

Courts, Law, and Justice

Double Jeopardy

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Chapter 3: Double Jeopardy

The double jeopardy rule prohibits being tried in federal or state court more than once for the same criminal offense. The Double Jeopardy Clause of the Fifth Amendment to the Constitution states that: "... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb..." In practice, it can be used as a procedural defense in that the defendant may plead that they have previously been acquitted or convicted for the same offense. This is a matter that is usually raised and resolved prior to a trial, a rare exception to the general rule prohibiting appeals from nonfinal orders. If the defendant is able to produce evidence substantiating the assertion of double jeopardy, the court may not allow the trial to proceed.

Double jeopardy is an ancient and seemingly simple doctrine in the law that enjoys widespread public support. Contemporary legal scholars and decision makers consider the protection against double jeopardy to be a fundamental aspect of the relationship between citizens and their government. While the doctrine itself seems straightforward, its interpretation has generated controversy and misunderstanding. Some of this can be attributed to the evolution of the double jeopardy doctrine and to historical shifts in its application. Other disagreements have emerged concerning the application of its cornerstone elements and granting of exceptions to the doctrine. Some legal scholars have concluded that the controversy is grounded in basic differences among members of the U.S. Supreme Court concerning the [p. 32 ↓] fundamental intent of the double jeopardy doctrine itself. As a consequence, members of the Court and other legal experts find it difficult to agree in the interpretation and application of key terms such as *acquittal*, *multiple punishments*, and *same offense*. Even the concept of what constitutes jeopardy is open to interpretation.

History of the Double Jeopardy Rule

The guarantee against double jeopardy can be traced to Greek and Roman times, eventually becoming established in the common law of England. Lord Coke's interpretation of English law in the 17th century served to standardize the definition of double jeopardy as a combination of three common-law pleas: *autrefois acquit*, *autrefois convict*, and pardon. Any of these pleas were sufficient to bar the retrial of the defendant for the same crime (*United States v. Wilson*, 1975). In his 1772 *Commentaries*, Blackstone originated the use of the term *jeopardy* in describing the principle that one should not be brought into jeopardy of his life more than once for the same offense.

The Massachusetts Colony Constitution was the first colonial charter that guaranteed protection against double jeopardy in its Declaration of Rights. When the U.S. Constitution was ratified in 1787, it did not include a similar declaration. This was rectified by the inclusion of the Bill of Rights in the first 10 amendments to the Constitution. It was James Madison's intention that a constitutional amendment should be included preventing the government from abusing guarantees against double jeopardy. While the final language included in the Fifth Amendment suggests offenses punishable in a corporal manner (i.e., "jeopardy of life or limb"), it has been interpreted to extend protection to all criminal acts. Since the inclusion of the Double Jeopardy Clause in the Constitution, the Supreme Court has attempted to define the specific intentions of those involved in its drafting. At various times, the Court has concluded that its purpose is to prevent the government from wearing down and falsely convicting innocent citizens; prevent the negative financial, emotional, and social consequences of repeated prosecutions; preserve the integrity of final criminal case decisions; restrict prosecutorial discretion in the charging process; and eliminate judicial discretion to impose multiple punishments for the same offense.

When the Bill of Rights was ratified in 1791, double jeopardy guarantees were expressly provided in only two of the 13 states. In fact, for most of the nation's history, the Double Jeopardy Clause has only restricted criminal proceedings in federal courts. As late as 1937, in *Palko v. Connecticut*, the Supreme Court rejected an argument that the Fourteenth Amendment extended all of the procedural guarantees found in the first eight amendments to the states. In the majority opinion, Justice Cardozo asserted

that while some guarantees in the Bill of Rights formed the basis of liberty, the Double Jeopardy Clause was not counted among these fundamental rights. By 1969, the U.S. Supreme Court reversed its position, concluding in *Benton v. Maryland* that the double jeopardy prohibition is a fundamental right, and therefore extended to criminal proceedings in the states under the Due Process Clause of the Fourteenth Amendment. An unintended consequence of *Benton* was a dramatic increase in the number of U.S. Supreme Court reviews of double jeopardy laws and their application, particularly in the 1970s.

The Attachment of Jeopardy

Central to consideration of the Double Jeopardy Clause is the moment when jeopardy attaches in a criminal proceeding. If jeopardy has been attached, through the final disposition of the case by acquittal or conviction (or in some instances of justified termination without a final order), the government is prohibited from conducting subsequent criminal proceedings. However, if jeopardy has not attached, the government is not barred from starting a new criminal proceeding against the defendant. In practice, jeopardy attaches when a criminal trial has commenced before a competent court. In a jury trial, this occurs when the jury is impaneled and sworn. In a bench trial, jeopardy is attached when the court begins to hear evidence, that is, when the first witness is sworn.

Most states have implemented two-tier trial systems. In these systems, criminal defendants can choose an initial (first-tier) bench trial and, if they are satisfied with the process and outcome, the order of the court is considered final. However, if the defendant is not satisfied with the initial outcome, they can demand a jury trial without claiming that there was an error in the bench trial. The Supreme Court held *injustices of Boston Municipal Court v. Lydon* (1984) that a retrial after the first-tier trial does not constitute a violation of the Double Jeopardy Clause, even if the second-tier trial results in greater punishment for the defendant, as held in *Colten v. Kentucky* (1972). The Court has acknowledged the significant benefits of the two-tier system for both the state and the defendant, and based their decisions on the concept of continuing jeopardy, that is, where criminal proceedings against the accused have not run their full course. The full course of a criminal pro [p. 34 ↓] ceeding occurs when a defendant is

acquitted, accepts their conviction as final, or has exhausted their methods of appeal. Since defendants can make a voluntary choice to participate in a second-tier trial, the jeopardy originally attached in the first-tier trial has not been finalized, but is continued into the second-tier trial, and thus the two-tier system does not violate the Constitution's Double Jeopardy Clause.

Same Offense

The Double Jeopardy Clause expressly prohibits re-prosecution for the same offense. But when can a defendant successfully claim that an offense for which they have been acquitted or convicted is the same? For many years, the Supreme Court followed Blackstone's guideline that two different offenses were the "same" if one is necessarily included in the other. As Blackstone noted in his *Commentaries*, a conviction of manslaughter precludes a later trial for murder because manslaughter is an offense necessarily included in murder. This approach served well into the 20th century, but with the proliferation of overlapping criminal statutes, it has become increasingly difficult to apply Blackstone's guideline. As a remedy for this concern, the Supreme Court constructed a test for same offense in *Blockburger v. United States* (1932). The Court asserted that when the same criminal conduct violates more than one statute, offenses are different if each requires proof of an element (i.e., defendant's mental state, the prohibited action, and/or lack of legal justification) that the other does not. If each requires proof of an element the other does not, then neither can be included within the other.

Using the Blockburger test, there is little controversy about a crime episode that includes the commission of two separate legal offenses involving separate legal elements, such as in the instance of an armed robbery that results in the murder of the victim. Since the armed robbery and murder are not the same prohibited action, a prior conviction for the armed robbery in this crime episode will not bar prosecution in a subsequent murder trial. Also, the Double Jeopardy Clause cannot be invoked if the offender breaks the same law twice; the "same offense" is not defined as a legal category of crime, but rather as the same behavior. The robber, for example, can be tried on multiple occasions for different robberies if they are separate and unrelated.

The question of how closely related the events need to be before the prohibition against double jeopardy can apply is open to discussion, and has been applied inconsistently. For example, in the case of the illegal sale of controlled prescription drugs, the sale of 50 pills is considered a single offense.

[p. 35 ↓] The defendant cannot face 50 separate prosecutions for the sale of controlled substances if the sale occurred in a single transaction. On the other hand, if the defendant sold 20 pills in one transaction and then immediately sold an additional 30 pills to the buyer in a separate transaction, prior prosecution on the first transaction may not bar prosecution of the second.

The case of *Ashe v. Swenson* (1970) is helpful in defining “same offense.” In this case, six men were playing poker when three or four armed men broke into the room and robbed the poker players. Ashe, one of the men accused of robbery, was charged with robbing Knight, one of the players. While it was clear in court that a robbery occurred, the evidence identifying Ashe as one of the robbers was weak. Ashe was acquitted because of insufficient evidence. Six weeks later, Ashe was again brought to trial for robbing Roberts, another player. Ashe's motion to dismiss the prosecution based on his previous acquittal was denied, and he was convicted after the prosecutor strengthened the identification evidence. The state appellate courts upheld the conviction, but it was overturned in the Supreme Court. The Court made two points in *Ashe* and similar cases. First, a crime that involves multiple victims can be considered to be a single offense, so trying a suspect for separate violations against each victim is a violation of the Double Jeopardy Clause. Second, since Ashe had been found to not be among the group who robbed Knight in the first trial, he could not possibly have been found guilty of robbing Roberts in the second trial. *Ashe v. Swenson* is a classic example of how the civil law concept of collateral estoppel has been extended into criminal court considerations of double jeopardy.

Exceptions to the Double Jeopardy Clause

There are a number of exceptions to the Double Jeopardy Clause that have emerged through its application and interpretation by the Supreme Court. Some significant examples are related to consideration of separate sovereignties, the termination of

cases without acquittal or conviction, and the government's right to appeal final case outcomes.

Separate Sovereignities

A consequence of the federalist style of government is the division of authority between local, tribal, state, and national governments. Each one has its own legal jurisdiction in that each has a legitimate range of power and authority. The individual, however, is subject to the authority of all of [p. 36 ↓] these governments. The Constitution recognizes the separate sovereignty of federal and state governments, by indicating that governmental powers are delegated; some exclusively to the federal government, such as the authority to make war, and some concurrently to both federal and states governments, such as the authority to tax citizens and corporations.

Federalist governmental structures present challenges for double jeopardy in same-offense and multiple-punishments considerations. While the Double Jeopardy Clause prohibits being retried for the same offense, it is common for multiple governments to have jurisdiction over the same criminal offense or episode. The Supreme Court has repeatedly held that successive prosecutions involving that same alleged criminal conduct is not a violation of the Double Jeopardy Clause if the cases are brought by separate and distinct sovereignties, each of which have an independent interest in punishing the alleged criminal behavior. The Court has concluded that two offenses have occurred, each under that law of the two government entities, so the prohibition against double jeopardy for the same offense has not been breached.

The separate sovereignties exception is limited to governments that are in fact separate and distinct from each other. So, for example, the Court has determined that states and their subdivisions are distinct from the federal government (*Bartkus v. Illinois*, 1959), but states and their municipalities are not distinct from each other (*Abbate v. United States*, 1959). Federal and tribal governments have also been determined to be separate and distinct (*Wheeler v. United States*, 1978), as are states from each other (*Heath v. Alabama*, 1985).

Petite Policy

The authority of the federal government is limited by administrative policy in prosecuting cases tried earlier in state courts. Although there is no legal prohibition, Congress has expressly stated that with some offenses, a final order of conviction or acquittal in state court should preclude any subsequent federal prosecution for the same acts. In 1969, the U.S. Attorney General implemented a Justice Department policy of successively prosecuting in federal courts only when the reasons were compelling. This policy ultimately became known as the Petite Policy, after *Petite v. United States* (1969). As stated in the *United States Attorneys' Manual*, this policy precludes successive federal prosecution based on the same acts unless the matter must involve a substantial federal interest, the prior prosecution has left that interest unresolved, and the admissible evidence will probably be sufficient to obtain a conviction for a federal offense. Successive federal prosecutions must be approved [p. 37 ↓] by the appropriate assistant attorney general, who should bring the case to the attention of the Attorney General before proceeding.

Government Appeal

An acquittal would seem to present the strongest case for the vigorous application of prohibitions against double jeopardy, barring any government appeal in an effort to retry the accused. However, some exceptions preclude the application of double jeopardy guarantees to some cases that have resulted in acquittal. These exceptions center almost exclusively on the interpretation of what is considered a final and legitimate acquittal. The strongest argument that has been made in favor of placing few, if any, limitations on government appeals was made by Justice Holmes in dissenting to the majority opinion in *Kepner v. United States* (1904). He asserted that defendants were not placed in jeopardy, even after acquittal, as long as all legal actions were part of the same cause. His concept of “continuing jeopardy” was rejected at the time, but the Court has also rejected the opposite; that there should be a prohibition against any appeal by the government against any ruling in favor of the defendant in a criminal case.

The most obvious grounds for granting an appeal filed by the government is when the defendant obtained an acquittal by fraud. If the prosecution can produce evidence beyond a reasonable doubt that the judge or jurors were bribed or otherwise coerced into returning a verdict of not guilty, the acquittal can be set aside upon appeal. The second, and more common, grounds for the exception is when the trial judge acts in error or in an arbitrary manner, with the result of depriving the government of the ability to obtain a legitimate criminal conviction. This is best described by the Court in *United States v. Wilson* (1975). In *Wilson*, the judge granted a final motion to dismiss on the grounds that the trial violated the defendant's rights to a speedy trial. Interestingly, the judge's decision occurred after the jury had returned a verdict of guilty against Wilson. The government appealed the dismissal and the defense countered with a claim of double jeopardy since the final motion of dismissal amounted to an acquittal. The Court rejected the defense's argument, noting that since the government could be granted relief from an erroneous trial decision without holding a second trial, double jeopardy protections were not violated. The dismissal was set aside, and the verdict was reinstated.

The Court's decision in *Wilson* is consistent with that in the case of *Ball v. United States* (1896). In *Ball*, the Supreme Court actually heard the case twice, on two separate matters. First, the Court ruled in favor of the defendant, who appealed their convictions of murder on the grounds of a faulty indictment. The case was remanded to the trial court, where the original flawed indictment was dismissed and the defendants were retried on a new indictment. When they were reconvicted, their case came back to the U.S. Supreme Court, based on the defendant's claim of double jeopardy. This was rejected, since the indictment was not a part of the trial itself, and thus not covered by the double jeopardy prohibition against multiple trials.

Termination without Acquittal or Conviction

The Double Jeopardy Clause prohibits re prosecution when the case is dismissed without legal cause after the trial has begun, the judge has declared a mistrial and dismissed the jury (without the consent of the defendant), or the charges have been dismissed in return for the defendant becoming a witness for the state. However, this prohibition only applies when the trial phase has begun. As a result, if a defendant's

case is dismissed at the preliminary hearing, or if a judge dismisses an indictment (or information) the defendant may be tried for the same offense at a later date.

However, there are exceptions where the trial itself may be terminated without subjecting the defendant to jeopardy for a re-trial. One example is if a jury is discharged for failure to agree on a verdict or some other legal necessity, or due to the illness of a juror, the defendant may be retried. Also, if a mistrial is granted at the defendant's request, the defendant may then be retried for the same offense.

Application in Non-Criminal Proceedings

The Double Jeopardy Clause is specifically intended to apply in the prosecution of criminal cases, and the Supreme Court has repeatedly ruled that civil proceedings do not bar subsequent criminal prosecution and vice versa, as in *Hudson et al.* (1997). Over time, the interpretation of double jeopardy has been broadened to apply in noncriminal court proceedings as well.

The test to determine if double jeopardy is applicable in a civil case is if the judgment awarded is remedial or punitive in intent. In *United States v. Halper* (1989), the Supreme Court held that the general test is if the civil penalty is overwhelmingly disproportionate to compensating the government, thus serving primarily a retributive or deterrent purpose. After Halper was convicted in criminal court for submitting 65 false claims for Medicaid reimbursement, the government sought in civil court to fine him \$2,000 [p. 39 ↓] for each false claim as well as for additional government legal costs. Since the Supreme Court determined the civil award was far in excess of the real costs or damages for all of the false claims, the Court concluded that the subsequent civil action was punitive in intention, and thus prohibited as a violation of double jeopardy protections. This test formed the basis of the Ninth U.S. Circuit Court's decision in *Montana Department of Revenue v. Kurth Ranch* (1994), where members of the Kurth family were convicted of drug possession in the form of several marijuana plants. In a separate civil action, the state attempted to collect a tax on the marijuana in an amount in excess of eight times the market value of the marijuana. The Court upheld a lower court determination that this constituted a violation of the Kurth's constitutional protection against double jeopardy.

A critical application of double jeopardy in civil proceedings also occurs in the juvenile court. Since *Kent v. United States* (1966) and *in re: Gault* (1967), many rights of due process in criminal proceedings have been extended to juveniles. A significant concern, however, has been the waiver of juveniles into adult criminal court after a juvenile court proceeding and judgment, which was allowed in several states for a number of years. Juvenile waiver from civil to criminal court might not constitute a double jeopardy concern if it occurred before jeopardy was attached to the case. For example, in pre-trial proceedings, states such as California held that waiver to adult court for prosecution could occur after a trial has begun in juvenile court, at time of disposition, and even after the child has served time in a juvenile facility. In *Breed v. Jones* (1975), the Supreme Court held that a juvenile who has been exposed to jeopardy in juvenile court adjudication cannot be retried in adult court on the same charge. Underlying this determination is that the final disposition in the juvenile civil court suggests the termination of jeopardy in the first instance, and that the disposition was retributive in intent. Thus, even though the juvenile court is formally civil in nature, the juvenile offender (in this case, Gary Jones), could not be exposed once again to jeopardy in the adult criminal court.

Pro: Arguments in Favor of Double Jeopardy

There is wide consensus in the United States concerning the general principle of protecting against repeated criminal proceedings for the same offense, and the prohibition of double jeopardy is considered to be a fundamental constitutional right guaranteed to citizens. The Double Jeopardy Clause is part of the Bill of Rights, which provides both substantive freedoms (the right of assembly, free speech and press, and to petition) and procedural [p. 40 ↓] guarantees (the right of due process of law, jury trial, and legal counsel; and freedom from searches and seizures, self-incrimination, cruel and unusual punishment, and double jeopardy). Both substantive and procedural guarantees are considered to be fundamental to the rule of law in democratic societies because they embody the basic idea of constitutionalism itself: the limitation of government power and a protection of individual liberty.

The importance of the Double Jeopardy Clause is clear in this passage written by Justice Hugo Black in *Green v. United States* (1957):

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

As noted in *Green*, the prohibition of double jeopardy is consistent with common values concerning fairness in society. Given the general grounding of American values in Judeo-Christian religious precepts, it is not surprising to find reference to prohibitions against double jeopardy in the Old Testament. In a more contemporary context, Tom Tyler asserts in *Why People Obey the Law* (2006) that the occurrence of crime is best predicted by the perceived legitimacy of the criminal justice system. A key element of this perception is that justice procedures are fair and unbiased, including the belief that those suspected of a crime are not repeatedly punished, formally or informally, by representatives of the justice system. If the system is perceived as procedurally fair, citizens are more likely to conform to the rules of conduct promoted by that system. Conversely, if the justice system acts in a capricious and procedurally unfair way, citizens feel less bound to adhere to the law.

Con: Arguments against Double Jeopardy

Given the cultural and historical traditions of our democratic form of government, public opinion and scholarly discussion is consistently supportive of the general concept of protecting citizens from double jeopardy. In practice, however, the interpretation and implementation of the double jeopardy doctrine raises some important questions concerning the degree to which citizens are actually protected and justice is maintained.

[p. 41 ↓] First, some justice officials and crime control advocates are concerned that the double jeopardy doctrine might be overly protective in its implementation. One

instance where justice might be thwarted is when new information arises after a case has reached a final outcome in the courts. As the Supreme Court held in *Fong Foo v. United States* (1962), even the discovery of new evidence that conclusively proves the guilt of someone previously acquitted is not sufficient to overcome the prohibition against retrial on the same offense. In reviewing the implementation of other procedural rights, the Court has attempted to balance the general concern for public safety and welfare with technical procedures intended to protect the procedural rights of accused persons and have acknowledged the need for some “good faith” exceptions. For example, the Court has held that some violations of the exclusionary rule prohibiting the use of improperly collected evidence in a criminal trial are permissible, as in *United States v. Leon* (1984). At this time, however, no such exception has been implemented to limit the double jeopardy doctrine.

Second, while citizens expect the law to be applied fairly and consistently, this expectation can be difficult to achieve in practice. For example, use of the Petite Rule since its inception has been inconsistent; apparently, the Supreme Court and U.S. Attorney General did not anticipate that the federal government would become much more involved in federalizing crimes and take such an aggressive and outcome-oriented approach in their response to drug and firearm offenses.

Finally, implementation of the double jeopardy doctrine is one of the many arenas in which the larger constitutional concern of balancing the rights of citizens and the government's responsibility to promote the public welfare is played out. Many believe the Supreme Court should take a leadership role in creating such a balance. It seems reasonable that there would be some incremental reinterpretation of the Double Jeopardy Clause since it became part of the Constitution in 1791, but one might expect that repeated application and description would allow the Court not only to keep policies up to date, but also bring clarity and refinement to such an ancient concept. Unfortunately, that has not been the case; the double jeopardy doctrine has become increasingly complex and confusing in interpretation. For example, the Court's position in *Lydon* is grounded upon Justice Holmes's definition of continuing jeopardy in *Kepner v. United States* (1904). By using the continuing jeopardy rationale, *Lydon* allows the government, at least in theory, to retry accused persons in a second-tier court even if an acquittal occurred in a first-tier proceeding.

The Court acknowledged in *Burks v. United States* (1978) that their decisions “can hardly be characterized as models of consistency and clarity.”

[p. 42 ↓] In fact, *Burks* overruled four other Supreme Court cases from the previous 25 years, and *Scott v. United States*, also resolved in 1978, reversed a major double jeopardy decision (*Jenkins v. United States*) decided only three years earlier that was intended to clarify the double jeopardy doctrine. The confusing state of double jeopardy guarantees is explained in the Fifth Amendment:

In large part, the re-evaluation of doctrine and principle has not resulted in the development of clear and consistent guidelines because of the differing emphases of the Justices upon the purposes of the clause and the consequent shifting coalition of majorities based on highly technical distinctions and individualistic fact patterns. Thus, some Justices have expressed the belief that the purpose of the clause is only to protect final judgments relating to culpability, either of acquittal or conviction... in so doing, of course, they are likely to find more prosecutorial discretion in the trial process. Others have expressed the view that the clause not only protects the integrity of final judgments but, more important, that it protects the accused against the strain and burden of multiple trials... Still other Justices have engaged in a form of balancing of defendants' rights with society's rights to determine when reprosecution should be permitted when a trial ends prior to a final judgment.



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Further Readings

See Also: Asset Forfeiture Jury System.

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