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"Double Jeopardy: A Case Study in the Influence of Christian Legislation"

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The present era in Western civilization progressively exhibits the undeniable necessity for the Christian faith to exercise a reforming effect throughout the many aspects of human culture. The obvious decay of morality and leadership in our day can be arrested only by the salt of the earth. Until the light of the world is uncovered and set on a hill, the darkness of political and judicial evil will be undaunted, and oppression will not be reproved. At the present time, when the suicidal direction of secular humanism is becoming so evident, the Christian is called to a self-conscious and diligent reconstruction of every area of life, including judicial principles and law, on a biblical foundation. The sovereign reign of Jesus Christ must extend to the ends of the earth, instructing judges to be wise, to serve the Lord with fear and put their trust in Him.

However, the author was recently impressed with the degree to which many quarters of Christendom are unprepared to disciple the nations in whatsoever Christ has commanded. In the specific area of applying God's word to all of life in order that righteousness might be manifest in whatsoever we do (unto God's glory), that every human activity be surrendered to the Lordship of Christ, that there might be a social realization of the standards of justice, that even the political and judicial realms might render unto God the things that are God's, we as disciples of Christ are often so far from being ready to carry out our task. Now, as always, ignorance and misguided thinking can be such an obstacle to running the race set before us! To many who observe us from outside, we might appear on many points to be the blind leading the blind. The Christian simply cannot, without detriment to the cause of the Kingdom, fail to do his homework. Here we must be scribes of God's word, every jot and tittle; we must be wise to discern the godly application of the whole word of God to the contemporary situation in which we need direction and reformation.

Throughout history the Christian church has exercised an underlying effect on the course of culture, notably the socio-political and judicial realms. God's law has been, explicitly and implicitly, taken as the directive for human law, thereby laying the crucial foundation for Western civilization and its advance. There is a wealth of learning to be gained by the Christian who will be studious in exploring the roots of modern-day legislation. Contemporary reformation of society should be carried on in full knowledge of God's directives, current problems, and Christian applications in the past. It should also be encouragement to present-day believers to see the remarkable sway which God's word has had in culture over the years as a result of Christian discipling and education. Others have gone before us, cutting a deep and wide swath.

What is discouraging today is to observe many bodies of believers which think and act in terms of a radical dichotomy between the Christian faith and public life outside the walls of worship. Water-tight compartments are assumed or imposed. Further, sometimes associated with this reductive

attitude toward God's revealed word and sometimes not, one can sadly detect a lack of historical self-consciousness and inexperience in God's law among believers (including oneself: Matt. 7:3-5). These are pervasive problems, and even the otherwise most sound of theological groups can be infected with them. When a problem creeps into the most dependable organizations or denominations, how much more is to be found in the lesser! Christendom has known such unhappy days. I have had occasion to hear the following line of thought among members of a higher ecclesiastical judicatory with respect to a trial conducted in a lower court of the church: "although the defendant was legally acquitted by a properly constituted court which acted conscientiously in consideration of the evidence, nevertheless if we are not satisfied with the verdict we may (in the name of "justice") try the defendant over again at the higher level." In reply to the consideration that such a procedure would transgress the commonly recognized prohibition of double jeopardy, some were willing to dismiss the well known principle as contrary to Christianity and a device of unbelieving or civil jurisprudence. According to them, in the church it need not be recognized or adhered to. Such an attitude, while perhaps not ill-motivated, is nonetheless a somber indication of retrogression in Christian thought and prompts us to study the subject of double jeopardy anew. In so doing, we aim to learn and have illustrated the crucial reforming influence of the Christian gospel in Western history. The above-mentioned incident is but a remote trigger for our present reflection; the object of our study and concern is exclusively the landscape into which we have been catapulted.

It will become apparent that to despise or neglect the principle (or prohibition) of double jeopardy because it is a mere maxim of civil (alias, secular) jurisprudence is to repudiate the religious foundation crucial to Western civilization and to act in dangerous ignorance of the historical origin of that principle in Christian legislation.

The Concept of Double Jeopardy

What do we mean by "the principle (or prohibition) of double jeopardy"? In legal parlance, it also goes under the name of "former jeopardy." About this term the CORPUS JURIS SECUNDUM says, "'former jeopardy' is simple language to denote a guaranty that one who has had a fair trial according to law and established legal procedure shall not again be placed on trial for same offense."[1] Martin Friedlander writes in his study of the subject, "No other procedural doctrine is more fundamental or all-pervasive. 'At the foundation of criminal law', wrote Rand J. of the Supreme Court of Canada, 'lies the cardinal principle that no man shall be placed in jeopardy twice for the same matter...'."[2] The doctrine is incorporated constitutionally (e.g., New Jersey: "once a person is tried on a charge specific in nature and in character, such person may not be tried again on the same charge"), and there is page after page of abbreviated annotations of cases where the court's decision was explicitly predicated on this principle.[3]

In virtue of the very nature of legal adjudication and its presupposed authority, double jeopardy cannot be permitted. Prior judgment in its own nature is conclusive of a subject matter, leaving nothing for subsequent adjudication, and is thus in itself a bar to second prosecution.[4] The substance of a trial puts the matter to rest irrespective of who dissents from the verdict; otherwise, the authority of the judge was a sham, a legal rationalization for doing whatever you wanted to do in the first place. "Rule against double jeopardy forbids a second trial for the same offense regardless of whether accused was convicted or acquitted at the former trial"; thus "double

jeopardy does not depend upon the RESULT of trial, but upon the FACT of trial."[5] If this holds for those who have been convicted, how much more would it apply to those who have been acquitted! "The defense of former jeopardy will be available to accused whenever he has already gained acquittal for the same offense. Under the Fifth Amendment, a verdict of acquittal is final, ending the accused's jeopardy; once a person has been acquitted of an offense he cannot be prosecuted again on the same charge."[6]

The Exteny and Rationale of the Principle

When this prohibition against double jeopardy is not adhered to, the door is wide open for unrestrained tyranny on the part of the governing authority. "Doctrine of double jeopardy is nothing more than the declaration of ancient and well-established public policy that no man should be unduly harassed by state's being permitted to try him for the same offense again and again until desired result is achieved."[7] Therefore, the principle does not depend on the court's whim or evaluation: it applies whether or not the court is satisfied with the conviction, and no appeal can be allowed even when the acquittal seems erroneous to some.[8] "No matter how irregular the proceedings have been, one who has been tried in a competent court and acquitted on the merits cannot be placed on trial again for the same offense."[9]

Moreover, the prohibition of double jeopardy cannot be evaded by making recourse to a higher or more general jurisdiction. "A conviction in a court of limited jurisdiction will bar subsequent proceedings in a court of general jurisdiction, provided the former proceedings were in good faith."[10] The argument of dual-sovereignty over a person is a subterfuge, substituting artificial reasoning for basic rights, says J.A.C. Grant.[11] This observation is sanctioned historically: "an acquittal in any court whatsoever, which has a jurisdiction of the cause, is as good a bar of any subsequent prosecution for the same crime, as an acquittal in the highest court," wrote Hawkins in 1726.[12]

Because the protection against double jeopardy is so strong, overbearing states have in the past resorted to various tricks to prevent its application (for example, dismissing the jury in order to present later a stronger case against the accused). Such was put to end by statute in England as early as 1698.[13] On the other hand, to prevent criminal abuse of this protection, it has been established that one is not entitled to the plea of double jeopardy unless the prior proceedings were valid and the trial was according to law.[14]

As we have noted above, the key rationale for the double jeopardy principle is that of RESTRAINT ON THE GOVERNMENT and PROTECTION OF INDIVIDUAL RIGHTS. Jay Sigler declares in his thorough study of this legal maxim: "The original purpose of the concept of double jeopardy was to diminish 'the danger of governmental tyranny' through repeated prosecutions for the same crime."[15] The CORPUS JURIS SECUNDUM puts it well in saying:

The prohibition against double jeopardy is a doctrine or concept designed to restrain the sovereign power, and to prevent the government from unduly harassing an accused. It is designed to protect an individual from being subject to the hazards of trial and possible conviction more than once for an alleged offense; and the idea underlying the doctrine is that the state, with all its resources and power, should not be allowed to make repeated attempts to convict an individual for an alleged

offense, thereby subjecting him to embarrassment, expense, and ordeal, and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[16]

History witnesses the fact that this principle has been opposed in the name of centralized power and totalitarianism. For instance, when Thomas Coke [pronounced "Cook"] completed his SECOND INSTITUTES OF THE LAWS OF ENGLAND, which set forth the full expanse of English common law (inclusive of the important doctrine of double jeopardy), he was bitterly attacked by Thomas Hobbes, the promoter of political absolutism (cf. LIVIATHAN); Hobbes complained, in his "Dialogue between a Philosopher and a Student of the Common Laws of England," that Coke had undermined the authority of the king.[17] Of course, the truth of the matter is that a prohibition against double jeopardy -- just as with all constitutional guarantees -- serves to restrain the monarch, which is intolerable to dictators.

Therefore, the prohibition of double jeopardy is crucial to civil liberty, individual rights, and political confidence. A domineering state must be restrained so that personal rights, liberties, and safeties are guarded. "It has been said that the right not to be put in jeopardy a second time is as essential as the right to a trial by jury, if not more important."[18]

Special Revelation

God's law everywhere presupposes the principle of double jeopardy as a dictate of just dealing with men. No one can simply assume the right to come into judgment over another; the prerogative to judge another man must be delegated (2 Sam. 15:4; Ex. 2:14; cf. Acts 7:27,35). Consequently, to bring a man into trial and stand in judgment over him with the threat of punishment to him, one must have divine authorization for this kind of activity. Moreover, to go beyond this judgment and make a man submit to ordeal again in the courts is a FURTHER KIND of judgment which must be sanctioned by God's word. That is, the burden of proof rests on those who would transgress the prohibition of double jeopardy to adduce authorization for their judgmental activity; without it they would be arrogating to themselves authority which does not belong to them. The juridical procedures we follow must conform to the directives of the Divine Lawgiver if justice is to be realized, and thus double jeopardy is illegal unless provided for in God's word.

This general point can be seen in another way. The infliction of punishment against a person presupposes a lawful trial to determine his guilt or innocence; otherwise the "punishment" is nothing more than culpable persecution of some group against a particular individual. It is uniformly recognized that Scripture prohibits a double infliction of punishment (e.g., the substitutionary atonement of Christ rests on this cardinal point with respect to eternal judgment). Therefore, double trial (i.e., double jeopardy) is ruled out; a man once tried and sentenced is not be subjected to further trial for the same offense. Otherwise the biblical restriction of forty stripes (Deut. 25:3) would be senseless; through retrial for the same crime a man could REPEATEDLY be given sets of forty stripes. Thus double trial is forbidden. Now, if this protection is extended even to the guilty, to those convicted of offense, HOW MUCH MORE should the protection be afforded to those who are acquitted as innocent? To grant this security to the convicted and withhold it from the innocent would indirectly constitute showing respect unto the wicked and a

double standard of treatment (cf. Deut. 25:13-16). Therefore, to violate the prohibition of double jeopardy is to run counter to underlying principles of biblical justice.

A new trial against an acquitted person must be founded upon concrete scriptural authorization for such an activity. But no such authorization is to be found. Absolute justice can be done only by the sovereign Lord over all creation; He alone sees perfectly the conditions of men's hearts, the circumstances of their actions, and the moral quality of their behavior. Man, as God's creature, is not called upon to do justice in the way which God alone can, for man has not the prerogatives of the Creator. Instead, men are required to do JUSTICE UNDER LAW -- that is, to bring rectitude into human conditions in accordance with the wise directions of God for judicial affairs. To attempt to realize "justice" apart from the law of God, which alone defines justice for us, is delusion at best and deceit at worst. Thus those who would (in the name of justice) permit placing men in double jeopardy for alleged offenses must demonstrate that the law of God permits such a procedure. Without that authorization the locus of authority in legal matters has shifted from God to man, which opens the door to unrestrained tyranny (cf. Neh. 9:34-37; Prov. 28:16,28; Isa. 10:1-2; Ezek. 28:2; Hos. 5:10).

Scripture illustrates for us that, in terms of the common legal practice of the Old Testament, one who had received an unfavorable verdict had the right to protect himself by appeal to a higher court; however, after a FAVORABLE verdict has been reached, the accused was not to be touched or harassed any longer (2 Sam. 14: 4-11). When no sentence had been delivered in a case which was too difficult for the judges to try, the matter could be referred to a higher court. However, once a verdict had been reached, the judgment was WITHOUT APPEAL. Indeed, it was grave presumption and a capital crime to deviate from the verdict of the judge (Deut. 17:8-13). This means that when an accused is acquitted, is justified or declared righteous in a properly constituted court of law, it is highly immoral to disregard the judgment rendered and bring him into trial again. Only in the case of known prejudice or bribery might a verdict be challenged and the trial deemed invalid (cf. Deut. 16:18-19; 2 Chron. 19:7).

Two concrete examples of the protection afforded to those who have been legally acquitted can be found in the cases of accusation of unchastity and murder. If a man brought a charge of premarital promiscuity against his new wife and it was legally established that she was innocent, the case was terminated with qualification. The slanderous husband could not appeal the verdict and bring his wife into judicial jeopardy again; "he may not put her away all his days" (Deut. 22:13-19). Another example of protection against double jeopardy is clearly seen in the legislation about cities of refuge in God's law. A man who had slain another was to flee to a city of refuge for protective custody until he could stand for judgment in the courts (Num. 35:12, 24). If the verdict turned out that he was a willful murder, his life could not be spared (Deut. 19: 11-13). However, after declaring his cause before the elders of the city and he is acquitted, then he is thereafter completely released from jeopardy for the crime; the accuser cannot pursue the matter further, appeal the verdict, or inflict anything upon the accused. When it is legally established that he is guiltless, the man is delivered out of the hand of the avenger of blood, the avenger is not given any further recourse against him, and the acquitted is to be restored to his own land and home in complete safety (Num. 35: 25, 28; Jos. 20:4-6). In terms of God's righteous ordinances, the jeopardy of an accused terminates upon a favorable verdict (at any level of the legal system).

In terms of the procedure prescribed by God to be followed in the earthly courts of Israel[19] and which forms the analogical background to the theological doctrine of justification, the authority of a judge was paramount. To disregard his judgment was to dishonor his office as well as to undermine the prerogative of one who judges in earthly matters for the Lord. If his judgment of acquittal were to be as a matter of course laid aside and another trial pursued, then (1) the authority of the previous judge would be hollow not hallowed and his trial would be a pointless performance preceding the genuinely authoritative judgment (which is contrary to the whole rationale for graded courts, since lower courts would cease having a meaningful function), but (2) then the authority of the next-highest judge could likewise be spurned as a sham, and on and on, so that (with the implicit undermining of the authority of the judges who declare verdicts) the entire legal system would be a trivial game and the jeopardy of the accused would never end during his earthly lifetime.

Such is contrary to the whole spirit of civil justification in God's law. When a case was brought before a judge, he was deemed the helper or redeemer of the wronged party; both the accused and accuser stood before him (Deut. 19: 17) because ONE of them was a guilty party who would have a prescribed punishment meted out against him for the crime which was alleged. If the accused was found guilty, he was punished; if the accuser was found false, then that same punishment became his own (vv. 18-21). Here is PRACTICAL indication of the protection against double jeopardy, for the accuser is NOT deemed free to continue his slandering activity but is rather PUNISHED in the place of the accused. The acquitted man was released, and the party which brought false accusation was now the guilty one. Hence a judge was the redeemer of the wronged party (either the alleged wrong for which trial is held, or the wrong involved in false accusation). (Notice the instructive parallel to God, the righteous Judge, who is called upon by the accused to right the wrong against him: Ps. 43: 1.)

In ancient Israel the judge's duty was not only to hear the case and pronounce a just verdict (declaring the right for one or the other party), but also to see to it that the judgment is recognized and adhered to publicly. The verdict was to be accepted by the parties to the trial as well as by everyone who hears of the judgment, thereby bringing public praise or "justifying" the judge who justified one of the parties (cf. Ps. 51: 4; Lk. 7: 29, 35). The righteous judge is responsible for seeing to it that his judgment is executed and generally acknowledge; he brings his verdict or judgment to completion. Without this might, the right of the judge would be impotent. This again points up the release from jeopardy once an accused party has been acquitted; to bring him into judgment again for the same alleged offense is a contradiction of the whole legal system and the practice of judicial procedure. The judge would enforce his verdict of innocence, punish the slanderously guilty party, and redeem the wronged party from further oppression. Renewed jeopardy is unthinkable. The real authority of the judge (even in a lower court) entailed the prohibition of double jeopardy; the FACT of judgment left nothing more to be adjudicated.

General Revelation

The doctrine of double jeopardy is a matter of ancient common law. General revelation has taught it as a dictate of fairness even to pagans. As Friedlander says, "An analysis of the history of double jeopardy shows that the concept is as old as the common law itself."[20] "The doctrine is nothing

more than the declaration of an ancient and well-established policy"; "it simply always existed."[21]

The doctrine that no one shall be twice put in jeopardy for the same offense is ancient, being embedded in the common law and incorporated in most constitutions in this country... The prohibition against double jeopardy ... is a sacred principle of criminal jurisprudence, and is part of the universal law of reason, justice, and conscience... [It] is embedded in the very elements of the common law...[22]

Therefore, it is significant that even those who were without God's special, redemptive, written revelation of the law still recognized the moral imperative of the doctrine of double jeopardy. For example, we can look to ancient Greece. "The main concern of a man brought into court was to win a verdict by one means or another, for once tried he could not be prosecuted again on the same charge, the rule NE BIS IN EADEM RE being accepted in Athens."[23] In 353 and 355 B.C., Demosthenes declared: "The law forbid the same man to be tried twice on the same issue... The legislator does not permit any question once decided by judgment of the court to be put a second time."[24]

The prohibition against double jeopardy prevailed in Roman law as well, the doctrine of RES JUDICATA being integral to its system of justice.[25] Under the Roman Republic, appeal was allowed under conviction, but an acquittal completely ended the matter.[26] Both Cicero and Gaius noted the important maxim of civil procedure in their day that the same thing could not again be brought into court.[27] Thus the unregenerate have still recognized the injustice involved in retrying a man who has been formerly acquitted.

Paul tells us in Romans 2: 14-27 that the Gentiles who have not the law of God do the things of the law by nature, the work of the law being written on their hearts and their consciences bearing witness. Hence those who have the written law and yet do not live up to it as well as the Gentiles dishonor God's name, showing the people who claim that name to be less moral than God's enemies. In such a case the lawful pagan will judge the transgressing Jew!

Paul also says that the church should be able to enact justice in law suits BETTER than the unbelieving magistrates, in which case there is no need for Christians to go to pagan judges in order to receive fair treatment and honest judgment (I Cor. 6: 1-6). Consequently, for the church to despise such a basic and common principle of fair jurisprudence as the prohibition of double jeopardy with a (sneering) reference to it as "a mere matter of secular law" would be unfitting to its calling and the name of the righteous Lord which it claims; it would be to ride roughshod over the law which unbelievers yet honor and keep. Dictates of general revelation ought to be the more firmly adhered to by Christians (with the advantage of special revelation and Spiritual enlightenment) than by pagans. The church should be, not simply AS JUST, but more just than the civil courts, for otherwise the believer could have no confidence in Paul's exhortation in I Corinthians 6. Therefore, leaders of the church cannot properly act upon the principle that precludes anything which is recognized in civil courts; such would deny general revelation and unwittingly move away from the minimal standards of fair play apprehended by the unbeliever.

The Origin of the Doctrine in Christian History

Throughout history there have been those who have violated the principle of double jeopardy (e.g., Greek prosecutors often sought loopholes to get around it, and certain Roman dictators turned it aside).[28] But the church has not added its name to this infamous company. Rather, the doctrine has progressed in clarity and consistency of expression under those with the benefit of special revelation, reaching its climax in early Christian America. The best elaborations of the doctrine of double jeopardy did not come with the ancients; they were realizing simply an imperfectly received ethical principle of general revelation. The doctrine came into proper expression in the course of Western civilization THROUGH THE CHURCH as it expounded the law of God. It has been developed as a piece of explicitly CHRISTIAN LEGISLATION. For the church today to turn aside this cardinal doctrine of jurisprudence would be retrogression with respect to the historical extension of Christ's kingdom and all that He has commanded in the area of civil law and administration. It would be to backslide from its own historical accomplishment.

Legal historians trace the principle of double jeopardy in Western law to the church (e.g., Pollock and Maitland, A HISTORY OF ENGLISH LAW).[29] In his chapter, "The History of Double Jeopardy," Sigler writes: "In EARLY CHURCH LAW ... there arose the principle that God does not punish twice for the same transgression,"[30] and Friedlander writes that the adoption of the doctrine in English law stemmed "from ECCLESIASTICAL LAW."[31]

The canon law of the church comprised those dictates which, being based upon God's word, the church authoritatively imposed in matters of faith, morals, and discipline. It accumulated from the church's pronouncements, the CORPUS developing gradually from the CANONS handed down by the councils (beginning especially with the twenty miscellaneous canons decreed at Nicea in 325 A.D.). Sigler declares, "The canon law, which began its development at the close of the Roman Empire, opposed placing a man twice in jeopardy."[32] The well known maxims, "Non Judicabit Deus Bbis in idipsum" and "Nemo bis idisum," were the foundational principles upon which the church based the prohibition of double jeopardy.[33] "The maxim was well known in ecclesiastical law. It stems from St. Jerome's commentary in A.D. 391 on the prophet Nahum: 'For God judges not twice for the same offense.'"[34]

Justinian was a Christian emperor, a champion of orthodoxy, and a promoter of Christian missionary advance. He attempted to restore the older glories of the empire on a Christian basis. Thus he set out to revise, purge, order, and expound a civil law for the empire. This came to expression in the CODE OF JUSTINIAN (529 A.D.) and the CORPUS JURIS CIVILIS (533 A.D.). "The concept of double jeopardy ... no doubt stems from its adoption in Justinian's CORPUS JURIS CIVILIS in later Roman law"[35]; "the principle of double jeopardy ... found final expression in the THE DIGEST OF JUSTINIAN as the precept that 'the governor should not permit the same person to be again accused of a crime of which he has been acquitted.'"[36]

The maxim was cited in the Council of Mainz in 847 and again in the Council of Worms in 868.[37] The principle became explicit in later English law due to the controversy between Henry II and the Archbishop of Canterbury, Thomas a Becket.[38] The influence of Christian leaders in English courts is well known; in Becket's own day bishops and archdeacons often presided in lay courts.[39] The double jeopardy argument was Becket's main thrust against clause III of Henry's 1164 A.D. Constitutions of Clarendon; Becket contended that Henry's proposal "would violate the maxim NEMO BIS IN IDIPSUM... The maxim was well known in ecclesiastical law."[40] One

cannot underestimate the importance of this controversy, for it "was primarily responsible for bringing about the adoption of the concept of double jeopardy in the common law."[41]

Therefore, the maxim which was deeply rooted in canon law from the fourth century, cited in Church councils of the ninth century, and expounded in the ancient Justinian Code was Becket's argument against the kind. The doctrine of double jeopardy became a distinct and explicit principle of English law from CHURCH LEADERS who were urging CHRISTIAN CANONS. This foundational element of Western liberty from tyrannical monarchs owes its origins to the Christian church! The statutory development of the doctrine follows upon this Christian impetus. The Statute of Westminster (1281) restrained repeated prosecution; a defendant who had been acquitted could, on this basis, bring a suit of malicious prosecution against his appellors who tried to re-prosecute the case. The thirteenth century work, THE MIRROR OF JUSTICES protects against double jeopardy, specifically calling it an "abuse." In 1346 it was reaffirmed that an acquittal on an indictment was a bar to the suit of the accusing party who seeks an appeal from the verdict. The fifteenth century saw the specific decree that "an acquittal on an indictment was a bar to a prosecution for the same offense by appeal." The Yearbooks of 1443, 1477, and 1494 - the period when modern criminal procedure was developing -- afford protection from double jeopardy. The maxim is found in the actual transcripts of court decisions from 1588 and 1589. "The last half of the seventeenth century was a period of increasing consciousness of the importance of double jeopardy. Perhaps this was due partly to the writings of Lord Coke and partly as a reaction against the lawlessness in the first half of the century ... And in 1660 the Court of King's Bench held that the prosecutor had no right to seek a new trial after an acquittal." Sir Edward Coke (1552-1634) was the great English jurist of his day, enunciating the doctrines of personal liberty and championing the Parliament against the King. The full expanse of English common law was set forth in his INSTITUTES. According to Sigler, Coke is thereby "a fountainhead of double jeopardy law." What Coke displayed was that the defense had only to be employed once in a man's lifetime against a particular accusation, "being a remnant of the fading jurisdiction of the church courts." Finally, Sir William Blackstone's COMMENTARIES ON THE LAWS OF ENGLAND (1765) reiterated Coke's work and set forth double jeopardy as a universal maxim. (It is noteworthy that Blackstone's work was the single most influential work in the elaboration of American jurisprudence at the time of the war for independence with England.)[42]

American Developments

Having traced the doctrine of double jeopardy from the canon law of the Christian church, into the Justinian code, through Church councils, to its explicit expression in Becket's argument based on ecclesiastical law (with the ensuing historical elaboration of the law in explicit English legislation), we come to the most significant phase of its historical development, namely, its overtly Christian legislation in early America. The doctrine of double jeopardy was refined and expanded, and then given its clearest exposition and most consistent application under the Christian leaders of the colonies. It was carried from them into the very constitution of the new country.

Sigler tells us that the "American formulation of double jeopardy began with the Massachusetts colony."[43] This is in itself noteworthy when one recalls the nature of the early Massachusetts settlement. In 1630 John Winthrop and a thousand others came to Massachusetts to escape the persecution of Charles I and William Laud against the Puritans; later twenty thousand others joined

them in Massachusetts in an attempt to establish a genuinely godly civil government. "They wanted a government that would take seriously its obligation to enforce God's commandments."[44] This desire is well illustrated in the career of John Cotton, who authored at least two civil codes taken from the Mosaic Law in a predominant fashion. On December 10, 1641 the Bay Colony adopted a biblically based civil code authored by Nathaniel Ward, a Christian pastor from Ipswich who had formerly studied at Cambridge and practiced law for ten years in England; this BODY OF LIBERTIES was given Scriptural annotations by John Cotton.[45] So then, the colony found a satisfactory blend of civil legislation and biblical law, and it came by way of the efforts of CHRISTIAN pastors.

It is to this BODY OF LIBERTIES that America traces its adherence to the doctrine of double jeopardy. "Provision was made that men should not be sentenced twice for the same offense by the civil courts in the BODY OF LIBERTIES of 1641, which was composed by Nathaniel Ward under the direction of Governor Bellingham and the General Court."[46] The BODY OF LIBERTIES explicitly stated that no laws were to be prescribed which were contrary to the word of God, and any which could be shown to conflict with God's word would be withdrawn -- thereby testifying that its legislation was based on God's revealed law.[47] The doctrine of double jeopardy was clearly expounded in the code and applied in terms of biblical presuppositions.[48] In the section on "Rights, Rules, and Liberties Concerning Judicial Proceedings," at heading 42 we read: "No man shall be twice sentenced by civil justice for one and same crime, offense, or trespass."[49] That the Puritans held to this scriptural position firmly and consistently is evident from their 1660 BOOK OF GENERAL LAWS, a summary of court rulings for that time: "It is ordered, and by this court declared, that no man shall be twice sentenced by civil justice, for one and the same crime, offense, or trespass."[50]

The MASSACHUSETTS CODE of 1648 was a complete statement of laws, privileges, duties, and rights for the colony, being based on the earlier BODY OF LIBERTIES. The CODE "was the first comprehensive code of laws in the New World,"[51] and it provided the prototype and original content for the legislation of every other state constitution.[52] There we read "every action ... in criminal causes shall be ... entered in the rolls of every court ... that such actions be not afterwards brought again to the vexation of any man."[53] Therefore, Sigler rightly observed, "Thus, Massachusetts law helped serve as a conveyer of the double jeopardy concept to those other colonies ... [and] laid the groundwork for the eventual adoption of double jeopardy as a constitutional protection."[54] There is clear evidence of the application of double jeopardy protection in the early years of the colonies (e.g., VIRGINIA COLONIAL DECISIONS 1728-1741; LAW ENFORCEMENT IN COLONIAL NEW YORK 1694-1731) where it was heard to be "oppressive, contrary to the spirit of government and the dictates of law and reason."[55] An eloquent opinion of a 1788 Pennsylvania court declared in ringing terms: "By the law it is declared that no man shall be twice put in jeopardy for the same offense; and yet, it is certain that the enquiry, now proposed by the Grand Jury, would necessarily introduce the oppression of a double trial. Nor is it merely upon the maxims of law, but i think, likewise, upon principles of humanity, that this innovation should be opposed." Likewise, a 1783 Connecticut decision upheld the prohibition of the second trial of a citizen once he had been acquitted.[56]

With such a pervasive and consistent adherence to the doctrine of double jeopardy it was naturally adopted as a fundamental right in the United States Constitution from the very outset (see the Fifth

Amendment). In June of 1789, the following amendment to the Constitution was introduced in the first session of the House of Representatives: "No person shall be subject ... to more than one punishment or trial for the same offense." James Madison was a Christian of reformed persuasion who had earlier studied under John Witherspoon, the first president of the college of New Jersey (later, Princeton). Madison was a thorough student of Scripture and recognized as such by the time he was twenty-three years old when he studied a year longer than most other students at the College of New Jersey. Madison staunchly maintained that every area of human endeavor was to be subject to God's revealed direction. Thus he once declared that human law must be evaluated against the standard of God's own law.[57] It was Madison who led the argument in favor of the necessity of including a bill of rights in the Constitution and recommending it to the States. In the 1789 meeting of Congress where the subject of the Bill of Rights was broached, "Madison moved his own propositions by way of a series of resolutions permitting the House to do what they thought proper. His propositions included the substance of the double jeopardy concept ... To Madison must be credited the idea of including double jeopardy in the federal Bill of Rights."[58] Hereby the prohibition against double jeopardy became an outstanding and inviolable principle of American jurisprudence, one of the fundamental protections enjoyed by all Americans and a continuing restraint on the potentially tyrannical power of the Federal and State governments. One can hardly think of America and its landmark stand for individual liberty and limited government in the founding days without recalling the sterling call of the colonists and adopters of the Constitution t forbid the government ever to bring a man to trial twice for one and same alleged crime.

Conclusions

The influence of God's revealed law on Western jurisprudence is undeniable; illustrations of it are abundant. In particular we have in this study observed the effect of Christian ethics on the specific question of double jeopardy. This cardinal principle of judicial process is fundamental and all-pervasive in American civil law. The fact that a lawful trial has been completed brings litigation to final termination; the acquitted is not to be further harassed. This protection is not contingent upon complete regularity of proceedings, nor does it apply solely at the highest level of adjudication. Any lawful acquittal in a court of competent jurisdiction bars further prosecution at any level (provided bribery cannot be proven).

The prohibition of double jeopardy is embedded in the Old Testament law of God, both in terms of underlying principles and in specific legislation. The doctrine was recognized, as a matter of general revelation, even among the ancient Greek and Romans. Paul instructed the church of Christ to be even more competent than the pagans when it comes to law suits; judicial fair play must be displayed with full clarity in the church -- which means the church must wake up and think straight with respect to crucial doctrines like double jeopardy, not automatically precluding it merely because it is adhered to by civil officials. Of course, it is to be recognized that ecclesiastical and civil jurisprudence are not in all respects identical; where they diverge reflects the difference in the USE and AIM of the two courts. the church looks upon conversion as highly relevant, and it sees repentance as the end of discipline for a Christian. However, the state has no right to be a respecter of persons or to consider the state of a man's heart. Hence there are differences as to when judicial proceedings are to be engaged, where they end, and the final end in mind. Yet when the courts ARE to be used, there are PRINCIPLES OF JUSTICE AND FAIR PLAY which apply in them BOTH. The prohibition of double jeopardy is one of these stipulations of justice in human affairs.

The prohibition of double jeopardy is central to individual rights and protection from unrestrained despotism or oppression on the part of the governing authority. This basic provision assures us that we shall not be subject to continuing ordeal with respect to some accusation until the governing officials gain the outcome which they desire, irrespective of the facts which initially established our innocence.

Historically, the origin of the prohibition against double jeopardy can be traced to the ancient common laws of the church, the Christian emperor Justinian's civil code, church councils, Archbishop Becket's argument which affected the common law, the explicitly scripture-rooted civil legislation of the Massachusetts Bay colony (under the direction of Christian pastors), and the United States Bill of Rights (fostered by the reformed, biblical, scholar James Madison). It has been Christians who have borne the doctrine and imbedded it in Western civilization as a fundamental dictate of human justice. We have the church to thank for it! May it not be that the church in this day evidences regrettable retrogression by unwittingly dismissing this principle as a secular legal device. The reconstruction of society according to a godly pattern by disciples of Christ can hardly drive ahead if we are still stumbling over the ABC'S of socio-political and judicial righteousness.

[1] Corpus Juris Secundum: A Complete Restatement of the Entire American Law (in 135 volumes of c. 1000 pages each), ed. F.J. Ludes and H.J. Gilbert (New York: American Law Book Co., 1961), vol. 22, @22, p. 615.

[2] Martin L. Friedlander, Double Jeopardy (Oxford: Clarendon Press, 1969), p. 3.

[3] See Corpus Juris Secundum as well as American Jurisprudence: A Modern Comprehensive Statement of American Law (New York: CoOperative Publishing, 1965), 2nd ed., ed. G.S. Gulick and R.T. Kimbrough.

[4] Corpus Juris Secundum, p. 619 (New Jersey: State vs. Labato).

[5] Ibid., pp. 619, 642.

[6] Ibid., p. 689.

[7] Ibid., p. 616.

[8] Ibid., p. 689.

[9] Ibid., pp. 687-688.

[10] Ibid., @270, p. 695.

[11] See Grant's articles on this subject in the Columbia Law Review for 1932 and the U.C.L.A. Law Review for 1956 and 1957.

[12] Hawkins, Pleas of the Crown, 2nd ed., ii, Chap. 35, section 10.

[13] Friedlander, op. cit., pp. 12-13.

[14] Corpus Juris Secundum, pp. 647-648.

[15] Jay A. Sigler, Double Jeopardy: The Development of a Legal and Social Policy(New York: Cornell University Press, 1969), p. 15; cf. Yale Law Journal 133 (1947), p. 57.

[16] Corpus Juris Secundum, p. 620; see also Friedlander's discussion, op. cit., pp. 3-4.

[17] Sigler, op. cit., p. 19.

[18] Ibid., p.v.

[19] Cf. J. Pedersen, Israel, Its Life and Culture (London: Oxford University Press, 1954); R. de Vaux, Ancient Israel, tr. J. McHugh (New York: McGraw-Hill, 1961).

[20] Friedlander, op. cit., p. 5.

[21] "Double Jeopardy, "Minnesota Law Review 24 (1940); cf. Sigler, op. cit., pp. Vi, 2 (Oklahoma: Stout v. State).

[22] Corpus Juris Secundum, pp. 614, 616.

[23] J.W. Jones, Law and Legal Theory of the Greeks (1956), p. 148; cited by Friedlander, op. cit., p. 15.

[24] Demosthenes, trans. J.H. Vince (Cambridge, 1956) at XX:147 and XXIV:55.

[25] Jolowicz, Roman Foundations of Modern Law (1957), pp. 87-100; cf. Friedlander, op. cit., p. 15.

[26] J.L. Strachan-Davidson, Problems of the Roman Criminal Law (1912), i. Pp. 127ff., 155; ii. P. 177; cited in Friedlander, op. cit., p. 16.

[27] Greenidge, The Legal Procedure of Cicero's Time (Oxford, 1901), p. 247.

[28] Friedlander, op. cit., p. 16.

[29] Pollock and Maitland, A History of English Law, 2nd ed. (Cambridge, 1899), pp. 448-449.

[30] Sigler, op. cit., p. 3.

[31] Friedlander, op. cit., p. 6.

[32] Sigler, loc. cit.

[33] Maitland, Roman Canon Law in the Church of England (1898), p. 138; also Holdsworth, History of English Law, 7th ed. (1956), i. P. 615.

[34] Friedlander, op. cit., p. 5; see also Poole, From Domesday Book to Magna Carta 1087-1216, 2nd ed. (1955), p. 206.

[35] Friedlander, op. cit., p. 15.

[36] Sigler, op. cit., p. 2; see Digest of Justinian, Bk. 48, Title 2, no. 7, trans. S.P.Scott (Cincinnati, 1932), Vol. XVII: Civil Law.

[37] Brooke, Then English Church and the Papacy (Cambridge, 1931), p. 205.

[38] Friedlander, op. cit., p. 326.

[39] Ibid., pp. 6,328.

[40] Ibid., pp. 5,326-327; cf. Sigler,op. cit., p. 3.

[41] Friedlander, op. cit., pp. 327, 328. In 1176 Henry acceded.

[42] The preceding review of highpoints in English development of double jeopardy legislation (and quotations) has been drawn from Friedlander, pp. 13-14, 9, 6, 11, and Sigler, pp. 10, 14, 17.

[43] Sigler, op. cit., p. 21.

[44] J.M. Blum, et. Al. The National Experience (New York: Harcourt, Brace, & World, 1963), p. 23.

[45] George L. Haskins, Law and Authority in Early Massachusetts (New York: Macmillan and Co., 1960), pp. 130, 199.

[46] Sigler, op. cit., pp. 21-22.

[47] Edmund S. Morgan, The Puritan Dilemma: A Biography of John Winthrop (Boston: Little, Brown, 1958), p. 171.

[48] Haskins, loc. cit.

[49] Puritan Political Ideas, ed. Edmund S. Morgan (Indianapolis: Bobbs-Merrill, 1965), p. 187; cf. Sigler, op. cit., p. 22.

[50] Original edition (published in Cambridge, 1660), p. 67.

[51] Haskins, "Codification of the Law in Colonial Massachusetts: A Study in Comparative Law," Indiana Law Journal (1954); cf. Sigler, op. cit., p. 22.

[52] Ewing and Haskins, "The Spread of Massachusetts Law in the Seventeenth Century," University of Pennsylvania Law Review (1958); cf. Sigler, loc. cit.I

[53] The Laws and Liberties of Massachusetts, ed. Farrand (Cambridge, 1929), p. 47.

[54] Sigler, op. cit., p. 21.

[55] Ibid., p. 25.

[56] Ibid. (Respublica vs. Shaffer; Gilbert vs. Marcy)

[57] Sidney H. Gay, James Madison (Boston: Houghton-Mifflin, 1884), pp. 12, 69.

[58] Sigler, op. cit., pp. 29, 30.