University of Miami Law Review

Volume 23
Number 2 *Winter-Spring 1969*

Article 10

5-1-1969

Double Jeopardy and Due Process

R. Thomas Farrar

DOUBLE JEOPARDY AND DUE PROCESS

R. THOMAS FARRAR*

I. INTRODUCTION

In recent years the Supreme Court has been selectively incorporating various guarantees of the Bill of Rights within the due process clause of the fourteenth amendment, making them applicable to the states to the same extent as they are applicable to the federal government. Effectually incorporated thus far have been the first[1] and fourth[2] amendments, the self-incrimination[3] and just compensation[4] clauses of the fifth amendment, the speedy trial,[5] confrontation[6] and right to counsel[7] clauses of the sixth amendment, and the eighth amendment's prohibition against cruel and unusual punishment.[8] A current subject of debate is whether the double jeopardy clause of the fifth amendment should be so incorporated, with its application in a particular instance thereafter to be gauged by a federal standard. Because to some extent the states presently have double jeopardy provisions, it would seem that the greatest effect of incorporation of the fifth amendment's prohibition would be the impact of the federal standard.

Incorporation of the fifth amendment prohibition might have dual effects. It might terminate the "dual sovereignty theory," which at present permits successive prosecutions both by a state and by the federal government for essentially the same crime. It also would institute a controlling standard for application of the double jeopardy clause to

* J.D., University of Miami School of Law; former Associate Editor, *University of Miami Law Review;* former Student Instructor of Freshman Research and Writing; Law Clerk to the Honorable David W. Dyer, Judge, United States Court of Appeals for the Fifth Judicial Circuit.

1. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

2. *See* Ker v. California, 374 U.S. 23 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

3. *See* Malloy v. Hogan, 378 U.S. 1 (1964).

4. *See* Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897).

5. *See* Klopfer v. North Carolina, 386 U.S. 213 (1967).

6. *See* Pointer v. Texas, 380 U.S. 400 (1965).

7. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

8. *See* Robinson v. California, 370 U.S. 660 (1962). For a general discussion of the selective incorporation doctrine, *see* Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963).

reprosecutions and repunishment for crimes committed against a single sovereign.

The dual sovereignty concept reached fruition in the Supreme Court cases of *Bartkus v. Illinois*[9] and *Abbate v. United States*.[10] In *Bartkus* the Court held that prosecution by a state of an individual after acquittal of the same crime in a federal trial was not a denial of due process under the fourteenth amendment. In *Abbate* the Court held that prosecution by the federal government of an individual previously convicted by a state for the same crime was not a violation of the double jeopardy clause of the fifth amendment. Thus both a state and the federal government may prosecute the same person for the same crime, regardless of the other's conviction or acquittal, without transgressing due process or double jeopardy provisions.

Since *Palko v. Connecticut*[11] in 1937, the standard applicable to state reprosecutions over an asserted defense of double jeopardy has been that of "fundamental fairness" under the due process clause of the fourteenth amendment. *Palko*, which held that a state statute allowing the state the right of appeal in a criminal case did not violate the due process clause of the fourteenth amendment, made it clear that state reprosecutions were not to be judged by a federal standard. Thus, variations from state to state are permissible so long as they do not violate rights which are "implicit in the concept of ordered liberty."[12]

Palko v. Connecticut did not hold, however, that *any* reprosecution would be permitted. The due process clause of the fourteenth amendment imposes *some* limitations upon the states, although the extent of the limitations is not clearly defined. This comment will review those cases in which federal courts have limited state reprosecutions which have violated "fundamental fairness" under the fourteenth amendment, and will suggest other areas in which further limitations may be likely. Outside the scope of the cases and this comment is an examination of the dual sovereignty theory of multiple prosecutions, as "fundamental unfairness" has been held violative of due process only in instances in which a single sovereign has acted.[13]

---

9. 359 U.S. 121 (1959).

10. 359 U.S. 187 (1959).

11. 302 U.S. 319 (1937).

12. *Id.* at 325.

13. The dual sovereignty theory has been discussed at length by various commentators, *e.g.*, *Harrison, Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. MIAMI L. REV. 306 (1963). *See also* Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. CHI. L. REV. 591 (1961); Fisher, *Double Jeopardy and Federalism*, 50 MINN. L. REV. 607 (1966); Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309 (1932); Note, *Multiple Prosecution: Federalism vs. Individual Rights*, 20 U. FLA. L. REV. 355 (1968); Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538 (1967); Pontikes, *Dual Sovereignty and Double Jeopardy: A Critique of Bartkus v. Illinois and Abbate v. United States*, 14 W. RES. L. REV. 700 (1963).

II. THE CASES

A. *The Supreme Court*

1. PRIOR TO PALKO

Prior to *Palko v. Connecticut* in 1937, the Supreme Court followed a policy of studious avoidance of the question of the applicability of fourteenth amendment due process to state reprosecutions. In one class of cases the technique utilized was to find that the state procedure involved would not be violative of the double jeopardy provision of the fifth amendment and thus would not violate due process under the fourteenth. In *McDonald v. Massachusetts*,[14] for example, the Court avoided the question of the constitutionality under double jeopardy simply by holding that the habitual offender statute, which imposed an increased penalty on individuals who had recently committed a felony, punished a separate crime rather than the previous conviction.[15]

In another class of cases the Court did not reach the question of whether fourteenth amendment due process included a prohibition against double jeopardy, because under available fifth amendment authority the individual had not been placed in double jeopardy. The Court having previously determined that no double jeopardy existed, a determination of the substance of the fourteenth was unnecessary to the decision. Thus in *Dreyer v. Illinois*,[16] the fourteenth amendment claim was passed without consideration of whether double jeopardy was prohibited simply by reference to *United States v. Perez*,[17] which had held that discharge of the jury under similar circumstances did not bar a second prosecution. Therefore the determination of the content of fourteenth amendment due process was avoided without the necessity of deciding as an original proposition whether the circumstances would constitute a violation of the fifth amendment.[18]

2. PALKO AND ITS AFTERMATH

The Supreme Court was unable to avoid considering the content of fourteenth amendment due process in *Palko v. Connecticut*. In *Palko*, a state statute permitted appeals in criminal cases to be taken by the state, and following the defendant's conviction for second degree murder in a trial under an indictment for first degree murder, the state successfully appealed. At the second trial, over an objection on the ground that it constituted double jeopardy, the defendant was convicted of murder in the first degree and was sentenced to death. The Supreme Court,

14. 180 U.S. 311 (1901).

15 *Id.* at 312-13. *Accord*, Graham v. West Virginia, 224 U.S. 616 (1912). Avoidance in this manner has continued; *see* Gryger v. Burke, 334 U.S. 728 (1948).

16. 187 U.S. 71 (1902).

17. 22 U.S. (9 Wheat.) 579 (1824).

18. *Accord*, Keerl v. Montana, 213 U.S. 135 (1909).

through Mr. Justice Cardozo, assumed that *Kepner v. United States*,[19] which was decided earlier by a closely divided Court, would operate to preclude, under the fifth amendment, the defendant's conviction in a federal court. Thus, the Court had to decide for the first time whether a state could reprosecute under circumstances in which the federal government, because of the fifth amendment, could not. Examining the instances in which constitutional safeguards "valid as against the federal government by force of the specific pledges of particular amendments"[20] had or had not become valid as against the states, Cardozo, in what is now classic language, concluded:

> The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." . . . Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. . . .[21]

Cardozo reasoned that the exclusion of certain rights from protection against the actions of the states

> has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself.
>
> We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed.[22]

With the principle of this decision thus stated, Cardozo then inquired whether it operated to prohibit the defendant's conviction. In doing so, Cardozo made it abundantly clear that the decision was based only upon the particular facts under consideration:

---

19. 195 U.S. 100 (1904).
20. 302 U.S. at 324-25.
21. *Id.* at 325.
22. *Id.* at 326.

> Is *that kind of double jeopardy* to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"? . . . The answer surely must be "no." *What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider. We deal with the statute before us and no other.* The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. . . . This is not cruelty at all, nor even vexation in any immoderate degree. If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege, subject at all times to the discretion of the presiding judge, . . . has now been granted to the state. There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before.[23]

Palko thus determined that the question whether reprosecution by a state violates the due process clause of the fourteenth amendment is to be decided upon application of the standard of "fundamental fairness" to the facts of the particular case. Its progeny have continued application of this standard, but the Supreme Court has evinced general agreement that at least to some extent state reprosecutions are circumscribed by due process requirements. Whether the double jeopardy clause of the fifth amendment will at some time be incorporated into the fourteenth, abrogating the standard of fundamental fairness in favor of a federal standard, must be left to conjecture. Thus far state reprosecutions have withstood the siege of the selective incorporation doctrine, and although the present Court has indicated a willingness to re-examine whether the double jeopardy clause should be incorporated, a change of Court personnel, expected under the incoming Nixon administration, could snuff hopes that it will.

Thus, it is proper to examine the fate and future of double jeopardy as tested by fundamental fairness. Avoiding the separate sovereigns doctrine,[24] under which prosecutions by state and federal governments are permitted, and, where possible, the situations in which double jeopardy by a single sovereign have not been found to exist, the inquiry will focus upon Supreme Court dicta and lower federal court cases.

Some Supreme Court cases in the aftermath of *Palko* have been factually similar to its precursors. In those in which has been necessary

23. *Id.* at 328 (emphasis added).

24. *See* text accompanying notes 9 and 10 *supra*.

to apply a standard, as it was in *Palko*, the standard has remained that of fundamental fairness. Although there appears to be a general agreement that the due process clause of the fourteenth amendment has some double jeopardy content, in view of the applicable fundamental fairness standard it would appear that only cases constituting or approaching such a classic form of double jeopardy as retrial following an acquittal would fall under the standard. Though lower courts have voided convictions approaching the classic pattern, the Supreme Court has not yet done so, and the affirmative portions of the fundamental fairness standard are available from it only by way of dictum.

3. PALKO'S PROGENY

In *Gryger v. Burke*[25] the Court again had the opportunity to review a conviction under a multiple offender statute. Adhering to the avoidance technique of *McDonald v. Massachusetts*,[26] the Court held that the statute did not constitute double jeopardy but was merely a stiffened penalty for the latest crime.[27] In *Bartkus v. Illinois*,[28] the Court did not avail itself solely of available fifth amendment precedent to avoid reaching the question of due process, as it had done fifty-seven years earlier in *Dreyer v. Illinois*.[29] Although ample authority was available and was cited, including a fifth amendment double jeopardy determination decided the same day,[30] the Court reached a determination on the merits. In doing so, the Court implied that some double jeopardy situations would be proscribed by due process, an implication drawn not only from the dissenting opinions but also from that of the majority.

Other cases reached the Supreme Court presenting novel questions as to the necessity of applying the due process clause to them and, in at least one case, as to the facts themselves. This latter case was *Louisiana ex rel. Francis v. Resweber*,[31] which in 1947 presented the first re-examination of *Palko's* exposition of due process. The defendant was convicted of murder and sentenced to death by electrocution. In attempting to carry out the execution, "an innocent misadventure"[32] occurred. The switch was thrown, but death did not result.[33] Undaunted, the state determined to try again, whereupon the defendant claimed double jeopardy.

---

25. 334 U.S. 728 (1948).

26. 180 U.S. 311 (1901). *See* text accompanying note 14 *supra*.

27. Four Justices dissented on other grounds. *See also* Pennsylvania *ex rel.* Sullivan v. Ashe, 302 U.S. 51 (1937); Carlesi v. New York, 233 U.S. 51 (1914); Graham v. West Virginia, 224 U.S. 616 (1912); Moore v. Missouri, 159 U.S. 673 (1895).

28. 359 U.S. 121 (1959). *See* text accompanying note 9 *supra*.

29. 187 U.S. 71 (1902).

30. Abbate v. United States, 359 U.S. 187 (1959).

31. 329 U.S. 459 (1947).

32. *Id.* at 470 (Frankfurter, J., concurring).

33. It was unclear as to why. *See id.* at 472 (dissenting opinion).

Citing *Palko*, the Court held that there was no double jeopardy of due process proportions. The Court stated:

> When an accident, with no suggestion of malevolence, prevents the consummation of a sentence, the state's subsequent course in the administration of its criminal law is not affected on that account by any requirement of due process under the Fourteenth Amendment.[34]

For the most part the discussion revolved around the defendant's cruel and unusual punishment argument. As for double jeopardy, while the Court indicated that the defendant had been prejudiced by having to make a second trip to the chair, it was felt that a state, by "insistence on its pound of flesh,"[35] could make a second attempt to carry out a duly pronounced sentence.

The Court again reached the merits of a due process claim in *Brock v. North Carolina*[36] in 1953. The defendant and two others had been arrested for firing shots into an occupied house from a passing auto. The defendant's companions, one of whom had informed police that the defendant helped plan the assault and fired the shots, were tried first and convicted of assault with a deadly weapon. Following this the state tried the defendant, intending to use the testimony of the companions to corroborate that of other witnesses. When put on the stand, however, the companions became obstinate, invoking the privilege against self-incrimination in order not to prejudice their appeals. Stymied in presenting its case fully, the state then moved that the trial court remove a juror from the sworn panel and declare a mistrial. Stating that the ends of justice entitled the state to have the witnesses testify, the court did so, over the defendant's objection. Thereafter the convictions of the companions were affirmed, and they were witnesses at the defendant's second trial although the defendant objected to the trial on the ground that it constituted double jeopardy depriving him of fourteenth amendment due process. The defendant was convicted.

In affirming the conviction, the Supreme Court did not use a clear fifth amendment precedent, as in *Dryden*, nor did it hold that there was no double jeopardy, as in *McDonald*. As in *Palko*, and using the *Palko* standard of fundamental fairness, the Court simply held that the second trial did not contravene fourteenth amendment due process. The case was similar to *Palko* in that the Court recognized that the ends of justice could include fairness to the state as well as to the accused, although Mr. Chief Justice Vinson in his dissent pointed out that the authority cited by the majority was distinguishable through the lack of compelling necessity to declare a mistrial in the instant case.[37] To Mr. Justice Frankfurter,

34. *Id.* at 463.
35. *Id.* at 471 (Frankfurter, J., concurring).
36. 344 U.S. 424 (1953).
37. *See id.* at 438-39 (Vinson, C.J., dissenting).

who concurred with the Court's opinion, the question was not whether the state had placed the defendant in double jeopardy, for, in accordance with the "subtle technical controversies,"[38] it probably had, but whether that particular kind of double jeopardy was so unfair as to be a denial of due process. He noted:

> Implications have been found in [the fifth amendment] provision very different from the mood of fair dealing and justice which the Fourteenth Amendment exacts from a State in the prosecution of offenders. A State falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted or prevents a trial from proceeding to a termination in favor of the accused merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time.[39]

Double jeopardy and due process were again considered in *Hoag v. New Jersey*[40] and *Ciucci v. Illinois*[41] in 1958. The Court again applied the standards of fundamental fairness, this time against multiple prosecutions for different crimes arising in the same occurrence, and again due process was held not to be denied. Hoag was tried for the robbery of three tavern patrons in one trial and was acquitted. He then was tried for the robbery of a fourth patron and was convicted. Ciucci was tried three times, for the respective murders of his wife and two of his children, and was convicted of first degree murder in each trial. In the third trial, but not in the first two, Ciucci was sentenced to death. As in *Hoag*, where all of the patrons were robbed at the same time, in *Ciucci* the deaths were simultaneous.

The Court held that the fourteenth amendment did not prohibit a state from applying "dissimilarity of victims" as a test of whether crimes are the same, though it noted that the preferable practice would be to use a single prosecution when all were victims in the same occurrence.[42] As important, perhaps, as the question of using the "act-offense dichotomy"[43] to find separate crimes because the same evidence is not used in each prosecution, is the fact that by allowing states to vary their criminal procedures, the Court again refused to require uniformity through imposition of a single, compelling federal standard. Rather than decide the question whether variation or double jeopardy was present, the Court looked only to the very basic and essential fairness of the piecemeal prosecutions.

In assessing the import of the fundamental fairness standard as

38. *See id.* at 428 (Frankfurter, J., concurring).
39. *Id.* at 428-29.
40. 356 U.S. 464 (1958).
41. 356 U.S. 571 (1958).
42. *See* Kirchheimer, *The Act, The Offense and Double Jeopardy*, 58 YALE L.J. 513 (1949).
43. *Id.*

elucidated by the Supreme Court, three factors seem to be important. One important determination probably is whether through multiple prosecutions, or in whatever circumstance the double jeopardy claim arises, the state has indicated malevolence toward the accused, as opposed to a conscientious determination to apply its criminal law and procedure. It should be noted that in *Louisiana ex rel. Francis v. Resweber* both the majority, and Frankfurter in his concurring opinion, stressed the apparent innocence of the electrical failure and the lack of intentional prejudice to the convicted murderer, other than the prejudice, of course, which stemmed from the state's sincere determination to kill him. In *Ciucci v. Illinois* this factor very nearly was present. Several newspaper articles were appended to the petitioner's brief before the Supreme Court, attributing statements to the prosecution which expressed dissatisfaction with the prison sentences of the first two trials and a determined purpose to keep prosecuting until the death penalty was obtained. Both Justices Frankfurter and Harlan, staunch advocates of the fundamental fairness standard, expressed the belief that this malevolence, if established, might constitute fundamental unfairness.[44] The Court did not consider the newspaper articles, however, since they were not part of the record and had not been considered by the state courts.

A second factor is whether the procedure utilized by the state is directed toward providing both adversaries, prosecution and accused, with commensurate opportunity to prevail. Thus in *Palko* the Court considered that allowing the state an appeal privilege reciprocal to that of the accused was not an unfair dual subjection to jeopardy. Fairness to both sides was allowed, with the *symmetry* of the edifice of justice perhaps greater than before. Similar considerations seem to have been present in *Brock v. North Carolina.*

The third factor is whether the particular double jeopardy to which the accused has been subjected comports with the policies behind limiting successive prosecutions. Thus, in *Brock*, Frankfurter did not consider the inquiry to be determined by whether through "technical controversies" double jeopardy was present, as would be the case in an inquiry under the fifth amendment's express prohibition, but whether the particular facts of the case were callous. Therefore, in addition to being designed to prevent dual prosecutions or punishment through a rote, though occasionally technical inquiry, the prohibition of double jeopardy is to prevent harassment of the accused.[45] While merely subjecting the accused to double jeopardy in some technical fashion, over which there may be disagreement, would be contrary to the first policy, the second may not at the same time come into play. In considering whether the accused is being subjected to harassment, it must be remembered that although there is

44. Cuicci v. Illinois, 356 U.S. 571, 573 (1958).

45. *See* Note, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 YALE L.J. 339, 339-44 (1956).

multiplicity and prejudice to the accused, there may also exist a sincere desire to enforce state criminal law and vindicate the rights of the public. To strike a balance in conformity with a sense of justice and fairness is not an abhorrent concept; indeed, it is an essential ingredient of applying a standard of fundamental fairness. While to scrutinize only whether there has been double jeopardy is in keeping with avoidance of harrassment, permissible instances of reprosecution might be possible despite a degree of harassment where the result is to give the state a fair opportunity to enforce its criminal laws. The laws, after all, are there for a reason.

The fundamental fairness standard has not met with the approbation of all members of the Supreme Court. Vociferous dissents, and more recently majority opinions, have advocated selective incorporation of the Bill of Rights, and, on the part of at least one Justice, complete incorporation[46] into the due process clause of the fourteenth amendment. Ignoring the fate of the selective incorporation doctrine,[47] occasional lower federal court decisions illustrate the application of the standard of fundamental fairness, and since it may well be that at least in this area the standard will continue to be applied, they bear examination.

B. *The Lower Federal Courts*

The first instance in which double jeopardy was held violative of due process was in the case of *Ex parte Ulrich*.[48] Using as its standard the common law principle that no one should twice be placed in jeopardy, and drawing freely upon both state and federal precedent to find the law, the court "applied" fourteenth amendment due process to a state.

The defendant was indicted for bigamy and, after a plea of not guilty, a jury was impanelled. On the first day the state introduced a part of its evidence, after which the case was adjourned until the following day. After resumption of the trial, the state examined more witnesses until noon, at which time a discussion arose as to the admissibility of certain evidence. Helpfully, counsel suggested that the court adjourn until after the noon meal, but the court, observing that "there was a matter of small importance, or something of that tenor, to come up that afternoon,"[49] instead adjourned until ten o'clock the next day.

As it turned out, the "matter of small importance" on that second day was a trial before another judge and jury. When the defendant's counsel arrived at the designated hour expecting his client's trial to enter

46. *See* Adamson v. California, 332 U.S. 46, 85-86 (1947) (Black, J., dissenting).

47. But if insistence persists, *see* Brennan, *The Bill of Rights and the States*, 36 N.Y.U.L. REV. 761 (1961); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949); Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963).

48. 42 F. 587 (W.D. Mo. 1890), *rev'd on other grounds*, 43 F. 661 (C.C.W.D. Mo. 1890), *appeal dismissed sub nom.*, Ulrich v. McGowan, 149 U.S. 789 (1893).

49. 42 F. at 588.

its third day, the other trial was still in progress. This did not bother the judge, who was not there, nor the prosecuting attorney, who resourcefully announced that two o'clock would be a better hour and dispersed the jury and witnesses until that afternoon. Undoubtedly the defendant was not pleased with the prosecutor's solution, since he languished in jail without consenting to the delay. Probably the jury was not pleased about having to come back at two o'clock either, since the judge did not arrive until three. The judge's delay was not equivalent to the length of the other trial, however, and upon finding it still in progress, the judge announced that the defendant's case would be called the following morning.

The fourth morning arrived, and the other trial ground on. Again the judge announced that the defendant's trial would be called the next morning, but upon reassembling on the fifth day the other trial eked on still. It finished late that night, however, and on the morning of the sixth day the defendant's trial was finally called. It did not continue very long, however. The judge announced that he was not feeling well enough to continue the trial, so over the objection of Ulrich's counsel he discharged the jury and left after transacting other business for about an hour.

One month later the defendant was brought to trial again. His counsel's plea of double jeopardy was overruled, and he lost the case. The judge gave the defendant two years in prison to think it over, but he needed less time. He sought his discharge without incarceration by filing a writ of habeas corpus in a United States district court.

The district court held that when the jury was sworn and impanelled and the state presented before it most of its evidence, the defendant was placed in jeopardy. It also held that the discharge of the jury over the objection of the accused operated as an acquittal. Having been acquitted and again tried on the same charge, the defendant therefore was placed in jeopardy twice; and the jeopardy was as real as it was apparent since he was convicted.

The court reasoned that the import of the due process clause was to be found in *Hurtado v. California*,[50] which "concludes by saying that that proceeding is due process of law 'which regards and preserves those principles of liberty and justice' which have come to us from immemorial usage as safeguards of personal liberty."[51] The court, concluding that the manner in which the defendant's trial ended and his second trial began constituted common law double jeopardy, held that the defendant was illegally in custody under the imperatives of the due process clause and issued the writ.[52] The court had no difficulty holding the fourteenth amendment applicable to the judge's capriciousness because it constituted state action.[53]

50. 110 U.S. 516 (1884).

51. 42 F. at 593, citing *id.* at 537.

52. The district court was reversed on jurisdictional grounds. 43 F. 661 (C.C.W.D. Mo. 1890).

53. 42 F. at 597.

Seven years later, in *In re Bennett*,[54] double jeopardy was again held violative of due process of law under the fourteenth amendment. The defendant was charged with assault with intent to commit murder, and at the trial he was convicted by a jury of the lesser offense of assault with a deadly weapon. He then moved for and was granted a new trial, and without any new charge being made he was put on trial again in the same court on the original charge of assault with intent to commit murder. This time he was convicted, and he again moved for a new trial on the ground that the second trial had placed him in double jeopardy. The motion for a third trial was granted, but the state supreme court reversed, remanding the case for sentence for assault with intent to commit murder.[55] On petition for habeas corpus the district court, relying upon *Ex parte Ulrich* stated:

> The right of a person, after acquittal by a jury, to be exempt from the jeopardy of being again placed on trial in the same court, and upon the same indictment, for the identical offense of which he has been acquitted, is certainly one of the fundamental rights which has always been recognized by our system of jurisprudence as belonging to the citizen; and, unquestionably, the guaranty of due process of law, found in the fourteenth amendment to the constitution of the United States, was intended, among other things, to secure to the citizen this right, and deprives the state of authority to convict and punish a person for a crime of which he has been duly acquitted by a jury, when the fact of such former acquittal is made to appear to the court before which he is again put in jeopardy for the same offense. . . .
>
> The judgment of the court under which the petitioner is now imprisoned is in violation of the constitutional rights of the petitioner as thus defined, and, in my opinion, is void in the extreme sense. After the petitioner was acquitted of the higher offense charged in the information, the . . . court . . . had no jurisdiction to again place him upon trial for such offense, upon the same information, or to require him to enter any further plea in order to preserve his constitutional right of protection against a second trial for that offense . . . .[56]

Neither of these early attempts to apply due process to double jeopardy imposed by a state was later utilized as precedent, and neither resulted in the discharge of the prisoner. *Ulrich* was reversed on other grounds on appeal, the circuit court holding that a writ of error, rather than habeas corpus, was the appropriate remedy. *Bennett* itself did not

54. 84 F. 324 (N.D. Cal. 1897).

55. The state supreme court held that because Bennett did not specially plead former jeopardy it was no defense to the second trial. *Id.* at 325. The federal district court held that because the first trial was in the same court and the jury verdict was therefore a part of the records of the court, such a plea was not required.

56. *Id.* at 326.

result in discharge, as the petitioner for habeas corpus had not exhausted his state remedies. Indeed, only in more recent times has undiluted application of due process and double jeopardy occurred.

Norkett v. Stallings,[57] decided without precedent other than dicta, was based squarely upon due process grounds and the standard of fundamental fairness. "The facts in the case are confusing because of the numerous offenses and the nature of the sentences imposed,"[58] but they reveal that Norkett was tried and sentenced for crimes for which he had been previously convicted, the sentences for which had already been served. In essence, he was serving a sentence for an offense for which he had already completed serving a sentence.

Norkett pleaded guilty to four charges in a state court, for convenience here numbered (1), (2), (3) and (4). He was sentenced to two years on each charge, terms to run consecutively. The following year he was convicted on a fifth charge, (5), and was sentenced to ten years for it, that term to run concurrently with (1) through (4). Five years later he attacked the five sentences through post-conviction relief; the sentences were vacated, and he was awarded new trials on each.[59] Naturally, he pleaded guilty again in each of the five cases. He was then sentenced to two years for charge (1) and fifteen to twenty-four months for charge (2); and a prayer for judgment was continued in cases (3) through (5).[60] However, because the state appellate court had voided *all* of the five sentences, the first three of which he had already served, and at his new trial he was sentenced for two of those which he had already served, he was under an active sentence for an offense which he had already served.[61]

The district court first examined Supreme Court cases in which a state procedure was attacked on due process and double jeopardy grounds. Citing Frankfurter's concurrence in *Brock v. North Carolina*, where the Justice noted that

> [a] State falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted or prevents a trial from proceeding to a termination in favor of the accused merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time,[62]

57. 251 F. Supp. 662 (E.D.N.C. 1966).

58. *Id.* at 663.

59. At this point he began serving a one year sentence for escape, but because service of sentence for that conviction was completed one year prior to the district court's decision, it did not affect the case in federal court.

60. Subsequent to his new trial he escaped again, and as a result he received six months which were to begin at the conclusion of the sentences in cases (1) and (2).

61. The escape sentences were also completed since service of them began on the first day of the term on which they were imposed, under the rule announced in Barrow v. North Carolina, 251 F. Supp. 612 (E.D.N.C. 1965).

62. Brock v. North Carolina, 344 U.S. 424, 429 (1953).

the district court stated:

> To subject a defendant to a second trial in the same court under the same facts for the same offense, it seems to us, would be more shocking to the conscience of the general citizenry, when he has already served sentences for those very crimes, than to subject him to successive trials on a charge on which he has been acquitted—a practice which Justice Frankfurter said in *Brock* would violate the Due Process Clause of the fourteenth amendment. If it is unconstitutional to try again after an acquittal, surely it would be unconstitutional to try again after conviction when the sentence imposed at the earlier conviction had already been served. The 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . . should prevent such a state action.[63]

Norkett v. Stallings, though probably unique, could be said to be a case of "classic" double jeopardy. It is doubtful that any would disagree with the decision, and certainly it seems to constitute an unimpeachable application of the fundamental fairness standard. It is a case of double punishment as well as double jeopardy. A series of similar cases, though involving perhaps not as flagrant double punishment and conviction situations as that in *Norkett*, have arisen out of Texas juvenile delinquency proceedings.

In *Hultin v. Beto*[64] Howard Hultin, age sixteen, had stabbed two other minors, one of whom died. The state sought to have Hultin declared a juvenile delinquent solely on the basis of the non-fatal stabbing, but Hultin's counsel filed a supplemental petition which charged the fatal assault. The state moved to strike the petition, but the court, suggesting that an appeal might be appropriate, overruled the motion and stated that had the information not been contained in the petition the court would have required it of probation officers.[65] The court then adjudicated Hultin a delinquent on the basis of both the fatal and non-fatal stabbings, and he was committed to juvenile confinement until the age of twenty-one.

The state thought that release at the age of twenty-one would be premature, and so when Hultin reached seventeen he was indicted and tried as an adult for murder with malice. The judge and jury agreed with the state's assessment of an appropriate release date, and as a result Hultin was convicted and sentenced to life imprisonment. Hultin suggested that this was a denial of fourteenth amendment due process for the reason that it subjected him to double jeopardy; the federal courts agreed.

Citing both federal and state precedent regarding this Texas pro-

63. Norkett v. Stallings, 251 F. Supp. 662, 666 (E.D.N.C. 1966), citing Palko v. Connecticut, 302 U.S. 319, 328 (1937).

64. 396 F.2d 216 (5th Cir. 1968).

65. Record at 6. The state took no appeal from the denial of its motion to strike.

cedure,[66] the Fifth Circuit held that the state's actions did not meet the test of fundamental fairness expressed in the *Palko* dictum. In reversing the conviction, the court expressly refused to reach the question of whether fifth amendment double jeopardy was applicable to the states through incorporation.[67] The court simply held that because Hultin had been deprived of his liberty through the adjudication of delinquency, his later conviction as an adult for the same offense violated due process.[68]

While both *Norkett* and *Hultin* involved rather clear cases of double jeopardy, such was not the case in *United States ex rel. Hetenyi v. Wilkins*,[69] in which the Second Circuit held that following a conviction of second degree murder in a trial upon an indictment charging first degree murder and a successful appeal by the defendant, reprosecution for first degree murder transgresses fourteenth amendment due process by any standard, including that of fundamental fairness. In its extended discussion the court first reviewed Supreme Court cases involving fourteenth amendment due process and double jeopardy, and concluded that although that Court had never invalidated any state court conviction, it was clear that the fourteenth amendment imposes *some* limitations upon a state's power to reprosecute.

In reaching its conclusion that some limitations on the states exist under the fourteenth amendment, the court analyzed the doctrine of selective incorporation, finding that there is serious question as to there being two levels of selective incorporation,[70] and also analyzed the Su-

66. Sawyer v. Hauck, 245 F. Supp. 55 (W.D. Tex. 1965); Garza v. State, 369 S.W.2d 36 (Tex. Crim. App. 1963).

67. 396 F.2d at 217. *Accord*, Martinez v. Beto, No. 25205 (5th Cir. July 16, 1968). *But see* Roberts v. Beto, 245 F. Supp. 235 (S.D. Tex. 1965).

68. There was no problem in holding the juvenile commitment to be jeopardy and a criminal proceeding, in view of the Supreme Court's recent decision in *In re* Gault, 387 U.S. 1 (1967). The problem was engendered by the inability, at the time of Hultin's adjudication as a delinquent, to try him as an adult while he was still under the age of seventeen. The state at the time had to use juvenile commitment for incarceration until the offender reached the age at which he could be tried as an adult, in instances in which the juvenile was near that age and probably should have been tried immediately as an adult even though still under seventeen; otherwise the state had to leave the offender with his freedom until it was possible to try him. *See* 396 F.2d at 216 n.1. The state is no longer placed in this quandary, since the Texas Youthful Offenders Act was amended in 1965 to allow trial as an adult. *See* VERNON'S ANN. TEX. STAT. art. 2338-1 (1964).

69. 348 F.2d 844 (2d Cir. 1965).

70. The court considered Justice Frankfurter's language in *Brock v. North Carolina* (*see* text accompanying note 38 *supra*) concerning "technical controversies," and Justice Goldberg's concurrence in Pointer v. Texas, 380 U.S. 400, 410 (1965), which found the doctrine of incorporation to be conceived in *Palko*, to allow two levels of selection. The first level would be to hold the particular right applicable to the states; the second would be to absorb only those parts of the provision which are fundamental. It would not appear that Justice Goldberg's concurrence could lend much support to a dual level theory of incorporation, in view of his concurring opinion to the effect that he believed any provisions applicable to the states would have full strength. *Id.* at 413. But then *Palko* does not lend support to the incorporation method, and to cite it in support of incorporation could cause some confusion. Perhaps a dual level of incorporation would tend to reconcile the citing of *Palko* in support of incorporation, after all.

preme Court cases in which a double jeopardy claim was interposed but rejected. The court found that the question became, even assuming that the fifth amendment double jeopardy provision was not absorbed intact within the due process clause of the fourteenth amendment, not whether there are no limitations upon the state but rather *which* reprosecutions are forbidden. The more difficult problem then became the selection of a standard by which to judge the state's reprosecution.[71]

The court envisioned three possible standards: the federal standard, the "basic core" standard, and the fundamental fairness standard.[72] Under the first, the double jeopardy clause of the fifth amendment would be incorporated *in toto* within the due process clause of the fourteenth amendment, with cases applying the double jeopardy clause to federal prosecutions becoming applicable precedent. Under the basic core standard, the double jeopardy clause would be incorporated by the doctrine of selective incorporation, but only those convictions which contravene the fundamental core of double jeopardy, *i.e.*, those which do not turn upon technical nuances, would be unconstitutional.[73] Under the fundamental fairness standard, the court felt that no cases applying the fifth amendment would be binding; rather the question was asked simply whether the reprosecution is fundamentally unfair. In answering this question the court stated that contemporary notions of the minimum standards of justice were to be consulted.

The court correctly applied the federal standard, as *Green v. United States*[74] was ample authority to hold that the reprosecution for first degree murder would violate the fifth amendment in a federal prosecution. Its application of the basic core standard and fundamental fairness standard, however, was more difficult. A holding that the fundamental fairness standard was breached would certainly mean that the basic core standard would similarly be breached. Whether the fundamental fairness standard was breached is somewhat questionable, and in view of federal authority prior to *Green v. United States* there is an argument as to how technical the nuances would appear under the basic core standard as well.

The court premised its application of the fundamental fairness standard by noting that although the jury's silence on the charge of first degree murder in the first trial might not impliedly constitute a verdict of not guilty on that charge, the silence permits of one certainty: that the state failed in its efforts to obtain a conviction for first degree murder. Next it was pointed out that here, unlike the state's appeal in *Palko*, the accused had been prejudiced by being re-convicted of second degree murder. The effect of allowing reprosecution by the state, other

71. 348 F.2d at 854-55.
72. *Id.* at 855.
73. *See* note 70 *supra.*
74. 355 U.S. 184 (1957).

than the fundamental unfairness of doing so, then became that of having placed the accused in a dilemma. Because the state had conditioned the right of reprosecution upon successful appeal by the accused from a lesser degree, the accused's "right to appeal from a conviction for the lesser degree can only be exercised at the risk of being reprosecuted for the greater charge as well as the lesser charge if the appeal is successful, even though the state had once failed to obtain a conviction on the greater charge."[75] The court found that this tended to deprive the accused of liberty secured by the fourteenth amendment. "By placing this unconscionable premium upon a successful appeal by an accused, a vital societal interest is threatened—assuring that liberty shall not be deprived without a trial free from legal error prejudicing the accused's substantial rights."[76]

While the court's distinguishing of arguably contrary Supreme Court precedents,[77] and its discussion relating to the prejudice suffered by conviction at a third trial of second degree murder (a conviction which was the same as that achieved by the state in the first trial and the one which he was attacking),[78] tend to militate against its holding that the basic core and fundamental fairness standards operated to void the conviction, one aspect of the court's reasoning does not. The court emphasized that fundamental fairness is to be judged by contemporary societal values, and that what was fair in one generation may be fundamentally unfair in the next.[79] In perceiving and applying the evolution of societal values, the court exemplified the increasing sensitivity to the rights of an accused which has in relatively recent years been transforming our constitutional law. And it would be impossible to state, in view of the precedent of *In re Bennett* which was decided nearly seventy years before, that an increased sensitivity marks a milestone in the transformation of generations as to these facts.

United States ex rel. Hetenyi v. Wilkins may be the precursor of future Supreme Court decisions. In *Cichos v. Indiana*[80] the Supreme Court indicated its interest in reconsidering the question of double jeopardy and due process. Although the writ of certiorari was dismissed in *Cichos* as improvidently granted, *United States ex rel. Hetenyi* was cited approvingly by the three dissenting Justices.[81] Furthermore, the Court was aware of the problem of double jeopardy inherent in the Texas juvenile prosecutions when it decided *In re Gault*.[82] It therefore may be easier for the Supreme Court to apply double jeopardy protection to state

75. 348 F.2d at 859.
76. *Id.*
77. *Id.* at 861-62.
78. *Id.* at 863-66.
79. *Id.* at 862-63.
80. 385 U.S. 76 (1966).
81. *Id.* at 81-82 (Fortas, J., dissenting).
82. 387 U.S. 1, 20 n.26 (1967).

reprosecutions, as there is available some lower court authority for doing so.

III. THE STANDARD

Because fundamental fairness is presently the standard and because it might well continue to be, it seems proper to examine it as applied to due process and double jeopardy. It is suggested that, for several reasons, fundamental fairness should continue to be the standard used in interpreting the due process clause of the fourteenth amendment.

The first reason is that a standard of fundamental fairness has historical support, whereas incorporation does not.[83] With regard to an inquiry into a state's selection of a particular procedure for the administration of its criminal law, the pivotal emphasis should be the fairness of the procedure selected, not the prohibitions of the Bill of Rights, since due process safeguards "liberty," not procedure.[84] Fairness, rather than the full stricture of express prohibitions, historically has been the guide to interpreting the due process clause. Similarly, to expand and utilize the incorporation doctrine is inconsistent with the scheme of federal government instituted by the Constitution; a single standard was not intended. That some variation between states was intended seems beyond dispute, yet the essence of incorporation is uniformity.

Secondly, use of incorporation rather than fundamental fairness as a standard is too limiting. A determined insistence upon finding either specific prohibitions in the Bill of Rights or none at all does not allow for the development of refined, or even new, rights. A good example of this is found in *Griswold v. Connecticut*,[85] in which the Court protected the right of marital privacy. The incorporation advocates either advanced strained interpretations of "penumbral rights,"[86] or pointed to the ninth amendment,[87] or, most consistently, refused to recognize the right because it was not enumerated.[88] On the other hand, the advocates of the fundamental fairness standard simply voided the statute involved as contrary to basic values "implicit in the concept of ordered liberty."[89]

It is because of the fact that incorporation utilizes a single federal standard that it becomes so limiting. At the same time that it becomes the sole standard it becomes unsuitably inflexible. By achieving a fixed

83. *See* Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

84. *See* Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74, 85-88 (1963).

85. 381 U.S. 479 (1965).

86. *Id.* at 485.

87. *Id.* at 486 (Goldberg, J., concurring). The ninth amendment states:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

See Note, 23 U. MIAMI L. REV. 231 (1968); Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U.L. REV. 787 (1962).

88. 381 U.S. at 507 (Black, J., dissenting).

89. *Id.* at 499 (Harlan, J., concurring).

meaning related to specific prohibitions, the inextricable connection of protected rights with express provisions tends to obscure other rights which properly could and should have constitutional protection.

What is most dissatisfying about the incorporation doctrine as opposed to one of fundamental fairness, however, is that it covertly does what fundamental fairness forthrightly does, and at the expense of academic honesty. When a standard is explicated in written opinions it becomes more than a mere guide to future consistency; it becomes an expression of the judicial reasoning used to reach a result.

The technique of using incorporation is first to select phrases from prior cases, then subtly to alter their original substance, and finally to apply them as justifying authority which purportedly signalled an uncontemplated result.[90] Thus under the pretense of finding old law, new law is made. It seems more palatable to have its newness admitted.[91]

What is most pathetic about the technique, however, is that it is used with well-intentioned misguidance, and its advocates fail to accomplish the avoidance they seek. It has been asserted that use of the incorporation doctrine will make the judicial process more "objective" through institutionalization of judicial self-restraint.[92] It is suggested that this goal, to the extent that it is desirable, not only is not achieved through use of the incorporation theory, but may also be made more difficult of achievement. This is because the incorporation doctrine does indirectly exactly what the fundamental fairness doctrine does directly. Incorporation merely adds a second step to applying personal views; first the views are imposed upon federal procedures, and then they are transplanted into state procedure through the due process clause coupled with a federal standard by which it is to be judged. Yet the federal standard results from interpretation of the very ambiguous language of the Constitution, and into the interpretive process it is impossible not to inject personal views. Judges are men, and subjectivity rather than mathematical precision governs their construction of law. Whether they label law as "found" or "made," it often results from a process of reasoning backward from the desired conclusion.

Rather than misconstrue old phrases or formulate new doctrine, it seems preferable to recognize that judicial philosophy often causes legal result. Whether the shibboleth employed is termed "natural law" or is named after a particular doctrine, societal environment conditions the result because judicial philosophies are reflective of their environment. There seems to be no justification for discarding the standard of fundamental fairness when it is recognized that, regardless of the standard

90. *See* Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965).

91. As Justice Frankfurter noted in his concurring opinion in Griffin v. Illinois, 351 U.S. 12, 25 (1956), "Candor compels acknowledgement that the decision rendered today is a new ruling."

92. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 522 (1965) (Black, J., dissenting).

purportedly applied, objectivity is not completely possible. Use of the standard of fundamental fairness is most appealing because it honestly admits what the judicial process necessarily entails: subjectivity.

The degree of subjectivity can best be limited when subjectivity is admitted. The limitations result from the use of judicial self-restraint and the shunning of super-legislative power. It is suggested that this occurs not from voiding a particular law, but from preventing its application in situations where its result is contrary to those values which are perceived to be basic to a democratic society which has as its goal the maximization of individual liberties and the minimization of governmental strictures. These concepts are no more capable of definition than obscenity, but through environmental conditioning they, too, are known when seen. Judicial self-restraint is possible, but as Justice Harlan noted:

> It will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underly our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.[93]

The application of fundamental fairness to state reprosecutions, utilizing contemporary standards but also respecting the influences which resulted in past standards, can be as progressive and as libertarian as could be the use of any other standard or technique.[94] In addition, it has the appeal of more accurately reflecting the judicial process.

93. *Id.* at 501 (Harlan, J., concurring).
94. *See* text accompanying note 79 *supra*.