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NOTES

Double Jeopardy and Federal Prosecution After State Jury Acquittal

The fifth amendment's double jeopardy clause prohibits successive prosecutions of a defendant for the same offense.[1] Because this seemingly clear prohibition is "not self-defining,"[2] a number of interpretive difficulties have arisen. One of the most intractable of these difficulties concerns the propriety of successive state-federal prosecutions[3] for identical offenses. When the state proceedings resulted in a conviction[4] or a guilty plea[5], the Supreme Court has held that a subsequent federal prosecution does not offend the double jeopardy clause. But the Court has never sanctioned federal reprosecution for the same offense after a state jury acquittal.[6] The

1. U.S. CONST. amend. V: "No person . . . shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." Successive prosecutions for the same offense place a defendant in double jeopardy once the jury in the second trial is "empaneled and sworn." *See* Crist v. Bretz, 437 U.S. 28, 38 (1978); Green v. United States, 355 U.S. 184, 188 (1957); Wade v. Hunter, 336 U.S. 684 (1949). In a bench trial, jeopardy attaches when the court begins to hear the evidence. *See* Lee v. United States, 432 U.S. 23 (1977).

2. Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1001 (1980).

3. This Note uses the phrase "state-federal prosecutions" to refer to federal prosecution after state trial. Under the dual sovereignty principle, two criminal offenses are deemed to be different for double jeopardy purposes when each is defined by a separate sovereign government. Although this Note emphasizes the dual sovereignty principle as it applies to federal prosecution after state trial, many of the same arguments apply equally to state prosecution after federal trial. Questions of dual sovereignty also arise in several other contexts. The U.S. Supreme Court has decided that, for double jeopardy purposes, neither municipalities nor counties within a single state are separate sovereigns. *See* Brown v. Ohio, 432 U.S. 161 (1977); Waller v. Florida, 397 U.S. 387 (1970). On the other hand, the federal government and Indian tribal governments are separate sovereigns. *See* United States v. Wheeler, 435 U.S. 313 (1978). Two separate states are also separate sovereign governments for double jeopardy purposes. *See* Nielsen v. Oregon, 212 U.S. 315 (1909).

4. *See, e.g.*, Jerome v. United States, 318 U.S. 101, 105 ("[T]he double jeopardy provision of the Fifth Amendment does not stand as a bar to federal prosecution though a state conviction based on the same acts has already been obtained."); United States v. Lanza, 260 U.S. 377 (1922).

5. *See* Abbate v. United States, 359 U.S. 187 (1959). After Abbate pleaded guilty to the state offense of conspiracy to destroy another's property, he was tried and convicted in federal court for conspiring to destroy "essential and integral parts" of a federally operated communications system. 359 U.S. at 188-98.

6. The Supreme Court did permit the State of Illinois to prosecute a defendant who had already been acquitted by a federal jury. Bartkus v. Illinois, 359 U.S. 121 (1959). In *Bartkus*, however, the Court could not base its decision on the double jeopardy clause, since that clause was not held to apply to the states until ten years later in Benton v. Maryland, 395 U.S. 784 (1969). The *Bartkus* Court upheld the state reprosecution under its fourteenth amendment due process analysis, using a standard which prohibited "only those practices 'repugnant to the conscience of mankind.'" 359 U.S. at 127 (citing Palko v. Connecticut, 302 U.S. 319, 323

possibility of federal prosecution of defendants already acquitted by state juries in two highly publicized cases has recently fueled the controversy.[7] After each acquittal, statements by Justice Department officials raised expectations that the federal government would reprosecute the defendants.[8]

This Note argues that the rationale of the Supreme Court's post-conviction cases cannot be extended to cases involving jury acquittal and that federal reprosecution after state jury acquittal violates the double jeopardy clause. One can give meaning to the clause, Part I explains, only by reference to its underlying constitutional values. Part II suggests that these values, while possibly compatible with

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(1937)). *See also* Benton v. Maryland, 395 U.S. 784, 796 (1969) (contrasting "the watered-down standard enunciated in Palko" with "this Court's interpretations of the Fifth Amendment double jeopardy provision.").

In all other cases in which the Supreme Court has applied the dual sovereignty principle, the first trial resulted in either conviction or a guilty plea. *See* notes 4-5 *supra*. While circuit courts have squarely addressed the issue whether the dual sovereignty principle applies after jury acquittal despite the double jeopardy clause, they have relied only on the dicta in Supreme Court dual sovereignty decisions to uphold federal prosecution following state jury acquittal. *See, e.g.*, United States v. Johnson, 516 F.2d 209 (8th Cir.), *cert. denied*, 423 U.S. 859 (1975). But the circuit courts have relied on the *Bartkus-Abbate* cases to support their conclusion that jury acquittal is no different than conviction. *See, e.g.*, United States v. Smaldone, 485 F.2d 1333, 1343 (10th Cir. 1973). The problem with relying on *Bartkus-Abbate* for this conclusion is that *Abbate* concerned federal prosecution after the defendant pleaded guilty in state court; *Bartkus*, on the other hand, was decided solely upon the *Palko* due process standard.

7. On May 18, 1980, a Florida criminal court jury acquitted four Miami policemen of the fatal beating of Arthur McDuffie, a black insurance executive. Florida had indicted the policemen for several offenses — murder, manslaughter, aggravated battery, and evidence tampering. *See* N.Y. Times, May 19, 1980, § 1, at 1, col. 6. According to the prosecutor's evidence, the policemen chased McDuffie after he failed to stop for a red light while driving his motorcycle. When the police captured McDuffie, they beat him to death. *See* N.Y. Times, May 18, 1980, § 1, at 24, col. 1. This case captured widespread attention when the verdict sparked rioting in Miami. For Miami blacks, the verdict reached by an all-white jury represented final "frustration." *See* N.Y. Times, May 20, 1980, § 2, at 11, col. 1. As Attorney General Benjamin Civiletti said, "There is a great perception of injustice, which has brought a sense of frustration and rage." *Id.*

In November 1980, a North Carolina criminal court jury acquitted several Ku Klux Klan and Nazi Party members of murdering five Communist Workers Party members. *See* N.Y. Times, Nov. 18, 1980, § 1, at 1, col. 2. In an editorial, the Washington Post said that the verdict would undoubtedly be publicized "as another example of how injustice still reigns in the good, old, bigoted USA." Washington Post, Nov. 20, 1980, § 1, at 18, col. 1.

8. After the Florida acquittal, Attorney General Benjamin Civiletti arrived in Miami "to try to rectify 'whatever injustice has occurred here.'" N.Y. Times, May 20, 1980, § 2, at 11, col. 1. Civiletti expressed his hope that "no one feels so outraged and revengeful that they will not give the United States Government a chance to investigate the death of Arthur McDuffie." *Id.* After the North Carolina verdict, the Justice Department was "studying the verdict to see if there is anything we can do." N.Y. Times, Nov. 18, 1980, § 1, at 1, col. 2. Though the federal government has not indicted those defendants already tried by state prosecutors in either case, the potential for successive state-federal prosecution remains in these two cases as well as other cases. On June 19, 1981, for instance, three blacks under arrest drowned when a boat carrying them and three officers capsized. Both the state of Texas and the federal government have the opportunity to file charges against the three officers based on this incident. *See* NEWSWEEK, July 20, 1981, at 24. In another recent example, Ernest Lacy, a black man, died while handcuffed in a Milwaukee police paddywagon. *See* N.Y. Times, Aug. 16, 1981, § 1, at 26, col. 1.

federal prosecution after a state conviction, cannot countenance reprosecution after a jury acquittal. Part III proposes that courts determine whether such reprosecution is appropriate by applying the *Blockburger* same offense standard: Two offenses are the same unless each requires proof of an element the other does not.[9] Provided that federal jurisdiction is not the only distinct element in the federal offense, this standard accommodates both the federal interest in prosecution and the defendant's double jeopardy interests.

I. THE NEED TO IDENTIFY THE VALUES UNDERLYING THE DOUBLE JEOPARDY CLAUSE

"No person," the fifth amendment guarantees, "shall . . . be subject for the same offence to be twice put in jeopardy . . . ."[10] This guarantee, however, is not absolute; the scope of a defendant's double jeopardy protection is coextensive with the scope of the definition of "the same offence."[11] To decide whether the federal government may prosecute a defendant who has been acquitted by a state jury, it is thus necessary to determine what constitutes "the same offence" in this context. One conception of the phrase is implicit in the principle of dual sovereignty that the Supreme Court has applied to federal prosecutions following convictions or guilty pleas in state proceedings.[12] This principle is grounded in the independent powers of the state and federal governments to define and prosecute

9. *See* Blockburger v. United States, 284 U.S. 299, 304 (1932).

10. U.S. CONST. amend. V.

11. The "principal question" raised in double jeopardy cases involving successive prosecutions is whether the offense charged at the second trial is the "same" as that charged at the first trial. *See, e.g.*, Illinois v. Vitale, 447 U.S. 410, 415-16 (1980); Brown v. Ohio, 432 U.S. 161, 164 (1977). *See generally* J. SIGLER, DOUBLE JEOPARDY 63-67 (1969); Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 267 (1962).

12. *See* text at notes 4-5 *supra*; United States v. Wheeler, 435 U.S. 313, 317 (1978). *See also* Bartkus v. Illinois, 359 U.S. 121, 158 (1959) (Black, J., dissenting). This principle originated in several nineteenth century cases in which the Court said that both the state and federal governments, as separate sovereigns, had the power to make the same act a criminal offense. *See* Moore v. Illinois, 55 U.S. (14 How.) 13 (1852); United States v. Marigold, 50 U.S. (9 How.) 560 (1850); Fox v. Ohio, 46 U.S. (5 How.) 410 (1847). Until 1922, the Court had not confronted a factual situation where either the federal government sought to prosecute a defendant already tried in state court or a state court sought to prosecute a defendant already tried in federal court. But in United States v. Lanza, 260 U.S. 377 (1922), the Court held for the first time that the federal government could prosecute a defendant convicted in state court. The *Lanza* court, relying on the dicta of the nineteenth century cases, decided that successive state-federal prosecutions were permissible since the state and federal governments were separate sovereigns, "deriving power from different sources, capable of dealing with the same subject-matter within the same territory . . . . It follows that an act denounced as a crime by both national and state sovereigns is an offense against the peace and dignity of both and may be punished by each." 260 U.S. at 382. The Court reaffirmed the dual sovereignty principle in two important companion cases decided in the 1959 Term. Bartkus v. Illinois, 359 U.S. 121 (1959); Abbate v. United States, 359 U.S. 187 (1959). *See generally* L. MILLER, DOUBLE JEOPARDY AND THE FEDERAL SYSTEM (1968).

criminal offenses.[13] Two criminal offenses, it posits, are not the same if each has been proscribed by a separate sovereign government even if their elements are identical.[14] If courts applied the dual sovereignty principle after state jury acquittals, the double jeopardy clause would never bar federal reprosecution.

A very different view of "the same offence" is implied by the "jury-acquittal rule"[15] that governs cases involving a single sovereign. The Supreme Court has not used the dual sovereignty principle to justify federal prosecution after acquittal by a state jury;[16] in fact, it has repeatedly suggested — in other contexts — that a jury verdict of not guilty has "absolute finality."[17] If this rule truly "op-

13. *See, e.g.*, United States v. Wheeler, 435 U.S. 313, 320 (1978) ("Each [government] has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses . . . ."); United States v. Lanza, 260 U.S. 377, 382 (1922) (the federal and state governments represent "two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. . . ."). *But see* Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538, 1542 (1967) [hereinafter cited as Harvard Note]; Note, *The Problems of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution*, 31 STAN. L. REV. 477, 486 (1979) [hereinafter cited as Stanford Note]. These Notes argue that the Court's conceptual approach to sovereignty is defective as to the source of state and federal sovereign power. The Notes suggest that each government derives power from the same source, the people.

14. *See* United States v. Wheeler, 435 U.S. 313, 317 (1978) ("The basis for the [dual sovereignty] doctrine is that prosecutions under the laws of separate sovereigns do not, in the language of the fifth amendment, 'subject [the defendant] for the same offence to be twice put in jeopardy.' "); Bartkus v. Illinois, 359 U.S. 121, 158 (1959) (Black, J., dissenting) (describing the principle as "the notion that, somehow, one act becomes two because two jurisdictions are involved").

15. *See* Westen, *supra* note 2, at 1005. The Court itself has not referred to this rule as the "jury-acquittal rule."

16. *See* note 6 *supra*. The Court has confronted double jeopardy cases where the defendant was retried after jury acquittal. *See, e.g.*, Ashe v. Swenson, 397 U.S. 436 (1970); United States v. Ball, 163 U.S. 662 (1896). But it decided those cases based on either a "same offense" standard of limited applicability or no such standard at all. *Ashe* represents the former category. The defendant Ashe had been accused of participating in the robbery of six poker players. At the first trial, prosecution witnesses could not make certain identification of Ashe. As a result, the jury acquitted him. Upon retrial, the question of identification was relitigated. The Court held that retrial was collaterally estopped. By linking the collateral estoppel doctrine with the double jeopardy clause, the Court in effect said that two offenses are the "same" when the prosecutor at the second trial tries to prove any issue of fact that the prosecutor at the first trial tried but failed to prove. *See* 397 U.S. at 445-46. But this same offense standard applies only when the prosecution relitigates issues actually determined in the defendant's favor at the first trial. *See* 397 U.S. at 442.

In United States v. Ball, 163 U.S. 662 (1896), the Court held that the defendant could not be retried for murder after he had been acquitted of the same charge. The only difference between the two offenses was that the second indictment alleged specifically when and where the murder took place. *See* 163 U.S. at 664. But the Court did not develop any general same offense standard.

Similarly, no other cases related to acquittal provide any guidance as to what an appropriate post-acquittal same offense standard should be. *See* Benton v. Maryland, 395. U.S. 784 (1969); Green v. United States, 355 U.S. 184 (1957).

17. United States v. DiFrancesco, 449 U.S. 117, 130 (1980) (quoting Burks v. United States, 437 U.S. 1, 16 (1978)). *Accord*, Bullington v. Missouri, 101 S. Ct. 1852, 1861 (1981) (holding that the first jury's decision to sentence defendant to life imprisonment constitutes an

erates without exception,"[18] it would bar all successive state-federal prosecutions where the first trial ended in a jury acquittal. The same offense standard that inheres in the jury-acquittal rule thus directly contradicts the standard implied by the dual sovereignty principle.

Any resolution of this conflict will likely be influenced by the Supreme Court's fear of the "undesirable consequences"[19] that a prohibition on successive state-federal prosecutions would engender. If a state prosecution absolutely barred federal prosecution for the same offense, the state or its agents could, either unwittingly or intentionally, interfere with federal law enforcement.[20] Even if the state prosecution ended in conviction, the state might punish the defendant less severely than would the federal government.[21]

The damage to federal law enforcement could be mitigated in several ways, but disadvantages attend each course of action.[22] The supremacy clause, [23] for example, allows Congress to preempt a state law that interferes with federal criminal law.[24] But preemption of

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acquittal on the capital murder issue and is "absolutely final"); Burks v. United States, 437 U.S. 1, 16 (1978) (dictum) ("we necessarily afford absolute finality to a jury's verdict of acquittal"); United States v. Martin Linen Supply Co., 439 U.S. 564, 571 (1977).

18. Westen, *supra* note 2, at 1004.

19. Abbate v. United States, 359 U.S. 187, 195 (1959).

20. *See* Abbate v. United States, 359 U.S. 187, 195 (1959); Fox v. Ohio, 46 U.S. (5 How.) 410 (1847). The federal government has been especially concerned that state prosecution will not vindicate federal interests in the area of civil rights. *See* S. REP. No. 721, 90th Cong., 1st Sess. 4, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 1837, 1840 ("In some places . . . local officials either have been unable or unwilling to solve and prosecute crimes of racial violence or to obtain conviction in such cases — even where the facts seemed to warrant. As a result, there is a need for Federal action to compensate for the lack of effective protection and prosecution on the local level."); U.S. COMMN. ON CIVIL RIGHTS, LAW ENFORCEMENT: A REPORT ON EQUAL PROTECTION IN THE SOUTH 49-53 (1965). This can occur for several reasons. First, state prosecutors may have conducted a less vigorous prosecution than their federal counterparts. Second, state rules of evidence may differ from the Federal Rules of Evidence. Third, state judges may exhibit what federal authorities believe to be excessive leniency. *See generally* Johnson v. Virginia, 373 U.S. 61, 62 (1963) (per curiam) (reversing state conviction for contempt that rested on black defendant's refusal to sit in "the section [of the courtroom] reserved for Negroes"); Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Avert State Court Trial*, 113 U. PA. L. REV. 793, 797 (1965).

21. *See* United States v. Wheeler, 435 U.S. 313, 318 (1978); Abbate v. United States, 359 U.S. 187, 195 (1959). The *Abbate* Court specifically emphasized that after the defendant had pleaded guilty to the state offense of conspiracy to destroy another's property, he was sentenced to a three month prison sentence. By contrast, the federal punishment for conspiracy to destroy federal communications facilities could have been five years' imprisonment. *See* 359 U.S. at 195. It does not seem to follow, however, that federal law enforcement in this case "must necessarily be hindered." 359 U.S. at 195. Indeed, even if the appropriate measure of each government's interest is the length of the sentence, the comparison between the maximum federal punishment and the actual state punishment is misleading at best. Either both maximum punishments or both actual punishments should be compared. *But see* 359 U.S. at 195.

22. *See* 359 U.S. at 195.

23. U.S. CONST. art. VI.

24. *See* Pennsylvania v. Nelson, 350 U.S. 497 (1956) (holding that the Smith Act, 18 U.S.C. § 2385 (1976) (congressional anticommunist legislation) preempts state sedition act). Congressional intent to preempt state law must be "clear." Rice v. Sante Fe Elevator Corp., 331 U.S.

state criminal law "would not be desirable"[25] since the states should retain the "principal responsibility"[26] for criminal law enforcement.[27] As an alternative to federal preemption, state and federal officials could devise procedures to coordinate prosecutorial efforts. The impracticality of such a scheme, however, has made the Court reluctant to require that federal prosecutors "keep informed" of defendants in state court who may be subject to federal prosecution.[28] For cases where state officials obtained a conviction, the Court has rejected these proposals[29] and has adopted the dual sovereignty principle, which always permits federal reprosecution.[30]

The Court's determination that the dual sovereignty principle applies after state conviction does not settle the question whether it should also apply after state jury acquittal. "[R]etrials after acquittal," Justice Black once noted, "have been considered particularly obnoxious, worse even, in the eyes of many, than retrials after conviction."[31] It may seem paradoxical that the outcome of a trial — conviction or jury acquittal — could affect the application of the dual sovereignty principle and, in turn, the same offense standard.[32]

218, 230 (1947). The Court presumes congressional intent to preempt in three cases: first, when state law "may produce a result inconsistent with the objective of the federal statute," Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947); second, when there is a predominant federal interest in a particular area, *see* Pennsylvania v. Nelson, 350 U.S. 497, 504 (1956); and third, where the "scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

25. United States v. Wheeler, 435 U.S. 313, 318 (1978).

26. Abbate v. United States, 359 U.S. 187, 195 (1959). *See also* Bartkus v. Illinois, 359 U.S. 121, 137 (1959); Screws v. United States, 325 U.S. 91, 109 (1945); Jerome v. United States, 318 U.S. 101, 104-05 (1943).

27. *See* Address by Attorney General Benjamin R. Civiletti to the North Carolina State Bar Association (Oct. 17, 1980).

28. Abbate v. United States, 359 U.S. 187, 195 (1959). *See* Westen, *supra* note 2, at 1037 n.121. Despite these repeated assertions about the impracticality of coordinating prosecutions, this theory has never been tested. Indeed, in the recent Florida trial of the four policemen, federal prosecutors did "keep informed" about the progress of the trial. They simply expected the trial to produce some convictions. *See* N.Y. Times, May 20, 1980, § 2, at 11, col. 1.

29. Walter Fisher, Bartkus' attorney in Bartkus v. Illinois, 359 U.S. 121 (1959), argues for limited preemption of state criminal law. *See* Fisher, *Double Jeopardy and Federalism*, 50 MINN. L. REV. 607 (1966). Fisher suggests that Congress should bar state prosecution if a state defendant elects a federal trial and the federal prosecutors agree to prosecute. Federal trial, in Fisher's proposal, is not barred even if federal prosecutors at first decline to prosecute. *See id.* at 610-11. This proposal leaves unanswered the question whether a defendant's double jeopardy protection under the fifth amendment bars *any* federal trial after state prosecution. If it does, then Fisher's proposed statute would be unconstitutional.

30. Justice Frankfurter, writing for the majority in Bartkus v. Illinois, 359 U.S. 121, 138 (1959), argued that "[t]he greatest self-restraint is necessary when that federal system yields results with which a court is in little sympathy." He meant that the dual sovereignty principle, though finally accepted, was not totally desirable. He thus expressed the Court's hope that the states would restrain themselves from prosecuting defendants already tried in federal court. *See* 359 U.S. at 138-39 (commending several states that statutorily barred such prosecutions).

31. Bartkus v. Illinois, 359 U.S. 121, 162 (1959) (Black, J., dissenting).

32. This Note restricts its analysis to successive prosecutions where the first trial is a jury

But if previously acquitted defendants have greater double jeopardy interests than their convicted counterparts, courts arguably should develop a same offense standard that affords them additional protection. The validity of this tentative conclusion can be tested by using four traditional aids to constitutional interpretation.[33] Unfortunately, three of these aids — the constitutional text, the framers' intent, and precedent — provide few clues as to the level of protection that defendants who have been acquitted in state jury trials deserve. As a result, the fourth — the values or purposes underlying the double jeopardy clause — must provide the framework for defining "the same offence" after state jury acquittal.

Although the language of the fifth amendment furnishes a starting point, it does not indicate how "the same offence" should be defined.[34] "[T]he meaning of this phrase," the Supreme Court has observed, "may vary from context to context. . . ."[35] Nothing in the amendment's language, therefore, is inconsistent with the tentative conclusion regarding the greater protection to be accorded acquitted defendants.

The utility of tying constitutional interpretation to the framers' original intentions has been seriously questioned,[36] but that debate should not detain an analysis of the double jeopardy clause because the framers said little that is helpful about the meaning of "the same offence." They believed that the phrase meant *precisely* the same offense. In their view, two offenses were the same only when the elements of the crimes were identical.[37] The Supreme Court has explicitly rejected this approach; its cases make clear that two offenses need not be identical to be considered the "same" for double jeopardy purposes.[38] Since the framers' statements on the scope of

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trial. Bench trial is not discussed because, for double jeopardy purposes, bench acquittal differs substantially from jury acquittal. While bench acquittal raises the double jeopardy value of finality, jury acquittal alone implicates the value of jury nullification. *See* Part II *infra*. The Court has recently denied certiorari in two double jeopardy cases where the first trial resulted in bench acquittal. *See* Cecil v. United States, 444 U.S. 881 (1979) (Brennan, J., dissenting from denial of certiorari) (after judge acquitted defendant of possession of cocaine with intent to distribute, prosecutors charged defendant with distribution of cocaine as well as possession of cocaine with intent to distribute); Cousins v. Maryland, 429 U.S. 1027 (Brennan, J., dissenting), *denying cert. to* 277 Md. 383, 354 A.2d 825 (1976).

33. *See* Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1037, 1061 (1981); Westen, *supra* note 2, at 1001-04.

34. Whalen v. United States, 445 U.S. 684 (1980); Westen, *supra* note 2, at 1001.

35. Whalen v. United States, 445 U.S. 684, 700 (1980) (Rehnquist, J., dissenting) (citing Brown v. Ohio, 432 U.S. 161, 166-67 n.6 (1977)).

36. *See* Sandalow, *supra* note 33.

37. The framers relied on both Blackstone and Coke. *See* J. SIGLER, *supra* note 11, at 16. Blackstone had said that double jeopardy occurred only when a defendant was tried twice "for the same identical act and crime." 4 W. BLACKSTONE, COMMENTARIES *336. Until the nineteenth century, the double jeopardy bar prohibited retrial only "for *precisely* the same offence." M. FRIEDLAND, DOUBLE JEOPARDY 14 (1969) (emphasis in original).

38. *See* Brown v. Ohio, 432 U.S. 161, 164 (1977). Indeed, double jeopardy questions about

double jeopardy protection were based on a fundamentally different conception of what constitutes "the same offence," the task of defining the phrase devolves to the two final sources of constitutional interpretation.

Yet precedent, the third aid, is not decisive. The Court has never confronted the question whether the dual sovereignty principle should apply when the first trial ended in jury acquittal.[39] Whenever the Court has been prepared to consider this question, federal prosecutors, following established Justice Department policy,[40] have requested dismissal of the federal charges.[41] The Court's statements in double jeopardy cases, moreover, support two inconsistent conclusions. Some of its language suggests that the clause permits successive state-federal prosecutions however the first trial ended.[42] But other language hints that an acquittal affords greater double jeopardy protection than a conviction[43] and that "a jury's *verdict* of acquittal" is absolutely final.[44] The meaning of "the same offence" after jury acquittal, therefore, may differ from the meaning of the phrase after conviction.[45]

In the absence of decisive precedent, only the values underlying the double jeopardy clause can support a conclusion that state jury acquittal differs sufficiently from conviction to justify a broader,

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identical offenses are rare today. Because of the proliferation of statutorily defined crimes, litigation often centers instead on whether two or more statutes proscribe what appears to be the same act. *See* Comment, *supra* note 11, at 268-69.

39. *See* note 6 *supra*.

40. Soon after the *Bartkus-Abbate* decisions, the Justice Department adopted a policy that there should be no federal prosecution after state trial unless "reasons are compelling." N.Y. Times, Apr. 6, 1959, § 1, at 1, col. 4. The Department continues to adhere to that policy. *See, e.g.,* Rinaldi v. United States, 434 U.S. 22 (1977) (per curiam). *See also* Petite v. United States, 361 U.S. 529 (1960) (per curiam) (first decision accepting the Department's policy, later known as the *Petite* policy).

41. *See* Rinaldi v. United States, 434 U.S. 22 (1977) (per curiam); Watts v. United States, 422 U.S. 1032 (1975); Marakar v. United States, 370 U.S. 723, *vacating per curiam* 300 F.2d 513 (3d Cir. 1962); Petite v. United States, 361 U.S. 529 (1960) (per curiam).

42. The Court has stated that "a state prosecution does not bar a federal one." United States v. Wheeler, 435 U.S. 313, 317 (1978) (permitting federal prosecution of a Navajo Indian who previously pleaded guilty in a Tribal Court). The *Abbate* Court did not view the dual sovereignty principle as broadly, stating only that *"Lanza* has been considered in many cases in the Courts of Appeals to have established the general principle that a federal prosecution is not barred by a prior state prosecution of the same person for the same acts." Abbate v. United States, 359 U.S. 187, 194 (1959).

43. *See* United States v. DiFrancesco, 449 U.S. 117, 129 (1980) ("An acquittal is accorded special weight."); United States v. Scott, 437 U.S. 82, 91 (1978) (an acquittal has "particular significance"); Arizona v. Washington, 434 U.S. 497, 503 (1978) (double jeopardy clause "conclusively presumes that a second trial would be unfair" after acquittal); Fong Foo v. United States, 369 U.S. 141, 143 (1962) (per curiam).

44. Burks v. United States, 437 U.S. 1, 16 (1978) (emphasis in original). For other cases, see note 17 *supra*.

45. *See* Whalen v. United States, 445 U.S. 684, 700 (1980) (Rehnquist, J., dissenting); Westen, *supra* note 2, at 1004.

more protective same offense standard. Professor Westen has persuasively demonstrated that "the double jeopardy clause is a triptych of three separate values."[46] The first concerns the defendant's interest in repose and finality. This value, which lies at the "heart"[47] of the clause, safeguards a defendant from the "ordeal" of a second criminal prosecution for "the same offence." The second value concerns the preservation of the defendant's interest in criminal jury nullification. The "absolute finality" of jury acquittals springs from the criminal jury's prerogative to nullify the law by acquitting a defendant "against the evidence."[48] The third value concerns the double jeopardy rule that the government cannot punish a defendant twice for "the same offence."[49] The value that informs this rule is the defendant's interest in the "lawful administration of prescribed sentences."[50] This means that a defendant cannot be punished beyond the maximum penalty authorized by the legislature for the criminal offense that he has committed.[51]

These three "entirely distinct . . . and theoretically independent"[52] values explain the existence of double jeopardy protection. If these values mandate dissimilar treatment for convicted defendants and those previously acquitted by a jury, that difference in treatment should be reflected in the same offense standard applied to each class of defendant. Only after assessing the double jeopardy values implicated in each situation, therefore, can one establish an appropriate same offense standard for federal prosecution after state jury acquittal.

II. The Double Jeopardy Values Implicated by Conviction and Jury Acquittal

Because the Supreme Court has held that the double jeopardy clause does not prohibit federal prosecution after a state conviction, the argument that the clause limits federal prosecution after a state jury acquittal must rest on a palpable distinction between conviction and jury acquittal. As Part I indicated, such a distinction can be found only in the clause's values or purposes. Two values underlie double jeopardy protection against postconviction retrial — finality and the prohibition against multiple punishment for a single offense.

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46. *See* Westen, *supra* note 2, at 1002.

47. Jeffers v. United States, 432 U.S. 137, 150 (1977) (plurality opinion).

48. *See* Westen, *supra* note 2, at 1012-23.

49. The Court adopted this rule in *Ex parte* Lange, 85 U.S. (18 Wall.) 168 (1873).

50. Westen, *supra* note 2, at 1002.

51. *See* North Carolina v. Pearce, 395 U.S. 711, 718 (1969) (describing an example of multiple punishment where defendant serves "separate prison terms of three and 10 years, although the maximum single punishment for the offense is 10 years imprisonment").

52. Westen, *supra* note 2, at 1002.

Retrial after jury acquittal also implicates two double jeopardy values — finality and jury nullification. This Part evaluates these values and argues that double jeopardy protection is significantly broader after jury acquittal than after conviction. This, in turn, explains why the same offense standard should afford greater protection to a defendant's interests after state jury acquittal.

A. *The Interest in Finality*

After a defendant has been tried, he has an interest in ending the "ordeal" of criminal prosecution;[53] to the extent that the ordeal of retrial is undue, the double jeopardy clause protects this interest. Courts effectuate the finality value by balancing the defendant's interest in repose against the public's interest in effective law enforcement.[54] Thus, a defendant's interest in ending the "embarrassment, expense and . . . anxiety"[55] of criminal prosecution is weighed against the government's interest in ensuring conviction of the guilty.[56]

Implicit in the Supreme Court's double jeopardy decisions are two criteria that point to an appropriate balance between these interests after a state trial.[57] First, a defendant should be able to prepare a defense with the expectation that he can concentrate his efforts at a single trial. If a defendant fears the possibility of a second prosecution, he may be forced to conserve resources, thus reducing his ability to defend.[58] Second, the federal government should not be

53. Green v. United States, 355 U.S. 184, 187 (1957). *See* Swisher v. Brady, 438 U.S. 204, 216-18 (1978); Price v. Georgia, 398 U.S. 323, 331 (1970); United States v. Kuck, 573 F.2d 25, 27 (10th Cir. 1978); United States v. Beckerman, 516 F.2d 905, 906 (2d Cir. 1975); United States *ex rel.* Russo v. Superior Court of N.J., 483 F.2d 7, 12 (3d Cir.), *cert. denied*, 414 U.S. 1023 (1973).

54. This balancing method is derived from mistrial cases, which "present in pure form what is often taken to be the central value of double jeopardy, *viz.*, the defendant's interest in getting the proceedings over with once and for all." Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 85. *See* United States v. Scott, 437 U.S. 82, 92 (1978) (balancing the defendant's interest in finality against the public interest in prosecution when mistrial declared upon motion by the prosecutor or the court); Illinois v. Somerville, 410 U.S. 458, 471 (1973) ("the defendant's interest in proceeding to verdict is outweighed by the competing and equally legitimate demand for public justice"); Finch v. United States, 433 U.S. 676, 680 (1977) (Rehnquist, J., dissenting) (describing precedent which "emphasized more of a balancing and fairness test"). *See also* Westen, *supra* note 2, at 1036.

55. Green v. United States, 355 U.S. 184, 187 (1957).

56. *See* Burks v. United States, 437 U.S. 1, 15 (1978). *See generally* Westen, *supra* note 2, at 1036.

57. Professor Westen argues that no double jeopardy problems of finality can be resolved unless the appropriate criteria of finality are defined. *See* Westen, *supra* note 2, at 1038-40.

58. This criterion proceeds from the assumptions that the adversary relationship between government and individual is uneven from the beginning and that the individual has scarce resources for his defense. In mistrial cases, the double jeopardy clause permits retrial only when required by "manifest necessity." *See* United States v. Jorn, 400 U.S. 470, 480 (1971) (quoting United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824)); Downum v. United States, 372 U.S. 734, 738 n.1 (1963) (quoting United States v. Watson, 28 F. Cas. 499, 500

permitted to use the state trial solely "to strengthen its case" by discovering the defendant's evidence or by correcting possible deficiencies in its own case.[59] The government can muster resources that dwarf those of the defendant, and retrial compounds this imbalance.[60] A defendant facing successive state-federal prosecutions, moreover, is in an adversarial relationship with, not one, but two governments possessing resources far superior to those available for his defense.[61]

These two prerequisites to fairness apply to all state-federal prosecutions, regardless of the outcome of the state trial. But they carry greater weight after acquittal than after conviction because retrial following acquittal creates "an unacceptably high risk" that an innocent defendant will be convicted.[62] All things considered (assuming adequate resources, effective assistance of counsel, and constitutional trial procedures), a defendant who has previously been found guilty beyond a reasonable doubt is more likely to be actually guilty than a defendant who was *acquitted* in his first trial. Retrial of a previously acquitted defendant who has expended all of his resources preparing and presenting a successful defense thus increases the likelihood that federal prosecutors will obtain a conviction against an innocent defendant. If sufficient evidence existed to convince the state judge or jury beyond a reasonable doubt that the defendant was guilty, moreover, it is less likely that the federal prosecutors needed to use the state case to further their discovery or otherwise aid their case. All

(S.D.N.Y. 1868)). "Manifest necessity" is taken to mean that the government bears a special burden of justifying retrial. *See* Westen & Drubel, *supra* note 54, at 91 n.58.

59. Illinois v. Somerville, 410 U.S. 458, 469 (1973) (retrial not barred because it was manifestly necessary). The Court indicated that retrial is permissible in some cases, even though the retrial enables the government to strengthen its case. In *Somerville*, the Court permitted retrial because "delay was minimal" and mistrial was "the only way" to correct a defective indictment. 410 U.S. at 469. This suggests that, although any retrial presents the prosecution with the opportunity to strengthen its case, retrial will be permitted when there is "no suggestion that the implementation of that policy . . . could be manipulated so as to prejudice the defendant." 410 U.S. at 469. *Cf.* Swisher v. Brady, 438 U.S. 204, 216 (1978) (trial *de novo* after master's hearing did not violate double jeopardy clause because both were part of a "single proceeding"). *But cf.* Burks v. United States, 437 U.S. 1, 11 (1978) (retrial improper where appellate court reverses conviction because of inadequacy of the evidence).

60. *See* United States v. DiFrancesco, 449 U.S. 117, 130 (1980).

61. A third criterion concerns prosecutorial harassment. A prosecutor should not harass a defendant by subjecting him to repeated prosecution without justification, since prosecutorial misconduct aggravates a defendant's "anxiety and insecurity." Green v. United States, 355 U.S. 184, 187 (1957). Harassment, for double jeopardy purposes, necessarily involves prosecutorial misconduct. Prosecutorial misconduct occurs when the prosecutor reprosecutes "without legitimate justification." *See* Comment, *supra* note 11, at 288. But Justice Department policy requires legitimate justification because federal prosecutors forego federal prosecution after state trial unless there are compelling reasons supporting federal prosecution. *See* Dept. of Justice Press Release (Apr. 6, 1959); N.Y. Times, Apr. 6, 1959, § 1, at 19, col. 2. For cases dismissed at the request of the Justice Department, see note 41 *supra*.

62. United States v. DiFrancesco, 449 U.S. 117, 130 (1980). *See* Swisher v. Brady, 438 U.S. 204, 216 (1978); Arizona v. Washington, 434 U.S. 497, 504 (1978); Green v. United States, 355 U.S. 184, 187-88 (1957).

of this suggests that a defendant's interest in finality should be valued more highly if he were acquitted in the prior state proceeding rather than convicted.

B. *Jury Nullification and the Prohibition Against Multiple Punishment*

The remaining two double jeopardy values are outcome-specific: The interest in jury nullification arises only after jury acquittal, while the interest in avoiding greater punishment than the legislature intended arises only after conviction. The importance of these values is not fixed, but varies with the context in which they are implicated. This Section demonstrates that the prohibition against multiple punishment affords defendants less double jeopardy protection than does the need to protect the jury's prerogative to acquit against the evidence.[63]

1. *Multiple Punishment*

The double jeopardy clause prohibits courts from punishing a defendant twice for the same offense. Double punishment occurs when a defendant's sentence exceeds the maximum penalty that the legislature intended to impose for his crime.[64] To determine whether cumulative state and federal sentences constitute single or double punishment, courts must first ascertain what Congress intended.

The effect of the double jeopardy clause on this analysis of Congress' intent is unsettled.[65] It is unlikely that the clause provides an independent standard limiting the penalties that can be imposed for specific offenses.[66] But it may create "a *presumption* against finding that domestic law intends multiple offenses and multiple punishment, a presumption that can be overcome only by 'clear and unmistakable' evidence that the domestic law intends offenses and sentences to be cumulated."[67] The Supreme Court has used the presumption approach where a defendant was convicted and punished in a single trial under two separate statutory provisions enacted by Congress. It justified the presumption on the ground that "Congress

63. There is no reason to believe that the combined effect of the two weaker postconviction values somehow outweighs the combined effect of the two stronger jury acquittal values.

64. *See, e.g.*, Whalen v. United States, 445 U.S. 684 (1980) (defendant unconstitutionally sentenced at a single trial to consecutive terms for rape and for killing the same victim in the course of the rape); Iannelli v. United States, 420 U.S. 770 (1975); North Carolina v. Pearce, 395 U.S. 711, 717 (1969); Gore v. United States, 357 U.S. 386 (1958); *Ex Parte* Lange, 85 U.S. (18 Wall.) 163 (1873) (originated double punishment rule).

65. *See* text at notes 66-73 *supra*.

66. *See* Whalen v. United States, 445 U.S. 684, 697 (1980) (Blackmun, J., concurring); Westen, *supra* note 2, at 1024-25.

67. Westen, *supra* note 2, at 1026 (emphasis in original) (footnotes omitted). *See* Whalen v. United States, 445 U.S. 684, 692 (1980).

ordinarily does not intend to punish the same offense under two different statutes."[68] It is not clear, however, that the case for the presumption is as strong when both the federal and state governments prohibit and penalize certain conduct.

Even if the presumption is applied against successive state-federal prosecution, it will not have much effect, for there is sufficient evidence both to rebut a strong presumption against double punishment and to establish affirmatively that Congress did intend cumulative sentences. The legislative history reveals that Congress enacted several statutes because some criminal defendants were not "appropriately punished by local courts."[69] Yet the record also displays Congress's preference for concurrent, not exclusive, jurisdiction.[70] Only a handful of sections of the federal criminal code explicitly provide that state conviction or acquittal bars subsequent federal prosecution.[71] As for the rest of the code, the legislative record shows, although often not explicitly, Congress' intent to permit con-

68. Whalen v. United States; 445 U.S. 684, 692 (1980). The Court also applied the high standard of "clear and unmistakable" evidence.

69. S. REP. No. 721, 90th Cong., 1st Sess. 4, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 1837, 1840 ("In some places, however, local officials either have been unable or unwilling to solve and prosecute crimes of racial violence or to obtain convictions in such cases . . . ."). The problem of inadequate state punishment was especially true for "racial crimes." *Id.*, [1968] U.S. CODE CONG. & AD. NEWS at 1839. In response to this problem, Congress enacted several statutes that prescribe punishment for civil rights offenses. *See* 18 U.S.C. §§ 241, 242, 245(b) (1976). The federal penalties for these offenses range "from misdemeanor penalties when no one is harmed to $10,000 fines and 10 years' imprisonment when there is physical injury, and life imprisonment when death occurs." S. REP. No. 721, 90th Cong., 1st Sess. 6, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 1837, 1841.

70. Congress enacted the civil rights offenses "to compensate for the lack of effective protection and prosecution on the local level." *See* S. REP. No. 721, 90th Cong., 1st Sess. 4, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS. 1837, 1840. The Senate Report did not suggest that such compensation should amount to displacement of state prosecutions and punishments. According to the Senate Minority views, federal enforcement authorities should still defer to the states. *See id.* at 14, [1968] U.S. CODE CONG. & AD. NEWS at 1847-48.

Outside the civil rights area, Congress has stated its intent regarding concurrent jurisdiction. *See, e.g., Arson-for-Profit: Its Impact on States and Localities: Hearing Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Affairs*, 95th Cong, 1st Sess. (1977). For other examples of Congress' intent, see notes 71-72 *infra*.

71. *See* 18 U.S.C. § 659 (1976) (interstate or foreign shipments by carrier) ("A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts."); 18 U.S.C. § 660 (1976) (carrier's funds derived from commerce); 18 U.S.C. § 1992 (1976) (wrecking trains); 18 U.S.C. § 2101(c) (1976) (riots); 18 U.S.C. § 2117 (1976) (breaking or entering carrier facilities).

Principles of statutory construction suggest that the inclusion of a statement barring successive state-federal punishment in these five sections indicates an intent to permit such punishment in the remaining sections. *See* 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 53.01 (4th ed. C. Sands ed. 1972). The counterargument is that this concerns a penal statute, and penal statutes should be strictly construed. *See id.* at § 59.01. Where punishment relies on questionable intent, the "rule of lenity" governs criminal punishment. *See* Gore v. United States, 357 U.S. 386, 391 (1958). This rule suggests that doubts about double punishment should be resolved in the defendant's favor. But this principle of strict construction should not defeat Congress' actual intent if it can be deduced from the statutes and the record.

secutive sentences.[72] Evidence like this has led the Supreme Court to presume congressional intent to permit federal punishment in addition to state punishment.[73] Congress' intent, in short, does not limit the application of the dual sovereignty principle after state conviction, and successive state-federal prosecution does not undermine the double punishment value.

2. *Jury Nullification*

Jury nullification is based on a view of the criminal jury as an institution that provides a buffer between the government — legislature, prosecutor, and judge — and the defendant.[74] A criminal jury, of course, may acquit a defendant based on its findings of fact. When this occurs, the jury applies the law prescribed by the legislature. But when a criminal jury acquits a defendant against the evi-

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72. In a recent House Report on District of Columbia Court Reform, the Committee on the District of Columbia conceded that Congress often fails to specify explicitly its intent to permit consecutive sentences for criminal offenses based on the same conduct. *See* H.R. REP. No. 907, 91st Cong., 2d Sess. 113 (1970). But the Committee spoke approvingly of the usual judicial interpretation of Congress's intention to impose consecutive sentences when each offense requires proof of a fact that the other does not. *Id.* (endorsing *Blockburger* rule that permits consecutive sentences as reflecting congressional intent). By contrast, the Committee disapproved of recent decisions by the District of Columbia Circuit Court of Appeals that denied consecutive sentences derived from separate provisions. *See, e.g.*, Smith v. United States, 418 F.2d 1120 (D.C. Cir. 1969). Most importantly, the Committee explained the intent underlying separate criminal provisions. In particular, it suggested that, if offenses are defined by "separate, independent provisions of law," then sentences for such offenses can be imposed consecutively. H.R. REP. No. 907, 91st Cong., 2d Sess. 114 (1970).

Indeed, a review of the federal criminal code fails to reveal any shred of evidence suggesting that Congress intended to bar successive state-federal prosecutions, aside from the five sections where that bar was mentioned specifically. *See* note 71 *supra*. Nothing suggests that state and federal penalties cannot cumulate so long as the combined sentence falls within the maximum federal sentence. Congress simply prescribes maximum penalties for the federal criminal offenses. *See, e.g.*, 18 U.S.C. § 873 (1976) (blackmail defendant "shall be fined not more than $2000 or imprisoned not more than one year, or both"); 18 U.S.C. § 1001 (1976) (defendant convicted of fraud "shall be fined not more that $10,000 or imprisoned not more than five years, or both"); 18 U.S.C. § 2113(a) (1976) (defendant convicted of bank robbery "[s]hall be fined not more than $5000 or imprisoned not more than twenty years, or both"). *See also* 18 U.S.C. § 3568 (1976) (credit for time in custody prior to imposition of sentence); 18 U.S.C. § 3617 (1976) (fines and penalties).

73. The Court presumes that federal law enforcement "must necessarily be hindered" if a state conviction bars subsequent punishment. *See* Abbate v. United States, 359 U.S. 187, 195 (1959). In general, the federal courts permit federal sentences to cumulate with state sentences. *See* United States v. Myers, 451 F.2d 402, 404 (9th Cir. 1972) (federal district judge cannot require, but only recommend, that federal sentence run concurrently with state sentence); Hardy v. United States Bd. of Parole, 443 F.2d 402, 402 (9th Cir. 1971) (defendant is not entitled to credit on federal sentence for time served on state sentence); Green v. United States, 334 F.2d 733, 736 (lst Cir. 1964), *cert. denied*, 380 U.S. 980 (1965) (federal sentence can begin when state sentence is completed).

74. *See* Ballew v. Georgia, 435 U.S. 223, 229 (1978); Williams v. Florida, 399 U.S. 78, 100 (1970) ("the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen"); Duncan v. Louisiana, 391 U.S. 145, 156 (1968) ("Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or over-zealous prosecutor and against the compliant, biased, or eccentric judge.").

dence, it nullifies the law. In such cases, the jury rejects the legislature's standard of criminal conduct, perhaps implicitly, by finding the defendant not guilty under its own more lenient standard.[75] By nullifying what it perceives to be an unjust law or an unjust application of a just law, the jury plays a special role in the criminal process.

Although commentators have debated the question whether the criminal jury has legitimate authority to nullify the law,[76] the Supreme Court has recognized its power to do so.[77] The Court's view is supported by the considerable differences between the sixth amendment criminal jury and the seventh amendment civil jury. In a civil case, a judge may direct a verdict against the defendant,[78] enter judgment n.o.v.,[79] or order a new trial if the jury returns an inconsistent verdict.[80] These jury-control devices are conspicuously absent in criminal cases;[81] the criminal jury cannot be restricted to its fact-finding role.[82] And the prosecutor in a criminal case cannot appeal a jury acquittal "even if the evidence of guilt is overwhelming."[83] A defendant's interest in jury trial is guaranteed by the sixth

75. *See* Beck v. Alabama, 447 U.S. 625, 640 (1980) (juries "create their own sentencing discretion"). *See generally* M. KADISH & S. KADISH, DISCRETION TO DISOBEY 50-72 (1973); Westen, *supra* note 2, at 1012-18. Just as the chief executive has authority to pardon, so, too, does the jury have the prerogative to nullify the law set down by legislature. *See* Westen & Drubel, *supra* note 54, at 130 n.230.

76. *See* Scheflin & Van Dyke, *Jury Nullification: The Contours of a Controversy*, LAW & CONTEMP. PROBS., Autumn 1980, at 51, 85-110. *Compare* Scheflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972) (supporting jury nullification) *with* Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEXAS L. REV. 488 (1976) (questioning jury nullification). *See also* Westen, *supra* note 2, at 1012-23.

77. *See* Standefer v. United States, 447 U.S. 10, 22 (1980) (per Burger, C.J.) (criminal juries can "acquit out of compassion or compromise"); Jackson v. Virginia, 443 U.S. 307, 317 n.10 (1979) ("the factfinder in a criminal case has traditionally been permitted to enter an unassailable but unreasonable verdict of 'not guilty.' ").

78. *See* FED. R. CIV. P. 50(a).

79. *See* FED. R. CIV. P. 50(b).

80. *See* FED. R. CIV. P. 59.

81. Under FED. R. CRIM. P. 29, the defendant can move for judgment of acquittal. But no rule allows the prosecutor to move for judgment of conviction. *See* United States v. Benedetto, 558 F.2d 171, 176-77 (3d Cir. 1977) (prejudicial error to direct jury to assume fact favorable to the prosecution); United States v. Burnett, 476 F.2d 726, 728-29 (5th Cir. 1973) (alternative holding) (prejudical error in jury instruction because it amounted to directing a verdict of guilty). As for motions for a new trial, the defendant can make such a motion under FED. R. CRIM. P. 33. There is no similar provision enabling the prosecution to move for a new trial.

82. *See* Standefer v. United States, 447 U.S. 10, 22 (1980) ("The absence of these remedial procedures in criminal cases permits juries to acquit out of compassion or compromise . . . .").

83. Jackson v. Virginia, 443 U.S. 307, 317 n.10 (1979). Congress permits prosecutorial appeal in some cases. For instance, federal prosecutors can appeal from "a decision arresting a judgment of conviction for insufficiency of the indictment . . . ." 18 U.S.C. § 3731 (1976). But Congress nowhere provides for appeal from judgment entered on a jury verdict of acquittal. The courts generally prohibit government appeal from either bench acquittal or jury acquittal. *See* Sanabria v. United States, 437 U.S. 54, 75 (1978); United States v. Altamirano,

amendment.[84]

To protect this interest, the Supreme Court has developed the jury acquittal rule, which accepts jury acquittals, "no matter how erroneous," as final.[85] The rule prohibits retrial because prosecuting a defendant twice for the same offense would greatly dilute the jury's prerogative to nullify the law. Although the Court has applied the jury acquittal rule only to reprosecution by the same sovereign, the reasoning that underlies the rule appears to apply as well to federal prosecution following a state jury acquittal.

This conclusion, however, should not be accepted too hastily. To argue that federal reprosecution undermines a defendant's interest in jury nullification, one must first define the scope of that interest. A defendant, one could argue, has no interest in state jury nullification of federal law. While his interest in state jury nullification of state law is absolute, the argument would run, state juries cannot nullify federal law. And because the federal government could have prosecuted and punished the defendant even if he had been convicted in the state trial,[86] federal prosecution after a state jury acquittal does not, at least in theory, deprive him of the benefit of jury nullification of state law.

These arguments miss the central point. The interest threatened by federal prosecution of a previously acquitted defendant is an interest in nullification of state law, not an interest in state jury nullification of federal law. Federal reprosecution, moreover, poses a real threat to this interest. Although *Abbate* sanctioned federal prosecution of a defendant previously convicted in a state court,[87] the Court has warned that "[t]he greatest self-restraint is necessary" in exercising the power to reprosecute.[88] In response to the Court's concern over potential abuses of a rule that permits double prosecution, the Justice Department established what has become known as the "*Pe-*

633 F.2d 147, 151 n.2 (9th Cir. 1980). But some federal courts have permitted the government to appeal a judgment of acquittal where the jury previously entered a verdict of guilty. *See* United States v. Clemones, 577 F.2d 1247, 1255 (5th Cir. 1978), *cert. denied*, 445 U.S. 927 (1980); United States v. Donahue, 539 F.2d 1131, 1134 (8th Cir. 1976). Permitting government appeal in these cases highlights the significance of the jury verdict. Put another way, jury acquittal, not bench acquittal, operates to prohibit completely government appeal.

84. U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .").

85. *See* Bullington v. Missouri, 451 U.S. 430, 445 (1981); United States v. DiFrancesco, 449 U.S. 117, 130 n.11 (1980); Burks v. United States, 437 U.S. 1, 16 (1978); Arizona v. Washington, 434 U.S. 497, 503 (1978); United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977); Fong Foo v. United States, 369 U.S. 141, 143 (1962) (per curiam).

86. *See* text at notes 4-5 *supra*.

87. Abbate v. United States, 359 U.S. 187 (1959); *see* Bartkus v. Illinois, 359 U.S. 121 (1959).

88. Bartkus v. Illinois, 359 U.S. 121, 138 (1959); *see* Abbate v. United States, 359 U.S. 187, 201-04 (1959) (Black, J., dissenting); Bartkus, 359 U.S. at 163 (Black, J., dissenting).

tite policy":[89] "After a state prosecution there should be no Federal trial for the same act or acts unless the reasons are compelling."[90]

This policy, while not creating substantive rights for defendants,[91] demonstrates that federal prosecution after a state jury acquittal actually undermines a defendant's interest in nullification. It establishes a loose partnership or community of interest between state and federal prosecutors and ensures that "consideration of a second prosecution very seldom should arise."[92] The Justice Department's guidelines are open-ended, but its examples of "compelling" reasons for federal reprosecution seem to apply mainly after acquittal.[93] For convicted defendants, the theoretically possible federal reprosecution is unlikely to materialize. If the threat of double prosecution becomes real only after state acquittal, it seems clear that reprosecution may deprive defendants of the benefit of jury nullification. The Justice Department guidelines, in fact, list state jury nullification itself as a "compelling" reason for federal reprosecution.[94]

This jury nullification value and the stronger post-acquittal finality interest provide a basis for distinguishing between convicted and acquitted defendants and according greater double jeopardy protection after state jury acquittal than after state conviction. The prohibition against multiple punishment creates, at best, a presumption against successive state-federal prosecution — a presumption that is

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89. The name comes from Petite v. United States, 361 U.S. 529 (1960).

90. N.Y. Times, Apr. 6, 1959, § 1, at 19, col. 2 (text of Attorney General William P. Rogers' memorandum to federal attorneys). The current version of the *Petite* policy is spelled out in the U.S. DEPT. OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, Tit. 9, § 2.142, at 20 (rev. Jan. 3, 1980) [hereinafter cited as U.S. ATTORNEYS' MANUAL]:

> The Department of Justice's dual prosecution policy precludes the initiation or continuation of a federal prosecution following a state prosecution based on substantially the same act or acts unless there is a compelling federal interest supporting the dual prosecutorial discretion in order to promote efficient utilization of the Department's resources and to protect persons charged with criminal conduct from the unfairness associated with multiple prosecutions and multiple punishments for substantially the same act or *acts.*

91. *See* Annot., 51 A.L.R. FED. 852, 856 (1981); Stanford Note, *supra* note 13, at 488-94. *But see* United States v. Thompson, 579 F.2d 1184, 1189 (10th Cir. 1978) (dissenting opinion).

92. N.Y. Times, Apr. 6, 1959, § 1, at 19, col. 4 (text of Attorney General William P. Rogers' memorandum to federal attorneys).

93. *See* U.S. ATTORNEYS' MANUAL, *supra* note 90, at 20. The Manual states that "if the state proceeding resulted in a conviction — [dual prosecution] normally will not be authorized unless an enhanced sentence in the federal prosecution is anticipated." The Manual goes on to list factors which may compel federal prosecution:

> (1) infection of the state proceeding by incompetence, corruption, intimidation, or undue influence; (2) court or jury nullification involving an important federal interest, in blatant disregard of the evidence; (3) the failure of the state to prove an element of the state offense which is not an element of the federal offense; or (4) the unavailability of significant evidence in the state proceeding either because it was not timely discovered or because it was suppressed on state law grounds or on an erroneous view of the federal law.

Id. at 20c. *See generally* U.S. DEPT. OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION 11-13 (1980).

94. *See* U.S. ATTORNEYS' MANUAL, *supra* note 90, at 20c.

rebutted in the legislative history of the federal criminal code. The jury nullification interest, by contrast, provides a strong reason to limit federal reprosecution since the second trial could undercut the first jury's prerogative to acquit against the evidence.

III. Defining "the same offence" after state jury acquittal

Despite the differences between conviction and jury acquittal, it does not necessarily follow that state jury acquittals should always bar subsequent federal prosecutions. A same offense standard that preserves the jury nullification value must also be consistent with the federal interest in reprosecution.[95] It is difficult, however, to devise a standard that balances these interests, in large part because we do not understand why criminal juries acquit against the evidence. To begin with, we do not know precisely when a jury has nullified the law because the rationale for nullification changes with each case.[96] In the usual case, jury nullification appears to be based on the sentimental appeal of the defendant's predicament.[97] But a court will be unable to discover whether the verdict resulted from defective fact-finding or whether the jury acquitted against the evidence. The decision-making process of a criminal jury is hidden by the general verdict that it returns,[98] and investigation of the jury to determine how it reached its verdict is generally disfavored.[99] Judicial review to determine whether the jury nullified the law, moreover, is repugnant to the principal justifications for jury nullification.[100] The Supreme

95. *See* text at notes 19-30 *supra*.

96. It is suspected that juries acquit against the evidence with greater frequency in certain cases — when a defendant is charged with offenses such as gambling, drunken driving, draft evasion, or withholding confidential sources. *See* M. Kadish & S. Kadish, *supra* note 75, at 55; H. Kalven & H. Zeisel, The American Jury 293 (1966); Scheflin & Van Dyke, *supra* note 76, at 71-73; Westen & Drubel, *supra* note 54, at 130 n.230.

97. There are two basic sources of jury sympathy. First, the defendant himself, by virtue of his personal traits, his occupation, or his court appearance, may present a sympathetic picture. In their study of the jury, Kalven and Zeisel provide numerous examples of this type of defendant. *See* H. Kalven & H. Zeisel, *supra* note 96, at 200-09 (describing defendants who are crippled, ill, old, veterans, police, clergymen, repentant, attractive in court). Second, the jury may perceive that the circumstances surrounding the defendant's case justify acquittal. For example, the jury may believe that "extra-legal punishment" such as job loss sufficiently punishes the defendant. *See id.* at 306-07. Or the jurors may acquit because the defendant was subjected to improper police conduct. *See id.* at 318-23.

98. *See* Sparf & Hansen v. United States, 156 U.S. 51, 81, 83, 87, 94-95 (1895); Westen, *supra* note 2, at 1013 n.44.

99. *See* Dunn v. United States, 284 U.S. 390, 394 (1932); United States v. Dougherty, 473 F.2d 1113, 1120-37 (D.C. Cir. 1972).

100. A jury of "peers" provides a check against the government's potential to abuse its power; the government includes "the compliant, biased, or eccentric judge." Duncan v. Louisiana, 391 U.S. 145, 156 (1968). Also, the jurors, as laymen, can interpose their "common sense judgement through jury nullification." Williams v. Florida, 399 U.S. 78, 100 (1970). Judicial review cuts against these reasons for jury nullification. It would supplant the jury's checking function and permit judges to displace the jury's common sense decision.

Court has contrasted the jury's reaction to the "perhaps less sympathetic reaction of the single judge";[101] to permit the judge to review criminal jury verdicts undermines the jury's prerogative to acquit against the evidence.

Since reviewing courts cannot determine when a state jury actually acquitted against the evidence, they cannot limit double jeopardy protection to identifiable cases of nullification. To ensure that the defendant's constitutional interests are adequately protected, therefore, the court should begin its analysis with the assumption that the acquitting jury nullified the law. It should then apply a same offense test that both protects the integrity of the jury's acquittal and recognizes legitimate federal interests in reprosecution.

The need to balance these interests is well served by the distinct elements test promulgated by the Supreme Court in *Blockburger v. United States.*[102] The *Blockburger* Court held that two offenses are not identical if each requires proof of a fact that the other does not.[103] If, for example, a defendant is charged with violating two statutes, the first requiring proof of elements *A*, *B*, and *C*, and the second requiring proof of elements *B*, *C*, and *D*, the *Blockburger* test would permit successive trials on these offenses because each includes a "distinct" element. *Blockburger* was a multiple punishment case, which required the Court to evaluate the difference in offenses at a single trial,[104] but courts have since applied its distinct elements

101. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

102. 284 U.S. 299 (1932). When the Supreme Court adopted the distinct elements test in *Blockburger,* the defendant had been convicted both for selling narcotics not in an original stamped package and for selling narcotics without receiving a written order from the purchaser. The lower court then sentenced the defendant to five years in prison for each of these offenses, to be served consecutively. Because each offense was based on one sale of narcotics, the defendant claimed that he was being twice punished for "the same offense". Using the distinct elements test, the Court held that these two offenses were not the same. 284 U.S. at 304. Ironically, Justice Sutherland, writing for the *Blockburger* Court, did not mention the double jeopardy clause even once. But since the test was taken from an earlier double jeopardy case, Gavieres v. United States, 220 U.S. 338, 342 (1911), the Court has since applied the distinct elements test in double jeopardy cases. *See, e.g.,* Illinois v. Vitale, 447 U.S. 410 (1980); Brown v. Ohio, 432 U.S. 161, 166 (1977). *See also* King v. United States, 565 F.2d 356 (5th Cir. 1978) (per curiam); United States v. Hairrell, 521 F.2d 1264 (6th Cir. 1975). For commentators who suggest that the distinct elements test is the test currently employed, see Haddad & Mulock, *Double Jeopardy Problems in the Definition of the Same Offense: State Discretion to Invoke the Criminal Process Twice,* 22 U. FLA. L. REV. 515 (1970); Note, *The Double Jeopardy Clause as a Bar to Reintroducing Evidence*, 89 YALE L. J. 962, 966 (1980).

103. 284 U.S. at 304.

104. 284 U.S. at 300-01. The federal courts apply the *Blockburger* test to determine what constitutes consecutive sentences at a single trial. *See* Albernaz v. United States, 101 S. Ct. 1137, 1141-43 (1981) (21 U.S.C. § 963 conspiracy to import marijuana distinct from 21 U.S.C. § 846 conspiracy to distribute marijuana); United States v. Peacock, 654 F.2d 339, 349 (5th Cir. 1981) (18 U.S.C. § 1341 mail fraud different from 18 U.S.C. § 1962(c) racketeering); United States v. Walker, 653 F.2d 1343, 1351 (9th Cir. 1981) (Sherman Act § 1 conspiracy different from 18 U.S.C. § 371 fraud conspiracy), *cert. denied*, 50 U.S.L.W. 3570 (U.S. Jan. 18, 1982); United States v. Greschner, 647 F.2d 740, 744 (7th Cir. 1981) (18 U.S.C. § 113(f) assault different from 18 U.S.C. § 1792 conveying a weapon); United States v. Barton, 647 F.2d 224, 235-36

test in cases involving retrial within a single jurisdiction.[105] That test, this Note argues, is also suitable for defining "the same offence" when the federal government reprosecutes a defendant following state jury acquittal.[106]

Admittedly, the essentially arbitrary *Blockburger* test does not perfectly resolve double jeopardy issues. Consider, for example, the two offenses whose elements are listed above. The *Blockburger* test permits successive trials because each requires proof of a fact that the other does not. But these different proof requirements may provide little justification for reprosecuting the defendant. When a legislature drafts a criminal statute, it may include certain elements in a particular offense not for substantive reasons but for convenience in drafting. Indeed, many federal criminal offenses include federal ju-

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(2d Cir. 1981) (18 U.S.C. § 1962(d) racketeering conspiracy distinct from 18 U.S.C. § 371 general conspiracy statute); United States v. Bangert, 645 F.2d 1297, 1307 (8th Cir. 1981) ("the material elements" of 18 U.S.C. § 641 stealing property differ from 18 U.S.C. § 1361 destroying property), *cert. denied*, 102 S. Ct. 314 (Oct. 5, 1981); United States v. Fountain, 642 F.2d 1083, 1094-95 (7th Cir.), *cert. denied*, 101 S. Ct. 2335 (1981).

105. *See* Illinois v. Vitale, 447 U.S. 410 (1980) (holding that failure to reduce speed is the "same" as manslaughter); Brown v. Ohio, 432 U.S. 161, 166 (1977) (holding that joyriding is the "same" as the lesser included offense of car theft); United States v. Ross, 654 F.2d 612, 614 (9th Cir. 1981) (attempted extortion different from both attempted bank robbery and conspiracy to commit bank robbery); Wilkett v. United States, 655 F.2d 1007, 1013-14 (10th Cir. 1981); King v. United States, 565 F.2d 356 (5th Cir. 1978) (per curiam); United States v. Hairrell, 521 F.2d 1264 (6th Cir. 1975). *See also* Ashe v. Swenson, 397 U.S. 436, 463 (1970) (Burger, C.J., dissenting) (citing *Blockburger*: "This Court, like most American jurisdictions, has expanded that part of the Constitution [the double jeopardy clause] into a 'same evidence' test").

For the purpose of reprosecution within a single jurisdiction, some federal courts caution against applying the *Blockburger* test restrictively. *See* Brown v. Ohio, 432 U.S. 161, 166 n.6 (1977). In Jordan v. Virginia, 653 F.2d 870, 873 (4th Cir. 1980), the Fourth Circuit ruled that the double jeopardy clause barred prosecution for the felony offense of possessing narcotics after conviction of the misdemeanor offense of obtaining those same narcotics. The court refused to apply *Blockburger*, instead relying on "the more appropriate test for successive prosecution." 653 F.2d at 873. In essence, that more appropriate test bars retrial if the second offense does not require proof of a "significant additional fact." 653 F.2d at 874 (quoting United States v. Sabella, 272 F.2d 206, 212 (2d Cir. 1959)). Put another way, the critical question is whether the evidence required for one offense would have sufficed to convict on the other. *See In re* Nielsen, 131 U.S. 176, 188 (1889) (quoting Morey v. Commonwealth, 108 Mass. 433, 434 (1871)). In *United States v. Sabella,* Judge Friendly said that the *Blockburger* test was developed to determine what offenses can give rise to consecutive sentences and that that test was not applicable to successive trials. 272 F.2d at 211-12. *See* Abbate v. United States, 359 U.S. 187, 196-201 (1959) (Brennan, J.). However, Judge Friendly later suggested: "Although stated in the context of the prohibition of consecutive sentences after a single trial, this [*Blockburger*] test, has become the established test for double jeopardy [successive trials] as well." Archer v. Commissioner of Correction, 646 F.2d 44, 47 n.2 (2d Cir. 1981). In any event, courts need not apply the *Blockburger* test in a highly mechanical fashion.

In Brown v. Ohio, 432 U.S. 161, 166 (1977), the Court said that "[i]f two offenses are the same under this test for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions." By implication, this leaves open the possibility that offenses considered different at a single trial may be the same for successive prosecutions. *See* Jordan v. Virginia, 653 F.2d 870, 873 (4th Cir. 1980).

106. For an alternative justification for the *Blockburger* test in cases involving successive state-federal prosecutions, see Stanford Note, *supra* note 13.

risdiction as an element.[107] A more adequate same offense standard would take account of the importance of the proof requirements that distinguish the two statutes. Nonetheless, *Blockburger* provides a workable standard for balancing federal interests with the defendant's interests, provided that federal jurisdiction is not the only distinct element in the federal offense.

By focusing on the differences between the elements of the first and second offenses, the *Blockburger* test safeguards a defendant's interest in jury nullification. When a jury acquits against the evidence, it presumably understands that the defendant is in fact guilty of the offense charged. But the jurors decide to acquit the defendant because they sympathize with his predicament. If confronted with a different offense, however, the jury may not have voted to acquit the defendant against the evidence. The distinct elements test attempts to determine when two offenses are "sufficiently different"[108] that prosecution for the second will not undermine a previous jury's nullification of the first.

It may be helpful to view reprosecution and the effect of the distinct elements test from the perspective of the acquitting jury. When the elements required to prove both the state and federal offenses are identical, the jury would presumably nullify the second offense as well as the first since the factors that originally persuaded it to acquit against the evidence would still be present.[109] Reprosecution in such a case would override the first jury's prerogative to acquit against the evidence. When the federal offense contains an additional element,

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107. *See generally* Pauley, *An Analysis of Some Aspects of Jurisdiction under S.1437, the Proposed Federal Criminal Code*, 47 GEO. WASH. L. REV. 475 (1979).

108. Brown v. Ohio, 432 U.S. 161, 166 n.6 (1977).

109. An empirical study conducted by Kalven and Zeisel has disclosed the significance of the composition of criminal offenses to jury nullification. *See* H. KALVEN & H. ZEISEL, *supra* note 96, at 111. Kalven and Zeisel found that jurors acquitted where judges would have convicted in 16% of the 3576 cases in their sample. They collected data on the reasons for judge-jury disagreement in 962 of these cases, and they measured the frequency of five reasons for disagreement: (a) sentiments on the law; (b) sentiments on the defendant; (c) evidence factors; (d) facts that only the judge knew; and (e) disparity of counsel. *See id.* Sentiments on the law and evidence factors ranked highest, with sentiments on the law a factor in 53% of the cases and evidence factors relevant in 78%. *See id.* Conceivably, these two factors bear a strong relationship to the composition of the criminal offense. Sentiments on the law, for example, may come into play where the jury perceives that "a particular set of facts" is "inappropriately classified." *See id.* at 108. Evidence factors become a reason for judge-jury disagreement where the jury evaluates "specific items of evidence differently" than does the judge. *See id.* at 106.

To be sure, sentiment for the defendant plays an important role in jury nullification. Jury sentiment on the defendant, however, is significant when combined with other reasons for judge-jury disagreement. While sentiment on the defendant appeared as the sole factor only 8% of the time in Kalven and Zeisel's sample, it appeared with other reasons in 92% of the cases documented. *See id.* at 113. According to the authors, the jury "yields to sentiment in the apparent process of resolving doubts as to evidence." *See id.* at 165. This suggests that the jury will be restrained from applying its sentimental views to the extent that the evidence and law present a stronger case against the defendant.

the jury's basis for nullification is tempered by a factor that it never considered.[110] While the state jury might not have acquitted against the evidence if it had weighed the federal interest, all of the factors originally favoring nullification are still present. Courts should, therefore, continue to assume that the first jury would also have nullified the second offense. But when a federal element is added and at least one state element is removed from the jury's consideration, a court cannot be certain that the factors that compelled the jury to acquit against the evidence on the first offense are present in the second. At this point, the likelihood that the first jury would nullify the second offense has been substantially reduced, and a federal prosecution would be permitted under the *Blockburger* test.

CONCLUSION

The solution to the double jeopardy problem posed by successive state-federal prosecutions must take the form of a same offense standard. When the state trial ended in conviction, the dual sovereignty principle, which holds that offenses defined by different governments are never "the same," always permits federal reprosecution. An examination of the values underlying the double jeopardy clause reveals, however, that applying the dual sovereignty principle after state jury acquittals would, in some cases, deprive defendants of rights guaranteed by the fifth and sixth amendments. This Note's same offense standard, a slightly modified version of the Supreme Court's *Blockburger* test, accommodates the federal interest in prosecution and the acquitted defendant's heightened double jeopardy interests. By converting what could be a difficult balancing process into a comparison of the elements of the state and federal offenses, this test provides a workable solution to a difficult double jeopardy problem.

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110. Typically, this extra element protects national interests in areas such as civil rights, *see* 18 U.S.C. § 242 (1976); S. REP. No. 721, 90th Cong., 1st Sess. 4, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 1837, 1840, ensuring the safety of federal officers, *see* 18 U.S.C. § 1751 (1976), or protecting the mails, *see* 18 U.S.C. §§ 1691-1737 (1976). *See generally* Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171, 1209 (1977). Distinct national interests may be identifiable in some cases well-suited for federal enforcement because the states appear unable to prosecute effectively, as in racketeering. *See* 18 U.S.C. §§ 1951-1968 (1976).