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COMMENT

DOUBLE JEOPARDY WHERE BOTH CITY AND STATE PROSECUTE THE SAME ACT

INTRODUCTION

This comment’s concern is the situation in which a municipality and a state each define the same conduct as criminal, and each, in a separate action prosecutes the same defendant for the same act. The sole question explored in this comment is whether there is, or should be, a bar, on the ground of double jeopardy, to city or state prosecutions where the other has prosecuted. An attempt has been made exhaustively to canvass the question and also the position of the state and federal courts.

The double jeopardy issue may arise, or at least be indirectly decided, in three possible situations. First, the defense will occur most often where the defendant has already been tried by the city (or state), and then the second prosecution has been started by the state (or city). The defense will, of course, be urged in the latter trial. In the second situation, a prosecution by the city where the state has not yet prosecuted, the defendant may argue that the city prosecution is invalid. The defendant, propounding this argument, will challenge the validity of an ordinance, claiming that it conflicts with state law. The premise of the defendant’s argument is that it would constitute double jeopardy for both a city and a state to prosecute; therefore if the city prosecuted first, the state is precluded from enforcing its penal law. The fact that a state may not be considering a prosecution is not important. The important point is that, as a matter of law, the state cannot prosecute a violation of its statute in the particular case. Thus, since the existence of a conflict is shown, the ordinance is invalid, and any conviction thereon should be reversed. Of course, if

1 Indeed there may, in addition, be a prosecution by the United States if it too, has defined the particular act as a crime. Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959).
2 For example, see State v. Tucker, 137 Wash. 162, 242 Pac. 363 (1926).
3 For example, see Ex Parte Sloan, 47 Nev. 109, 217 Pac. 233 (1923).
4 It should be remembered that pre-emption may apply even though the state has not specifically covered the particular offense which the city ordinance purports to define. In re Lane, 22 Cal. Reptr. 857, 372 P.2d 897 (Sup. Ct. 1962). This comment, however, has a more limited concern, i.e., attention is focused on the case where both a city and a state have actually regulated the same act, both defining the act as an offense.

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both a city and a state are allowed to prosecute without placing a defendant in double jeopardy, then there is no conflict, and an otherwise valid ordinance is not defective.\(^5\)

The third situation which has an impact, although indirect, on the double jeopardy issue is one in which other issues of criminal procedure are decided. For example, a court may hold that a city has a right to appeal in an ordinance prosecution. The ground usually is that an ordinance prosecution is a civil, not a criminal action.\(^7\) Then, if the court is subsequently confronted with a double jeopardy issue, it might rely on the prior holding that an ordinance prosecution is a civil action; therefore the prohibition against double jeopardy does not apply.\(^8\)

Thus, the double jeopardy issue has ramifications and importance not only in itself, but also, it may be controlling where the validity of an ordinance or a proceeding under an ordinance is brought into question. In addition, the reasoning which a court uses to decide the double jeopardy issue may be used where other criminal procedure rights are in question.\(^9\) With these points in mind we move to the analysis used by courts when faced with a double jeopardy issue.

**Court Disposition of the Basic Issue**

The Present Majority Rule. The clear weight of authority\(^10\) allows prosecutions for the same criminal act by both a city and a state where the act constitutes a violation of an ordinance and a statute.\(^1\)

A few states hold to the contrary, and they will be considered later. The courts allowing the double prosecutions do so on various grounds. The reasons include: 1) the double offense doctrine: that

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\(^5\) State v. Flint, 63 Conn. 248, 28 Atl. 28 (1893); State v. Welch, 36 Conn. 215 (1869); Southport v. Ogden, 23 Conn. 128 (1854). See also City of Billings v. Herold, 130 Mont. 138, 296 P.2d 263 (1956).


\(^7\) City of Kansas v. Clark, 68 Mo. 588 (1878).

\(^8\) State v. Gustin, 152 Mo. 108, 53 S.W. 421 (1899), relied on Kansas City v. Neal, 122 Mo. 232, 26 S.W. 695 (1894), which in turn relied on City of Kansas v. Clark, 68 Mo. 588 (1878).

\(^9\) See City of Fort Scott v. Arbuckle, 165 Kan. 374, 196 P.2d 217 (1948), where the court reasoned that § 10 of the Kansas Constitution covers both double jeopardy and trial by jury, but a single act of an individual may be punished both by city and state. Thus § 10 does not apply to prosecutions by cities. Therefore there is no constitutional right to a trial by jury where the prosecution is under a city ordinance.

\(^10\) Twenty-five states, either by holding or dictum, adhere to the majority position while about four states without the aid of statute take a minority position. Michigan and Minnesota are in question. See Village of Northville v. Westfall, 75 Mich. 603, 42 N.W. 1068 (1889); State v. Hoben, 256 Minn. 436, 98 N.W.2d 813 (1959).

\(^11\) It should be pointed out that the great majority of state courts have based their decisions on their own statutes and constitutions, and have not considered the impact which the United States Constitution might have.
the single criminal act constitutes two offenses, one against the city and one against the state; 2) the civil action doctrine: that a prosecution for an ordinance violation is an exercise of police power while prosecution for violation of a statute is an exercise of judicial power; 3) the policy doctrine: that there are areas in which it is necessary for both the city and the state to regulate and prosecute independently without the possibility of being precluded by the other's prior prosecution; 4) the assume-the-conclusion doctrine: that in order to prevent a conflict between the ordinance and the statute, both must be able to prosecute; and 5) the precedent doctrine: that the court is bound to follow the majority rule.

**Double Offense Doctrine.** Many courts adopt the reasoning that a city and a state constitute two distinct political entities. Some courts support this theory by analogy to the United States Supreme Court holdings that the states and the federal government are dual sovereigns, both of which can prosecute for the same act. It follows that since both the state and federal governments can prosecute without violating the double jeopardy restriction, then both a city and state may prosecute. These courts dissect the single act of the defendant into two offenses, one against the city and one against the state. Thus, since two offenses were discovered, there can be no double jeopardy because that bar applies only when the "same offense" is involved.

There are at least two vulnerable aspects of this argument. First, the argument assumes that a city and a state are separate sovereigns. This position is flatly contradicted by many state cases holding that a city is an arm and agency of the state legislature and subordinate to its power. Furthermore, the analogy from the federal-state relationship is dubious because a clear distinction exists between state-federal relationships, as defined by the United States Constitution, and the city-state relationships which are not so governed. To elucidate, the

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12 See for example State v. Simpson, 78 N.D. 360, 49 N.W.2d 777 (1951).
15 Theisin v. McDavid, 34 Fla. 440, 16 So. 321 (1894).
16 City of Canon City v. Merris, 137 Colo. 169, 323 P.2d 614 (1958), recognized the contradiction. Colorado was committed to the majority position in Hughes v. People, 8 Colo. 536, 9 Pac. 50 (1885). The Merris case severely undermines the prior cases. See also State v. Reid, 19 N.J. Super. 32, 87 A.2d 562 (1952).
17 U.S. Const. amend. X.
18 Compare the language of the United States Constitution amendment X: "The powers not delegated to the United States by the constitution, nor prohibited by it to
powers of the state are independent of the federal government, while the powers of the city government depend entirely on the state, except in certain circumstances. The city is wholly a creature of the state. Indeed, it would seem that a more appropriate analogy is to the relationship of the federal government with its territories. The Supreme Court has held that after a prosecution by a territory, the fifth amendment will preclude a subsequent prosecution by the federal government. The converse is also true. The Supreme Court has ruled that:

If . . . a person be tried for an offense in a tribunal deriving its jurisdiction and authority from the United States, and is acquitted or convicted, he cannot again be tried for the same offense in another tribunal deriving its jurisdiction and authority from the United States.

Even if the analogy to the federal-state double jeopardy rule is granted, there is some doubt as to the continued life of this rule. At least three Justices currently believe that the prohibition of the United States Constitution against double jeopardy applies to the states or the federal government whenever the other sovereign has first prosecuted for a single action that would constitute "two offenses." Should this dissent prevail, then the main support to city-state multiple prosecutions would necessarily be destroyed.

Civil Action Doctrine. A group of state courts characterize a prosecution under an ordinance as a civil action. Under this view, there is no double jeopardy if the state subsequently prosecutes because the double jeopardy bar only prohibits a second "criminal" prosecution for the same act. Thus, by classifying the state action as

the States, are reserved to the States respectively, or to the people." with the Washington Constitution article XI § 10: "[C]ities or towns heretofore or hereafter organized and all charters thereof framed or adopted by authority of this Constitution shall be subject to, and controlled by general laws."

22 Washington recognized this possibility in State v. Tucker, 137 Wash. 162, 242 Pac. 363 (1926), but the Washington court felt bound to follow the majority view.
27 E.g., City of Clayton v. Nemours, 237 Mo. App. 167, 164 S.W.2d 935 (1942).
the 'first criminal' prosecution, these courts avoid the double jeopardy argument. However, these state courts fail to clarify the exact status of a prosecution under an ordinance. In fact, some courts indicate that the prosecution is "quasi-criminal."\(^{29}\) There are also variations of classifications depending on the right claimed by the defendant, \textit{i.e.}, the prosecution may be criminal for one purpose and civil for another.\(^{30}\) Or there may be variations of the classification depending on whether the state also has legislated in the area.\(^{31}\) For example, in Michigan the prosecution is civil if it is for the collection of a fine, but if imprisonment is possible, then it is criminal.\(^{32}\) The courts may treat ordinance prosecutions as sui generis.\(^{33}\) The result of the variations has been the creation of a great deal of confusion.\(^{34}\)

The core of the confusion comes from the definition of the word "crime." Some courts define "crime" as any act in violation of "public law."\(^{35}\) These courts hold that only a state statute qualifies as a "public law." Thus a city ordinance must be classified as a "local law."\(^{36}\) Other courts imply that a necessary element of a criminal action is imprisonment.\(^{37}\) These courts state that a prosecution under an ordinance is a suit to recover a fine, a penalty, or a debt, and

\(^{28}\) City of Selma v. Shivers, 150 Ala. 502, 43 So. 555 (1907).


\(^{30}\) See note 28 supra. In Chicago v. Lord, 3 Ill. App. 2d 410, 122 N.E.2d 439 (1954), aff'd, 7 Ill. 2d 379, 130 N.E.2d 504 (1955), the court said the action is criminal in nature since it constituted a violation of the public law (state law). On the basis of that statement it is hard to see any case where double jeopardy by a city and a state prosecution would arise when there would not be a violation of the public law, thus the city prosecution would be a criminal prosecution. See also \textit{Ex parte Simmons}, 4 Okla. Crim. 662, 112 Pac. 951 (1911) (quasi criminal).

\(^{31}\) See note 28 supra. In Chicago v. Lord, 3 Ill. App. 2d 410, 122 N.E.2d 439 (1954), aff'd, 7 Ill. 2d 379, 130 N.E.2d 504 (1955), the court said the action is criminal in nature since it constituted a violation of the public law (state law). On the basis of that statement it is hard to see any case where double jeopardy by a city and a state prosecution would arise when there would not be a violation of the public law, thus the city prosecution would be a criminal prosecution. See also \textit{Ex parte Simmons}, 4 Okla. Crim. 662, 112 Pac. 951 (1911) (quasi criminal).

\(^{32}\) Village of Northville v. Westfall, 75 Mich. 603, 42 N.W. 1068 (1889).

\(^{33}\) State v. Hoben, 256 Minn. 436, 98 N.W.2d 813 (1959).

\(^{34}\) The early Colorado cases are in point. \textit{Compare} City of Greeley v. Hamman, 12 Colo. 94, 20 Pac. 1 (1888) and Noland v. People, 33 Colo. 322, 80 Pac. 887 (1905), \textit{with} City of Canon City v. Merris, 137 Colo. 169, 323 P.2d 614 (1958).


\(^{36}\) Ibid.


\(^{38}\) Town of Canton v. McDaniel, 188 Mo. 207, 86 S.W. 1092 (1905).

\(^{39}\) State v. Hauser, 137 Neb. 138, 288 N.W. 518 (1939); \textit{But see} City of Hudson v. Granger, 23 Misc. 401, 52 N.Y.S. 9 (Sup. Ct. 1898).

\(^{40}\) In Village of Northville v. Westfall, 75 Mich. 603, 42 N.W. 1068 (1889), the court admits the prosecution is to recover a fine, but the court says the prosecution is in the nature of a proceeding for a debt.
thus, it is viewed as a civil action. This reasoning necessarily disregards the conventional definition of "debt." Another inconsistency with the "debt" concept is shown when the ordinance prescribes imprisonment until the fine is paid. In many, if not most, jurisdictions imprisonment for a debt is prohibited by the state constitution.

The confusion in this area is shown by the following quotation:

[A] prosecution for the violation of a city ordinance is a civil action... though concededly resembling a criminal action in its effects and consequences. Regarding it with respect to both form and substance, it partakes of some of the features of each character of action.

In the sense that its primary object is to punish, a prosecution for the violation of a city ordinance is undoubtedly criminal in its purpose but nevertheless civil in form, and especially so when regarded as an action for the recovery of a debt representing the amount of the fine or penalty imposed against the defendant for violation of the ordinance. Where the punishment prescribed by the ordinance may, in the first instance, be the imprisonment of the defendant, the conception of the action as one for the recovery of the debt will of course no longer obtain... but even so the proceeding, though its sole object is to punish, is nevertheless not a proceeding to punish for the commission of a crime in the accurate legal sense of the term. This for the reason that a crime is an act committed in violation of the public law, that is, a law coextensive with the boundaries of the state which enacts it, while an ordinance, on the contrary, is no more than a mere local police regulation passed in pursuance of and in subordination to the general or public law for the preservation of peace and the promotion of good order in a particular locality.

In contrast with the above quoted statement that an ordinance prosecution is civil in form, Nebraska holds that a prosecution for violation of an ordinance is criminal in form, but, in fact, it is really a civil action.
One simply cannot deny that the purpose of a prosecution under an ordinance is that of seeking to impose a criminal sanction. Furthermore, form—procedural form—is normally criminal procedure, i.e., a criminal complaint is issued, no answer is required of the defendant, the defendant pleads guilty or not guilty, etc. The realistic conclusion is that the "criminal-civil" distinction is fictitious. It only adds confusion to an already clouded area.

**Police Power Doctrine.** A few courts argue that a prosecution for violating a city ordinance represents an exercise of police power while a prosecution for violating a state statute constitutes an exercise of judicial power. The underlying reason supporting this distinction is not fully explained, but it appears to be that the prohibition against double jeopardy is operative only in "judicial" trials. Therefore, if the city prosecution did not constitute a "judicial trial," there could not be double jeopardy. This approach seems abortive, particularly when one examines the definitions of "police power," "judicial power," and "trial." This distinction between the powers exercised by city courts and those exercised by state courts, is evasive, and probably non-existent. It is apparent that any court that uses this rationale is grasping at straws to support a pre-determined conclusion.

**Policy Doctrine.** Some courts take the approach that a criminal act done in a city involves more risks than the same act done outside a city. Thus, the increased penalty for the city offender through 47 City of Hudson v. Granger, 23 Misc. 401, 52 N.Y.S. 9 (Sup. Ct. 1898). See also People v. Ward, 146 Misc. 606, 263 N.Y.S. 511 (County Ct. 1933).

48 Ibid.

49 See United States v. Constantine, 296 U.S. 287 (1935); United States v. La Frana, 282 U.S. 568 (1931) and cases cited. The United States Supreme Court in both the Constantine and La Frana cases was dealing with federal tax cases and refused to be governed by mere form. In Constantine the Court said: "If in reality a penalty it cannot be converted into a tax by so naming it, and we must ascribe to it the character disclosed by its purpose and operation, regardless of name." 296 U.S. at 294.

50 The beginning of this doctrine was probably Shafer v. Mumma, 17 Md. 331 (1861). See also Kemper v. Commonwealth, 85 Ky. 219, 3 S.W. 159 (1887); State v. Clifford, 45 La. Ann. 980, 13 So. 281 (1893); State v. Sly, 4 Ore. 277 (1872) (dictum).

51 Police power normally means the establishment of laws, not their adjudication. See Black's Law Dictionary, 1317 (4th ed. 1951).

52 "The authority vested in courts and judges as distinguished from the executive and legislative power" Black's Law Dictionary, 986 (4th ed. 1951).


54 See Hughes v. People, 8 Colo. 536, 9 Pac. 50 (1885), where the court admits that the double offense doctrine, civil action doctrine, and the police power doctrine are fictitious, but the court nevertheless adopted the majority rule allowing the double prosecutions. Not until City of Canon City v. Merrit, 137 Colo. 169, 323 P.2d 614 (1958), did the court overrule this position.

55 Hood v. Von Glahn, 88 Ga. 405, 14 S.E. 564 (1862). See also Ex parte Sloan, 47 Nev. 109, 217 Pac. 233 (1923).
double prosecutions by the city and state, is justified on the basis of the additional risk.\textsuperscript{56} This argument assumes that the needs of a city are peculiar to it and are not provided for by the state legislature in its general statewide prohibitions.\textsuperscript{57}

Perhaps the above policy reasoning is behind many court decisions notwithstanding the use of more traditional language by the courts.\textsuperscript{58} One such traditional theory used by these courts is that the city and state are separate jurisdictions;\textsuperscript{59} this theory was discussed earlier.

The assumption in the policy doctrine that the increased risks warrant double prosecutions is fallacious. The courts making that assumption overlook other alternative ways in which the problem of increased risks can be handled. There are at least two such alternatives. First, the state may use home rule concepts which distinguish between the needs for state uniformity and local rule. A second alternative would give discretion to the judge hearing the matter to alter the penalty according to the risk. Both alternatives are discussed below.

Under the home rule concept,\textsuperscript{60} state law should be supreme where uniformity is needed, but where matters are local, then the municipal laws should supersede state law.\textsuperscript{61} Of course the local-uniformity concept may be difficult to apply in the borderline cases.\textsuperscript{62} Nevertheless, there are notable examples of areas where the uniformity concept is adequate. For example, some problems of traffic regulation are subject to uniformity.\textsuperscript{63} On the other hand if the problem has serious local ramifications, such as acts creating abnormal risks, then the court may deem the area one properly regulated at the local level. In such a case the city can prescribe penalties coextensive with the risks created by the act. If the regulation by the city supersedes the state’s regulation in this area, then the defendant is punished but once.\textsuperscript{64} This

\begin{footnotesize}
\begin{enumerate}
\item \cite{Compare, Wragg v. Penn Township, 94 Ill. 11 (1879) with In re Monroe, 13 Okla. Crim. 62, 162 Pac. 233 (1917).
\item Hood v. Von Glahn, 88 Ga. 405, 14 S.E. 564 (1892).
\item A familiar statement by courts is found in State v. Mills, 108 W.Va, 31, 150 S.E. 142, 144 (1929): “[P]rosecutions of each [city and state] offense proceeds upon a different hypothesis; the former contemplates disturbance of the peace and good order of the city; the other had a more enlarged object in view—the maintenance of the peace and dignity of the state. Therefore, a conviction under such ordinance [sic., indictment?] for one may not be pleaded in bar of a conviction under indictment for the other.” \textit{But see In re Sic, 73 Cal. 142, 14 Pac. 405 (1887).}
\item Town of Van Buren v. Wells, 53 Ark. 368, 14 S.W. 38 (1890).
\item Home rule is in force in Washington. See Wash. Const. art. 11, § 10.
\item Woolverton v. City and County of Denver, 146 Colo. 247, 361 P.2d 982 (1961).
\item City of Canon City v. Merris, 137 Colo. 169, 323 P.2d 614 (1948) (driving while under the influence of alcohol).
\end{enumerate}
\end{footnotesize}
procedure would seem to satisfy both the policy considerations and the double jeopardy requirements.

The uniformity-local distinction may be applied even where home rule is not in force.65 The application will be through the pre-emption doctrine.66 Here the court will be more apt to apply pre-emption where uniformity is needed.67

The second alternative is to allow the judge to determine whether a more severe penalty may or may not be warranted due to the circumstances of the criminal act in question. This alternative would have the benefits of a single prosecution and yet provide for a penalty in terms of the risk created.

Assume-the-Conclusion Doctrine. Some courts begin with the conclusion that city action should not bar effective state prosecution. In order to protect this conclusion, the court then rules that there is no double jeopardy when the city has already prosecuted the defendant.68 These courts overlook the other possible alternative: the court could rule the ordinance invalid and the conviction void. This would leave the state free to prosecute without any double jeopardy claim.

Precedent Doctrine. Some states blindly follow the majority rule.69 A notable example is the Washington court. While appearing to recognize that the reasoning of the minority of courts is superior, the Washington court conceived itself bound to follow the majority position and allowed a double prosecution.70 The precedent doctrine contains an element of conflict for Washington. In 1959 the Washington court said that where the Washington constitution and the United States Constitution are identical in thought, substance and purpose, as they are in Article 1, Sec. 9 of the Washington constitution and the double jeopardy provision of the fifth amendment of the United States Constitution, then the Washington court will give the same interpretation to the provision as the United States has given to its Constitution.71

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64 For an analogous argument see Bartkus v. Illinois, 359 U.S. 121 at 157 (1959) (dissenting opinion of Black, J.).
66 Ibid.
68 There seems to be this element of reasoning running through Robbins v. People, 95 Ill. 175 (1880).
69 Hughes v. People, 8 Colo. 536, 9 Pac. 50 (1885); Koch v. State, 8 Ohio Cir. Ct. R. 641 (1894), aff'd, 53 Ohio St. 433, 41 N.E. 689 (1895); State v. Tucker, 137 Wash. 162, 242 Pac. 363 (1926).
70 State v. Tucker, 137 Wash. 162, 242 Pac. 363 (1926). However, on the basis of State v. Taylor, 142 Wash. 528, 253 Pac. 796 (1927), the defendant might persuade the judge of the second trial to suspend the penalty if the defendant has already been punished for the same offense.
As we have seen, the United States Supreme Court has taken the minority position prohibiting double prosecution in the analogous situation where federal and territorial laws are involved.  

The Minority Rule. Some states do not allow double prosecutions by a city and a state for the same criminal act. The reasons include: 1) a statute prohibits double prosecution; 2) a city having an ordinance which duplicates a statute creates a conflict where both are enforced, so the ordinance must yield; and 3) both the statute and ordinance are based on the same authority which precludes double prosecutions.

Statute. Some states have passed statutes preventing double prosecutions by city and state. Such a statute will, of course, be in derogation of the common law, and therefore interpreted strictly by the courts.  

Conflict. Some states, where the question of double prosecution has risen, have assumed that it would be double jeopardy for a city and a state to prosecute. Thus the ordinance is held invalid as conflicting with the state statute because an ordinance prosecution would preclude the enforcement of the statute. It is sometimes difficult to identify the exact reasoning of a court in this type of case. There appear to be three alternative constructions of a statute-ordinance conflict. In the first situation the court may hold that the double jeopardy rule would prohibit both the city and state from prosecuting. Or secondly, the court may reason that the home rule local-uniformity distinction may apply, and that the area regulated is one requiring uniform regulation. Thus the city is precluded from regulating this area. Thirdly, the preemption doctrine may be applied. The court will here decide that the state, by passing an act in this area, intended to pre-empt the

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72 See text accompanying notes 23 and 24, supra.
73 For an example see the Arkansas statutes and the construction given by the court. The statute, as construed, applies only if there has been a prior conviction. Smith v. State, 136 Ark. 263, 206 S.W. 437 (1918); Champion v. State, 110 Ark. 44, 160 S.W. 878 (1913); Richardson v. State, 56 Ark. 367, 19 S.W. 1052 (1892). For other states with statutes and cases construing the statutes see the appendix.
75 In re Sic, 73 Cal. 142, 14 Pac. 405 (1887); Southport v. Ogden, 23 Conn. 128 (1854).
77 See Southport v. Ogden, 23 Conn. 128 (1854).
79 Davis v. City and County of Denver, 140 Colo. 30, 342 P.2d 674 (1959).
80 See earlier discussion in text accompanying notes 61-63 supra.
81 This is probably the most significant reason in City of Billings v. Herold, 130 Mont. 138, 296 P.2d 263 (1956).
entire area and any ordinance regulating the same area is therefore in conflict and accordingly is void.\textsuperscript{82}

\textit{Single Sovereign.} The most persuasive reason why there is double jeopardy where a city and a state prosecute is that both an ordinance prosecution and a prosecution under a state statute are based on the same ultimate authority, namely, the state.\textsuperscript{83} It has often been held that a city is a mere creature of the state and is responsible to the state.\textsuperscript{84} Thus, it would seem that the city prosecutes as an agent of the state, and this should preclude a subsequent prosecution by the state in its more direct capacity. The converse, that an earlier prosecution by a state bars a subsequent city prosecution, should also follow.\textsuperscript{85}

\textbf{The Position of the United States Supreme Court.} To the present date the Supreme Court has not been asked to test the constitutionality of a double prosecution by a city and a state.\textsuperscript{86} However, we should examine the arguments that would be considered by the Supreme Court. An argument seeking to prohibit double prosecutions by both a city and a state may take any of three positions: 1) that the double prosecution violates the due process clause of the fourteenth amendment; 2) that the fifth amendment prohibition against double jeopardy should apply to the states as well as to the federal government; and 3) that the double prosecution violates the equal protection clause of the fourteenth amendment.

\textit{Due Process.} In \textit{Palko v. Connecticut},\textsuperscript{87} the court held that an act, here a statute, of the state does not necessarily violate the fourteenth amendment just because a similar act by the federal government would violate the fifth amendment. The Court in \textit{Palko} set up the familiar test to determine whether the particular right claimed by the defendant is within the protection of the fourteenth amendment. The test is whether the right violated is of “the very essence of a scheme of ordered liberty.”\textsuperscript{88} In addition the Court announced another test which

\textsuperscript{82} In \textit{re Lane}, 22 Cal. Repr. 857, 372 P.2d 897 (Sup. Ct. 1962).

\textsuperscript{83} City of Canon City v. Merris, 137 Colo. 169, 323 P.2d 614 (1958).

\textsuperscript{84} State v. Reid, 19 N.J. Super. 32, 87 A.2d 562 (County Ct. 1952), recognized this but it held that for the purpose of double jeopardy the city and state are regarded as separate bodies.

\textsuperscript{85} Grafton v. United States, 206 U.S. 333 (1907); People of Puerto Rico v. Shell Oil, 302 U.S. 253 (1937).

\textsuperscript{86} In two cases the court could have decided this issue, but it declined to do so. See \textit{Palko v. Connecticut}, 302 U.S. 319 (1937); \textit{Flemister v. United States}, 207 U.S. 372 (1907).

\textsuperscript{87} \textit{Grafton v. United States}, 206 U.S. 333 (1907). Defendant was charged with first degree murder. The jury found him guilty of second degree murder. The state under statutory authority appealed and upon reversal retried defendant for first degree murder.

\textsuperscript{88} \textit{Id.} at 325.
is directed to the double jeopardy issue of that case: "Is that kind of
double jeopardy to which the statute has subjected him a hardship so
acute and shocking that our polity will not endure it."

The "shock" test appears to be wholly inadequate to determine the
applicability of the fourteenth amendment to the problem of double
prosecutions by a city and a state. Assuming that prosecutions by a
city and a state are in effect like two state prosecutions, the question
remains whether the double prosecution is "a hardship so acute and
shocking that our polity will not endure it?" When emphasis is placed
on the test of state endurance, it must be recognized that most of the
states have endured this double prosecution, although there have been
some statutory enactments in this area. If we view the test as one
which measures "shock" or conversely "unreasonableness," then we
run into another difficulty. The impossibility of applying a shock test
was emphasized in two search and seizure cases. This impossibility
is even more acute in the double prosecution area. Mr. Justice Clark
said, concurring in Irvine v. California, that what may be shocking
to one person may not be to another; the result is unpredictability.

Notwithstanding the difficulty in applying the Palko case, the double
prosecution by the city and state should not be permitted even under
the Palko tests. The Palko Court, while dealing with a double jeop-
dardy argument, intimated that there are different kinds of "double
jeopardy," i.e., some kinds that might be prohibited by the fourteenth
amendment, and some that are not. In fact, the Court specifically
reserved the decision concerning the type of double prosecution to
which this comment is addressed stating:

What the answer [to a double jeopardy claim] would have to be if the
state were permitted after a trial free from error to try the accused
over again or to bring another case against him, we have no occasion
to consider.

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89 Id. at 328.
89 See text accompanying notes 16-25 supra.
91 See note 73 supra, and appendix.
94 The Court held that the type of double jeopardy where the state can appeal a
criminal case is not the kind that is prohibited by the Constitution. The Court said:
"Is double jeopardy in such circumstances, if double jeopardy it must be called, a
denial of due process forbidden to the States? The tyranny of labels...must not lead
us to leap to a conclusion that a word which in one set of facts may stand for oppres-
sion or enormity is of like effect in every other." 302 U.S. at 323.
95 302 U.S. at 328.
On the basis of the Court's reservation it seems that there is still room to argue that the due process clause of the fourteenth amendment should bar double prosecutions by the city and state.

There are two hurdles for a successful due process argument. The first problem is whether the court will consider a city prosecution as a prosecution by the state. If this proposition is accepted then a second trial by the state court results in two trials and two punishments for a single offense. This idea has previously been discussed. The second hurdle, once the court has disposed of the double sovereignty fallacy, is whether the court will consider that this kind of double jeopardy is a violation "of the scheme of ordered liberty." In making this decision the Court should keep in mind that the prohibition against double jeopardy is considered so fundamental to liberty that it has found its way into most of the constitutions of the states.

Fifth Amendment. On the basis of the two dissents, in Hoag v. New Jersey and Bartkus v. Illinois an argument might be made that the Court should apply the fifth amendment prohibition against double jeopardy to the states. Mr. Justice Black stated his views in regard to double prosecutions by the federal government and a state in Bartkus:

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

This same line of reasoning has equal applicability to double prosecutions by a city and a state. Mr. Justice Douglas, dissenting in Hoag, stated that the same standard used in federal cases, i.e., the constitutional protection against double jeopardy, should be used to judge state prosecutions as well. While these are minority views, they are due definite respect as possible prophesies of the future.

Equal Protection. The basis for an equal protection argument is that the state is treating the class of city offenders differently from the

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96 See text accompanying notes 15-25 supra.
99 359 U.S. 121, 150 (1959) (Black, J., dissenting with Mr. C. J. Warren and Mr. J. Douglas concurring).
100 Id. at 155.
class of offenders whose criminal acts were committed outside the city. Where the offender did not commit the criminal act in a city, he is subject only to the penalty provided by statute. But the offender whose criminal acts were in a city is subject to the same statutory penalty, plus an additional penalty when the state, indirectly through the city, prosecutes the defendant for violation of the city ordinance and exacts from him the penalty imposed by the ordinance. As there is no apparent reason for treating one offender differently from the other, an invidious discrimination results, and a state, by allowing two prosecutions for the same act, has violated the equal protection clause of the fourteenth amendment.

Such an argument seems to have validity, but it rests on two premises that have been controverted by the states, namely, that the city and state are one sovereign, and that there is no reason to treat the city offender differently than an offender outside the city. The first of the two premises has been previously discussed. The second premise should be viewed a little more carefully.

As prior discussion indicated, some courts take the position that an offense committed in a city presents a greater risk of harm than does an offense committed outside the city. On this premise courts have said that double punishment through double prosecutions is merited. If one views this argument without regard to the reasonable alternatives open to the state legislatures, one might admit that the argument has some validity. However, it would appear that there are reasonable alternatives open to the legislature by which it could take into account the added danger of the offense which is committed in the city. For example, discretion might be left to the trial judge to impose a more stringent penalty for a violation of the law, particularly where the risk of harm varies according to the place where the offense was committed. While the discretion rule would impose an additional burden on the trial judge, it is the lesser evil when compared with the present rule which subjects the defendant to multiple prosecutions. In support of the argument that the double punishment is the greater of the two evils, one need only remember that double prosecutions have been

103 See Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389, 406 (1928) (Brandeis, J., dissent).
104 See text accompanying notes 16-25 supra.
105 See text accompanying notes 55-57 supra.
106 Ibid.
considered of sufficient evil to warrant a prohibiting provision in most of the state constitutions.\(^{107}\)

**Conclusion**

Most courts hold that a city can prosecute a defendant under a city ordinance, and in addition, a state may prosecute the same defendant for the same act on the basis of a state statute. The most common theory uses the analogy of the state-federal relationship. Thus, the city and state are said to be separate sovereigns punishing different "offenses." Another common theory holds that the prosecution by the city is a civil action while the state prosecution is criminal. These reasons are often contradicted by other statements by the same courts, i.e., they say that the city is an agent of the state, but the city trial is criminal for purposes of procedure and form.

Nor are double punishments necessary, as some courts suggest, to protect a city and state. There are other alternatives available besides double prosecutions to adequately reflect the increased risk created by the city offender; namely, the sentencing power of the judge and the local-uniform concept used in home-rule states.

In a few states the minority rule, disallowing double prosecutions, is followed, either because a statute governs or because the court recognizes that the city prosecution is indirectly a state prosecution.

While the problem here faced has not yet reached the Supreme Court, one could argue that the United States Constitution prohibits this type of double prosecution. Such argument would be based on the possible future application of the fifth amendment to the states, or that the states in allowing double prosecutions are violating the equal protection clause of the fourteenth amendment. A decision accepting one of these arguments would eliminate the illogical and unfortunate double prosecution by both a city and a state.

L. WILLIAM HOUGER

**Appendix**

This appendix attempts to set out the important cases in the states and Philippine jurisdictions which have been decided with regard to the issue of double prosecutions by a city and a state. In addition, there are also set out the states which have not dealt with the issue directly, but which have given some indication of their position. For

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\(^{107}\) See note 97 supra.
other summaries of this area see Kneier, Prosecutions Under State Law and Municipal Ordinance as Double Jeopardy, 16 CORNELL L.Q. 201 (1931); United States v. Joson, 26 Phil. 1 (1913).

Alabama: Allows double prosecutions.

At an early date, Alabama allowed double prosecutions. Mayor v. Allaire,\(^\text{108}\) Black v. State.\(^\text{109}\)

Subsequently the legislature enacted 1907 Code §§ 1221, 1222 which disallowed double prosecutions. See Cast v. State,\(^\text{110}\) Gustin v. State,\(^\text{111}\) Ex parte Ratley.\(^\text{112}\)

The statute was amended in 1915 deleting the bar against double prosecution. The court reverted to its pre-1907 view. Bell v. State,\(^\text{113}\) Schroeder v. State,\(^\text{114}\) Williams v. State,\(^\text{115}\) Leach v. State,\(^\text{116}\) Morgan v. State,\(^\text{117}\) Marchman v. State\(^\text{118}\) Howell v. City of Fort Payne,\(^\text{119}\) Slayton v. State,\(^\text{120}\) Billingsley v. State,\(^\text{121}\) Pike v. City of Birmingham,\(^\text{122}\) Inman v. State.\(^\text{123}\) For other relevant cases see Perry v. City of Birmingham\(^\text{124}\) and Shields v. State.\(^\text{125}\)

Alaska: Undecided.

There exists one federal district court decision which held that double prosecutions are allowed in Alaska. United States v. Farwell.\(^\text{126}\)

Arkansas: Allows double prosecutions in certain cases only.

At an early date double prosecutions were allowed. Town of Van Buren v. Wells.\(^\text{127}\)

Subsequently a statute, Acts of 1891, p. 97, § 3 was enacted. The

108 14 Ala. 400 (1849).
109 144 Ala. 92, 40 So. 611 (1906).
110 11 Ala. App. 177, 65 So. 718 (1914).
111 10 Ala. App. 171, 65 So. 302 (1914), cert. denied, 66 So. 1008 (1914).
112 188 Ala. 107, 66 So. 147 (1914).
113 16 Ala. App. 36, 75 So. 181 (1917), aff'd, 200 Ala. 364, 76 So. 1 (1917).
114 17 Ala. App. 497, 85 So. 851 (1920).
115 18 Ala. App. 218, 90 So. 36 (1921) (rev'd on other grounds).
116 18 Ala. App. 15, 100 So. 306 (1924).
117 20 Ala. App. 511, 104 So. 341 (1925), cert. denied, 213 Ala. 130, 104 So. 341 (1925).
119 246 Ala. 315, 20 So. 2d 880 (1945).
120 31 Ala. App. 622, 21 So. 2d 122 (1945).
121 34 Ala. App. 475, 41 So. 2d 431 (1949). This case presents the history of double prosecution in Alabama.
123 39 Ala. App. 496, 104 So. 2d 448 (1958).
127 53 Ark. 368, 14 S.W. 38 (1890).
statute was construed in *Richardson v. State*¹²⁸ and in *Williams v. State.*¹²⁹

The statute was amended, Kirbey's Digest sec. 5633, to change the *Williams* case construction and add the additional requirement that the penalty imposed by the ordinance must be equal to the minimum penalty imposed by the statute.¹³⁰ *Champion v. State.*¹³¹

The statute as amended does not prohibit double prosecutions where the first prosecution results in an acquittal. *Smith v. State.*¹³²

**California:** Disallows double prosecutions.

The important cases have been *In re Sic,*¹³³ *Ex parte Knight,*¹³⁴ *Ex parte Mingo*¹³⁵ and *In re Lane.*¹³⁶

**Colorado:** Disallows double prosecutions.

The court has until recently allowed double prosecutions. *Hughes v. People*¹³⁷ and *McInerney v. City of Denver.*¹³⁸

The court overruled the prior position in *City of Canon City v. Merris.*¹³⁹

Other relevant cases are *City of Greely v. Hamman,*¹⁴⁰ *Noland v. People,*¹⁴¹ and *Woolverton v. City and County of Denver.*¹⁴²

**Conneccticut:** Disallows double prosecutions.

The only case which holds that double prosecutions are prohibited is *Southport v. Ogden.*¹⁴³ Two subsequent cases, *State v. Welch*¹⁴⁴ and *State v. Flint,*¹⁴⁵ give recognition to the prohibition in their dictum.

¹²⁸ 56 Ark. 367, 19 S.W. 1052 (1892).
¹²⁹ 63 Ark. 307, 38 S.W. 337 (1896).
¹³⁰ This requirement changes the *Richardson* case which had used a "no collusion" requirement. For a collusion case see State v. Caldwell, 70 Ark. 74, 66 S.W. 150 (1902).
¹³¹ 110 Ark. 44, 60 S.W. 878 (1913). The additional language in *Champion* indicating that the court might be giving its decision a constitutional underpinning is dictum and was not followed when the court had the chance. Smith v. State, 136 Ark. 263, 206 S.W. 437 (1918).
¹³² 136 Ark. 263, 206 S.W. 437 (1918).
¹³³ 73 Cal. 142, 14 Pac. 405 (1887).
¹³⁴ 55 Cal. App. 511, 203 Pac. 777 (1921). The dictum in the *Knight* case says that double prosecutions are permissible. However, this aspect of *Knight* has not been followed. See *Ex parte Mingo,* 190 Cal. 769, 214 Pac. 850 (1923).
¹³⁵ 190 Cal. 769, 214 Pac. 850 (1923).
¹³⁷ 8 Colo. 536, 9 Pac. 50 (1885).
¹³⁸ 17 Colo. 302, 29 Pac. 516 (1892).
¹⁴⁰ 12 Colo. 94, 20 Pac. 1 (1888).
¹⁴¹ 33 Colo. 322, 80 Pac. 887 (1905).
¹⁴³ 233 Conn. 128 (1854).
¹⁴⁴ 36 Conn. 215 (1869).
¹⁴⁵ 63 Conn. 248, 28 Atl. 28 (1893).
Florida: Allows double prosecutions.
The relevant cases are *Theisen v. McDavid*,\(^{146}\) *Bueno v. State*\(^{147}\) and
*Gillooley v. Vaughn*.\(^{148}\)

Georgia: Allows double prosecutions:
The significant cases are: *Hood v. Von Glahn*,\(^{149}\) *Sutton v. Mayor*\(^{150}\)
and *Smith v. State*,\(^{151}\) which in its dictum throws some doubt as to the
exact status of the issue in Georgia.
The Uniform Act Regulating Traffic on Highways, Ga. Code Ann. ch. 68 § 1681, has a provision preventing double prosecution. *Hannah v. State*.\(^{152}\)

Idaho: Allows double prosecutions.
The relevant cases are: *State v. Preston*,\(^{153}\) *In re Henry*\(^{154}\) and *State v. Poynter*.\(^{155}\)

Illinois: Allows double prosecutions.
See *Wragg v. Penn Township*,\(^{156}\) *Robbins v. People*,\(^{157}\) *People v. McCanney*\(^{158}\) and *City of Chicago v. Lord*.\(^{159}\)

Indiana: Undecided.
In *Levy v. State*,\(^{160}\) the court held that double prosecutions are not
forbidden. But since then in *City of Frankfort v. Aughe*,\(^{161}\) the court
said that a city cannot prohibit an act which is also prohibited by
statute. Such a view would prevent a double prosecution. *Thomas v. City of Indianapolis*\(^{162}\) adds some confusion.

Iowa: Allows double prosecutions.
See *Town of Noola v. Reichart*\(^{163}\) (dictum).

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\(^{146}\) 34 Fla. 440, 16 So. 321 (1894).
\(^{147}\) 40 Fla. 160, 23 So. 862 (1898).
\(^{148}\) 92 Fla. 948, 95 So. 653 (1926).
\(^{149}\) 88 Ga. 450, 14 S.E. 564 (1892).
\(^{150}\) 149 14 Ga. App. 30, 60 S.E. 811 (1908).
\(^{152}\) 152 97 Ga. App. 188, 102 S.E.2d 624 (1958).
\(^{153}\) 4 Idaho 215, 38 Pac. 694 (1894).
\(^{155}\) 70 Idaho 438, 220 P.2d 386 (1950).
\(^{156}\) 94 Ill. 11 (1879). Here the state had two statutes, providing for punishment by
the state and allowing the city to recover a penalty.
\(^{157}\) 95 Ill. 175 (1880).
\(^{158}\) 205 Ill. App. 91 (1917).
\(^{159}\) 3 Ill. App. 2d 410, 122 N.E.2d 439 (1954), aff'd, 7 Ill. 2d 379, 130 N.E.2d 504
(1955).
\(^{160}\) 6 Ind. 281 (1885).
\(^{161}\) 114 Ind. 77, 15 N.E. 802 (1888).
\(^{162}\) 195 Ind. 440, 145 N.E. 550 (1924) (dictum).
\(^{163}\) 131 Iowa 492, 109 N.W. 5 (1906) (dictum).
Kansas: Allows double prosecutions.

See *City of Fort Scott v. Arbuckle*[^106]. This case is poorly reasoned. To the writer's knowledge there are no prior Kansas cases which allow double prosecution[^105], yet the court "reasoned" that since double prosecutions are allowed in Kansas, the Kansas constitutional provision (sec. 10) did not apply to prosecutions under city ordinances, therefore since section 10 also contained the guarantee of the right to trial by jury, the defendant was not entitled to a jury trial.

See also *City of Garden City v. Miller*,[^166] *Lawton v. Hand*,[^167] and *State v. Holmes*[^168].

Kentucky: Allows double prosecutions in certain cases only.


Kentucky Constitution § 168 requires that where an ordinance and a statute prohibit the same act the ordinance is to provide the same penalty as the statute and the prosecution under one bars prosecution under the other. *White v. Commonwealth*[^173].

An ordinance which does not provide the same penalty is invalid. *City of Newport v. Nier*.[^174]

If there is no statute, and the state prosecutes on the basis of common law, then the constitutional inhibition does not apply. *Respass v. Commonwealth*,[^175] *Lucas v. Commonwealth*,[^176] *Ehrlick v. Commonwealth*[^177] and *Louisville & N.R. Co. v. Commonwealth*.[^178]

Louisiana: Allows double prosecutions.

See *State v. Fourcadel*[^179] and *State v. Clifford*.[^180]

[^166]: State v. City of Topeka, 36 Kan. 76, 12 Pac. 310 (1886), however, uses the same rationale in the same manner.
[^170]: 85 Ky. 219, 3 S.W. 159 (1887).
[^172]: 118 Ky. 408, 92 S.W. 285 (1906).
[^174]: 239 Ky. 491 (Ky. 1931).
[^175]: 107 Ky. 139, 53 S.W. 24 (1899).
[^176]: 118 Ky. 818, 82 S.W. 440 (1904).
[^177]: 125 Ky. 742, 102 S.W. 289 (1907).
[^178]: 144 Ky. 558, 139 S.W. 785 (1911).
Maryland: Allows double prosecutions.

Michigan: Undecided.
Village of Northville v. Westfall might be an indication that the court will hold as civil an action for a fine by a city, therefore a double prosecution is available. But Westfall also indicates that where imprisonment is possible the prosecution under the ordinance is criminal. Thus Michigan might allow double prosecution where the city prosecutions are for a fine, and disallow double prosecutions where the city prosecution could result in imprisonment.

Minnesota: Disallows double prosecutions.
The court was severely split in its first case concerning city and state prosecutions. State v. Oleson. Subsequently the court slowly resolved the doubt. State v. Lee and State v. Cavett and State v. End. Some of the reasoning in the Lee case is contrary to City of St. Paul v. Stamm.

Presently there is some confusion. In State v. Hoben, the court puts some restriction on the prior cases of Lee, Cavett, and End. It would appear that at least where the ordinance carries "more serious sanctions" or denounces the same act which a statute also prohibits, there cannot be double prosecutions.

Mississippi: Allows double prosecutions.
See Johnson v. State and May v. Town of Carthage.

Missouri: Allows double prosecutions.

One can only hesitantly conclude that Minnesota disallows double prosecution. There may be cases where double prosecutions are still allowed. See State v. Hoben, 256 Minn. 436, 98 N.W.2d 813 (1959).

26 Minn. 507, 5 N.W. 959 (1880).
29 Minn. 445, 13 N.W. 913 (1882).
21 Minn. 505, 214 N.W. 479 (1927).
232 Minn. 266, 45 N.W.2d 378 (1950).
106 Minn. 81, 118 N.W. 154 (1908).
256 Minn. 436, 98 N.W.2d 813 (1959). This case is concerned with the technical issue of trial by jury but it purports to deal with criminal procedure, including double jeopardy, generally.
59 Miss. 543 (1882).
191 Miss. 97, 2 So. 2d 801 (1941).
3 Mo. 414 (1834).
29 Mo. 330 (1860).
37 Mo. 360 (1866).
56 Mo. App. 530 (1894) (dictum).
56 Mo. App. 579 (1894).

Other relevant cases are *King City v. Duncan* 205 and *City of Webster Groves v. Quick*. 206

**Montana:** Disallows double prosecutions.

See *City of Billings v. Herold*. 207

**Nebraska:** Allows double prosecutions.

See *State v. Hauser* 208 and *State v. Amick*. 209

**Nevada:** Allows double prosecutions.

See *Ex parte Sloan*. 210

**New Jersey:** Allows double prosecutions.

See *State v. Reid*. 211

**New York:** Undecided.

There have been no cases on the double prosecutions issue, but there are two cases that at least admit that city prosecutions are criminal. *City of Hudson v. Granger* 212 and *People v. Ward*. 213

**North Carolina:** Disallows double prosecutions.

While there are no cases directly on point, there is a case, *State v. Keith*, 214 which declares an ordinance void which prohibits acts which are also prohibited by state law. Thus the double prosecution point should not arise.

**North Dakota:** Allows double prosecutions.

*State v. Simpson*. 215

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198 152 Mo. 108, 53 S.W. 421 (1899) (dictum).
200 188 Mo. 207, 86 S.W. 1092 (1905).
201 237 Mo. App. 167, 164 S.W.2d 935 (1942).
202 220 S.W.2d 779 (Mo. Ct. App. 1949).
203 360 Mo. 50, 226 S.W.2d 604 (1950).
204 313 S.W.2d 189 (Mo. Ct. App. 1958).
205 238 Mo. 513, 142 S.W. 246 (1911).
206 319 S.W.2d 543 (Mo. 1959).
210 47 Nev. 109, 217 Pac. 233 (1923).
212 23 Misc. 401, 52 N.Y.S. 9 (Sup. Ct. 1898).
213 146 Misc. 606, 263 N.Y.S. 511 (County Ct. 1933).
214 94 N.C. 686 (1886).
215 78 N.D. 360, 49 N.W.2d 777 (1951).
Ohio: Allows double prosecutions.
   Koch v. State.\textsuperscript{216}

Oklahoma: Allows double prosecutions.
   \textit{Ex parte Simmons},\textsuperscript{217} \textit{In re Monroe},\textsuperscript{218} Cumpton v. City of Mush-gee,\textsuperscript{219} McCann v. State\textsuperscript{220} and Booker v. State.\textsuperscript{221}

Oregon: Allows double prosecutions.
   \textit{State v. Sly},\textsuperscript{222} Mayhew v. City of Eugene,\textsuperscript{223} Miller v. Hansen\textsuperscript{224} and Claypool v. McCauley.\textsuperscript{225}
   Other relevant cases are: \textit{State v. Crawford}\textsuperscript{226} and \textit{Harlow v. Clow}.\textsuperscript{227}

Philippines: Allows double prosecutions.
   \textit{United States v. Chan-Cun-Chay},\textsuperscript{228} \textit{United States v. Flemister},\textsuperscript{229} \textit{United States v. Garcia Gaveris}\textsuperscript{230} and \textit{United States v. Jason}.\textsuperscript{231}

South Carolina: Disallows double prosecutions.
   The court did allow double prosecutions until the statute was passed. See \textit{City Council v. O'Donnell},\textsuperscript{232} \textit{City Council v. Leopard}\textsuperscript{233} and \textit{State v. Sanders}.\textsuperscript{234}
   Now, however, a statute governs. South Carolina Code 1952 Art. 17-502. See \textit{State v. Butler}.\textsuperscript{235}

Tennessee: Allows double prosecutions.
   Greenwood v. State.\textsuperscript{236}

\textsuperscript{216} 8 Ohio Cir. Ct. R. 641 (1894), aff'd, 53 Ohio St. 433, 41 N.E. 689 (1895).
\textsuperscript{217} 4 Okla. Crim. 662, 112 Pac. 951 (1911).
\textsuperscript{218} 13 Okla. Crim. 62, 162 Pac. 233 (1917) (dictum).
\textsuperscript{219} 23 Okla. Crim. 412, 255 Pac. 562 (1923) (dictum).
\textsuperscript{220} 82 Okla. Crim. 374, 170 P.2d 562 (1946).
\textsuperscript{221} 312 P.2d 189 (Okla. 1957).
\textsuperscript{222} 4 Ore. 277 (1872) (dictum).
\textsuperscript{223} 56 Ore. 102, 104 Pac. 727 (1909) (dictum).
\textsuperscript{224} 126 Ore. 297, 269 Pac. 864 (1928).
\textsuperscript{225} 131 Ore. 371, 283 Pac. 731 (1929) (dictum).
\textsuperscript{226} 58 Ore. 116, 113 Pac. 440 (1911).
\textsuperscript{227} 110 Ore. 257, 223 Pac. 541 (1924).
\textsuperscript{228} 5 Phil. 385 (1905) (dictum).
\textsuperscript{229} 9 Phil. 500 (1906) (dictum), aff'd, 207 U.S. 372 (1907).
\textsuperscript{230} 10 Phil. 694 (1908) (dictum).
\textsuperscript{231} 26 Phil. 1 (1913).
\textsuperscript{232} 29 S.C. 355, 7 S.E. 523 (1888) (rev'd on other grounds).
\textsuperscript{233} 61 S.C. 99, 39 S.E. 248 (1901).
\textsuperscript{234} 68 S.C. 192, 47 S.E. 55 (1904).
\textsuperscript{235} 230 S.C. 159, 94 S.E.2d 761 (1956).
\textsuperscript{236} 65 Tenn. (6 Baxt.) 567, 32 Am. Rep. 539 (1873).
Texas: Allows double prosecutions.
A statute governs (1895 Code of Criminal Procedure §931). See *Davis v. State*\textsuperscript{237} and *Ex parte Freeland*.\textsuperscript{238} Another relevant case is *Burdett v. State*.\textsuperscript{239}

Virginia: Allows double prosecutions in certain cases only.
This state follows the general rule allowing double prosecutions except where the statute provides otherwise. *Morganstern v. Commonwealth*,\textsuperscript{240} is an exception engrafted on the statute. See also *Malouf v. City of Roanoke*,\textsuperscript{241} *Anthony v. Commonwealth*\textsuperscript{242} and *Kelley v. County of Brunswick*.\textsuperscript{243} *Bryan v. Commonwealth*\textsuperscript{244} is also relevant.

Washington: Allows double prosecutions.
*State v. Tucker*.\textsuperscript{245} Other relevant cases include: *State v. Taylor*,\textsuperscript{246} *State v. Schoel*\textsuperscript{247} and *Bellingham v. Schampera*.\textsuperscript{248}

West Virginia: Allows double prosecutions.
*State v. Mills*,\textsuperscript{249} *Austin v. Knight*.\textsuperscript{250}

Wisconsin: Allows double prosecutions.
*Ogden v. City of Madison*,\textsuperscript{251} *City of Milwaukee v. Johnson*\textsuperscript{252} and *Guinther v. City of Milwaukee*.\textsuperscript{253}

Wyoming: Allows double prosecutions.
*State v. Jackson*.\textsuperscript{254}

\textsuperscript{237} 37 Tex. Crim. R. 359, 38 S.W. 616, reversing 39 S.W. 937 (1897).
\textsuperscript{238} 38 Tex. Crim. R. 321, 42 S.W. 295 (1897) (dictum).
\textsuperscript{239} 116 Tex. Crim. 264, 32 S.W.2d 360 (1930).
\textsuperscript{240} 94 Va. 787, 26 S.E. 402 (1896).
\textsuperscript{241} 126 Va. 749, 101 S.E. 316 (1919).
\textsuperscript{242} 104 Va. 45, 104 S.E.2d 7 (1958).
\textsuperscript{243} 137 Va. 303, 18 S.E.2d 897 (1942).
\textsuperscript{244} 142 Wash. 528, 253 Pac. 796 (1927).
\textsuperscript{245} 54 Wn.2d 388, 341 P.2d 481 (1959).
\textsuperscript{246} 57 Wn.2d 106, 356 P.2d 292 (1960).
\textsuperscript{247} 108 W. Va. 31, 150 S.E. 142 (1929).
\textsuperscript{248} 124 W. Va. 106, 125 S.E. 433 (1922).
\textsuperscript{249} 111 Wis. 413, 87 N.W. 568 (1901).
\textsuperscript{250} 192 Wis. 585, 213 N.W. 335 (1927).
\textsuperscript{251} 217 Wis. 334, 258 N.W. 865 (1935).
\textsuperscript{252} 75 Wyo. 13, 291 P.2d 798 (1955) (dictum).