The Doctrine of Multiple Prosecution in Texas

Walter W. Steele Jr.
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by

Walter W. Steele, Jr.*

The law and procedure of sentencing, as a step in the administration of criminal justice, is currently receiving a great deal of attention and reformative effort. Aspects of plea bargaining, pre-sentence information, sentencing uniformity, and right to counsel at sentencing are all under scrutiny. The doctrine of multiple prosecution, however, continues to be largely ignored, although it too is a part of any comprehensive sentencing scheme. If it can be said that the philosophy of sentencing procedures is to balance the harm done society and the consideration due the individual offender as a human being, then the doctrine of multiple prosecution should strike the same balance. Indeed, the premise of "making the punishment fit the crime" is sympathetic to "one crime, one punishment." The law of multiple prosecution is of further interest because it constitutes one of the few remaining phases of criminal law and procedure uncontrolled by decisions applying federal constitutional doctrine. In fact, the doctrine of multiple prosecution is so faintly understood that even its nominative, "double jeopardy," is a misnomer, as shall be demonstrated in this paper.

Special emphasis will be given herein to Texas law and practice. This is not to say that Texas jurisprudence is model; in fact it is a classic example of the confusion and overlapping which typifies all of the law of multiple prosecution.

I. History of the Jeopardy Principle

"Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in Western Civilization," stated Justice Black in his Bartkus v. Illinois dissent. As a general proposition the maxim of one crime, one punishment, may be traced as far back as the Greeks and Romans; however, the origins of the doctrine as a specifically applied procedural principle are not as distinct.

Apparently, the First Congress gave little thought to the double jeopardy clause of the fifth amendment, simply observing that it was intended to be "declaratory of the law as it now stood" and was to conform to the "universal practice in Great Britain and in this country." In retrospect the approach of the First Congress seems rather cavalier when one considers that there was no mention of double jeopardy in the Magna Carta and that the doctrine was not contained in English statute law at the time the Constitution was adopted. In fact Yearbook period defendants were

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3 U.S. CONST. amend. V.
5 Sigler, supra note 2, at 287.
often placed in multiple jeopardy in England.\textsuperscript{6}

One of the earliest English cases to recognize a defendant's right to be free from multiple prosecution was \textit{Vaux's Case}, decided in 1591.\textsuperscript{7} Three years later Sir Edward Coke became Attorney General and gave the doctrine the substance described by the First Congress.\textsuperscript{8} So successful was Coke in postulating the jeopardy principle that only one hundred years later Blackstone, in his \textit{Commentaries}, stated: "First, the plea of autrefois acquit, or former acquittal, is grounded on the universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offense."

The American history of double jeopardy began with the Body of Liberties of 1641, a document applying in the Massachusetts Colony, which stated: "no man shall be twice sentenced by civil Justice for one and the same Crime, Offence, or Trespase."\textsuperscript{9} Furthermore, in Massachusetts every criminal action was required to be entered "in the rolls of everie court that such Actions be not afterwards brought again to the vexation of any man."\textsuperscript{11} Nevertheless, only one state, New Hampshire, put a double jeopardy clause into its Constitution during the Colonial period.\textsuperscript{12} After the United States Constitution was ratified, the attention of the new republic focused on strengthening the individual's protection from governmental authority. The result was the Bill of Rights, and it was James Madison who sponsored the double jeopardy concept as it was finally incorporated into the fifth amendment.\textsuperscript{13} Certainly, Madison cannot be criticized for the confused position of today's courts in applying the double jeopardy principle. Double jeopardy operates somewhere between substantive and procedural criminal law and is therefore dependent upon their development. The First Congress merely did the best they could with the undeveloped body of knowledge available to them at the time.

Since colonial days, the federal and state concepts of multiple prosecution have developed independently. Whatever single-line development might have been achieved through controlling federal precedent was nipped by the Supreme Court's refusal to impose a constitutional standard on state application of the jeopardy principle. In \textit{Palko v. Connecticut}\textsuperscript{14} the Court held that the due process clause of the fourteenth amendment did not make the double jeopardy provision of the fifth amendment\textsuperscript{15} applicable to the states. Palko was indicted for first degree murder, convicted of second degree, and sentenced to life. The state appealed and won a reversal, whereupon Palko was retried on the same indictment, convicted of first degree.

\textsuperscript{6} Kirk, \textit{Jeopardy During the Year Books}, 82 U. Pa. L. Rev. 602 (1934).
\textsuperscript{7} 4 Co. Rep. 44(a), 76 Eng. Rep. 922 (K.B. 1591).
\textsuperscript{8} Sigler, \textit{supra} note 2, at 294.
\textsuperscript{9} 94 BLACKSTONE, \textit{COMMENTARIES} *152.
\textsuperscript{10} 0 M. FARRAND, \textit{THE LAWS AND LIBERTIES OF MASSACHUSETTS} 46 (1929).
\textsuperscript{11} \textit{Id.} at 47.
\textsuperscript{12} N.H. Const. art. 1, § VXI (1784).
\textsuperscript{14} 102 U.S. 319 (1937).
\textsuperscript{15} "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V.
murder, and sentenced to death. Despite the harsh circumstances, the Court concluded that there was no violation of "fundamental principles of liberty and justice which lie at the base of our civil and political institutions."

Since the Palko opinion in 1937, the Supreme Court has consistently refused to reverse any state conviction on the grounds that fifth amendment principles of jeopardy are applicable. However, a recent Supreme Court decision indicates a possible change in the Court's view of double jeopardy. In Cichos v. Indiana the Court was squarely presented with the question of the applicability of the double jeopardy provisions of the fifth amendment to the states under the due process clause of the fourteenth amendment. Although the Court dismissed certiorari as improvidently granted, Justice Black, joined by Chief Justice Warren and Justices Fortas and Douglas, specifically approved the fifth amendment doctrine of jeopardy being made applicable to the states through the fourteenth amendment. Moreover, in a 1965 case, United States v. Wilkins, the Second Circuit concluded that the due process clause of the fourteenth amendment does impose some limitation on the power of the state to re-prosecute an individual for the same crime. Although the Wilkins opinion does not override Palko, it is interesting to note that the facts of the two cases are almost identical. Surely, the Supreme Court eventually will reverse its stand.

Should the Court refuse to do so, the scope of the eighth amendment protection against cruel and unusual punishment invites speculation.

II. PATTERNS OF MULTIPLE PROSECUTION

A. Res Judicata as a Jeopardy Doctrine

This commentary is concerned with criminal procedure; thus the intricacies of res judicata and its cousin, collateral estoppel, will not be discussed. Suffice it to say that the comprehensive common law doctrine of a single trial being permanently determinative of a single issue has some relevance to the problem of multiple prosecution.

To start at the beginning, Blackstone had this comment: "It is to be observed, that the pleas of autrefois acquit and autrefois convict, or a former acquittal, and former conviction, must be upon a prosecution for the same identical act and crime." It is impossible to know if Blackstone actually intended his "and" in the conjunctive sense. If so, he called for a very limited application of jeopardy which is not followed today, for the dis-
tinction between identity of act and identity of crime is determinative of several conflicting philosophies of double jeopardy.

The federal courts have been fairly uniform in applying identity of act (facts) as the determinative factor. This principle was established as early as 1886 in *Coffey v. United States*, where the Supreme Court held that since the defendant had been found innocent of illegally operating a still in an earlier criminal trial, the facts of the same alleged act could not be used by the government in a later civil proceeding for forfeiture of the still equipment. To highlight the decision, the Court stated that the difference in burden of proof, *viz.*, "beyond reasonable doubt" versus "preponderance of proof," was not significant. The *Coffey* principle was later enunciated as: "[A] question of fact or law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed by the same parties. The principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction." While some states follow the federal approach, others ignore acts or quantum of facts and simply apply identity of crime (penal definition) as the determinant for multiple prosecution.

Texas is in a very small minority of states which refuse to apply the doctrine of res judicata to criminal cases. The rationale given is that the legislature intended, through what is now article 27.05 of the Code of Criminal Procedure, to exclude res judicata as a plea because the doctrine was not specifically mentioned in that statute, while the specified defenses of *autrefois convict* and *autrefois acquit* were included. Perhaps the Texas solution is advisable. Res judicata depends upon identity of something—acts or substantive crimes. It is impossible to identify what facts have actually been determined in a criminal trial, because the defendant is allowed a general plea of not guilty and is not forced to plead specifically to each element of the offense. Furthermore, the defendant may raise affirmative defenses under his general plea, and the jury may return a general verdict without specifying what issues were resolved in their decision.

B. Former Acquittal Versus Former Conviction

Clearly the doctrines of *autrefois acquit* and *autrefois convict* demand a

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22 116 U.S. 416 (1886).
24 State v. Phillips, 171 Wash. 607, 38 P.2d 372 (1934), and cases cited therein.
26 TEX. CODE CRIM. PROC. ANN. art. 27.15 (1967).
27 Spannell v. State, 83 Tex. Crim. 418, 432, 203 S.W. 357, 363 (1918). The reasoning in *Spannell* is inconsistent with the fact that TEX. CODE CRIM. PROC. ANN. art. 27.05 (1967) also fails to mention the defense of former jeopardy, and yet that defense has always been well recognized in Texas.
28 TEX. CODE CRIM. PROC. ANN. art. 27.02 (1965).
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final judgment of either acquittal or conviction. Although it seems that
the doctrines are rather well defined, as is true in other areas of the law,
their application leads to confusion. As early as 1880 the Texas courts
had made a classic statement defining the principles: "Autrefois acquit is
only available in cases where the transaction is the same and the two indict-
ments are susceptible of, and must be sustained by, the same proof. These
two elements must combine and both are sine qua non to the sufficiency of
the plea. Autrefois convict only requires that the transaction, or the facts
constituting it be the same."

Autrefois acquit is a proper procedural application of the general dem-
ocratic doctrine of one crime, one punishment. Suppose, during one crim-
inal escapade, a defendant commits acts amounting to multiple violations
of one penal statute, or single violations of several statutes. If, in trial A,
the defendant is acquitted of offense A, he is not entitled to claim he has
been placed in jeopardy for offense B unless (1) offenses A and B were
committed at the same time, and (2) the facts necessary to establish a con-
viction for offense A are identical to those required to prove offense B. The
second requirement, identity of the evidence, is most significant. In order
for an acquittal in trial A to protect a defendant in trial B, the evidence
must be the same. The fact that the evidence might be the same at both
trials will not support a plea of autrefois acquit. Principles of res gestae are
involved. For instance, if the defendant steals the cattle of A and B at the
same time, and at trial A res gestae evidence of the B theft is introduced,
acquittal at trial A does not bar trial B. The evidence was not bound to be
identical for both crimes; it merely happened to be so because of the ap-
plication of res gestae.

The rule of autrefois convict, which in theory requires only that the
transaction be the same, is more difficult to apply. Considering the postu-
late—one crime, one punishment—a defendant seemingly should be sus-
ceptible to but one conviction for one crime. However, as social intercourse
has expanded, so has the definition of crime. Now it is quite possible for a
defendant to violate several penal statutes in the commission of a single act
with a single mens rea. A policy conundrum therefore exists: shall we

21 A question which continues to plague the courts is: acquittal or conviction of what? Note,
Double Jeopardy and the Multiple-Count Indictment, 57 YALE L.J. 132 (1947).
22 "Black letter law, specific rules designed to cover the infinite variety of possible human con-
duct, has for centuries invited ignorance of principle by artful construction conforming to the
letter of the law but wholly avoiding it in spirit." Warden, Miranda—Some History, Some Ob-
24 Wright v. State, 17 Tex. Crim. 152, 159 (1884): "An accused cannot be acquitted of a
crime with which he has not been charged and tried, and could not be convicted . . . ." See
162 (1884); Hudson v. State, 9 Tex. Crim. 151 (1880).
25 In Texas, this rule is sometimes referred to as the "doctrine of carving," meaning that the
prosecution can carve only one conviction from a multi-criminal escapade. Whitten v. State, 94
Tex. Crim. 144, 250 S.W. 165 (1923); Wright v. State, 17 Tex. Crim. 152 (1884); Simco v.
26 Ward v. State, 148 Tex. Crim. 186, 185 S.W.2d 477 (1945) (driving while intoxicated, and
aggravated assault); Young v. State, 87 Tex. Crim. 184, 222 S.W. 1103 (1920) (Miranda on
assault, and carrying a pistol); Hopkins v. State, 79 Tex. Crim. 483, 186 S.W. 201 (1916) (same);
follow the common law and provide only that a defendant may not be twice convicted of the identical crime (i.e., identical victim, identical penal statute, identical evidence); or shall we negate the obvious potential for prosecutorial harassment and provide some limitation to the number of convictions allowed for a single criminal transaction?  

Although the majority of the courts in the United States allow multiple prosecutions for the same criminal escapade, Texas has opted for a broad concept which affords the most protection to the defendant. Doggett v. State provides an excellent example of the Texas application of autrefois convict. There, the defendant shot the deceased and robbed him in Callahan County, but the deceased died of his wounds in Eastland County. After the defendant was tried and convicted of robbery in Callahan County, he pleaded autrefois convict at his trial for murder in Eastland County. On rehearing, the court of criminal appeals sustained the plea and barred the subsequent murder prosecution. The court distinguished autrefois acquit and autrefois convict, noting that while autrefois acquit requires that the multiple crimes arise from the same transaction and be sustained by identical proof, autrefois convict requires only the former. Clearly, the proof required to sustain Doggett’s robbery conviction in Callahan County was not identical with the proof of the murder in Eastland County, but the transaction was the same. However, the potential for multitudinal confusion arising from attempts to define a criminal “transaction” is obvious.

The statutory fractionalization of crime, often declared to be malum prohibitum, makes a solution to the problem of multiple prosecution for a single criminal escapade imperative. The role played by autrefois acquit is the least troublesome. Properly understood and applied, it is self-enacting and requires very little discretion. The vagueness of “same transaction” is quickly reduced to jural certainty by the additional requirement of identical proof. Autrefois convict, on the other hand, is susceptible to judicial death because of the impossibility of defining a single criminal transaction. Additionally, at least in Texas, there is a doctrine called “carving,” which is easier of application than autrefois acquit or convict. This doctrine places the burden on the prosecutor to carve but once, forcing him to make the initial decision as to transaction with the right to second guess left to the courts.

The courts’ applications of “same transaction” to the autrefois acquit and convict rules are inconsistent and confused. Much of the confusion results from failure to grasp the fact that “identity of proof” is not necessary for a plea of autrefois convict. The early Texas case of Thomas v. State is an example. At his trial for assault to murder, the defendant plead-
ed his prior conviction for carrying a pistol, which arose from the same transaction. The court denied the plea and adopted what it stated to be a generally accepted rule of common law: that conviction or acquittal of a minor offense is no bar to prosecution for a greater offense unless the evidential elements of the greater offense include the minor. However, in Hirshfield v. State, where the issue was whether a prior conviction of swindling barred prosecution for a forgery arising from the same transaction, the court specifically refused to follow Thomas and held that the prosecution could "carve" but one conviction out of the entire transaction. This is an application of the conventional autrefois convict rule. Nevertheless, Hirshfield contains a strong suggestion that the "carving" doctrine is intended to be something in addition to, and not a part of, autrefois convict. The court said: "[B]ut it must be borne in mind that there is another principle applicable to this subject of jeopardy which is quite distinct from that which obtains in pleas of former conviction or acquittal generally. This is the doctrine of carving . . . ." In fact, it may be more appropriate to conceptionalize autrefois acquit as one doctrine, and "carving" as a second doctrine in lieu of autrefois convict.

Unfortunately, the Texas courts have not applied uniformly the doctrine of carving in lieu of autrefois convict. In Foster v. State where the defendant fired one blast of a shotgun and wounded four men, a conviction for assault to murder one of them was held a bar to further trials for wounding the other victims. In Lillie v. State several shots were fired and there were several victims. In this instance the court of criminal appeals reasoned that even though defendant was shooting at his wife, the shot that killed his child constituted a separate transaction. Regardless of appearances, it is to be hoped that liability for multiple prosecutions from a single transaction does not depend upon how many shots are fired. If so, defendants are well advised to employ shotguns and bombs and avoid small caliber pistols.

Other Texas cases have solved the single transaction-multiple victim problem by seeking an identity of intention: "The true test in such cases must be that, if the intent to kill the one is an intention formed and existing distinct from and independent of the intention to kill the other, the two acts cannot constitute a single offense." The element of single intent
has even qualified as the “identical proof” necessary to apply the limited
d Doctrine of *autrefois acquit*; “[W]here there is one act, one intent, one vol-
tion, then appellant cannot be convicted upon an act, intent and volition
for which he has been previously acquitted.”

Lawyers may never conclude when a criminal event begins and ends, and
perhaps should not even try. Is either doctrine, “carving” or *autrefois con-
vict*, sound if it results in one prosecution for a multitude of statutory sins?
Approaches favoring single prosecution in the name of jeopardy make the
price of crime cheaper on a volume basis; this results in sound economics
but inappropriate criminology. Should a man who murders thirty in one
act have no more potential punishment than a man who murders one? Cer-
tainly, administrative sentencing techniques offer sufficient limitations to
possible prosecutorial vindictiveness. Could we not have a type of enhance-
ment of punishment in reverse, so that the multiple offender is liable to
progressively less punishment for each succeeding prosecution arising from
the same transaction? This could be accompanied by liberal rules of joinder
of prosecution at the defendant’s option. Such innovations should serve to
discourage the punitive prosecutor while preserving the privilege of the
people to punish.

C. Jeopardy Without Acquittal or Conviction

A question basic to the application of the doctrine of double jeopardy
or multiple prosecution is: when does the first “jeopardy” arise? The com-
mon law recognized only the pleas of *autrefois convict* and *autrefois acquit*;
“jeopardy” as a word of art was not known. Initially, it appeared that
Texas would follow the common law and require a final conviction before
jeopardy would attach. The Texas Legislature in 1856 declared that
“no person can be subjected to a second prosecution for the same offense
after having once been . . . duly convicted,” and that there was no pro-
tection of jeopardy arising from a trial where “a jury has been discharged
without rendering a verdict, nor for any cause other than that of a legal
conviction.”

Nevertheless, in *Powell v. State* the court refused to follow the legisla-
tive definition. Noting that the interpretation of “jeopardy” was a matter
of constitutional construction for the judiciary, the court held that jeop-
dardy attaches to and protects a defendant when he is put to trial in a court
of competent jurisdiction, upon an indictment or information in sufficient
form to confer jurisdiction, and a jury has been impaneled and sworn. This
is the generally accepted meaning of jeopardy today. Thus, where a

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52 Pizano v. State, 20 Tex. Crim. 139 (1886); Interpretative Commentary, Tex. Const. art. I, § 14; Comment, Test as to Former Proceeding in Pleas of Former Acquittal, Conviction and Jeopardy, 17 Texas L. Rev. 81 (1938).
53 Moody v. State, 33 Tex. 671 (1870).
54 1 W. Paschal, Laws of Texas 476 (3d ed. 1873). (Emphasis added.)
55 Id.
57 Id. at 350.
defendant is put to trial on an indictment with substantively defective averments, as when an impossible date is alleged, the state may dismiss and retry the defendant. The defendant may have been put to some risk, but jeopardy did not attach.

The Texas approach to jeopardy is unique in one respect—the defendant is required to enter his plea as a prerequisite to jeopardy attaching to the proceeding. This principle was elucidated in Fann v. State, where the court observed that "the plea of the defendant is an essential part of the preliminary proceedings, and until he has pleaded he is not in jeopardy, though the jury has been sworn to try him." It is submitted that such is a wise requirement, as the issue is not actually joined until the defendant enters his plea.

"The next question is, the prisoner being in jeopardy, what will deprive him of the constitutional shield, and relieve the case of jeopardy so that he can again be placed on trial for the same offense?" An obvious answer is provided where completion of the trial is prevented by acts of God or sickness of the participants or where there is a hung jury. However, when the court declares a mistrial on its own motion the question is closer. If the court discharges the jury and capriciously declares a mistrial, jeopardy will attach. Whether or not the judge at the first incomplete trial abused his discretion is said to be a question of fact to be decided at the second trial. Failure of the defendant personally to consent to the mistrial is a factor indicating an abusive discretion.

In federal jurisdictions Downum v. United States established that, if a mistrial is necessitated because of a prosecution error, the fifth amendment requires that jeopardy attach. Thus, a second trial is prohibited, even though the first trial was incomplete. In Downum the prosecution erred in not having witnesses available after an announcement of ready. Texas applied the same rule as early as 1886 in Pizano v. State, a case similar to Downum. However, in Wilson v. State the court held that jeopardy did not attach to the first trial where the defendant pleaded guilty and the only reason the trial was not completed was prosecutorial failure to introduce sufficient corroborating evidence. Similar results have been obtained where the prosecution, after discovering a misspelled name in an indictment, re-
quests a dismissal prior to verdict. All jurisdictions hold that jeopardy does not attach by reason of a verdict which has been reversed on appeal. One reason given for this rule is that, by appealing, the defendant waives his jeopardy privilege; another rationale often cited is that the judgment is not final when appealed. Texas courts have adopted both philosophies from case to case.

One may wonder why "jeopardy" should be a word of art. If the purpose of the concept is to protect the defendant from the risk, expense, and anguish of multiple, abortive attempts to take his liberty, it seems inconsistent to deprive him of his constitutional jeopardy shield simply because the prosecution blunders. Pure application of the jeopardy doctrine dictates only one exception: where the trial cannot be completed because of uncontrolled circumstances.

D. Repetitive Sentencing

The practice of repetitive sentencing is closely related to multiple prosecution. Repetitive sentencing presents two problems, each with independent considerations. The first arises when a defendant is tried and sentenced, reverses his conviction, and is retried and resentenced. Should there be any coordination between the two sentences, or may the defendant's first sentence be increased at the second trial? The other aspect of repetitive sentencing deals with enhancement. If a sentence for one crime is considered as a factor to increase a sentence for a second crime, is not the defendant placed twice in jeopardy for the first crime?

As early as 1919 the Supreme Court of the United States adopted the attitude that the jeopardy provisions of the fifth amendment did not prohibit increasing punishment on a new trial. Later federal cases have justified this rule on the rationale that when the defendant seeks a new trial, he impliedly assumes the risk of receiving a higher sentence if the new trial is granted. Texas and a majority of the states have consistently followed the federal approach. However, it is interesting to note that some of the lower federal courts are beginning to apply fourteenth amendment due process and equal protection standards to an increase in sentence at defendant's second trial. These cases deny the power to increase the first sentence unless there is a showing of severely amplified probative facts at the second trial. The application of the fourteenth amendment to protect the defendant in this instance finds some support in state jurisprudence. At least three states refuse to allow an increase in the second sentence on the

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78 King v. United States, 98 F.2d 291 (D.C. Cir. 1938). The rationale suggests that when the defendant has the new trial forced upon him, he should not be subject to a potentially higher penalty. See State v. Case, 268 N.C. 330, 150 S.E.2d 509 (1966).
ground that to do so places an undue burden upon the defendant's right to appeal."

The extent of the double jeopardy aspects of enhancing punishment depends entirely upon the definition of "jeopardy." Therefore, a comparison of the Constitutions of the United States and Texas is quite interesting. The United States Constitution provides: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Arguably, this phrase could be interpreted to apply to double prosecution only. Hence, the jeopardy concept would not interfere with a reformatory policy of enhancement of punishment which dictates that a person who has previously been punished for one crime, and then commits another, receive a higher punishment for the second crime than would a first offender. In contrast to the United States Constitution, the Texas double jeopardy provision reads: "no person, for the same offense, shall be twice put in jeopardy of life or liberty, nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction." Because the drafters of the Texas Constitution were aware of the provisions of the United States Constitution, their language takes on special meaning. The Texas provision, which seemingly distinguishes between jeopardy of life or liberty (punishment) and prosecution at trial, could reasonably be construed to mean that, in Texas, "jeopardy" protects a defendant against double punishment as well as double prosecution."

The position of the Texas courts on this subject is simple to state, but difficult to justify. Clearly, the law of Texas is that alleging and proving prior convictions during the course of a subsequent trial is not a violation of jeopardy concepts. Such action is said to be only an averment of probative facts to assist the fact-finder in assessing punishment, and not in any way an attempt to punish the defendant twice for the same crime. For some incomprehensible reason, however, the jeopardy concept is applied if the prior conviction is used for enhancement in more than one subsequent trial. In Kinney v. State the court said: "Evidently it was never intended that prior offenses could thus be made to do double duty; that is, that prior cases could be used to enhance the punishment in any given case more than once. To give the statute such an effect would be violative of the principle of former jeopardy, which inhibits a defendant from being convicted more than once for the same offense." Consistent with this phil-

80 U.S. Const. amend. V.
82 No cases have been found using Tex. Const. art. I, § 14 as the basis for decision. Furthermore, the interpretive commentary to the Texas Constitution places a different connotation upon the meaning of the clause.
84 This reasoning is not applied, however, if the prior conviction is used in successive subsequent trials for jurisdictional purposes only, viz., misdemeanor conviction for driving while intoxicated may be used as the basis of a felony driving while intoxicated indictment on two different subsequent offenses. Hill v. State, 158 Tex. Crim. 313, 256 S.W.2d 93 (1953).
85 45 Tex. Crim. 500, 501, 79 S.W. 570, 571 (1904).
osophy, in Sigler v. State it was held that if two prior convictions are alleged in prosecution A and the jury convicts, but fails to enhance, the same two prior convictions may be alleged for enhancement in subsequent prosecution B.

A particular defendant’s persistence in committing crime may well merit progressively increased punishment. It is an obvious desideratum that the regulator of the punishment be advised of the defendant’s previous sentence. Nevertheless, the notion that enhancement punishes the defendant for his past crimes is difficult to escape.

That the court of criminal appeals has added to this philosophical problem by introducing the procedural element of jeopardy in the Kinney case is unfortunate. The Kinney reasoning cannot be defended on the conventional theory that jeopardy applies only to multiple prosecutions and not to reformative punishment, because the court held that jeopardy did apply to punishment if the prior conviction was used more than once. If evidence of prior convictions can be used at all, why not more than once? More particularly, how is the theory of enhancement justified if we enhance once, but not progressively so? It is submitted that the protection of society and reformation of defendants compel the use of all prior convictions in each subsequent prosecution for enhancement.

E. Juvenile Convictions and the Jeopardy Principle

The Texas Court of Criminal Appeals has long been troubled by the question of jeopardy which arises when a finding of delinquency in juvenile court is followed, after the defendant reaches majority, by a trial related to the same transaction for violation of a penal statute. In this connection Texas development may be chronicled as follows. In 1924 in Van Hatten v. State the court, relying on the jeopardy principle, held that a juvenile declared a delinquent for commission of a felony could not at adulthood be tried for the same transaction. In 1961 in Hultin v. State the juvenile defendant assaulted one boy and killed a girl in a single transaction. At the delinquency hearing he was charged only with the assault on the boy, but his counsel wisely placed in evidence the fact that he also murdered the girl, and the defendant was found delinquent on the totality of the facts. However, when the defendant reached seventeen and was indicted and convicted of the murder of the girl, the court of criminal appeals unequivocally held that jeopardy did not apply because a delinquency hearing was not a criminal proceeding and hence doctrines of criminal law did not apply.

The next phase came in 1963 in Garza v. State. Although the facts were identical with Van Hatten, the court could not reach the same result because of the Hultin decision. It chose, therefore, to reverse Garza’s adult conviction on the basis of the due process clause of the fourteenth amend-

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86 143 Tex. Crim. 220, 157 S.W.2d 903 (1942).
ment. This was an extraordinarily bizarre holding for the Texas Court of Criminal Appeals, because not even the United States Supreme Court has been willing to apply the fourteenth amendment to this issue.\textsuperscript{91} The court has construed Garza very narrowly, however. In Ex parte Sawyer,\textsuperscript{92} Garza was distinguished on the tenuous ground that in Garza the defendant actually pleaded former jeopardy as a defense while in Sawyer he did not, but rather entered a plea of guilty to the criminal offense.\textsuperscript{93}

Apparently the questions are now moot. Recent statutory amendments provide the juvenile courts with discretion to transfer defendants at age fifteen or above directly to district courts for trial as adults\textsuperscript{94} and clearly state that no defendant who has been declared a delinquent shall be subsequently prosecuted for any offense alleged in the delinquency petition or within the knowledge of the juvenile judge at the time of the delinquency sentence.\textsuperscript{95}

### III. Procedure

The procedure for invoking a plea of jeopardy is provided by the Code of Criminal Procedure, which requires a written motion filed in advance of trial.\textsuperscript{96} The court of criminal appeals has stated that this statutory procedure must be followed, or the plea will be waived.\textsuperscript{97} Nevertheless, an important exception exists: where the second trial is held in the same court as the first, the court has judicial knowledge of the prior jeopardy and a formal motion is unnecessary.\textsuperscript{98} Another exception to the requirement of formal pre-trial motion is described in article 37.14 of the Code of Criminal Procedure.\textsuperscript{99} If a defendant is tried for a crime which includes within it lesser offenses and is convicted of one of the lesser offenses, he is automatically acquitted of the higher offense. Therefore, he need not file a formal motion alleging this acquittal at a subsequent trial.\textsuperscript{100}

However the plea may arise, the burden is always on the defendant to establish former jeopardy by a preponderance of the evidence.\textsuperscript{101} Once the plea is brought, and evidence submitted, the question of jeopardy becomes a jury issue. If the jury believes the plea to be true, it so finds and returns; otherwise it proceeds to the issue of guilt.\textsuperscript{102}

\begin{itemize}
\item \textsuperscript{91} Note 16 supra, and accompanying text.
\item \textsuperscript{92} 386 S.W.2d 271 (Tex. Crim. App. 1965).
\item \textsuperscript{93} In the Sawyer case the court used the words "former jeopardy" and "former conviction" interchangeably. Actually, they are not the same. See notes 53, 54, 56 supra. As pointed out previously, the plea of former jeopardy is not even provided in the Texas Code of Criminal Procedure. See note 28 supra.
\item \textsuperscript{96} Tex. Code Crim. Proc. Ann. arts. 27.01, 27.06 (1965).
\item \textsuperscript{97} Hamilton v. State, 115 Tex. Crim. 243, 29 S.W.2d 393 (1930) ; Lee v. State, 66 Tex. Crim. 567, 148 S.W. 567 (1912).
\item \textsuperscript{98} Black v. State, 143 Tex. Crim. 318, 158 S.W.2d 791 (1942). In many instances, of course, the second trial will in fact be in the same court as the first. Certainly this is likely where multiple felonies are charged from one escapade.
\item \textsuperscript{100} Robinson v. State, 21 Tex. Crim. 160, 17 S.W. 632 (1886).
\item \textsuperscript{101} Willis v. State, 24 Tex. Crim. 586, 6 S.W. 857 (1888).
\end{itemize}
The procedure requiring the jury to grant or deny the plea of former jeopardy does not seem in the best interest of the defendant or the state. No jury can intelligently pass upon such an issue. This abdication of responsibility further reflects the excessive confusion existing in the law of multiple prosecution. Article 27.07 should be amended to provide that pleas of jeopardy be passed upon by the court at the conclusion of the evidence. A pre-trial ruling would be even more expeditious; however, considerations of identity of the evidence and single versus multiple criminal transactions make a pre-trial ruling impossible.

IV. Analysis of Existing Statutory Provisions

It is submitted that the Texas statutes attempting to define and implement the principles of jeopardy are seriously inappropriate. At the outset, article 1.10 of the Code of Criminal Procedure is nothing more than a verbatim copy of the Texas constitutional provision. Considering the generality of the language of article 1.10, article 1.11 is seemingly needless repetition. A primary functional void of the Code is the failure to define the point at which jeopardy arises. The conflicting and uncertain opinions on this most basic aspect of the problem make statutory definitions mandatory. Certainly all courts would agree that there is no jeopardy unless the court has jurisdiction over the person and subject matter, and, in Texas, that the defendant has entered his plea to the court or jury.

Once jeopardy is clearly defined, the doctrines of former acquittal and former conviction may be dealt with efficiently. The present statutory language calling for former acquittal from proceedings "regular or irregular" merely compounds the complexity. In this instance the philosophy of the Model Penal Code is most logical— acquittal is clearly defined as a final judgment on the merits. Additionally, collateral problems of pre-

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104 Although no cases have been found suggesting this procedure, it is somewhat analogous to admission of confessions. Jackson v. Denno, 378 U.S. 368 (1964). The same problem has been discussed relative to court versus jury findings on the defense of entrapment. Masciale v. United States, 316 U.S. 386 (1942); Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932).

105 "No person, for the same offense, shall be twice put in jeopardy of life or liberty, nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction." Tex. Code Crim. Proc. Ann. art. 1.10 (1966); Tex. Const. art. I, § 14.

106 "An acquittal of the defendant exempts him from a second trial or a second prosecution for the same offense, however irregular the proceedings may have been; but if the defendant shall have been acquitted upon trial in a court having no jurisdiction of the offense, he may be prosecuted again in a court having jurisdiction." Tex. Code Crim. Proc. Ann. art. 1.11 (1966).

107 Id. See also Tex. Code Crim. Proc. Ann. art. 27.15 (1966). Ball v. United States, 140 U.S. 118 (1891), on second appeal, 163 U.S. 662 (1896), apparently first announced the doctrine that a plea of former acquittal is applicable no matter whether the proceedings were regular or irregular. A, B, and C were charged with murder and jointly tried. A was acquitted, and B and C were convicted. They appealed and won a reversal because the indictment failed to state an offense. A, B, and C were re-indicted. A's plea of former acquittal was sustained. The plea of B and C of former conviction was overruled and they were re-tried and convicted.

108 Model Penal Code § 1.08 (Proposed Official Draft 1962): When a prosecution is for a violation of the same provision of the statutes and is based upon the same facts as a former prosecution, it is barred by such former prosecution under the following circumstances:

(1) The former prosecution resulted in an acquittal. There is an acquittal if the prosecution resulted in a finding of not guilty by the trier of fact or in a determination that there was insufficient evidence to warrant a conviction. A finding of guilty of a lesser included offense is an acquittal of the greater inclusive offense,
judgment termination of the trial are well treated in the Model Code.\textsuperscript{108} Although the listings of the Model Code may seem arbitrary, they supply a predictable solution to the question of when the jeopardy shield is lost.\textsuperscript{109}

The Texas doctrine of carving but one prosecution from a single transaction appears to be both fair and workable. The doctrine should be recognized by statute, although such legislation would not resolve the debate as to what is a "single transaction" from which the carving must take place. However, the presence of the equally vague term "malice" in article 1257b of the Penal Code\textsuperscript{110} has not deterred prosecutions for murder with malice. For those cases not covered by carving, viz., where there is in fact more than one transaction or where there is statutory fractionalization of crimes, a statute should be adopted limiting the number of separate trials to which the defendant may be subjected.\textsuperscript{111} If such legislation were adopted, article 27.05 as it now reads would have to be changed.\textsuperscript{112} At the same time, the situation might be clarified if article 45.32 were repealed because it is merely repetitive of article 27.05.

Concomitant with the statutory definition of jeopardy and multiple prosecution is the doctrine of lesser included offenses. The significance of this doctrine is apparent when article 37.09, article 28.13, and article 37.14

\begin{itemize}
\item [108] Id. § 1.08(4).
\item [109] Id.
\item [112] The only special pleas which can be heard for the defendant are (1) That he has been convicted legally, in a court of competent jurisdiction, upon the same accusation, after having been tried upon the merits for the same offense; and (2) That he has been before acquitted of the accusation against him, in a court of competent jurisdiction, whether the acquittal was regular or irregular. \textsc{Tex. Code Crim. Proc. Ann.} art. 27.05 (1966) (emphasis added).
\item [113] The only special plea allowed is that of former acquittal or conviction for the same offense.\textsc{Tex. Code Crim. Proc. Ann.} art. 45.32 (1966); compare with id. art. 27.01.
\end{itemize}
are considered together.114 Texas allows a conviction for a lesser offense if it is a part of the crime actually charged.115 It becomes mandatory, therefore, that those crimes which do include lesser offenses be known. Although article 37.09 attempts to delineate some of the crimes which have lesser included offenses, the statute is in need of amendment, because the first example that it gives, murder, has been held by the Texas Court of Criminal Appeals not to be a crime of degree.116 In fact, the court has even held that the crime of assault with intent to murder with malice does not include as a lesser offense assault with intent to murder without malice.117 These decisions violate the plain language of the first two sections of article 37.09. If the statute is to be amended, it should set forth some guidelines to assist lawyers in determining which crimes include lesser offenses. Apparently, the rule now is that if the crime is not specifically listed in the statute, there can be a conviction for a lesser offense only if its every constituent element is charged in the major offense and there is no repugnancy of elements.118

Once a decision is made as to which lesser offenses are included in a crime, a joint construction of article 28.13 and article 37.14 places the law of Texas in this position: (1) if prosecution is brought upon a complaint, a judgment of acquittal or conviction does not bar further prosecution for a higher offense;119 (2) if prosecution is brought upon an information or indictment, a judgment of acquittal or conviction bars further prosecution

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The following offenses include different degrees:
1. Murder, which includes all the lesser degrees of culpable homicide, and also an assault with intent to commit murder;
2. An assault with intent to commit any felony, which includes all assaults of an inferior degree;
3. Maiming, which includes aggravated and simple assault and battery;
4. Burglary, which includes every species of house breaking and theft or other felony when charged in the indictment in connection with the burglary;
5. Riot, which includes unlawful assembly;
6. Kidnapping or abduction, which includes false imprisonment; and
7. Every offense against the person includes within it assaults with intent to commit said offense, when such attempt is a violation of the law.

If a defendant, prosecuted for an offense which includes within it lesser offenses, be convicted of an offense lower than that for which he is indicted, and a new trial be granted him, or the judgment be arrested for any cause other than the want of jurisdiction, the verdict upon the first trial shall be considered an acquittal of the higher offense; but he may, upon a second trial, be convicted of the same offense of which he was before convicted, or any other inferior thereto.

A former judgment of acquittal or conviction in a court of competent jurisdiction shall be a bar to any further prosecution for the same offense, but shall not bar a prosecution for any higher grade of offense over which said court had not jurisdiction, unless such judgment was had upon indictment or information, in which case the prosecution shall be barred for all grades of the offense.

117 Ex parte Byrd, 157 Tex. Crim. 595, 251 S.W.2d 537 (1952).
for all grades of included offenses.\textsuperscript{120} Article 37.14 apparently creates one exception to the above rules. If the prosecution is upon indictment and a judgment of conviction is reversed, there may be further prosecution for lower grades of the offense.\textsuperscript{121}

This statutory hodgepodge is untenable. Potential for retrial of degrees of offenses should not turn upon the type of accusatorial pleading used. Instead, considerations of harm done to society and criminal intent should control.\textsuperscript{122}

V. Conclusion

If we are to avoid the present quagmire with respect to the law of multiple prosecution, a new approach appears necessary. Should we start anew, we must constantly retain the notion that the purpose we are attempting to achieve is that of a single punishment for a single crime. With this in mind, considerations of limitation of a single crime to act, fact, definition, intent, or whatever, may be made simpler and more uniform. It is equally necessary that we appreciate that doctrines of res judicata, autrefois acquit, autrefois convict, and carving are not so sacrosanct as to merit the punctilious treatment we now afford them. They are, after all, merely tools to reach our ultimate principle of a single punishment for a single crime. In addition, we should realize that problems of repetitive sentencing and preverdict trial termination have no place in the law of multiple prosecution.

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\textsuperscript{120} Allen v. State, 389 S.W.2d 307 (Tex. 1965) (conviction of assault upon complaint filed in justice of peace court does not bar further prosecution by indictment for robbery by assault); Grisham v. State, 19 Tex. Crim. 504 (1885) (conviction for aggravated assault upon information in county court does bar further prosecution by indictment for assault with intent to murder). See also Foster v. State, 21 Tex. Crim. 543, 8 S.W. 664 (1888); Allen v. State, 7 Tex. Crim. 298 (1879). For definition of "information" and "indictment" see TEX. CODE CRIM. PROC. ANN. arts. 21.20, 21.21, 21.01, 21.02 (1966).

\textsuperscript{121} This language in article 37.14, note 114 supra, is in apparent conflict with TEX. CODE CRIM. PROC. ANN. art. 41.05 (1965), which states: "The effect of arresting a judgment is to place the defendant in the same position he was before the indictment or information was presented . . . " If the defendant is actually in the "same position" then seemingly he would be amenable to prosecution for all grades of an offense.

\textsuperscript{122} MODEL PENAL CODE § 1.09 (Proposed Official Draft 1962):

(1) The former prosecution resulted in an acquittal or in a conviction as defined in Section 1.08 and the subsequent prosecution is for:

(a) any offense of which the defendant could have been convicted on the first proceeding; or

(b) any offense for which the defendant should have been tried on the first prosecution under Section 1.07, unless the Court ordered a separate trial of the charge of such offense; or

(c) the same conduct, unless (i) 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 (ii) the second offense was not consummated when the former trial began.

(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 second offense.

(3) The former prosecution was improperly terminated, as improper termination is defined in Section 1.08, and the subsequent prosecution is for an offense of which the defendant could have been convicted had the former prosecution not been improperly terminated.
They are separate considerations and deal with issues obverse to the single crime, single punishment axiom. They deserve a jurisprudence of their own which allows for broader concern with issues outside the scope of the single crime, single punishment idea.

Perhaps the United States Supreme Court will bring a fresh insight to multiple prosecution, should it decide to make the fifth amendment prohibition applicable to the states. Considering the trend, there is every reason to suspect that such will be the case. In the meantime, considerable improvement could be made in the approach to multiple prosecution in Texas through the use of plenary legislative revision.