

Double Jeopardy and Fairness

Joseph Grcic

Introduction

The fifth amendment to the US Constitution states that no person shall be "subject for the same offense to be twice put in jeopardy of life and limb." Known as the double jeopardy rule, it means that no one shall be tried twice for the same offense after an acquittal. Nor can the state try the same person for the same crime after a conviction with the intent of seeking a more severe punishment.

Justice Hugo Black in the 1957 Supreme Court case *Green v. United States* gave the classic justification for the rule against double jeopardy. The rationale is based on the understanding that the state, unlike individuals,

The rationale [for the rule of double jeopardy] is based on the understanding that the state, unlike individuals, has vast resources at its command to use against the accused if it wishes.

has vast resources at its command to use against the accused if it wishes. To prevent this ordeal of embarrassment, expense, anxiety, insecurity and the possibility of the innocent found guilty, the rule against double jeopardy was adopted by the federal Constitution and, later, by most state constitutions as well.

I argue against the rule of double jeopardy, and my argument consists of several points: 1.) the rule is arbitrary and irrational; 2.) it undermines the rule of law ideal; 3.) it violates equal treatment under law; 4.) the rule violates Rawls' idea of fairness and the ideal of a well-ordered society, and 5.) instead of the rule against double jeopardy, potential abuses of governmental power can be made less likely by restructuring the grand jury.

The overall argument against the rule of double jeopardy has two basic parts. One part examines the validity of the rule against double jeopardy from the point of view of the ideas of the rule of law, due process and equal protection of the laws. The second

part applies Rawls' ideas of fairness and the "original position" to the problem of double jeopardy. I consider the two approaches mutually reinforcing by bringing to light different dimensions of the controversy.

Problems with Double Jeopardy

The rule is arbitrary. The rule against double jeopardy is arbitrary and irrational. No human endeavor in an important domain is allowed only one attempt to achieve a desired goal, and to require it in such a crucial matter as justice seems arbitrary. A possibility the framers of the Constitution apparently did not consider is that in serious criminal cases two trials might be allowed in some cases while in less serious cases and civil cases, only one trial could be permitted.

Rationality means, among other elements, that beliefs should be supported by sufficient evidence and that relevant evidence cannot be intentionally ignored. Therefore, it is irrational to ignore relevant evidence in all criminal cases, especially as it applies to situations that affect the basic structure of society. The rule against double jeopardy sometimes forces the state to act irrationally by ignoring evidence that is relevant to the guilt of a person once the person has been mistakenly found not guilty by the first trial.

The rule violates the ideal of the rule of law. The ideal of the rule of law expresses the value that law is supreme and that all members of a society are subject to the law and to various consequences for violating the law. On this view, law is a system of universal normative rules governing social relations and enforceable by the political system.

The meaning of the rule of law can be clarified by distinguishing it from the 'rule of men' and the 'rule by decree.' A rule by men or persons would mean rule by whim and prejudice and as such lacks, among other factors, the consistency and predictability a modern complex society needs. A complex and diverse society implies the need for a rational legal system consisting of general rules to structure society and guide human behavior. A rational society needs consistent rules con-

sistently applied to be stable and enable individuals to make plans and carry out endeavors with some degree of security, which rule by decree cannot provide.

To be sure, the rule of law has been subject to valid criticisms from various schools of thought. We cannot discuss the entire debate here but many have been skeptical about the notion of the rule of law as too abstract, arguing that one cannot extricate law from the social, cultural, linguistic, psychological and political contexts within which it is created, formulated, interpreted and applied. Though the law is a social practice and as such malleable to some degree by these forces, with some exceptions, it is assumed here that the law generally is not necessarily totally obscured by these forces. These external forces are more a factor at the more abstract and constitutional level of legal dispute, not the more specific level of law that constitutes the majority of legal situations. To abandon the very idea of the rule of law ideal would be tantamount to abandoning the idea of a written law and would lead to rule by decree and certainly to social chaos in a modern complex society.

The rule of law suggests the need for due process or a set of necessary and sufficient conditions for correctly and fairly determining the guilt and innocence of individuals. Rawls calls the trial an instance of "imperfect procedural justice" since the goal of the process is to distinguish between the guilty and the innocent, but there is no perfect procedure that guarantees such an outcome. But clearly one can find better and worse procedures.

The rule against double jeopardy undermines the rule of law and procedural justice in at least three

The rule against double jeopardy undermines the rule of law and procedural justice. . . .

ways. The double jeopardy condition places an undue burden on the state to show the guilt or innocence of an individual in a single attempt. Given the social, institutional and personal limitations of prosecutors, juries and judges, the system fails at times and allows guilty individuals to go unpunished. For the guilty to suffer no undesired consequences reduces the power, legitimacy and effectiveness of law.

The second way in which the rule against double jeopardy conflicts with the rule of law is that sometimes prosecutors are reluctant to indict at all because of the rule. They are loath to bring charges because they are not sure if more evidence may come forth later which would make a stronger case but, if they proceed with an indictment sooner, they may not get a

conviction but would be prevented from attempting the case again with the new evidence.

The double jeopardy exclusion undermines due process since the rule does not allow the process to come to a rational completion in some cases. The process that is due must reflect the socio-economic realities of the judicial system as it relates to the desired goal just as, say, scientific method reflects the fallibility of humans in suggesting hypotheses, testing them and, if unsuccessful, formulating new hypotheses, retesting and so forth.

The rule violates equal protection. The equal protection of the laws concept, in essence, is a requirement that the law be applied consistently without respect to characteristics that are irrelevant to the purpose of the law, the determination of basic rights and duties, penalties and opportunities. What is relevant is determined by the underlying principles that inform the

Fairness, for Rawls, is key to justice and implies a correct structuring of distribution of goods and burdens that would be agreed upon and accepted by free and equal persons. . . .

system of laws and the ideal of equal protection is the requirement that the law should be implemented in a manner consistent with these underlying principles.

The rule against double jeopardy violates the equal protection clause in its implementation in a social context in two ways. First, it violates equal protection because those who have the financial resources are able to enlist the services of superior legal representation (and other personnel such as investigators, jury consultants, etc.), which enhance the chance for the guilty to be found innocent. Given a free market system of allocation of professionals such as attorneys, the private sector has in general been able to attract highly qualified attorneys and pay them more generously than the government can. As a result, the state may be at a disadvantage in criminal trials where wealthy individuals are indicted. Second, state prosecutors are often overworked and lack the experience and training the top trial lawyers from the private sector have. It seems clear that the reality of class society permeates even the court system and undermines the equal protection clause.

The rule violates fairness. Fairness, for Rawls, is key to justice and implies a correct structuring of distribution of goods and burdens that would be agreed upon and accepted by free and equal persons under the right circumstances. Rawls explains his conception of justice as fairness with his thought-experiment version of the state of nature, called the "original position." This

hypothetical choice situation is defined by three basic elements, namely, a definition of the 'people' in the original position, the "veil of ignorance" and the general knowledge he allows the people in the original position to have. The veil of ignorance expresses some of Rawls' ideas of the necessary structures of the decision-making framework for defining the nature of justice. This fictional veil is Rawls' way of specifying the relevant knowledge conditions of the original position.

The central concept in justice as fairness is the mutual acceptance and agreement of basic rules of social organization, which Rawls believes is a necessary condition for any just community. Given these conditions, Rawls believes the principles of justice chosen would be: "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all"; and social and economic inequalities are to be arranged so that they are both: "to the greatest benefit

The central concept in justice as fairness is the mutual acceptance and agreement of basic rules of social organization, which Rawls believes is a necessary condition for any just community.

of the least advantaged consistent with the just savings principle" and "attached to offices and positions open to all under conditions of fair equality of opportunity."

The reason people in the original position would choose these principles is that they provide for what Rawls calls "primary goods." Primary goods are "what a rational man wants whatever else he wants." That is, they are necessary means to fulfilling one's plan or goal of life, whatever these happen to be. These goods include rights and liberties, opportunities and powers, income and wealth and self-respect. The two principles would be chosen by rational self-interested persons as the best way for each to secure their ends. Though persons in the original position don't know their particular conception of the good, they do know they have a rational life-plan and to achieve this end they prefer more primary social goods.

The members of the original position would not accept the rule against double jeopardy for the following reasons. First, since they are allowed general knowledge, they would know that they are far more likely to be a victim of crime than a perpetrator of it. As potential victims, they would realize that their primary goods are in jeopardy and as such would want crime deterred and criminals punished, as the rule of law demands. They would also be concerned about excessive prosecution and so would agree to some restrictions on governmental indictments (as explained below.)

Second, members of the original position would also know that they are not likely to be affluent but more likely in the middle class. This means they would not want the wealthy to have an unfair advantage in evading the consequences of their criminal acts. Nor would they want a tyrannical government, since they would lack the resources to adequately defend themselves against false charges; hence the restrictions discussed below.

Third, the current practice violates Rawls' ideas of a stable and well-ordered democratic society because of three facts. A well-ordered democratic society is one in which citizens are treated as free and equal and special priority is given to basic rights as specified by the two principles of justice and the basic institutions encourage the virtues of fairness and mutual trust. First, people in the original position would know that there exists a class-divided society and would see that the rule against double jeopardy places an undue burden on the state, especially in cases where the accused are affluent and have resources to get their desired result. Second, the people in the original position would also know the general limitations of the basic institution of criminal justice. They would know how the trial system in reality works given the human weaknesses in general and of the jury and judge in particular. The moral and intellectual limitations exacerbate the social class problem to undermine the reliability of the judiciary.

The third fact that would lead members of the original position to see the irrationality of the rule against double jeopardy is based on the fact that one is more likely to be a victim of a criminal act than one is likely to be a criminal. Given this, they would be concerned that those found guilty can appeal but society is not given the same right since it, under the current system, cannot re-try those found innocent but later evidence

The reason people in the original position would choose these principles is that they provide for what Rawls calls "primary goods."

shows could be guilty. The hypothetical persons of the original position would further reason that if the state can err in finding the innocent guilty and thus gives the right to appeal to those found guilty, it seems rational to conclude that the state can also err in finding the guilty innocent in which case it would seem fair that the community must have the right for another trial.

These three conditions weaken what Rawls calls the ideal of a stable and well-ordered society and as such do not strengthen mutual trust or encourage the public

virtues of fairness. However, people in the original position would not abandon the rule against double jeopardy without requiring that there be conditions put in place to prevent possible abuses of power by the state. The restructured grand jury is the solution to this problem.

Diminishing Potential Governmental Abuse: Restructuring the Grand Jury

The grand jury must be distinguished from the trial jury. The grand jury as currently practiced is a group of individuals called by the government to hear evidence in a criminal matter and to decide whether there is sufficient evidence for the government to issue an indictment. A judge instructs the jurors concerning their rights and responsibilities and jurors hear witnesses under oath and, unlike a regular trial, can ask questions of the witnesses.

If the grand jury decides there is enough evidence to bring an indictment, then if the person does not plead guilty, a trial is called for with a different set of persons who will constitute the trial jury and will decide the guilt or innocence of the defendant.

The rule preventing double jeopardy is based on a desire to avoid violating the rights of citizens. The goal of the founders was valid but the means they chose was too blunt an instrument to meet the needs of justice.

Analogous to the rule against double jeopardy, the grand jury's purpose is to protect the people from abuse of power by the government by restricting indictments the state can issue. Currently the grand jury is called by the office of the prosecutor but it can become an instrument of the community.

The rule against double jeopardy can be abolished if the grand jury is restructured so that the power of calling the second trial is placed in the hands of the community. After an initial trial resulted in an acquittal, laws relating to the grand jury must allow the grand jury to be reconstituted by a decision of the citizens if new evidence comes to light which casts serious doubt on the accuracy of the original acquittal. This reform of the grand jury and elimination of the rule against double jeopardy would go some distance in preventing gross injustice.

The rule preventing double jeopardy is based on a desire to avoid violating the rights of citizens. The goal of the founders was valid but the means they chose

was too blunt an instrument to meet the needs of justice. The problem overlooked by the framers of the Constitution is that they seem to have been oblivious to the violation of equal rights that arise from a society radically divided by economic resources and income. The grand jury properly used can act as a buffer between the tyranny of the government and the consequences of losing what Rawls calls the "lottery of life" by being born on the wrong side of the tracks that lead some innocent to prison and some guilty to freedom, simply because they happen to be the lucky winners of the lottery of life.

Joseph Grcic
Philosophy Department
Indiana State University
Terre Haute, Indiana 47809
jgrcic@isugw.indstate.edu

Sources: Constitution of the United States, fifth amendment; *Green v. United States* (1957) 355 US 184; John Rawls, *A Theory of Justice* (Cambridge: Harvard Univ. Press, 1972) and also see his *Political Liberalism* (NY: Columbia Univ. Press, 1993) and *Justice as Fairness* (Harvard Univ. Press, 2001). For criticisms of the rule of law, see S. Sinha, *Jurisprudence* (St. Paul, MN: West, 1993). Examples of guilty individuals going unpunished include the case of Mel Ignatow, accused of murdering Brenda Schaefer in 1988 in Kentucky (see Bob Hill, *Double Jeopardy* (Avon Books, 1996)) and the Robert Durst case, in which Durst was accused of killing Julius Black in 2001 in Galveston, Texas (see *State v. Durst* (No. CR1901)). For further discussion of the equal protection clause, and the normative issues related to political theory, see Joseph Grcic, *Ethics and Political Theory* (Lanham, MD: Univ. Press of America, 2000). For a discussion of the distinction between grand jury and trial jury, see Susan W. Brenner, "The Voice of the Community," *Virginia Journal of Social Policy and the Law*, vol. 67 (Fall 1995). For a discussion of the violations of equal rights that can be caused by differing economic resources among citizens, see "Meritocracy in America," *Economist* (January 1, 2005), and available on line at: http://www.economist.com/world/na/displayStory.cfm?story_id=3518560.