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ON LEO KATZ, DOUBLE JEOPARDY, AND THE BLOCKBURGER TEST

I. INTRODUCTION

In his recent book *Bad Acts And Guilty Minds*, Leo Katz points out several problems that result "when statutes collide", or interact with other statutes in negative ways as a result of being poorly integrated into a body of preexisting law. Mr. Katz singles out "overlap" as an especially troublesome and frequent form of statute interaction. Overlap occurs when a person seemingly performs one action yet manages to violate two or more statutes. The problem that Katz finds with overlap is that, in such cases, it appears that the defendant is being "brought to book" twice for the same act. This, says Katz, seems to offend both fairness and constitutional prohibitions against double jeopardy.

Katz examines two possible criteria for "same act": logical identity and numerical identity, claiming that there are sensible arguments for each. The problem, says Katz, is that American law has been reluctant to adopt either criterion of identity for double jeopardy purposes, thus leaving things uncertain and in disarray.

Contrary to my opinions about Katz's discussions throughout most of his fascinating book, I believe that his discussion about double jeopardy has it wrong. His arguments indicate a fundamental misunderstanding of double jeopardy generally and of the logic behind *Blockburger v. United States*, the leading case on the subject. Mr. Katz is

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2 Katz, pp. 96–103.

3 284 U.S. 299 (1932).
not alone. The “Blockburger test” for double jeopardy, for instance, is commonly referred to as a “mere” test for legislative intent.

In this paper, I outline Katz’s discussion, show where it went wrong, and argue that Blockburger does, in fact, provide a satisfactory double jeopardy test that is generally in accord with our intuitions about fairness and justice. I note, however, that Blockburger does not solve all double jeopardy concerns, and I describe two significant limitations: First, Blockburger fails to adequately address fairness-related double jeopardy concerns with respect to one class of cases. Second, courts have placed significant restrictions on the use of Blockburger for purposes of identifying double jeopardy constitutional violations.

II. SUMMARY OF KATZ’S DISCUSSION

When statutes “overlap”, the interesting question, for Katz, is whether a person who manages to break two statutes during one course of action is being punished twice for the same act. To use two of several Katz examples: Suppose a store owner sells a 15-year-old boy a bottle of Johnny Walker on Sunday. Is it wrong to charge him with selling liquor to a minor and with selling liquor on Sunday? Suppose a man rapes his daughter? Is it wrong to charge him with rape and with incest? Through a pair of imaginary interlocutors, “Simplicio” and “Salviati”, Katz presents arguments on both sides:

Simplicio, on the one hand, argues that the sale of liquor and the act of intercourse each constitute but one act, proscribed by various statutes. This suggests we might have a double jeopardy problem if we charge the actors with a violation of more than one statute in either case.

Salviati, on the other hand, invokes a criterion for identity from Leibniz that states that two things are identical if they share all of the same properties. Applying this criterion to the example of the man raping his daughter yields the following result: Since the rape and the incest have different properties, they cannot be the same act but must

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4 Katz, pp. 96–103.