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Double Jeopardy & Collateral Estoppel: A Thing Derided

John R. Messinger
Asst. State Prosecuting Attorney

Author Contact Information:
John R. Messinger
State Prosecuting Attorney's Office
Austin, Texas

john.messinger@spa.texas.gov
512.463.1660

> "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb[.]"[1]

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution (the Clause) is one of many ways the Bill of Rights reduces government oppression. Although it also protects from multiple punishments in a single trial, this paper focuses on the right to be free from successive trials. It begins with a brief discussion of this core right followed by an in-depth analysis of substantive jeopardy law, including when jeopardy attaches and terminates. The second half of the paper deals with issue preclusion, *i.e.*, the aspect of the Clause that applies when a successive trial is not actually for "the same offence."

I. What is the core right?

The Clause had its origin in the three common-law pleas of *autrefois acquit*, *autrefois convict*, and pardon. "These three pleas prevented the retrial of a person who had previously been acquitted, convicted, or pardoned for the same offense."[2] Despite its origins, the application of these pleas through the clause they spawned "has come to abound in often subtle distinctions which cannot by any means all be traced to the original three common-law pleas referred to above."[3]

First, "[a]lthough the constitutional language, 'jeopardy of life or limb,' suggests proceedings in which only the most serious penalties can be imposed, the Clause has long been construed to mean something far broader than its literal language."[4]

Second, and perhaps most important for the people affected, despite its explicit reference to punishment, "[t]he prohibition is not against being twice punished, but against being twice put in jeopardy[.]"[5] The common law at the time of the founding distinguished the freedom from a second trial from the more basic freedom from a second punishment.[6] While freedom from a second trial would prevent a second punishment, that was not the primary purpose of the Clause:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and

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[1] U.S. CONST. AMEND. V.

[2] *U.S. v. Scott*, 437 U.S. 82, 87 (1978).

[3] *Id*. The Double Jeopardy Clause of the Texas Constitution, Art. I sec. 14, is interpreted the same. *See Ex parte Lewis*, 219 S.W.3d 335 (Tex. Crim. App. 2007) (overruling the only case interpreting it more expansively).

[4] *Breed v. Jones*, 421 U.S. 519, 528 (1975).

[5] *Ball v. U.S.*, 163 U.S. 662, 669 (1896).

[6] *Green v. U.S.*, 355 U.S. 184, 187 (1957). This protection from multiple punishments was later incorporated but is a function of legislative intent rather than pure constitutional prohibition. *Ervin v. State*, 991 S.W.2d 804, 814 (Tex. Crim. App. 1999). It is not the focus of this paper.

> 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.[7]

The Supreme Court has sometimes viewed the primary purpose of the Clause to be context-specific: after acquittal, it "prevent[s] the State from mounting successive prosecutions and thereby wearing down the defendant[;]"after conviction, it "prevent[s] a defendant from being subjected to multiple punishments for the same offense."[8] However, it has consistently viewed the "controlling constitutional principle" to be the use of successive trials for the same offense as "a potent instrument of oppression"[9] and a second trial for a serious offense "an ordeal not to be viewed lightly," regardless of the ultimate outcome.[10] As it said in its most recent case on the subject, "This guarantee recognizes the vast power of the sovereign, the ordeal of a criminal trial, and the injustice our criminal justice system would invite if prosecutors could treat trials as dress rehearsals until they secure the convictions they seek."[11]

Third, and perhaps most noteworthy for practitioners, the Court has added to the list of interests being balanced when applying the Clause. As will be shown below, its conceptualization of what jeopardy is has changed over the years to accommodate new situations and avoid mechanical or formulaic application. It has sometimes viewed the freedom from successive trials positively as the "valued right" to have guilt decided by a single tribunal.[12] Perhaps as a corollary, the Court has recognized the government's interest in obtaining one full and fair opportunity to prove its case.[13] It has also characterized "the preservation of the finality of judgments" as a "vitally important" interest.[14] And, as will be discussed in greater detail in the second part of this paper, the Court has showed a renewed interest in the Clause's reference to "the same offence."[15]

Keeping the Court's formulation of the Double Jeopardy Clause in mind is crucial because, as the Court recently held, "the Clause was not written or originally understood to pose an insuperable obstacle to the administration of justice in cases where there is no semblance of these types of oppressive practices."[16] Most arguments will thus be based more in policy than rule.

II. When does jeopardy attach?

[7] *Green*, 355 U.S. at 187-88.
[8] *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 307 (1984).
[9] *U.S. v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977).
[10] *Price v. Georgia*, 398 U.S. 323, 331 (1970).
[11] *Currier v. Virginia*, 138 S. Ct. 2144, 2149 (2018).
[12] *Ex parte Garrels*, 559 S.W.3d 517, 519 (Tex. Crim. App. 2018) ("A defendant has a constitutional right to have her fate determined 'before the first trier of fact.'"); *Torres v. State*, 614 S.W.2d 436, 441 (Tex. Crim. App. 1981).
[13] *See Wade v. Hunter*, 336 U.S. 684, 689 (1949) ("a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.").
[14] *Yeager v. U.S.*, 557 U.S. 110, 117-18 (2009) (internal quotations and citations omitted).
[15] *Currier*, 138 S. Ct. at 2149.
[16] *Id.* (cleaned up).

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