT. ch. 38, § 3-4(c) (Smith-Hurd 1972); KAN. STAT. ANN. § 21-3108(3) (Cum. Supp. 1980); KY. REV. STAT. § 505.050 (1975); MISS. CODE ANN. § 99-11-27 (1972); MONT. CODE ANN. § 46-11-504 (1981); NEV. REV. STAT. §§ 171.070, 208.020 (1979); N.Y. CRIM. PROC. LAW §§ 40.20-.30 (McKinney 1971 & Supp. Pamphlet 1980-1981); N.D. CENT. CODE § 29-03-13

Reprosecution in a second state also was discussed in a recent California case, *People v. Comingore*.[159] The defendant drove a car from Glendale, California, to Salem, Oregon, without the consent of the car's owner. The defendant pleaded guilty in an Oregon court to unauthorized use of a vehicle and was sentenced. While the defendant was on parole, he was arrested in California and charged with auto theft and unlawfully driving or taking a vehicle. He urged in the California proceeding that the Oregon prosecution barred the California proceeding.[160] The court responded with the California Penal Code section providing, "When an act charged as a public offense is within the jurisdiction of another State or country, as well as of this State, a conviction or acquittal thereof in the former is a bar to the prosecution or indictment therefor in this State."[161] The court observed that even though the Federal Constitution does not bar successive prosecutions by different jurisdictions, a state may provide greater double jeopardy protection through either its own constitution or a statute.[162] The court concluded that under California law the California prosecution was barred by the prior action in Oregon because the same conduct violated the statutes of both states.[163]

State v. Glover[164] is another example of reprosecution in a second state. The defendant committed a burglary in Missouri and took the property to his home in Kansas. He was convicted in Kansas of possessing stolen property and then convicted in Missouri for burglary and stealing. The Missouri

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(1974); OKLA. STAT. ANN. tit. 21, § 25 (West 1958); *id.*, tit. 22, § 130 (West 1969); PA. CONS. STAT. ANN. tit. 18, § 111 (Purdon 1973); UTAH CODE ANN. § 76-1-404 (1978); WASH. REV. CODE ANN. § 10.43.040 (1980).

Some state statutes do not specify prosecution in another state as a bar, but have language broad enough to cover this situation. *See* IND. CODE ANN. § 35-41-4-5 (Burns 1979); IOWA CODE § 803.4 (1981); MINN. STAT. ANN. § 609.045 (West 1964); NEB. REV. STAT. § 29-1817 (1979); TEX. STAT. ANN. art. 1.10 (1977); WIS. STAT. ANN. § 939.71 (West 1958).

Some state statutes bar prosecution in that state after prosecution in another state for particular offenses, including importing stolen goods, dueling, and violating laws concerning controlled substances. *See* ALA. CODE § 20-2-77 (1975); ARK. STAT. ANN. § 43-1423 (1977); HAWAII REV. STAT. § 712-1254 (1976); ME. REV. STAT. ANN. tit. 17, § 1353 (1965); MASS. GEN. LAWS ANN. ch. 265, § 5 (West 1970); MICH. COMP. LAWS ANN. § 767.64 (1968); MO. REV. STAT. § 541.050 (1978); N.M. STAT. ANN. § 30-31-27 (1978); N.C. GEN. STAT. § 15A-134 (1978); R.I. GEN. LAWS § 11-12-5 (1969); S.C. CODE § 44-53-410 (1976); W. VA. CODE § 61-2-23 (1977); WIS. STAT. ANN. § 161.45 (West 1974).

159. 20 Cal. 3d 142, 570 P.2d 723, 141 Cal. Rptr. 542 (1977).
160. *Id.* at 144, 570 P.2d at 724, 141 Cal. Rptr. at 543.
161. CAL. PENAL CODE § 793 (West 1970).
162. 20 Cal. 3d at 145, 570 P.2d at 725, 141 Cal. Rptr. at 544.
163. *Id.* at 148, 570 P.2d at 726, 141 Cal. Rptr. at 546.
164. 500 S.W.2d 271 (Mo. App., Spr. 1973).

court held that the earlier Kansas conviction did not bar the Missouri prosecution.[165] The court rested its decision on the dual sovereign double jeopardy rule, finding it "unnecessary to demonstrate that in fact and in law the identity of offenses requirement was not met by the defendant and such failure would deny his plea of former jeopardy."[166]

A final example is *Magness v. State*,[167] in which the defendant robbed a drug store in Arkansas and took contraband drugs to Oklahoma. He pleaded guilty to possession of drugs in Oklahoma and was then convicted in Arkansas of possession of contraband substances with intent to deliver.[168] An Arkansas statute provided:

> When a person has been either acquitted or convicted, on the merits, of an offense . . . against another state . . . , the acquittal or conviction is a bar to prosecution for an offense against this State, . . . when the two offenses were committed in the same course of conduct and are of the same character.[169]

Offenses of the same character were defined as offenses for which the elements of proof were not substantially different.[170] In making this determination the court was to "compare the respective purposes of the laws defining the two offenses, as such purposes relate to the particular course of conduct of the defendant."[171] The statute further provided that any differences "attributable solely to the fact that the defendant's conduct affected, in the same manner, the person or property of two or more individuals . . . shall not be considered in deciding whether the two offenses are of the same character."[172] The court in affirming the conviction stated that "the offenses in the case at bar were not committed in the same course of conduct, and are not of the same character as the misdemeanor to which Magness pleaded guilty in Oklahoma."[173]

C. *State Prosecution Followed by Federal Prosecution*

After a state prosecutes an individual for a particular act, the federal government may choose to prosecute the same individual for the same act as a violation of a federal law. Although some urge that this double prosecution violates the double jeopardy clause of the United States Constitution, the United States Supreme Court has held that it does not. In *Abbate v. United States*,[174] the Supreme Court upheld the federal conspiracy conviction of in-

165. *Id.* at 272-74.
166. *Id.* at 274.
167. 257 Ark. 564, 518 S.W.2d 479 (1975).
168. *Id.* at 564-65, 518 S.W.2d at 479-80.
169. ARK. STAT. ANN. § 43-1224.1 (1977).
170. *Id.* § 43-1224.2.
171. *Id.*
172. *Id.* § 43-1224.2(a) to (b).
173. 257 Ark. at 566, 518 S.W.2d at 481.
174. 359 U.S. 187 (1959).

dividuals who previously had pleaded guilty to the same conspiracy in an Illinois state court, holding that the federal prosecution was not barred under the double jeopardy clause by the earlier state conviction.[175]

Nevertheless, federal prosecution after a state prosecution may be barred by statute. For example, if a state prosecutes for theft from a box car, prosecution in a federal court for theft from a common carrier or of goods in interstate commerce will be precluded by a federal statute which provides that "[a] judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts."[176] Similar provisions exist throughout the United States Code,[177] but only a few cases have been reported under the provisions. One such case is *United States v. Porria*.[178] The defendant was convicted in a Washington state court of receiving and withholding stolen property. The defendant subsequently was indicted under federal law for larceny of property moving in interstate commerce and receiving stolen property. The defendant claimed that the state prosecution barred the federal prosecution. The district court agreed with respect to the count of receiving stolen property, but denied the bar as to the count dealing with the larceny of property using the same evidence test.[179]

A second approach to federal prosecution following state prosecution is found in two federal statutes that provide for a suspension of state court jurisdiction when there is an overriding federal interest because of a presidential or congressional assassination.[180] For example, one of the statutes provides, "If federal investigative or prosecutive jurisdiction is asserted for a violation of this section, such assertion shall suspend the exercise of jurisdiction by a state or local authority, under applicable state or local law, until federal action is terminated."[181] This provision prevents the state prosecution until the federal action is terminated, at which point the state must decide whether to proceed.

The United States Supreme Court recently has addressed the problem of a state prosecution followed by a federal prosecution for the same event. In *Rinaldi v. United States*,[182] the defendant was convicted in a state court of conspiracy to commit robbery, conspiracy to commit grand larceny, and carrying a concealed weapon. He was later convicted in a federal court of

175. *Id.* at 196.
176. 18 U.S.C. § 659 (1976).
177. *See, e.g.*, 15 U.S.C. §§ 80a-36, 1282 (1976); 18 U.S.C. §§ 660, 1992, 2101, 2117 (1976); 48 U.S.C. § 1704 (1976).
178. 255 F. 172 (W.D. Wash. 1918).
179. *Id.* at 172-73.
180. *See* 18 U.S.C. §§ 351, 1751 (1976).
181. *Id.* § 1751.
182. 434 U.S. 22 (1977).

conspiracy to affect interstate commerce by robbery in violation of the Hobbs Act.[183] On appeal, the government acknowledged that the conviction had been obtained in violation of the *Petite* policy of the Justice Department.[184] The court of appeals remanded the case to the district court to permit the government to seek a dismissal of the indictment. The district court refused to dismiss the indictment, and the government and the petitioner appealed from the denial of the motion to dismiss; the court of appeals affirmed. The Supreme Court vacated the judgment and remanded the case to the district court with orders to dismiss the indictment.[185] The Court stated that the policy limits the discretion of the federal prosecutor to initiate prosecution for violations of federal statutes.[186] The refusal to allow duplicative prosecutions is based on "the efficient management of limited Executive resources," the encouragement of local responsibility in law enforcement, and the protection of citizens "from any unfairness that is associated with successive prosecutions based on the same conduct."[187] The opinion suggested that the *Petite* policy should not be applied without exception, but that exceptions would be few. Exceptions may arise " 'in instances of peculiar enormity, or where the public safety . . . [demands] extraordinary rigor.' "[188]

The *Petite* policy also was recently applied by the United States Supreme Court in *Thompson v. United States*.[189] The defendant had been prosecuted in a state court and subsequently tried and convicted in a federal court.[190] The Supreme Court noted that an exception to the policy "is made only if the federal prosecution is specifically authorized in advance by the [Justice] Department itself, upon a finding that the prosecution will serve 'compelling interests of federal law enforcement.' "[191] The Solicitor General con-

183. 18 U.S.C. § 1951 (1976).

184. 434 U.S. at 24-25. The *Petite* policy was articulated in a Department of Justice Press Release dated April 6, 1959, which stated:

> In two decisions on March 30, 1959, the Supreme Court of the United States reaffirmed the existence of a power to prosecute a defendant under both Federal and state law for the same act or acts. That power, which the court held is inherent in our Federal system, has been used sparingly by the Department of Justice in the past. The purpose of this memorandum is to insure that in the future we continue that policy. After a state prosecution there should be no Federal trial for the same act or acts unless the reasons are compelling.

Memorandum to United States Attorneys, *quoted in* N.Y. Times, Apr. 6, 1959, at 19, col. 2.

185. 434 U.S. at 24-26, 32.

186. *Id.* at 27.

187. *Id.*

188. *Id.* at 28 (quoting Fox v. Ohio, 46 U.S. (5 How.) 410, 435 (1847)).

189. 444 U.S. 248 (1980) (per curiam).

190. *Id.* at 249.

191. *Id.* at 248.

ceded in the Supreme Court that the United States attorney had not obtained the authorization required before bringing the action. The Solicitor General further had concluded that the prosecution in the federal court was "not supported by an independent compelling federal interest not satisfied by the state prosecution for armed burglary."[192] The Supreme Court vacated the judgment and remanded the case to the court of appeals "for reconsideration in light of the Government's present position."[193]

In light of the statutory provisions that bar a federal prosecution after a state prosecution, the *Petite* policy, and the possible exercise of prosecutorial discretion, duplicative federal prosecutions after state prosecutions usually will not occur.

D. *Federal Prosecution Followed by State Prosecution*

As in the case of state prosecution followed by federal prosecution, the United States Supreme Court has held that federal prosecution followed by state prosecution does not violate the double jeopardy clause. In *Bartkus v. Illinois*,[194] the defendant was acquitted in a federal court of robbing a federally insured savings and loan association. He then was tried in an Illinois state court and convicted on substantially the same evidence. The Court held that the Illinois prosecution after the federal acquittal did not violate the United States Constitution.[195]

Almost two decades after *Bartkus*, the United States Court of Appeals for the Eighth Circuit faced the same problem in *Turley v. Wyrick*.[196] Two armed men were acquitted in federal court of charges of robbing a Missouri bank in violation of federal law. The State of Missouri then charged one of the two men with robbery in the first degree by means of a dangerous and deadly weapon, in violation of Missouri Revised Statutes section 560.120.[197] The defendant moved to dismiss, claiming that his prior federal acquittal barred the state prosecution. The motion was overruled, the Supreme Court of Missouri denied a request for a writ of prohibition, and the United States Supreme Court denied certiorari.[198] A jury then convicted the defendant of robbery in the first degree and sentenced him to twenty years imprisonment. The conviction was affirmed on appeal and the United States Supreme Court denied certiorari.[199] The defendant filed a petition

192. *Id.* at 249.
193. *Id.* at 250.
194. 359 U.S. 121 (1959).
195. *Id.* at 139.
196. 554 F.2d 840 (8th Cir. 1977), *cert. denied*, 434 U.S. 1033 (1978).
197. (1969) (current version at MO. REV. STAT. § 569.020 (1978)).
198. 404 U.S. 1024 (1972) (denial of certiorari after denial of writ of prohibition).
199. 421 U.S. 966 (1975) (denial of certiorari following affirmation of conviction).

for a writ of habeas corpus in the federal district court. The court denied the writ, and an appeal was taken to the court of appeals.[200] The petitioner based his right to relief on three grounds: (1) double jeopardy applied even though two sovereigns were involved, (2) the *Ashe v. Swenson*[201] doctrine of collateral estoppel or issue preclusion applied, and (3) the state was bound by the federal acquittal under the full faith and credit clause of the Federal Constitution or under federal statute.[202] The court affirmed the decision of the district court. The majority adhered to the traditional view that prosecution by different sovereigns does not violate the double jeopardy clause, rejected the collateral estoppel argument because different parties were involved, and rejected the full faith and credit argument because violations of different laws were claimed.[203]

Judge Lay concurred in the result, but indicated his dissatisfaction with it. He questioned the vitality of the two sovereign exception to the protection afforded by the double jeopardy clause. After noting the attitude of several states on this point, he stated, "Where the interests of the state and federal governments coincide in the prosecution of a criminal act, as they do here, the federalism rationale is completely unavailing. When this occurs the accommodation of the interest of the individual should be paramount."[204] Nonetheless, he concluded, "As an intermediate appellate judge I realize it is not my singular role to express opinion contrary to established law. However, recognition of this judicial discipline should not prevent one from expressing dismay in the use of stare decisis to perpetuate an injustice."[205]

Although the federal double jeopardy clause does not bar state prosecution after federal prosecution, such prosecution may be foreclosed by a state statute. For example, an Alaska statute provides, "When an act charged as a crime is within the jurisdiction of the United States, another state, or a territory, as well as of this state, a conviction or acquittal in the former is a bar to the prosecution for it in this state."[206] Approximately one-quarter of the states have such provisions.[207] Louisiana, on the other hand, has

200. 554 F.2d at 841.
201. 397 U.S. 436 (1970).
202. 554 F.2d at 841.
203. *Id.* at 841-42.
204. *Id.* at 844 (Lay, J., concurring).
205. *Id.* at 844-45 (Lay, J., concurring).
206. ALASKA STAT. § 12.20.010 (1980).
207. *See* ALASKA STAT. § 12.20.010 (1980); ARIZ. REV. STAT. ANN. § 13-112 (1978); ARK. STAT. ANN. §§ 41-108, 43-1224.1 (1977); COLO. REV. STAT. § 18-1-303 (1978); DEL. CODE ANN. tit. 11, § 209 (1974); GA. CODE ANN. § 26-507(c) (1977); HAWAII REV. STAT. § 701-112 (1976); ILL. ANN. STAT. ch. 38, § 3-4(c) (Smith-Hurd 1972); KAN. STAT. ANN. § 21-3108(3) (Cum. Supp. 1980); KY. REV. STAT. § 505.050 (1975); MONT. CODE ANN. § 46-11-504 (1981); N.J. STAT. ANN.

specifically provided that "[d]ouble jeopardy does not apply to a prosecution under a law enacted by the Louisiana Legislature if the prior jeopardy was in a prosecution under the laws of another state or the United States."[208]

The Model Penal Code provides:

> When conduct constitutes an offense within the concurrent jurisdiction of this State and of the United States or another State, a prosecution in any such other jurisdiction is a bar to a subsequent prosecution in this State under the following circumstances:
>
> (1) the first prosecution resulted in an acquittal or in a conviction . . . and the subsequent prosecution is based on the same conduct, unless (a) the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of such offenses is intended to prevent a substantially different harm or evil or (b) the second offense was not consummated when the former trial began; or
>
> (2) the former prosecution was terminated, after the information was filed or the indictment found, by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed or vacated and which acquittal, final order or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the offense of which the defendant is subsequently prosecuted.[209]

The Model Penal Code has had a substantial impact on the provisions of Hawaii[210] and Colorado.[211]

In some jurisdictions with no statutes dealing with a state prosecution following a federal prosecution, courts have interpreted state constitutions to bar the state prosecution. For example, in *People v. Cooper*,[212] the defen-

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§ 2C:1-11 (West Pamphlet 1981); N.Y. CRIM. PROC. LAW §§ 40.20-.30 (McKinney 1971 & Supp. Pamphlet 1980-1981); PA. CONS. STAT. ANN. tit. 18, § 111 (Purdon 1973); UTAH CODE ANN. § 76-1-404 (1978); VA. CODE § 19.2-294 (1975).

Some state statutes do not specify federal prosecution as a bar to state prosecution, but have language broad enough to cover this situation. *See* CAL. PENAL CODE § 656 (West 1970); IND. CODE ANN. § 35-41-4-5 (Burns 1979); IOWA CODE § 803.4 (1981); MINN. STAT. ANN. § 609.045 (West 1964); OKLA. STAT. ANN. tit. 21, § 25 (West 1958); WIS. STAT. ANN. § 939.71 (West 1958).

Some state statutes bar prosecution after federal prosecution for particular offenses, including violation of laws concerning controlled substances. *See* ALA. CODE § 20-2-77 (1975); ARIZ. REV. STAT. ANN. § 36-2533 (Cum. Supp. 1980-1981); FLA. STAT. ANN. § 398.23 (West 1973); HAWAII REV. STAT. § 712-1254 (1976); N.M. STAT. ANN. § 30-31-27 (1978); OR. REV. STAT. § 167.252 (1979); S.C. CODE § 44-53-410 (1976); WIS. STAT. ANN. § 161.45 (West 1974).

208. LA. CODE CRIM. PRO. ANN. art. 597 (West Cum. Supp. 1981).
209. MODEL PENAL CODE § 1.10 (Prop. Official Draft, 1962).
210. *See* HAWAII REV. STAT. § 701-112 (1976).
211. *See* COLO. REV. STAT. § 18-1-303 (1978).
212. 398 Mich. 450, 247 N.W.2d 866 (1976).

dant was acquitted in a federal court on a bank robbery charge and subsequently prosecuted in a Michigan state court for attempted murder, bank robbery, and assault with intent to rob. Michigan has no statute dealing with this double prosecution for a single event. The Michigan Constitution, however, provides, "No person shall be subject for the same offense to be twice put in jeopardy."[213] The Michigan Supreme Court in a well-reasoned opinion held that the state constitution "prohibits a second prosecution for an offense arising out of the same criminal act unless it appears from the record that the interest of the State of Michigan and the jurisdiction which initially prosecuted are substantially different."[214] The court recognized that this approach requires a case-by-case analysis, but it noted that the state constitution might forbid a state prosecution after a federal prosecution if both were based on the same criminal act.[215]

The Michigan court indicated that it was adopting the approach used by the Supreme Court of Pennsylvania in *Commonwealth v. Mills*.[216] The *Mills* court vacated the defendant's conviction for carrying a concealed deadly weapon, unlawfully carrying a firearm, and aggravated robbery, which conviction followed a guilty plea in a federal court to bank robbery and assault. The Pennsylvania court recognized the importance of the rights of the defendant in the double jeopardy cases and the need for finality.[217] The court found undesirable the possibility that governments "with all their resources and power" will make "repeated attempts to convict, thus subjecting the accused to live in a continuous state of anxiety, insecurity and possible harassment."[218] The court concluded that it would allow a second prosecution in a Pennsylvania court after a federal trial in some cases: "[I]f it appears that the interests of this Commonwealth were not sufficiently protected in the initial prosecution, then a second prosecution and imposition of additional punishment in Pennsylvania will be allowed."[219] In this case, the record failed to show that the interests of the state were not protected; accordingly, the state convictions were reversed.[220]

A more recent Pennsylvania case on the problem of federal prosecution followed by state prosecution for crimes arising from the same factual situa-

213. MICH. CONST. art. 1, § 15.
214. 398 Mich. at 461, 247 N.W.2d at 870.
215. *Id.*
216. 447 Pa. 163, 286 A.2d 638 (1971).
217. *Id.* at 171, 286 A.2d at 642.
218. *Id.*
219. *Id.* at 172, 286 A.2d at 642.
220. *Id.* The New Hampshire Supreme Court recently reached the same conclusion in the situation where the federal trial resulted in an acquittal. *See* State v. Hogg, 118 N.H. 262, 385 A.2d 844 (1978). The court left for future adjudication the situation where the federal adjudication resulted in a conviction. *Id.* at 267, 385 A.2d at 847.

tion is *Commonwealth v. Grazier*.[221] Two individuals were acquitted in a federal court on charges of mail fraud and conspiracy. State criminal complaints already had been filed in a Pennsylvania court charging the two with arson. After the acquittal in the federal court, the defendants filed an application to quash the state indictments, claiming double jeopardy and collateral estoppel arising from the acquittal in the federal court. The lower court quashed the indictment, but the superior court reversed and ordered the indictments reinstated.[222] The Pennsylvania Supreme Court considered the applicability of *Mills* and *Ashe v. Swenson*[223] and held that "the concepts embodied in . . . [*Mills* and *Ashe*] bar a Commonwealth prosecution on arson charges."[224] The court concluded that although the crimes were different, "both statutes as used in this case protect the same governmental interest. Under these facts, *Mills* will act as a bar to a state prosecution for arson following an acquittal in federal court for mail fraud in connection with a scheme to commit arson."[225]

When a federal prosecution is followed by a state prosecution for a crime committed at the same time as the federal offense, the interests of both sovereigns are affected as are the interests of the defendant. A state may forego prosecution after the federal prosecution because of a state statute, a state court interpretation of state double jeopardy protections, or policy considerations.[226] On the other hand, the federal government might prohibit the state prosecution. In *United States v. Wheeler*,[227] the United States Supreme Court noted that although "conflict might be eliminated by making federal jurisdiction exclusive where it exists, such a 'marked change in the distribution of powers to administer criminal justice' would not be desirable."[228]

E. *Foreign Prosecution Followed by Prosecution in the United States*

An act may be an offense both in a state within the United States and

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221. 481 Pa. 622, 393 A.2d 335 (1978).
222. *Id.* at 627, 393 A.2d at 337.
223. 397 U.S. 436 (1970).
224. 481 Pa. at 629, 393 A.2d at 338.
225. *Id.* at 631, 393 A.2d at 339-40. The supreme court also concluded that a second prosecution would be barred by the concept of issue preclusion because of the acquittal in the federal court. This is a somewhat novel application of the doctrine because the commonwealth never had its day in court. The court so held because of "the degree of federal-state cooperation in the instant investigation" and because "the Commonwealth admitted in an answer to a bill of particulars that the evidence it would present would be substantially the same as that presented in the federal prosecution." *Id.* at 634, 393 A.2d at 341 n.4.
226. *See* State v. Rogers, 90 N.M. 673, 568 P.2d 199 (1977).
227. 435 U.S. 313 (1978).
228. *Id.* at 318 (following Abbate v. United States, 359 U.S. 187 (1959)). For

in a foreign country.[229] When this occurs, the alleged criminal may be subject to multiple prosecutions. Several states have enacted general provisions that bar a state prosecution following a prosecution in a foreign country.[230] The language used in the statutes varies, but all afford the defendant basically the same protection. Arizona's statute is typical:

> When on the trial of an accused person it appears that upon a criminal prosecution under the laws of the United States, or of another state or country, founded upon the act or omission in respect to which he is on trial he has been acquitted or convicted, it is a sufficient defense.[231]

The California Supreme Court faced the question of the effect of a foreign prosecution on a subsequent state prosecution in *Coumas v. Superior Court*.[232] Coumas was born in Greece, had emigrated to the United States in 1907, and became an American citizen in 1914. The Greek government never consented to his becoming an American citizen. In 1932, Coumas allegedly murdered one individual and committed an assault with a deadly weapon on another. Shortly thereafter he fled the country and went to Greece. On May 12, 1932, Coumas was indicted by a California grand jury and the United States instituted extradition proceedings.[233] Coumas resisted extradition, and the Greek court found that he had never divested himself of his Greek citizenship and that "Greek law therefore absolutely forbade his extradition but required his prosecution and punishment in Greece in accordance with its criminal law."[234] Coumas was tried in Greece on the same charges alleged in California. He was found guilty of manslaughter and the

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an example of federal legislation suspending state court jurisdiction to prosecute, see notes 180 & 181 and accompanying text *supra*.

229. *See, e.g.*, Coumas v. Superior Court, 31 Cal. 2d 682, 192 P.2d 449 (1948).

230. *See* ARIZ. REV. STAT. ANN. § 13-112 (1978); CAL. PENAL CODE §§ 656, 793 (West 1970); IDAHO CODE § 19-315 (1979); MISS. CODE ANN. § 99-11-27 (1972); NEV. REV. STAT. §§ 171.070, 208.020 (1979); N.D. CENT. CODE § 29-03-13 (1974); OKLA. STAT. ANN. tit. 21, § 25 (West 1958); WASH. REV. CODE ANN. § 10.43.040 (1980).

Some state statutes do not specify foreign prosecution as a bar to state prosecution, but have language broad enough to cover this situation. *See* IND. CODE ANN. § 35-41-4-5 (Burns 1979); IOWA CODE § 803.4 (1981); MINN. STAT. ANN. § 609.045 (West 1964); NEB. REV. STAT. § 29-1817 (1979); TEX. STAT. ANN. art. 1.10 (1977); WIS. STAT. ANN. § 939.71 (West 1958).

Some state statutes bar prosecution after foreign prosecution for particular offenses, including importing stolen goods and dueling. *See* ARK. STAT. ANN. § 43-1423 (1977); MASS. GEN. LAWS ANN. ch. 265, § 5 (West 1970); MICH. COMP. LAWS ANN. § 767.64 (1968); MO. REV. STAT. § 541.050 (1978).

231. ARIZ. REV. STAT. ANN. § 13-112 (1978).

232. 31 Cal. 2d 682, 192 P.2d 449 (1948).

233. *Id.* at 684, 192 P.2d at 450.

234. *Id.* at 684, 192 P.2d at 451.

unlawful carrying of a firearm.[235] When Coumas returned to the United States he was arrested, whereupon he sought a writ of prohibition. The California Supreme Court found no fraud, collusion, trickery, or subterfuge in Coumas' conduct in Greece.[236] The court noted that the California Penal Code provided, "When an act charged as a public offense is within the jurisdiction of another State or country, as well as of this State, a conviction or acquittal thereof in the former is a bar to the prosecution or indictment therefor in this State."[237] The court indicated that this fact situation fell precisely within the statute and that the writ of prohibition was the proper method of raising the defense.[238] *Coumas* appears to be the only relevant case arising under a state statute barring prosecution after a foreign prosecution.

Absent a statutory provision, a foreign country prosecution probably will not bar a subsequent state prosecution. The United States Supreme Court determined in *Bartkus v. Illinois*[239] that the double jeopardy protection guaranteed by the fifth amendment to the United States Constitution does not extend over jurisdictional lines.[240] In *Bartkus*, the Court dismissed, as irrelevant, an English line of cases which held that a prosecution in one jurisdiction barred subsequent prosecution in another.[241] The leading English case was *Rex v. Hutchinson*,[242] which is reported in *Beak v. Thyrwhit*.[243] Hutchinson allegedly killed a man in Portugal and was acquitted of murder there. On returning to England, Hutchinson was reprosecuted for the murder, and he pleaded and established the former acquittal.[244] The judges all agreed "that he being already acquitted by their [Portugal's] law, could not be tried again here [England]."[245]

In a more recent English case, *Rex v. Aughet*,[246] Aughet, a Belgian soldier stationed in England, wounded another Belgian soldier and was acquitted of the offense in a Belgian court-martial. When Aughet returned to England, the English courts asserted their jurisdiction and indicted Aughet for a comparable offense. The trial court rejected Aughet's plea of *autrofois acquit* and found him guilty of malicious wounding.[247] The court of criminal appeal quashed the conviction, noting that "it would be unjust to the prisoner not

235. *Id.* at 685, 192 P.2d at 451.
236. *Id.* at 688, 192 P.2d at 452.
237. CAL. PENAL CODE § 793 (West 1970).
238. 31 Cal. 2d at 684, 192 P.2d at 450.
239. 359 U.S. 121 (1959).
240. *Id.* at 127.
241. *Id.* at 128 n.9.
242. 84 Eng. Rep. 1011 (1677).
243. 87 Eng. Rep. 124 (1689).
244. *Id.* at 125.
245. *Id.*
246. 118 L.T.R. 658 (Crim. App. 1918).
247. *Id.*

to accept a decision of a competent court in his favour."[248] A previous agreement between the English and Belgian governments provided for Belgian jurisdiction in such a situation.[249] The court found that "it would be contrary to the true intent and meaning of the Convention to subject the man to punishment here for an offence for which he has been in jeopardy and has been acquitted in accordance with Belgian law."[250] The current law in England is consistent with *Hutchinson* and *Aughet*.[251]

American courts have not accepted the English common law rule. The general rule in American jurisprudence was stated by the Supreme Court of Nebraska over 100 years ago:

> This is a foreign state, and the principle seems well settled that the laws of a country do not extend beyond its territorial limits; and therefore it is said to be "an obvious principle that the maxim and rule of constitutional law cannot span country and country in such a way . . . [as] to cause a jeopardy in one country to free the party from trial in another."[252]

American courts have been reluctant to allow a foreign country prosecution to bar a state prosecution. New York enacted two statutes[253] in the nineteenth century expressly providing for such a bar.[254] Even so, in 1931, a New York court refused to allow a former conviction in an Italian court to bar

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248. *Id.* at 660.

249. *Id.* at 659.

250. *Id.* at 660.

251. "A previous acquittal before a court of competent jurisdiction in a foreign country is a bar to a subsequent indictment here." 11 H. HALSBURY, THE LAWS OF ENGLAND ¶ 242 (4th ed. 1976). *See also id.* ¶ 88.

The English line of cases has been cited by a dissenting judge in a single Pennsylvania Superior Court decision. *See* Commonwealth v. Mills, 217 Pa. Super. Ct. 269, 280, 269 A.2d 322, 327 (1970) (Hoffman, J., dissenting), *vacated*, 447 Pa. 163, 286 A.2d 638 (1971). The Pennsylvania Supreme Court, in deciding the case, stated that "a second prosecution and imposition of punishment for the same offense will not be permitted unless it appears from the record that the interests of the Commonwealth of Pennsylvania and the jurisdiction which initially prosecuted and imposed punishment are substantially different." 447 Pa. at 171-72, 286 A.2d at 642. This language seems to be broad enough to cover a foreign country prosecution. Pennsylvania has since adopted PA. CONS. STAT. ANN. tit. 18, § 111 (Purdon 1973), which bars a second state prosecution following a prosecution in another state or by the United States. The statute is similar to MODEL PENAL CODE § 111 (Tent. Draft No. 5, 1956).

252. Marshall v. State, 6 Neb. 120, 122 (1877) (dictum) (quoting 1 J. BISHOP, CRIMINAL LAW § 983 (4th ed. 1868)).

253. A discussion of the New York statutes is found in People v. Lo Cicero, 14 N.Y.2d 374, 377-78, 200 N.E.2d 622, 623, 251 N.Y.S.2d 953, 955 (1964).

254. *See* People v. Lo Cicero, 14 N.Y.2d 374, 200 N.E.2d 622, 251 N.Y.S.2d 953 (1964).

a New York indictment.[255] Evidently, the court based its decision on a procedural technicality: the defendant did not properly enter the plea.[256] The court then stated in self-proclaimed obiter dictum:

> Aside from the form and sufficiency of said plea, I am of the opinion that the conviction in the courts of the Kingdom of Italy, in the absence of specific treaty provisions binding our state courts, cannot successfully be pleaded in bar to a prosecution under an indictment in this state when it appears that here is where the crime was committed.[257]

New York has since revised its statutes and no longer allows a foreign country prosecution to bar a subsequent state prosecution for the same offense.[258]

F. *Indian Court Prosecution Followed by Federal Prosecution*

It has been urged that double jeopardy may arise when an individual has been tried in an Indian tribal court and then is tried in a federal court. This argument was presented recently to the United States Supreme Court in *United States v. Wheeler*.[259] Anthony Wheeler, a member of the Navajo tribe, was arrested by a tribal police officer on the Navajo reservation and charged with disorderly conduct in violation of the tribal code. Wheeler pleaded guilty to the charge and to a further charge of contributing to the delinquency of a minor, also in violation of the code, and was sentenced. Over a year later, Wheeler was indicted by a federal grand jury for statutory rape. Wheeler attacked the indictment claiming that the tribal proceedings barred any further proceedings in a federal court. The trial court rejected the argument of the prosecutor that there was not an identity of sovereignties between the tribal court and the federal court and dismissed the indictment. The court of appeals affirmed the dismissal on double jeopardy grounds.[260]

The United States Supreme Court examined with care the role of tribal courts and the power of Congress over Indian tribes. The Court decided that the crucial question was that of "the ultimate source of the power under which the respective prosecutions were undertaken."[261] The Court viewed Indian tribes as " 'a separate people, with the power of regulating their internal and social relations,' "[262] and the powers of the Indian tribes as " 'inherent powers of a limited sovereignty which has never been

255. People v. Papaccio, 140 Misc. 696, 251 N.Y.S. 717 (N.Y. County Ct. Gen. Sess. 1931).

256. *Id.* at 698, 251 N.Y.S. at 719.

257. *Id.* at 698, 251 N.Y.S. at 719-20 (dictum).

258. *See* N.Y. CRIM. PROC. LAW §§ 40.20-.30 (McKinney 1971 & Supp. Pamphlet 1980-1981).

259. 435 U.S. 313 (1978).

260. *Id.* at 315-16.

261. *Id.* at 320.

262. *Id.* at 322 (quoting United States v. Kagama, 118 U.S. 375, 381-82 (1886) & Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831)).

extinguished.' "[263] The Court recognized that the tribes are ultimately subject to federal control, but that the power to govern themselves was not created by federal law.[264] The Court concluded:

> [T]he power to punish offenses against tribal law committed by Tribe members, which was part of the Navajos' primeval sovereignty, has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority. It follows that when the Navajo Tribe exercises this power, it does so as part of its retained sovereignty and not as an arm of the Federal Government.
>
> . . .
>
> Since tribal and federal prosecutions are brought by separate sovereigns, they are not "for the same offence," and the Double Jeopardy Clause thus does not bar one when the other has occurred.[265]

The Court also considered the impact of barring federal prosecution and concluded that the federal interest in prosecuting major offenses that occur on tribal reservations might be frustrated.[266] The Court recognized that Congress, "in the exercise of its plenary power over the tribes,"[267] could give exclusive jurisdiction to the federal courts over crimes committed on tribal reservations, but suggested that this might undesirably reduce tribal self-government.[268]

G. *Summary*

Although duplicative prosecutions in different jurisdictions for a single criminal act are theoretically possible, it is not a common occurrence. Because of the geographical limitations on state court jurisdiction, a single act rarely will be a crime in more than one state. Under the *Petite* policy, a state prosecution usually will not be followed by a federal prosecution. Similarly, many state statutes bar a state prosecution after a federal prosecution or after prosecution in a foreign country.

The trend is clearly against dual prosecution for a single act, even though two jurisdictions are involved. Such prosecution is possible, but as a practical matter duplicative prosecutions rarely will occur. Perhaps it is time to reconsider whether the constitutional double jeopardy bar against duplicative prosecutions for a single act might not apply even when two jurisdictions are involved. Judge Lay of the United States Court of Appeals for the Eighth

263. 435 U.S. at 322 (quoting F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945)).
264. 435 U.S. at 327-28.
265. *Id.* at 328-30 (footnotes omitted).
266. *Id.* at 331.
267. *Id.*
268. *Id.* at 332.

Circuit has indicated his dissatisfaction with the possibility of duplicative prosecutions. He questioned the vitality of the two-sovereign exception to the protection afforded by the double jeopardy clause. Perhaps other judges should recognize the present trend and put a constitutional imprimatur on the barring of duplicative prosecutions in different jurisdictions.[269]

V. MULTIPLE JURISDICTIONS—SINGLE EVENT—MULTIPLE CRIMES

The final situation to be considered is a combination of the situations discussed above, *i.e.*, when an individual commits several crimes and violates the laws of multiple jurisdictions. For example, the person who breaks into several residential mail boxes at approximately the same time may have committed several crimes under both state and federal law.[270] Under the apparent law today, the actor in a series of criminal acts might be subjected to serial prosecutions by different governments. Should different governments be allowed to prosecute a single individual for different crimes that occurred in the same episode? Or should an individual be protected from any harassment or persecution that might result from successive prosecutions?[271]

A body of law exists that forces an authority to prosecute in large units and not serially;[272] a body of law also exists under which a prosecution by one authority will bar a prosecution by a second authority.[273] If these principles are generally accepted, should not these be taken in combination to preclude serial prosecutions by more than one authority for different crimes arising out of the same episode? One solution might be to allow prosecution by one jurisdiction for a felony of the severity approximating the most serious one that could be charged by any of the jurisdictions involved. Such a prosecution would bar any further prosecutions for the same criminal episode. This would protect the criminal actor and still foreclose the possibility of gamesmanship[274] by a prosecutor or a defendant who would use the principle to avoid the imposition of appropriate sanctions.

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269. *See* State v. Rogers, 90 N.M. 673, 568 P.2d 199 (1977). The dual sovereignty exception to the double jeopardy limitation does not apply in every situation when successive prosecutions occur in different jurisdictions. The United States Supreme Court has noted that a soldier who had been acquitted by a military court on a charge of murder could not be tried by a territorial court, that there could not be successive prosecutions by federal and territorial courts because they are created by the same sovereign, and that city and state could not prosecute successively for "unlawful conduct growing out of the same episode." *See* United States v. Wheeler, 435 U.S. 313, 318-19 (1978).

270. *See* 18 U.S.C. §§ 1702, 1705, 1708 (1976).

271. These principles underlie preclusion on the civil side as well as the bar against double jeopardy on the criminal side.

272. *See* Part III. *supra.*

273. *See* Part IV. *supra.*

274. *See* notes 182-93 and accompanying text *supra.*

The problem was posed in a recent prosecution of an individual for killing two black men who had been jogging with two white women. The United States prosecuted the assailant for a violation of the civil rights of the two blacks, and the defendant was convicted.[275] The state government then prosecuted the defendant for murder under state law, and he was convicted again.[276] This case involved multiple wrongs in the same episode and the violation of the laws of two different jurisdictions. Potential problems might have arisen, however, if the federal government had prosecuted for the violation of the civil rights of one of the two killed, and then the state had prosecuted the defendant for the murder of the other. Would this have been permitted? Or would the sequence have seemed so contrived that it would not have been sanctioned? What benefits would accrue from such a scenario? Would this not be the harassment—the game playing and the persecution—that is to be avoided? Are these not the very evils that the concept of double jeopardy, the *Petite* policy, and various state statutes aim to eliminate?[277]

Current statutes, policies, and constitutional considerations generally should bar repetitive prosecutions by different authorities for the crimes of an episode, even though several persons were injured, just as in the case of a single victim. The trend of the law today foreshadows requiring an election of a single proceeding for the vindication of the interests of the public in a multi-victim, multi-jurisdiction situation.

VI. CONCLUSION

An examination of the different situations when a defendant may be prosecuted more than once for a single event suggests that several variables must be examined to reach a conclusion. Some constants, however, do unify these different situations.

The first is the defendant's interest in being subjected to only one prosecution. Since the principle of not allowing duplicative prosecutions by a single sovereign is accepted generally, should not this general principle also apply when more than one jurisdiction is involved?[278] In most situations,

275. United States v. Franklin, No. CR-80-00125 (D. Utah Mar. 4, 1981), *appeal docketed*, No. 81-13-43 (10th Cir. Mar. 26, 1981).

276. State v. Franklin, No. CR81-498 (Dist. Ct., Salt Lake County, Utah Sept. 19, 1981).

277. Issue preclusion applied in criminal prosecutions also may reduce harassment and persecution. *See* Ashe v. Swenson, 397 U.S. 436, 447 (1970).

278. When double jeopardy is stated as a general principle, it is phrased in terms of protecting

> an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . The underlying idea . . . 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 com-

the concerns of the various governments are identical. The punishment of the criminal for the wrong committed is the end sought. The vindication of the interests of one government satisfies the interests of another. Thus, no rationale justifies a duplicative prosecution under principles of federalism.

Second, perhaps the expenditure of society's resources in duplicative prosecutions in or between jurisdictions cannot be justified. The costs involve the courts, the defendants, the prosecutors, the witnesses, the defense attorneys, and a host of persons on the periphery of the prosecution. Although issue preclusion may reduce the repetitive aspects of duplicative actions, the effect will be minimal. The result of the duplication often is nothing more than a gesture—a sentence that will have no real effect on the defendant. When the cost of such prosecutions is weighed against the results obtained, duplicative prosecution may not be justified.

Third, society is best served by procedures that allow for a speedy termination of the judicial process. Allowing multiple prosecutions does not serve this desirable end.

Fourth, society's interests are served by consistency in judicial decisions. If results are inconsistent, the prestige of the courts suffers. It is difficult for laymen to understand how different courts can reach different results in the same factual situation. If the government is allowed to seek a second prosecution because the first has terminated in favor of the defendant, inconsistent decisions are possible.

Arguments to the contrary are based on the need for severe punishment if multiple crimes have been committed, the right of each sovereign to punish as it sees fit,[279] the need for prosecutorial discretion, and the desirability of allowing the prosecution a second chance if it fails the first time. This last argument seems specious, but it has been urged by the Supreme Court because of the idiosyncratic character of juries and the state's inability to appeal if it loses.[280]

The answers in this area may not be absolute. Variable factors may control each situation. The United States Supreme Court has called attention to one possible difficulty with the application of double jeopardy when two sovereigns are involved. The Court suggested that "prosecution by one sovereign for a relatively minor offense might bar prosecution by the other

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pelling 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). Under this general principle, it is difficult to see how duplicative prosecutions by different sovereigns can be allowed if a single criminal act is involved and the Constitution of the United States governs.

279. For an example of the use of duplicative prosecutions in a seemingly appropriate manner, see notes 275 & 276 and accompanying text *supra*.

280. *See* Standefer v. United States, 447 U.S. 10 (1980).

for a much graver one, thus effectively depriving the latter of the right to enforce its own laws."[281] The possibility of such an arrangement suggests that the bar of the earlier prosecution should not be absolute. A government that has a valid reason for punishing an individual should not be foreclosed because some other government has prosecuted without a true desire to bring the criminal to justice.

Perhaps the power of the federal government to prosecute individuals should be viewed, at least in part, as a power in reserve to ensure the reasonable operation of the criminal justice system.[282] When an egregious miscarriage of justice occurs at the state level through an acquittal, the availability of federal prosecution might be viewed as beneficial in allowing a second prosecution. The failure to convict in a state court may be remedied by a prosecution under the civil rights statutes or some other federal criminal provision.[283] This compares to the civil rights removal statutes that allow a defendant in a state court criminal prosecution to remove the proceeding to the federal court to avoid a state court miscarriage of justice by an unjustified conviction.[284] Similar federal supervision exists in the habeas corpus provisions that sometimes allow a federal court to second-guess the state court.[285]

In *Bartkus v. Illinois*[286] the Supreme Court, in discussing the problem of duplicative prosecutions, stated:

> The entire history of litigation and contention over the question of the imposition of a bar to a second prosecution by a government other than the one first prosecuting is a manifestation of the evolutionary unfolding of law. Today a number of States have statutes which bar a second prosecution if the defendant has been once tried by another government for a similar offense.[287]

The Court concluded that the matter should be handled by the states and that the Court should "not utilize the Fourteenth Amendment to interfere with this development."[288] The Court just as easily might have concluded that the problem required a single, unified solution that could be provided only by the federal government and, more specifically, the Supreme Court.

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281. United States v. Wheeler, 435 U.S. 313, 318 (1978) (footnote omitted).
282. While Congress has been considering the revision and codification of the federal criminal law, the problem of duplicative prosecutions has been considered. *See* S. 1722, 96th Cong., 1st Sess., §§ 205-206 (1979); H.R. 6915, 96th Cong., 2d Sess., §§ 115-117 (1980).
283. *See* 18 U.S.C. §§ 241, 242, 245 (1976).
284. *See* 28 U.S.C. § 1443 (1976).
285. *See id.* § 2241.
286. 359 U.S. 121 (1959).
287. *Id.* at 138.
288. *Id.* at 138-39.

Even absent the possibly overriding constitutional considerations, courts easily may conclude that, under case law, statutes, or state constitutions, duplicative prosecutions should not be allowed.[289] Prosecuting authorities may adopt written or unwritten policies, such as the *Petite* policy, that preclude duplicative prosecutions.[290] The trend in the law today is clearly moving toward protecting defendants from unwarranted duplicative prosecutions. The principle may never become as clear as claim preclusion on the civil side,[291] but, nonetheless, the general principle is gaining support on the criminal side. Just as the concept of claim preclusion on the civil side is subject to exceptions, the developing law on the criminal side recognizes that some situations exist under which a second prosecution must be allowed. This development is consistent with preclusion's underlying basis. Preclusion reflects the needs of society; it is based on the need to use the courts' time wisely, to promote respect for the judicial system, and to prevent harassment of persons in the courts. Perhaps there should be a presumption in favor of preclusion. Preclusion is, however, not an absolute; it is a proposition that must stand or fall on its essential value. When society's interests are best served by using preclusion, it should be adopted. When society's interests are best served by a rejection of preclusion because of some overriding contrary consideration, it should not control.

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289. *See* Parts III. & IV. *supra.*

290. *See* notes 182-93 and accompanying text *supra.*

291. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 61 (Tent. Draft No. 1, 1973).