Chapter 16

The Right to Protection against Double Jeopardy

No rule of criminal procedure is older than the one forbidding the government to try defendants twice for the same offense. It was considered so fundamental to due process that its appearance in the Bill of Rights is not surprising. The Fifth Amendment language seems clear—"nor shall any person be subject for the same offense be put in jeopardy of life or limb"—but in fact the protection is one of the least understood rights of the accused.

The principle that no person can be put in jeopardy, or in danger, twice for the same crime dates back to ancient Greek and Roman law. In England, the protection was part of the common law, or the body of judge-made law used in royal courts, but in the United States it became a part of the Constitution. The language used to describe double jeopardy differed between the two countries. English law included what its most influential commentator, Sir Edward Coke, called the "universal maxim. . . that no man is to be brought into jeopardy of his life, more than once, for the same offense." For double jeopardy to apply, however, a trial had to result in a verdict. The Fifth Amendment broadened this language by adding "or limb" to the ban on "jeopardy of life," which meant it applied in less serious criminal cases and not simply felonies, as was true in Great Britain, but the new language also was less precise. In America, a trial did not have to result in a verdict to bar a second prosecution, so it was unclear when a defendant was in jeopardy.Was it upon indictment, the formal accusation of a crime? When the trial began? When the trial ended?

Complicating the law of double jeopardy in the United States was the division of power between the states and the central government, a system known as federalism. For most of American history, states have been responsible for criminal justice on the theory that violations of law were best judged by the community in which they occurred.Many state constitutions contained a double jeopardy clause, but not all did. States that did not make it part of their constitutional law, however, still included it in their law of criminal procedure. The language of the ban differed somewhat from state to state, however, so from the beginning the potential existed for various interpretations of what everyone agreed was a fundamental right.

By the early nineteenth century, two primary standards existed for applying the ban on double jeopardy. Some states adopted the practice of allowing a second trial on the same offense if the jury could not agree on a verdict or if the defendant consented to a motion to dismiss, or discharge, the jury before it reached a verdict. A verdict of guilty or innocent was the test to determine whether a person had been tried once. Other states believed this standard did not protect the defendant sufficiently. For these courts, a defendant was in jeopardy when a jury was sworn and charged to try the case. Only then would the accused be protected from multiple prosecutions for the same offense. As the Indiana su-

"No man shall be twise sentenced by Civill Justice for one and the same Crime, offence, or Trespasse."

—Massachusetts Body of Liberties (1641)

preme court explained it, "If a Court has the right, during the trial, capriciously to discharge the jury, and continue the case until the next term, the liberty of [the defendant] would be completely in the hands of the judge. He might, at every term, empanel, discharge, and continue, and thus rob the prisoner of his liberty, by preventing a final determination."

Other questions plagued the interpretation of double jeopardy. An especially troublesome one was whether a person could be tried for the same crime in both federal and state courts. For most of its history, the Fifth Amendment prohibition applied to the federal government only. This situation changed in the twentieth century, however, when federal law enforcement increasingly moved into areas once reserved almost exclusively for the states and as the U.S. Supreme Court nationalized the Bill of Rights protections, thereby enforcing national standards, for criminal defendants. More urgent was another question. Did the Fourteenth Amendment include a ban on double jeopardy in its guarantee of due process of law, thus making protection uniform across the nation rather than one that varied from state to state?

This latter issue came up in an important case in 1937. A Connecticut grand jury had charged Frank Palko with the first-degree murder of two policemen, but the trial jury found him guilty of second-degree murder. After Palko was sentenced to life imprisonment, the state appealed the conviction. It asked for a new trial because the indictment was for first-degree murder, whereas the jury gave a verdict only on the lesser, included charge of second-degree murder. The state supreme court agreed and ordered a new trial. This time, a jury found Palko guilty of first-degree murder, and the judge sentenced him to death. Palko appealed to the U.S. Supreme Court. He argued that the Fourteenth Amendment incorporated, or included, the Fifth Amendment prohibition of double jeopardy as a restriction on the power of the states. Justice Benjamin Cardozo, writing for the majority, rejected this position. Some rights, such as the right to free speech or religious freedom, were so basic as to be "of the very essence of a scheme of ordered liberty," but double jeopardy was not one of these rights, Cardozo wrote. "The state is not attempting to wear the accused out by a multitude of cases, [but only] that the case against him shall go on until there shall be a trial free from the corrosion of legal error." Frank Palko died in the electric chair several months later.

The Court's decision did not allow states to ignore the principle of double jeopardy, but the justices were unwilling to make it part of a national standard of due process and fair trial. Over the next few decades, they would consider the issue case by case. But this course did not mean the Court was backing away from the ancient ban on double jeopardy; indeed, in some ways its commitment was stronger than ever, as a case from the 1950s revealed.

Everett Green was a mild-mannered man in his early sixties when District of Columbia police arrested him in 1953 for the murder of his longtime friend Bettie Brown. They lived in the same boardinghouse, and Green looked after Brown as her health began to fail.No one had any reason to suspect him of anything other than devotion, but when firefighters found the elderly woman dead in a burning house, with Everett unconscious in a bloody bathtub upstairs, they uncovered disturbing conflicts between the evidence and his account of what happened.

At the hospital where he had been taken, Green told investigators about an intruder who had attacked him with a knife. He could not explain how the

man had gotten into the locked house, which still was bolted when the firemen arrived, nor why his assailant had set fires in five locations throughout the residence. Later, the detectives returned with damning evidence that pointed directly to him as the murderer of Bettie Brown. In a letter postmarked the day of the fire, Green had written to an acquaintance about his friend's death, saying "we both want it this way." He asked that his ashes be thrown on Chesapeake Bay and had included forty dollars to buy flowers for Brown's grave.

Green acknowledged the letter. He said he had found Bettie Brown dead when he checked on her the night before the fire; she had died in her sleep, and, depressed, he contemplated suicide. Then the intruder attacked him. He stuck with this story when testifying in his own defense at his trial for arson and mur der, even though a medical examiner said Brown had died of smoke inhalation. Upon cross-examination, however, he revealed that both he and Brown had been threatened with eviction more than once, including the day before the fire. They believed they soon would be institutionalized.

The jury found Green guilty of arson and second-degree murder, and the judge sentenced him to one to three years in prison for arson and five to twenty years for murder. Given his age, the term could be a life sentence. Dissatisfied with the verdict, the defense attorney combed the trial record for a mistake to justify a reversal of the conviction. He found it in the judge's instructions to the jury, which allowed jurors to find Green guilty of murder in either the first or second degree. This instruction was wrong; the criminal code required a verdict on the charge of first-degree murder if the death was caused by arson. Now Everett Green had to make a critical decision. If he succeeded in overturning the verdict, the state might try him for first-degree murder; if found guilty in a new trial, he could be put to death. Green was willing to take the risk because, he told his lawyer, his current sentence meant he likely would die in prison.

The trial judge erred, the court of appeals agreed; Green would have a new trial. But before the second trial began, his attorney advanced a new defense. Green had already been tried once on the charge of first-degree murder, and when the jury found him guilty of second-degree murder, it implicitly found him not guilty of the more serious crime.Trying him again would be a violation of his Fifth Amendment protection against double jeopardy. It was a novel argument, and even his attorney doubted its success. In fact, the U.S. Supreme Court had rejected a similar argument in 1905, and no court had upheld a case on the grounds proposed by Green's lawyer.

The trial judge rejected the double jeopardy claim, and this time the jury found Everett Green guilty of murder in the first degree. His gamble had failed; now he faced death by electrocution.When the court of appeals rejected his petition for a new trial, noting he had been warned about the possible consequences of his actions, Green asked the Supreme Court to hear his case.

The justices heard arguments in the case on two different occasions—they could not reach a decision the first time—before issuing their opinion in fall 1957. The retrial, they concluded, violated the Fifth Amendment ban on double jeopardy. Green was in direct peril of being convicted and punished for first-degree murder at his first trial, but the jury refused to convict him. He did not waive his double jeopardy right by appealing his conviction. "The State with all its resources and power," the Court stated, "should not be allowed to make repeated attempts to convict an individual." Protection against double jeopardy, it continued, is "a vital safeguard in our society, one that was dearly won and

"[The guarantee against double jeopardy] consists of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."

—Justice Potter Stewart, *North Carolina v. Pearce* (1969)

one that should continue to be highly valued. If such great constitutional protections are given a narrow, grudging application they are deprived of much of their significance." Everett Green had been required to take a "desperate chance." He had risked his freedom and his life for a principle guaranteed by the Constitution. "The law should not," the justices decided, "place the defendant in such an incredible dilemma."

After years of anxiety, frustration, and expense, Everett Green was a free man, even if he remained poor and sick. Four years later, he died in a veterans' home in Virginia, having left the District of Columbia on the one-way bus ticket provided to all released felons.

In *Green v. United States*, the Supreme Court made a strong statement about he value of the ban on double jeopardy, and because of it, Everett Green had his freedom. But this was one case. How long would the justices continue to accept appeals one by one before they concluded that this "vital safeguard" would become a guarantee in all criminal trials at all levels, as part of the Fourteenth Amendment's due process clause?

In 1969, they reached this result in *Benton v. Maryland.* Throughout the 1960s the Court had been engaged in what became known as the due process revolution. It interpreted the Bill of Rights protections for defendants as restraints on state, as well as federal, criminal process. Protections against search and seizure, the right to counsel, the privilege against self-incrimination—all had been incorporated into the due process language of the Fourteenth Amendment. With *Benton v. Maryland*, the ban on double jeopardy joined the list. In its 1937 *Palko* decision, the Court had allowed states the freedom to deny rights to defendants so long as the denial was not shocking to a universal sense of justice. Now, the justices specifically rejected this vague standard and ruled that states must extend those guarantees of the Bill of Rights that are fundamental to an American sense of justice. The ban on double jeopardy was one of them.

Stripped to its essence, the Fifth Amendment right against double jeopardy seems clear—a person cannot be tried twice for the same crime—but in practice many questions remain.What about a case in which the same crime can be prosecuted under two separate laws, such as a kidnapping that results in a murder? Does a conviction for murder bar a prosecution for kidnapping? Generally, the Supreme Court has ruled that in this case the ban would apply if the same facts are used to prove guilt in each trial.What about a mistrial or a dismissal of charges before the jury reaches a verdict? Does this bar another prosecution? Here the rules are a bit more complicated. A defendant is in danger, or in jeopardy, when the jury is sworn in—or when the first witness is sworn in a trial by judge alone (a bench trial)—but not if the jury cannot reach a verdict (a hung jury). Also, the protection against double jeopardy usually does not bar a retrial when the verdict is reversed on appeal. Significantly, protection against double jeopardy applies to civil as well as criminal trials because the same issue—subjecting a person to possible penalties twice for the same act—is at stake.

The most difficult question, however, is whether a defendant may be tried in both federal and state courts for the same crime. The double jeopardy clause does not prevent such prosecutions because we have a federal system of government in which both state and national governments have the power to define criminal acts. Occasionally, the result may appear unjust. Should both state and federal authorities prosecute someone for the same act of bank fraud, for example? But sometimes this dual sovereignty corrects an injustice. When some

southern states in the 1960s conducted sham trials of individuals who had killed or abused civil rights workers, the federal government prosecuted the same crime under national statutes and convicted racist thugs who otherwise would have escaped punishment.

Modern double jeopardy law is complicated. Chief Justice William Rehnquist once characterized it as "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator."What is not complicated, however, is the reason for the doctrine. Although any society requires a high degree of public order to function properly—and we trust government to enforce laws to ensure our safety—as a nation we have chosen first to protect individual liberty. We do not allow government to hammer away, trial after trial, at individuals for the same offense because it would violate our commitment to fairness. The ban on double jeopardy is no mere technicality. This ancient principle is essential to our definition of a fair trial and to our sense of justice, and our commitment to these ideals provides us one of our best guarantees of liberty.

Freedom from Anxiety and Insecurity

Everett Green faced a cruel dilemma when he sought a new trial after he had been convicted of second-degree murder and arson in the death of his friend in 1953, because a successful appeal meant the state could try him for first-degree murder and sentence him to death. Green made the choice to appeal, however, and the Supreme Court, in Green v. United States (1957), accepted his contention that he already had been placed in jeopardy once. Justice Hugo Black explained for the 5-to-4 majority why the protection against double jeopardy is essential to American conceptions of justice.

The constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . .

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

In accordance with this philosophy it has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy, and even when "not followed by any judgment, is a bar to a subsequent prosecution for the same offence.". . . Thus it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous. . . .

Moreover it is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge. This Court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again. . . . This prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict. At the same time jeopardy is not regarded as having come to an end so as to bar a second trial in those cases where "unforeseeable circumstances. . . arise during [the first] trial making its completion impossible, such as he failure of a jury to agree on a verdict.". . .

At common law a convicted person could not obtain a new trial by appeal except in certain narrow instances. As this harsh rule was discarded courts and legislatures provided that if a defendant obtained the reversal of a conviction by his own appeal he could be tried again for the same offense. . . . [W]hatever the rationalization, this Court has also held that a defendant can be tried a second time for an offense when his prior conviction for that same offense had been set aside on appeal. . . .

Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gantlet once on that charge and the jury refused to convict him. When given the choice between finding him guilty of either first or second degree murder it chose the latter. In this situation the great majority of cases in this country have regarded the jury's verdict as an implicit acquittal on the charge of first degree murder. But the result in this case need not rest alone on the assumption, which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree. For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent. Yet it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so. Therefore it seems clear, under established principles of former jeopardy, that Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense. . . . In brief, we believe this case can be treated no differently, for purposes of former jeopardy, than if the jury had returned a verdict which expressly read: "We find the defendant not guilty of murder in the first degree but guilty of murder in the second degree.". . .

The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued. If such great constitutional protections are given a narrow, grudging application they are deprived of much of their significance.

States Cannot Make Repeated Attempts at Conviction

In Palko v. Connecticut *(1937), the Supreme Court concluded that the Fifth Amendment protection against double jeopardy did not apply to the states under the due process clause of the Fourteenth Amendment. The justices considered the question again in 1969 in* Benton v. Maryland. *Benton had been charged with larceny and burglary but convicted only of burglary, while being found not guilty of larceny.When he sought a new trial because of a problem with the way the jury had been selected, the state sought to try him again on both crimes. Benton agreed that he had waived his right to claim double jeopardy on the burglary charge, but he argued that the jury had acquitted him of larceny and therefore the state could not retry him for that crime. Writing for the 5-to-4 majority, Justice Thurgood Marshall agreed and reversed* Palko*, applying the ban on double jeopardy to the states as well as the federal government.*

Our recent cases have thoroughly rejected the Palko notion that basic constitutional rights can be enied by the States as long as the totality of the circumstances does not disclose a denial of "fundamental fairness." Once it is decided that a particular Bill of Rights guarantee is "fundamental to the American scheme of justice,". . . the same constitutional standards apply against both the State and Federal Governments. Palko's roots had thus been cut away years ago.We today only recognize the inevitable. . . .

Today, every State incorporates some form of the prohibition in its constitution or common law. As this Court put it in *Green v. United States*, "[t]he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." This underlying notion has from the very beginning been part of our constitutional tradition. Like the right to trial by jury, it is clearly "fundamental to the American scheme of justice."