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Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU

Susan Herman

DOUBLE JEOPARDY ALL OVER AGAIN: DUAL SOVEREIGNTY, RODNEY KING, AND THE ACLU

Susan N. Herman*

When the federal government decided to reprosecute the Los Angeles police officers who beat Rodney King, anyone who recognized me as a civil libertarian asked me why it was not considered double jeopardy to retry defendants who had been acquitted in state court. My answer was aggravatingly more complex than the answer most members of the public received when they asked that question. Typically, lawyers (or journalists who had consulted lawyers) assured the public that the reprosecution was indubitably constitutional—because the well-established dual sovereignty doctrine creates an exception to usual double jeopardy rules. This answer sounded suitably technical and suitably conclusive. It also seemed to comport with the public's general sense that the American civil rights movement had depended heavily upon the historical prerogative of the federal government to reprosecute in cases where states did not adequately prosecute or punish civil rights violators. Doubts about the fairness of the second trial put to rest, observers of the federal retrial could then comfortably focus on the civil rights of the victim of the beating rather than the civil liberties of the perpetrators.

The American Civil Liberties Union (ACLU), I explained, had recently studied the issue of double jeopardy and had concluded that the officers had indeed been "twice put in jeopardy" for the "same offense,"[1] as the Double Jeopardy Clause prohibits. The ACLU adopted this position for two reasons. First, the Supreme Court's current position on dual sovereignty, as the vast majority of most commentators and legal scholars have agreed,[2] is misguided. Second, at least one of the double jeopardy arguments presented by the

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* Professor of Law, Brooklyn Law School. B.A. Barnard College, 1968; J.D. New York University, 1974. The author is also a member of the National Board of Directors of the American Civil Liberties Union and its Executive Committee, and Chair of the ACLU Due Process Committee.

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1. The Double Jeopardy Clause provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.

2. *See infra* note 32.

reprosecution of at least one of the defendants, Sergeant Stacey Koon,[3] fell within a potential exception to the dual sovereignty exception: The Supreme Court has never held that reprosecution following an acquittal is permissible under the Double Jeopardy Clause.[4]

Those who were open to the possibility that the dual sovereignty exception might not be an eternal monolith often had a follow-up question: Can it truly be said that the officers were twice put in jeopardy for the "same offense" when the federal prosecution charged a civil rights violation, while the state prosecution had charged crimes defined differently? Here, my response varied depending on when the question was asked. At the time of both trials, the definition of "same offense" maintained by the Supreme Court focused not on the technical definition of the crimes charged, but on whether or not the offenses were based on the "same conduct."[5] The conduct on which the state and federal prosecutions rested—the use of excessive force against Rodney King—was plainly the same. This "same conduct" rule, however, proved to be short-lived. In June of 1993[6] the Supreme Court retreated from this definition and resumed its pre-1990 definition of "same offense": the so-called *Blockburger* rule,[7] under which the two prosecutions in the King case would probably not be considered the "same offense."[8] When the law changed, I stressed another point: Even if the officers were not tried twice for the "same offense" under the Supreme Court's revised definition, they should nevertheless be entitled to the benefit

3. Sergeant Koon is the only defendant who was convicted at the second trial after having been acquitted on all relevant charges at the first, and is therefore the only one who could appeal on the basis of the double jeopardy claim left open under current Supreme Court case law. Laurence Powell was also convicted in the second trial, but the jury did not reach a verdict on the relevant charges against him at the first trial. Theodore Briseno and Timothy Wind were acquitted at the second trial, so their pretrial double jeopardy arguments are now moot.

4. *See infra* text accompanying notes 103–133.

5. Grady v. Corbin, 495 U.S. 508 (1990). This case was decided on May 29, 1990 and was overruled on June 28, 1993 by United States v. Dixon, 113 S. Ct. 2849 (1993). The beating of Rodney King took place in March 1991, the state trial in the spring of 1992, and the federal trial in the spring of 1993.

6. *Dixon*, 113 S. Ct. 2849.

7. Blockburger v. United States, 284 U.S. 299 (1932). The rule derived from *Blockburger* defines successive prosecutions for the same conduct as not violating the Double Jeopardy Clause so long as each prosecution is based on a charge requiring proof of an element not required by the other. *Id.* at 304.

8. Professor Cassell concludes that the offenses charged in the second Rodney King trial are, under this test, not the "same offense." Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original Meaning and the American Civil Liberties Union's Schizophrenic Views on the Dual Sovereign Doctrine*, 41 UCLA L. REV. 693, 702–04 (1994). I see no reason to doubt that the courts would agree with his analysis on this point. *Accord* Paul Hoffman, *Double Jeopardy Wars: The Case for a Civil Rights "Exception,"* 41 UCLA L. REV. 649, 656–57 (1994).

of facts found in their favor by the first jury. In other words, a prosecutor should be collaterally estopped from relitigating facts already found in a defendant's favor, even if the relitigation is in a different jurisdiction. This argument, related to the argument that even dual sovereign prosecutions should be disallowed following an acquittal, also strikes at an unsettled area of the law.[9]

The debate within the ACLU, both before and after the Los Angeles trials, focused on questions markedly different from these. The ACLU had examined double jeopardy law a few years before the Rodney King incident. During those and subsequent discussions, there was little disagreement among the members of the National Board of Directors that the ACLU should oppose the dual sovereignty doctrine as a harmful, misconceived, unsustainable legal fiction. There was also little disagreement that the ban on double jeopardy should be interpreted to prohibit successive prosecutions on the basis of the same conduct, rather than hinging on the vagaries of the wording or construction of criminal statutes. Among members of the ACLU Board of Directors, the chief source of disagreement—frequently lively and impassioned disagreement—was whether the ACLU could advocate more meaningful double jeopardy protection than the Supreme Court has afforded in recent years and, at the same time, support federal civil rights prosecutions, even if those prosecutions follow a state prosecution for the same conduct.

During each of the Board's debates on this issue, the principal choice considered was whether to oppose the dual sovereignty doctrine in all instances, or to oppose the dual sovereignty doctrine except in federal prosecutions for civil rights violations.[10] Those advocating the limited exception were concerned that to prohibit federal civil rights reprosecutions on double jeopardy grounds would be to choose the civil liberties of individual defendants over the civil rights of many. The rationale for permitting a civil rights exception was that in federal civil rights prosecutions, countervailing the double jeopardy guarantee is another federal constitutional right—a right of equality.

For a civil libertarian, choosing between constitutional guarantees is "Sophie's Choice." The ACLU's struggles with this double jeopardy

9. This argument, based on the ruling in Ashe v. Swenson, 397 U.S. 436 (1970), that the Double Jeopardy Clause includes a collateral estoppel principle, will be discussed *infra* in text accompanying notes 118–133.

10. Board members also considered advocating broader exceptions to the no successive prosecution principle, such as allowing successive prosecutions by the federal government generally, or in cases where the first prosecution was a sham, if they believed that a broader exception was necessary to maintain a principled position. For a discussion of the scope of the various exceptions explored, see *infra* text accompanying notes 22–94.

issue—both procedural and substantive—showcase fundamental questions about constitutional interpretation and about reconciling competing constitutional demands of civil rights and civil liberties. A majority of the ACLU Board of Directors concluded, on more than one occasion, that the apparent conflict between the constitutional guarantees of equality and freedom from double jeopardy is not an inherent tension, but a product of history. Ironically, it is precisely because of the Supreme Court's cavalier acceptance of dual sovereignty that the federal government has been able to rely on its presumed authority to reprosecute civil rights violators, conducting occasional show trials instead of developing more meaningful strategies for addressing the problem of police misconduct. But to reach this conclusion, one must travel through a thicket of constitutional interpretation issues: less restrictive alternatives, originalism and the role of history in constitutional interpretation, stare decisis, the relationship between the Fourteenth Amendment and the Bill of Rights, the constitutional status of various notions of federalism, and the very nature of individual rights.

In this Essay, I will describe first the procedural and then the substantive struggles with these issues that has led the ACLU repeatedly to the same conclusion: The Double Jeopardy Clause's prohibition against multiple prosecutions cannot be discarded in order to serve the prosecutorial interests of the state or federal governments, even where those interests are exceptionally worthy, or even where those interests coincide with individual rights.

I. PROCEDURAL BACKGROUND

It was not until 1980, when the ACLU was considering filing a brief in the case of *United States v. DiFrancesco*,[11] that the absence of a comprehensive ACLU policy[12] on interpretation of the Double Jeopardy Clause be-

11. 449 U.S. 117 (1980). The issue in this case was whether it is double jeopardy for the government to seek a sentence enhancement on appeal under a dangerous offender provision. The ACLU filed a brief arguing that the relitigation of facts previously found in the defendant's favor constituted double jeopardy. *See* Amicus Curiae Brief for the ACLU, United States v. DiFrancesco, 449 U.S. 117 (1980) (No. 79-567). The Court ruled that the Double Jeopardy Clause was not implicated because revising a sentence does not threaten the same range of interests as repeated decisions regarding guilt or innocence.

12. The ACLU Board of Directors, comprised of lay members of the organization, adopts policies on a range of civil liberties issues to guide ACLU staff in litigation, lobbying, and educational efforts. These policies are compiled in the Policy Guide of the ACLU, available from the author or any ACLU office.

came noticeable.[13] The ACLU's Due Process Committee, a standing committee that often considers and recommends policy to the Board of Directors on criminal justice matters,[14] was asked to study the Double Jeopardy Clause and recommend a comprehensive double jeopardy policy. In September of 1989, the Committee, after almost a year of researching and discussing double jeopardy law as it was and as it ought to be, wrote a report to the Board recommending that the ACLU argue for a number of changes in the Supreme Court's then current interpretation of the Double Jeopardy Clause.[15] The Committee unanimously concluded that the Double Jeopardy Clause was being interpreted so restrictively that its protections had become illusory and recommended that the ACLU advocate restoring protection of the core values of the Clause in three ways.

First, the Committee recommended that the ACLU advocate broadening the definition of what constitutes the "same offense" for purposes of the Double Jeopardy Clause. At that time, the Supreme Court applied the so-called *Blockburger* test to define the "same offense." Under *Blockburger*, a successive prosecution is not for the same offense if the charge on which each prosecution is based contains an element not contained in the other.[16] The Committee supported the "same offense" definition long advocated by Justice Brennan: that successive prosecutions based on the same transaction are im-

13. Before 1980, the ACLU had raised double jeopardy arguments only in cases where the relevant interpretations of the Double Jeopardy Clause seemed so clear that no special study was thought necessary to decide what position the ACLU should adopt. The ACLU had, for example, been active with respect to the landmark dual sovereignty case of Bartkus v. Illinois, 359 U.S. 121 (1959). ACLU Board member Walter Fisher was appointed by the Supreme Court to represent Bartkus, which he did with great zeal as well as skill. (Anthony Lewis has described Fisher's efforts on behalf of Bartkus in this case—arguing the case one term, winning the right to reargue it the next term, successfully lobbying the Illinois legislature for a statute to address Bartkus's situation, successfully petitioning the governor for clemency, and finally, when Bartkus was pardoned, giving him a job—as an example of a truly heroic effort by assigned counsel. *See* ANTHONY LEWIS, GIDEON'S TRUMPET 45–46 (1964).) The ACLU supported efforts by the Attorney General after the *Bartkus* decision to constrain federal prosecutors' discretion to bring successive prosecutions. *See, e.g.*, ACLU Press Release, Apr. 7, 1959 (quoting a telegram sent to Attorney General Rogers).

The ACLU also raised double jeopardy arguments in other contexts. *See, e.g.*, Letters from Lawrence Speiser, Director, ACLU, Washington, D.C. office, to Senator James Eastland, Chairman, Committee on the Judiciary (Aug. 26 & 27, 1960) (urging the Senate to hold hearings on whether the Fugitive Felon Act should be amended to avoid double jeopardy problems).

14. The Committee includes practicing and academic attorneys, most of whom practice or have experience in criminal defense or prosecution, or in constitutional law relating to the criminal process.

15. Report from the ACLU Due Process Committee to the ACLU National Board of Directors (Sept. 22, 1989) [hereinafter ACLU Due Process Committee] (on file with the author or the ACLU office) (discussing the proposed ACLU policy on double jeopardy).

16. Blockburger v. United States, 284 U.S. 299, 304 (1932). The subsequent fate of the *Blockburger* test is recounted *supra* in text accompanying notes 5–8.

permissible.[17] Shortly after this recommendation, in 1990, Justice Brennan persuaded the Court to adopt a modified version of his recommended approach, defining "same offense" as any offense resting on the same conduct.[18]

The Committee's second set of recommendations advocated modification of current rules concerning when reprosecution is permissible following a mistrial or reversal on appeal.[19] Finally, the Committee recommended that the ACLU oppose the dual sovereignty exception to the Double Jeopardy Clause, most recently interpreted by the Supreme Court in *Heath v. Alabama*,[20] to permit two states to try a defendant for the same capital murder.[21] At a meeting in October 1989, the Board overwhelmingly endorsed

17. *See* Ashe v. Swenson, 397 U.S. 436, 448 (1970) (Brennan, Douglas, & Marshall, JJ., concurring); *see also* Grubb v. Oklahoma, 409 U.S. 1017 (1972) (Brennan, Douglas, & Marshall, JJ., dissenting); Simpson v. Florida, 403 U.S. 384, 386 (1971) (per curiam) (Brennan & Douglas, JJ., concurring). Justice Brennan's position was based on his conclusion that the *Blockburger* test left too much control of constitutional principles to legislatures which have almost unlimited power to define crimes. He believed that focusing on the conduct or transaction involved was the only meaningful way to avoid the chief evil the Double Jeopardy Clause aimed to prevent by prohibiting multiple prosecutions based on the same incident regardless of how many ways a legislature could carve that incident into different statutory offenses. A test focusing on the elements of crimes charged is too easily subverted or overcome by legislative decisions about how to divide up or word the offenses that may arise out of one incident and, in any event, does not prevent the state from harassing defendants with multiple prosecutions in a case where a prosecutor could easily have joined all of the charges in one proceeding. In *Ashe*, for example, the defendant was charged with robbing the players at a poker game. Under state law, the prosecutor claimed the right to try Ashe as many times as there were poker players in the game, despite the fact that he had been acquitted by the first jury, apparently on the basis that the jurors doubted that he had been one of the robbers. *Ashe*, 397 U.S. at 437–40.

18. Grady v. Corbin, 495 U.S. 508 (1990), *overruled by* United States v. Dixon, 113 S. Ct. 2849 (1993). This test differs from the "same transaction" test advanced by Brennan in that it permits reprosecution based on the same transaction as long as different conduct is the focus of the subsequent prosecution. Corbin was convicted of traffic offenses arising out of an incident in which he was driving while intoxicated and his car jumped the median, hit two oncoming vehicles, and killed one of the drivers. Apparently due to prosecutorial disorganization, Corbin was charged with and allowed to plead guilty to several minor offenses based on this incident before a homicide charge was brought. Under the same transaction test, no further prosecution would have been permissible. Under the test used by the Court, however, Corbin could be prosecuted for homicide so long as the prosecution was not based on conduct that was the basis for the charges of which he had already been convicted—he could not be charged with homicide based on his intoxication, for example, because he had previously been convicted of driving while intoxicated, but he could be charged with homicide based on reckless driving.

19. *See* ACLU Due Process Committee, *supra* note 15, at 4, 11, 42–49.

20. 474 U.S. 82 (1985).

21. Heath was charged with capital murder in Georgia, and agreed to plead guilty in order to avoid the death penalty. He was sentenced to life imprisonment in Georgia and then reprosecuted for the same murder in Alabama, convicted, and sentenced to death. The dual jurisdiction was possible because Heath was charged with murdering his wife, whose body was found in Georgia after she was kidnapped from her home in Alabama. The Supreme Court's double jeopardy analysis is discussed *infra* in text accompanying notes 52–60.

the Committee's recommendations as to the first two issues, and also expressed a great deal of support for opposing the dual sovereignty doctrine, at least in part. Most Board members were troubled by the manipulation of jurisdiction in *Heath*, but some members expressed concern that opposing dual sovereignty generally would preclude support of reprosecutions in federal civil rights cases.

Because this was the first time the ACLU had considered whether it could reconcile unconditional support of federal civil rights reprosecutions with unconditional support of the ACLU's conception of the Double Jeopardy Clause, the Board voted to appoint an ad hoc committee to consider whether the proposed opposition to the dual sovereignty doctrine should be modified by creating an exception that would allow support of federal civil rights reprosecutions.[22] After meetings and additional research, this Committee voted unanimously, with one abstention, to adopt the Due Process Committee's proposed policy opposing the dual sovereignty doctrine without exception. The new Committee could not find any principled basis for treating federal civil rights offenses differently from other crimes. Adopting the principle of the less restrictive alternative, the Committee concluded that the federal government could serve its interest in prosecuting civil rights offenders in a number of ways without resorting to multiple prosecutions. Therefore, the new Committee proposed modifying the Due Process Committee's report by adding a footnote to describe the desirable role of the federal government with respect to civil rights prosecutions. This footnote stressed that the federal government need not put individuals twice in jeopardy in order to enforce civil rights laws, but could instead use alternative methods of vindicating the federal interest in civil rights. The alternatives discussed included federal preemption of state prosecutions in cases where the likelihood of effective prosection seemed questionable, state removal of state prosecutions to federal court for similar reasons, enhanced cooperation of federal and state authorities to strengthen state prosecutions, using civil suits for damages or injunctive relief as a deterrent to civil rights violations, and punishing as an independent violation of federal civil rights law attempts by state actors to immunize colluding defendants from successful prosecution by

22. This new Committee was composed of some members of the Due Process Committee who had filed the report and some members of the Board who were skeptical about the Committee's recommendation. In addition to considering whether to adopt an exception limited to federal civil rights reprosecutions, the Committee also considered (1) exempting the federal government from the successive prosecution ban; (2) allowing successive prosecutions only if the first prosecution had been a sham; or (3) accepting the dual sovereignty doctrine if no defensible exception could be drawn. *See infra* text accompanying notes 23–94.

conducting a sham prosecution.[23] In January 1990, the Board adopted the policy, with additional material from the clarifying footnote, as proposed by both Committees.[24]

Soon thereafter, in 1991 and 1992, came the beating of Rodney King, the unsuccessful state prosecution of the officers responsible, and the burning of Los Angeles. The ACLU of Southern California, which had been in the forefront of efforts to curb police brutality in Los Angeles, advocated, as part of its campaign against police misconduct, a federal reprosecution of the officers.[25] This dramatically real context seemed so different from the academic debates several years before that some believed that previously unexamined questions might be raised about applying the double jeopardy policy in this case. Was the policy truly inconsistent with advocating reprosecution in such extreme circumstances, and if so, did the policy value an individual civil liberty at the expense of what a large constituency saw as a critical issue of civil rights? Should the ACLU, by arguing against reprosecution on double jeopardy grounds, ally itself with officers whose conduct most members did not approve, rather than with the victim of those officers? In June 1992, while the federal government moved ahead with its own investigation of the officers, a bare majority of Board members[26] concluded that without additional study they were not sufficiently certain about the

23. Memorandum from the Ad Hoc Committee on Dual Sovereignty Issues in Double Jeopardy to the ACLU National Board of Directors (Dec. 8, 1989) [hereinafter Ad Hoc Committee] (on file with author). The reasoning behind these conclusions is discussed more fully *infra* in text accompanying notes 24–94.

24. The Policy, as adopted, provides in pertinent part:

> (5) There should be no exception to double jeopardy principles simply because the same offense may be prosecuted by two different sovereigns. [State or federal governments, therefore, would be prohibited from reprosecuting a defendant previously prosecuted in another jurisdiction for charges arising out of the "same transaction." Prosecutors should coordinate their efforts to maximize their ability to serve the interests of their own jurisdictions without impeding the defendant's double jeopardy rights.]
>
> In addition, there are many tools at the disposal of Congress or federal prosecutors to prevent the states from eviscerating the power of the federal government to vindicate important interests, such as those embodied in the civil rights laws. These might include preempting state prosecutions, creating a federal removal statute for situations where federal prosecution is deemed desirable, or prosecuting or enhancing penalties for activities designed to impede federal prosecution. Because of the existence of less restrictive alternatives, even important federal interests do not justify balancing away a defendant's rights under the double jeopardy clause.

POLICY GUIDE OF THE AMERICAN CIVIL LIBERTIES UNION, Policy #238a (1993) (footnote in bracketed text).

25. For an account of some of these efforts, see Hoffman, *supra* note 8, at 652 n.12.

26. The actual vote was 32 to 31 to suspend operation of that portion of the double jeopardy policy that expressed general opposition to the dual sovereignty doctrine. Minutes from ACLU National Board Meeting 3 (June 1992) (discussing Double Jeopardy Policy #238a).

application of the double jeopardy policy in this singular context to endorse taking a public position on either side of this explosive issue.[27]

Once again, a Committee was appointed to research, discuss, and present this issue to the Board. Hoping to test whether a middle ground was possible, the members of the Committee agreed to consider what would be the most acceptable, or least objectionable, form an exception might take if an exception were to be adopted. This new Committee again rejected the options of abandoning opposition to the dual sovereignty doctrine, creating a wholesale exception for the federal government and an exception for all "sham" prosecutions. The exception submitted for the Board's consideration, without vote or endorsement, would have allowed reprosecution only of state actors who had violated an individual's federal civil rights, and whose initial prosecution had been a sham or otherwise defective.[28]

After another extensive, thoughtful, and impassioned (although completely cordial) discussion, the Board once again concluded that the opposition to successive prosecutions could not accommodate an exception for reprosecutions in one category of cases, even if that category was as important to the ACLU as the vindication of civil rights. This renewed debate took place amidst an accompanying chorus of public and press criticism of the ACLU for vacillating,[29] for the substance of the position the Board con-

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27. In the several intervening years, there had been considerable turnover on the Board and some new members, not having participated in the earlier debate, were unsure why the second prosecution was characterized by some as being for the same "offense," and unsure why the ACLU's history of supporting federal civil rights prosecutions was not a sufficient reason to read an exception into the double jeopardy policy. Some Board members who believed that the policy should not be changed nevertheless voted for reconsideration on the theory that if the Board did not, as presently constituted, understand and support the organization's double jeopardy policy, there was little hope of explaining the policy to others who would not read or debate the subject as extensively.

28. The exception would have read:

> Nothing in this policy precludes a federal prosecution of an individual acting under color of state law, or acting in concert with one acting under color of state law, for violation of federal civil rights, even if that individual has previously been prosecuted by state authorities for another offense based on the same event which forms the basis for the federal civil rights prosecution, provided that the initial state prosecution was not full and fair for one of the following reasons: 1) the prosecution was a sham or involved collusion between the defendant(s) and prosecuting officials; or 2) there was a procedural defect in the initial state prosecution that undermines the reliability of the outcome; or 3) the outcome was so grossly disproportionate to the outcomes of comparable cases as to give rise to a suspicion that the outcome was tainted by racial bias.

Report from the Special National Board Committee on Double Jeopardy Policy to the ACLU National Board of Directors 8 (Mar. 8, 1993) (on file with author).

29. *See* Charlotte Allen, *The King Cops and Double Jeopardy*, WALL ST. J., May 20, 1992, at A17 (criticizing the ACLU for reconsidering its position); Alex Beam, *Double Jeopardy*, BOSTON GLOBE, Apr. 21, 1993, at 19 ("Where is the American Civil Liberties Union in all this? Twisting itself up in knots.").

sidered adopting,[30] and for the substance of the position the Board actually did adopt.[31]

What is most notable in retrospect, after the clamor, after the procedural imbroglios, and after the fervor of the repeated debates, is the consistency of the ACLU's position. Again and again, majorities of committee and Board members, whatever their initial reactions, became convinced that the original policy, as proposed, was correct: Successive prosecutions for the same conduct should be considered to violate the ban on double jeopardy, even if these prosecutions take place in different jurisdictions, and even if the prosecutions are to vindicate interests as dear to the ACLU as the interests underlying other criminal statutes are to other constituencies.

II. ON THE MERITS

A. Assuming Away Dual Sovereignty

A great deal has been written about the Supreme Court's dual sovereignty doctrine, almost all of it critical. Commentators have virtually uniformly argued against the dual sovereignty theory the Court has forged, advocating its abolition or at least limitation.[32] About half of the state legislatures have

30. *See* Beam, *supra* note 29 (expressing hope that the ACLU would reject the proposed exception and continue to take the position that the second Rodney King trial was double jeopardy); Nancy Hollander, *The ACLU's New Thinking on Double Jeopardy*, THE CHAMPION (Nat'l Ass'n of Crim. Def. Att'ys, Houston, Tex.), Apr. 1993, at 3 (also expressing hope that the ACLU would maintain its position, and fear that it might not: "[T]he ACLU is preparing to compromise its principles in the case of dual sovereignty.").

31. *It's Not Double Jeopardy in L.A.*, N.Y. TIMES, Apr. 8, 1993, at A20 (editorial criticizing the ACLU position that dual sovereignty is a legal fiction on the ground that "such arguments don't meet the legitimate needs of separate governments in a Federal system"). For discussion of the substance of this critique which echoes the Supreme Court's result-oriented jurisprudence in this area, see *infra* text accompanying notes 32–70.

Of course, the ACLU also had supporters for the position it adopted. *See, e.g.*, Ronald J. Allen, *Freedom From Double Jeopardy, Our Lost Liberty*, WALL ST. J., Mar. 17, 1993, at A15 (arguing that the federal retrial should be considered double jeopardy); Jeffrey A. Meyer, *Double Jeopardy in the King Case*, N.Y. TIMES, Apr. 19, 1993, at A18 (letter to the editor) ("I am not a member of the American Civil Liberties Union. But one need not be a civil libertarian to take issue with 'It's Not Double Jeopardy in L.A.' . . . your attack on the A.C.L.U. position that the second trial of the Rodney King defendants violates the constitutional guarantee of double jeopardy.") (citation omitted).

32. *See, e.g.*, Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1 (1992) (advocating dramatic limitation of the dual sovereignty exception); Walter L. Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. CHI. L. REV. 591 (1961) (common law prohibits reprosecution, even if dual sovereignty is correct as a matter of constitutional law); J.A.C. Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309 (1932) (the Constitution guarantees freedom

declined the broad power to reprosecute afforded by the Supreme Court.[33] In fact, promptly after the Court first authorized a state reprosecution for an offense that had already been the subject of a federal prosecution, in *Bartkus v. Illinois*,[34] the Illinois legislature repudiated the authority offered, enacting

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from successive prosecutions for a single wrongful act); Harlan H. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. MIAMI L. REV. 306 (1963) (disagreeing that criminalization by two sovereigns renders one action two discrete "offenses"); Evan Tsen Lee, *The Dual Sovereignty Exception to Double Jeopardy: In the Wake of* Garcia v. San Antonio Metropolitan Transit Authority, 22 NEW ENG. L. REV. 31 (1987) (arguing that the premises of the dual sovereignty doctrine have been undercut by revisions in the Court's current views on federalism); Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. REV. L. & SOC. CHANGE 383, 426 (1986) (dual sovereignty doctrine, with its "antilibertarian" approach, is the product of concerns of a different era—the era of Prohibition—and should be subject to re-evaluation); Lawrence Newman, *Double Jeopardy and the Problem of Successive Prosecutions*, 34 S. CAL. L. REV. 252 (1961) (neither history of the Double Jeopardy Clause, common law, nor United States case law supports the dual sovereignty doctrine); George C. Pontikes, *Dual Sovereignty and Double Jeopardy: A Critique of* Bartkus v. Illinois *and* Abbate v. United States, 14 W. RES. L. REV. 700 (1963) (successive prosecutions under federal and state statutes representing substantially the same policies should be barred); Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281 (1992) (the Double Jeopardy Clause is a structural provision implementing the principle of popular sovereignty; the dual sovereignty doctrine rests on an inaccurate notion of sovereignty and undermines the jury's power to check government authority); Note, *Double Jeopardy and Federal Prosecution After State Jury Acquittal*, 80 MICH. L. REV. 1073 (1982) [hereinafter Note, *Double Jeopardy*] (double jeopardy principles should preclude retrial, at least after a jury acquittal); Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538 (1967) (advocating a "separate interests" test to limit successive prosecutions); James E. King, Note, *The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution*, 31 STAN. L. REV. 477 (1979) (stating that the *Bartkus/Abbate* rule is overbroad in that it does not distinguish cases where the interest of the second jurisdiction is unique).

33. Twenty-four states have enacted legislation limiting cross-jurisdictional successive prosecutions. *See* Braun, *supra* note 32, at 5 n.15.

The United States Department of Justice has also adopted as a policy that, absent unusual circumstances, no one should be punished twice for crimes arising out of the same criminal act, even if such punishment does not violate the Constitution. *See* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL, tit. 9, § 2.142 (1992). This policy is referred to as the *Petite* policy, after the case of Petite v. United States, 361 U.S. 529 (1960), where on motion of the government on the ground that it is the general policy of the United States that several offenses arising out of a single transaction should be alleged and tried together rather than being made the basis of multiple prosecutions, the Supreme Court vacated and remanded a conviction with directions to vacate the judgment and dismiss the indictment. The policy originated less than one week after the *Bartkus* case, when Attorney General Rogers called upon federal prosecutors to use self-restraint to avoid the potential for unfairness in successive prosecutions unless the reasons were compelling. *See* Benjamin R. Civiletti, Remarks on *Petite* Policy Before the United State Conference 4 (Nov. 1977) (on file with author).

34. 359 U.S. 121 (1959). Bartkus was prosecuted twice, by federal and state authorities, for the same bank robbery.

a statute limiting successive prosecutions by the state.[35] The influential Model Penal Code advocates limiting the dual sovereignty exception to prohibit second prosecutions by a separate jurisdiction in those circumstances in which a successive prosecution would be prohibited in the same jurisdiction under the Double Jeopardy Clause as it is currently interpreted.[36] Several state courts have found the dual sovereignty doctrine to violate their state constitutional protections against double jeopardy.[37] *Bartkus* itself was a hard-fought five to four decision,[38] which many predicted would not survive the incorporation of the Double Jeopardy Clause to the states.[39]

Justice Black, writing for the four dissenters in *Bartkus*, believed that being placed twice in jeopardy for the same offense was so "contrary to the spirit of our free country" that the Due Process Clause itself should be inter-

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35. The Illinois statute provides:

> A prosecution is barred if the defendant was formerly prosecuted in a District Court of the United States or in a sister State for an offense which is within the concurrent jurisdiction of this State, if such former prosecution: (1) Resulted in either a conviction or an acquittal, and the subsequent prosecution is for the same conduct, unless each prosecution requires proof of a fact not required in the other prosecution, or the offense was not consummate when the former trial began . . . .

ILL. ANN. STAT. ch. 720 paras. 5/3-3 to -4 (Smith-Hurd 1993).

36. Model Penal Code § 1.10(1)(a) would prohibit reprosecution, even by a different jurisdiction, unless the second prosecution is for a different offense, as defined under the *Blockburger* test (for the crime charged in each jurisdiction requires proof of a fact not required by the other, see *supra* note 7) *and* the laws defining the two offenses were designed to prevent substantially different harms or evils. MODEL PENAL CODE § 1.10(1)(a) (1985).

Some state statutes have adopted this approach. *See, e.g.*, N.Y. CRIM. PROC. LAW § 40.20 (McKinney 1992).

37. People v. Cooper, 247 N.W.2d 866 (Mich. 1976); State v. Hogg, 385 A.2d 844 (N.H. 1978); Commonwealth v. Mills, 286 A.2d 638 (Pa. 1971). The Pennsylvania court balanced defendants' interests in avoiding reprosecution against the interests of the two sovereigns involved, criticizing the Supreme Court for consistently considering only one side of this balance. *Id.* at 640-41.

38. *See Bartkus*, 359 U.S. at 150 (Black, J., dissenting). During the preceding term, with Justice Brennan not participating, the Court had split four to four over the issue of whether the second prosecution was double jeopardy.

39. Justice Frankfurter's majority opinion in *Bartkus* is primarily a discussion of why the Fourteenth Amendment was not believed to incorporate Bill of Rights provisions. The discussion almost seemed to assume that, were the Double Jeopardy Clause to be incorporated, dual sovereignty prosecutions would be disallowed. Having concluded that actual double jeopardy guarantees would not apply, Frankfurter analyzed the defendant's constitutional challenge under the more general Due Process Clause, describing this analysis as involving a "necessary process of balancing relevant and conflicting factors." *Id.* at 127-28. That many states prohibited successive prosecutions was taken by Frankfurter as evidence that the states should be permitted to experiment and reach their own results on such issues, *id.* at 138-39, rather than as evidence that multiple prosecutions might be considered by many to be a significant evil.

preted to prohibit such governmental conduct, even when the two governments are "separate sovereigns."[40]

> The Court apparently takes the position that a second trial for the same act is somehow less offensive if one of the trials is conducted by the Federal Government and the other by a State. Looked at from the standpoint of the individual who is being prosecuted, this notion is too subtle for me to grasp.[41]

The guiding purposes of the Double Jeopardy Clause are frequently described as being

> 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.[42]

As Justice Black succinctly pointed out, all of these consequences are suffered by defendants who are subjected to multiple prosecutions, regardless of how many different sovereigns are involved.

> If double punishment is what is feared, it hurts no less for two "Sovereigns" to inflict it than for one. If danger to the innocent is emphasized, that danger is surely no less when the power of State and Federal Governments is brought to bear on one man in two trials, than when one of these "Sovereigns" proceeds alone. In each case, inescapably, a man is forced to face danger twice for the same conduct.[43]

Black might have argued that a defendant actually faces a graver danger of suffering these adverse consequences when reprosecuted by a second sovereign. As the federal prosecution of Stacey Koon and his colleagues demonstrated, having a dress rehearsal is an invaluable aid to performance. With the additional resources of the federal government, the experience of the previous prosecutors, and the public lesson of the earlier acquittal brought to bear against them, it is not surprising that Officers Powell and Koon were

40. *Id.* at 150 (Black, J., dissenting).
41. *Id.* at 155.
42. Green v. United States, 355 U.S. 184, 187–88 (1957).
43. *Bartkus*, 359 U.S. at 155 (Black, J., dissenting).

convicted on the second attempt.[44] One assumption of the Double Jeopardy Clause is that prosecutorial practice can make perfect. But, as Justice Black predicted in *Bartkus*, people have become accustomed to double trials, "once deemed so shocking, just as they might, in time, adjust themselves to all other violations of the Bill of Rights should they be sanctioned by this Court."[45]

If the defendant's interests are the same regardless of the identity of the second prosecutor, what was the Court's justification for allowing successive prosecutions by the state and federal government? Most of the dual sovereignty cases rest only on the shifting sands of the Court's own precedents. The dual sovereignty doctrine was first pressed into service to allow successive state and federal prosecutions of Prohibition cases.[46] In *United States v.*

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44. For analyses of what the federal prosecutors in the King trial learned from the first prosecution, see Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 530–32 (1994); Laurie L. Levenson, *The King Retrial: What Made the Difference?*, CAL. LAW., June 1993, at 76; Amy Stevens, *Split Decision: Verdict in King Case Owes Much to Lessons of State-Court Trial*, WALL ST. J., Apr. 19, 1993, at A1.

Stevens describes how the experience of retrial is generally thought to benefit prosecutors more than defendants and discusses the controversy over whether such retrials can be said to be fair. *Id.* at A1, A4. Stevens also points out the high success rate of federal prosecutions, citing statistics showing that in 1991, the Justice Department prosecuted 129 people (including 64 police officers) for civil rights violations and obtained convictions at trial or by guilty pleas in 108 of those cases. *Id.*

45. *Bartkus*, 359 U.S. at 162–63 (Black, J., dissenting). For this reason, the survey of judges showing that a majority believed that the reprosecution of officers Powell and Koon was not double jeopardy is unsurprising. *See* Gary A. Hengstler, *How Judges View Retrial of L.A. Cops*, A.B.A. J., Aug. 1993, at 70, 71 (27% of judges surveyed thought the trial constituted double jeopardy; 62% thought it did not). Given the ambiguity of the question asked—it is not clear whether the opinion sought is a legal one, concerning what success a double jeopardy claim would meet under current law, or a normative one, expressing a view on whether the law *should* consider this to be double jeopardy—it is hard to interpret the responses. It is also unsurprising that many more state than federal judges responded, whatever their interpretation of the question, that the second trial was double jeopardy. *Id.* (30% of state judges and 10% of federal judges reached this conclusion). State law is more varied and flexible than federal law on dual sovereignty, pretending less often that this double jeopardy issue is easy, obvious, and well-settled.

46. *See, e.g.*, Hebert v. Louisiana, 272 U.S. 312 (1926) (permitting a state Volstead Act prosecution despite the pendency of a federal charge based on the same conduct); United States v. Lanza, 260 U.S. 377 (1922) (federal prosecution for a Volstead Act violation following a state prosecution for the same offense). In these cases, the only issue was how heavily a defendant would be punished for his acts, not whether he would be punished. For an argument that the dual sovereignty doctrine is an incongruous anomaly based on the special needs of the Prohibition Era, that should not have survived the repeal of Prohibition, see Murchison, *supra* note 32, at 391–407. Murchison also discusses whether the dual sovereignty exception as considered in the Prohibition Era cases could be regarded as inherent in the Eighteenth Amendment's approach to concurrent jurisdiction, which could give rise to an argument that the Eighteenth Amendment superseded the double jeopardy protections of the Fifth and Fourteenth Amendments in a manner that would not then pertain to other prosecutions. *Id.* at 388–90.

Lanza,[47] Justice Taft's opinion provided a clear precedent for later cases, but little reasoning or support for its holding. "We have here two sovereignties, deriving power from different sources," Taft pointed out, so it "follows" that "an act denounced as a crime . . . may be punished by each."[48] Taft simply announced that the Double Jeopardy Clause applies only to two successive prosecutions in federal court. He did not discuss potentially relevant factors like the individual interests protected by the Double Jeopardy Clause or the framers' intentions. The precedents on which he relied were cases upholding concurrent federal and state jurisdiction over criminal offenses, which occasionally mentioned successive prosecutions approvingly in dicta, but did not actually confront or permit multiple prosecutions.[49] *Bartkus* and its companion case, *Abbate v. United States*,[50] do not add to this meager analysis; they simply invoke *Lanza* and earlier precedents, and fend off more sophisticated due process arguments challenging the result in *Lanza*.[51]

The Court's most recent attempt to explain the dual sovereignty doctrine, *Heath v. Alabama*,[52] also relies heavily on the Court's own precedent, and reiterates Taft's formalistic approach: Where prosecutions are by two different sovereigns, those prosecutions are based on two different laws, derived from two different sources of power. Therefore, the prosecutions cannot be said to be based on the same "offense" even if the conduct being punished is identical.[53] This definition of "offense" has drawn criticism on a number of grounds. First, the reasoning is circular. Conceptualizing the

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47. 260 U.S. 377.

48. *Id.* at 382.

49. In a recent article, Daniel Braun concludes that the precedent on which the Court relied in *Lanza*, and later in *Bartkus* and *Abbate*, described by Justice Frankfurter as a "long, unbroken, unquestioned course of impressive adjudication," *Bartkus*, 359 U.S. at 136, "was not 'long,' 'unbroken,' or 'unquestioned'; frankly, it was not that 'impressive.'" Braun, *supra* note 32, at 14. For his analysis of why these precedents are unimpressive, see *id.* at 14–23.

Kenneth Murchison also concluded that *Lanza* was not dictated by precedent, but was a choice among competing precedents, and a poorly defended and reasoned choice. Murchison, *supra* note 32, at 398–404.

50. 359 U.S. 187 (1959) (allowing federal prosecution for conspiracy to destroy telephone company facilities, following an Illinois state conviction on the basis of the same conspiracy).

51. Justice Brennan's opinion in *Abbate*, for example, responds to new due process arguments simply: "Petitioner asks us to overrule *Lanza*. We decline to do so." *Id.* at 195. The defense of *Lanza* that precedes and follows this declaration discusses only the venerability of precedent supporting *Lanza* and the possibly undesirable consequences in practical terms of overruling *Lanza*. Atypically, Justice Brennan ignores what had been most important to Justice Black, who dissented in *Abbate*: the perspective of the defendant whose rights are at risk.

52. 474 U.S. 82 (1985). See *supra* note 21 for a brief summary of the underlying facts.

53. As Braun points out, it is not entirely accurate to refer to the dual sovereignty doctrine as an "exception" to double jeopardy principles. Braun, *supra* note 32, at 24. The doctrine actually defines away the double jeopardy problem by holding that the offenses prosecuted cannot be considered to be the "same," and therefore the Double Jeopardy Clause is inapplicable.

states as separate "sovereigns" defining separate offenses is not a reason for limiting the reach of the Double Jeopardy Clause, but a conclusion that it should be limited. The Court's highly generalized notion of sovereignty has been criticized as being inconsistent with the fundamental political theory underlying the Constitution in several respects,[54] and as inconsistent with the reality of present relationships between state and federal governments, and among the states.[55]

Dissenting in *Heath*, Justice Marshall resisted application of the dual sovereignty doctrine to successive prosecutions by two states, but distinguished the right of the federal government to reprosecute.[56] Unlike the majorities in *Heath* and the earlier cases, Marshall acknowledged that even this limited acceptance of the dual sovereignty doctrine as an interpretation of the Double Jeopardy Clause has survived "not because of any inherent plausibility, but because it provides reassuring interpretivist support for a rule that accommodates the unique nature of our federal system."[57] As Justice Black had predicted, even the members of the Supreme Court had come to accept the dual sovereignty doctrine, because earlier decisions had made acceptance seem unremarkable. Although the Court had been evenly split over this issue in 1958,[58] by 1985, no member of the Court was willing to champion the viewpoint Black had espoused. Despite the intervening incorporation of the Double Jeopardy Clause to the states,[59] concerns about federalism were deemed to trump individual liberty interests so conclusively that the individual interests were no longer even mentioned by any Justice on the Supreme Court.[60]

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54. *See, e.g.*, Dawson, *supra* note 32 (sovereignty inheres in the people; sovereigns are limited by individual rights, and the dual sovereignty doctrine therefore violates the constitutionally based principle of popular sovereignty); *see also* Braun, *supra* note 32, at 30 ("The U.S. Constitution implicitly recognizes the existence of one sovereign, not two. That sovereign identifies itself in the document's opening words: 'We the people.'"). Braun also argues that the Court has failed to define the critical but vague concept of "sovereignty" on which its theory depends and that, if a more precise definition is attempted, it becomes clear that under the Constitution, as under common law, a nation can have only one "sovereign." *Id.* at 25–30 (citing Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1430 (1987)) (conventional British position understood sovereignty as an ultimate authority that could not be shared or divided).

55. *See* Braun, *supra* note 32, at 10 ("Today, in light of the extensive cooperation between state and federal law enforcement officials, the story of two independent sovereigns pursuing their independent goals is a transparent fiction."). The doctrine also actively deters desirable cooperation among law enforcement officials. *See infra* note 80.

56. *Heath*, 474 U.S. at 95 (Marshall, J., dissenting).

57. *Id.* at 98.

58. *See supra* note 38.

59. Benton v. Maryland, 395 U.S. 784 (1969).

60. This tunnel vision contrasts with the broader consideration given this issue by, for example, the Pennsylvania courts. *See supra* note 37.

History is conspicuously absent in all of the Supreme Court cases championing dual sovereignty. Examination of the history of successive prosecutions under common law at the time of the framing of the Double Jeopardy Clause suggests that the framers would not have accepted the dual sovereignty doctrine, certainly not in its present form.[61] Professor Paul Cassell, in his essay in this Issue, is persuaded by this research that the Supreme Court was wrong to accept the dual sovereignty doctrine.[62] He then chides the ACLU for reaching the right result for what he views as the wrong reason. Aligning himself with the view of Antonin Scalia and Robert Bork that a historical inquiry into the framers' views of a particular constitutional provision is the alpha and omega of constitutional interpretation, he contends that the ACLU should have based its opposition to the dual sovereignty doctrine exclusively on the historical "meaning" of the framers of the Double Jeopardy Clause, rather than what he characterizes as mere "policy" discussion.[63] Like the ACLU, Cassell believes that the text of the Double Jeopardy Clause—which on its face carries no exception for different sovereignties—provides one basis for arguing against dual sovereignty; his argument is most heavily based, however, on the common law background available to the framers of the clause.

While history is often important to constitutional interpretation, the ACLU has consistently disagreed with the Scalia/Bork position that it is the only relevant source of inquiry. The ACLU did not ground its position on a historically-based interpretation of the views of the framers in part because

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61. For the earliest and most extensive attempts at discovering and analyzing this history, see Grant, *supra* note 32; J.A.C. Grant, *The Scope and Nature of Concurrent Power*, 34 COLUM. L. REV. 995 (1934) [hereinafter Grant, *Concurrent Power*]; J.A.C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA L. REV. 1 (1956) [hereinafter Grant, *Successive Prosecutions*]. On the basis of his historical research, Professor Grant concluded that the dual sovereignty doctrine was inconsistent with the English common law and continental law that would have been familiar to the framers of the Double Jeopardy Clause. Grant, *supra* note 32, at 1316–29; Grant, *Successive Prosecutions*, *supra*, at 7–12; *see also* IRVING BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING 485 (1965) (common law considered a prosecution barred by a prosecution in any court of competent jurisdiction).

Early treatises supported this view of common law. "I take it to be settled at this day, that an acquittal in any court whatsoever which has a jurisdiction of the cause, is as good a bar of any subsequent pro[s]ecution for the same crime, as an acquittal in the highest court." 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN, ch. 35, § 10 (Thomas Leach ed., London, His Majesty's Law-Printers, 6th ed. 1787) (translated from Old English).

According to Professor Grant, international law of the era also maintained as a customary principle a prohibition of a second prosecution for the same act. Grant, *supra* note 32, at 1312; *see also* Thomas Franck, *An International Lawyer Looks at the* Bartkus *Rule*, 34 N.Y.U. L. REV. 1096 (1959).

62. Cassell, *supra* note 8, at 708–715.

63. *See id.*

the committee studying the issue was not persuaded that the available accounts of history are either complete or conclusive.[64] Consequently Professor Cassell charges that the ACLU's position must have been irresponsibly reached because, in his view, there is no other legitimate basis for constitutional interpretation. This is a position with which the ACLU, the vast majority of constitutional law commentators, the majority of the Senate that decisively denied Robert Bork confirmation as a Supreme Court Justice, and probably even a majority of the public,[65] disagree. There are universes of constitutional theory beyond the only two possibilities Professor Cassell lists (original intent, or "public policy" making).[66] In interpreting the Double Jeopardy Clause, the ACLU looked to such factors as the text itself, the interests the Double Jeopardy Clause seeks to protect, the countervailing governmental interests, whether those interests are susceptible to balancing, and whether governmental interests can be served in alternative ways without sacrificing a defendant's interest in the fairness of process. The methodology is typical of mainstream judicial interpretation of those provisions of the Constitution relating to the criminal process. A more apt example of a conclusion based on ungrounded "public policy" rather than constitutional interpretation is the Supreme Court's analysis of the dual sovereignty doctrine in the cases discussed above: An interpretation based only on a particular concept of the needs of federalism, without reference to the values protected by the Fifth Amendment, the context or history of the double jeopardy provision, or alternative means of serving a sovereign's interests.[67]

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64. In defense of his assertion that discussion of common law "has not been deemed relevant" to the Court's decision in *Bartkus*, Justice Frankfurter refers to the English precedents that form the basis for Professor Grant's and Professor Cassell's conclusions as "dubious," in part because of confused and inadequate reporting. *Bartkus*, 359 U.S. at 128 n.9. For Professor Cassell's response to this criticism, see *supra* note 8, at 714–15.

65. *See* Erwin Chemerinsky, *The Constitution Is Not "Hard Law": The Bork Rejection and the Future of Constitutional Jurisprudence*, 6 CONST. COMMENTARY 29 (1989) (arguing that the Senate's refusal to confirm Judge Bork reflected a consensus among the American people that constitutional interpretation should not be limited to the actual concerns of the framers, but needs to be more flexible to accommodate changing needs and values).

66. For just a few examples of the wealth of commentary criticizing original intent theory, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 133–37 (1977); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981); Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349 (1989); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983). For a recent rebuttal, see Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988).

67. Even Robert Bork, in expressing his judicial philosophy in the context of his Supreme Court confirmation hearings, described an inquiry broader than what Professor Cassell finds relevant, approximating the ACLU's approach to double jeopardy interpretation. Where the words

At times, in fact, the ACLU debate on the dual sovereignty doctrine resembled an academic exercise in constitutional interpretation. As noted previously, the Supreme Court does not seem open to arguments that the dual sovereignty law it has created, albeit by ipse dixit, should be rethought or modified. The current Supreme Court values federalism and governmental interests in crime control highly, often at the expense of individual rights.[68]

However, as an organization devoted to promoting civil liberties, the ACLU cannot and should not always consider itself bound by the Supreme Court's current interpretation of a particular constitutional provision. Change comes from challenge, even if immediate change from the Supreme Court is unlikely. And the policy-making process described above is how the ACLU decides what should be challenged. Even in the double jeopardy area itself, the Court has recently demonstrated how quickly and completely change can take place.[69] The ACLU's criticism of the Court's current views on dual sovereignty can also have practical impact even if the Supreme Court is unresponsive to change. State legislatures and state courts can, and often do, offer individuals greater protections than the federal Constitution is interpreted as providing.[70] The states are more likely to be amenable to lobbying and legislation in an area like this one where the Court's decisions are not universally admired or accepted. While of academic interest, therefore, the debate was not wholly academic.

B. Potential Exceptions to the Nonexception

Both Professor Cassell and Paul Hoffman agree that the ACLU's opposition to the dual sovereignty doctrine is well-founded. Cassell criticizes only

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of a constitutional provision are general, said Bork, the judge's task is to "find the principle or value that was intended to be protected and to see that it is protected. . . . 'to discern how the framers' values, defined in the context of the world they knew, apply in the world we know.'" *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 104 (1987) (opening statement of Robert H. Bork, quoting a D.C. Court of Appeals opinion he had authored).

68. The opinion in Heath v. Alabama, 474 U.S. 82 (1985), for example, was written by Justice O'Connor, one of the current Court's most ardent exponents of a vision of federalism based on powerful state and federal governments coexisting in harmony because they are well-matched, not as a matter of federal grace. *See* New York v. United States, 112 S. Ct. 2408 (1992).

69. The "same conduct" rule in Grady v. Corbin, 495 U.S. 508 (1990), *overruled by* United States v. Dixon, 113 S. Ct. 2849 (1993), replaced a secure *Blockburger* rule followed by the Court since 1932, and was then succeeded only three years later by the abrupt reinstatement of the old *Blockburger* rule in *Dixon*. *See supra* notes 5–7, 16–18.

70. Many have already done so by limiting the dual sovereignty power offered by the Court. *See supra* notes 33, 37.

the ACLU's methodology in reaching the result,[71] although I cannot imagine a civil liberties organization adopting the myopic theory of constitutional interpretation he proffers as the only acceptable possibility. Hoffman's critique is neither of result nor of methodology, but of unbounded organizational idealism. He contends that the Supreme Court's broad acceptance of the dual sovereignty doctrine moots the debate about whether there should be any exceptions to the ACLU's alternative view of the Double Jeopardy Clause because that view is unlikely to be adopted by the Court in the foreseeable future.[72] Therefore, although he might agree that in an ideal constitutional world the ACLU should oppose all successive prosecutions, he, with the ACLU of Southern California, sought a compromise between the ideal and the available: Some dual sovereignty prosecutions, but not others, should be permitted.

The parameters of a desirable compromise were another subject of extensive debate. At one end of the spectrum, the ACLU's Board of Directors and all of the committees to consider the question agreed that what happened in *Heath*—a state prosecuting for the same crime simply to get a second chance at imposition of the death penalty—was something the ACLU should oppose. At the other end, most agreed that if there were to be any permissible reprosecutions, that category should include federal reprosecutions for civil rights violations. How to explain this exception, and how broadly the exception should be defined, proved to be complex questions. They were also important questions, because members of the Board who would have liked to support an exception allowing federal civil rights reprosecutions were unwilling to do so unless they were convinced that the exception created was logically defensible as a matter of constitutional interpretation.

1. The Federal Exception

One possibility considered was the position Justice Marshall espoused in his dissent in *Heath*: While it is unacceptable to treat the states as separate

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71. Professor Cassell also questions what the role of stare decisis should be in a situation in which the Court has been consistently and persistently wrong. Cassell, *supra* note 8, at 715–17. Justice Scalia's brand of originalist philosophy generally favors correctness over consistency. *See, e.g.*, Planned Parenthood of Pa. v. Casey, 112 S. Ct. 2791, 2873 (1992) (Scalia, J., concurring in part and dissenting in part). Cassell's position may be more moderate than Scalia's and may in fact approximate the ACLU's typical approach to stare decisis issues. As with original intent, the ACLU has taken the position that stare decisis is relevant but not always dispositive on issues of constitutional interpretation.

72. Hoffman, *supra* note 8, at 652–53 (contrasting the ideal of the ACLU national policy with the real world of the courtroom).

sovereigns, the federal government is sui generis under our constitutional scheme and must be permitted to vindicate its own unique national interests.[73] This exception would authorize successive prosecutions not only for federal civil rights violations, but for every violation of a federal criminal statute.

Few ACLU committee or Board members found this distinction tenable. First, allowing a concern about federalism to trump what would otherwise be an individual's civil liberty would distort the constitutional significance of arguments about states' rights, or the status of any governmental interest. Under the Supremacy Clause, the federal government has the power to serve its own interests by preempting any state law or prosecution. If the federal government does not do so, it is because of comity—the desire to foster cordial relations between the federal and state governments by allowing the states a sufficient measure of autonomy. It is not necessary to consider whether an important federal interest—be it vindicating civil rights or preventing counterfeiting of money—should be deemed to outweigh an individual's right to the finality and repose provided by a rule allowing only one prosecution for one event. It is not the federal interest that necessitates a *second* prosecution, but considerations of comity. The federal interests can be protected by prosecuting first, or by cooperating in a state prosecution.

The continuing explosion in federal criminal jurisdiction also led many to conclude that the federal government's interests should not be considered to outweigh double jeopardy concerns generally. Even if it was possible to say at the time of *Abbate* that the federal government's interests in prosecuting federal crime deserved special solicitude, the relationship between state and federal criminal statutes has changed radically since 1959. The Supreme Court has been so generous in its definition of what constitutes an adequate basis for federal criminalization[74] that there is increasingly substantial overlap between state and federal crime. There has also been a marked increase in the levels of cooperation between state and federal law enforcement officials.[75] For this reason, some critics have concluded that the national interest in enforcing federal statutes is no longer sufficiently unique to justify

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73. *Heath*, 474 U.S. at 99; *see supra* text accompanying note 57.

74. For example, see Perez v. United States, 402 U.S. 146 (1971), in which the Court determined that a federal statute prohibiting loan sharking has a sufficient basis for federal jurisdiction if Congress believed that the class of activities involved might have an impact on interstate commerce, even if the defendant's activities were local and did not themselves have any discernible impact on interstate commerce. *See also* Robert L. Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime*, 15 ARIZ. L. REV. 271 (1973) (commenting on the expansion of federal criminal jurisdiction over even intrastate crime).

75. *See* Braun, *supra* note 32, at 10 (describing the "age of cooperative federalism").

creating an exception to double jeopardy to allow that interest to be served.[76]

Even if the federal interest were deemed unique and commanding, in order to accept this proposed exception, one would have to conclude that the federal interest can and does outweigh the individual interest in being free from multiple prosecutions. It is not surprising that many ACLU members tended to place a high value on the individual right. Furthermore, allowing reprosecution based on the strength of the governmental interest assumes that the double jeopardy right can be subjected to being balanced away. The Pennsylvania court, as described above, balanced the relevant interests and decided that defendants' interests should prevail against a state's interest in reprosecution.[77] Some questioned whether a balancing of interests is an appropriate method of analysis in this context.[78]

Had it been adopted, this exception would have allowed the reprosecution of the officers in the Rodney King case. Moreover, it would also have allowed dual prosecutions of massive numbers of drug dealers, owners of firearms, and anyone else unlucky enough to violate a federal as well as a state law.[79]

2. Sham Prosecutions

One concern expressed about opposing the dual sovereignty doctrine was that if multiple prosecutions were prohibited in all cases, unscrupulous state actors could immunize a favored defendant (perhaps a fellow state or city employee, like a sheriff or police officer) from further prosecution by instituting a sham state prosecution. Therefore, some thought that an exception to the

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76. *See id.*

77. Commonwealth v. Mills, 286 A.2d 638 (Pa. 1971).

78. There are some constitutional guarantees that define minimally fair criminal proceedings that cannot be balanced away no matter how great the government's need. *See infra* note 92 and accompanying text.

For an insightful critique of balancing as a technique of constitutional interpretation, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

79. Despite Professor Cassell's suggestion to the contrary, the discretion exercised by the federal government under the *Petite* policy, discussed *supra* at note 33, is not a satisfying response to this concern. *See* Cassell, *supra* note 8, at 698–99. First, government discretion is typically what Bill of Rights provisions seek to curb (*e.g.*, the Fourth Amendment's search and seizure provisions, the Sixth Amendment's right to assigned counsel under Gideon v. Wainwright, 372 U.S. 335 (1963)) and is not a meaningful substitute for the provisions of the Bill of Rights. Where government is afforded too much discretion, there is potential for arbitrary or discriminatory enforcement. Some ACLU Board members expressed the concern that allowing dual sovereignty prosecutions would be likely to disadvantage powerless or unpopular minorities, whether racial or political, who could be prime targets for excessive prosecutorial zeal.

antidual prosecution rule was necessary in any case where the initial prosecution was a sham.[80] This possible exception was proposed as a matter of intellectual integrity, despite the fact that its adoption would not have been likely to authorize support for the reprosecution of Officers Powell and Koon.

There were two reasons for rejecting this exception. First, the concept of what would constitute a "sham" is so irreducibly vague that some feared that this exception would immediately threaten to swallow any antisuccessive prosecution rule. If this exception had been adopted, it seemed predictable that someone would argue that the state prosecution of Powell and Koon had been a sham. It might be maintained, for example, that "sham" should be defined objectively as reflecting a lack of competence, instead of subjectively as a collusive prosecution intended to be ineffective. Second, there are alternative means of preventing sham prosecutions without requiring defendants (who might not even have been involved in any collusion) to stand trial twice for the same offense. Federal law could punish, as an independent civil rights violation, any attempt to immunize civil rights violators in this manner.[81] If the collusion (or incompetence) of state actors were discovered early enough, the doomed prosecution could be removed to federal court. The federal government could also retain the right to preempt any state prosecution or enact legislation to give the United States a right to stay a state prosecution while the federal government considered whether to become involved, either by assisting hard-pressed or ineffectual local prosecutors, or by preemption.

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80. In Bartkus v. Illinois, 359 U.S. 121 (1959), the Supreme Court adopted a so-called "sham" exception to the dual sovereignty doctrine, but with a very different focus. Rather than asking whether the first proceeding was a good faith effort at prosecution, the Court's exception asks whether the first prosecution was truly by a different sovereign. In a case where federal (or other state) authorities have been heavily involved in the investigation or prosecution of a state court defendant, the courts are to prohibit a successive prosecution in another jurisdiction if it can be said that one prosecuting sovereign was acting as a "tool" of the other, or if one prosecution was merely a "sham and a cover" for another. *Id.* at 123–24.

The exception the ACLU considered would have offered an extraordinary opportunity at a second federal prosecution where the states were being uncooperative, so that federal interests, including those in vindicating civil rights, could be served. The Court's exception, peculiarly, punishes federal/state cooperation rather than encouraging it. Federal authorities will have the opportunity to conduct a second trial only if they do not cooperate substantially with state prosecuting officials. This anomaly is one more undesirable consequence of the dual sovereignty's notion that the enforcement of criminal law in this country is the job of separate and distinct polities: The doctrine not only permits but encourages federal and state prosecutions to remain separate and distinct.

81. Of course, any criminal statute addressing such conduct would have to proscribe specific behavior in order to avoid the very problem of vagueness that led some to reject this exception.

3. The Federal Civil Rights Exception

The possible exception with the broadest support would have confronted the problem of the Powell/Koon trials directly by creating a narrow exception for federal prosecutions vindicating civil rights, instead of broader exceptions based on other federal interests or on the quality of the first prosecution. An immediate response to this proposal was that it was unprincipled simply to select out one category of criminal statutes which the ACLU particularly favored, and to make an exception on the basis of the ACLU's view of the value of that goal. Therefore, whether this distinction could be adequately explained as a matter of principle became a critical question.

To justify an exception by declaring that the civil rights at stake were simply more important than the double jeopardy protection seemed overly subjective. The Supreme Court had taken much the same approach in declaring that interests of sovereignty are so important that they can displace double jeopardy considerations. Other organizations or individuals might find the goals of other criminal statutes to be equally compelling. What may be distinctive about the civil rights statutes, however, is that they protect a discrete constitutional right—a right of equality. Rather than base their argument solely on the importance of civil rights, therefore, proponents of this exception stressed the constitutional stature of civil rights. If, in fact, there are two constitutional rights at stake, why should double jeopardy rights prevail over equality rights, these advocates asked.

During debates about the civil rights exception, it was assumed that the subject of discussion was how to reconcile two important constitutional values.[82] One potentially powerful position on the relationship between the two rights contended that the civil rights statutes superseded the Double Jeopardy Clause because they were enacted under the aegis of the Fourteenth Amendment, which post-dated the Double Jeopardy Clause.[83] The Due Process Clause of the Fourteenth Amendment was also the conduit for the incorporation of the Double Jeopardy Clause against the states, so the Fourteenth and Fifth Amendments must be read together. There is no in-

82. This decision finessed the issue of whether other federal criminal statutes are also based on independent constitutional guarantees, which leads to the difficult question of the extent to which victims' rights in general may be constitutionally based.

83. Cassell argues that this construction would necessarily cede to Congress the right to contract previous rights under § 5 of the Fourteenth Amendment. *See* Cassell, *supra* note 8, at 707. Paul Hoffman agrees, arguing that under this authority, the current Congress could supersede the Double Jeopardy Clause. *See* Hoffman, *supra* note 8, at 670–71. This potentially limitless power could also give Congress the opportunity to restrict other provisions of the Bill of Rights in the name of equality, like the right to trial by jury. *See infra* text accompanying notes 92–93.

herent reason why a guarantee of equality should be fundamentally inconsistent with protection against double jeopardy. If the two rights are in fact inimical, some framed the relevant inquiry as which right should take precedence.

One plausible way to argue that the Double Jeopardy Clause had been modified by the Due Process or Equal Protection Clause would be to rely on the intent of the framers of the Fourteenth Amendment to allow successive prosecutions, or on history of the federal government's contemporaneous practices suggesting that the framers would have approved successive prosecutions. The problem with this argument was that no such history was discovered. The legislative history with which I am familiar suggests that the civil rights statutes were not enacted on the assumption that states would prosecute and the federal government reprosecute, but on the assumption that a federal presence was necessary because the states were unlikely to prosecute civil rights violators at all.[84] Providing concurrent jurisdiction is not the same thing as allowing multiple prosecutions for the same conduct.[85]

On several occasions, I asked research assistants to search for evidence of awareness on the part of any of the framers that the authority of the Fourteenth Amendment or the civil rights statutes might be used for successive prosecutions, or for evidence of successive prosecutions immediately following the enactment of the civil rights statutes. No such evidence was found. It is even difficult to establish how frequently the federal government has brought prosecutions for civil rights violations following state prosecutions, because neither the Justice Department nor anyone else appears to have kept records on that basis. Frequency of federal prosecution might be possible to establish; frequency of reprosecution, apparently, is not.[86] In evaluating whether the double jeopardy protection must yield to critical federal efforts

84. "Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices." CONG. GLOBE, 42d Cong., 1st Sess. app. 78 (1871) (statement of Rep. Perry); *see also id.* at 334 (statement of Rep. Hoar deploring the unavailability of state courts for enforcement of the laws). The legislative history of the civil rights acts is massive, and I cannot lay claim to having read all of it, so I cannot declare definitively that none of the framers of the Fourteenth Amendment had any such intention.

85. This is the leap that Justice Taft made in United States v. Lanza, 260 U.S. 377 (1922), moving from precedents establishing concurrent federal/state jurisdiction, to the assumption that such cases endorsed double prosecution. *See supra* text accompanying notes 47–49.

86. If the frequency of reprosecutions in the nineteenth and twentieth centuries could be established, one would have to decide how to use this information in interpreting the constitutional provisions at stake. The extent to which history, or history to which Congress has not reacted, can be taken as a gloss or as an aid to interpretation is another vexing question of constitutional interpretation. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case), 343 U.S. 579 (1952).

to foster equality, the relevant question is not how frequently the federal government has prosecuted for civil rights violations, but how frequently the federal government has brought a second prosecution for the same conduct.

The most familiar federal civil rights reprosecutions took place after the mid-twentieth century.[87] By the time these prosecutions occurred, the Supreme Court had already accepted the dual sovereignty doctrine, so the courts (and even commentators) had little occasion to analyze the interplay of the Double Jeopardy Clause and the civil rights statutes. Therefore, the lack of previous discussion of this knotty issue rivals the lack of pertinent history. If dual sovereignty is assumed, the history and the discussion are unnecessary; if dual sovereignty is not regarded as total, many questions are raised that may have been rendered unanswerable, in part because of the reign of the dual sovereignty doctrine.

Partly because the historical argument seemed to have reached an impasse, and partly out of reluctance to embrace such a heavily intentionalist approach to constitutional interpretation, the proponents of the civil rights exception turned instead to the argument that, whatever the framers of the Fourteenth Amendment and civil rights statutes might have predicted, federal civil rights reprosecutions have become a critical component of the federal campaign to promote equality. This is the argument Paul Hoffman advocates.[88] Rather than beginning with the Double Jeopardy Clause and asking why that protection should be abandoned, the proponents argued, why not start with the Equal Protection Clause and ask whether it is constitutional to force the champions of federal civil rights prosecution to strip themselves of a weapon that is necessary to promote equality? Advocates of this position at the National Board meetings, like Hoffman in his Essay, provided emotionally powerful narratives to underscore the importance of civil rights prosecutions.

There were several responses to this argument. First, it was argued that the fact that the government has consistently violated a right in the past does not make that violation constitutional. If reprosecutions should not have been permitted, they should not now be approved on the ground that they have become indispensable. If a less restrictive alternative analysis is adopted, the question that must be answered is whether there would have been

87. For a summary of some of the most famous of these cases, including the multiple prosecutions for the murder of Viola Liuzzo, a civil rights worker, see 114 CONG. REC. 533–34 (1968) (statement of Sen. Javits). *See also* United States v. Guest, 383 U.S. 745 (1966) (federal reprosecution for the murder of Lemuel Penn); JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954–65 (1987).

88. *See* Hoffman, *supra* note 8, at 661–66.

any other effective means for the government to pursue this goal without mowing down a separate constitutional right along the way. Several proposed alternatives were listed above: The federal government could preempt, remove, or punish, without reprosecuting.[89] Congress could also authorize civil litigation in areas like police misconduct, so that the Justice Department could, in an appropriate case, seek injunctive relief against police practices that led to instances of brutality or other police misconduct.[90]

Here again, analysis was hampered by the imprecision of speculation. Would these alternatives be as effective as the ability to reprosecute?[91] How much less effective would they have to be before the double jeopardy protection should yield? Some took the position that if reprosecution is helpful in promoting civil rights, the double jeopardy guarantee could be overcome; others demanded a higher burden of proof—only if reprosecution was *necessary* to promote civil rights (or at least far more effective than the alternatives) would they consider dispensing with the double jeopardy protections of some defendants. Whatever the standard, relevant evidence could not be mustered to meet it. No study or reliable estimate of the deterrent value of federal *re*prosecution, or of the potential deterrent value of the proposed alternatives, was or was likely to become available.

While some were willing to rely on their own observations to conclude that federal reprosecution was a sufficiently valuable weapon to outweigh the double jeopardy guarantee in this context, a majority of the Board was either unwilling to accept this conclusion without some more demonstrable empirical basis, or simply unwilling to conclude that it was possible to outweigh the double jeopardy guarantee in this manner, regardless of what the historical evidence showed. There are absolute constitutional guarantees, argued some, and they are typically found in the Bill of Rights provisions defining what

89. *See supra* text accompanying notes 22–23.

90. Under City of Los Angeles v. Lyons, 461 U.S. 95 (1983), individual plaintiffs are not considered to have standing to seek injunctive relief against questionable police practices absent a showing of any real or immediate threat that this particular plaintiff will be wronged again. *Id.* at 111. The Justice Department, unlimited by this rule, could be more effective in obtaining injunctive relief as well as damages.

See Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 453–55 (1978), for suggestions on how to bolster civil damage remedies, including federal intervention. *See also* Paul Hoffman, *The Feds, Lies and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. CAL. L. REV. 1453 (1993).

91. Judge Newman, for one, argues that criminal prosecution is unlikely to be an effective deterrent to police misconduct. *See* Newman, *supra* note 88, at 449–50.

constitutes a fair trial.[92] We would not be willing to ask a defendant to forego the right to counsel or the right to trial by jury if we were to conclude that requiring him to do so might better promote equality. Once the Constitution has set forth the minimum requirements of a fair criminal proceeding, those rights cannot be bartered. Because the right not to be put twice in jeopardy for the same offense is one of those rights, the federal government is required to find methods of vindicating civil rights that do not violate this command.

It could be argued, for example, that what stood in the way of a fair verdict in the first Rodney King trial was the jury. Suppose that, unwilling to risk the unpredictability of jurors, Congress were to provide that in a federal criminal civil rights prosecution there is no right to a jury trial. Such an act would be generally assumed to be unconstitutional. I cannot imagine that we would require defendants to sacrifice their constitutionally protected right to a jury trial in order to achieve results more conducive to promoting civil rights. Or, if we believed that the result in the first Rodney King trial was attributable to the jury being manipulated by defense counsel's perversely clever deconstruction of the infamous videotape, would we be willing to strip defendants in a second trial of their right to counsel? Removing the double jeopardy protection seems a more palatable result than these only because, as Justice Black predicted, it has become a familiar result.

Faced with this web of unknowable facts and competing theories, many members of the Board extracted the simple principle of the less restrictive alternative. A civil libertarian's first reaction to an apparent conflict between rights is not to choose between rights or to prioritize them, but to try to make the conflict disappear. There is no way to eliminate or minimize the damage to the double jeopardy guarantee when a defendant is prosecuted twice for the same conduct. That defendant has been put twice in jeopardy for the same offense—the precise unfairness that the Double Jeopardy Clause aims to prevent.[93] There are no alternative ways to serve double jeopardy goals. It does not help a defendant if other defendants are not put twice in jeopardy; it does not help to promise that it is still impermissible to be put in jeopardy a third time. On the other hand, there are alternative ways to promote equality, and we do not know those measures to be any less effective

92. These rights are absolute, not in the sense that they can never suffer an exception—the rights can be waived, for example—but in the sense that we would not hold these minimal rights to fair procedure to be outweighed by a public need for conviction. The Constitution has already considered and struck that balance. It has been argued that the Double Jeopardy Clause is, at its most, absolute in barring retrials after a jury acquittal. *See infra* note 103.

93. The definition of "same offense" the ACLU continues to advocate is the "same transaction" test. *See supra* text accompanying notes 16–18.

than the ability to reprosecute for the same offense. There is even basis to hope that, if such alternatives were to be adopted, equality might be better served than it is by the interstitial role the federal government has carved out under the dual sovereignty doctrine and the *Petite* policy: refraining from assisting local prosecutors for fear of forfeiting the prerogative to conduct its own occasional show trials in highly publicized cases.[94] Without assuming dual sovereignty, the federal government might need to ask harder questions about how it can best play an effective role in protecting civil rights.

One final argument against adopting a civil rights exception was vividly underscored by the other highly publicized prosecution arising out of the Rodney King events: the trial of Damian Williams and Henry Watson for the attempted murder of Reginald Denny, the white truck driver who was beaten, also captured on videotape, by black members of a mob reacting to the acquittals of the officers. Like the officers, Williams and Watson were acquitted of the most serious charges by jurors whom some believed to be improperly influenced by racial and other extraneous considerations. Under the Supreme Court's current equal protection law, decisions based on race are equally impermissible whether they favor whites or blacks.[95] The ACLU itself has supported bias crime legislation that can enhance the punishment of those who select the targets of their crimes on the basis of race, regardless of whether the crime is committed by or against minorities.[96]

If the ACLU were to support reprosecution of those charged with crimes against minorities, like Officers Powell and Koon, would consistency (and accommodation to existing Supreme Court case law) then require support for federal reprosecution of Williams and Watson as well, at least by any civil libertarian who was convinced that this jury's verdict was also influenced by race? And should the ACLU then also call for the federal reprosecution of Lemrick Nelson, Jr., the black defendant charged with killing a Hasidic Jew

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94. The federal authorities generally allow the states the first opportunity to prosecute, and rarely reprosecute. In 1991, for example, the Department of Justice prosecuted only 64 cases of police misconduct throughout the nation and 129 civil rights cases of any variety. *See supra* note 44.

95. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (finding a denial of equal protection in a city set-aside program intended to favor minority businesses). The Court's attraction to the principle of colorblindness can be criticized, for example, see T. Alexander Aleinikoff, A *Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991) and David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, but it appears to be entrenched in the Court's current approach to the Equal Protection Clause.

96. *See* Amicus Curiae Brief for the ACLU, Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993) (No. 92-515). In *Mitchell*, the Supreme Court upheld a Wisconsin statute enhancing the sentence of a black defendant who was charged with having selected his white target on the basis of race.

in Crown Heights, Brooklyn, because of his religion, and acquitted by a jury that some charge with considering factors like race?[97]

If the principle countervailing the Double Jeopardy Clause is equality, would all instances of crimes with elements of discrimination be subject to dual trials, even if race or religion were not a factor? Should federal court reprosecutions be encouraged in all crimes where victims are selected on the basis of gender, a category that would include vast numbers of sexual assaults and episodes of domestic violence? Are the interests at stake in these cases—like preventing or punishing rape—less than compelling?

The principle countervailing the Double Jeopardy Clause could be construed even more broadly as the existence of any independent constitutional interest on the part of the victim or the targeted class. The Due Process Clause's guarantee of protection for life, liberty and property could then provide an occasion for balancing away the right not to be put twice in jeopardy for the same offense in all cases involving homicide, assault, robbery or larceny. Many would argue that the need for federal prosecutorial muscle in these contexts is also compelling.

The ACLU/SC position provides no principle for defining which of these civil rights of equality or liberty are so privileged as to trump the constitutional guarantee of freedom from multiple prosecutions, or any other component of what the Constitution defines as a minimally fair trial.[98] If, as Hoffman seems to suggest,[99] the only limitation on reprosecution is the subjective standard of the *Petite* policy—how "compelling" is the governmental interest?—protection against reprosecution becomes dependent on the will of the very sovereign whom the Bill of Rights was intended to curb. The *Petite* policy could be enfolded into the constitutional analysis and made part of double jeopardy law, to be applied by the courts instead of the Department of Justice. But the policy would not lose its inherent elasticity. Once the guarantees of the Bill of Rights are regarded as open to balancing, those guarantees tend to disappear.[100]

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97. *See* Stephen Labaton, *Reno to Take Over Inquiry in Slaying in Crown Heights*, N.Y. TIMES, Jan. 26, 1994, at A1.

98. Hoffman allows that the "constitutional values embodied in the federal criminal civil rights statutes are not limited to equality rights." Hoffman, *supra* note 8, at 663 n.57.

99. See *id.* at 31, 42–43.

100. In interpreting the Fourth Amendment, for example, once the Supreme Court began to regard the exclusionary rule as open to exceptions if the costs of its application in a particular context outweighed its benefits, the exclusionary rule was found not to apply in virtually every circumstance the Court considered. *See, e.g.*, I.N.S. v. Lopez-Mendoza, 468 U.S. 1032 (1984) (exclusionary rule inapplicable in deportation proceedings); United States v. Leon, 468 U.S. 897 (1984) (good faith exception to the exclusionary rule); United States v. Janis, 428 U.S. 433 (1976) (exclusionary rule does not apply in civil litigation, at least under the circumstances of this case);

Other limiting principles might be found to avoid the slippery slope of surrendering double jeopardy protections every time a crime victim's interest could be called compelling. The exception to double jeopardy principles could, for example, be limited to prosecutions of state actors.[101] Hoffman, like many members of the National Board, rejects this limitation.[102] As some Board members argued, the exception may be too narrow—it would preclude prosecution of private individuals who, without government involvement, attempt to deny the civil rights of those who would attend abortion clinics, for example—or it may be too broad—why should individuals forfeit what the Constitution defines as due process in a criminal prosecution simply because they have accepted government employment?

Had a narrowly drawn, principled exception appeared to be available for federal civil rights reprosecutions, the ACLU might have been tempted to adopt it. The continuing discussions made it seem increasingly clear that the proposed exception was without solid foundation, and without viable boundaries.

C. Collateral Estoppel and the Acquittal Rule

The fact that Stacey Koon was convicted in federal court following an acquittal in state court made the dual sovereignty debates seem less moot by raising the possibility of distinguishing the Supreme Court's existing dual sovereignty law. If Koon was retried for the "same offense," he could argue that he had previously been acquitted of that offense. Double jeopardy arguments based on previous acquittals have always been the most favored because one of the paramount purposes of the Double Jeopardy Clause is to preserve a defendant's right to the verdict of the jury chosen in his case.[103]

United States v. Calandra, 414 U.S. 338 (1974) (exclusionary rule does not apply with regard to questioning of grand jury witnesses).

101. This was the limitation proposed by the National Board committee which was asked to formulate an exception that could command the broadest support. *See* Ad Hoc Committee, *supra* note 23.

102. *See* Hoffman, *supra* note 8, at 670.

103. *See* Peter Westen & Richard Drubel, *Towards a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81; Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Governmental Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001 (1980). Westen and Drubel posit that the Double Jeopardy Clause is a "triptych" of three separate values: (1) defendant's interest in repose and finality, (2) defendant's interest in criminal jury nullification, and (3) a prohibition on multiple punishment for the same offense. They argue that the first interest, avoiding the expense and anxiety of a second trial, is not the paramount value of the double jeopardy guarantee, as shown by the fact that defendants may be retried following mistrials declared over their objection or required by a hung jury. *Id.* at 1007. If the double jeopardy right is, at essence, a right to the verdict of the first jury sworn, this explains why Laurence Powell's retrial could be permitted and

Requiring a defendant to stand trial a second time for the same offense following an acquittal jeopardizes a broader range of interests than reprosecution of a defendant who has been convicted. In addition to suffering the anxiety and expense of defending against charges a second time, a previously acquitted defendant has a stronger argument that he is risking conviction although he is innocent—one jury has already found him not guilty. It is, of course, possible that the jury's verdict in the first trial may not have been based on a defendant's innocence. One commentator has argued that the strongest basis for the absolute prohibition of retrials following acquittals (at least in the same jurisdiction) is the need to protect "the jury's prerogative to acquit against the evidence."[104] Not only the Double Jeopardy Clause, but the Sixth Amendment's guarantee of a right to trial by jury reflects our commitment to giving the jury the final authority to decide the facts in a case, even if jurors sometimes use that power to nullify the law.[105]

The jury's nullification power has often been heralded as one of our criminal justice system's most effective techniques for protecting liberty against arbitrary government. The jury that acquitted John Peter Zenger, despite the fact that he had clearly violated existing criminal libel laws by printing criticism of the colonial government,[106] is one of our historical icons. But the state trial of the four officers showed that even this allocation of power is not without its dangers. I have elsewhere questioned whether the

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Stacey Koon's prohibited. The jury in Powell's first trial did not reach a verdict, so it was not possible for that double jeopardy interest to be served in one trial. Paul Hoffman uses retrial after a hung jury as an example of an exception to the Double Jeopardy Clause, but the retrial in Powell's case did not compromise the entire range of double jeopardy interests that were at stake in the retrial of Koon, whose jury did reach a verdict. *See* Hoffman, *supra* note 8, at 676–77.

The ACLU, as noted above, has taken the position that double jeopardy principles should prohibit reprosecution after other types of mistrials more frequently than the Supreme Court would find double jeopardy. *See* ACLU Due Process Committee, *supra* note 15.

104. *See* Westen, *supra* note 103, at 1012–23.

105. Ambivalence about jury nullification has led the courts to refuse to instruct jurors that they have this power. *See* United States v. Dougherty, 473 F.2d 1113, 1130–37 (D.C. Cir. 1972); *see also* Alan Scheflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, LAW & CONTEMP. PROBS., Autumn 1980, at 51, 85–110 (describing the range of positions on jury nullification); Alan W. Scheflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972) (supporting jury nullification power); Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488 (1976) (expressing skepticism about jury nullification).

106. *See* JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER (Stanley N. Katz ed., 2d ed. 1972).

jury, valued as a protector of liberty,[107] is inherently a poor protector of equality.[108]

In the wake of the state court acquittal of Sergeant Koon and two of his codefendants, some expressed doubts about the jury system, even challenging the acquittal rule itself on the theory that if juries are not trustworthy, perhaps their verdicts should always be subject to review.[109] The jury system and the double jeopardy guarantee seem to command enough popular support that this radical proposal did not meet with much enthusiasm. But would that support extend to finding that the value of according finality to jury acquittals should trump the dual sovereignty doctrine?

The Supreme Court has never actually held that an individual who has previously been acquitted of the same offense, albeit in a different jurisdiction, may be reprosecuted. In *Bartkus v. Illinois*,[110] the Court did allow a prosecution following an acquittal but, as noted above, that case was decided before the Double Jeopardy Clause was applied to the states, and the second trial in *Bartkus* was a state trial.[111] It has been argued that retrial following acquittal should be regarded as distinguishable from a second prosecution following a conviction.[112] The defendant's double jeopardy arguments are stronger—requiring the defendant to run the gauntlet a second time increases the possibility of convicting an innocent person or at least a person who would not otherwise be subject to punishment at all, and undermines the jury's role as finder of fact. When the Court first allowed dual convictions in the Prohibition cases, the only interests the defendants had at stake were first, undergoing the ordeal of a successive trial, and second, risking more extensive punishment for the conduct that was already the subject of

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107. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES *349 (praising the jury for providing a barrier against abuse of executive power).

108. *See* Susan N. Herman, *Why the Court Loves* Batson: *Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1842–46 (1993) (arguing that the Court's special attention in the *Batson* cases to promoting the service of minorities on juries is unlikely to result in true equal protection for minority defendants).

109. Compare views from Letters to the Editor, *King Verdict Shows Uncertainty of Jury Trials*, N.Y. TIMES, May 15, 1992, at A29. In one letter, F. H. Buckley and Esther Goldberg argue that the verdict at the first trial demonstrated the unreliability of jury verdicts, showing that the criminal justice system should be reformed to afford prosecutors the right to appeal acquittals. *Id.* In the other, Morton I. Greenberg, Judge of the Third Circuit Court of Appeals, argues on behalf of the jury system that criminal cases should be decided by a jury on the basis of evidence rather than in accordance with public opinion shaped by media exposure. *Id.*

110. 359 U.S. 121 (1959).

111. *Id.*; *see supra* note 34. As also noted above, Justice Frankfurter described the due process guarantee that did apply as being far more flexible and forgiving than the Double Jeopardy Clause itself. *See supra* note 39.

112. *See* Note, *Double Jeopardy*, *supra* note 32.

a conviction. The latter interest is of the same character as the one which the Court, in *United States v. DiFrancesco*,[113] has held not to be a double jeopardy interest at all, on the theory that the scope of the punishment is a far less weighty matter than whether the defendant will be convicted or acquitted. Lanza was going to be punished. The only question being decided in the second prosecution was how extensive that punishment would be.

The Model Penal Code, which accepts the dual sovereignty principle at least in part,[114] nevertheless would prohibit a successive prosecution in a second jurisdiction if the first prosecution resulted in a verdict for the defendant that necessarily entailed a determination inconsistent with a fact that must be established for conviction of the offense for which the defendant is being prosecuted in the second jurisdiction.[115] What makes good policy is not always what the Constitution requires, but the arguments in favor of according greater finality to an acquittal certainly show that post-acquittal prosecution is distinguishable from what the Court has found constitutionally acceptable. The argument that Stacey Koon was put twice in jeopardy is not foreclosed by the Court's earlier acceptance of the dual sovereignty principle.

The Model Penal Code formulation also solves a problem that Koon might otherwise confront in raising a double jeopardy argument. Although Koon was tried for the "same offense" in state and federal courts at the time of his trials, the Court's recent about-face on the issue of how to define "same offense" seems to leave him with little argument that his two prosecutions were for the "same offense" as that term is currently defined.[116] The jury in the first trial, however, could still be described as having found facts in his favor that were necessary to establish the civil rights offense in the federal prosecution. In other words, he could raise a collateral estoppel, although not a res judicata, claim.[117]

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113. 449 U.S. 117 (1980); *see supra* note 11.

114. *See supra* note 36.

115. MODEL PENAL CODE § 1.10(2) (1985).

116. *See supra* notes 5–7.

117. I have frequently wondered why no one appears to have argued to the Supreme Court that its retroactivity doctrine should be applied to changes of law disfavoring criminal defendants as well as to changes of law favoring them. In cases like Linkletter v. Walker, 381 U.S. 618 (1965), the Court maintained that whether a defendant should receive the benefit of a new ruling, like that in Mapp v. Ohio, 367 U.S. 643 (1961), applying the exclusionary rule to the states, is an open question that should be analyzed by considering (1) the purpose of the new rule, (2) the reliance of the states on prior law, and (3) the effect on the administration of justice of a retroactive application of the new law. *Linkletter*, 381 U.S. at 636. In Fourth Amendment cases in particular, the Court has tended not to apply new rulings retroactively on the theory that the principal purpose of those rules is deterrence of police misconduct, and that conduct that has already occurred cannot be deterred. *See id.* at 637.

The Supreme Court has held that the Double Jeopardy Clause includes a constitutionally-based collateral estoppel principle. In *Ashe v. Swenson*,[118] the Court found that a state was not permitted to retry a defendant for robbing a player in a poker game when a jury had acquitted him, in an earlier trial, of robbing another of the poker players. The collateral estoppel principle went beyond evaluating the identity of elements of the two crimes, and entailed reviewing the proceedings to determine what facts the jury had probably found. In this case, the Court concluded that the jury's acquittal could only have been based on doubts about whether the defendant was one of the masked men who committed a robbery that clearly had occurred.[119] The jury having decided that controverted fact in defendant's favor, the prosecution was not permitted to litigate that fact again.

Whether this collateral estoppel principle applies across jurisdictional boundaries is a question the Court has never considered. Like the drafters of the Model Penal Code, the Court could decide that the collateral estoppel principle, based on the right of the jury to find facts and the special status of acquittals under the Double Jeopardy Clause, should create an exception to the dual sovereignty doctrine. My prediction is that this argument would be no more successful for Koon in the Supreme Court than it was in the District Court. The argument has bits of dicta already lined up against it. The Court in *Ashe* introduced the collateral estoppel principle as providing that "when an issue of ultimate fact has been determined by a valid and final judgment,

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If, conversely, the police or prosecutors violate what is clearly a defendant's right at the time of their conduct and at the time of that defendant's trial, why should their misconduct be ignored, and even rewarded, simply because the Supreme Court decides after the fact to restrict the scope of the rights involved? This argument seems most compelling in areas where deterrence of police misconduct is at issue, but could also be applied to prosecutorial decisions, like whether to bring a successive prosecution. Some prosecutors, familiar with the new "same conduct" rule of Grady v. Corbin, 495 U.S. 508 (1990), may have decided to comply with the law and not prosecute an individual a second time for offenses arising out of the same conduct. Other prosecutors may have disregarded the current law and harassed defendants by prosecuting them twice for the same conduct despite the constitutional ruling in effect at the time of their conduct. Why should those lawless prosecutors be rewarded by seeing affirmances of convictions they may have obtained in defiance of the Constitution as interpreted at the time, simply because the Court has now decided to change the law back? In the case in which the Court created its new rule, United States v. Dixon, 113 S. Ct. 2849 (1993), this retroactivity argument could not have arisen because the prosecutions followed convictions for criminal contempt, and the law was not clear as to whether dual prosecutions were permissible in this unique context.

Therefore, if Stacey Koon wanted to make an argument depending on how "same offense" is defined, why should he not be able to rely on the constitutional law that existed at the time of the incident, at the time of his first trial, and of the second trial, rather than on the recent *Dixon* revision which, at least arguably, should apply only prospectively?

118. 397 U.S. 436 (1970).

119. *See id.* at 445.

that issue cannot again be litigated *between the same parties* in any future lawsuit."[120] *Heath*'s broad assertions about the significance of dual sovereignty have also led observers to generalize more broadly than the case law warrants about the current scope of the dual sovereignty doctrine.[121]

The collateral estoppel argument is entitled to more careful consideration than it has received so far, or than I suspect it is likely to receive. Even the broadest notion of sovereignty and the narrowest notion of the scope of collateral estoppel are not inconsistent with accepting a double jeopardy argument under these circumstances. Collateral estoppel principles are applied across jurisdictional boundaries in other contexts. In *Migra v. Warren City School District Board of Education*,[122] for example, the Supreme Court held that a federal civil rights plaintiff who had previously litigated a case arising out of the same incident in state court was precluded from raising claims in federal court if the state court would not have heard those claims.[123] *Allen v. McCurry*[124] had applied this principle to a criminal defendant who raised a federal constitutional argument in a state criminal proceeding (on a motion to suppress evidence), lost, and was then precluded from bringing a federal civil rights action based on the previously litigated facts. The parties involved in these collateral estoppel cases are sometimes identical, and some-

120. *Id.* at 443 (emphasis added). This dictum was taken seriously by the Fourth Circuit in one of the few cases where a cross-jurisdictional collateral estoppel claim was raised. *See* United States v. Ricks, 882 F.2d 885, 889–90 (4th Cir. 1989) (concluding, without any discussion, that the collateral estoppel doctrine was inapplicable because the parties were not the same), *cert. denied*, 493 U.S. 1047 (1990); *see also* United States v. Bonilla Romero, 836 F.2d 39, 43 (1st Cir. 1987) (holding that collateral estoppel did not apply because the federal prosecutors were not a party or in privity with a party in the state trial), *cert. denied*, 488 U.S. 817 (1988). The scenario in *Ricks* did not actually require double jeopardy analysis under current law, however, because the fact previously found in the defendant's favor was merely being used for evidentiary purposes, in a manner that would be allowed by the Court's subsequent decision in Dowling v. United States, 493 U.S. 342 (1990).

121. "[I]t is permissible under the dual sovereignty doctrine for the federal government to prosecute a defendant after a state prosecution of the same conduct, or vice-versa, *regardless of the outcome of the first prosecution*." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 199[B], at 430 (1991) (emphasis added).

122. 465 U.S. 75, 81 (1984) (holding that a state court judgment is entitled, under 28 U.S.C. § 1738, to the same preclusive effect in federal court as would be given that judgment under the law of the state in which the judgment was rendered).

123. *Id.* at 83–85.

124. 449 U.S. 90 (1980).

times only similar.[125] In civil cases, application of collateral estoppel law does not always require that the parties be the same.[126]

The Supreme Court has disapproved one example of nonmutual collateral estoppel in a criminal context, in *Standefer v. United States*,[127] where a defendant accused of aiding and abetting a crime tried to claim the benefit of an earlier jury verdict acquitting the "principal." In holding that collateral estoppel did not apply in these circumstances, the Court stressed that the government may not have had the "full and fair opportunity to litigate" that is a prerequisite to civil estoppel rules.[128] But the defendant in *Standefer* could not raise either a double jeopardy or due process claim, because the previously litigated facts had not been litigated as to him.[129]

There has been surprisingly little exploration of the implications of the constitutionally based collateral estoppel doctrine recognized in *Ashe*. Analysis of this aspect of double jeopardy protection should not be considered to be limited by the factors that govern collateral estoppel law in civil cases. In addition to the usual considerations of judicial economy, finality, and fairness, the defendant's constitutional right to a jury's previous verdict must be added to the balance. This consideration, powerful enough to ground the strict prohibition against prosecution appeals of acquittals, could well be considered powerful enough to create an exception to dual sovereignty, when added to the other factors (e.g., anxiety, expense, and the risk of wrongful conviction of the innocent) that the Court has allowed to be overcome by the needs of sovereignty. The premise of the dual sovereignty doctrine, and the reason the Court was able to avoid balancing all of the interests involved, was that successive prosecutions in different jurisdictions are not defined as the "same offense," so the Double Jeopardy Clause is sidestepped. The collat-

125. Because § 1983 actions cannot be brought against the state, a federal civil rights action, like the one in *Allen v. McCurry*, is brought against an individual state actor, while the criminal prosecution was brought by the state itself.

126. *See, e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313 (1971).

127. 447 U.S. 10 (1980).

128. *Id.* at 22; *see* Montana v. United States, 440 U.S. 147, 153 (1979). Among the features the Court identified as distinguishing criminal from civil litigation were the greater limitations on the government's discovery rights in criminal as opposed to civil cases, the government's inability in a criminal case to obtain a directed verdict or a new trial after an acquittal, and possible limitations on the use of evidence arising from court rules and constitutional privileges. *Standefer*, 447 U.S. at 22.

129. In one of the few cases considering whether collateral estoppel can trump dual sovereignty, the Second Circuit stated, again in dicta, that *Ashe* does not control in a dual sovereignty prosecution. United States v. Davis, 906 F.2d 829, 832–33 (2d Cir. 1990). But jeopardy had not yet attached in the earlier proceeding, so in this case, too, no actual double jeopardy claim could be raised.

eral estoppel doctrine recognized by *Ashe* and by the Model Penal Code is an aspect of the Double Jeopardy Clause that applies regardless of whether the two prosecutions are for the "same offense."[130]

There are also other factors to be considered. The government in a second prosecution would certainly argue that it is unfair for the second prosecuting entity to be bound by the verdict in a proceeding in which it could not participate.[131] The difference in sovereigns, according to some, should foreclose the use of collateral estoppel against a second prosecution except in unusual circumstances.[132] Defendants might argue that in certain extreme circumstances, relitigation of facts is a denial of due process, whether or not it is double jeopardy.[133]

Regardless of whether the Supreme Court is likely to accept this argument, the fact that the dual sovereignty doctrine is open to challenge under current law in a range of cases, including at least one of the prosecutions in the Los Angeles trials, was another reason leading the ACLU to conclude that such prosecutions do amount to double jeopardy. Although many Board members started out with the belief that the best case for making an exception to the dual sovereignty doctrine would be a situation where civil rights defendants had been acquitted in state court, serious examination of the interests underlying the Double Jeopardy Clause suggested that a post-acquittal prosecution is probably the worst scenario for allowing a second prosecution because such cases involve a broader range of double jeopardy and jury trial interests. The paramount lesson of the Los Angeles trials is that juries are fallible. We have never acted upon our awareness of that fallibility by

130. It seems likely, in fact, that the Court relied on collateral estoppel in *Ashe* to avoid having to confront Justice Brennan's concurring position that the multiple prosecutions were for the "same offense" because they arose out of the same transaction. Collateral estoppel offers a means of finessing the difficult question of how to define "same offense" because it addresses the facts that give rise to an "offense" however that term is defined.

131. Under the dual sovereignty doctrine in its current delineation, participation in the first prosecution, the only basis for prohibiting a successive prosecution by a new sovereign, is actively discouraged. *See supra* note 80.

The defendant in *Davis* argued that the federal government, although a different party, should be bound by litigation in the earlier state prosecution because the federal government's participation in that proceeding put the federal government in privity with the state. The court, while holding open the possibility that in a case of extensive involvement a second prosecutor might be bound by the results of earlier litigation, held that there was not sufficient participation to warrant that result in this particular case. *Davis*, 906 F.2d at 833–35.

132. *See* Allan D. Vestal, *Issue Preclusion and Criminal Prosecutions*, 65 IOWA L. REV. 281, 290 (1980).

133. *But see* United States *ex rel.* DiGiangiemo v. Regan, 528 F.2d 1262, 1265 (2d Cir. 1975) (finding that the state's failure to apply collateral estoppel doctrine did not deny petitioner due process in a case where petitioner failed to object to the use of evidence previously ruled inadmissible), *cert. denied*, 426 U.S. 950 (1976).

allowing appeals of jurors' acquittals in the same jurisdiction. The relevant principles are the same no matter how many different jurisdictions are involved.

CONCLUSION

A position that takes thirty-nine pages in a law review to explain is unlikely to be fully understood or appreciated in a world where even major news stories receive only a few bytes of attention. In the preceding discussion, I have tried to use this occasion to explain the reasoning as well as the process behind the ACLU's conclusion that what happened in the federal court in Los Angeles was and should be considered to be double jeopardy. I hope that even those readers who do not agree with the ACLU's conclusions will respect the process by which those conclusions were reached. As a member of the Board of Directors of the ACLU, I am proud of the full, intelligent, and civil debate that characterized discussion of this issue, despite the strong emotions raised. As befits a group that values diversity and free expression, members of the Board had different views on how to interpret the constitutional guarantees involved, and they expressed those views.

Once the debates resolved the interpretation questions, the ACLU found itself in the not unfamiliar position of defending a principled position on behalf of individuals whose conduct the members of the ACLU would not be likely to approve. Support for the civil liberties of the officers who were convicted of violating the civil rights of Rodney King is not the same thing as support for the officers' conduct; a conclusion that the civil rights of victims and potential victims may not be vindicated by the particular device of holding repeated prosecutions for the same conduct is not the same thing as lack of support for civil rights. The ground between these positions is the territory the ACLU has always tried to occupy.