

FEDERAL MULTIPLE OFFENSE PROSECUTIONS: THE SAME EVIDENCE TEST AND CUMULATIVE PUNISHMENT

It is well established that Congress can so define punishable offenses that several can be committed in the course of a single criminal transaction.¹ Thus an accused may be convicted and punished cumulatively for both entering with intent to rob and the robbery itself,² or for both selling and possessing the same contraband goods³ even though the possession was in contemplation of the sale. In each case a single course of conduct can be found to violate more than one statutory prohibition. In such cases cumulative punishment may be authorized by one of four possible statutory combinations: (1) by separate clauses of the same section of a statute⁴ or of the criminal code,⁵ (2) by separate sections of the same statute⁶ or chapter of the code,⁷ (3) by separate chapters of the code,⁸ or (4) by separate statutes⁹ or by the code and a statute outside it.¹⁰

Federal prosecutors who fear losing convictions because of insufficiency or failure of the evidence,¹¹ or who wish to tailor punishments

1. *Blockburger v. United States*, 284 U.S. 299 (1932); *Albrecht v. United States*, 273 U.S. 1 (1927); *Gavieres v. United States*, 220 U.S. 338 (1911).

2. E.g., *Hensley v. United States*, 156 F.2d 675 (8th Cir. 1946), and cases cited in note 25 *infra*.

3. *Albrecht v. United States*, 273 U.S. 1 (1927).

4. E.g., *Slade v. United States* 85 F.2d 786 (10th Cir. 1936) (endeavoring to and obstructing the administration of justice).

5. The various criminal statutes were codified and re-enacted into positive law effective Sept. 1, 1948. 18 U.S.C. (1958).

6. E.g., *Blockburger v. United States*, 284 U.S. 299 (1932) (sale of narcotics not in original package and sale of narcotics without written order); *Roark v. United States*, 17 F.2d 570 (8th Cir. 1927) (persuading women to be transported, and transporting women for immoral purposes).

7. E.g., *McGann v. United States*, 261 F.2d 956 (4th Cir. 1958) (robbing a bank and robbing on federal lands).

8. E.g., *Pereira v. United States*, 347 U.S. 1 (1954) (mail fraud and transporting stolen property); *Pinkerton v. United States*, 328 U.S. 640 (1946) (conspiracy and the substantive offense).

9. E.g., *Gavieres v. United States*, 220 U.S. 338 (1911) (drunken conduct and insulting an officer).

10. E.g., *Rayborn v. United States*, 234 F.2d 368 (6th Cir. 1956) (transporting stolen property and Internal Revenue Code).

11. See *Roark v. United States*, 17 F.2d 570, 573 (8th Cir. 1927); *Huffman v. United States*, 259 Fed. 35 (8th Cir. 1919); *Kirchheimer, The Act, The Offense, and Double Jeopardy*, 58 Yale L.J. 513, 525-26 (1949).

to fit particular criminals,¹² often take advantage of this statutory complexity by prosecuting every possible offense, either by charging several offenses as separate counts of a single indictment¹³ or by bringing separate indictments which will be tried together.¹⁴ A frequent result is that the accused is convicted of more than one offense and is punished cumulatively. Historically, defendants have objected to such cumulative sentencing on the grounds of double jeopardy,¹⁵ but such pleas have been almost completely ineffective in the federal courts because of the application of the "same evidence test." This test, in view of its usual result, could better be termed "the different evidence test," for it holds that unless the same evidence is needed to prove both offenses they are *not* the same in law or fact.¹⁶ The purpose of this note is, first, to inquire to what extent a double jeopardy limitation may be possible despite the same evidence test and to suggest a second limitation upon cumulative sentencing besides double jeopardy. In addition, the note will proffer a conceptual system for analyzing multiple count indictment cases. Scope of the treatment will be limited to those federal cases in which multiple offenses are prosecuted together in a single trial. Most of the discussion will pertain to the cases involving one of the first two situations mentioned above where the same statute or code chapter defines all the offenses in question.

The same evidence test as used in the multiple count indictment cases was originally devised for use where two offenses were tried separately. The test in such situations was utilized to resolve the issue of double jeopardy raised in the second trial. Either upon failure of

12. See Horack, *The Multiple Consequences of a Single Criminal Act*, 21 Minn. L. Rev. 805, 820 (1931); Note, *Identity of Offenses: A Study in Judicial Method*, 45 Harv. L. Rev. 535, 541 (1932).

13. Fed. R. Crim. P. 8(a) provides: "Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

14. Fed. R. Crim. P. 13 provides: "The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information."

15. U.S. Const. amend. V, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb"

16. *Blockburger v. United States*, 284 U.S. 299 (1932); *Morgan v. Devine*, 237 U.S. 632 (1915); *Gavieres v. United States*, 220 U.S. 338 (1911); *Burton v. United States*, 202 U.S. 344 (1906); *Carter v. McClaughry*, 183 U.S. 365 (1902); *Hans Nielsen, Petitioner*, 131 U.S. 176 (1889).

conviction in the first prosecution, or upon discovery of additional evidence, an offense related to that of the former prosecution could be tried if the same evidence test showed any difference between the offenses.¹⁷ Thus, in the landmark case of *The King v. Vandercomb & Abbott*,¹⁸ a prosecution for breaking and entering with intent to steal was allowed to follow a prosecution for breaking, entering, and stealing which had failed because the element of stealing had not been proved. Because the element of stealing did not have to be proved in the second indictment, the two indictments were held to be sufficiently different to avoid the double jeopardy ban. Moreover, the "same evidence" was held to mean the evidence required under the respective indictments, not the evidence actually offered at the two trials. With the advent of complex statutory crimes and the modern provisions for joinder of offenses in one indictment¹⁹ came the multiple offense prosecution as we know it today. A single criminal transaction could be in violation of several statutory clauses or sections, and each offense could be charged in a separate count of an indictment and made separately punishable. To override the defense of double jeopardy the same evidence test was carried over from the two-trial situation on the theory that counts could be equated to indictments. Apparently, however, this transfer was made without the courts taking cognizance of a crucial difference regarding the double jeopardy issue in the two-trial and one-trial situations. In the two-trial situation the issue is harassment—whether the defendant can twice be submitted to the rigors of trial for the same offense. In the one-trial situation the issue is punishment—whether the defendant can twice be punished for the same criminal transaction.²⁰ Thus the test originally designed to permit a second trial has been used to permit cumulative punishment, and furthermore, has been used as the criterion for decision almost to exclusion of the more important test of statutory interpretation, i.e., whether Congress intended such a result when it enacted the particular statute.

Before inquiring into the rationale of the same evidence test to show specifically how it restricts the double jeopardy limitation on cumulative punishment, it would be well to examine the basis for the

17. For contemporary application of this principle see, e.g., *Gavieres v. United States*, supra note 16; *Burton v. United States*, supra note 16; *District of Columbia v. Buckley*, 128 F.2d 17 (D.C. Cir. 1942); *Singleton v. United States*, 294 Fed. 890 (5th Cir. 1923); *Ex parte Rhineland*, 11 F. Supp. 298 (W.D. Tex. 1935).

18. 2 Leach 708, 168 Eng. Rep. 455 (1796).

19. See statutes cited in notes 13 and 14 supra.

20. This distinction has been referred to in terms of the procedural and substantive aspects of double jeopardy. Note, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 Yale L.J. 339, 340-41 (1956).

plea of double jeopardy in the one-trial, as opposed to the two-trial situation. In the 1873 case of *Ex Parte Lange*,²¹ the Supreme Court held that the double jeopardy clause of the Constitution applied to double punishment as well as to double trial. In that case there had been a double punishment for a single offense; a statute had provided a punishment of fine *or* imprisonment, and the trial court had imposed both a fine *and* imprisonment. Since the fine had already been paid, the court vacated the prison sentence. More recently the Supreme Court has held²² that where the second punishment was imposed because of the mistaken supposition that Congress had defined two offenses instead of one there is no double jeopardy but only an erroneous sentencing. The distinction between the two holdings relates to whether the second punishment is for the same offense or for a supposed second one. This distinction is somewhat technical, but as a practical matter the grounds upon which the second sentence is vacated are of no consequence.²³ It should be noted that in both situations the only federal agency charged with imposing double jeopardy was the court, not Congress, and in the multiple offense case it was held that the court, even in imposing a wrongful second sentence, had not technically violated the double jeopardy clause. Thus in a case where Congress *may have* authorized a court to punish each offense charged in a multiple count indictment, the determination that *Congress* has violated the double jeopardy clause should be preceded by three preliminary questions to be answered in the affirmative.

- (1) Do the statutes define separate offenses?
- (2) If so, did Congress intend that punishment for these offenses be cumulative instead of alternative?
- (3) If so, are the offenses so identical that part of the same offense will be twice punished?

A fourth question is whether or not there is a double jeopardy limitation on Congress' power to provide for cumulative punishment. From this order of inquiry emerge two possible limitations to protect criminal defendants from the imposition of cumulative punishment. The first lies in construction of the statutes as providing only for alternative punishments. This limitation should be a possibility in all multiple offense prosecutions. The second possible limitation is the restriction placed on Congress by the double jeopardy clause. Because

21. 85 U.S. (18 Wall.) 163 (1873). The *Lange* case was reaffirmed in *Benz v. United States*, 282 U.S. 304 (1931), and *In re Bradley*, 318 U.S. 50 (1943).

22. *Holiday v. Johnson*, 313 U.S. 342, 349 (1941). Accord, *White v. Pescor*, 155 F.2d 902 (8th Cir. 1946), rev'd on other grounds.

23. An erroneous sentence is as subject to collateral attack as an imposition of double jeopardy. See 28 U.S.C. § 2255 (1958).

continued application of the same evidence rule appears probable, this limitation will be available, if at all, in only a few cases.

How the same evidence test has been used to restrict the double jeopardy defense can be best understood by reviewing the more important multiple offense prosecution cases in the context of five factual categories suggested by the test itself. In each category the largely overlooked, but distinctly possible, limitation of statutory interpretation will be discussed.

I. CASES IN WHICH NO ELEMENT OF ONE OFFENSE IS NEEDED TO PROVE THE OTHER.

In this situation one criminal transaction can be broken into two parts which do not overlap. The two offenses are chronologically separate. Here the same evidence test is used as a logical device for demonstrating this severability. The most notable example is the case of breaking and entering with intent to steal, which is a completed offense, and the subsequent larceny, which also is a completed offense. Graphic illustration of the way in which use of the same evidence test has led to consideration of only the double jeopardy limitation in this type of case is furnished by the recent decisions of the Supreme Court dealing with the Federal Bank Robbery Act of May 8, 1934.²⁴ For a number of years the lower federal courts had generally held that entering a federally insured bank with intent to commit robbery was an offense apart from the completed robbery and that the bank robber therefore could be punished separately for each offense.²⁵ The courts reasoned that since proof of the completed robbery required evidence other than that which was needed to prove entry with intent to commit robbery, the two offenses were separate.²⁶ In other words, the courts used the same evidence test to decide that since each offense was defined by the statute, both could be punished at the same time. It can scarcely be maintained that the courts, in taking this position, were engaging in statutory interpretation to discover the intention of Congress. Because of dissension among circuits,²⁷ the issue of whether there should be one punishment or two finally came before the Supreme Court in *Prince v. United States*²⁸ in 1957. The Court did not even consider the same evidence test in deciding that although

24. 48 Stat. 783 (1934), as amended, 18 U.S.C. § 2113 (1958).

25. *Rawls v. United States*, 162 F.2d 798 (10th Cir. 1947); *Audett v. United States*, 132 F.2d 528 (8th Cir. 1942); *Wells v. United States*, 124 F.2d 334 (5th Cir. 1941); *Durrett v. United States*, 107 F.2d 438 (5th Cir. 1939).

26. See especially *Rawls v. United States*, supra note 25; *Durrett v. United States*, supra note 25.

27. *Simunov v. United States*, 162 F.2d 314 (6th Cir. 1947).

28. 352 U.S. 322 (1957).

two offenses were defined only a single punishment was intended. The Court considered only the statute and found in its legislative history that the offense of entry with intent to rob had been added by amendment in 1937 with the purpose of closing a loophole left when the completed offense of robbery could not be proved. The Court found no congressional intention to pyramid punishments, and refused to give the statute other than a narrow construction.²⁹ Implicit in this holding is the conclusion that the vision of the lower courts had been obstructed by the same evidence test, which looks only to the double jeopardy issue to the exclusion of any other possible limitation upon cumulative punishment. The same evidence test may be useful in delineating the various offenses which can be carved from a single criminal transaction, but it is of no help in discerning whether Congress intended cumulative punishment.

In fairness it must be admitted that before the *Prince* case the lower courts did have previous Supreme Court authority for their results. In the 1915 case of *Morgan v. Devine*³⁰ the Supreme Court had decided that forcibly entering a post office with intent to steal and thereafter consummating the larceny were offenses which could be punished cumulatively.³¹ In comparing the statutory interpretation of the *Morgan* case with that of the *Prince* case a basic difference in approach is to be noted.³² In the *Morgan* case the Court found an

29. Two years after the decision in the *Prince* case, the Court, in *Heflin v. United States*, 358 U.S. 415 (1959), used the same reasoning and method to decide that robbing a bank and receiving the stolen money were not cumulatively punishable under the Bank Robbery Act. The Court held that the pertinent section of the act "was not designed to increase the punishment for him who robs a bank but only to provide punishment for those who receive the loot from the robber." *Id.* at 419.

30. 237 U.S. 632 (1915).

31. As a matter of fact the first federal case dealing with multiple offense indictments had been with regard to this very issue. In 1880, a circuit court had decided in the case of *Ex parte Peters*, 12 Fed. 461 (8th Cir. 1880), that the entering and the larceny could be punished cumulatively. The basis for this holding was the apprehension by the judge that the common law allowed punishment for both burglary and larceny at the election of the prosecutor not to seek punishment on only one offense. The appellate courts were not faced with this issue again until the case of *Halligan v. Wayne*, 179 Fed. 112 (9th Cir. 1910), by which time the *Peters* case still provided the only federal authority. The court in *Halligan v. Wayne* held contrary to the *Peters* case which it felt was based on a misapprehension of the common law. The *Peters* case was similarly rejected in *Munson v. McClaughry*, 198 Fed. 72 (8th Cir. 1912) and *O'Brien v. McClaughry*, 209 Fed. 816 (8th Cir. 1913). In accord with the *Peters* case was *Anderson v. Moyer*, 193 Fed. 499 (N.D. Ga. 1912). In *Morgan v. Devine*, the Supreme Court in effect adopted the argument of the *Peters* case and bolstered it with the same evidence test and statutory interpretation.

32. It is submitted that the real difference between the cases is in this method. In the *Prince* case the Court did, in a footnote, distinguish the cases by adverting

intention by Congress to create the separate offenses of entering and larceny. From this finding the Court apparently assumed that both offenses were to be punished cumulatively, basing this assumption on common law³³ rather than on congressional intention. In the *Prince* case the Court was not in doubt about the intent of Congress to define two separate offenses, and extended their consideration to whether Congress had intended cumulative punishment. It is submitted that the intention of Congress regarding the question of punishment must be specifically considered and the statute strictly construed if penal statutes are not to receive an unduly broad application.³⁴

II. CASES IN WHICH NO ELEMENT OF ONE OFFENSE IS NEEDED IN PROVING THE OTHER ONLY IF THE FACTS ARE TAKEN HYPOTHETICALLY AND NOT AS THEY ACTUALLY HAPPENED.

The rationale for permitting cumulative punishment under cases of the first category is that the two offenses can be considered as two segments of the same transaction having no overlap with each other. The segments are chronologically separate, and each is defined by statute as an offense. In cases of the second category there is no such chronological severability since the evidence of one offense will automatically prove the other. Therefore some other kind of severability must be found to save the case from falling under category IV, *infra*,

to the fact that the statute in *Morgan v. Devine* spoke of *forcible* entry while the Bank Robbery Act was violated by merely walking through an open door with the intent to steal. 352 U.S. 322, 328 n. 9. The significance of this distinction was not articulated. Cf. *Clark v. United States*, 267 F.2d 99, 101 (4th Cir. 1959).

33. See note 31 *supra*.

34. Another noteworthy example of the type of case includible in this category, but one which involves separate chapters of the code, is when defendant is indicted for both conspiracy and the substantive crime which was the object thereof. It has been firmly settled that the conspiracy chapter calls for cumulative punishment if the conspiracy is chronologically separate from the completed crime. *Pinkerton v. United States*, 328 U.S. 640 (1946). Nor is there double jeopardy in this. *Carter v. McClaghry*, 183 U.S. 365 (1902).

For other cases of this category in which two offenses have been held cumulatively punishable see, e.g., *United States v. Kafes*, 214 F.2d 887 (3d Cir. 1954) (failing to file income tax return and attempting to evade); *Gargano v. United States*, 140 F.2d 118 (9th Cir. 1944) (transporting and concealing morphine); *Chrysler v. Zerbst*, 81 F.2d 975 (10th Cir. 1936) (transporting and receiving a stolen car); *Reid v. Aderhold*, 65 F.2d 110 (5th Cir. 1933) (forging and uttering a check); *Silverman v. United States*, 59 F.2d 636 (1st Cir. 1932) (selling and receiving morphine); *Parmagini v. United States*, 42 F.2d 721 (9th Cir. 1930) (selling morphine and concealing smuggled morphine); *Gorsuch v. United States*, 34 F.2d 279 (6th Cir. 1929) (receiving and transporting liquor); *Roark v. United States*, 17 F.2d 570 (8th Cir. 1927) (persuading women to be transported and transporting women for immoral purposes); *Hilt v. United States*, 12 F.2d 504 (5th Cir. 1926) (possession and transportation of liquor).

where the result may be a finding of double jeopardy. It has already been noted that in the early case of *The King v. Vandercomb & Abbott*,³⁵ where there were successive trials for both breaking and entering and stealing and for breaking and entering, that in distinguishing the two offenses as separate the court held the forms of the two indictments controlling, no matter what had actually been proved at the second trial. The same concept has been carried over into the multiple offense prosecution, along with the application of the same evidence rule,³⁶ and it has an especially severe application in cases of category II. The basic case is *Albrecht v. United States*³⁷ where the Supreme Court was faced with the contention that punishment for illegal sale and illegal possession of the same liquor under the National Prohibition Act was double punishment and therefore violated the fifth amendment double jeopardy clause. The argument was based on the actual fact that the liquor which defendants had sold was the same as that on which the possession count was based, and that the evidence of the sale was the same as that which proved possession. The Court held that selling and possession were distinct offenses because, despite what had actually happened, one *might* sell and cause to be delivered something he has never possessed and one *might* possess without selling. The hypothetical severability rendered the offenses separate for purposes of prosecution.³⁸

In seeking rational grounds for the decision in the *Albrecht* case, the fact situation must be clearly isolated from that of the first category. If the possession had lasted for a long period of time before the defendant had decided to sell, the case would have been clearly includible under category I, *supra*. What makes the second category distinguishable is that the only proof of possession actually offered is

35. See note 18 *supra* and text supported thereby.

36. In *United States v. Kafes*, 214 F.2d 887 (3d Cir. 1954) defendant objected that although failure to file an income tax return need not have been proved as part of the case under the second count of income tax evasion, it had in fact been so proved. The court replied, that "The short answer . . . is that the [same evidence] rule itself, as quoted above, sanctions the use of one act as part of the proof of both offenses." *Id.* at 891.

37. 273 U.S. 1 (1927).

38. This rule of hypothetical severability was directly challenged in *Michener v. United States*, 157 F.2d 616 (8th Cir. 1946). In that case defendant had been convicted of forcing an engraver to make counterfeit plates for printing money and of having been in constructive possession of the plates at the same time. The court held that sentences on both counts constituted erroneous double punishment because the evidence of one offense did actually prove the other. The Supreme Court reversed, *per curiam*, 331 U.S. 789 (1947), citing the *Albrecht* case. The case may be rationalized on the grounds that one can cause counterfeit plates to be made without being in possession (constructive or otherwise) of them. But cf. *Carney v. United States*, 163 F.2d 784 (9th Cir. 1947).

part of the same evidence used to prove the sale. If the same evidence rule is to be prevented from discovering that the second punishment is double punishment, some way must be found to make the offenses appear to be separate and without fatal overlap. This severability is found by use of a hypothesis which gives Congress every benefit of the doubt. The hypothesis is that Congress intended to make the sale of goods already in possession a more serious offense than the sale of goods not in possession. Since there need be no possession for sale, the hypothesis is that Congress intended the prohibition of sale to refer only to the least definition of sale and did not contemplate a sale coupled with possession. It is submitted that this hypothesis really amounts to an application of the principle that a statute will be given such a construction as to avoid if at all possible the result of unconstitutionality.³⁹ The constitutional challenge is raised by the same evidence test which is, historically, a test for double jeopardy. But if, in the first place, the more familiar rule of construction—that penal statutes will be construed strictly against the state—were applied, the result might be that no cumulative punishment was ever intended and therefore no constitutional question would ever be raised. Once it has been raised, the courts fail to consider what has been done by Congress and look only to what Congress can do. Once the same evidence test has been brought into court, the courts apparently become blinded to all but the constitutional considerations. Properly conceived, the same evidence test is no more than a convenient rule of thumb—a logical method—for pointing out the identity of offenses. When it is applied to the evidence actually offered at trial it can be a means for demonstrating the improbability that Congress meant for cumulative punishment to apply to these second category situations where there is not even chronological severability as in category I.⁴⁰ It is much more probable that Congress intended in such cases that the one offense be punished only if the more serious offense could not be proved.⁴¹ If, however, there is reason for deciding in favor of cumu-

39. See *Ashwander v. T.V.A.*, 297 U.S. 283 (1936); *Crowell v. Benson*, 285 U.S. 22 (1932).

40. No less authority than Judge Learned Hand of the Second Circuit has argued that Congress never intended in defining distinct crimes of this sort to make them more than alternatively punishable. *United States v. Chiarella*, 187 F.2d 12, 13 (2d Cir. 1951), rev'd per curiam, 341 U.S. 946 (1951). The grounds for the reversal are not clear.

41. In *Hefin v. United States*, 358 U.S. 415 (1959), the Supreme Court overruled several decisions by the circuit courts of appeal to the effect that robbing and receiving could be punished cumulatively under the Bank Robbery Act. See, e.g., *Martin v. United States*, 256 F.2d 345 (5th Cir. 1958). As in the Prince case the Court was aided by "meager" legislative history which indicated that the prohibition against receiving was added merely to cover the earlier omission. Therefore the section "was not designed to increase the punishment for him who

lative punishment despite the improbability of such congressional intention, the test can then be applied hypothetically to show how the cumulative punishment is not double punishment.⁴²

III. CASES IN WHICH BOTH OFFENSES HAVE A COMMON ELEMENT, BUT EACH REQUIRES PROOF OF SEPARATE ELEMENTS NOT NEEDED FOR THE OTHER.

In category I, severability of offenses was chronological and in category II severability was hypothetical. In category III severability is either by virtue of separate statutory regulations concerning a particular act⁴³ or is on the basis of separate physical objects to which the statute pertains. Moreover, in the first two applications of the same evidence test the basic inquiry of the statutory interpretation limitation was whether Congress intended alternative or cumulative punishments. In the third category there is no question of punishments being alternative; rather the question is whether Congress meant to define separate punishments at all, i. e., did Congress intend to define a crime in terms of a course of conduct or in terms of a series of cumulatively punishable offenses? If the latter, there will be as many punishments as there are offenses proved. Finally, in the first two categories any cumulation amounted to only two sentences; in this third category cumulation can amount to several sentences. This last aspect apparently has induced the courts to look much more to the question of punishment than in the previous cases. A good illustration of what is involved is found in cases dealing with the White Slave Traffic Act (Mann Act),⁴⁴ when more than one woman is illegally transported across a state line at the same time. The First⁴⁵ and Eighth Circuits,⁴⁶ relying on the same evidence test to demonstrate severability, held that the transportation of each woman was a separate offense even though all were transported at the same

robs a bank but only to provide punishment for those who receive the loot from the robber. We find no purpose of Congress to pyramid penalties for lesser offenses following the robbery." 358 U.S. at 419. But cf. *State v. Gumbs*, 246 F.2d 441 (2d Cir. 1957) and *Aaronson v. United States*, 175 F.2d 41 (4th Cir. 1949). In both cases defendant was sentenced cumulatively for stealing and receiving.

42. Other cases to be considered in this category are *McGann v. United States*, 261 F.2d 956 (4th Cir. 1958) (robbing a bank and robbing on federal lands); *Mathis v. United States*, 200 F.2d 697 (6th Cir. 1952) (punishment both for transporting and possessing held improper); *Simkoff v. Mulligan*, 67 F.2d 321 (2d Cir. 1933) (possession and uttering of a counterfeit bill).

43. E.g., *Blockburger v. United States*, 284 U.S. 299 (1932) (selling drugs not in original stamped package and selling drugs without a written order).

44. 18 U.S.C. § 2421 (1958).

45. *Crespo v. United States*, 151 F.2d 44 (1st Cir. 1945).

46. *Gillenwaters v. Biddle*, 18 F.2d 206 (8th Cir. 1927).

time. Although the common element of transportation was required for proof of each offense, the same evidence test showed no possible double jeopardy because the transportation of each woman could be proved independently. The fact that a different woman was involved in each count made each count a distinct offense separately punishable. Finally, in the 1955 case of *Bell v. United States*⁴⁷ the Supreme Court upheld the view of the Tenth Circuit⁴⁸ in deciding that the common element of transportation was the gist of the offense defined by Congress. In so holding, the Court expressed no doubt that Congress could punish on the basis of the number of women transported, but held as it did because it found the statute ambiguous and therefore resolved to construe it strictly as a penal statute.

The Mann Act cases illustrate the problems found in statutes which use the word "any" as the common adjective in describing the object against which the offense is committed. The Mann Act speaks of "any woman or girl,"⁴⁹ and this finally was interpreted not to indicate the number of offenses defined. The same has been held concerning "any of the aforesaid drugs"⁵⁰ and the theft of "any mail matter."⁵¹ But in the 1915 case of *Ebelling v. Morgan*,⁵² the Supreme Court held that a defendant could be convicted and sentenced cumulatively for cutting several different mailbags during the same course of conduct where the statute read, "whoever shall cut, tear, or otherwise injure any mail bag, pouch, or other thing." And a recent case held that more than one offense was punishable in a situation in which a stolen truck contained several interstate shipments to different customers, the statute reading "any interstate shipment."⁵³ There is also an unresolved disagreement among the circuits with regard to whether the wording of the Federal Bank Robbery Act, "assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon" can support as many punishments as there were lives put in jeopardy.⁵⁴ It is submitted that there is nothing objectionable in the existence of such apparently inconsistent results, if the distinction can be based upon statutory interpretation. The word "any" can assume greater or lesser importance depending upon its use by Congress in different contexts. Its ambiguity can best be resolved by the basic

47. 349 U.S. 81 (1955).

48. *Robinson v. United States*, 143 F.2d 276 (10th Cir. 1944).

49. 18 U.S.C. § 2421 (1958).

50. *Braden v. United States*, 270 Fed. 441 (8th Cir. 1920).

51. *Colson v. Johnson*, 35 F. Supp. 317 (N.D. Cal. 1940); *Colson v. Aderhold*, 5 F. Supp. 111 (N.D. Ga. 1933).

52. 237 U.S. 625 (1915).

53. *Oddo v. United States*, 171 F.2d 854 (2d Cir. 1949).

54. *Lockhart v. United States*, 136 F.2d 122 (6th Cir. 1943); *McDonald v. Hudspeth*, 129 F.2d 196 (10th Cir.), cert. denied, 317 U.S. 665 (1942).

canons of statutory interpretation, such as looking to the evil sought to be remedied, and, as a last resort, the maxim that penal statutes will be construed strictly against the state. It is important to notice that in the cases in the third category, unlike the cases in the two foregoing categories, the courts apparently have more often realized that the same evidence test only begs the question of congressional intention and leads to cumulative punishment. In cases of this type the courts have often decided against such punishment.⁵⁵

IV. CASES IN WHICH THE PROOF OF ONE OFFENSE NECESSARILY INCLUDES ALL THE ELEMENTS OF ANOTHER, BUT ADDS ITS OWN SPECIAL ELEMENT TO THEM.

For purposes of analysis the cases of this category can be divided into three general types:

- a) Cases in which the greater and the lesser statutory offenses are defined in terms of common law crimes, thus making analogous the doctrine of the lesser included offense. Examples are indictments which charge both robbery and assault or robbery and larceny, or which charge both the crime and the attempt.
- b) Cases in which a crime is made a lesser included offense by the establishment of a greater punishment for a particular application of it. An example is where the indictment charges both robbery and robbery by use of a dangerous weapon.
- c) Cases similar to those found in main category II, except that no hypothetical severability is possible. An example is an indictment which charges both manufacture and possession of contraband goods.

In the three main categories of cases previously discussed the only limitation available to a defendant was strict construction against cumulative punishment. In the cases of the fourth category there is also a possibility of the additional limitation of double jeopardy. In the previous categories the double jeopardy argument has not had a firm basis because of the severability of offenses under the same evidence test. In this category the same evidence test does not show severability of offenses but rather a partial overlap or identity. As will be shown in the following discussion, however, the double jeopardy limitation has not been firmly established by the cases.

55. For other cases of this category see, e.g., *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952); *United States v. Adams*, 281 U.S. 202 (1930); *Flemister v. United States*, 207 U.S. 372 (1907); *Caballero v. Hudspeth*, 114 F.2d 545 (10th Cir. 1940); *Reger v. Hudspeth*, 103 F.2d 825 (10th Cir. 1939); *Becker v. United States*, 91 F.2d 550 (9th Cir. 1937); *Bracey v. Zerst*, 93 F.2d 8 (10th Cir. 1937); *United States ex rel. Bracey v. Hill*, 77 F.2d 970 (3d Cir. 1935).

Only one case favorable to defendant rests flatly on grounds of double jeopardy. In the 1945 case of *Rutowski v. United States*,⁵⁶ defendant had been charged with both robbing a postal clerk and carrying away postal property. The court held that sentencing on both counts had been a violation of the double jeopardy clause because the charge of asportation was essentially a charge of larceny, and that larceny is included in every robbery. Therefore, to the extent of the lesser crime, defendant had been punished twice for the same offense. The *Rutowski* case seems to be directly contrary to the earlier case of *Schultz v. Biddle*⁵⁷ in which a court had upheld cumulative punishment for assault with intent to rob and robbery by use of a dangerous weapon. In contrast to the clear logic of the *Rutowski* case it is difficult to discover from the opinion a logical basis for the *Schultz* case. One difference between the cases was that in the *Schultz* case the count charging the lesser crime came first, while in the *Rutowski* case the greater crime was charged first. There is language in each opinion which on first reading seems to make this distinction controlling by virtue of that version of the same evidence test which was designed for the two-trial situation. Unless the second count required the same evidence as was needed to prove the first count there was no double jeopardy. But it is difficult to conceive that either court could have so misapplied the same evidence test, especially in view of the fact that each court quoted the correct version of the test for multiple offense prosecutions elsewhere in its opinion. That such an unimportant distinction as the order of the counts should make any difference is hard to believe. The more probable reason for the *Schultz* decision is that the case was not clearly of type (a) above, but had mixed elements of both type (a) and type (b). The charge was not merely assault and robbery but assault and robbery by use of a dangerous weapon. Therefore the decision may rest on the idea that there were somehow two assaults, one with and one without a dangerous weapon. By this view one assault could be punished separately and one could be punished as part of the robbery. Since it seems improbable that a robbery would involve more than one assault, and since the courts have never gone so far as to make offenses separately punishable by breaking one offense down into time segments,⁵⁸ the *Schultz* case remains confusing and is probably a wrong decision.⁵⁹

56. 149 F.2d 481 (6th Cir. 1945).

57. 19 F.2d 478 (8th Cir. 1927).

58. Hans Nielsen, Petitioner, 131 U.S. 176 (1889); *In re Snow*, 120 U.S. 274 (1887).

59. The decision in *Schultz v. Biddle* should be read in conjunction with the later decision of *Schultz v. Zerbst*, 73 F.2d 668 (10th Cir. 1934). *Costner v. United States*, 139 F.2d 429 (4th Cir. 1943), reaches exactly the opposite conclusion of the *Schultz* cases in exactly the same kind of situation, but the court based its

Nevertheless, the *Schultz* case was followed in the case of *Slade v. United States*,⁶⁰ in which there was cumulative punishment for obstructing and impeding the administration of justice and also for endeavoring to do so. The *Slade* case adopts the seemingly improper use of the same evidence test of the *Schultz* case, and demonstrates the tendency of the courts to allow conviction and punishment for a violation of every "or" clause in a statute, without regard to either the possibility that "or" may really mean "or even," or to the possibility that the double jeopardy clause may have been violated.

In the cases of type (b) above, the question of cumulative punishment has thus far been decided in favor of the defendants on the basis of the statutory interpretation limitation. In such cases the double jeopardy limitation has not been reached. With regard to the robbery of both banks and post offices it has been decided that Congress intended robbery with a dangerous weapon to be only a more serious degree of robbery and therefore only alternatively punishable.⁶¹ The same principle has been applied when the lesser crime is assault instead of robbery.⁶²

In cases of type (c) the courts have based their denial of cumulative punishment squarely upon a proper application of the same evidence test. In a notable series of cases decided under the National Prohibition Act, the majority of courts held that conviction for manufacturing liquor necessarily included the offenses of possession of the liquor and possession of equipment for manufacturing liquor.⁶³ Each possession was made punishable by the statute, but when the ultimate act of manufacturing was proved punishment of possession could be

decision on the statutory interpretation limitation and therefore never reached the question of a double jeopardy limitation. In still another identical case a district court seemed to base a decision in favor of defendant upon double jeopardy grounds but did not use that exact term. *Colson v. Johnston*, 35 F. Supp. 317 (N.D. Cal. 1940). In view of these cases it is probable that the *Schultz* case is no longer the law on its own facts. But cf. *Hensley v. United States*, 156 F.2d 675 (8th Cir. 1946), in which the indictment broke up the robbery into separate elements of larceny and assault.

60. 85 F.2d 786 (10th Cir. 1936). It is noteworthy, however, that the fines for the lesser offenses were for the nominal amount of one dollar.

61. With regard to the Bank Robbery Act, a host of cases have followed the decisions in *Hewitt v. United States*, 110 F.2d 1 (8th Cir. 1940), and *Durrett v. United States*, 107 F.2d 438 (5th Cir. 1939). With regard to the Postal Service Statute, see *Costner v. United States*, 139 F.2d 429 (4th Cir. 1943), and *Colson v. Johnston*, 35 F. Supp. 317 (N.D. Cal. 1940).

62. *Costner v. United States*, supra note 61.

63. *Goetz v. United States*, 39 F.2d 903 (5th Cir. 1930); *Tritico v. United States*, 4 F.2d 664 (5th Cir. 1925); *Morgan v. United States*, 294 Fed. 82 (4th Cir. 1923); *Reynolds v. United States*, 280 Fed. 1 (6th Cir.), rev'd on other grounds, 282 Fed. 256 (6th Cir. 1922). Contra, *Gracie v. United States*, 15 F.2d 644 (1st Cir. 1926).

only alternative. Possession did not prove manufacture, but manufacture did prove possession. However, in none of these cases did the courts indicate whether the consequences of this finding by the same evidence test were based on the double jeopardy limitation or merely upon the improbability of any Congressional intention to punish cumulatively.

The conclusion to be drawn from all three types of cases in this category concerning the possibility that a doubly jeopardy limitation upon Congress exists is that no such limitation has yet been established. Although in view of the firm holding of the *Rutowski* case it is probable that such limitation will be established, there are some grounds for believing that it may not. One is the possibility that the growing recognition of the statutory interpretation limitation will obviate any necessity of a second limitation. Another is the fact that when faced with cases of this kind trial courts will often exercise their discretionary power to make sentences concurrent.⁶⁴ There may, however, be cases, especially when the two statutory offenses are not defined in the same statute,⁶⁵ when the courts will be reluctant to construe strictly against cumulative punishment or to sentence concurrently. Even then there is still the possibility that the courts may decide that the double jeopardy clause, although it prevents Congress from punishing the same offense as many times as it wants, does not prevent Congress from punishing as much as it wants when all offenses are tried together.⁶⁶ It must not be forgotten that although the case of *Ex Parte Lange* decided that the double jeopardy clause applied to double punishment as well as double trial, the facts of that case were that a court had imposed a second punishment without authority from Congress.⁶⁷ To the question of whether Congress has authority to impose double punishment only one Court of Appeals has given an answer.

64. E.g., *McGann v. United States*, 261 F.2d 956 (4th Cir. 1958) (robbing a bank and robbing on federal lands); *Evans v. United States*, 232 F.2d 379 (D.C. Cir. 1956) (larceny and unauthorized use of a vehicle).

65. See *Catrino v. United States*, 176 F.2d 884 (9th Cir. 1949), in which the two counts were endeavoring to obstruct justice and subornation of perjury. Each offense is defined under a separate chapter of the present criminal code, 18 U.S.C. (1958). *Catrino* was acquitted on the first count, but had he been convicted the court would have been confronted with a situation in which a holding of strict construction against cumulative punishment would have been difficult but in which the same evidence test would clearly show that there was double punishment.

66. This would, in effect, be a holding that double jeopardy has no substantive side where separate offenses are defined. See note 20 *supra*, and text supported thereby. See also *Calvaresi v. United States*, 216 F.2d 891, 902 (10th Cir. 1954) (*dictum*).

67. See text supported by note 21 *supra*.

V. CASES IN WHICH BOTH OFFENSES REQUIRE IDENTICAL EVIDENCE.

These are the cases for which the same evidence test purports to be searching. The evidence required to prove one offense automatically proves the other offense and vice versa. Such cases are not common; they occur only when one count is *substantially* only a verbal variation of another count.⁶⁸ The verbal variations are usually different phrases in the same statute, and the question which courts must answer is whether the different statutory phrases have more than mere exemplary significance.⁶⁹ This question is really no more than whether Congress has in fact defined separate offenses or has merely said the same thing twice and in two different ways. The way to determine whether Congress has said the same thing twice is to ask what are the essential elements of each offense charged and whether the same evidence satisfies both.⁷⁰ If the same evidence test shows identity, the conclusion most readily available is that Congress did not intend to make the same offense twice punishable. If an opposite conclusion is reached, the possibility of a double jeopardy limitation would be precisely the same as in category IV.⁷¹

In summary, it is concluded that the same evidence test, when it is properly used, provides the federal courts with a convenient and logical tool for demonstrating the distinctions between the separate offenses involved in a course of criminal conduct. Such severability

68. "We have repeatedly protested against the practice when the counts are merely verbal variants of a single criminal transaction." Hand, J., in *United States v. Chiarella*, 184 F.2d 903, 911 (2d Cir. 1950). Even conspiracy is considered only a verbal variation in certain cases where there is no ingredient of conspiracy not present in the completed crime. *Pinkerton v. United States*, 328 U.S. 640, 643 (1946); *Gebardi v. United States*, 287 U.S. 112, 121-22 (1932); *United States v. Katz*, 271 U.S. 354, 355-56 (1926).

69. In *Stevens v. McClaughry*, 207 Fed. 18 (8th Cir. 1913), the statute spoke in one place of taking mail and in another place of taking, opening, and embezzling the contents. The court held that where the same mail was involved in each count there was no substantial difference in offenses.

70. In *United States v. Noble*, 155 F.2d 315 (3d Cir. 1946), the court, in dictum, decided that several violations of ration orders were really only one offense. In *Barnes v. United States*, 142 F.2d 648 (9th Cir. 1944), the court held that shipping adulterated food under a guaranty and misbranding of food were a single offense under the Pure Food and Drug Act.

71. See cases cited note 70 *supra*. In the *Noble* case the court spoke in terms of double jeopardy, but the whole subject was dictum. In the *Barnes* case there was no mention of double jeopardy but only interpretation of the statute.

Another case to be considered under this category is *Carter v. McClaughry*, 183 U.S. 365, 394-95 (1901) in which a court martial punished an officer for both fraud and conduct unbecoming an officer, the latter conduct being the same as the former. The Supreme Court held that this was not double jeopardy. The case deserves special consideration as a court martial, not an ordinary criminal proceeding.

is an effective counter to the plea of double jeopardy. But the courts can be criticized for over-reliance on the same evidence test because they have let it divert them away from the problems of statutory interpretation inherent in multiple offense prosecutions. This appears to have been partly because of the idea that the only issue was double jeopardy, and partly because the statutes do define crimes and set punishment without covering the possibility of cumulation. The statutes are often clear, as far as they go. The problem is what criteria the courts are to use in filling the gaps left by the failure of Congress to specify whether punishment should be cumulative. It is submitted that this gap should be filled by a reasonable presumption against cumulative punishment. There is no reason why Congress should be presumed to have intended every definition of an offense to require an additional sentence when the real purpose was probably to cover an additional possibility. The burden of establishing any such intention should be on the prosecution, not the defendant. In most cases the general duty of the courts to construe penal statutes strictly should provide a remedy for injustice without resort to the double jeopardy clause of the constitution. That clause can at best be used only in a limited number of cases anyway, and it is possible that it has no application in multiple offense cases at all. But whether the question is the propriety of cumulative punishment or the existence of a double jeopardy limitation, the courts should not dodge the issues by imposing concurrent sentences. To do so is a kind of judicial hedging which does not clarify the law. The courts should in all cases give the statutes a thorough examination *and* interpretation, and should justify their conclusions with more than mere invocation of the principle that Congress has the power to make each step of a criminal transaction a separate offense.