

5-1-1963

## Federalism and Double Jeopardy: A Study in the Frustration of Human Rights

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### Recommended Citation

Harlan R. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. Miami L. Rev. 306 (1963)

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# FEDERALISM AND DOUBLE JEOPARDY: A STUDY IN THE FRUSTRATION OF HUMAN RIGHTS

HARLAN R. HARRISON\*

I.	INTRODUCTION .....	306
II.	HISTORICAL DEVELOPMENT OF DOUBLE JEOPARDY .....	307
III.	CREATION OF A FEDERAL GOVERNMENT AND ITS IMPACT ON THE CONCEPT OF DOUBLE JEOPARDY .....	308
	A. <i>The Adoption of the Constitution</i> .....	308
	B. <i>Theory of Concurrent Jurisdiction</i> .....	309
	C. <i>The Dual Sovereignty Theory</i> .....	311
	D. <i>Successive Prosecutions</i> .....	313
	E. <i>Comparison with the British Unitary System and the Canadian Federal System</i> .....	315
IV.	ACCEPTANCE OF SUCCESSIVE FEDERAL AND STATE PROSECUTIONS BY THE MODERN COURTS .....	319
	A. <i>Bartkus v. Illinois</i> .....	320
	B. <i>Abbate v. United States</i> .....	323
V.	SUGGESTIONS FOR A JUDICIAL SOLUTION .....	327
	A. <i>The Present Interpretation of the Double Jeopardy Clause</i> ..	327
	B. <i>Proposals to Prevent Successive Prosecutions "for the Same Offence"</i> .....	330
	C. <i>The Doctrine of Collateral Estoppel</i> .....	334
VI.	IMPLEMENTATION OF THE "SOCIAL INTEREST" TEST .....	338
VII.	PRESENT AND PROPOSED LEGISLATION DESIGNED TO PREVENT SUCCESSIVE PROSECUTIONS BY DIFFERENT GOVERNMENTS ....	342
VIII.	CONCLUSION .....	346

## I. INTRODUCTION

In 1959 the Supreme Court of the United States held that it was not a denial of due process of law for a state to try a man after he had been acquitted of the same crime by the federal government;<sup>1</sup> on the same day it also reaffirmed its position that a person first convicted by a state may also be tried for the same crime by the federal government without violating the double jeopardy clause of the fifth amendment.<sup>2</sup> Although, on the surface these decisions seem shocking, they followed a long line of cases which lent support to them.<sup>3</sup> Since these decisions were the result of the interaction of the American federal system and the protection against double jeopardy, it is necessary to examine the history of both in order to understand the problems which faced the Supreme Court.

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1. *Bartkus v. Illinois*, 359 U.S. 121 (1959).

2. *Abbate v. United States*, 359 U.S. 187 (1959); *cf.* *United States v. Lanza*, 260 U.S. 377 (1922).

3. *E.g.*, *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847); *United States v. Marigold*, 50 U.S. (9 How.) 560 (1850); *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852); *Hall v. Commonwealth*, 197 Ky. 179, 246 S.W. 441 (1923); *State v. Holm*, 139 Minn. 267, 166 N.W. 181 (1918); see also cases cited in *Bartkus v. Illinois*, *supra* note 1.

## II. HISTORICAL DEVELOPMENT OF DOUBLE JEOPARDY

One of the oldest restraints on governmental power known to Western civilization has been the prohibition against trying a man twice for the same crime. Its beginnings can be traced at least back to Roman times where a form of double jeopardy was forbidden.<sup>4</sup> One of the earliest English cases upholding the doctrine of double jeopardy was *Vaux's Case*<sup>5</sup> decided in 1591 during the reign of Elizabeth I. However, there are authorities which trace the English development back to the twelfth and thirteenth centuries.<sup>6</sup> By the time of the American Constitutional Convention, the sixth edition of Hawkins, *Pleas of the Crown* was referring to the plea of *autrefois acquit* as a well accepted principle of English law.<sup>7</sup> Blackstone declared that the plea of *autrefois acquit* was "grounded on this universal maxim of the common law of England."<sup>8</sup>

Moreover, the doctrine of double jeopardy was introduced to this country by its earliest settlers. The *Massachusetts Body of Liberties* of 1641 declares that "No man shall be twice sentenced by Civill Justice for one and the same Crime, offence or Trespass."<sup>9</sup>

Furthermore, the doctrine is familiar to systems of law other than the common law. For example, the Napoleonic Code provided that "no person legally acquitted can be a second time arrested or accused by reason of the same act."<sup>10</sup> The ancient Talmudic law also recognized a form of double jeopardy.<sup>11</sup>

Thus by 1791 when the Bill of Rights was incorporated into the Constitution, there was a sizable body of law to which the double jeopardy clause of the fifth amendment referred.<sup>12</sup> Yet 171 years later, as noted above, the freedom from double jeopardy has by no means been secured.

## III. CREATION OF A FEDERAL GOVERNMENT AND ITS IMPACT ON THE CONCEPT OF DOUBLE JEOPARDY

### A. *The Adoption of the Constitution*

As Woodrow Wilson so aptly observed,

The question of the relation of the States to the federal govern-

4. RADIN, HANDBOOK OF ROMAN LAW 475 n.28 (1927).

5. 4 Co. Rep. 44(a), 76 Eng. Rep. 992 (K.B. 1591).

6. BROOKE, THE ENGLISH CHURCH AND THE PAPACY 205 (1952).

7. 2 HAWKINS, PLEAS OF THE CROWN 524 (6th ed. 1788), "sect. 1. And first of the plea of *autrefois acquit* which is grounded in this maxim (f) That a man shall not be brought into danger of his life for one and the same offence more than once."

8. 4 BLACKSTONE, COMMENTARIES\* 335.

9. BODY OF LIBERTIES, MASSACHUSETTS 43 (1641).

10. Wilfley, *Trial by Jury and "Double Jeopardy" in the Philippines*, 13 YALE L.J. 421, 424 (1904).

11. Newman, *Double Jeopardy and the Problem of Successive Prosecutions: A Suggested Solution*, 34 SO. CAL. L. REV. 252, 254 (1961).

12. U.S. CONST. amend. V, ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."

ment is the cardinal question of our constitutional system. At every turn of our national development we have been brought face to face with it, and no definition either of statesmen or of judges has quieted or decided it.<sup>13</sup>

After the signing of the Declaration of Independence in 1776, the American colonies banded together to meet a common enemy. The Articles of Confederation which were adopted in 1781 soon proved to be a failure. The great defect of the confederation was the impotence of the central government. Most of the states refused to pay the duties levied on them and the central government had no legal means by which to compel them to do so. Furthermore, the weakness of the central government made it practically impossible to carry on foreign affairs. Thus by 1785, the central government had virtually collapsed "shattered by the blows received from the jealousy and particularism of the individual states."<sup>14</sup>

Moreover, when the new Constitution was set up in 1787, the comparative isolation of the states, their diverse social and economic conditions, as well as their original independent status, caused them to regard the maintenance of a high degree of local independence as of the greatest importance. In order to secure this independence and at the same time provide for a central government strong enough to provide for their common interests, they resorted to the device of "federal government."<sup>15</sup>

The new system of government was based on the proposition that there should be two types of governments, each sovereign in its own sphere. There were first the old state governments, which would maintain all their former powers subject only to the enumerated powers in the Constitution granted to the central government and those specifically prohibited to the states, and second, the central government created by the Constitution.<sup>16</sup> Hamilton, in *The Federalist*, declared,

An entire consolidation of the states into one complete national sovereignty, would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the state governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States.<sup>17</sup>

In effect, Hamilton was emphasizing the idea that sovereign states merely

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13. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 173 (1908).

14. MERRIAM, AMERICAN POLITICAL THEORIES 97 (1926).

15. GOODNOW, PRINCIPLES OF CONSTITUTIONAL GOVERNMENT 32 (1916).

16. See, U.S. CONST. art. I §§ 8, 9; U.S. CONST. amend. X.

17. THE FEDERALIST No. 32, at 169 (Scott ed. 1898) (Hamilton).

delegated a part of their power to another government, but kept a large part in reserve. This was made clear in the tenth amendment to the Constitution.<sup>18</sup>

### B. *Theory of Concurrent Jurisdiction*

With the creation of a system of government whereby power was divided between two sovereignties, it was essential that a method exist whereby conflicts between the two could be resolved. Hamilton said that the states alienated their sovereignty in only three cases:

where the constitution in express terms granted an exclusive authority to the union; where it granted, in one instance, an authority to the union; and in another, prohibited the states from exercising the like authority; and where it granted an authority to the union, to which a similar authority in the states would be absolutely and totally *contradictory* and *repugnant*.<sup>19</sup>

Although both Hamilton<sup>20</sup> and the Constitution<sup>21</sup> tell us how to deal with the question of conflicting laws, both leave open the question concerning laws of duplication—that is, those situations in which both the central and the state governments enact identical laws. Thus the courts were faced with the task of solving this problem. In *Cooley v. Board of Wardens*,<sup>21a</sup> the Supreme Court held that the states could not legislate as to subjects which “are in their nature national or admit only of one uniform system.”<sup>22</sup> Such subjects require the exclusive legislation of Congress. However, subjects which are national in nature are exceedingly rare in the criminal law.<sup>23</sup> Hence, it would be difficult for a court to strike down a criminal statute under the *Cooley* doctrine.

Apart from the local-national distinction, the Supreme Court in *Houston v. Moore*<sup>24</sup> in 1820 adopted a doctrine whereby anytime the federal government enacted a law dealing with the same subject as a state law, the latter would be superseded. In that case, the State of Pennsylvania provided for the punishment of militiamen who refused

18. U.S. CONST. amend. X, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

19. THE FEDERALIST *op. cit. supra*, note 17 at 169.

20. *Ibid.*

21. U.S. CONST. article VI, cl. 2, “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land . . . .”

21a. 53 U.S. (12 How.) 299 (1851).

22. *Id.* at 319.

23. See *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). Here Pennsylvania passed a law making sedition against the United States a crime. Even with a statute which appears to be national in nature the court said that “when the Federal Government has not occupied the field and is not protecting the entire country from seditious conduct,” the states may enforce their sedition laws. *Id.* at 500.

24. 18 U.S. (5 Wheat.) 1 (1820).

to serve when called into actual service by the President of the United States. Congress had also passed a statute which prescribed punishment for the same act. The plaintiff in error was tried before a court martial of the state and convicted. He appealed on the ground that the state law was contrary to the law of Congress and thus null and void. The court did not unequivocally declare that if a state and the national government legislate on the same topic the latter supersedes the former. Instead it talked in the traditional terms of "repugnance"<sup>25</sup> to the Constitution. After saying that the states cannot enter upon the same ground and punish for the same objects as Congress, the Court went on to declare that:

The two laws may not be in such absolute opposition to each other, as to render the one incapable of execution, without violating the injunctions of the other; and yet the will of the one legislature may be in direct collision with that of the other. . . . Congress, for example, has declared, that the punishment for disobedience of the act of congress, shall be a certain fine; if that provided by the state legislature for the same offence be a similar fine, with the addition of imprisonment or death, the latter law would not prevent the former from being carried into execution, and may be said, therefore, not to be repugnant to it. *But surely the will of congress is, nevertheless, thwarted and opposed.*<sup>26</sup> (Emphasis supplied.)

In 1849 Mr. Justice McLean echoed the same views when he declared that:

A concurrent power in two distinct sovereignties to regulate the same thing is as inconsistent in principle as it is impracticable in action. It involves a moral and physical impossibility.<sup>27</sup>

Although one would not expect to find the state courts supporting the *Houston* doctrine of supersession, a few judges voiced their assent.<sup>28</sup>

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25. See text accompanying note 19 *supra*.

26. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 22 (1820). The statement by the majority of the court quoted above is dictum since the court sustained the conviction on the ground that a state court martial was *given* concurrent jurisdiction to enforce the laws of Congress. *Id.* at 32. In regard to the concurrent jurisdiction of the state court martial with that of the United States court martial, the court went on to say, "the sentence of either court, either of conviction or acquittal, might be pleaded in bar of the prosecution before the other. . . ." *Id.* at 31. Mr. Justice Story although he dissented agreed with the majority that there could be a plea in bar before a second court martial. *Id.* at 72. See also, Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309 (1932).

27. *The Passenger Cases*, 48 U.S. (7 How.) 283, 399 (1849).

28. *State v. Antonio*, 3 Brevard 562, 577; 2 Treadway 776, 802-03 (S.C. 1816). Justice Nott of South Carolina said, "Now if the United States have the power to regulate the value of money and of foreign coin, and to provide for the punishment of counterfeiting the current coin of the United States, they must have the exclusive jurisdiction; otherwise, two governments equally sovereign and independent, would have jurisdiction over the same subject. . . . The exercise of such authority by the States would be 'absolutely and totally

But in spite of these pronouncements, the court soon began to develop different theories of concurrent jurisdiction.

### C. *The Dual Sovereignty Theory*

Twenty-seven years passed before the problem presented in *Houston v. Moore* reached the Supreme Court again.<sup>29</sup> In the meantime, however, the state courts were formulating the proposition that since they had jurisdiction over offenses committed within their boundaries, they could not be deprived of it by the mere enactment of a federal statute on the same subject. For example, in *Harlan v. People*,<sup>30</sup> the defendant was tried under a Michigan statute for counterfeiting coins. Pursuant to its constitutional powers,<sup>31</sup> Congress had also provided for the punishment of counterfeiting. But the state court was quite vociferous in exerting its jurisdiction over the offense. It pointed out that although the Constitution gave Congress jurisdiction to coin money, that jurisdiction was *exclusive* only because the Constitution also prohibited the states from doing so. Furthermore, the court said the Constitutional grant of power to Congress to punish counterfeiters was not accompanied by a corollary prohibition to the states; therefore such power could *not be exclusive*. The court then declared that the power to punish crimes was peculiarly local and that Congress, by its mere passage of similar legislation, did not displace the State's jurisdiction.

It could be argued that the real basis for the court's decision was that the statute of Congress punishing the crime of counterfeiting *granted* jurisdiction to the states because it contained a proviso stating that "nothing in this act contained, shall be construed to deprive the courts of the individual states of jurisdiction, under the laws of the several states, over offences made punishable by this act."<sup>32</sup> However, the court refuted this argument by saying:

This is not giving jurisdiction to a state court by act of Congress, to enforce a law of Congress. It is merely removing a disability imposed, or which might be supposed to have been imposed, by a previous act of Congress, and restoring to the states the original jurisdiction over offences against state laws, providing for the punishment of counterfeiting current coin.<sup>33</sup>

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contradictory and repugnant' to the exercise of it by the United States." (Dissenting opinion.) In *Commonwealth v. Fuller*, 49 Mass. (8 Metcalf) 313 (1844), the court sidestepped the question of supersession by pointing out that the statute of Congress creating the crime said, "that nothing in this act contained shall be construed to deprive the courts of the individual States of jurisdiction, under the laws of the several States, over offences made punishable by this act." *Id.* at 316. The court discussed *Houston v. Moore*, *supra* note 24, but did not pass judgment on its reasoning.

29. *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847).

30. 1 Douglass 207 (Mich. 1843).

31. U.S. Consr. art. I, § 8, cl. 6, "To provide for the Punishment of counterfeiting the Securities and current Coin of the United States."

32. 2 Stat. 404 ch. 49, § 4 (1806).

33. *Harlan v. People*, *supra* note 30, at 216. *Cf.* *Commonwealth v. Fuller*, *supra* note

The argument is made more forcefully in *State v. Randall*.<sup>34</sup> *Randall* clearly recognized that the states had jurisdiction to try counterfeiters all along but that Congress could take away that jurisdiction if it wished to do so. The court said that the proviso did not *give* the states jurisdiction; it merely recognized an existing fact.

Thus, the difference between *Houston* on the one hand and *Harlan* and *Randall* on the other, is that in *Houston*, the court believed that an act of Congress automatically superseded a state law on the same subject, while the judges in the latter cases believed that a Congressional statute could supersede a state law only if Congress intended to do so.

Although the problem of successive federal and state prosecutions could never have arisen had *Houston* been followed, that court's reasoning was unsound. It turned on the proposition that two distinct wills could not be exercised against the same subject at the same time and still be compatible with each other.<sup>35</sup> But our whole federal system depends on the opposite being true. If federal law automatically superseded all state laws on the same subject, the problems of enforcement would be insurmountable. In the counterfeiting cases discussed above, the states would have to depend on federal enforcement facilities to protect their citizens against a localized crime. Thus, it seems that at least from the standpoint of the state police power, the creation of the doctrine of dual sovereignty was essential.

Moreover, the Supreme Court of the United States lent its support to the dual sovereignty theory advanced by the states in the cases of *Fox v. Ohio*,<sup>36</sup> *United States v. Marigold*,<sup>37</sup> and *Moore v. Illinois*.<sup>38</sup> It is important to note that at the time these decisions came down (1847-52), the nation was in the midst of the great slavery question and the doctrine of state sovereignty was not merely a politico-legal question, but a burning emotional one as well. Roger Taney, who was Chief Justice of the Supreme Court from 1836-64, believed that the proper function of the Court during this period was to arbitrate between the states and the federal government.<sup>39</sup> His own theories on federal-state relations placed him in an intermediate position between the two extremes of

28, which recognizes jurisdiction in the states over counterfeiting, but lays heavy stress on the saving clause in the statute of Congress. *Contra*, *Mattison v. State*, 3 Mo. 421 (1834).

34. 2 Aikens 89 (Vt. 1827). "The necessary construction of this [proviso] is, that congress admit, or concede the previous power of the states to enact laws, and their courts to execute them, over this offence, and give jurisdiction to the Courts of the United States, *sub modo*, and so as not to interfere with that previous jurisdiction of the state courts. . . . The distinction between the conferring a jurisdiction by Congress, and the refusal to take away a jurisdiction already enjoyed, is too obvious to require elucidation." *Id.* at 99.

35. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 23 (1820).

36. 46 U.S. (5 How.) 410 (1847).

37. 50 U.S. (9 How.) 560 (1850).

38. 55 U.S. (14 How.) 13 (1852).

39. SMITH, ROGER B. TANNEY: *JACKSONIAN JURIST* 88 (1936).



his day,<sup>40</sup> and were in accord with those espoused in *Fox, Marigold*, and *Moore*.<sup>41</sup> In *Ableman v. Booth* he said:

And the powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres.<sup>42</sup>

Thus it appears that when the Supreme Court in *Fox, Marigold* and *Moore* considered the problem of subjecting a man to the criminal laws of two governments, it never really considered the question on its merits—that is, it never balanced the interests of the respective governments against the rights of the individuals involved. Rather it was concerned only with balancing the rights of the two governments. The individual was only a sacrificial pawn in a game that had higher stakes—the survival or demise of the federal union. Considering, then, the jealousy of the states which attended the adoption of the Constitution, and which strongly reasserted itself in the period between 1830 and the Civil War, it was almost inevitable that the courts would evolve a dual sovereignty theory.

#### D. Successive Prosecutions

Although the development of the dual sovereignty theory was practically inevitable in the American system of government, it was by no means necessary that the courts accept the principle of successive prosecutions by the state and federal governments. And, in fact, the early decisions were split on this issue. Basically there were three lines of thought. First, in *Fox v. Ohio*, after stating for the purposes of argument that both Congress and Ohio had jurisdiction over the crime, the Court said that both had power to punish *but that*,

in the benignant spirit in which the institutions both of the state and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed this might occur in

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40. These were (1) John C. Calhoun who expressed the theory of one group by stating that the Constitution of the United States was a compact between the States which had established it as sovereigns and remained sovereign as parties to it. 1 WORKS OF CALHOUN, 277-78 (1858). (2) On the other end of the spectrum was Mr. Justice Story who said that the Constitution was established by "the people of the *United States*, not the distinct people of a *particular state* with the people of the other states," and that it was the irrevocable and supreme law of the nation. See 1 STORY, COMMENTARIES ON THE CONSTITUTION, sec. 153 (1833).

41. Mr. Justice Daniel who rendered the opinions in *Fox v. Ohio*, *supra* note 36, and in *United States v. Marigold*, *supra* note 37, was a strong states rights man. See generally, BROWN, THE DISSIDENTING OPINIONS OF MR. JUSTICE DANIEL, *passim* (1887).

42. 62 U.S. (21 How.) 506, 516 (1858).

instances of peculiar enormity, or where the public safety demanded extraordinary rigor.<sup>43</sup>

The Court made clear however, that even if the "benignant spirit" was somehow lacking, the governments still had power to punish successively because the fifth amendment guarantee against double jeopardy applied only to the situation where one government, that is, the federal government, tries a defendant twice, not where two governments each try him once.<sup>44</sup>

The second line of cases is illustrated by *Moore v. Illinois*, in which the Court said:

Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. . . . That either or both may (if they see fit) punish such offender, cannot be doubted.<sup>45</sup>

Finally there are at least four state decisions in this period which held that a prosecution by one government would bar a prosecution by another. In one of them, *State v. Randall*, the court said:

But there is urged upon the Court the hardship, and even absurdity, that a man should be liable to be arraigned before two distinct tribunals, for the same offence. The difficulty in this, like other concurrent jurisdictions, is rather imaginary than real. The court that first has jurisdiction, by commencement of the prosecution, will retain the same till a decision is made; and a decision in one court will bar any further prosecution for the same offence, in that or any other court.<sup>46</sup>

Thus the door was left open for the states to assert their sovereignty and still maintain the rights of the individual to protection against successive prosecutions. Nevertheless, the vast majority of the courts followed the *Moore* decision.<sup>47</sup>

43. *Fox v. Ohio*, 46 U.S. (5 How.) 410, 435 (1847).

44. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833) held that the "fifth amendment to the constitution, declaring that private property shall not be taken for public use, without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states." This case has been broadly interpreted to mean that the Bill of Rights was intended to apply to the federal government only. See *Fox v. Ohio*, 46 U.S. (5 How.) 410, 434 (1847); *United States v. Lanza*, 260 U.S. 377, 382 (1922).

45. *Moore v. Illinois*, 55 U.S. (14 How.) 13, 20 (1852) (dictum). Cf. vehement dissent by Mr. Justice McLean. *Id.* at 21-22. State decisions in accord with *Moore v. Illinois*, *supra*; *State v. Brown*, 2 N.C. 100 (1794); *Chess v. State*, 1 Blackford 198 (Ind. 1822).

46. 2 Aikens 89, 100-01 (Vt. 1827). Accord, *State v. Antonio*, 3 Brevard 562; 2 Treadway 776 (S.C. 1816); *Commonwealth v. Fuller*, 49 Mass. (8 Metcalf) 313 (1844); *Harlan v. The People*, 1 Douglass 207 (Mich. 1843).

47. See cases cited in *Bartkus v. Illinois*, 359 U.S. 121 (1959) at 133-35.

E. *Comparison with the British Unitary System and the Canadian Federal System*

Although Britain has a unitary government, there are a few instances in which statutes or treaties have created concurrent jurisdiction over crimes committed abroad. For instance in *The King v. Thomas*,<sup>48</sup> which arose under a 1534 statute<sup>49</sup> vesting jurisdiction in the bordering English county over felonies committed in Wales, but without suppressing the Wales jurisdiction, the court held that an acquittal in Wales was a plea in bar in England. Since the leading case of *R. v. Hutchinson* was reported only partially,<sup>50</sup> it is necessary to resort to the cases in which it was discussed in order to get the facts and rulings.<sup>51</sup> Hutchinson killed a man in Portugal and was acquitted there under the local law of a charge corresponding to murder. When he was tried in England the court held that the acquittal was a bar to a new prosecution. According to the report in *Gage v. Bulkeley*,<sup>52</sup> the court did not seem to base its decision on a rule of law, but rather seemed to leave to the discretion of the trial judge whether or not to bar a second prosecution.<sup>53</sup>

In 1918, the case of *Rex v. Aughet*<sup>54</sup> was decided. Aughet was a Belgian officer stationed in London. While in London he shot a Belgian soldier. He was turned over to the Belgian authorities pursuant to a treaty which granted each government jurisdiction over its respective armed forces wherever stationed. Upon acquittal, Aughet returned to England and was tried there. Even though the crimes under Belgian law and English law were not exactly the same, the English court allowed the plea of *autrefois acquit*. Again however, the court might not have set down an absolute rule of law; rather it might have looked to the intent of the treaty between the two nations:

We think that in these circumstances it would be contrary to the true intent and meaning of the Convention to subject the man to punishment here for an offence for which he has been in jeopardy and has been acquitted in accordance with Belgian law.<sup>55</sup>

48. 1 Sid. 179, 82 Eng. Rep. 1043 (in Norman French); 1 Lev. 118, 83 Eng. Rep. 326; 1 Keb. 621, 83 Eng. Rep. 1147; 1 Keb. 663, 83 Eng. Rep. 1172 (K.B. 1662). All of these reports must be consulted to secure a full account of the case.

49. 26 Hen. 8, c. 6, § 6 (1534).

50. 3 Keb. 785, 84 Eng. Rep. 1011 (K.B. 1678).

51. *R. v. Hutchinson* reported in *Beak v. Thyrwhit*, 3 Mod. 194, 87 Eng. Rep. 124 (K.B. 1688); and in *Burrows v. Jemino*, 2 Str. 733, 93 Eng. Rep. 815; and in *Gage v. Bulkeley*, Ridg. T. Hard. 263, 27 Eng. Rep. 824 (Ch. 1744).

52. *Gage v. Bulkeley*, Ridg. T. Hard. 263, 272, 27 Eng. Rep. 824, 827 (Ch. 1744).

53. England had concurrent jurisdiction over this crime because the court gave a liberal reading to the statute of 33 Hen. 8, c. 23 (1541). See *Gage v. Bulkeley*, *supra* note 52, Ridg. T. Hard. at 272, Eng. Rep. at 827.

54. 26 Cox Crim. Cas. 232 (1918).

55. *Id.* at 238.

But then the court went on to say:

The Convention does not affect or diminish the jurisdiction of the King's courts over crimes committed in this country, but where its provisions have been observed it would be unjust to the prisoner not to accept a decision of a competent court in his favor.<sup>56</sup>

In any event, regardless of whether the British doctrine is a rule of law or a rule construction, the fact remains that there are no reported English cases which allow successive prosecutions.<sup>57</sup>

The question still remains as to why the United States did not adopt the English view. It is submitted that although the English do have a concept of concurrent jurisdiction it is not the same as concurrent jurisdiction in a federal system. The common law in both the United States and in England has established the *territorial* theory of jurisdiction over crimes.<sup>58</sup> In a federal system, if a crime is committed within the boundaries of a state, by definition it is also committed within the boundaries of the federal government. Thus it was easy to justify two prosecutions by saying that the "peace and dignity" of two sovereigns was offended and therefore two crimes were committed.<sup>59</sup> However, this is not true in Britain. In that country two sovereigns do not have *territorial* jurisdiction over a crime. Any concurrent jurisdiction must be statutory or by treaty, not territorial.

No British subject can be tried under English law for an offense committed on land abroad, unless there is a statutory provision to the contrary.<sup>60</sup> Thus, the English courts when trying a case pursuant to concurrent jurisdiction conferred by statute or treaty, could not justify double prosecutions because the "peace and dignity" of two sovereigns had been offended.

Typically these statutes and treaties are designed to maintain order along the borders of two countries where the jurisdiction of both may be in doubt or to maintain discipline among mobile military troops.<sup>61</sup> In short, the device of concurrent jurisdiction is used for exceptional situations only. The English can draw upon their general rule of barring a second prosecution to take care of the exception. In the United

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56. *Ibid.*

57. For a discussion of the English cases, see Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 U.C.L.A.L. REV. 1 (1956).

58. See 39 HARV. L. REV. 492 (1926). Cf. *Regina v. Ellis* [1899] 1 Q.B. 230.

59. See e.g., *United States v. Lanza*, 260 U.S. 377, 382 (1922), where the court said, "that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both, and may be punished by each."

60. ARCHBOLD, CRIMINAL PLEADING, EVIDENCE & PRACTICE, 28 (33rd ed. 1954).

61. See *The King v. Thomas*, 1 Sid. 179, 82 Eng. Rep. 1043; 1 Lev. 118, 83 Eng. Rep. 326; 1 Keb. 621, 83 Eng. Rep. 1147; 1 Keb. 663, 83 Eng. Rep. 1172 (K.B. 1662); and *Rex v. Aughet*, 26 Cox. Crim. Cas. 232 (1918).

States, on the other hand, there is no general rule barring two prosecutions by different governments. Concurrent jurisdiction is the general rule, and as we have seen above, it has been used to protect states' rights rather than human rights. In the same vein, there has been no pressure on the British Government to "prove" to a competing sovereign that it too is sovereign as there has been on the American states. It seems that without these problems confronting it, Britain has been able to concentrate on protecting the human rights involved.

An examination of the Canadian experience shows that although it has a federal form of government it has solved the problem of successive prosecutions by declaring that in cases of overlap, Dominion law supersedes Provincial law.<sup>62</sup> The reason lies in the development of Canadian federalism. In the first place, the principal architect of the Canadian union, John A. Macdonald, was an avowed centralizer. Because the British North America Act was drafted in 1864-67, he and the men about him were greatly influenced by the Civil War in the United States and were determined to avoid what they considered the errors of the American Union—the major one being leaving to the states the residuum of power.<sup>63</sup> Thus, even though there were strong sectional interests, such as the French minority in Quebec, the framers designed a central government which was to be superior to those of the Provinces. Therefore various controls were placed in the hands of the Dominion—nomination of the judges, appointment of the lieutenant-governors, the right to disallow provincial legislation and of course the reservation of the residuum of power to the central government.<sup>64</sup>

Thus, it has been said that:

The underlying theory of Canadian federalism may . . . be summarized by saying that a single political power distributes its energy through two groups of institutions, some national and others provincial.<sup>65</sup>

Hence, although Canada has a federal system it is based upon a unitary principle whereas federalism in the United States is based on a principle of dualism.<sup>66</sup> Furthermore, one of the most obvious examples of this distinction is the area of the criminal law. As we have already seen, the machinery, judicial, legislative and executive, for administering the

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62. See *e.g.*, *Rex v. Hanel*, 45 Can. Cr. Cas. 381 (1925).

63. See LOWER, *EVOLVING CANADIAN FEDERALISM*, 20-1 (1958); The British North America Act, 30 & 31 Vict. c. 3 (1867), which is the Canadian Constitution grants the residuum of powers to the Dominion government. "It shall be lawful for the Queen . . . to make Laws for the Peace, Order, and Good Government of *Canada*, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces . . . . *Id.* sec. 91.

64. LOWER, *op. cit. supra* note 63, at 20-1.

65. SMITH, *FEDERALISM IN NORTH AMERICA* 10 (1923).

66. *Id.* at 11.

criminal law is completely duplicated in the state and federal system of the United States.

However, in Canada, the constitution sets up a different system. The Dominion is given exclusive legislative authority over the criminal law,<sup>67</sup> while the Provinces are given exclusive legislative authority to create penalties for the violation of statutes pertaining to local order such as control of street traffic.<sup>68</sup> Hence, as far as the general criminal law is concerned, Canadians are used to looking to the Dominion Parliament. It is only when civil crimes and misdemeanors are concerned that Canadians turn to provincial law. When the inevitable situation arose whereby the Dominion enacted a traffic law, the provincial courts were not concerned with maintaining their "sovereignty"; they had long since recognized the supremacy of the Dominion.

Thus, in *Rex v. Hanel*,<sup>69</sup> the Dominion passed a statute penalizing persons driving while intoxicated. The Province of Quebec had a similar statute. The defendant was tried under the Quebec statute and was convicted. He appealed on the theory that the Dominion statute superseded that of the Province and his position prevailed. The Crown argued that:

By s. 92(8) & (15) [of the British North America Act] the Provincial Legislatures are given exclusive power to make laws relative to municipal institutions within the Province and to impose fines, penalties or imprisonment in aid of the enforcement of any law of the Province applying to the matters enumerated in s. 92.<sup>70</sup>

In effect, the Crown contended that to allow the Quebec law to be superseded would be to allow the Dominion to override an exclusive grant of power to the Provinces. However, the court rejected this argument and declared that the Dominion was within its legislative authority in enacting this statute because of its power to enact criminal laws.<sup>71</sup> It said that there can be a domain in which the powers of the Dominion and Provincial legislatures may overlap and that if the field is not clear and the two legislatures meet in this domain, the Dominion legislature must prevail.<sup>72</sup>

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67. British North America Act, 30 & 31 Vict. c. 3 (1867). "[T]he exclusive Legislative Authority of the Parliament of *Canada* extends to . . . (27) The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters." *Supra* § 91.

68. "In each Province the Legislature may exclusively make Laws . . . that is to say. . . (15) The Imposition of Punishment by Fine, Penalty or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section." British North American Act, 30 & 31 Vict. c. 3, § 91 (1867).

69. 45 Can. Cr. Cas. 381 (1925).

70. *Id.* at 386.

71. British North America Act, 30 & 31 Vict. c. 3, § 91 (1867).

72. *Rex v. Hanel*, 45 Can. Cr. Cas. 381, 389 (1925). *Accord*: *Rex v. Chapman*, 66 Can.

Even though the Canadian federal system could produce this decision without any apparent hesitation, the American federal system, because of certain essential differences, could not.

For example, if the United States adopted the doctrine of supersession, this would place the states in the awkward position of not being able to keep order until the federal government acted to enforce its law. But Canada does not possess a completely dual system of courts as in the United States. The constitution gives the Provinces the power to create criminal courts, not the Dominion.<sup>73</sup> Thus the provincial courts are able to administer justice *regardless of the source of law* being enforced, whether Dominion or provincial.<sup>74</sup>

Further, Canada's federal system is in a sense the reverse of that in the United States. The residuum of power lies with the central government while in the United States, the residuum lies with the states. Also, because the Canadian constitution gives the Dominion, among other things, power to appoint provincial lieutenant-governors and power to overrule provincial legislation, the people are accustomed to recognizing the supremacy of the federal government.<sup>75</sup> Because of these reasons when the relatively rare problem of concurrent jurisdiction comes up, the courts are able to resolve it in favor of the Dominion government without even reaching the question of double jeopardy.

Hence, because the British and Canadian historical experiences have been different from that of the United States, our courts have not drawn on the precedents available from these countries.<sup>76</sup> While the courts have been correct in assuming that the American federal system creates its own peculiar problems, they have been content with the results that system produces and have made no endeavor to find better solutions.

#### IV. ACCEPTANCE OF SUCCESSIVE FEDERAL AND STATE PROSECUTIONS BY THE MODERN COURTS

When *Bartkus v. Illinois*<sup>77</sup> and *Abbate v. United States*<sup>78</sup> were

L.R. 72 (1922); *Re Rex v. Drolet*, [1925] 2 D.L.R. 326; *Rex v. Oitenson*, 40 Man. 95 (1931). For a discussion of these cases, see Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 U.C.L.A.L. REV. 1, 16 (1956).

73. British North America Act, 30 & 31 Vict. c. 3 (1867), at § 91 grants the Dominion power over the Criminal Law, "(27) . . . except the Constitution of Courts of Criminal Jurisdiction . . ." Section 92 grants to the Provinces the power over "(14) The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts . . . of Criminal Jurisdiction . . ."

74. CLOKIE, CANADIAN GOVERNMENT AND POLITICS 224 (1944).

75. These powers have rarely been used.

76. E.g., Mr. Justice Frankfurter in referring to the English precedents said, "Such precedents are dubious also because they reflect a power of discretion vested in English judges not relevant to the constitutional law of our federalism." *Bartkus v. United States*, 359 U.S. 121, 128 n.9 (1959).

77. 359 U.S. 121 (1959); see note 1 *supra* and accompanying text.

78. 359 U.S. 187 (1959); see note 2 *supra* and accompanying text.

decided in 1959, the Supreme Court had an opportunity to reexamine the whole doctrine of successive prosecutions at a period in history when civil liberties were not being lightly dismissed when they clashed with "anti-libertarian" state interests.<sup>79</sup> Furthermore the Court need not have gone to the extreme of adopting the *Houston* doctrine of supersession;<sup>80</sup> it could have concentrated its efforts on giving meaning to the protection against double jeopardy once one sovereign had already prosecuted. The Court chose to do otherwise.

#### A. *Bartkus v. Illinois*

In *Bartkus*, the petitioner was tried and acquitted in a federal court for a violation of a federal statute which makes it a crime to rob a federally insured bank. On substantially the same evidence, he was later tried and convicted in an Illinois state court for violation of an Illinois robbery statute.<sup>81</sup> On certiorari from the state court, the Supreme Court affirmed the conviction.

Mr. Justice Frankfurter, who delivered the opinion of the Court, stated that the second prosecution could be unconstitutional only if the fourteenth amendment restrictions on state power incorporated by reference the double jeopardy clause of the fifth amendment.<sup>82</sup> The general test was set down by Mr. Justice Cardozo in *Palko v. Connecticut*<sup>83</sup> and is as follows:

In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be *implicit in the concept of ordered liberty*, and thus, through the Fourteenth Amendment, become valid as against the states.<sup>84</sup>

Yet Frankfurter never inquired as to whether a state prosecution after a federal acquittal was contrary to the "concept of ordered liberty."<sup>85</sup>

79. *E.g.*, *Brown v. Board of Education*, 349 U.S. 294 (1954) (school desegregation cases); *Mapp v. Ohio*, 367 U.S. 643 (1961) (a state cannot introduce into evidence the fruits of an illegal search and seizure); *Baker v. Carr*, 82 Sup. Ct. 691 (1962) (legislative reapportionment).

80. See note 24 *supra* and accompanying text.

81. *People v. Bartkus*, 7 Ill. 2d 138, 130 N.E.2d 187 (1955).

82. Since the decision in *Palko v. Connecticut*, 302 U.S. 319 (1937), the Court has been consistent in saying that the due process clause of the fourteenth amendment does not *automatically* include all of the Bill of Rights. Frankfurter, in the *Bartkus* case, examined the history of the adoption of the fourteenth amendment and says that the framers did not intend to include the Bill of Rights. Black and Douglas, J.J. are noted for their strong and persistent dissents, which argue for automatic inclusion. See their dissent in *Bartkus v. Illinois*, 359 U.S. 121, 151 n.1 (1959).

83. 302 U.S. 319 (1937).

84. *Id.* at 324-25. (Emphasis added.)

85. This question *was* asked in *Palko v. Connecticut*, *supra* note 83. There a statute gave the state the right to appeal in criminal cases. The Court asked, "Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it?" 302 U.S. at 328. Although it answered in the negative,



Instead he examined the historical development of the successive prosecutions doctrine and discovered that before *Fox v. Ohio* was decided, the courts were split as to whether or not to bar second prosecutions.<sup>86</sup> He then seemed to conclude that merely because some courts approved the theory of successive prosecutions, that theory could not, by the very fact of approval, be contrary to the "concept of ordered liberty." His statement is as follows:

Conflicting opinions concerning the applicability of the plea in bar may manifest conflict in conscience. They certainly do not manifest agreement that to permit successive state and federal prosecutions for different crimes arising from the same acts would be repugnant to those standards of outlawry which offend the conception of due process outlined in *Palko*.<sup>87</sup>

This argument might have had some weight had these courts given *reasoned* opinions on the issue at bar. However, two of the courts were concerned with different problems<sup>88</sup> and the other two never really coped with the issue.<sup>89</sup> After continuing to cite a massive body of precedent he stated:

With this body of precedent as irrefutable evidence that state and federal courts have for years refused to bar a second trial even though there had been a prior trial by another government for a similar offense, it would be disregard of a long, unbroken, unquestioned course of impressive adjudication for the court now to rule that due process compels such a bar.<sup>90</sup>

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it went on to say, "What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider." *Ibid.*

86. Frankfurter cites four cases denying a bar to a second trial. *State v. Brown*, 2 N.C. 100 (1794); *Mattison v. State*, 3 Mo. 421 (1834); *Hendrick v. Commonwealth*, 5 Leigh 707 (Va. 1834); *State v. Tutt*, 2 Bailey 44 (S.C. 1830). See *Bartkus v. Illinois*, 359 U.S. 121, 129-130 (1959).

87. *Bartkus v. Illinois*, 359 U.S. 121, 131 (1959).

88. In *State v. Brown*, 2 N.C. 100 (1794), the defendant stole a horse in a federal territory and brought it to North Carolina. The court held that the taking and the asportation were part of the same crime and thus defendant could only be tried under federal, not state law. Upon assuming that the asportation was a *new* crime, the court said, there could then be two trials. The federal government could try for the taking and the state for the asportation. Thus this court would allow successive trials only if there were *two* different substantive offenses. In *Mattison v. State*, 3 Mo. 421 (1834), the court feared that a state could pass a law creating a minor penalty and thus subvert a federal law which created harsh penalties. In such a case, there would be no bar. Once again this is a different problem from that faced in *Bartkus*. (Frankfurter does deal with this problem later in his opinion. *Bartkus v. Illinois*, *supra* at 137).

89. *Hendrick v. Commonwealth*, 5 Leigh 707 (Va. 1834) refers to the problem of double prosecutions. In an attempt to justify double prosecutions, it says that both the state and the federal government have jurisdiction to try the crime of forgery of a check of the bank of the United States. *Id.* at 713. The court never faced the question of whether a trial by one government would bar the other. The same analysis can also be made for *State v. Tutt*, 2 Bailey 44 (S.C. 1830).

90. *Bartkus v. Illinois*, 359 U.S. 121, 136 (1959).

In short, according to Mr. Justice Frankfurter, a prosecution by a state court after a federal acquittal is not a violation of the fourteenth amendment because a great many courts said it isn't!

Thus, only the dissenters really considered the question of whether or not successive prosecutions by different governments for what is essentially the same offense, was a violation of the fourteenth amendment. For Mr. Justice Black the question was easily answered:

For I think double prosecutions for the same offense are so contrary to the spirit of our free country that they violate even the prevailing view of the Fourteenth Amendment, expressed in *Palko v. Connecticut* . . . .<sup>91</sup>

Justice Black further said:

*Looked at from the standpoint of the individual who is being prosecuted*, this notion [of the Court] is too subtle for me to grasp. If double punishment is what is feared, it hurts no less for two 'Sovereigns' to inflict it than for one. If danger to the innocent is emphasized, that danger is surely no less when the power of State and Federal Governments is brought to bear on one man in two trials, than when one of these 'Sovereigns' proceeds alone.<sup>92</sup>

A close analysis of the majority opinion yields what the author believes to be Justice Frankfurter's real reasons for upholding the state conviction. Frankfurter has always believed that state action should be struck down only after great hesitation and reflection. He has been wary of excessive federal legislative and judicial power over objects traditionally within the sphere of the states.<sup>93</sup> Near the end of his opinion he stated:

Time has not lessened the concern of the Founders in devising a federal system which would likewise be a safeguard against arbitrary government. The greatest self-restraint is necessary when that federal system yields results with which a court is in little sympathy.<sup>94</sup>

Justice Frankfurter concluded by saying that successive prosecutions are a matter of concern although they do not violate due process, but that the states, not the Supreme Court, are the proper parties to deal with the problem. It seems that Justice Frankfurter, having realized the grave problems of criminal law administration which would arise if successive state and federal prosecutions for the same offense were

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91. *Id.* at 150-51.

92. *Id.* at 155. (Emphasis added.)

93. *Cf.* *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943) (dissent); *Screws v. United States*, 325 U.S. 91 (1945) (dissent).

94. *Bartkus v. Illinois*, 359 U.S. 121, 137-8 (1959).

proscribed by the due process clause,<sup>95</sup> has delegated to the state legislatures what the author considers to be a proper judicial function. There is no dispute over the fact that the Supreme Court is the interpreter of the due process clause. It is true that a part of that interpretive process requires a delicate balancing of interests. However, this does not mean that the Court should shy away from declaring conduct a violation merely because doing so will create difficult administrative problems.<sup>96</sup>

#### B. *Abbate v. United States*

Abbate was convicted in an Illinois state court for violating a state statute making it a crime to conspire to injure the property of another and was sentenced to three months imprisonment. Thereafter, because of the same conspiracy, he was convicted in a federal district court for violating a federal statute<sup>97</sup> by conspiring to violate 18 U.S.C. § 1362, which forbids the injury or destruction of communications facilities "operated or controlled by the United States."

The major difference between *Abbate* and *Bartkus* is that in the former a federal court tried the petitioner after the state court had. Thus there was no question as to whether the fourteenth amendment incorporated the proscription against double jeopardy found in the fifth. The fifth amendment itself was involved. Mr. Justice Brennan, speaking for the Court, affirmed the conviction relying on *United States v. Lanza*.<sup>98</sup> That court said:

The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the Federal Government, . . . and the double jeopardy therein forbidden is a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority. Here the same act was an offense against the State of Washington, because a violation of its law, and also an offense against the United States [under its law]. The defendants thus committed two different offenses by the same act, and a conviction by a court of Washington of the offense against that State is not a conviction of the different offense against the United States and so is not double jeopardy.<sup>99</sup>

In effect the court said that the United States only placed the defendant in jeopardy once. The fact that another government had also placed him in jeopardy was none of its affair.

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95. These problems are discussed in Chapters IV & V *infra*.

96. For another criticism of the *Bartkus* case, see 44 MINN. L. REV. 534 (1960). A student note in sympathy with *Bartkus* can be found at 45 CORNELL L.Q. 574 (1960).

97. 18 U.S.C. § 371 (1958).

98. 260 U.S. 377 (1922). For an extended discussion of this case see Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309 (1932).

99. *United States v. Lanza*, *supra* note 98, at 382.

This of course is a possible interpretation of the double jeopardy clause. However, the Supreme Court, which is often meticulous in examining the intent of the Founding Fathers, did not do so this time.<sup>100</sup> At the time the fifth amendment was under consideration the double jeopardy clause read:

No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense . . . .<sup>101</sup>

A delegate moved to have the clause changed to read,

No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense *by any law of the United States.*<sup>102</sup>

This amendment was rejected. While this bit of legislative history is by no means conclusive, a diligent court should have discussed the point. Neither *Lanza*<sup>103</sup> nor *Abbate* did. Further, even if the Court's interpretation of the double jeopardy clause is correct, it failed to consider the applicability of the due process clause of the fifth amendment. Even though in *Abbate* the federal government did not itself place the defendant in jeopardy twice, under Justice Black's reasoning in *Bartkus* he was denied due process of law.<sup>104</sup>

The *Abbate* case does raise one problem that is worth discussion at this point. The defendant committed the act of conspiracy in Illinois, but the act was to have been consummated by destroying property in Mississippi, Tennessee, and Louisiana. Under the Illinois statute<sup>105</sup> the court had discretion to imprison him for five years, but it only sentenced him to three months. Justice Brennan contended that to allow this very light sentence by the state court to bar a federal prosecution which could

100. Mr. Justice Black did, however. See *Bartkus v. Illinois*, 359 U.S. 121, 201 (1959) (dissent).

101. 1 ANNALS OF CONG. 434 (1789-91) [1789-1824].

102. *Id.* at 753. (Emphasis added.)

103. Although some commentators say that the basis of the *Lanza* opinion which arises under the Prohibition amendment is that the second section of the eighteenth amendment grants the states concurrent jurisdiction, the Court specifically refutes this argument. "To regard the Amendment as the source of the power of the States to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter." *United States v. Lanza*, 260 U.S. 377, 381 (1922). *Cf.* 22 GA. BAR J. 392, 399 (1959-60).

104. *Cf.* text accompanying notes 91 & 92 *supra*.

105. ILL. REV. STAT. ch. 38, § 139 (1957), "If any two or more persons conspire or agree together, . . . with the fraudulent or malicious intent wrongfully and wickedly to injure the . . . property of another, . . . or to commit any felony, they shall be deemed guilty of a conspiracy; . . . and every person convicted of conspiracy at common law, shall be fined not exceeding \$2,000 or shall be imprisoned in the county jail not exceeding one year, or shall be imprisoned in the penitentiary for a term of not less than one year and not exceeding five years, or may be so fined and so imprisoned in the county jail or penitentiary." The statute applies to conspiracies in Illinois to destroy property outside the state. See *People v. Buckminster*, 282 Ill. 177, 118 N.E. 497 (1917).

result in a five year sentence,<sup>106</sup> would be to impair the efficiency of federal law enforcement.<sup>107</sup> Brennan feared that the Illinois state court did not consider the offense as seriously as it might have, since the conspiracy was to be consummated, not in Illinois, but in three other states. As he pointed out, "such a disparity will very often arise when, as in this case, the defendants' acts impinge more seriously on a federal interest than on a state interest."<sup>108</sup> However, this statement is not completely accurate. The legislature set a penalty almost as strict as that set in the federal statute,<sup>109</sup> showing that at least the legislative branch of the state considered that a serious state interest was harmed. It seems, then, that Brennan's statement is based solely on the sentence imposed by the trial judge. Since judges traditionally have broad discretion to consider many factors when sentencing a prisoner, a judge should not draw the inferences Justice Brennan did, without adequate proof before him that the courts of the state considered the interests of Illinois to be so different that in reality two offenses were committed.

The *Lanza* case also mentions a problem analogous to the one confronting Justice Brennan. The court hypothesized that if a state were to punish a crime by small or nominal fines, the race of offenders to the state courts to plead guilty and secure immunity from federal prosecution would not lead to respect for the federal statutes or for their deterrent effect.<sup>110</sup> But a strong argument can be made to the contrary; that is, if the first trial is a mock trial, then the defendant never was in jeopardy and can be tried again.<sup>111</sup> In its brief in *Abbate* the Government met this argument by stating that the problems of proving collusion are so great that in most instances they are insurmountable.<sup>112</sup> However true this may be, it does not follow that successive prosecutions always should be permitted, even when there is no collusion. In order to solve this problem, it is necessary to weigh the rights of the individual against double punishment against the rights of a government to protect itself against collusive prosecutions by another government. In all probability, collusive prosecutions are very rare, and if in a particular case collusion cannot be proved, then the proscription against double jeopardy should apply. This is not shocking in a system of criminal law which always gives the benefit of doubt to the defendant.<sup>113</sup>

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106. 18 U.S.C. § 371 (1958) provides, "If two or more persons conspire . . . to commit any offense against the United States, . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

107. *Bartkus v. Illinois*, 359 U.S. 121, 195 (1959).

108. *Ibid.*

109. See notes 105 and 106, *supra*.

110. *United States v. Lanza*, 260 U.S. 377, 385 (1922).

111. See Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 U.C.L.A.L. REV. 1, 3 n.6 (1956).

112. Brief for the United States, pp. 43-44, *Abbate v. United States*, 359 U.S. 187 (1959).

113. *Cf. State v. Lawrence*, 120 Utah 323, 234 P.2d 600 (1951). "However, under our

Furthermore, it is unlikely that a race of offenders will ever develop. Unless we assume that criminals are always in league with the police, it is unlikely that a criminal will turn himself in to the state authorities in the hope of receiving a minor sentence and by this means bar a federal trial. Practically speaking, he will hope to escape the clutches of the law altogether. The possibilities of collusion then, should not be a reason to allow *all* successive state-federal prosecutions. It should only mean that in the proper case, collusive practices if proved, should permit a second prosecution.

Although they are distinguishable, it is interesting to note that neither *Bartkus* nor *Abbate* made any mention of two cases in which the Supreme Court did recognize a bar against successive prosecutions. In *United States v. Furlong*,<sup>114</sup> the Court declared:

Robbery on the seas is considered as an offence within the criminal jurisdiction of all nations. It is against all, and punishable by all; and there can be no doubt that the plea of *autrefois acquit* would be good, in any civilized state, though resting on a prosecution instituted in the courts of any other civilized state.<sup>115</sup>

Almost 100 years later, the Supreme Court decided the case of *Nielson v. Oregon*.<sup>116</sup> Congress had given the States of Oregon and Washington concurrent jurisdiction over the Columbia River. By way of dictum, the Court said:

Where an act is *malum in se* prohibited and punishable by the laws of both States, the one first acquiring jurisdiction of the person may prosecute the offense, and its judgment is a finality in both States, so that one convicted or acquitted in the courts of one State cannot be prosecuted for the same offense in the courts of the other.<sup>117</sup>

The concurrent jurisdiction in both these cases is similar to that of the English cases discussed above.<sup>118</sup> They are not cases in which two governments always *have* territorial jurisdiction over the subjects involved. Rather they are examples of situations in which the legislature has tried to correct a situation whereby two or more governments might come into conflict on certain occasions. In fact the *Nielson* Court said:

Undoubtedly one purpose, perhaps the primary purpose, in the grant of concurrent jurisdiction was to avoid any nice question

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jury system, it is traditional that in criminal cases juries can, and sometimes do, make findings which are not based on logic, nor even common sense." *Id.* at 330, 234 P.2d at 603.

114. 18 U.S. (5 Wheat.) 184 (1820).

115. *Id.* at 197 (dictum).

116. 212 U.S. 315 (1909).

117. *Id.* at 320.

118. See text, notes 48-61 *supra*.

as to whether a criminal act sought to be prosecuted was committed on one side or the other of the exact boundary in the channel, that boundary sometimes changing by reason of the shifting of the channel.<sup>119</sup>

Even though these two cases are distinguishable from *Bartkus* and *Abbate*, the courts in barring a second prosecution did not worry about the "race of offenders" nor about one state "thwarting" the law of another although the possibilities were equally present.

In summary, *Bartkus* and *Abbate* were concerned with only one problem, that of balancing the interests of the administration of the criminal laws of two governments. In the interests of preventing friction the Supreme Court believed that it was better to try a man twice than have one government usurp the powers of another. The Court was quite cognizant of the fact that if it had ruled otherwise, it would have created many new problems of criminal administration. It is submitted that these problems, although difficult, can be solved, and therefore the rights of the individual defendants should have been protected.

## V. SUGGESTIONS FOR A JUDICIAL SOLUTION

### A. *The Present Interpretation of the Double Jeopardy Clause*

The double jeopardy clause provides that no person shall be twice put in jeopardy "for the same offence." However, the courts have consistently held that *because of the sole fact* that a man commits an act that is made a crime by two sovereigns, he is deemed to have committed *two distinct offenses* and may be punished by each sovereign. The traditional justification for this holding is, "that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each."<sup>120</sup> However, this argument fails to hold up under scrutiny. This "peace and dignity" is not something which belongs to each sovereign and which may be coveted by each. In reality, this "peace and dignity" represents the interests of society, which the two governments were given concurrent jurisdiction to protect. An "offense against the peace and dignity" of a sovereign is not really an offense *against the sovereign itself*, but against the society which the sovereign protects. Further, the states and federal government do not protect separate societies. The federal government protects the same society as does the state. This protection overlaps in the same manner as does the jurisdiction. Thus, when an act is committed which violates the laws of two sovereigns, no offense is committed against the "peace and dignity of both"; rather the offense has been committed against *one* society. The only unusual factor is that our federal system

119. *Nielsen v. Oregon*, 212 U.S. 315, 320 (1909).

120. *United States v. Lanza*, 260 U.S. 377, 382 (1922).

has created two sovereigns with jurisdiction to protect *that* society and punish "for the same offence." Under this theory, then, successive prosecutions by the state and federal governments to vindicate the same social interest is in effect to try a man twice for the same offense, and therefore should be a violation of due process of law.<sup>121</sup>

Since the cases which have dealt with successive prosecutions by state and federal governments have automatically allowed double prosecutions without further inquiry, it is necessary to turn to cases involving only a single jurisdiction to see how the courts have interpreted the phrase "for the same offense" found in the double jeopardy clause. There are two tests in use today—the "same evidence" test, and the "same transaction" test.

The majority of the courts use the "same evidence" test which originated in *The King v. Vandercomb*.<sup>122</sup> In its most common form, this test permits multiple indictments except where the same proof will sustain a conviction under both the first and the second indictments. For instance, in the leading case<sup>123</sup> espousing this theory, the defendant committed one act; that is, he made a sale of morphine to one person, but in doing so he violated two different statutory provisions.<sup>124</sup> The Court declared that:

Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.<sup>125</sup>

Furthermore, the courts have continued to use the "same evidence" test to justify *multiple trials* in situations where a person commits two or more illegal acts which injure two or more persons or their property during the same occurrence. For example, in *Hoag v. New Jersey*,<sup>126</sup> the defendant was tried and acquitted for the robbery of three persons on the same occasion. Subsequently he was tried and convicted for robbing

121. Oddly enough, it may not be a violation of the double jeopardy clause itself since that has been interpreted to apply only when the federal government itself prosecutes a person twice. See text accompanying notes 98 and 99 *supra*. For an application of the "social interest" theory to multiple prosecutions, see Kirchheimer, *The Act, The Offense and Double Jeopardy*, 58 YALE L.J. 513 (1949).

122. 2 Leach 708, 168 Eng. Rep. 455 (Ex. 1796).

123. *Blockburger v. United States*, 284 U.S. 299 (1932).

124. INT. REV. CODE OF 1954, § 4704 forbids the sale of narcotics except in or from the original stamped package. INT. REV. CODE OF 1954, § 4705 forbids the sale of narcotics not in pursuance of a written order of a person to whom the drug is sold.

125. *Blockburger v. United States*, 284 U.S. 299, 304 (1932). For cases in *accord*, see A.L.I., ADMIN. OF CRIM. LAW: DOUBLE JEOPARDY § 5, commentary pp. 26-9 (1935).

126. 356 U.S. 464 (1958); see also *Ciucci v. Illinois*, 356 U.S. 571 (1958). For a discussion of these cases see 1958 ILL. L.F. 472.



a fourth person during the same occurrence. The court accepted the fact that under the "same evidence" test used by the New Jersey court, each robbery was a separate offense and thus could be punished separately. It then went on to declare that it was not a violation of due process to prosecute for each robbery in separate trials.<sup>127</sup>

On the other hand, a few courts have adopted the "same transaction" test. In *State v. Mowser*,<sup>128</sup> the defendant had been previously convicted of robbery. He was then put on trial for the killing of the victim of the robbery—the killing being felony-murder. The court held that the conviction of robbery barred a new trial for felony-murder, saying:

When such integral part of the principal offense is not a distinct affair, but grows out of the same transaction, then an acquittal or conviction of an offender for the lesser offense will bar a prosecution for the greater.<sup>129</sup>

However, by the use of the term "same transaction," the court does not mean that it is necessary to try all the illegal acts which defendant committed during the same time sequence. Instead, all the court said was, "The legislature has made the crime of robbery a constituent element of murder in the first degree . . . ."<sup>130</sup> It is the act of robbery which is made the basis of the murder charge, and in *this* sense it is all one transaction.<sup>131</sup>

It is interesting to note that no state adopts one test or the other; rather they use the two interchangeably in the hope of coming to an equitable solution in the particular case.<sup>132</sup> Few courts have yet adopted a test whereby they look to the intent of the legislature and try to determine just what interests it is trying to protect. Instead the courts seem to presume that because the legislature enacts several statutes, it intends that all should be cumulatively applicable.<sup>133</sup>

127. *Accord*, A.L.I. *op. cit. supra* note 125, § 22. "If a person is acquitted or convicted of an offense he shall not again be prosecuted for a violation of the same provision of the criminal law committed in the same transaction unless the acts done by him took effect on more than one person or the property of more than one person . . . ." For cases in *accord*, see A.L.I., *supra*, § 22, commentary pp. 162-65.

128. 92 N.J.L. 474, 106 Atl. 416 (1919).

129. *Id.* at 483, 106 Atl. at 420.

130. *Id.* at 482, 106 Atl. at 419.

131. In *Spannell v. State*, 83 Tex. Crim. 418, 203 S.W. 357 (1918), defendant fired several shots and killed two people. Since he only intended to kill one, the single intent encompassed both shots and thus there was only one transaction and only one trial could be had. For other cases in *accord*, see A.L.I., *op. cit. supra* note 125, pp. 29-30. For a discussion of the "same transaction" test see Lugar, *Criminal Law, Double Jeopardy, and Res Judicata*, 39 IOWA L. REV. 317, 323 (1954). *Cf.* 65 YALE L.J. 339 (1956).

132. Note that New Jersey used the "same evidence" test in *Hoag v. New Jersey*, 356 U.S. 464 (1958), *supra* note 126, and the "same transaction" test in *State v. Mowser*, 92 N.J.L. 474, 106 Atl. 416 (1919) *supra* note 128. See also, Lugar, *supra* note 131, at 325-29.

133. See 65 YALE L.J. 339, 346 (1956). See also Kirchner, *The Act, The Offense and Double Jeopardy*, 58 YALE L.J. 513 (1949) for an excellent discussion of this point.

B. *Proposals to Prevent Successive Prosecutions "for the Same Offense"*

As we have seen, the federal government enacts laws to protect the same society and therefore the same social interests as does the state. Merely because both Congress and the state legislatures take it upon themselves to define a crime does not mean that each crime is a different "offense." It seems highly unlikely that at the time this phrase was incorporated into the Constitution, the Framers were thinking in terms of particularized crimes. They were thinking in terms of broad social interests. Thus it is the role of the courts in this area to determine in each case whether Congress and the state legislatures intended to protect the same or different social interests.

The cases in this area break down into several basic categories. First, there is the situation where the defendant commits *one* act and violates *one* social interest which may be prosecuted by both the state and federal governments. *Bartkus* is such a case. The state had a broad robbery statute<sup>134</sup> designed to protect all private property within its jurisdiction. The federal government had a narrow robbery statute<sup>135</sup> designed to protect the property placed in depositories within its jurisdiction, namely federally insured banks. Because the federal government is protecting property placed in *its* own instrumentality does not mean it is protecting a different social interest.<sup>136</sup> All this means is that the federal government has jurisdiction to enact the statute. Since the federal government tried the defendant first, it vindicated the interests of society against having property illegally taken from a federally insured bank. When the state later tried the defendant, it vindicated the interests of society against having property illegally taken. Although the interest protected by the state is broader, it clearly includes that interest which the federal government had already vindicated, and thus when the State of Illinois tried *Bartkus* after the United States had, it was trying him for "the same offense." The converse is also true. If the federal government had prosecuted after the state, it would have been prosecuting for a violation of the same social interest.

The same analysis would hold true where the federal government enacts legislation not to protect its own instrumentalities, but to protect interstate commerce. For instance, if there is a federal statute proscribing the transportation of stolen goods in interstate commerce and a state statute proscribing larceny, a prosecution by one government should bar the other. Both statutes are protecting private property. The only reason for the different wording is jurisdictional.<sup>137</sup>

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134. ILL. REV. STAT. ch. 38 § 501 (1957).

135. 18 U.S.C. § 2113 (1958).

136. The Government in *Abbate v. United States*, 359 U.S. 187, 196 (1959) argued that the fact that a federal instrumentality was involved meant that there were two social interests.

137. It is assumed that asportation is part of the crime of larceny. If not the case is harder, but the result should still be the same.

A second category of cases are those in which the defendant commits *one* act, but violates *several* social policies.<sup>138</sup> Perhaps the best example of this is the situation presented in *Crossley v. California*.<sup>139</sup> There one Worden derailed a train exclusively engaged in carrying the United States mail. In the process he also killed the engineer. In such a situation, the state ought to be able to prosecute him for murder and the United States ought to be able to prosecute him for obstructing the mails. Society has two distinct interests at stake here—the protection of human life, and the protection of the mails. It is obvious that a federal prosecution under the mail statute should not bar a state murder prosecution. However, it could be argued that a state murder trial should bar a later federal mail prosecution, because the state vindicated the minor social interest when it tried the defendant for his violation of the major one. While as a practical matter a United States attorney might take this view and not prosecute, there should be no constitutional requirement against such action. Worden was “worse” than a murderer; he was also an obstructor of the mails. In contrast, Bartkus was “just” a robber. He was merely unfortunate enough to have robbed a federal instrumentality.

One should note at this point that although multiple trials by state and federal governments are proper when one act violates two or more social interests, this should not be so within a single jurisdiction.<sup>140</sup> For instance, a person by means of one act of sexual intercourse, could violate a number of different social interests. He could commit incest, adultery, forced rape, statutory rape, and in some states fornication. However, the state prosecutor should be required to bring all his theories of the crime in one trial, because one of the major reasons for the proscription against double jeopardy is to prevent harassment of the individual by confronting him with the prospect of multiple trials.<sup>141</sup>

When there are different governments involved, we cannot require that all the theories of the action be brought at once. While it is true that this means that the defendant may be tried more than once, at least the danger of *intentional* harassment is not great. If this added factor were present because of federal-state collusion, then there should be a bar.<sup>142</sup>

A problem similar to the one just discussed is that in which *one act*

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138. For a general discussion, see Horack, *The Multiple Consequences of a Single Criminal Act*, 21 MINN. L. REV. 805 (1937).

139. 168 U.S. 640 (1898).

140. Mr. Justice Brennan, in a separate opinion in *Abbate v. United States*, 359 U.S. 187, 196-201 (1959), failed to make any distinction between successive prosecutions by *one* government and by *two* governments. He said that if two governments were allowed to prosecute when two social interests are violated, it follows that one government must be able to prosecute twice for the two violations. But, he declares, the latter would violate the double jeopardy clause. Therefore he concludes that the “social interest” test cannot be adopted at all!

141. *Cf. Commonwealth v. Bishop*, 182 Pa. Super. 151, 126 A.2d 533 (1956).

142. The claim of collusion between federal and state authorities was made in *Bartkus v. Illinois*, 359 U.S. 121, 123 (1959), but was quickly dismissed.

results in injuries to *different* persons or property owned by different governments. For example, if a person driving an automobile wilfully strikes and injures two people, one of whom is a federal official and the other a private citizen, a state could bring an action for assault and battery for both injuries and punish for both. This would vindicate the social interest and the federal government would be barred. But if the state prosecuted only for the assault on the private citizen, the United States could prosecute for the other assault. The reason for this is that although only one social interest had been violated, it had been violated twice even though by means of only one act. Two members of society had been injured; it makes no difference whether it was by one act or by two. Thus, multiple prosecutions by different governments in this situation are constitutionally proper.

For the same reasons as stated above, when discussing the problem of one act violating several social policies, multiple prosecutions in a single jurisdiction are improper. All the counts should be brought in one trial. Although there should be only one trial, multiple punishments are permissible when different persons or property owned by different persons are injured. A defendant who has injured two people has done more social harm than one who has injured only one person and may be punished accordingly.<sup>143</sup>

A more difficult problem arises when both the state and federal governments proscribe the same act as a crime and give that crime essentially the same name, but in fact the two may be protecting different social interests. A possible example of this is raised in the *Abbate*<sup>144</sup> case. If the Illinois statute<sup>145</sup> for conspiring to destroy property had set a *maximum* penalty of three months and the federal penalty for the same crime was five years,<sup>146</sup> it would be possible to argue that the state did not consider this particular social interest to be worthy of much protection.<sup>147</sup> In this situation the federal government should not be deprived of its jurisdiction to protect what it considers to be an important interest. Naturally it is difficult for a court to decide at what point the protection given by one government is so weak that it will allow a second prosecution, but there are gray areas in all fields of the law and this, as we have seen, is no exception.

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143. A.L.I. *supra* note 125, § 22, "If a person is acquitted or convicted of an offense, he shall not again be prosecuted . . . unless the act or acts . . . took effect on more than one person or the property of more than one person . . ." *But cf.* MODEL PENAL CODE, § 1.08 (tent. draft No. 5, 1956) which says that there must be a single prosecution when "(a) the offenses are based on the same conduct . . ." The comment says that "same conduct" clearly includes the case where one act results in injuries to different persons. However, the MODEL PENAL CODE will not commit itself on the situation where two persons are injured by two acts in the same time sequence.

144. See also notes 105-09 *supra* and accompanying text.

145. See note 105 *supra*.

146. See note 106 *supra*.

147. In the actual case, the property to be destroyed was not located in Illinois. Illinois prosecuted for the crime only because the conspiracy took place there.

Perhaps a clearer example of this proposition is found in *People v. Welch*.<sup>148</sup> The defendant was charged in the state court with the crime of manslaughter by having feloniously and wilfully propelled a steamboat in such a way that one Jackson was thrown overboard and drowned. There was also a federal statute which declared that every person employed on a steamboat "by whose misconduct, negligence or inattention to his duties . . . the life of any person is destroyed . . . shall be deemed guilty of manslaughter . . ." <sup>149</sup> Here both governments have enacted a law on manslaughter yet the federal statute really penalizes only negligence, while the state law penalizes *wilful* misconduct.

In such a case, a federal prosecution would not vindicate the social interest which the state is trying to protect and thus would not act as a bar. On the other hand, if the state prosecuted first *and convicted*, it would vindicate both interests because the social interest, as the federal government sees it, is necessarily included in the state interest. However, if the state *acquitted* the defendant on the wilful misconduct charge, he might still have been negligent and although the state interest had been vindicated, the federal interest would not have been. Thus, a state *conviction* will act as a bar to a federal prosecution; a state *acquittal* will not, although the defendant should have the benefit of the doctrine of collateral estoppel<sup>150</sup> in any subsequent prosecution.

This analysis does present the anomaly that if the United States prosecutes first, there can be two trials, but if the state prosecutes first and *convicts*, there can be only one. This problem can be solved at the single jurisdictional level by requiring the government to bring its "whole" cause of action at once. However, at the multijurisdictional level the only solution is to have federal-state cooperation. In the *Welch* situation, the most likely solution would be for both governments to agree to have New York prosecute. Although this appears to be sound, the author does not contend that it is required by the due process clause. Although a double prosecution is always harsh, it does not appear that the fundamental "concepts of ordered liberty"<sup>151</sup> would be violated in this case. Also some limited protection would be given by the application of collateral estoppel.

Using the same analysis, the courts should be able to handle situations in which the defendant commits *two or more acts* in furtherance of

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148. 141 N.Y. 266, 36 N.E. 328 (1894).

149. REV. STAT. sec. 5344 (1875). The punishment under this statute is "confinement at hard labor for a period of not more than ten years." This heavy penalty indicates that even though the statute only speaks in terms of "negligence," perhaps the courts do look for some element of willfulness. *However for the purpose of our example, we shall assume that the federal penalty is very minor.*

150. Collateral estoppel is discussed in detail in the text accompanying notes 154-163 *infra*.

151. *Palko v. Connecticut*, 302 U.S. 319 (1937).

his crime. For instance, if a person should rob a private home and the post office next door, a federal prosecution for the latter robbery will not bar a state prosecution for the former. The converse is also true. Again only one social interest is violated—the protection of property,<sup>152</sup> but it is violated twice. Of course if the state prosecutes for both robberies, the United States is barred; however, the state can mete out multiple punishments.<sup>153</sup>

Hence, once the courts discard the archaic notion that just because two governments have jurisdiction to prosecute for an illegal act, this means that the act constitutes two offenses, and begin to look to the social interests violated, many of the obstacles to fair treatment of the individual will disappear.

### C. *The Doctrine of Collateral Estoppel*

Once a court decides that two social interests have been violated (or one social interest has been violated twice) and that successive prosecutions are permissible, the doctrine of collateral estoppel becomes important.<sup>154</sup>

Although this doctrine has long been recognized in the criminal law,<sup>155</sup> its principle use has been in civil actions. The rule can be stated as follows:

Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties [and their privies] in a subsequent action on a different cause of action . . . .<sup>156</sup>

The first problem that we must face is that in all situations in which we

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152. Some might argue that there are two social interests here—the protection of private property and the protection of public property. The author disputes this on the grounds that in order for the “social interest” test to be effective, the “social interest” must be defined broadly. In any event, the purpose of this paper is not to define “social interest” but merely to show that it can and should be defined.

153. A case similar to the above hypothetical both in facts and results is *State v. Moore*, 143 Iowa 240, 121 N.W. 1052 (1909).

154. The topic of collateral estoppel and its relationship to double jeopardy is discussed in Lugar, *Criminal Law, Double Jeopardy and Res Judicata*, 39 IOWA L. REV. 317 (1954); Kirchheimer, *The Act, The Offense and Double Jeopardy*, 58 YALE L.J. 513, 533 (1949); Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 29 (1960).

155. The leading American case is *United States v. Oppenheimer*, 242 U.S. 85 (1916). Technically this case deals only with the doctrine of *res judicata*. This means that a judgment is conclusive as to every question which was or *might have been presented and determined* while collateral estoppel refers only to those questions which were actually litigated and determined. In the criminal field most courts and writers use the term “*res judicata*” to refer to both. *But cf.* Sealon v. *United States*, 332 U.S. 575 (1948). For an excellent discussion of collateral estoppel in civil cases, see Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1 (1942).

156. RESTATEMENT, JUDGMENTS § 68 (1942); Comment (a) to § 83 declares that not only parties but those in privity with the parties are bound by and get the benefits of the rules of *res judicata* and collateral estoppel. *Cf.* 2 FREEMAN, JUDGMENTS 1322 (5th ed. 1925).

are concerned the prosecuting parties are different. However as the author has contended above, each government does not prosecute to protect its own sovereign interests. Rather each prosecutes to protect the interests of the same society. If this theory is correct, then the two governments are in "privity" and thus fall within the scope of the doctrine. "Privity" is a word incapable of precise definition. However the *Restatement of Judgments* says:

Privity is a word which expresses the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties.<sup>157</sup>

Even though, by hypothesis, the problem of collateral estoppel should arise only when the two governments are protecting different interests of society, it is at the point where society's two interests converge that the doctrine is used. Thus it is appropriate to say that the interests which the federal government desires to protect "are affected by the judgment" in a prior state action.

Once it is determined that collateral estoppel can be utilized in multi-jurisdictional prosecutions the next problem to consider is whether or not the use of that doctrine is constitutionally required. The Court in *Hoag v. New Jersey* said:

Despite its wide employment, we entertain grave doubts whether collateral estoppel can be regarded as a constitutional requirement. However, we need not decide that question, for in this case New Jersey both recognized the rule of collateral estoppel and considered its applicability to the facts of this case.<sup>158</sup>

In order to fully explore the constitutional issue, it is necessary to examine the facts in *Hoag*. The defendant was tried and acquitted by a state court for robbery of three persons on the same occasion. Subsequently he was tried and convicted for robbing a fourth person during the same occurrence. Although we have already decided that it is a violation of due process for a single government to bring two trials in such an instance, we shall assume for the purpose of this discussion that the second trial was properly brought by the federal government.

The only controverted fact at the first trial was the identity of the defendant. The jury acquitted him. At the second trial, he argued that since it had already been decided that he had not been present at the scene of the crime, the government was collaterally estopped from prosecuting him for the other robbery. Although the New Jersey court accepted the principle of collateral estoppel, they did not apply it in this

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157. *Id.* § 83, comment (a).

158. 356 U.S. 464, 471 (1958).

case because "there is nothing to show that the jury did not acquit . . . on some other ground or because of a general insufficiency in the State's proof."<sup>159</sup> In short, since the court could not be sure that the issue had been "actually litigated and determined" there could be no estoppel.

This decision is based on the recognition of the fact that juries are often irrational and therefore their verdicts *may* not have been grounded in a consideration of the issue in contention. While this may often be true, the use of this theory completely negates any effectiveness that collateral estoppel may have, both in criminal and in civil actions. Furthermore, in criminal cases especially, irrational jury verdicts are considered to be a virtue in that they often temper harsh rules of law. It seems that the jury trial advantage given to the defendant should not be taken away from him at a second trial; any controls on jury verdicts should be by the use of state appeals, not multiple prosecutions.<sup>160</sup>

Thus since only one issue—that of identity—was in contention, the court should have accepted the proposition that this issue was "actually determined."<sup>161</sup> Furthermore the acceptance of this proposition will lead to better prepared cases on the part of the prosecution because it would realize that if it fails to convict, another government will be barred from trying the same issue. Moreover, because collateral estoppel will bar the second government, there will be less temptation for the losing government to prevail upon the second to bring suit.<sup>162</sup>

Without the restrictions the doctrine of collateral estoppel imposes, a second government would be free to try an issue already decided by another court and which had not been declared to have been decided erroneously. Even though the defendant is not being put "twice in jeopardy for the same offence," he is being tried again for a component part of that offense and this seems to be contrary to the spirit of the double jeopardy clause and to the "very essence of a scheme of ordered liberty."<sup>163</sup> If a government is concerned with irrational jury verdicts, the proper solution once again is to allow the state to appeal, not to look to a second prosecution by that state or another government.<sup>164</sup>

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159. *State v. Hoag*, 21 N.J. 496, 505, 122 A.2d 628, 632 (1956).

160. See *State v. Lawrence*, 120 Utah 323, 234 P.2d 600 (1951). On state appeals, see text accompanying note 173 *infra*.

161. RESTATEMENT, JUDGMENTS § 68 (1942), Comment K suggests that the court look to the pleadings as evidence of what issues were litigated. There is no suggestion that the irrationality of jury verdicts be considered.

162. For policy considerations with respect to dual prosecutions by one government see *Mayers & Yarbrough*, *supra* note 154, at 31. A consideration of the difficult problems involved when there is more than one issue in dispute is beyond the scope of this paper. For a discussion see *Scott*, *supra* note 155, at 10.

163. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

164. A similar argument is made with regard to dual prosecutions by a single government in *Mayers & Yarbrough*, *supra* note 154, at 39-41; *Palko v. Connecticut*, *supra*, holds that it is not a violation of double jeopardy for a state to appeal a conviction.



Another question which must be considered is whether the government may use collateral estoppel *against* the defendant—that is, if a defendant is *convicted* by one sovereign, may the second sovereign, although prosecuting for a violation for a different social interest, contend that a component issue has already been decided against the defendant? There has been some discussion of this point in the federal courts. In *United States v. DeAngelo*,<sup>165</sup> the Court declared:

An accused is constitutionally entitled to a trial de novo of the facts alleged and offered in support of each offense charged against him and to a jury's independent finding with respect thereto. But a 'rule of evidence' has been recognized 'which accords to the accused the right to claim finality with respect to a fact or group of facts previously determined in his favor upon a previous trial.'<sup>166</sup>

This case reflects a strong policy that a wrongdoer should not be continually harassed—even at the expense of disallowing a relatively easy conviction.<sup>167</sup> However it is not so clear that the government should be *constitutionally* barred from using collateral estoppel *against* the defendant. It is the author's opinion that such use of collateral estoppel would not violate due process of law. Presumably the defendant was granted a fair chance in the first trial to present his case; while it might be an added safeguard to allow him to do so again, it would not be inherently unjust to him if he were barred. On the other hand, if the defendant can prove *actual* harassment by the second government such as repeated threats of prosecution with collateral estoppel effects if the defendant doesn't "play ball," then he may be able to show a violation of due process.

If the courts do decide that the government cannot use collateral estoppel against the defendant, this will raise the question of "mutuality of estoppel." Briefly stated, the theory is that if one party cannot use collateral estoppel against the other, the latter will not be able to use it either. However no reasoning has ever been suggested for this theory. Furthermore, it has been rejected in both criminal<sup>168</sup> and civil<sup>169</sup> cases.

In summary, it seems that if a defendant has been acquitted on an issue, it is not very satisfying to say that since he is now being tried for a violation of a different social interest, he may be tried once again

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165. 138 F.2d 466 (3d Cir. 1943) (dictum).

166. *Id.* at 468; for a discussion of this problem see 27 IOWA L. REV. 649 (1942); 39 J. CRIM. L., C. & P.S. 58 (1948); 27 TEXAS L. REV. 231 (1948).

167. *Cf.* *United States v. Waldin*, 253 F.2d 551, 557 (3d Cir. 1958) (dissent).

168. *United States v. DeAngelo*, 138 F.2d 466 (3d Cir. 1943). "Nor can there be any requirement of mutuality with respect to a criminal judgment's conclusiveness." *Id.* at 468.

169. The leading civil case rejecting mutuality is *Bernhard v. Bank of America*, 19 Cal. 2d 807, 122 P.2d 892 (1942) (Traynor, J.). *Cf.* 35 YALE L.J. 607 (1925-26).

on the same issue. Therefore the use of collateral estoppel in favor of a defendant should be constitutionally required.

#### VI. IMPLEMENTATION OF THE "SOCIAL INTEREST" TEST

In the first part of this paper, the theoretical justification for permitting successive prosecutions was examined and found to be grounded in the American conception of federalism. But to examine the reason why successive prosecutions are *allowed* is to examine only one side of the coin. Therefore it must be asked why it is actually *done*.

Probably the most important reason is that the federal government<sup>170</sup> and some states<sup>171</sup> do not permit the state to appeal because a new trial would violate the double jeopardy clause of their constitutions. Since court decisions have placed the state at a disadvantage by not allowing it to appeal erroneous verdicts, they have decided to right the balance by allowing second prosecutions through the device of the "same evidence" test on the single jurisdictional level,<sup>172</sup> and the device of federalism on the multi-jurisdictional level. This creates the anomalous situation whereby those jurisdictions which appear to be the most zealous in protecting individuals against double jeopardy actually cause the most harassment to the defendant.

If *Bartkus* and *Abbate* were overruled, and the "social interest" test was constitutionally required, this would in effect deprive the federal and state governments of a substitute for appeal and therefore it is most likely that they would reestablish state appeals by court decisions<sup>173</sup> or by constitutional amendment. A reestablishment of a right to appeal would give the state a chance to overturn erroneous verdicts and would also be fairer to the prisoner than second prosecutions, so long as the appeal is taken as promptly as possible.<sup>174</sup>

Furthermore, even under the "social interest" test, the threat of successive prosecutions is not eliminated; it is only reduced. A second government may retry the defendant if the first government failed to protect a particular social interest. Therefore, in order to give the individual maximum protection, the legislatures should enact laws designed to guarantee the state *one* full and fair opportunity to try the accused for

170. *Kepner v. United States*, 195 U.S. 100 (1904). It is unconstitutional for the Government to appeal only after jeopardy has "attached." For a discussion of the "attaching" of jeopardy see 1 WHARTON, CRIMINAL LAW AND PROCEDURE, § 138 (Anderson ed. 1957). Cf. *Fong Foo v. United States*, 369 U.S. 141 (1962) (It is a violation of the double jeopardy clause to allow the Government to get a *writ of mandamus* to compel a trial judge to vacate a directed verdict of acquittal even though he had no power to grant it under the circumstances.).

171. *E.g.*, *State v. Hand*, 6 Ark. 169 (1845). See also A.L.I. ADMIN. OF THE CRIM. LAW: DOUBLE JEOPARDY § 115 (1935).

172. *E.g.*, *Blockburger v. United States*, 284 U.S. 299 (1932).

173. See *Palko v. Connecticut*, 302 U.S. 319 (1937).

174. For a discussion of state appeals, see Mayers & Yarbrough, *supra* note 154, at 8.

violations of all social interests.<sup>175</sup> The Model Penal Code set out in the margin<sup>176</sup> represents an attempt to accomplish such a result.<sup>177</sup> It does so by means of a compulsory joinder of three types of allegations with an option granted to the court to order a severance when "justice so requires."

First, all offenses based on the "same conduct" must be tried together. According to the Comment to the Tentative Draft,<sup>178</sup> the term "same conduct" has been left to the courts to interpret in light of the purpose of the section to eliminate undue harassment. It is made clear, however, that this term does go beyond the "same act." Thus, if two shots, one immediately following the other, kill two persons, both homicides must be joined in a single trial. Also it is clear that two killings in unrelated situations could be tried separately. In effect the Code leaves to the courts the task of deciding just what is an "unrelated situation." This solution seems to be a sensible one. The state should not have to prosecute for two murders, two years apart, when the proofs and witnesses will be entirely different. On the other hand, a series of killings over a period of a month might well be tried at the same time.

Second, paragraph (b) requires that all "necessarily included offenses" and offenses incidental to the major objective be prosecuted at the same time. An example of a "necessarily included offense" would be the felony in a felony-murder prosecution.<sup>179</sup> An example of an offense

175. See 65 YALE L.J. 339, 354-68 (1955-56) which discusses Professor Dession's approach.

176. MODEL PENAL CODE § 1.08 (Tent. Draft No. 5, 1956). "(2) *Requirement of Single Prosecution.* Except as provided in paragraph (3) of this Section, if a person is charged with two or more offenses and the charges are known to the proper officer of the police or prosecution and within the jurisdiction of a single court, they must be prosecuted in a single prosecution when:

(a) the offenses are based on the same conduct; or

(b) the offenses are based on a series of acts or omissions motivated by a purpose to accomplish a single criminal objective, and necessary or incidental to the accomplishment of that objective; or

(c) the offenses are based on a series of acts or omissions motivated by a common purpose or plan and which result in the repeated commission of the same offense or affect the same person or the same persons or the property thereof.

"(3) *Relief from Required Joinder.* When a person is charged with two or more offenses, the Court may order any such charge to be tried separately, if it is satisfied that justice so requires."

In the Model Penal Code (Proposed Official Draft, 1962), section 1.08 has been renumbered section 1.07 and the test for required joinder of multiple offenses has been changed. Rather than the three-fold test described above, section 1.07 (2) states that there shall be no separate trials for "multiple offenses based on the same conduct or arising from the same criminal episode . . ." Unfortunately, the term "criminal episode" covers the same area as the term "same conduct" and thus in effect, section 1.08 (2) (b) and (c) has been deleted.

177. Professor Wechsler, Reporter for the MODEL PENAL CODE, said, "[T]his has been designed to cast the balance in favor of cleaning up the charges against a particular man at one time, in the view that he is only one man, and that however many things he has done the slate ought so far as possible to be cleaned so that he may be dealt with as the one man that he is, and appropriately disposed of." 33 A.L.I. PROCEEDINGS 139 (1956).

178. MODEL PENAL CODE, *supra* note 176, at 36-37.

179. See *State v. Mowser*, 92 N.J.L. 474, 106 Atl. 416 (1919).

that is not "necessarily included" but one that is often a part of a crime is a kidnapping incidental to a robbery. Often a person is kidnapped in order to rob him, but kidnapping is not one of the essential elements of the crime of robbery. In any event the Code treats both situations the same because successive prosecutions of a defendant should not turn on what the technical elements of a crime happen to be.

Paragraph (c) deals with two situations: one, in which the defendant repeatedly violates the same statute either against the same or different persons; and two, in which the defendant's acts affect the same person or his property but the offenses are different. In both situations joinder is required only if the offenses were motivated by a common purpose or plan. The purpose of this section is to provide that all "continuing" offenses be tried at the same time. For example, if a statute prohibits the exercise of a trade on Sunday, and the defendant storekeeper sells 200 articles, this is one continuing offense rather than 200 distinct offenses, because the sale of *all* the articles constitutes only *one* illegal "exercise of a trade."<sup>180</sup> However, the Code goes a bit further. It would consider an act to be a continuing offense even if the statute violated were written in narrower terms than the one above. For instance, in *O'Neil v. United States*,<sup>181</sup> defendant embezzled 831 letters from the United States mail, thus violating a federal statute<sup>182</sup> punishing the embezzlement of *any* letter. The Code, as did the *O'Neil* case, would say that even though technically the statute creates a separate crime for each letter taken, in fact there was only one criminal purpose or plan and thus there can only be one trial.

According to *O'Neil*, not only is it constitutionally required to bring all the counts at one trial, but it would be a violation of due process to provide for multiple punishments because the taking of all these letters, even though it was done over a nine day period and the letters belonged to different persons, constituted but one "continuing intent." Although the author has contended above that multiple punishments are proper when different persons or different property is involved, in situations when each renewed injury is inflicted in a purely mechanical manner without any additional thought on the part of a "reasonable man," then multiple punishments would be improper.<sup>183</sup>

Although this statute if interpreted liberally by the courts will go a long way to protect a defendant from successive prosecutions by his

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180. See *Ebeling v. Morgan*, 237 U.S. 625, 630 (1915) (dictum).

181. 236 F.2d 636 (6th Cir. 1956).

182. 18 U.S.C. § 1709 (1958). "Whoever . . . embezzles any letter . . . shall be fined . . . or imprisoned . . ."

183. Since the problem of multiple punishments is common not only to prosecutions by different governments, but to successive prosecutions by one jurisdiction, a full discussion is beyond the scope of this paper. See MODEL PENAL CODE § 1.07(1)(e) (Proposed Official Draft, 1962).

own state, its operation in certain circumstances will not prevent the federal government from prosecuting for a particular violation if the state failed to do so. The basic scheme of the statute is that if the state fails to join the required items, it is barred from prosecuting later.<sup>184</sup> There is no provision whereby the defendant can require that the state prosecute him for all offenses at once. For example, if the defendant passes five bad checks, the fifth of which was given to a federal official, but the state only knows about the first four, can the defendant also require prosecution on the fifth? This question was raised at the Annual Meeting of the American Law Institute in 1956, and Professor Wechsler, the Reporter, indicated that the defendant could so require.<sup>185</sup> However, if a court should hold that he could not, the federal government could prosecute on the fifth check, on the theory that the same social interest was violated more than once and not vindicated in the prior prosecution. Therefore the Code should specifically provide that the defendant has a right to require prosecution of all offenses referred to therein. Of course if he should fail to do so, then a federal prosecution would be at his own peril.

In order to further protect the defendant from successive prosecutions and also to increase the efficiency of criminal proceedings, a jurisdiction should provide for liberal amendment procedures for the prosecution. For instance in the bad check case above, if the prosecution did not learn of the check given to the federal official until after the indictment, it ought to be able to amend without reconvening the grand jury. The argument to the contrary is that if grand jury approval is necessary for indictments, any amendment as to substance also has to be submitted to a grand jury.<sup>186</sup> However, according to Kirchheimer,<sup>187</sup> the grand jury is only interested in the broadest and most cursory outlines of the facts presented by the district attorney. It does not go into details of evidence nor concern itself with the various theories under which a case may be presented. He concludes by declaring that in light of these considerations, amendment variances should be prohibited only "where there exists a reasonable presumption that the grand jury might not have brought the particular indictment if the amended version had been originally presented to it."<sup>188</sup>

If such a theory is adopted by the jurisdiction, it will greatly enhance the likelihood that violations of all social interests will be tried in one action and thus bar a retrial by a second jurisdiction. Of course if the

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184. MODEL PENAL CODE, *supra* note 183, § 1.09(1)(b).

185. 33 ALI PROCEEDINGS *supra* note 177, at 155-56.

186. *Commonwealth v. Snow*, 269 Mass. 598, 169 N.E. 542 (1930). *Cf. Ex parte Bain*, 121 U.S. 1 (1886).

187. Kirchheimer, *The Act, The Offense and Double Jeopardy*, 58 YALE L.J. 513, 534 (1949).

188. *Id.* at 538.

defendant can convince the court that trial of all offenses will be prejudicial to him he may ask for a severance.<sup>189</sup> The severance procedure should require the state to bring the second trial as soon as possible after the conclusion of the first.

#### VII. PRESENT AND PROPOSED LEGISLATION DESIGNED TO PREVENT SUCCESSIVE PROSECUTIONS BY DIFFERENT GOVERNMENTS

Although eighteen states<sup>190</sup> have statutes designed to bar successive prosecutions, these statutes have rarely been used,<sup>191</sup> and when they have been, the courts have, to a great extent, nullified their effectiveness.

New York has two statutes on the subject, one which creates a defense<sup>192</sup> and one which creates a procedural bar;<sup>193</sup> the wording of both is ambiguous, and the New York courts have exploited this defect to the extent that the defense is almost worthless. For example, in *People v. Adamchesky*,<sup>194</sup> the defendant was indicted for grand larceny for the theft of a truckload of cigarettes. He had previously been convicted of violating a federal statute<sup>195</sup> making illegal the transportation of stolen merchandise in interstate commerce. He pleaded both Penal Law section 33 and section 139 of the Code of Criminal Procedure as a defense.

The court dealt with each section separately. As to Penal Law section 33 the court stressed the word "offense." It said that the offense of

189. MODEL PENAL CODE, *supra* note 176, § 1.07(3).

190. ALASKA COMP. LAWS ANN. § 66-3-4 (1949) (Because Alaska was a territory when law was enacted, it does not bar prosecutions by the federal government. That presumably was left to the fifth amendment.); ARIZ. CODE ANN. § 43-6102 (1939); CAL. PENAL CODE § 656; IDAHO CODE ANN. § 19-315 (1948); ILL. REV. STAT. ch. 38 § 601.1 (1959) (This was enacted shortly after *Bartkus* and *Abbate* were decided); IND. STAT. ANN. § 9-215 (Burns 1933); MINN. STAT. § 610.23 (1947); MISS. CODE ANN. § 2432 (1942); MONT. REV. CODES ANN. § 94-4703 (1947); NEV. COMP. LAWS § 9963 (Hillyer 1929); N.Y. PENAL LAW § 33 and N.Y. CODE CRIM. PROC. § 139; N.D. REV. CODE § 12-0505 (1943); OKLA. STAT. ANN. tit. 21, § 25, tit. 22, § 130 (1951); ORE. REV. STAT. § 131.240(1) (1953); S.D. CODE § 13,0506, 34-0813 (1939); UTAH CODE ANN. § 76-1-25, 77-8-8 (1953); WASH. REV. CODE § 10.43.040 (1951); WIS. STAT. § 939.71 (1955). *Cf.* TEX. CODE CRIM. PROC. ANN. art. 208 (1954).

191. Although many of these statutes date back to the nineteenth century (*e.g.*, Minn.—1894, Mont.—1895) in only two states has there been much litigation,—New York where there has been a statute since 1816 [For history see *People v. Mignogna*, 54 N.Y.S.2d 233 (Queens County Ct. 1945)] and California where legislation has existed since 1872.

192. N.Y. PENAL LAW § 33 "Whenever it appears upon the trial of an indictment, that the *offense* was committed in another state or country, or under such circumstances that the courts of this state or government had jurisdiction thereof, and that the defendant has already been acquitted or convicted on the merits upon a criminal prosecution under the laws of such state or country, founded upon the act or omission in respect to which he is upon trial, such former acquittal or conviction is a sufficient defense." (Emphasis supplied.)

193. N.Y. CODE CRIM. PROC. § 139. "When an *act* charged as a crime is within the jurisdiction of another state, territory or country, as well as within the jurisdiction of this state, a conviction or acquittal thereof in the former, is a bar to a prosecution or indictment thereof in this state." (Emphasis supplied.)

194. 184 Misc. 769, 55 N.Y.S.2d 90 (1945).

195. 18 U.S.C. 2314 (1958).

grand larceny was different from that of transporting stolen merchandise. It failed to consider that asportation may be part of the crime of larceny, and also that the federal statute is worded in terms of "transportation" only to surmount jurisdictional difficulties. It did not mention that section 33 speaks not only in terms of "offenses" but also in terms of "acts."

However, it did get to this question in its discussion of the Code of Criminal Procedure, section 139. The court held that the "act" of taking was committed solely within the jurisdiction of New York, and thus section 139 did not apply.<sup>196</sup> Again, had the court been interested in carrying out the purpose of the statute, it would have construed the term "act" to embrace the asportation incidental to it. Even in the one New York case which held that the statute did bar a second prosecution, the court construed the statute as narrowly as possible, using the "same evidence" test to determine if the offenses were the same.<sup>197</sup>

Even though the barriers against successive state and federal prosecutions set up by the New York legislature were weak, in 1962 a decision came down which rendered them totally valueless. In *People v. Lo-Cicero*,<sup>197a</sup> the court held that the phrase "another . . . country" found in the New York statutes did not refer to the federal government. The result is that New York cannot prosecute a defendant after a prosecution for the same act by another state, territory or foreign country, but that in the most important situation of all, following a federal prosecution, the state is free to place the defendant in jeopardy once again.

The interpretation of the California Penal Code, section 656,<sup>198</sup> points out most graphically that these statutes are practically "dead letters." One, Candelaria, was tried and convicted in a federal court for robbing a federally insured bank.<sup>199</sup> He was then tried for robbery under California law.<sup>200</sup> However, the court said that both robberies were "founded upon the same act," that is, the "physical act . . . of defendant in taking the money," and therefore section 656 constituted a defense.

But the State of California was undaunted. It then prosecuted Candelaria for burglary in the first degree.<sup>201</sup> This time the court held:

The provisions of section 656 of the Penal Code [are not] of

196. *Accord*, *People ex rel. Helfin v. Silberglett*, 2 App. Div. 2d 767, 153 N.Y.S.2d 279 (1956); *People v. Mignogna*, 54 N.Y.S.2d 233 (Queens County Ct. 1945).

197. *People v. Eklof*, 179 Misc. 536, 41 N.Y.S.2d 557 (1942).

197a. 17 App. Div. 2d 31, 230 N.Y.S.2d 384 (1962).

198. CAL. PENAL CODE § 656 "Whenever on the trial of an accused person it appears that upon a criminal prosecution under the laws of another state, government, or country, founded upon the act or omission in respect to which he is on trial, he has been acquitted or convicted, it is a sufficient defense."

199. *United States v. Candelaria*, 131 F. Supp. 797 (S.D. Cal. 1955).

200. *People v. Candelaria*, 139 Cal. App. 2d 432, 294 P.2d 120 (1956).

201. *People v. Candelaria*, 153 Cal. App. 2d 879, 315 P.2d 386 (1957).

any assistance to the defendant in this proceeding, for that section provides . . . that the federal prosecution for robbery is a bar to a further prosecution for the robbery, but not otherwise. The 'act' spoken of in the statute must be 'the same act.' The burglary act . . . in the present case, that is, the entering of the building with the intent to commit a theft, is not the same act complained of in the federal court, namely, that he pointed a gun at the teller and by force and fear compelled her to deliver . . . certain monies.<sup>202</sup>

Thus the net result of these statutes is to eliminate the theory that an act committed within the jurisdiction of two sovereigns is *automatically* two offenses. But that is all. The courts then go on to deal with the problem exactly as they do on the single jurisdictional level. If proof of one fact in one prosecution is different, from a fact proved in the other, then there must be a different "act" or "offense" as the case may be. In short, the defendant gets the minimal protection against double jeopardy.

On the other hand, the Model Penal Code set out in the margin<sup>203</sup> does grant the defendant some real protection. Basically the statute operates on two levels. First, section 1.10, paragraph (1) (a) grants the defendant at least minimal protection by adopting the "same evidence" test used by the majority of jurisdictions.<sup>204</sup> However paragraph (1) (a) goes one step further. It states that even though one offense may require proof of facts not required by another, prosecution for one offense will still bar prosecution for the other, if both offenses were intended to prevent substantially the same harm or evil. By adding this new test, the Model Penal Code will force the courts to examine, not merely the technical elements of the offenses committed, but also the interests of society which may have been violated.

Secondly, once the court has made its determinations on the above stated issues, it must then decide whether the subsequent prosecution

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202. *Id.* at 884, 315 P.2d at 389.

203. MODEL PENAL CODE, sec. 1.10 (Proposed Official Draft, 1962). "When conduct constitutes an offense within the concurrent jurisdiction of this State and of the United States or another State, a prosecution in any such other jurisdiction is a bar to a subsequent prosecution in this State under the following circumstances:

(1) The first prosecution resulted in an acquittal or in a conviction as defined in Section 1.08 and the subsequent prosecution is based on the same conduct, unless (a) the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of such offenses is intended to prevent a substantially different harm or evil or (b) the second offense was not consummated when the former trial began; or

(2) The former prosecution was terminated, after the information was filed or the indictment found, by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed or vacated and which acquittal, final order or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the offense of which the defendant is subsequently prosecuted."

204. *Cf. Blockburger v. United States*, 284 U.S. 299 (1932).



is based on the same conduct as the first. This is the same test used in both section 1.08 (2) (a) of the tentative draft and in the revised section 1.07 (2) of the proposed official draft.<sup>205</sup> As we have seen in our consideration of that section, the "same conduct" test gives the courts some leeway to expand that test to the point of adopting a true "same transaction" test. In the words of the Reporter, Professor Wechsler:

[T]he purpose is to give the courts some leeway to expand the scope of the protection in dealing with criminality if it involves a succession of acts, but to do so in relation to what it conceives to be the policy of double jeopardy, and on balancing of interest, that of course is called for.<sup>206</sup>

Finally, in paragraph (2), the Code sets forth the principle of collateral estoppel.

Since the code is drafted in such a flexible manner, it is conceivable that it might grant more protection to the defendant than that which is constitutionally required by the social interest test, in this writer's opinion. This would be accomplished if the courts interpret the phrase "same conduct" in such a manner as to bar a second prosecution even if a different social interest was violated. Such a test would mean that the courts would look at the whole "transaction" and if the defendants were prosecuted for part of it, that would be a sufficient bar. However, this seems unlikely, since the courts are notorious for their narrow interpretations in this field. If section 1.10 has real value, it lies in its restatement of the "same evidence" test. By abandoning the purely mechanical examination of minor factual differences between offenses and requiring the courts to examine the substantive differences, the Code may force the courts to accept some type of social interest test. Finally, section 1.10 (2) adopts the collateral estoppel doctrine, which does grant protection, provided the courts assume that the jury in the first trial decided the case rationally on the basis of the issues in dispute.<sup>207</sup>

On April 8, 1959, one week after *Bartkus* and *Abbate* were decided, a bill designed to overrule them was introduced in the House of Representatives, where it died in the Judiciary Committee. Nevertheless its contents are of interest.<sup>208</sup> First, it forbids prosecution by a state after

205. MODEL PENAL CODE, *supra* note 176.

206. 33 ALI PROCEEDINGS 157 (1956).

207. See note 160 *supra*, and accompanying text.

208. H.R. 6176, 86th Cong. 1st Sess. (1959), "A bill to amend title 18 U.S.C. chap. 211 by adding the following new section.

sec. 3244. Prior adjudication of any court of competence, State or Federal, on the merits; bar to prosecution for similar act committed against same person and State."

"An adjudication on the merits by a competent State or Federal court of an act committed against a person or State, which same act also constitutes a like offense against the same person and state under any jurisdiction, State or Federal, other than the jurisdiction for which said adjudication was made, shall be a bar to any further or other prosecution for the same act committed against the same person and state."

a federal prosecution<sup>209</sup> and vice-versa. Second, since Congress has granted certain states concurrent jurisdiction over crimes on their common borders,<sup>210</sup> it bars a prosecution by one state after another state. Since Congress does not have the constitutional power, it could not require that a *state* not prosecute a man it had once tried before; therefore that is specifically excepted. However the bill does not forbid the *federal government* from prosecuting a man for the same act for which it had previously prosecuted him. This could be because there is dictum in *Abbate* which indicates that retrial in such an instance would be a violation of the double jeopardy clause of the fifth amendment.<sup>211</sup> Again the primary objection to the bill is that it refers to the "same act." Since the courts are quick to find two separate "acts," this protection is not adequate.

Mr. Justice Frankfurter in the *Bartkus*<sup>212</sup> case specifically left the problem of preventing successive prosecutions to the states. However, although a sizeable number of state legislatures had acted prior to this decision and Illinois followed suit afterward,<sup>213</sup> the statutes do not give comprehensive coverage and the courts have failed to apply the statutes in any meaningful way.

#### VIII. CONCLUSION

As noted, the courts have been struggling to find some means to justify successive prosecutions by different governments. They have evolved various theories and tests, none of which is particularly satisfying. On the other hand, the early decisions were motivated by a very real concern—the preservation of state sovereignty in a federal system. However, in these cases,<sup>214</sup> the individual was not actually being prosecuted twice and the political turmoil of the time justified the results.

In the twentieth century, on the other hand, when individual rights were squarely at issue, the courts could have adopted a rule that the first sovereign to prosecute would bar the other. This solution would have maintained state sovereignty and yet given protection to the defendant. Nevertheless, the courts adopted the old theories *in toto*.

Although the reasons for this have not been articulated by the courts, it seems that they lay in the courts' dissatisfaction with state criminal procedures, in that the government is often placed at an unfair disadvantage. In many jurisdictions the state cannot appeal and the

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209. This interference with state criminal procedures by Congress is of doubtful constitutionality.

210. See *Nielsen v. Oregon*, 212 U.S. 315 (1919).

211. *Abbate v. United States*, 359 U.S. 187, 197 (1959).

212. *Bartkus v. Illinois*, 359 U.S. 121, 138 (1959).

213. See note 190 *supra*.

214. *E.g.*, *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852); *United States v. Marigold*, 50 U.S. (9 How.) 560 (1850).

prosecutor cannot add to the indictment without reconvening the grand jury. The courts have reacted to this situation by treating the problem of double jeopardy subjectively. If after examining all the circumstances, the court believes that the defendant was acquitted because of a technicality, or convicted on a count which in the court's opinion did not fit the magnitude of the crime, it will allow a second prosecution.

If this analysis is correct, then in a given case, "justice" *may* actually have been done even though that fact could not have been discerned from the opinion. Nevertheless one of the most cherished principles of Anglo-American law has been that of a "government of laws and not of men." The ideal which has always been sought has been the "objective standard" which will yield predictable results. Human frailty is such that this ideal is rarely achieved, but this does not mean that the search should be abandoned. So in the area of double jeopardy, where the courts should be trying to balance the rights of the individual against the rights of the state, it is incumbent upon them to lay down some basic guidelines. It is hoped that the suggestions made in this paper will aid in this endeavor.