Constitutional Amendment by State Statute? The Case of Dual Sovereignty in Illinois

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Introduction

One often-repeated cliché about U.S. states is that they are "laboratories of democracy." This phrase comes from Justice Louis Brandeis's dissent in *New State Ice Co. v. Liebmann* (1932), a case that struck down a state licensing requirement. Brandeis wrote that "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

Brandeis's idea has taken on a life of its own. Lawyers, legislators, and commentators alike have invoked the concept of "laboratories of democracy" to argue for state-level innovation on a host of different issues, including perceived deficits in constitutional and civil rights. Scholars have discussed the possibility of states serving as laboratories of democracy by protecting citizens' rights in areas of law such as felon disenfranchisement and qualified immunity. In addition, a symposium held by the Nevada Law Journal in 2022 discussed the general potential for states to safeguard rights in a variety of ways, with specific statutory examples such as LGBT protections and limitations on the death penalty.

Another candidate for state innovation is the dual sovereignty exception to the Constitution's Double Jeopardy Clause, which allows successive criminal prosecutions for the same conduct so long as they are pursued by separate sovereigns (such as two different states). This Case Note examines Illinois law to argue that state statutes are a useful, though imperfect, means of addressing the dual sovereignty doctrine. It argues further that the details of statutory language are highly consequential to whether states can scale back dual sovereignty in practice.

I. Double Jeopardy and the Dual Sovereignty Exception

The law of double jeopardy in the United States comes from the text of the Constitution's Fifth Amendment, which mandates that no

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person shall "be subject for the same offence to be twice put in jeopardy of life or limb." In layman's terms, this means that no person may be prosecuted more than once for the same crime in the same jurisdiction. The Supreme Court incorporated this federal constitutional guarantee against the states more than fifty years ago in *Benton v. Maryland* (1969). Thus, it applies against every prosecutor in the country.[1]

Crucially, though, the privilege against re-prosecution does not apply across different jurisdictions. The so-called "dual sovereignty" exception was articulated a decade prior to *Benton* in *Bartkus v. Illinois* (1959) and was recently reaffirmed in *Gamble v. United States* (2019). As the *Gamble* Court summarized it, the theory behind this exception is that "a crime under one sovereign's laws is not 'the same offence' as a crime under the laws of another sovereign." For that reason, the Court said, "a State may prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a federal statute." That reasoning applies equally in the opposite direction, allowing a federal prosecution to follow a state prosecution, as *Abbate v. United States* (1959) clarified.

The dual sovereignty exception has faced significant criticism in the scholarly press, from soon after it was established through to the present day. Given its recent reaffirmation in *Gamble* by a lopsided 7–2 majority, critics of the doctrine must look outside the federal judiciary for answers. One potential approach is through state-level lawmaking. This Note discusses the promise and limits of that strategy by analyzing a set of Illinois statutes.

II. The Illinois Statutes

Bartkus, *Abbate*, and *Gamble* make clear that successive federal and state prosecutions—and successive prosecutions by different state governments—are permissible under the U.S. Constitution and under state constitutions such as Illinois's with identical double jeopardy provisions. But several states have chosen to restrict such proceedings by statute.[2] Illinois is among that number, and it accomplishes this

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[1] Many state constitutions also contain protections against double jeopardy, including Illinois's. The Illinois Supreme Court ruled in *People v. Kimble* that this provision must be interpreted "identically to the federal provision." 137 N.E.3d 799, 806 (2019). Accordingly, the state's courts are doubly bound—through federal incorporation and state interpretation—by the same double jeopardy principles as federal courts. This also means that judicially construed ceilings on the Fifth Amendment's prohibition of double jeopardy apply to the Illinois provision as well.

[2] For a helpful (though somewhat outdated) list of states that limit successive prosecutions by statute, constitution, or court doctrine, see

goal using a few different statutes. The Illinois General Assembly enacted the main reform provisions in its 1961 reorganization of the state's criminal code, only two years after *Bartkus* and *Abbate*.[3] Ten years later, the state enacted a differently worded statute covering only drug offenses and an even more specific one applicable only to cannabis.[4]

In Illinois, the primary dual sovereignty provision is 720 ILCS 5/3-4(c)(1), which directs that a "prosecution is barred if the defendant was formerly prosecuted in a District Court of the United States or in a sister state" for a crime over which Illinois shares jurisdiction under two conditions. The first condition is that the earlier prosecution "resulted in either a conviction or an acquittal"; the second is that the later prosecution is "for the same conduct, unless each prosecution requires proof of a fact not required in the other prosecution, or the offense was not consummated when the former trial began." The Illinois Supreme Court, in *People v. Porter* (1993), interpreted the provision to contain four basic requirements that must be met for a prosecution to be prohibited. First, the prior prosecution in a different jurisdiction "must indeed be a *former* prosecution; second, the former prosecution must have resulted in a conviction or an acquittal; third, both prosecutions must be for the same conduct; and fourth, proof of every required fact of one of the prosecutions must be required in the other prosecution."

Illinois law also contains a collateral estoppel provision regarding prior prosecutions in other jurisdictions. 720 ILCS 5/3-4(c)(2) prevents a prosecution in Illinois if the earlier case "was terminated by a final order or judgment, even if entered before trial, that required a determination inconsistent with any fact necessary to a conviction" under Illinois law. In dicta, *Porter* clarifies that the provision "was included to impose a form of collateral estoppel on nonessential elements which are nevertheless adjudicated by a Federal or sister-State court." Thus, Illinois gives a sort of full faith and credit to the final criminal decisions of fifty other court systems.

Thomas White, *Limitations Imposed on the Dual Sovereignty Doctrine by Federal and State Governments*, 38 N. KY. L. REV. 173, 207–216 (2011).

[3] Criminal Code of 1961 § 3-4(c), 1961 Ill. Laws 1992–93 (codified as amended at 720 Ill. Comp. Stat. 5/3-4(c) (2010)).

[4] Illinois Controlled Substances Act § 409, Public Act 77–757, 1971 Ill. Laws 1564 (codified as amended at 720 Ill. Comp. Stat. 570/409 (1991)); Cannabis Control Act § 13(b), Public Act 77–758, 1971 Ill. Laws 1577 (codified as amended at 720 Ill. Comp. Stat. 550/13(b) (1983)).

In drug cases, two special statutes impose a greater level of restriction on Illinois courts. 720 ILCS 570/409 provides that, except in racketeering cases, "a conviction or acquittal, under the laws of the United States or of any State relating to controlled substances, for the same act is a bar to prosecution in this State." In almost identical language, but without the racketeering exception, 720 ILCS 550/13(b) provides that "[a] conviction or acquittal, under the laws of the United States or of any State relating to Cannabis for the same act is a bar to prosecution in this State." Courts have interpreted these provisions in two cases—*People v. Barash* (2001) and *People ex rel. Power v. One 1979 Chevrolet Camaro* (1981)—to forbid any prosecution in Illinois for "the same criminal conduct" that was the grounds of an earlier prosecution in a different jurisdiction. Notably, these drug crime statutes impose a higher bar on the government than the general provision applicable to all offenses. That is, they do not contain any requirement of identical elements between the statutes used to prosecute the defendant in the two jurisdictions—only that both prosecutions were based on the same conduct.

III. How Much Protection Do These Statutes Really Provide?

Little scholarship has covered state-level innovation on the dual sovereignty issue in any detail. A Note written nearly fifty years ago by James E. King criticized several state statutes—including Illinois's—as inadequate to the task of dealing with the problem of dual sovereignty. The writer summarily stated that state-court constructions had narrowed them to the point of little, if any, substantive effectiveness. He also contended that variations in law and policy across jurisdictions only incentivized strategic timing of prosecutions, rather than substantively protecting defendants' rights.

Examining Illinois case law helps to evaluate King's claims. Several cases construing the general dual sovereignty statute, section 5/3-4(c)(1), have found, for various reasons, that the contested prosecution in Illinois was not barred by a prior prosecution in a different jurisdiction.

One reason is that the prior prosecution did not result in a conviction or acquittal. Thus, for example, a state appellate court in *People v. Ramirez* (2016) found that the reversal of the defendant's federal conviction on Speedy Trial Act grounds did not resolve his guilt or innocence and, therefore, was not an "acquittal" under section 5/3-4(c)(1). Thus, because his conviction was reversed, the Illinois prosecution could proceed. Similarly, in *Tezak v. United States* (2001), the Seventh Circuit approvingly discussed an Illinois appellate court's unpublished decision, which held that the dismissal of charges under a

plea agreement was not an acquittal and that the use of those charges for sentencing purposes did not constitute a conviction.

Prosecutions have also proceeded in spite of section 5/3-4(c)(1) when the first and second prosecutions were based on different criminal acts. An example of such a decision was *People v. Dunnavan* (2008), in which a lower appellate court held that an out-of-state conviction for sexual exploitation of children was based on acts different than the ones leading to his Illinois conviction for creating child pornography.

A third class of cases (and the most numerous) in which section 5/3-4(c)(1) did not stop Illinois prosecutors is those in which the first and second prosecutions, even if based on identical conduct, each required proof of a fact that the other did not. Thus, the Illinois Supreme Court found in *Porter* that double jeopardy did not attach because the initial federal RICO prosecution required proof of obstruction of justice or narcotics conspiracy (while the state prosecution did not), and the state prosecution required proof of murder (while the federal prosecution did not). In *People v. Aleman* (1996), a lower court permitted the state's murder prosecution in which the murder was a RICO predicate in a prior federal case, but the defendant had denied the murder and pleaded guilty on other predicates.

In a perhaps more egregious example of this exception, *People v. Brown* (2020)[5] allowed a state prosecution for bank robbery to proceed despite a prior federal bank robbery conviction for the same caper because the state case alone required proof that the defendant was armed, and the federal case alone required proof that the bank was FDIC-insured. A nearly identical case decided thirty years earlier, *People v. Covelli* (1989), approved a state armed robbery prosecution despite a prior federal conviction for Hobbs Act robbery, because the federal case alone required a nexus to interstate commerce, and the state case alone required proof the defendant was armed.[6] Finally, *People v. Jimenez* (2020) permitted a state prosecution for attempted murder and aggravated battery to follow a federal guilty plea under the felon in possession of a firearm statute. The court reasoned that the federal offense required proof of a prior conviction and that the gun

[5] People v. Brown, 2020 WL 2844521 (Ill. App. Ct. June 1, 2020).

[6] The case also allowed a murder charge to go through, although murder was one overt act alleged to support the defendant's federal conspiracy conviction. This was because the state case alone required intent to kill, while the federal case alone required intent to steal.

was possessed "in interstate commerce," while the state offenses required proof of other acts in addition to possession of a firearm.

Against this mass of cases in which the dual sovereignty laws did not impose a barrier on a subsequent state prosecution, I only found one case in which an Illinois court invalidated a prosecution due to a prior prosecution in a different jurisdiction. That case was *Barash*, which was decided under section 550/13(b), the more restrictive cannabis law.[7] In *Barash*, the defendant was charged with cannabis trafficking and possession in Illinois after previously pleading guilty in Arizona for "illegally conducting an enterprise," which was based on trafficking and possessing cannabis. The court held that even though the two statutes contained different elements, the Illinois prosecution was barred because the statute only required identity in the acts on which the two prosecutions were based, not in the laws used to convict.

IV. Implications and Next Steps

The story of litigation under Illinois's dual-sovereignty-related statutes suggests several conclusions. At first blush, it appears King was correct in his assessment that judicial construction has made these statutes largely worthless. It is certainly true that the statutes have gaps, but there are good reasons not to adopt King's conclusion wholesale.

For one thing, it appears that the statutes have rarely been litigated. Because criminal defendants generally have every incentive to find grounds to dismiss their charges or appeal their convictions, one would expect these statutes to crop up in significantly more cases if successive prosecutions across jurisdictions did occur regularly. While there is no causal research on whether the statutes are the reason for the dearth of Illinois prosecutions in such situations, it is easy to imagine that their mere existence deters state prosecutors from bringing a case similar to one previously adjudicated in a different jurisdiction. A busy prosecutor will not want to face an additional obstacle to litigation and will likely focus her limited resources elsewhere.

In addition, the many exceptions to Illinois's primary statute should calm fears that a state would cede too much sovereign authority by prohibiting successive prosecutions across jurisdictional lines. The

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[7] The other drug-related statute, section 570/409, was only litigated once, in One 1979 Chevrolet Camaro, 420 N.E.2d 770 (Ill. App. Ct. 1981). As the caption to that case suggests, it was a civil asset forfeiture case. The court held that the second proceeding was a civil matter, not a prosecution, and that therefore the statute did not apply.

state's interest in pursuing politically sensitive prosecutions (for example, of terrorist acts or frauds affecting large numbers of citizens) would rarely be vitiated by the federal government or another state starting its prosecution first. The salience of these exceptions could persuade skeptical legislators to support such a law, while the statute's substance would still signal to prosecutors that egregious cases of re-prosecution across jurisdictional lines could be invalid.

If the goal is a robustly protective statute, however, the experience of the drug crime statutes suggests that legislative drafting really matters. The court in *Barash* took seriously the distinction between section 5/3-4(c)(1) and section 550/13(b) and prohibited an Illinois prosecution due to the latter provision's greater scope because it barred all successive prosecutions across jurisdictions based on the same acts. Conversely, the narrower ambit of section 5/3-4(c)(2) allowed judges to consistently permit successive prosecutions based on the same acts, so long as they could find that each of the statutes used to prosecute the cases in the two jurisdictions required proof of some fact that the other did not.

Thus, policymakers across the country who hope to meaningfully clamp down on successive prosecutions in different jurisdictions would do well to focus on act-based, rather than law-based, definitions of double jeopardy. In contrast, compromise-oriented legislators who are mainly focused on signaling and a possibility of ex ante effects on prosecutors should be satisfied that a law like section 5/3-4(c)(2) would accomplish their goals. Regardless of the specific approach taken, any such law would vindicate the state's role as a laboratory of democracy solving constitutional problems.

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