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Double Jeopardy and Federalism

Walter T. Fisher

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The author condemns the present state of the law which allows the trial of a defendant in both state and federal court on charges arising from the same conduct. Mr. Fisher analyses the policies behind the rule and the rationales available to support it. He also discusses a precedent for changing the law and proposes a legislative solution.

Walter T. Fisher*

I.

When an accused person has been tried and acquitted, he cannot normally be taken to court again for the same thing. Even if the prosecuting officer has overwhelming reasons to believe that a mistake has been made by the jury, he cannot have a second try; the accused is protected by the deeply important principle of finality that a person cannot be put in double jeopardy. Does this prevent retrial in a federal court of a Collie Leroy Wilkins or a Thomas L. Coleman who were acquitted by an Alabama state court for killing civil rights demonstrators Viola Liuzzo and Jonathan Daniels?[1] Does it protect persons such as those acquitted by a Georgia state court of the murder of Negro educator Lemuel A. Penn?[2] Maybe it does and maybe it doesn't.

For many years the Supreme Court has made an exception to the double jeopardy rule when one of the trials was in a state court and the other in a federal court.[3] This exception was confirmed in 1959 in *Bartkus v. Illinois*[4] and *Abbate v. United States*.[5] Because under our federal system the states and the federal government are separate sovereignties, the Court reasoned,[6] each is free to prosecute regardless of what the other has done. However, the Court did not regard a second prosecution as a desirable thing

*Member of the Illinois Bar

1. See N.Y. Times, Nov. 30, 1965, p. 32, col. 5, p. 33, col. 1, 5.
2. United States v. Guest, 86 Sup. Ct. 1170 (1966).
3. See, *e.g.*, United States v. Lanza, 260 U.S. 377 (1922).
4. 359 U.S. 121 (1959).
5. 359 U.S. 187 (1959).
6. 359 U.S. at 138.

for the states or the nation to do,[7] but as a weapon which must be available to protect American federalism.

A third of the states have passed statutes forbidding prosecutors to retry a man already acquitted or convicted by the federal government for the same criminal act.[8] Similarly, acts of Congress prevent federal prosecutions following a few kinds of state trials, for example, for stealing from interstate carriers,[9] and immediately following *Bartkus* and *Abbate* the Attorney General instructed all United States attorneys not to bring reprosecutions except in special cases after obtaining his permission.[10]

An indication that the Supreme Court may make this policy mandatory on the federal government and the two-thirds of the states that still permit state-nation double jeopardy came in June 1964 in *Murphy v. Waterfront Commission.*[11] This case decided, in effect, that if a man is protected against the use by a state court of his self-incriminating testimony, it cannot be used against him by the federal government — in short, that a state and the federal government must not gang up and do together what each is forbidden by the Constitution to do alone. Since neither state nor federal government can by itself put a man in double jeopardy,[12] *Murphy* should also prevent double jeopardy by crossruff.

But the problem of how to protect federal power would remain. It would be intolerable that acquittal (or conviction with a small fine) by a state court be available as an immunity bath to free a man from trial in a federal court for a federal crime. That result would violate the basic principle of federal supremacy over the states. For example, if a would-be voter is beaten to death by the sheriff to prevent him from voting, acquittal of murder by a state court ought not protect the sheriff from federal prosecution for violating the victim's civil rights.[13] If double jeopardy prevents

7. Even Justice Frankfurter in adopting it wept like the Walrus, saying that it was a result "with which a court is in little sympathy." *Ibid.*

8. See ALASKA STAT. § 12.20.010 (1962); ARK. STAT. ANN. § 43-1224.1 (1965); ILL. REV. STAT. ch. 38 § 3-4 (1961); VA. CODE ANN. § 19.1-259 (1960); statutes cited in 44 MINN. L. REV. 534, 539 n.31 (1960).

9. See 18 U.S.C. §§ 659, 660, 1992, 2117 (1964).

10. See Petite v. United States, 361 U.S. 529, 531 (1960).

11. 378 U.S. 52, 55 (1964).

12. See People v. LoCicero, 14 N.Y.2d 374, 378, 200 N.E.2d 622, 624, 251 N.Y.S.2d 953, 956 (1964).

13. For purposes of argument this article will assume that § 12(a) of the Voting Rights Act of 1965, 79 Stat. 437, 42 U.S.C.A. §§ 1971, 1973—73p (Supp. 1965), will be amended so as to punish assault or murder to deprive a person of his right to vote, etc. as severely as assault and murder are pun-

federal retrial, as I believe it ought, some other way must be found to safeguard federal supremacy. I shall try to point one out.

CONCURRENT JURISDICTION

Except for concurrent jurisdiction our problem would not arise. Concurrent jurisdiction exists where the federal government has power over a class of cases but permits the states to exercise power also; for example, state and nation each has the unquestioned power to prosecute the same man for the same robbery of a national bank. This is a prime feature of American federalism. It is unlike Canadian federalism, where crimes are classified as either Dominion or provincial.[14] The power of Congress to oust the states and preempt the field, a power essential to federal supremacy, has been exercised over many classes of cases. If the states are ousted there can be only one trial — a federal trial.[15] Where jurisdiction remains concurrent, the mere existence of the unexercised preemption power apparently is sufficient to satisfy the requirements of federal supremacy.[16] Nonexercise of the preemption power has the advantage of respecting the balance between the nation and the sovereign states. However, the double jeopardy problem is an accompanying disadvantage.

The problem has been viewed — mistakenly, I believe — as part of the inevitable clash where two unyielding sovereignties have overlapping powers. The clash really would be inevitable if the sovereignties were equally powerful. But in a field of concur-

ished by the state in which the crime took place. This could be done either by a provision analogous to the Assimilative Crimes Act, 62 Stat. 686 (1948), 18 U.S.C. § 13 (1964), or to that in the Bank Robbery Act, 62 Stat. 796 (1948), 18 U.S.C. § 2113 (1964). I also assume the constitutionality of § 12(a), but if it is not constitutional the double jeopardy problem will not, of course, arise under it. See also President's State of the Union Message, 112 CONG. REC. 129, 130 (daily ed. Jan. 12, 1966).

14. So in Canada criminal cases of overlapping sovereignties do not often arise. The text book case is shooting a man across a provincial boundary or across the international boundary with the United States. See Palmer, *Federalism and Uniformity of Laws: The Canadian Experience*, 30 LAW & CONTEMP. PROB. 251 (1965).

15. See Pennsylvania v. Nelson, 350 U.S. 497 (1956), where avoidance of double jeopardy partly motivated the decision.

16. See the concurrence of Mr. Justice White in *Murphy* where he said: "federal pre-emption of areas of crime control traditionally reserved to the States has been relatively unknown and this area has been said to be at the core of the continuing viability of the States in our federal system." 378 U.S. at 96.

rent jurisdiction the sovereignties are not equally powerful. There the nation is all powerful. It could take over the whole field. Therefore it could take over part of the field, or make a partial and limited preemption.

SOLUTION THROUGH PREEMPTION

Since the Supreme Court has, I believe, expressed in *Murphy* a principle which would prevent a state from retrying a man already acquitted or convicted in a federal court, no problem exists where federal authorities get hold of the accused man first. Under the *Murphy* rationale they try him in a federal court once and for all. Federal supremacy is maintained and double jeopardy is prevented.

But the federal authorities should not be forced to a hasty election between getting hold of the man first and losing the right to prosecute. An early election might be feasible in the case of relatively infrequent and widely publicized crimes like bank robbery and kidnapping where a race to court can be prevented by a federal statute prohibiting state prosecution for specified crimes until a given number of days after notice to the appropriate United States attorney. During this grace period the man would be available for federal prosecution in lieu of state prosecution.[17] Similarly, the statute making assassination of the President a federal crime[18] provides, without wholly preempting the field, that state jurisdiction is suspended by the mere assertion of jurisdiction by the federal authorities. Since the assassination of the President would be instantly known, this provision would seem to be a practical way of protecting federal supremacy. But with ordinary homicides and assaults it would seem wholly impractical to inform the federal authorities of every state case which might later turn out to have federal aspects.[19]

My solution is to put the burden of election on the accused. Let Congress provide that any state defendant, our sheriff for example, arrested in Alabama for an assault or homicide, may avoid the double jeopardy of subsequent federal prosecution (for depriving the victim of his federal constitutional rights) by electing to have a federal trial instead of a state trial.[20] The case

17. This analysis was suggested in Note, 53 NW. U.L. REV. 521, 527 (1958).

18. 79 Stat. 580 (1965), 18 U.S.C.A. § 1751 (Supp. 1965).

19. Justice Brennan pointed this out in *Abbate*. 359 U.S. at 195.

20. *Cf.* the accused's right to be tried by the federal court instead of by a U.S. Commissioner. See 18 U.S.C. § 3401(b) (1964).

would be stayed in the state court pending a decision by the Department of Justice on whether it wanted to take the case. Of course, the Department ought to be given the right to decline to prosecute. If the federal authorities accept the election and obtain an indictment within a specified number of days, the state prosecution would be permanently quashed, a federal trial would take place, and the result of that trial would be a final disposition of the affair. The transfer of prosecution would not be "removal" as contemplated in existing removal statutes and the state's attorney would not prosecute in the federal court. A new, federal, case would be started for conduct constituting a federal offense. If the case were declined, it would be returned to the state court. The ensuing state trial would be a final disposition of the matter. The federal government's declining to prosecute would prevent trying the defendant again in a federal court for the same conduct.

If the accused chose a state prosecution, the statute would allow another trial on the federal issues in a federal court irrespective of the decision in the state court. He would be foreclosed from contending that the subsequent federal trial was double jeopardy.

Forcing the accused to such an election would be unconstitutional if he has a constitutional right to be tried in a state court, for the retention of one constitutional right cannot be made contingent on relinquishing another.[21] But there is no such right. The state's police power would not prevent Congress from providing, for example, that persons accused of robbing national banks be tried exclusively in the federal courts. Since Congress has the power to take away completely the right to be tried by the state in an area of concurrent jurisdiction, Congress could likewise make offenses under the federal Civil Rights Act exclusively triable in the federal courts, thereby preventing state action for all assaults and murders involving deprivation of constitutional civil rights.

But it is not necessary or desirable to go so far. Such an extreme preemption would be highly undesirable, upsetting the state-federal balance and endangering the viability of American federalism. I suggest no such thing. I think Congress should preempt only to the extent necessary to protect its jurisdiction in a limited class of cases — those cases where state trial may not adequately protect federal rights and where, if there is to be only one trial (as required by the double jeopardy principle) the De-

21. *Cf.* Van Alstyne, *In Gideon's Wake*, 74 YALE L.J. 606, 613–17 (1965) (doctrine of unconstitutional conditions).

partment of Justice should be given the power to make it a federal trial.

If the federal government could compel transfer to the federal court in these circumstances, our Alabama sheriff could not complain of being exposed to the danger of retrial in a federal court for the same conduct of which he may have been acquitted (or convicted) in Alabama. Since trial in Alabama is an option held by grace of Congress, and something to which he is not constitutionally entitled, he could not complain that the option is restricted and not as large as he would like. He could avoid the issue and double jeopardy, too, by opting for the federal trial which Congress could have imposed upon him.

As between a state and the federal government this proposal would not affect the present practice of initiating criminal proceedings. The state would continue to initiate proceedings under its police power as is presently the practice. It would then try the defendant unless he made timely exercise of his proposed right of transfer. The Department of Justice could continue to follow its policy of deferring to the state in certain situations. The Department would take cases where state prosecution was deemed likely to be inefficient or insincere and where for other reasons a federal prosecution was deemed appropriate.

It would seem constitutionally necessary to permit the defendant to challenge federal jurisdiction of the subject matter irrespective of his having requested the transfer. Coercing him into federal court, unless federal jurisdiction actually exists, would be improper. But, with certain exceptions, both he and the Government ought to be compelled to raise the issue before trial, contrary to the present rule permitting questions of subject-matter jurisdiction to be raised at any stage.[22] Disposing of the federal jurisdiction issue at the outset of the trial is particularly desirable in double jeopardy cases. If trial takes place before the question of jurisdiction is settled, faithfulness to the double jeopardy principle would militate against a second trial by the state. However, under present law there would be a second, state, trial for if the federal jurisdictional issue cannot be decided until after trial, and if it is decided against jurisdiction, there is no way to protect the accused against the jeopardy of a state trial. Present thinking

22. The American Law Institute's committee believes this change would be constitutional. A.L.I., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 106–10 (Proposed Final Draft No. 1, April 19, 1965).

places the policy against double jeopardy second to the empty rationale that the accused had not been in jeopardy because there was no federal jurisdiction.

If jurisdiction cannot be determined before trial it seems to me that the double jeopardy principle is so important that if the federal government has carried a case through trial but finally fails to sustain its claim of jurisdiction, a state — and more broadly, our American federalism — ought to take the risk of letting the accused escape. Here federal supremacy is not involved.

If on further study the particular proposal made in this article should turn out to be objectionable, I believe some other use of federal preemption will provide the path to a sound solution. There must be some way within the framework of federal supremacy to eliminate the constitutional scandal of double jeopardy. There must be some way by which the federal government can protect the finality of any judgment rendered by a federal court or by a state court in a federal field.[23]

II.

A proposal such as mine has the further merit of enabling the courts to avoid troublesome constitutional issues that are likely to arise. This is because the solution is a legislative one giving the accused a higher standard of protection than the bare constitutional minimum available.[24] Under such a statute those constitutional issues would not be reached.

23. As Justice Black said in dissent, "If Congress has power to make certain conduct a federal crime, it also has the power to protect the national interest . . . . [F]ederal laws can easily be safeguarded without requiring defendants to undergo double prosecutions." 359 U.S. at 202 n.2.

24. The federal government has gone a short distance along the legislative route by forbidding federal retrials for train wrecking and stealing from interstate carriers. 18 U.S.C. §§ 1992, 659, 660, 2117 (1964). And the Civil Rights Act of 1964 provides that acquittal or conviction shall bar a proceeding for criminal contempt based on the same conduct and vice versa. 78 Stat. 268, 42 U.S.C. § 2000 h–1 (1964), *overruling* United States v. Mirra, 220 F. Supp. 361 (S.D.N.Y. 1963). Legislative escape from the double jeopardy maze is advocated by Professor Wechsler, Wechsler, *Foreword* to Winter 1960 U. ILL. L. FORUM. See generally Note, 65 YALE L.J. 339 (1956). Legislative provision against interjurisdictional double jeopardy has been enacted by the Field Code states. See, *e.g.*, People v. LoCicero, 14 N.Y.2d 374, 200 N.E.2d 622, 251 N.Y.S.2d 953 (1964). Almost all the states have enacted the provision of the Uniform Narcotic Drug Act barring state prosecution of persons acquitted or convicted under the federal narcotic laws for the same conduct. UNIFORM NARCOTIC DRUG ACT § 21.

THE INTRUDING CONSTITUTION

A digression on the inflated role that the Constitution has been permitted to assume in the law of double jeopardy may make the discussion clearer.

The canon that constitutional issues ought not to be decided unless they are necessarily reached is too often forgotten in our fascination with all constitutional problems. "At the first sound of a new argument over the United States Constitution and its interpretation the hearts of Americans leap with a fearful joy. . . . Like King Harry's men before Harfleur, they stand like greyhounds in the slips . . .," quoted Justice Frankfurter.[25] But Justice Frankfurter himself joined his colleagues and his predecessors in overlooking the canon in double jeopardy cases.[26]

We too often forget that double jeopardy is not only a constitutional matter but a matter of common law, statute, or statutory interpretation. Even if there were no constitutional prohibition against trying a man repeatedly for the same offense, it would be prevented by statute (as in Massachusetts)[27] or by the common law defense of double jeopardy (as in Maryland[28] and North Carolina[29]). Thus, each statutory offense is to be construed as subject to the double jeopardy principle; and rightly so, because the legislature could hardly have intended that a person be tried twice for the same conduct under the same provision of the penal code. The same intention can be safely imputed to the legislatures of all the states, and to Congress too. That is the reason why a man cannot be tried twice under the identical statute, not because it is unconstitutional. Thus the constitutional issue need not be reached.

Distinguishing between constitutional and unconstitutional double jeopardy would be irrelevant if there were only one standard of double jeopardy. Then every determination of the scope of double jeopardy under the common law or statutes would be a

25. Quoted from The Economist (London), May 10, 1952, p. 370, in Youngstown Sheet & Tube Steel Co. v. Sawyer, 343 U.S. 579, 594 (1952).

26. See Abbate v. United States, 359 U.S. 187 (1959); W.T. Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. CHI. L. REV. 591, 600–02 (1961).

27. See Commonwealth v. Burke, 342 Mass. 144, 172 N.E.2d 605 (1961).

28. Wampler v. Warden, 231 Md. 639, 191 A.2d 594 (1963).

29. State v. Birckhead, 256 N.C. 494, 124 S.E.2d 838 (1962) (impliedly in the North Carolina constitution). Vermont and Connecticut, the two other states without constitutional provision against double jeopardy but with some statutory recognition of it, likewise regard themselves as bound by the common law. State v. Vincent, 25 Conn. Supp. 96, 197 A.2d 79, 81 (1961); State v. Woodmansee, 124 Vt. 387, 205 A.2d 407 (1964).

determination of its scope under the Constitution. But there are at least two kinds of double jeopardy: that which is merely forbidden by the common law as altered from time to time by statute (which might be called "fringe"[30] double jeopardy) and that which is so shocking to our standards of ordered liberty that it violates the due process clause of the fourteenth amendment (which might be called "basic" double jeopardy).[31] In *Palko v. Connecticut*[32] it was pointed out that double jeopardy under the fifth amendment may be different from that under the fourteenth and that permitting a state to appeal in a criminal case was not so basic as to be unconstitutional.[33] The difference, however, has been overlooked by many judges obsessed by the notion that double jeopardy is always a constitutional precept and hence always the same precept. This view that double jeopardy is a monolithic concept for all purposes leads to a common misapprehension that when *Palko* decided that the fourteenth amendment did not apply to a case of fringe double jeopardy it meant that the fourteenth amendment did not apply to double jeopardy at all and that the states would be free to engage in the basic double jeopardy of repeated trials under substantially identical sections of a state's penal code — or even under the same section.

The present discussion is not concerned with the particular content of basic double jeopardy under the fourteenth amendment, *i.e.*, whether *Palko* drew the line in the right place in permitting appeal by the prosecution, thus classifying it merely as fringe double jeopardy like such matters as when a judge, without sufficient justification, declares a mistrial after some evidence has been taken.[34] Nor are we concerned with the particular content of fifth amendment double jeopardy, nor where its lines are to be drawn between fringe and basic double jeopardy, if they ever are, as I believe they ought. Certainly government appeal of an acquittal is forbidden by the fifth amendment.[35]

30. The term "fringe area" is applied to double jeopardy in 1959 U. ILL. L. FORUM 677, 678 n.10.

31. In United States *ex rel.* Hetenyi v. Wilkins, 348 F.2d 844 (2d Cir. 1965), it is called the "basic core" of double jeopardy.

32. 302 U.S. 319 (1937).

33. *Id.* at 328; see United States *ex rel.* Hetenyi v. Wilkins, 348 F.2d 844 (2d Cir. 1965).

34. See Gori v. United States, 367 U.S. 364 (1961); Note, 77 HARV. L. REV. 1272 (1964); 36 N.Y.U.L. REV. 730 (1961).

35. Even if authorized by an amendment of 18 U.S.C. § 3731 (1964). But future thinking may change. See Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1 (1960).

My concern is with the either-constitutional-or-nothing approach, which produces the unfortunate result of freezing every fringe feature of double jeopardy into the Constitution, either into the fifth amendment as the Court has often said it is doing, or into the fourteenth by possible future reversal of *Palko*. For example, in a recent five-to-four decision none of the Justices questioned the Court's statement that premature discontinuance of a trial "presents a question under the Double Jeopardy Clause of the Fifth Amendment."[36] It apparently did not occur to them that the constitutional question could have been avoided in the absence of an act of Congress expressly authorizing retrial under those circumstances, and that the question could be much better decided by interpreting federal penal statutes as embodying the common law defense of double jeopardy or by exercising the supervisory jurisdiction of the Court.[37] The use of either of these nonconstitutional approaches would have the advantage of freeing the Court from the dilemma of depriving the accused of some minor feature of common law double jeopardy protection or of freezing a minor matter into the Constitution. It would have the further advantage of giving Congress some latitude in regulating relatively minor features of double jeopardy in the manner recommended for state legislation by the American Law Institute.[38] Similar advantages would be available to the states in interpreting their own constitutions.

The "Separate Gist" Theory

Even if, as I believe it will, the Court chooses to apply the reasoning of *Murphy v. Waterfront* to prevent basic double jeopardy between state and nation, it might still catch our southern sheriff by turning to the "separate gist" theory. This theory is based on something the Court said fifty years ago[39] and has been ignored during the period of obsession with the federal-state dichotomy. As counsel for Bartkus I failed to tempt the Court with this method of distinguishing civil rights cases. In *Abbate* the Government argued this separate gist theory as an alternative ground. The Court did not adopt the theory but Justice Brennan thought

36. Downum v. United States, 372 U.S. 734 (1963).

37. See the reasoning of Mr. Justice Harlan in his dissenting opinion in *Murphy*. 378 U.S. at 91. See also Note, 77 Harv. L. Rev. 1272, 1289 (1964).

38. *Cf.* Model Penal Code § 1.08(4) (1962), which would give the states the same latitude.

39. Gavieres v. United States, 220 U.S. 338, 342 (1911); see Cramton, *Pennsylvania v. Nelson*, 26 U. Chi. L. Rev. 85, 101 (1958).

it so dangerous that he wrote a separate opinion condemning it.[40] Though it may be constitutional it would involve continually troublesome constitutional or other issues that could be avoided by my suggested preemption legislation. It is an undesirable solution.

Here it is, applied to our example: The crime of violating a person's civil rights has a different gist, purpose or gravamen[41] from the crime of murder, and so the double jeopardy principle does not apply. The reasoning goes that the state and federal offenses are not the same; that, while they deal with the same conduct of the accused, one protects the citizen against homicide in general and the other protects against interference with his federal constitutional rights. Since each statute has its own purpose and policy and protects a different social interest from the other, it would follow that conviction or acquittal under one ought not to bar a prosecution under the other. Furthermore, the argument runs, the crime of robbing a federally-insured bank and the state crime of bank robbery have the same gist because they do not involve different social interests. Thus the bank robber would be protected from a second prosecution while the sheriff would not. This sets the task of dividing federal crimes into two classes, those which have the same gist as the corresponding state crime and those which do not.

The validity of the argument is to be tested not only by the practical difficulty of classifying the crimes but also by the scope of the double jeopardy principle. Without stopping to discuss the reasons behind the principle[42] it may be summarized as meaning that a defendant shall not be subjected to a second prosecution for what is essentially and practically the same thing as the first. The point is that in both trials our Alabamian would be tried for what is essentially and practically the same homicide, though state and nation have different purposes. Every federal crime has to some extent a different purpose from the similar state crime; otherwise there would be no basis for federal jurisdiction. Rob-

40. 359 U.S. at 196. Unimpressed by Justice Brennan's argument, the U.S. District Court in Maryland upheld a federal retrial after state acquittal for the same conduct "where the interests sought to be protected by each sovereign are different." United States v. Sutton, 245 F. Supp. 357, 362 (D. Md. 1965).

41. "Gravamen" is the word used in Prince v. United States, 352 U.S. 322, 328 (1957), in construing two statutes as not so different as to authorize double punishment.

42. See Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451–52, 506 (1963); W. T. Fisher, *supra* note 26, at 592–94; Mayers & Yarbrough, *supra* note 35.

bery of a national bank, for example, has been made a federal crime partly in order to protect the national banking system, even though in passing the statute Congress may, as is indicated by the legislative history, have had no wish to protect national banks more than state banks, but only to make the federal courts and the Federal Bureau of Investigation available to combat bank robberies.[43] Of course the truth is that there is no essential difference between federal and state bank robbery or between federal and state murder and assault. In each case state and nation are trying to stop the robbery, murder or assault. Congress simply feels that for one reason or another the state government sometimes does an inadequate job and that the federal government can do it better.[44] So it uses the federal aspect as a jurisdictional basis for bringing the aid of federal forces in protecting the same interests as those protected by state law.[45] Even though the federal interest must always be there to justify the federal legislation, its presence is irrelevant to the policy which prohibits double jeopardy. Every reason underlying the double jeopardy principle is fully applicable to prevent federal retrials for pairs of crimes based on the same conduct of the accused. There is no clear way of dividing the paired crimes into two classes, one where the gist is the same and one where it is different.

The separate gist theory has no other purpose than to protect federal supremacy. The protection would apply only to that limited class of cases where the gists are different, as in the historical example of liquor prohibition and the current example of civil rights. Other protection must be found where the state and federal crimes have the same gist, *e.g.*, bank robbery. True, where the gist is the same there are unlikely to be many occasions when a federal trial will be needed to maintain supremacy. Everybody, Alabamians included, is against bank robbery. In that field there is the usual excellent administrative cooperation between state

43. See H.R. REP. No. 1461, 73d Cong., 2d Sess. (1934).

44. For the reasons see HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1096–97 (1953).

45. "Courts find themselves talking nonsense like the often repeated declaration that the use of the mails is the 'gist' of the offense of mail fraud when all that is meant is that this federal jurisdictional element must, of course, be alleged and proved." Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROB. 64, 79 (1948). Justice White concurring in *Murphy*, stated: "National enactments which touch upon these areas are not designed directly to suppress activities illegal under state law but to assist state enforcement agencies in the administration of their own statutes." 378 U.S. at 96 n.3.

and federal officers both in investigation and as to selection of the appropriate court for trial. But the climate of local opinion may change in some field. Or nationwide public indignation may arise against a particular type of crime accompanied by greater public confidence in the efficiency of federal law enforcement.[46] It is likely advisable for the federal government to be ready to enter such a situation. Restricting federal supremacy to those situations where the state and federal statutes have separate gists might be dangerous. The Court, except for its reasoning in that fifty year old case,[47] has, rightly or wrongly, refused to make the attempt. Retrial has been permitted not because federal jurisdiction makes the federal crime different from the state crime, separate gist or no, but because the double jeopardy principle itself was tossed aside as an obstacle to the predominant claims of the federal system.[48] This is still double jeopardy, just as robbery by a diplomat is still robbery though court action is thwarted by a competing policy.

It is my thesis that tossing double jeopardy aside is not necessary to federal supremacy, which can be fully protected by preemption legislation along the lines of my suggestion.

CONCLUSION

My view of federal-state double jeopardy under the present confused state of the law may be summarized as follows:

(1) The Constitution (under the fifth and fourteenth amendments, respectively) prevents both the nation and the states from engaging in basic double jeopardy. This is a reversal of a long history, including *Bartkus* and *Abbate*. But it does not impair federal supremacy, because Congress remains free to preempt a federal field to the extent necessary to bar a prior state trial.

(2) As far as the federal constitution (*i.e.*, the fourteenth amendment) is concerned, the states are free to engage in fringe double jeopardy. Any protection in the state courts against these relatively minor features must be left to the states under the *Palko* rule. It is to be hoped that the states will, as far as possible, do this under the common law or by legislation rather than by freezing these minor features into their own constitutions by judicial interpretation.

(3) Fringe double jeopardy is forbidden to the federal courts.

46. See HART & WECHSLER, *op. cit. supra* note 44, at 1097.
47. Gavieres v. United States, 220 U.S. 338, 342 (1911).
48. See, *e.g.*, United States v. Lanza, 260 U.S. 377 (1922).

The Supreme Court has usually felt that the reason for this was the fifth amendment, but I hope I have shown that the constitutional question is not necessarily reached. Similarly, it is my view that the holdings in federal cases involving double jeopardy can best be rested on the common law or the supervisory jurisdiction of the Court. The constitutional question ought not arise until Congress passes a statute expressly authorizing duplicate prosecutions in some situations that the Court finds to involve either (a) basic double jeopardy or (b) fringe double jeopardy of so serious a nature or so offensive to deeply ingrained historical principles that it must be deemed part of the constitutional double jeopardy forbidden by the fifth amendment (even though not of the extreme kind forbidden by the fourteenth). But, under *Murphy*, using either the common law or the fifth amendment, the Court ought to prohibit a federal prosecution, for the same conduct, under a federal statute having a different gist from the state statute. This would be a reversal of *Abbate*, but here, too, it would not impair the power of Congress to bar a prior state trial by preempting the field to the extent necessary.

What I have said about the present law is filled with doubts. Many of them involve serious constitutional issues, some of which could best be postponed indefinitely, and some, it is to be hoped, forever. The best way to accomplish this would seem to be by some such legislation as that suggested in this article.