the tenant is not protected from suits by the lessor for damage not covered by the insurance. To relieve the tenant of all potential liability a clause is needed clearly exculpating the tenant from all liability in tort.

(2) The tenant can ask the insurer to agree to the exculpatory clause, so that the contract of insurance will not be voided. This would protect the tenant from subrogation suits, and the exculpatory clause can be broadly written to excuse the tenant from all liability in tort. However, this approach would also be subject to difficulties in the case of a multiple occupancy structure.

(3) The tenant can purchase legal liability insurance to the appropriate limits of liability.

(4) Perhaps the safest approach would be a combination of all three suggestions. Where practicality permits, the parties can adopt a broad exculpatory clause in the lease and include the tenant as a named insured in the policy. When it would be impractical to name the tenant as an insured the tenant could carry adequate limits of legal liability insurance and the exculpatory clause could be limited to the uninsured interest of the lessor. Quite properly, either party could insist that the arrangement made as to the insurance be reflected in the rent price. For example, the lessor could insist that the lessee contribute toward the insurance premiums as the price of added protection if he is named in the policy.

Whatever solution is adopted, it seems only fair to the insurer that it be advised of a release of liability if a lease containing an exculpatory clause is executed subsequent to the policy of insurance. This will place the tenant in a consensual relation with the insurer and will give the insurer an opportunity to accept or reject the tenant as an insured or to adjust the rate accordingly if additional hazard is shown.

RES JUDICATA AND DOUBLE JEOPARDY IN INDIANA CRIMINAL PROCEDURE

Article 1, Section 14 of the Indiana State Constitution guarantees that "No person shall be put in jeopardy twice for the same offense." Traditionally this type of constitutional clause has been considered as more than a safeguard against multiple punishments for the same offense. Both in England and the United States, the double jeopardy doctrine has protected the criminal defendant from not only successive

convictions but also from successive prosecutions for the same offense.[1] As a result, the jeopardy prohibited is a second trial, not merely a second punishment, the rationale being that the state should not be permitted to employ its greater power and resources in several attempts to convict a defendant for the same offense. Not only do multiple prosecutions for the same offense often cause the defendant great expense and injury to reputation, and force him to live in a continuing state of apprehension, but they also increase the possibility that a previously acquitted person may ultimately be found guilty.[2] Thus, assuming the validity of the underlying policy of the constitutional guarantee against double jeopardy, a fair application of the double jeopardy doctrine should secure criminal defendants from two types of abuses: procedurally, the prevention of more than one trial for the same acts; and substantively, the prohibition of multiple convictions for the same criminal acts.[3]

Since the double jeopardy clause of the Indiana Constitution is phrased in terms of the "same offense," a restrictive definition of the "same offense" directly limits the protection afforded to defendants. The narrower the definition adopted, the fewer the fact situations in which the defendant can use the defense of double jeopardy, and concommitantly the greater the probability of impairment of the rationale of the constitutional guarantee.[4] Essentially, two basic fact patterns give rise to the instant problem. The first and most common type of pattern is presented when the same criminal activity of the defendant violates two or more penal statutes; for example, a theft from a house at night may

1. Green v. United States, 78 U.S. 221, 223 (1957); *Ex parte* Lange, 18 Wall. 163 (U.S. 1873); Notes, 7 BROOKLYN L. REV. 79, 80 (1937), 65 YALE L. J. 339-41 (1956).

Although there was no plea of former jeopardy at common law, there were four special pleas in bar: *autrefois acquit* or former acquittal, *autrefois convict* or former conviction, *autrefois attaint* or former attainder, and former pardon. The first two were based on the common law maxim "that no man is to be brought into jeopardy of his life, more than once, for the same offense." They lie only when the second prosecution is for the "same identical act and crime." 4 Bl. Comm. 337-39. The third plea in bar applied to a subsequent prosecution for any felony, but it has been discarded by the modern English and American law. The American doctrine of double jeopardy has developed from the pleas of former acquittal and former conviction. In most jurisdictions of the United States, a verdict against the defendant is not required before the protection of double jeopardy may be invoked; rather jeopardy attaches when the jury has been impanelled, or, if the trial is before a judge, when the first witness has been sworn. ALI, MODEL PENAL CODE at 53 (Tent. Draft No. 5, 1956 (hereinafter cited as MODEL PENAL CODE); ALI, ADMINISTRATION OF CRIMINAL LAW: DOUBLE JEOPARDY 61-62 (1935 (hereinafter cited as ALI DRAFT), Note, 24 MINN. L. REV. 522, 524-26 (1940).

2. Green v. United States, *supra* note 1; Note, 65 YALE L. J. 339-41 (1956).

3. Note, 65 YALE L. J. 339-41 (1956); See Kirchheimer, *The Act, the Offense and Double Jeopardy,* 58 YALE L. J. 513, 525-27 (1949).

4. See generally MODEL PENAL CODE 34-39; ALI DRAFT § 5 commentary; Lugar, *Criminal Law, Double Jeopardy and Res Judicata,* 39 IOWA L. REV. 317, 319-21 (1954); Note, 65 YALE L. J. 339, 344-49 (1956).

violate at least two statutes, larceny and burglary.[5] The second type of factual circumstance arises when the defendant violates the same statute repeatedly during the "same transaction"; for example, a person who violates the anti-gambling statute might be prosecuted for each hand of poker played, or a person who steals a case of soft drinks might be prosecuted for the larceny of each bottle in the case.[6] It should be noted that the latter type of fact pattern does not include the violation of the same statute on two separate and distinct occasions, a case which is clearly not within the protection of the double jeopardy doctrine.[7]

In these fact patterns, the Indiana courts have generally relied upon the so-called "same evidence" test to determine when two prosecutions of a defendant are for the "same offense."[8] Stated generally, a court apply-

5. Cambron v. State, 191 Ind. 431, 133 N.E. 498 (1922); State v. Warner, 14 Ind. 572 (1860). For other examples see notes 16-18 *infra*.

6. *E.g.*, Johnson v. Commonwealth, 201 Ky. 314, 256 S.W. 388 (1923); See also cases cited notes 24 and 31 *infra*.

7. Ford v. State, 229 Ind. 516, 98 N.E.2d 655 (1951); Boyd v. State, 195 Ind. 213, 143 N.E. 355 (1924); Mood v. State, 194 Ind. 357, 142 N.E. 641 (1924); Barker v. State, 188 Ind. 263, 120 N.E. 593 (1918). In the *Boyd* case, the defendant was convicted for possession of liquor with intent to sell in August. He was tried and convicted on the same charge for possession of liquor in October, his claim of double jeopardy being unsuccessful. The Supreme Court of Indiana affirmed, stating that the defendant had committed two offenses separated by two months. The second conviction was proper even if part of the same liquor was involved in each case.

The fourth major fact circumstance under the double jeopardy doctrine arises when the defendant is twice prosecuted for the same act as a violation of the same statute. Such cases are clearly within the protection of the constitutional doctrine. Wilkinson v. State, 59 Ind. 416 (1877); Trittipo v. State, 13 Ind. 360 (1859); Bruce v. State, 9 Ind. 206 (1857). The primary issue in each of the above cases was whether the first conviction before a Justice of the Peace constituted a bar to a second prosecution before the Court of Common Pleas (today renamed Circuit Court).

8. The "same evidence" test was originated in the English case, The King v. Vandercomb and Abbott, 2 Leach 708, 168 Eng. Rep. 455 (Ex. 1796). The defendants contended that a prior acquittal upon the charge of burglariously breaking and entering and stealing certain goods precluded a subsequent prosecution alleging the same facts and charging breaking and entering with intent to steal. The acquittal had resulted because it appeared that the defendants, while they had broken and entered, had not stolen any goods. The court, speaking through Mr. Justice Buller, rejected the defendants' argument and permitted the second trial, stating that "unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second." *Id.* at 720, 168 Eng. Rep. at 461.

Several forces in the English law led to this decision. "The development of a common law doctrine of double jeopardy aiding the defendant was prompted by factors such as the severity of criminal penalties, the disproportionate trial advantages held by the prosecution and the disabilities suffered by an accused. On the other hand, rigid technicalities of common law pleading and proof, which then operated to cause acquittal without regard to the merits of a case, ultimately gave rise to opposing tendencies. Motivated by a desire to give the prosecution one fair try at convicting the defendant on the merits, courts were led to restrict the application of double jeopardy. Thus in the leading case of *The King v. Vandercomb and Abbott*, decided in 1796, the definition of 'offense' was narrowed to equate it with the legal theory on which the defendant had been tried. Consequently a second trial based on the same factual situa-

ing this test compares the evidence necessary to obtain a conviction at each prosecution; if the same evidence is necessary to convict under the charge at both prosecutions, the first trial bars the second one; but, if the same evidence is not necessary for a conviction at both prosecutions, the second trial is not barred.[9] On its face such a test seems consistent with the principles underlying the constitutional guarantee; for, if courts would analytically examine and compare the evidence introduced in the

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tion alleged in the first indictment, but proceeding under a new legal theory, was not barred by the rule proscribing a second trial for the same offense." Note, 65 YALE L. J. 339, 343-44 (1956). See Lugar, *supra* note 4, at 319-22.

The courts of a few jurisdictions employ the "same transaction" test to determine what constitutes the same offense. This requires that all offenses committed during the same criminal transaction be prosecuted at one trial. For example, in Roberts v. State, 14 Ga. 8 (1853), the defendants were indicted and convicted for robbery, although they had formerly been convicted for burglary. On appeal, the Supreme Court reversed, stating that "the plea of *autrefois acquit* or *convict* is sufficient, whenever the proof shows *the second case to be the same transaction with the first.*" *Id.* at 12. In Jones v. State, 19 Ala. App. 600, 99 So. 770, *cert. denied* 211 Ala. 701, 99 So. 924 (1924), the defendant was convicted under both counts of a two count indictment, one count charging possession of liquor for sale and the other charging mere possession. While recognizing that each count of the indictment charged a separate offense proscribed by the statute, the court held that there could not be a conviction for two offenses arising from the same transaction. For other examples of the "same transaction" test, see Worley v. State, 42 Okla. Cr. Rep. 240, 275 Pac. 399 (1929) (Acquittal of arson bars prosecution for burning insured property in the same building); State v. Coffman, 149 Tenn. 525, 261 S.W. 678 (1924) (Acquittal of forgery of one of three signatures on note bars prosecution for forgery of other two); Paxton v. State, 151 Tex. Cr. 324, 207 S.W.2d 876 (1948) (Conviction of murder without malice bars a conviction for driving while intoxicated during same transaction); Spannell v. State, 83 Tex. Cr. 418, 203 S.W. 357 (1918) (Acquittal of one of two homicides committed in same transaction bars a trial for the other). See also ALI DRAFT 29-30; Lugar, *supra* note 4, at 323-27; Notes, 24 MINN. L. REV. 522, 550-52 (1940), 65 YALE L. J. 339, 348-49 (1956).

Although Indiana is cited as being one of several states employing the "same transaction" test by at least one writer, Note, 7 BROOKLYN L. REV. 79, 84 (1937), the Supreme Court of Indiana has expressly repudiated it. Ford v. State, 229 Ind. 516, 98 N.E.2d 655 (1951); Foran v. State, 195 Ind. 55, 144 N.E. 529 (1924). A few early Indiana cases did apply the technique of the "same transaction" test, but it has retained no vitality in modern Indiana law. Clem v. State, 42 Ind. 420 (1873) (Prosecution for one of two murders committed by same act bars prosecution for the other); Fritz v. State, 40 Ind. 18 (1872) (Conviction for an affray bars prosecution for an assault and battery in the same transaction); Hamilton v. State, 36 Ind. 280 (1871) (Prosecution for assault and battery with intent to rob bars prosecution for robbery based on same facts) (dictum). For further discussion of the "same transaction" test, see note 80 *infra.*

9. The "same evidence" test has been stated in various styles by the Indiana courts, *e.g.*, ". . . whether the crimes as charged are so far distinct that the evidence which would sustain the one would not sustain the other," State v. Gapen, 17 Ind. App. 524, 45 N.E. 678 (1896), ". . . when the same facts constitute two or more offences, wherein the lessor offence is not necessarily involved in the greater, and when the facts necessary to convict on a second prosecution would not necessarily have convicted on the first, then the first prosecution will not be a bar to the second, although the offences were both committed at the same time and by the same act," State v. Elder, 65 Ind. 282, 285 (1879). For a discussion of the variations of the "same evidence" test used in the United States, see Note, 7 BROOKLYN L. REV. 79, 82-83 (1937). See also ALI DRAFT § 5 commentary.

two trials, the danger of multiple prosecutions and convictions for the same conduct would be negligible. However, this method of application has not been employed; instead the "same evidence" test has in effect been replaced by a test for determining what is the "same evidence," and in most instances the judicial determination of this test has tended to be somewhat automatic.[10]

Specifically, the mechanical test originally developed by Indiana courts to determine what constitutes the "same evidence" was whether more than one statute had been violated; that is, this test was interpreted to require that the defendant be charged with the *same conduct* as a violation of the *same statute* before a second prosecution was barred.[11] Such a narrow interpretation of the "same offense" severely limits the availability of the constitutional prohibition as a defense.[12] Thus, by the simple process of charging the violation of a different statute in each succeeding affidavit, a defendant may be subjected to multiple prosecutions for the same criminal conduct.[13] For example, in *State v. Elder*,[14] the defendant was charged with causing a miscarriage. He entered a special plea of former acquittal based upon an earlier prosecution for first degree murder of an unborn child.[15] The State's demurrer was

10. See, *e.g.*, Foran v. State, 195 Ind. 55, 144 N.E. 529 (1924); Woodworth v. State, 185 Ind. 582, 114 N.E. 86 (1916); State v. Reed, 168 Ind. 588, 81 N.E. 571 (1907); State v. Gapen, 17 Ind. App. 524, 45 N.E. 678 (1896).

11. See notes 14, 16-18, 20-21 *infra*.

12. See note 4 *supra* and accompanying text.

13. The courts apparently confuse the substantive and procedural objectives of double jeopardy by employing the "same evidence" test to determine not only whether a defendant has committed two or more separate substantive offenses but also whether he may be prosecuted at a separate trial for each. Even if it be conceded that there is a separate punishable offense for each statute violated by the same criminal conduct, there is still the procedural question of whether the defendant is entitled to be confronted with all the consequences of the same criminal activity at one prosecution. The substantive policy of the doctrine is challenged only when the defendant has been convicted and punished more than once for the same acts, and this abuse may occur at a single prosecution on a multiple count indictment as well as at successive prosecutions on separate indictments. See generally Kirchheimer, *supra* note 3; Note, 65 YALE L. J. 339 (1956).

There are other situations where two prosecutions and even convictions for the same conduct are permitted. For example, when one act constitutes an offense under both the laws of the federal government and the state, a prosecution before a federal court is not a bar to a subsequent prosecution by the state. Heier v. State, 191 Ind. 410, 133 N.E. 200 (1921). But, "a conviction or acquittal for an offense in another state, territory, or country . . . is a bar to a prosecution or indictment therefor in this state." IND. STATS. ANN. § 9-215 (Burns Supp. 1956). On the other hand, the Supreme Court of Indiana, applying the usual rules of double jeopardy, has stated that a defendant, who violates a municipal ordinance and a state statute in the same transaction, may be prosecuted for both. Thomas v. Indianapolis, 195 Ind. 440, 145 N.E. 550 (1924).

14. 65 Ind. 282 (1879).

15. Under IND. STATS. ANN. § 9-1132 (Burns Supp. 1956), former jeopardy may be pleaded specially as a bar or it may be proved under a plea of the general issue.

overruled, but, on appeal, the Supreme Court of Indiana reversed the trial court. The two offenses were held not to be the same even though both were committed "at the same time and by the same act."[16] Similarly, in *State v. Gapen*,[17] an accused, after an acquittal of selling liquor to a minor, was prosecuted for the same act on a charge of selling liquor retail without a license. The State appealed after its demurrer to a special plea of former jeopardy had been overruled. The Appellate Court of Indiana reversed, holding that double jeopardy was not an available defense and relying upon the fact that the same act had violated two statutes.[18]

Moreover, this restrictive interpretation increases the possibility not only of multiple prosecutions but also of multiple convictions for the same criminal conduct when that conduct falls within more than one statute.[19] To illustrate, in *Woodworth v. State*,[20] the defendant was first tried and convicted for selling liquor to a named person. A conviction was obtained at a second prosecution on the charge of maintaining a place where intoxicating liquors are sold. The Supreme Court of

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Kelly v. State, 225 Ind. 577, 75 N.E.2d 537 (1947); McCoy v. State, 193 Ind. 353, 139 N.E. 587 (1923); Mann v. State, 205 Ind. 491, 186 N.E. 283, *petition for rehearing denied*, 205 Ind. 497, 187 N.E. 343 (1933). It is not reversible error for a court to incorrectly sustain a demurrer to a special plea of former jeopardy since all facts admissible under the special plea are admissible under a general denial. Holt v. State, 223 Ind. 217, 59 N.E.2d 563 (1945); McCoy v. State, *supra*. However, the defendant does have the right to demand a separate trial by the court of the issue joined under his special plea, Earle v. State, *supra;* Clem v. State, *supra*.

16. State v. Elder, 65 Ind. 282, 285 (1879).

17. 17 Ind. App. 524, 45 N.E. 678 (1896).

18. *Accord*, State v. Reed, 168 Ind. 588, 81 N.E. 571 (1907); Beyerline v. State, 147 Ind. 125, 45 N.E. 772 (1897); Smith v. State, 85 Ind. 553 (1882); State v. Warner, 14 Ind. 572 (1860); Miller v. State, 33 Ind. App. 509, 71 N.E. 248 (1904) (dictum). *But see* Anderson v. State, 187 Ind. 94, 118 N.E. 567 (1918). For examples from other jurisdictions, see ALI DRAFT § 5 commentary.

Despite the broad general statement of the double jeopardy doctrine, the rules governing its application permit multiple prosecutions for the same offense in various types of circumstances. For example, double jeopardy does not prevent a second prosecution for the same offense if the first trial of the defendant did not proceed to the point at which jeopardy attaches. As a general rule, jeopardy attaches when the jury is empanelled, or, if the trial is before a judge only, when the first witness is sworn. For a discussion of the rules governing the attachment of jeopardy, see State v. Gurecki, 233 Ind. 383, 119 N.E.2d 895 (1954); Armentrout v. State, 214 Ind. 273, 15 N.E.2d 363 (1938); DANGEL, CRIMINAL LAW § 189 (1951); *ALI* DRAFT § 6 and commentary; Note, 24 MINN. L. REV. 522, 524-27 (1940). Moreover, some action by the defendant may be treated as a waiver of his right to plead double jeopardy in a subsequent prosecution for the same offense, *e.g.*, the defendant obtains his release upon a motion in arrest of judgment or obtains a new trial on his own motion. See IND. STATS. ANN., § 9-1202 (Burns Supp. 1956), State v. Killigrew, 202 Ind. 397, 174 N.E. 808 (1931); Armentrout v. State, *supra;* ALI DRAFT §§ 12 and 14 and commentaries; Note, 24 MINN. L. REV. 522, 534-38 (1940).

19. See notes 20 and 21 *infra*. See MODEL PENAL CODE 31-39; Note, 65 YALE L. J. 339 (1956).

20. 185 Ind. 582, 114 N.E. 86 (1916).

Indiana affirmed even though evidence had been admitted, over the defendant's objection, of the sale which had been the basis of the first prosecution. Likewise, in *Cambron v. State*,[21] a defendant was convicted twice for the same conduct: first for larceny of certain goods and second for burglary with intent feloniously to steal the same goods.

Although this "same statute" test of what constitutes the "same evidence" was developed in cases involving the first factual pattern discussed above where more than one statute was violated by the same conduct of the defendant, it has been applied in at least one case involving the second factual circumstance.[22] As indicated by foregoing discussion, the test's application turns upon whether the second prosecution is based upon the same acts as a breach of the same statutory provisions.[23] Consequently, the test literally is applicable to make the defense of double jeopardy available where an accused is being prosecuted a second time under the same statute for a different violation committed in the same transaction. Thus, when the Indiana Appellate Court was presented with a situation of the latter type in *State v. Rosenbaum*,[24] the second prosecution under the same statute was held to be barred by the constitutional protection against double jeopardy. In the *Rosenbaum* case, the charge at the first trial was for permitting a certain named person to remain in a place of business during prohibited hours. After an acquittal, the same charge was brought against the defendant, except the offense was charged with respect to a different person. The State's demurrer to the defendant's plea in abatement, based upon his former acquittal, was overruled. Upon appeal, the Appellate Court of Indiana affirmed, stating that the defendant committed a single offense which could not be split up into parts and prosecuted.[25] This result would seem to be sound from the standpoint of the policy of double jeopardy, as it

21. 191 Ind. 431, 133 N.E. 498 (1922).

22. State v. Rosenbaum, 23 Ind. App. 236, 55 N.E. 110 (1899).

23. See notes 11-18 *supra* and accompanying text.

24. 23 Ind. App. 236, 55 N.E. 110 (1899).

25. *Accord,* Clem v. State, 42 Ind. 420 (1873); Hayworth v. State, 14 Ind. 590 (1860); Jackson v. State, 14 Ind. 327 (1860). The foregoing cases were decided prior to the adoption of the "same evidence" test in Indiana; however, the same position was apparently established under the "same evidence" test by dicta in the lead case of State v. Elder, 65 Ind. 282 (1879). "When the facts constitute but one offense, though it may be susceptible of division into parts, as in larceny for stealing several articles of property at the same time, belonging to the same person, a prosecution to final judgment for stealing a part of the articles will be a bar to a subsequent prosecution for stealing another part of the articles stolen by the same act." *Id.* at 285. *But see* note 29 *infra* and accompanying text with respect to the current Indiana position. The rule applied to these fact situations by the Indiana courts is contrary to the weight of authority as most jurisdictions hold that there is more than one offense if the defendant's act affects several persons or articles of property. ALI DRAFT §§ 5 and 22 and commentaries;

precludes the State from prosecuting an accused more than once under the same statute for conduct committed during the same transaction upon the questionable basis that the offense happens to affect several persons or articles of property.[26]

In relatively recent years, the so-called "identity of offense" test of what constitutes the "same evidence" has been developed apparently as an adjunct to the "same statute" test to judge when two affidavits charge the "same offense." It establishes two requisites before two offenses are adjudged the same: first, they must be the same in law, *i.e.,* violations of the same statute; second, they must be the same in fact, *i.e.,* based upon the same criminal acts of the defendant.[27] Thus, the "identity of offense" test is a more specific standard of what constitutes the "same evidence."

The "identity of offense" test was first used in a case not specifically covered by the language of the "same evidence" test, although the facts of the case—the defendant violated the same statute on two separate and distinct occasions—do not seem to present a difficult problem under the principles of former jeopardy.[28] The Supreme Court of Indiana apparently took the opportunity to rephrase the test in order to clarify the point that two prosecutions of a defendant under the same statute are

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MODEL PENAL CODE 39. See Horack, *Multiple Consequences of a Single Criminal Act,* 21 MINN. L. REV. 805-11 (1937).

26. MODEL PENAL CODE 38-39; Note, 65 YALE L. J. 339, 347-48, 364-65 (1956).

27. Ford v. State, 229 Ind. 516, 98 N.E.2d 655 (1951); Foran v. State, 195 Ind. 55, 144 N.E. 529 (1924).

". . . The courts of this state, however, have leaned more strongly to the 'identity of offense' test, which is that the second charge must be for the same identical act and crime as that charged by the first affidavit or indictment upon which the defendant had been placed in jeopardy. This test is in harmony with the constitutional guarantee. . . . This test, as usually stated in the decisions of this court, is whether if what is set out in the second indictment had been proved under the first, there could have been a conviction. . . . The offenses charged must not only be the same in law, as would be shown by the instruments which charged the offenses, but that such offenses must be the same in fact. In other words, the offenses, in order to be the same must be the same act and crime." *Id.* at 60-61, 144 N.E. at 532-33.

The last sentence in the above quotation refers to Blackstone's statement. See note 1 *supra.* It will be noted that the court did not differentiate between the "identity of offense" test and the "same evidence" test, but treated them as one test. However, prior to the *Foran* case, the court had stated the "same evidence" test while interpreting it to permit second prosecutions if the second charge was not the "same in fact and in law" as the first. The current test, as formulated by the *Foran* case, continues to use the "same evidence" test, but combines it with an express statement of the "same conduct and same statute" requirement. See notes 11-18 *supra* and accompanying text.

28. Foran v. State, 195 Ind. 55, 144 N.E. 529 (1924). Although it appeared from the report of the case that the defendant had perhaps been in jeopardy for the "same offense," his defense was rejected because he had not sustained his burden of proof. He had not entered evidence to show that the charge at the first trial was the "same in fact and in law" as the charge at the second trial. *Ibid.* The defendant has the duty of going forward with the proof to sustain his defense of former jeopardy. Ford v. State, 229 Ind. 516, 98 N.E.2d 655 (1951). See also note 15 *supra.*

not prohibited by the double jeopardy doctrine, unless both prosecutions are based upon the exact same facts. Although there have been no cases specifically on the point since the formulation of the "identity of offense" test, it is arguable that this current test would permit multiple prosecutions in circumstances like the *Rosenbaum* case where the defendant's crime affects more than one person or in a case where the defendant repeatedly violates the same statute in the same transaction.[29] The courts of a few jurisdictions have followed similar tests logically to this result by reasoning that two affidavits are for different offenses if there is even a slight variation in the facts underlying them.[30] For example, in the Kentucky case of *Johnson v. Commonwealth,*[31] the defendant was convicted under separate indictments for two of some seventy-five hands of poker played at one sitting, the court stating that each hand of poker was a separate offense. The reaching of such results under the "identity of offense" test appears to be highly questionable in light of the policy of the double jeopardy doctrine which condemns the imposition of multiple consequences for the same criminal activity. If the realities of the above fact situations are considered, it can hardly be maintained that the defendants are not being convicted and punished twice for the "same offense."

On the other hand, it is clear that the revision of the test of the "same evidence" has not changed the results in double jeopardy cases where the same acts of the defendant violate two or more penal statutes.[32] Thus, in *Durke v. State,*[33] the defendant was first acquitted for lack of evidence on a charge of burglary. He was prosecuted a second time for the same conduct and convicted of uniting and combining with others for the purpose of committing a felony. On appeal, the Supreme Court of Indiana affirmed the conviction relying upon the "identity of offense" test. Two statutes were violated by the defendant's acts; therefore,

29. On the other hand, Indiana courts may continue to follow the principle of the *Rosenbaum* and earlier Indiana cases and refuse to allow multiple prosecutions where the defendant twice violates the same statute in the same transaction. For a discussion of these earlier Indiana cases, see notes 22-26 *supra* and accompanying text.

30. *E.g.,* cases cited in note 31 *infra.*

31. 201 Ky. 314, 256 S.W. 388 (1923). For other examples, see Oddo v. United States, 171 F.2d 854 (2d Cir.) *cert. denied* 337 U.S. 943 (1949) (theft of merchandise belonging to different persons from one truck constitutes separate offenses); Commonwealth v. Butterick, 100 Mass. (4 Browne) 1 (1868) (Separate offense for each of several bonds embezzled at one time from same person); Barton v. State, 23 Wis. 587 (1869) (Forgery of five drafts at one time constituted five separate offenses; similarly, uttering of each at same time was a separate offense). See also ALI DRAFT §§ 5 and 22 and commentaries; Horack, *supra* note 25; Kirchheimer, *supra* note 3; Note, 65 YALE L. J. 339, 347-48, 364-65 (1956).

32. See notes 35-37 *infra. Compare* cases cited notes 16-18, 20-21 *supra.*

33. 204 Ind. 370, 183 N.E. 97 (1932).

there were two separate offenses.[34]

The philosophy underlying double jeopardy that there shall be no more than one prosecution and punishment for the same criminal conduct is strongly opposed to such a narrow application of the "same offense."[35] Only limited protection is afforded against the imposition of multiple consequences for the same criminal activity and the inherent abuses which might accompany this type of criminal administration. The effect is created and accentuated by the great number of criminal statutes. These statutes, passed sporadically over a long period of time, often have duplicating provisions. Thus, the same criminal conduct may frequently be brought within the prohibitions of several statutes.[36] This is true under both the "same statute" and "identity of offense" tests of "same evidence." The "same evidence" test as interpreted by both tests allows a separate prosecution for each statute violated by the same criminal acts.[37] If each affidavit or indictment is based upon a different statute, two, or even more, prosecutions, and perhaps convictions, of a defendant for the same activity are possible. The Indiana case law affords ample and apt illustrations of the practice.[38] Moreover, under the 'identity of offense" test it is possible to prosecute, and even convict, an accused more than once under the same statute if he violates that statute repeatedly during the same transaction. Such power in the hands of the prosecutor to subject the accused to multpile harassments, and indeed convictions,

34. *Accord,* Woodward v. State, 198 Ind. 70, 152 N.E. 277 (1926); Pivak v. State, 202 Ind. 417, 175 N.E. 278 (1931); Thompson v. State, 89 Ind. App. 555, 167 N.E. 345 (1929); Reese v. State, 89 Ind. App. 378, 165 N.E. 780 (1929). The latter three cases involved convictions for two separate offenses at the same trial under a multiple-count indictment. For a further discussion of these cases and the problem they raise, see notes 86-91 *infra* and accompanying text. See ALI DRAFT § 5 commentary for further examples.

35. See notes 1-3 *supra* and accompanying text. See also MODEL PENAL CODE 31-39; Kirchheimer, *The Act, The Offense and Double Jeopardy,* 58 YALE L. J. 513 (1949); Lugar, *Criminal Law, Double Jeopardy and Res Judicata,* 39 IOWA L. REV. 317 (1954); Note, 65 YALE L. J. 339 (1956).

36. ". . . [T]he increasing number of penal statutes, along with the rise of the multiple count indictment, have created new problems. The tendency of modern penal legislation has been toward more detailed specification of criminal offenses so that a single criminal act or transaction comes under the proscription of a steadily increasing number of statutes. Moreover, these statutes are usually enacted piecemeal over a long period of time. Consequently, they overlap and seldom specify to what extent a given provision is intended to supplement or replace other applicable statutes. The problems created by this development have been heightened by the trend toward 'catchall' indictments charging violation of all provisions of the criminal law which are even remotely relevant. These factors increase considerably the possibility of multiple prosecution for the same criminal conduct on different theories of liability, as well as the danger of multiple punishment either as a result of successive prosecutions or on a multiple count indictment." Note, 65 YALE L. J. 339, 344 (1956).

37. Cases cited notes 33-34 *supra* and accompanying text.

38. *Ibid.*

would seem clearly antithetical to the rationale of the constitutional guarantee against double jeopardy. Such harassment of criminally accused persons—whether innocent or guilty—renders meaningless the constitutional right not to be put twice in jeopardy for the same offense. Therefore, in order to better secure for defendants the benefits of this policy, reform seems desirable.[39]

The need for reform in the doctrine of double jeopardy has prompted the courts of several jurisdictions to recognize the defense of res judicata in criminal prosecutions.[40] Since res judicata can effectuate some of the same policy objectives as double jeopardy,[41] it has been effectively used as a defense to supplement double jeopardy in order to establish safeguards not furnished under present applications of double jeopardy.[42] The defense of res judicata has never been raised in the Indiana courts—at least at the appellate level.[43] However, there would seem to be no

39. While there has been general agreement among legal scholars that reform is desirable in order to prevent imposition of multiple prosecutions and convictions for the same conduct, differences of opinion exist in respect to what improvements should be instituted. See, *e.g.,* MODEL PENAL CODE 31-39; Horack, *The Multiple Consequences of a Single Criminal Act,* 21 MINN. L. REV. 805 (1937); Kirchheimer, *supra* note 39; Lugar, *supra* note 39; Note, 65 YALE L. J. 339 (1956).

40. *E.g.,* United States v. Oppenheimer, 242 U.S. 85 (1916); Jay v. State, 15 Ala. App. 255, 73 So. 137 (1916) *cert. denied* 198 Ala. 631, 73 So. 1000 (1917); Harris v. State, 193 Ga. 109, 17 S.E.2d 573 (1941); People v. Grzesczak, 77 Misc. 202, 137 N.Y.S. 538 (County Ct. 1912).

". . . With the present tendency to multiply statutory regulations and penalties, there is a consequent increase of scope for the application of res judicata as distinguished from former jeopardy." McLaren, *The Doctrine of Res Judicata as Applied to the Trial of Criminal Cases,* 10 WASH. L. REV. 198 (1935). Other legal writers have urged the adoption of res judicata in criminal prosecution. See MODEL PENAL CODE 49-51; Schmidt, *Res Judicata in Criminal Cases,* 26 CALIF. S. BAR J. 366 (1951); Notes, 7 BROOKLYN L. REV. 79 (1937); 65 HARV. L. REV. 818, 874 (1956); Comment, 27 TEXAS L. REV. 23 (1948). *But see* Lugar, *supra* note 35, at 344; Note, 65 YALE L. J. 339, 349 (1956).

41. The doctrine of res judicata rests upon two maxims: 1) "A man should not be twice vexed for the same cause," and 2) "It is for the public good that there be an end to litigation." 2 FREEMAN, JUDGMENTS (5th ed. 1925) § 626, p. 1319.

42. See cases cited note 40 *supra* and notes 53, 56, 59-61 *infra.*

In the *Oppenheimer* case, the United States Supreme Court pointed out the usefulness of res judicata in this respect. "The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the Fifth Amendment was not intended to do away with what in civil law is a fundamental principle of justice, in order, when a man once has been acquitted on the merits, to enable the government to prosecute him a second time." United States v. Oppenheimer, 224 U.S. 85, 88 (1916).

43. The doctrine has been applied in criminal cases by most state courts, when presented. Comment, 27 TEXAS L. REV. 231, 239-40 (1948). Likewise, res judicata has been recognized as applicable to criminal prosecutions in the Court of Appeals for the Seventh Circuit. See United States v. Kaadt, 171 F.2d 600 (7th Cir. 1948).

In the federal courts, the defense of res judicata may be raised specially by a motion to dismiss. FED. R. CRIM. P. 12(a). If not raised by a motion to dismiss, it may be presented under a plea of not guilty. In the Indiana courts, the defense of res judicata may be presented under a plea of the general issue, or it could be raised specially prior to trial by a plea in bar. IND. STATS. ANN. § 9-1132 (Burns Supp. 1956).

reason why it would not be accepted, if properly presented.[44]

Under the doctrine of res judicata, once a question has been litigated and gone to a final judgment between two parties, it is binding upon the parties in any future actions between them with respect to both issues of fact and law.[45] In Indiana civil cases, res judicata is divided into two branches according to whether the same or a different cause of action is involved in the second trial.[46] One branch, "estoppel by judgment," bars forever the relitigation of the *same* cause of action. It is immaterial what matters were actually in issue, as the first judgment is conclusive not only with respect to those questions which were litigated, but also with respect to those which might have been litigated within the issues formed.[47] The other branch of res judicata is operative when the cause of action in the second trial is *different* from that in the first, but a ques-

44. For discussion of a recent case disclosing a possible favorable attitude on the part of the Supreme Court of Indiana toward res judicata in principle, see note 54 *infra*.

45. The doctrine of res judicata has been stated as follows in an Indiana civil case: ". . . an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies, in all other actions in the same or other judicial tribunal of concurrent jurisdiction." Hine v. Wright, 110 Ind. App. 385, 36 N.E.2d 972 (1941); See Bereolas v. Roth, 195 Ind. 425, 145 N.E. 545 (1924).

The doctrine of res judicata has been given a restricted interpretation by some authorities by drawing a distinction between ultimate and evidentiary facts, making the prior judgment conclusive as to ultimate facts determined thereby, but not as to evidentiary facts. The Evergreens v. Nunan, 141 F.2d 927, 928 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944); RESTATEMENT, JUDGMENTS § 68, comment p (1942). Moreover, *The Evergreens* case held that the fact determinations in the first case are conclusive only in respect to ultimate facts in the second trial. The Evergreens v. Nunan, *supra* at 929. See Schmidt, *supra* note 40; Note, 65 HARV. L. REV. 818, 842-43 (1956). However, such a distinction apparently has not been employed in Indiana res judicata cases. See, *e.g.*, Town of Flora v. Indiana Service Corp., 222 Ind. 253, 53 N.E. 2d 161 (1944). Citizens' Loan and Trust Co. v. Sanders, 99 Ind. App. 77, 187 N.E. 396 (1933); United Oil and Gas Co. v. Alberson, 43 Ind. App. 626, 88 N.E. 359 (1909).

46. Linville v. Chenoweth, 119 Ind. App. 515, 84 N.E.2d 473 (1949); Town of Flora v. Indiana Service Corp., 222 Ind. 253, 53 N.E.2d 161 (1944).

47. ". . . One branch of the subject deals with prior adjudication as a bar. Under it a cause of action finally determined between the parties on the merits by a court of competent jurisdiction, cannot again be litigated by new proceedings before the same or any other tribunal, except by way of review according to law. Such a judgment or decree so rendered is a complete bar to any subsequent action on the same claim or cause of action, between the same parties, or those in privity with them. Every question which was within the issues, and which, under the issues, might have been proved, will be presumed to have been proved and adjudicated." Town of Flora v. Indiana Service Corp., 222 Ind. 253, 256, 53 N.E.2d 161, 163 (1944). *Accord*, Hammond Pure Ice and Coal Co. v. Heitman, 221 Ind. 352, 47 N.E.2d 309 (1943); Smith v. Smith, 102 Ind. App. 436, 200 N.E. 90 (1936); United Oil and Gas Co. v. Alberson, 43 Ind. App. 626, 88 N.E. 359 (1909); Fought v. Fought, 98 Ind. 470 (1884).

There are four necessary elements before res judicata may be involved as a bar: 1) a suit, 2) a final judgment, 3) identity of subject-matter, and 4) identity of the parties. Burrell v. Jean, 196 Ind. 187, 146 N.E. 754 (1925); Jones v. Vert, 121 Ind. 140, 22 N.E. 882 (1889).

tion or fact adjudicated in the first trial is again at issue in the second.[48] In such a case, the judgment in the first litigation operates as an estoppel only with respect to matters which were actually adjudicated and determined, and not with respect to matters which could have been litigated, but were not.[49] The Indiana courts have denominated this branch of res judicata "estoppel by verdict or finding."[50]

In criminal procedure, the foregoing rules of res judicata could serve to complement the doctrine of double jeopardy thus giving greater substance to the constitutional protection against double jeopardy.[51] Even though res judicata, in contrast to double jeopardy, requires a final judgment on the merits, res judicata may occasionally constitute a valid defense to a subsequent prosecution before jeopardy has attached.[52] Thus,

48. ". . . a matter is in issue if it be something affirmed by one party and either denied or admitted expressly or impliedly by the other, and its determination is essential in the rendition of a final judgment upon the merits of the cause as presented by the pleadings." Van Camp v. City of Huntington, 39 Ind. App. 28, 37-38, 78 N.E. 1057, 1060 (1906).

49. The estoppel extends only to determinations which were necessary to the prior judgment, and the burden is upon the person pleading the estoppel to show that it was actually the basis of the first judgment. See Town of Flora v. Indiana Service Corp., 222 Ind. 253, 53 N.E.2d 161 (1944); Knotts v. Clark Construction Co., 191 Ind. 354, 131 N.E. 921 (1921). He is aided by the presumption that "in a subsequent action between the same parties, that all the issues were decided in the former action in favor of the party in whose favor that action so resulted." Van Camp v. City of Huntington, 39 Ind. App. 28, 37, 178 N.E. 1057, 1060 (1906).

50. "The other branch of the subject applies where the causes of action are not the same, but where some fact or question has been determined and adjudicated in the former suit, and the same fact or question is again put in issue in a subsequent suit between the same parties. In such cases the former adjudication of the fact or question, if properly presented and relied on, will be held conclusive on the parties in the latter suit, regardless of the identity of the causes of action, or the lack of it, in the two suits. When the second action between the same parties is on a different cause of action, claim, or demand, it is well settled that the judgment in the first suit operates as an estoppel only as to the point or question actually litigated and determined, and not as to other matters which might have been litigated and determined. In such cases the inquiry must always be as to the point or question actually litigated and determined in the original action." Town of Flora v. Indiana Service Corp., 222 Ind. 253, 257, 53 N.E.2d 161, 163 (1944). *Accord,* Linville v. Chenoweth, 119 Ind. App. 515, 84 N.E.2d 473 (1949); Citizens' Loan and Trust Co. v. Sanders, 99 Ind. App. 77, 187 N.E. 396 (1933); Van Camp v. City of Huntington, 39 Ind. App. 28, 78 N.E. 1057 (1906).

For discussions of the civil doctrine of res judicata by the United States Supreme Court, see Oklahoma v. Texas, 256 U. S. 70 (1921); Southern Pacific Railway Co. v. United States, 116 U.S. 436 (1886).

51. See, *e.g.,* United States v. De Angelo, 138 F.2d 466 (3d Cir. 1943), where the court said, "The conclusiveness of a fact which has been completely adjudicated by a criminal trial is not confined to such matter as is sufficient to support a plea of double jeopardy. Even though there has been no former acquittal of the particular offense on trial, a prior judgment of acquittal on related matters has been said to be conclusive as to all that the judgment determined. The matter is one of collateral estoppel of the prosecutor." *Id.* at 468; see note 40 *supra.*

52. Usually jeopardy will attach prior to final judgment, which is required for a valid defense of res judicata. See note 18 *supra.* Thus, if an affidavit is improperly dismissed after jeopardy has attached but prior to final judgment, double jeopardy

where the trial was formerly ruled to be barred by the statute of limitations, res judicata would operate to bar a second prosecution for the same offense while double jeopardy, as presently applied, would not. For example, in *United States v. Oppenheimer*,[53] the defendant was charged with participating in a conspiracy to conceal assets from a trustee in bankruptcy. The accused based his defense of res judicata upon a previous adjudication under an indictment charging the same offense where it was erroneously held that the prosecution was barred by the one year statute of limitations in the Bankruptcy Act. On this ground, the District Court quashed the indictment and the Supreme Court of the United States affirmed.[54]

But if res judicata applied only in the above situations, it would be of little significance since they represent only a small number of the cases raising the issue of double jeopardy. More important in the argument for res judicata as an adjunct to double jeopardy in criminal procedure is the fact that while the latter may operate only where the identical offense is involved in both prosecutions, the former may operate where the offenses are different.[55] In such circumstances, "estoppel by verdict or finding" may be a successful defense even though former jeopardy would fail. Thus, in *Sealfon v. United States*,[56] the defendant had been formerly tried and acquitted on the charge of conspiring to aid and abet the uttering and publishing of false invoices and the making of false representations to a ration board in order to defraud the United States. The government based its case upon a letter from the defendant to his al-

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would be an available defense but not res judicata. For Indiana examples of such fact circumstances, see, *e.g.*, Mann v. State, 205 Ind. 491, 186 N.E. 283, *petition for rehearing denied*, 205 Ind. 497, 187 N.E. 343 (1933); State v. Reed, 168 Ind. 588, 81 N.E. 571 (1907).

As the foregoing paragraph indicates, there is no concept of res judicata which corresponds to jeopardy. On the other hand, there is no double jeopardy term which is analogous to "estoppel by verdict." This indicates the areas in which res judicata and double jeopardy may be expected to act as supplements. However, the two doctrines do have analogous terms: Same offense would have the same meaning under each doctrine, while former conviction and former acquittal correspond to estoppel by judgment. See Comment, 27 TEXAS L. REV. 231-33 (1948).

53. 242 U.S. 85 (1916). See Comment, 27 TEXAS L. REV. 231, 232-33 (1948).

54. A recent Indiana criminal case, analogous to the *Oppenheimer* case, while not expressly recognizing res judicata, apparently applied its principles. In State v. Soucie, 234 Ind. 98, 123 N.E.2d 888 (1955), the court held that the discharge of the defendant under a statute requiring the release of a prisoner held by recognizance without trial for more than three terms of court barred his subsequent prosecution for unlawful placing of explosives and conspiracy to commit a felony. The court stated that double jeopardy was not an available defense, but that his prior release was analogous to a discharge under the statute of limitations. Consequently, the decision would seem to be a tacit recognition in principle of res judicata.

55. See McLaren, *supra* note 40; Schmidt, *supra* note 40.

56. 332 U.S. 575 (1948).

leged co-conspirator. The prosecution's theory that the defendant was guilty of a conspiracy because of the agreement evidenced in the letter was not accepted. In the second prosecution, defendant Sealfon was charged with the substantive offense. Upon appeal from a conviction, the United States Supreme Court determined that the former acquittal amounted to a decision that the letter from Sealfon to Granberg was not written pursuant to an agreement to defraud the government. The Court reversed the conviction since the core of the prosecution's case, based upon the agreement represented by the letter, was the same in both cases, and the first trial had necessarily determined the non-existence of an agreement. The Court noted that double jeopardy did not apply since a substantive offense and a conspiracy to commit that substantive offense are two separate and distinct offenses.[57]

Likewise, res judicata was applied in *United States v. Meyerson*,[58] defendants Meyerson and Katz were charged with a conspiracy to violate the Bankruptcy Act for concealing assets from the trustees in bankruptcy. They had formerly been indicted for using the mails for the purpose of executing a scheme to defraud. The court directed a verdict for Katz on the ground that he had no knowledge of the scheme to defraud, but Meyerson was convicted. Both defendants moved to quash the second indictment, Meyerson on the ground of his former conviction, and Katz on the ground of his former acquittal. The judge explained that, while the scheme to defraud by use of the mails may have been an incident of

57. The Indiana courts take the traditional double jeopardy view, as expressed in the Sealfon case, that prosecutions for a substantive offense and a conspiracy to commit that substantive offense involve two different offenses. Taylor v. State, 235 Ind. 126, 131 N.E.2d 297 (1956); Steffler v. State, 230 Ind. 557, 104 N.E.2d 729 (1952). However, such multiple prosecutions would be prohibited by res judicata in at least two instances: a prosecution for the substantive offense would be precluded if a prior trial for the conspiracy necessarily found that the defendant did not commit the overt acts relied upon, Sealfon v. United States, 332 U.S. 575 (1948); United States v. Clavin, 272 Fed. 985 (E.D. N.Y. 1921); and a prosecution for the conspiracy would be barred if it relied upon overt acts which an earlier prosecution for the substantive offense determined had not been committed. See United States v. De Angelo, 138 F.2d 466 (3d Cir. 1943). See also Comment, 27 TEXAS L. REV. 231, 239 (1948).

In another specific problem area, the majortiy of state courts have refused to apply res judicata in perjury cases if the perjury was committed by the defendant at his own prosecution. The policy underlying such decisions was well expressed in Jay v. State, 15 Ala. App. 255, 261, 73 So. 137, 139, *cert. denied*, 198 Ala. 691, 73 So. 1000 (1916): "It would be a monstrous doctrine to hold that a person could go into a court of justice and by perjured testimony secure an acquittal, and because acquitted he could not be tried for his perjury; this would be putting a premium upon perjury and allowing a scoundrel to take advantage of his own wrong." On the other hand, federal courts have ruled that a prior acquittal establishes the validity of the defendant's testimony in a later prosecution for perjury. Ehrlich v. United States, 145 F.2d 693 (5th Cir. 1944); United States v. Butler, 38 Fed. 498 (E.D. Mich. 1889); Note, 65 HARV. L. REV. 818, 877 (1956); Comment, 27 TEXAS L. REV. 231, 243-45 (1948).

58. 24 F.2d 855 (S.D. N.Y. 1928).

the general conspiracy charged, they are different offenses and may each be prosecuted within the rules of double jeopardy. However, ". . . the prior judgment of acquittal [of Katz] is . . . conclusive upon all questions of fact or of law distinctly put in issue and directly determined upon the trial of the former indictment."[59] The second indictment charged that Katz had participated in the alleged conspiracy on the same day and with the same persons as the first trial had determined that he had no knowledge of the scheme to defraud by use of the mails. Moreover, the latter scheme was charged as part of the conspiracy. Therefore, the Court upheld Katz's motion to quash, stating that his participation in the whole transaction was no longer open to question between him and the United States. On the other hand, Meyerson's motion to quash was overruled since he had been *convicted* of participating in the scheme to use the mails to defraud. A similar situation arose in *United States v. Simon.*[60] The defendant, who had been acquitted of receiving stolen turkeys, was subsequently charged with possession of stolen turkeys. He was convicted at the second trial at which evidence was admitted to show that he had guilty knowledge when he received the turkeys. The Court of Appeals awarded a new trial, stating that the acquittal was res judicata in regard to the fact that, at the time the turkeys were delivered to the defendant, he did not have the alleged guilty knowledge. The admission of evidence to the contrary might have prejudiced the defendant. A New York case affords a similar instance: A defendant was charged with attempted robbery upon the same facts as those upon which he was acquitted in a former trial of arson. The only litigated fact in the first trial was the defendant's presence or absence at the scene of the crime. The court directed a verdict for the defendant on the basis of res judicata.[61]

Even though the applicability of res judicata as a defense in criminal procedure has never been raised on the appellate level in Indiana, there have been Indiana cases where the defense of res judicata could have proved effective had it been raised and accepted. For example, in *State v. Gapen,*[62] the defendant was acquitted at the first trial on a charge of selling liquor to a minor. A second prosecution was begun upon the

59. *Id.* at 856.

60. 225 F.2d 260 (3rd Cir. 1955).

61. People v. Grzesczak, 77 Misc. 202, 137 N.Y.S. 538 (County Ct. 1912). For other examples of the application of res judicata in criminal cases, see, *e.g.,* Steele v. United States, 267 U.S. 505 (1925); Cosgrove v. United States, 224 F.2d 146 (9th Cir. 1955); United States v. De Angelo, 138 F.2d 466 (3d Cir. 1943); United States v. McConnell, 10 F.2d 977 (E.D. Penn. 1926); Mitchell v. State, 140 Ala. 118, 37 So. 76 (1903); Harris v. State, 193 Ga. 109, 17 S.E.2d 573 (1941); People v. Kleinman, 168 Misc. 920, 6 N.Y.S.2d 246 (Sup. Ct. 1938); Annot., 147 A.L.R. 991 (1943). See also note 40 *supra.*

62. 17 Ind. App. 524, 45 N.E. 678 (1896).

same facts for selling liquor at retail without a license. The defense was based upon former jeopardy, but this was overruled because a different offense—*i.e.*, the violation of a different statute—was charged.[63] Using the type of reasoning found in the *Sealfon* case, a defense of res judicata might have been successful depending upon what facts were adjudicated in the first trial. If the acquittal had resulted only because the person to whom the sale was made was not a minor, the defense would fail. But, if the first trial necessarily determined that no sale had been made to the person involved or that the thing sold was not intoxicating liquor, the defense of res judicata would have proved successful. Likewise, in *State v. Elder*,[64] the defendant was charged with attempting to cause a miscarriage based upon the same facts as those upon which he had been tried and acquitted of first degree murder. On appeal, the defense of former jeopardy was overruled.[65] A defense of res judicata, on the other hand, would have forced the court to examine the record of the previous trial to see whether there were findings of fact inconsistent with a conviction in the second prosecution. For example, if the first acquittal had resulted from a finding that the defendant had committed no harm upon the particular woman and child involved, this would be res judicata in a second prosecution and would thereby preclude a second conviction. The same would be true if the defendant had established a defense of insanity or alibi at the first trial. On the other hand, if the defendant was acquitted on the murder charge because the unborn child was not a human being capable of being killed, the doctrine of res judicata would not prevent the subsequent prosecution for causing a miscarriage.[66]

The cases using res judicata in criminal procedure would seem to support the contention that it may frequently provide desirable protections for defendants in cases where double jeopardy is ineffective.[67] It would appear to be principally useful as a supplement to double jeopardy in situations where the charges are different in the two prosecutions. Its proper application and operation would preclude the prosecuting attorney from recontesting facts and issues determined in an earlier trial of the same defendant.[68] If the finality of adjudicated issues is a desirable safeguard for parties to a civil proceeding, it would appear even more

63. See note 16 *supra* and accompanying text.
64. 65 Ind. 282 (1879).
65. See note 14 *supra* and accompanying text.
66. For other Indiana criminal cases in which the defense of res judicata could possibly have proved successful, see Woodward v. State, 198 Ind. 70, 152 N.E. 277 (1926); State v. Reed, 168 Ind. 588, 81 N.E. 571 (1907); Smith v. State, 85 Ind. 553 (1882).
67. See notes 55-61 *supra* and accompanying text.
68. *Ibid.*

important in a criminal prosecution, where a person's life and liberty are placed in jeopardy.[69] Traditional standards of criminal justice, as manifested in the underlying philosophy of the doctrine of double jeopardy, would seem to require that the state, with all its resources, should not be afforded a second opportunity to establish the defendant's criminality by relying on facts decided against it in a former trial.[70] Res judicata would appear to further these standards. Moreover, in direct contrast with the usual review in a case where double jeopardy is raised,[71] a plea of res judicata would require that appellate courts make a closer review of the record of the trial court in the first trial.[72] This in itself would appear to be a desired result in the administration of criminal justice.

There are, however, certain difficulties which are peculiar to, and may serve to limit, the application of res judicata in criminal prosecutions. The primary difficulty is the determination of the issues raised and decided in the first prosecution.[73] The main factors causing this difficulty are: the generality of the defendant's plea; the multiple theories of acquittal offered in the instructions to the jury; the general verdict by the jury; and, the joinder of counts.[74] But, in spite of these obstacles, the *Sealfon* case and other similar cases indicate that courts have succeeded at times in determining what issues were adjudicated in a prior criminal trial.[75] Either the court on the second trial or the court on appeal would have to make such a determination as a matter of law by carefully examining the record of the previous trial, including the pleadings, evidence, instructions to the jury, and opinions of courts, where written.[76]

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69. See United States v. Oppenheimer, 242 U.S. 85, 87 (1916).

70. See notes 1-3 *supra* and accompanying text.

71. A court may often decide the issue of double jeopardy merely by examining the charges at the two trials. See, *e.g.*, Durke v. State, 204 Ind. App. 370, 183 N.E. 970 (1932); Reese v. State, 89 Ind. App. 378, 165 N.E. 97 (1929); Alyea v. State, 198 Ind. 364, 152 N.E. 801 (1926).

72. See Sealfon v. United States, 332 U.S. 575 (1948); United States v. De Angelo, 138 F.2d 466 (3d Cir. 1943); United States v. Meyerson, 24 F.2d 855 (S.D. N.Y. 1928); Schmidt, *supra* note 40, at 372; Note, 65 HARV. L. REV. 818, 876 (1956); note 76 *infra* and accompanying text.

73. Lugar, *Criminal Law, Double Jeopardy and Res Judicata*, 39 IOWA L. REV. 317, 332-35, 344 (1954).

74. *Ibid.*

75. Sealfon v. United States, 332 U.S. 575 (1948); see notes 55-61 *supra*.

76. The correct approach was indicated by the United States Supreme Court in the civil case of Oklahoma v. Texas, 256 U.S. 70, 88 (1921): "What was involved and determined in the former suit is to be tested by an examination of the record and proceedings therein, including the pleadings, the evidence submitted, the respective contentions of the parties and the findings and opinion of the court. . . ." While the Supreme Court did not specifically mention use of the instructions to the jury from the first case, it has advocated this device in other cases. See, *e.g.*, Sealfon v. United States, 332 U.S. 575 (1948). In a recent case, the same court explained the duty of the trial

However, there is perhaps no escaping the conclusion that the above mentioned factors would limit the application of res judicata in Indiana criminal procedure. Moreover, while the doctrine of res judicata operates in certain types of fact situations to prevent successive prosecutions of the same defendant, which the double jeopardy doctrine would permit, there are situations in which res judicata could not be successfully pleaded by the defense. For example, a plea of res judicata would be unsuccessful if the first prosecution was dismissed prior to final judgment, if the issue relied upon in the second trial was not necessary to the first judgment, or if the primary issue in the second trial was not decided or was decided against the defendant in the first trial. In the latter case, if the doctrine of res judicata is available to the prosecution as well as the defense, a defendant may be subjected to successive convictions for different offenses based on the same facts.[77] Hence, even if it were applied, it would not always prevent the excesses possible under the present former jeopardy rules. Moreover, the aforementioned difficulties inherent in its application delimit its effectiveness.[78] Thus, notwithstand-

judge when presenting a defense of res judicata to the jury: ". . . [he] should (1) examine the record of the antecedent case to determine the issues decided by the judgment; (2) in his instructions to the jury reconstruct that case in the manner and to the extent he deems necessary to acquaint the jury fully with the issues determined therein; and (3) explain the scope and effect of the former judgment on the case at trial." Erich Motor Corp. v. General Motors Corp., 340 U.S. 558, 572 (1951).

77. For this reason, lower federal courts have refused to allow the prosecution to make use of res judicata. The policy supporting this position is that the problem arises only occasionally, since there will not usually be a second prosecution if a first trial resulted in a conviction. Moreover, the jury might be prejudiced against the defendant if a material issue were decided against him from the beginning of the trial. United States v. De Angelo, 138 F.2d 466 (3d Cir. 1943); United States v. Carlisi, 32 F. Supp. 479 (E.D. N.Y. 1940); Note, 65 HARV. L. REV. 818, 875-76 (1956); Comment, TEXAS L. REV. 231, 237-39 (1948). Most state courts, on the other hand, employ the rule applicable to the civil doctrine that a plea of res judicata is available only when there is mutuality of estoppel. For example, res judicata has been used against the defendant in People v. Majado, 22 Cal. App.2d 323, 70 P.2d 1015 (1937) (Prior conviction for non-support of illegitimate child conclusively established parentage in prosecution for same offense committed at a later date); Commonwealth v. Ellis, 160 Mass. 165, 35 N.E. 773 (1893) (Conviction for unreasonable neglect to support minor child established defendant's paternity in subsequent prosecution for same offense); State v. Sargood, 80 Vt. 412, 68 Atl. 51 (1907) (Conviction for poisoning certain colts established that the defendant had committed that offense in a subsequent prosecution for attempting to poison the owners of the colts). Note, 65 HARV. L. REV. 818, 875-76 (1956); Comment, 27 TEXAS L. REV. 231, 242-43 (1948). In civil cases, Indiana courts apply the general rule that before a plea of res judicata may be entered there must be mutuality of estoppel. Tobin v. McClellan, 225 Ind. 335, 344, 73 N.E.2d 679, 683 (1947). However, if the multiple convictions presently possible under the rules of double jeopardy are not to be further promoted by res judicata, it seems that the position of the *De Angelo* and *Carlisi* cases, *supra,* should be adopted.

78. The effectiveness of the doctrine of res judicata was somewhat weakened by the United States Supreme Court decision in Dunn v. United States, 284 U.S. 390 (1932), allowing inconsistent verdicts on different counts. However, the *Dunn* case was ignored by the same court in Scalfon v. United States, 332 U.S. 575 (1948) and the

ing the judicial acceptance of res judicata in Indiana, additional reforms would seem advisable.

Since more complete protection of defendants' rights in this area is necessary owing to the narrow standard of double jeopardy, one possible and perhaps most obvious reform would be the codification of the Indiana criminal statutes. Such action would reduce the number of overlapping criminal provisions which apply to one fact situation, thereby alleviating the effect of the present narrow standard of double jeopardy by decreasing the opportunities to try a defendant for the same activity under several penal proscriptions. However, the production of a comprehensive criminal code would be a time-consuming and expensive task and such reform is presently improbable.

A more practical, although incomplete, solution could possibly be produced through judicial interpretation of legislative intent: When confronted by a second prosecution of a defendant for the same acts based on a different statute, the court could preclude a second trial by ruling that the legislature intended the statutes to operate alternatively rather than cumulatively. This approach has been suggested by at least one Indiana case.[79] The defendant was first tried and convicted on the charge of transporting intoxicating liquor. He was subsequently prosecuted for transporting intoxicating liquor in an automobile, a violation of a different statute. The conviction in the trial court was appealed on the ground of former jeopardy, and the Supreme Court of Indiana reversed. The Court, applying the "same evidence" test, stated that there could not be a conviction on the second charge unless the facts underlying the first conviction were again proved, thereby reaching a result inconsistent with other double jeopardy cases. In support of its decision, the Court held that the intent of the legislature in passing the two statutes was not to permit two convictions for the same acts, but was to allow the prosecutor to proceed under either statute according to the facts of the case. While the result of this case is in accordance with the policy of double jeopardy, there would seem to be only a slight possibility of its approach being adopted by the Indiana courts to any great extent in view of well settled contrary precedents.[80]

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decisions in the state courts rule against inconsistent verdicts. State v. Parsons, 70 Ariz. 399, 222 P.2d 637 (1940); State v. O'Neil, 24 Wash.2d 802, 167 P.2d 471 (1946); MODEL PENAL CODE 33. See Kirchheimer, *supra* note 39, at 533; Lugar, *supra* note 73, at 339-41.

79. Arrol v. State, 207 Ind. 321, 192 N.E. 440 (1934). *Accord,* Hamilton v. State, 36 Ind. 280 (1871).

80. The "same transaction" test, *supra* note 8, has also been suggested as a solution to the problem of multiple prosecutions and punishments for the same conduct. See Kirchheimer, *supra* note 39, at 534-39. This test could be adopted through judicial

A more comprehensive and effective reform would be the addition of a compulsory joinder rule to Indiana's criminal procedure. Such a provision would require that two or more known offenses, committed by the same person, be prosecuted at a single trial if they are based on the same conduct or on one plan resulting in repeated commissions of the same offense. Thus, the test of whether the joinder is compulsory is a broad test, not restricted by the requirement that the offenses be violations of the same statute committed by the same acts.[81] If the prosecutor fails to comply with the joinder requirement, the defendant would be able to obtain a dismissal upon proof of an earlier prosecution for an offense based upon the same facts or the same general motive.[82] To illustrate, the prosecution in the *Gapen* case for selling liquor at retail without a license would be barred because of the former acquittal on the charge of selling liquor to a minor. Likewise, in *Greenwood v. State,*[84] the defendant was charged with an assault and battery. He had formerly been prosecuted for another assault and battery committed the same evening but upon a different person. Since the second prosecution was based on different facts, it would be dismissed only if the defense could establish that both offenses were committed pursuant to a common motive.[85]

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action without prior legislation, but the entrenchment of the "same evidence" test makes its adoption by the Indiana courts unlikely. But even if adopted, the "same transaction" test offers little assurance of effecting a lasting solution on the basis of the experience of other jurisdictions. The "same transaction" has been discovered to be a vague concept, being little more specific than the constitutional guarantee itself. The results of the test's application were well summarized by the following: ". . . Where the equities of a case appeared to call for a second trial, courts purporting to apply this rule have had no difficulty in permitting successive prosecutions for technically separate offenses, even though they were in fact committed in the course of a single criminal transaction. Even worse, many courts have confused substance and procedure by finding a separate transaction for each offense, or by expanding the scope of the offense to make it coextensive with the transaction. Inevitably this leads to self-contradiction, and the same transaction test as well as the act-offense dichotomy, embellished by the same evidence test, may all flourish simultaneously in the same jurisdiction. The consequent confusion surrounding the rule has led to its abandonment in some jurisdictions which had adopted it for a time." Note, 65 YALE L. J. 339, 348-49 (1956). See also Lugar, *supra* note 73, at 320, 323-27.

81. If the narrow "identity of offense" test were adopted to determine when the prosecutor must comply with the joinder provision, any reform would be nullified and present practices would be continued under a different name.

82. A joinder provision is included in the American Law Institute's MODEL PENAL CODE § 108(2) and comment. Moreover, the Federal Rules of Criminal Procedure recognize the desirability of joining counts based on the same conduct or on parts of the same scheme by including a permissive joinder provision. FED. R. CRIM. P. § 8(a).

83. 17 Ind. App. 524, 45 N.E. 678 (1896); note 17 *supra* and accompanying text.

84. 64 Ind. 250 (1878).

85. For Indiana cases in which a joinder provision would possibly have permitted only one prosecution, see, *e.g.,* Cambron v. State, 191 Ind. 431, 133 N.E. 498 (1922) (Prosecution for larceny and prosecution for burglary with intent to steal the same goods); State v. Reed, 168 Ind. 588, 81 N.E. 571 (1907) (Prosecution for selling liquor

There are Indiana cases where the joinder procedure has been voluntarily employed by the prosecutor. For example, in *Pivak v. State*,[86] a consolidated affidavit charged two offenses: possession of intoxicating liquor, and feloniously transporting [the same] liquor in an automobile. A conviction was obtained on both counts and affirmed on appeal. Likewise, in *Thompson v. State*,[87] the defendant was tried and convicted for unlawful possession of intoxicating liquor and maintaining a common nuisance at one prosecution. The offenses were based on the same facts.[88] As the above examples indicate, a required joinder rule, while providing a procedural safeguard against successive harassments for the same acts or activity, would apparently not place any appreciable burden upon the state.[89]

While the required joinder would alleviate present abuses of defendants by eliminating the possibility of several prosecutions for the same criminal conduct, further reform would appear to be desirable in order to prevent the substantive abuse of the imposition of several punishments for the same acts. Since, as illustrated by the *Thompson* and *Pivak* cases, the advocated reform would undoubtedly lead to a greater use of the multiple count affidavit or indictment, the defendant could still be subjected to double punishment for the same conduct if an unlimited use of consecutive sentencing is continued.[90] Under present sentencing practice, a prosecutor operating within a required joinder could prosecut a defendant on several counts, each count being based on the same acts, but on a different statute, and obtain a conviction and punishment on each count.[91] A statute requiring multiple sentences to run concurrently, except in certain extraordinary cases, would guard against such a possibility. For example, it could require that multiple sentences run concurrently if any one of the sentences is for a felony, but allow cumulation of sentences for misdemeanors up to one year. Exceptions to the rule might be cases involving habitual offenders, hardened criminals, or dangerously insane persons.[92]

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to intoxicated person and prosecution for giving liquor to intoxicated person based on same conduct); State v. Elder, 65 Ind. 282 (1879) (Prosecution for murder and prosecution for causing a miscarriage based on same acts).

86. 202 Ind. 417, 175 N.E. 278 (1931).

87. 89 Ind. App. 555, 167 N.E. 345 (1929).

88. *Accord*, Reese v. State, 89 Ind. 378, 165 N.E. 780 (1929).

89. For other examples of voluntary joinder of counts by Indiana prosecutors, see Steffler v. State, 230 Ind. 557, 104 N.E.2d 729 (1952); Carter v. State, 229 Ind. 205, 96 N.E.2d 273 (1951); Kokenes v. State, 213 Ind. 476, 13 N.E.2d 524 (1938).

90. Notes 86-88 *supra* and accompanying text.

91. *Ibid.*

92. MODEL PENAL CODE §§ 7.04, 7.06.

In summary, the suggested improvements would protect criminal defendants against the imposition of multiple consequences for the same conduct—even though the rules of former jeopardy continue unchanged. While a defendant would still be subject to multiple convictions for the same acts under the narrow Indiana former jeopardy doctrine, successive prosecutions of the same defendant for the same acts would be prohibited by the procedural device of the required joinder. Double punishment for the same criminal conduct would be precluded by the requirement that sentences imposed for multiple convictions run concurrently. Further relief from the substantive operation of the former jeopardy tests would be afforded by the addition of the defense of res judicata. These reforms, if perfected, would seem to bring the administration of criminal justice into conformity with the stated objectives of the doctrine of former jeopardy.

APPELLATE REVIEW BY EXTRAORDINARY WRIT IN INDIANA

The courts of Indiana have developed a complex body of case law governing the use of extraordinary writs to review the acts, orders, and judgments of inferior courts.[1] The Indiana cases state general require-

1. Mandamus originated in England for the King's use under guise of a court order. HIGH, EXTRAORDINARY LEGAL REMEDIES, § 2 (2d ed. 1884) (hereinafter cited as HIGH); FERRIS, THE LAW OF EXTRAORDINARY LEGAL REMEDIES, § 187 (1926) (hereinafter cited as FERRIS). The purpose of the writ was to prevent the miscarriage of justice by the courts or other public officials; it was granted where there was no other remedy available and "in justice there should be one." HIGH, p. 4. The nature of the writ of mandamus at this time was therefore highly prerogative in that it issued at the will of the sovereign. Indeed, the King often sat in his court and issued the writ in person, and after this practice was abandoned, the court continued the fiction that the King was still present in his courts and the writ was issued in his name, and by his authority. HIGH, § 3; FERRIS § 189.

The writ of prohibition developed as a device by which the King's Bench controlled the authority and jurisdiction of the ecclesiastical courts, and it is generally considered as pertaining primarily to questions of jurisdiction. HIGH §§ 764, 767; FERRIS §§ 304-05.

The history and nature of the writs in America is not the same as their English predecessors'. In crossing the Atlantic, the writs lost their prerogative nature to a great extent. Since the sovereignty rests with the people in the United States, the courts were not able to create for the purpose of giving the writs their prerogative nature the fiction that it was an uncontrolled sovereign issuing the writs. HIGH § 4; FERRIS §§ 189, 304. Therefore, the writs were considered subject to the requirement that court orders be based on authority of the law. The idea that the writs might not be subject to the ordinary rules and limitations of law did not fit in with the political attitude of America at that time. This is not to say that the writs lost their extraordinary nature, but merely that the remedies afforded by the writs became a matter of right under certain circumstances.

Even though these writs are no longer considered prerogative, they are both still