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INTRODUCTION

When a defendant is charged with conduct which violates both federal and state criminal statutes, representing substantially the same policies, then prosecution by one government for this violation should bar a subsequent prosecution by the other for the same violation. This position is contrary to that taken by the United States Supreme Court in *Bartkus v. Illinois*[1] and *Abbate v. United States*.[2] The main purpose of this article is to criticize these decisions, both in their theoretical underpinnings and in their practical consequences.

THE AUTHOR (A.B., LL.B., Harvard University) was a Ford Foundation Fellow in Criminal Law at Northwestern University Law School during 1961-62. He is now a practicing attorney in Chicago, Illinois and a member of the Illinois and Federal District Court for the Northern District of Illinois Bars.

THE DECISIONS IN BARTKUS AND ABBATE

Bartkus v. Illinois[3] and *Abbate v. United States*[4] were decided in the same term of the United States Supreme Court. Both involved the problem of successive prosecutions by the state and federal governments for substantially the same offense. In both cases, the Court upheld the second prosecution.

Bartkus involved the problem of a federal prosecution and acquittal followed by a state prosecution and conviction. On December 18, 1953, Alphonse Bartkus was tried for violation of The National Bank Robbery Act.[5] The indictment alleged that Bartkus robbed an Illinois savings and loan association. He received a jury trial and was acquitted. It appears that the federal authorities were upset by the decision, and the

1. 359 U.S. 121 (1959).
2. 359 U.S. 187 (1959).
3. Bartkus v. Illinois, 359 U.S. 121 (1959).
4. Abbate v. United States, 359 U.S. 187 (1959).
5. 18 U.S.C. § 2113 (1948). The National Robbery Act provides in part: "(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association . . . ."

district judge reprimanded the jury for reaching this verdict.[6] In January of 1954, Bartkus was indicted by an Illinois grand jury, and was later convicted for violation of the Illinois Robbery Act.[7] He was sentenced to life imprisonment under the Illinois Habitual Criminal Act.[8] The Illinois Supreme Court affirmed on appeal,[9] and certiorari was granted in the United States Supreme Court. There were essentially two issues before the court: (1) Whether the state prosecution was a sham and in fact a second federal prosecution, so that there was a violation of the double jeopardy clause of the fifth amendment;[10] and (2) Whether the second prosecution by the state was a violation of the due process clause of the fourteenth amendment.[11]

The Court, in a 5-4 decision, answered both of these questions in the negative. Justice Frankfurter wrote the majority opinion. As to the first issue, the Court held that the activities of the federal and state prosecuting authorities showed a high degree of cooperation, but did not establish that the Cook County prosecutor was a mere agent of the federal prosecutor.[12] As to the second issue,[13] the majority, relying to some extent upon *Palko v. Connecticut*,[14] argued that the due process clause of the fourteenth amendment did not make the first ten amendments automatically effective against the states. Justice Frankfurter relied upon the content of the constitution of each state, either at the time of ratification of the fourteenth amendment or at the time of admission after the ratification, to show that the states did not envision the inclusion of the first ten amendments within the due process clause, since many did not include some of the provisions of the amendments in their constitutions. A chart was attached to Justice Frankfurter's opinion to demonstrate this point.[15] Since the fifth amendment was not included within the meaning of the due process clause of the fourteenth amendment, its double jeopardy clause did not bind the states.

Secondly, Justice Frankfurter discussed the question of whether the sec-

6. Bartkus v. Illinois, 359 U.S. 121, 165 (1959) (Brennan, J., dissenting).

7. ILL. REV. STAT. ch. 38 § 501 (1927). "Robbery is the felonious and violent taking of money, goods or other valuable thing, from the person of another by force or intimidation."

8. ILL. REV. STAT. ch. 38, § 602 (1957).

9. Illinois v. Bartkus, 7 Ill. 2d 138, 130 N.E.2d 187 (1955).

10. "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

11. "[N]or shall any State deprive any person of life, liberty or property, without due process of law . . . ."

12. Bartkus v. Illinois, 359 U.S. 121, 123-24 (1959).

13. *Id.* at 124-26.

14. 302 U.S. 319 (1937). This case involved a Connecticut statute which allows the state to appeal for error in criminal cases in which the defendant was acquitted. Appeal by the prosecutor is not allowed in most states, or in the federal courts because it is thought that the second trial would violate one's double jeopardy protection.

15. Bartkus v. Illinois, 359 U.S. 121, 140-52 (1959).

ond prosecution by Illinois offended the "concept of ordered liberty," as expressed in the ringing rhetoric of Justice Cardozo in the *Palko* case.[16] He found lengthy precedent[17] which allowed a federal prosecution after a state prosecution based upon the same conduct, culminating in *United States v. Lanza.*[18] In the *Lanza* case, a federal conviction for violation of the Volstead Act was upheld after a conviction under the state prohibition statute. This was the first case where the Supreme Court expressly took this position, their earlier pronouncements being dicta. The underlying theory was definitively stated in *Moore v. Illinois:*[19]

> 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.[20]

In other words, because the laws of two sovereigns were applicable, the same act produced two offenses, so that Bartkus in the second prosecution was not put in jeopardy for the "same" offense. Justice Frankfurter went on to conclude that there was no good reason to overturn this precedent, and two good reasons to uphold it: (1) there is a danger of federal interference with the enforcement of state law, particularly in the area of civil rights;[21] and (2) there is a great deal of difficulty in determining when the offenses are so much alike that one prosecution should bar another. Therefore, because there were two sovereigns involved and there was no policy reason for allowing a bar, the state prosecution did not violate the due process clause.

Justices Black and Brennan wrote dissenting opinions with Chief Justice Warren and Justice Douglas concurring in both. Justice Black argued two points: (1) the fifth amendment should be effective against the states through the due process clause of the fourteenth amendment,[22] and (2) allowing the second prosecution in this case would violate the "concept of ordered liberty" since it transgresses a maxim which is fundamental to the whole of western civilization: no man shall be punished twice for the same offense. He countered Justice Frankfurter's argument that the federal and state governments would interfere with the enforcement of each other's criminal law by pointing out that in fact this rarely

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16. *Id.* at 127, citing Palko v. Connecticut, 302 U.S. 319, 324-25 (1937). Justice Cardozo used this concept as a criterion to determine whether the due process clause was violated.

17. Bartkus v. Illinois, 359 U.S. 121, 128-39 (1959).

18. 260 U.S. 377 (1922).

19. 55 U.S. (14 How.) 13 (1852).

20. *Id.* at 20.

21. Justice Frankfurter used as an example Screws v. United States, 325 U.S. 91 (1945), in which the defendant was charged with violating the Civil Rights Act, 18 U.S.C. § 242 (1948), when he was guilty of the more serious crime of murder under Georgia law.

22. This argument follows Justice Black's dissent in Adamson v. California, 332 U.S. 46, 68 (1947).

happens. If it did become a problem, however, the federal government could pre-empt state action under the supremacy clause and deprive the state courts of jurisdiction.[23] Justice Brennan argued that the participation of the federal authorities in this state prosecution was so significant that there was in substance a second federal prosecution. He pointed out that the federal officers did everything except prosecute the case in the state court. On that account, the fifth amendment should operate as a bar to this prosecution.[24]

In the *Abbate* case, the situation was reversed. The Illinois prosecution preceded the prosecution in the federal district court. Justice Brennan wrote the majority opinion in a 6-3 decision, Justices Black, Douglas, and Chief Justice Warren dissenting.

The defendant was convicted of the crime of conspiring to destroy the property of the Southern Bell Telephone and Telegraph Company.[25] The fact that Abbate and another had helped to disband the conspiracy by reporting it to the Chicago police is probably the reason they were given only three month sentences.[26] Thereafter, indictments were brought in the United States District Court, charging the defendants with violating the Federal Conspiracy Act[27] by conspiring to willfully and maliciously injure communications controlled by the United States.[28] They were convicted. Certiorari was granted on the question of whether this second prosecution violated the double jeopardy clause of the fifth amendment.

The majority upheld the second conviction on the basis of Justice Frankfurter's opinion in *Bartkus,* arguing that each sovereign had the power to punish for the violation of its law. Therefore, two offenses were committed by this one conspiracy. *United States v. Lanza,*[29] which also involved successive state and federal prosecutions, was followed. Justice Brennan argued that if the dual sovereignty theory was overthrown, a minor sentence by the state court might impinge upon a more serious interest of the federal government. In this case, for example, Abbate was

23. Bartkus v. Illinois, 359 U.S. 121, 150 (1959) (Black, J., dissenting).

24. *Id.* at 164 (Brennan, J., dissenting).

25. ILL. REV. STAT. ch. 38 § 139 (1919), which provides in part: "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 . . . they shall be deemed guilty of a conspiracy . . . ." The statute applies to conspiracies formed within the state to destroy property outside the state. People v. Buckminster, 282 Ill. 177, 118 N.E. 497 (1917).

26. 359 U.S. 187, 188 (1959).

27. 18 U.S.C. § 371 (1948), which provides in part: "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 or imprisoned . . . ."

28. 18 U.S.C. § 1362 (1948) which provides in part: "Whoever willfully or maliciously injures or destroys any of the . . . property . . . or any . . . means of communication, operated or controlled by the United States . . . shall be fined . . . or imprisoned . . . ."

29. 260 U.S. 377 (1922).

given only a three months sentence in Illinois when he might have been sentenced to five years imprisonment under the federal statute.[30] This reasoning is essentially the reverse of that given by Justice Frankfurter in *Bartkus,* where it was argued that federal prosecution might interfere with state enforcement of state criminal law.

Justice Black dissented, with Justice Douglas and Chief Justice Warren concurring. Justice Black argued that the dual sovereignty theory is not meaningful, and that the fifth amendement meant to establish a broad policy to prohibit exactly this type of prosecution by the federal government.[31] He based his opinion partly on the fact that Congress in 1789 rejected a wording of the double jeopardy clause which would have restricted the protection to offenses under the laws of the United States.[32] In his opinion, this second action should have been barred by the fifth amendment.

THE BASIS OF BARTKUS AND ABBATE IN PRECEDENT

An examination of the decisions dealing with the problem of successive prosecutions for the same act by different sovereigns indicates a lack of persuasive precedent. The United States Supreme Court, therefore, should not have felt compelled to reach its decisions in *Bartkus* and *Abbate* unless there were substantial policy reasons for arriving at these decisions. This section will examine the relevant precedent.

English Common Law and American Revolution Development

First, let us turn to the murky waters of the English common law. In *Roy v. Thomas,*[33] the question before the court was whether an acquittal of a felony in Wales barred a subsequent prosecution for the same offense in an adjoining English county where statutes gave concurrent jurisdiction.[34] The court, however, felt that since a general sessions court was established in a later statute,[35] the common-law rule that prior prosecution is a bar should apply. Similarly, in *The King v. Roche,*[36] the court said by way of dictum that prior acquittal in a court in

30. Justice Brennan did not make it clear that the maximum under the Illinois statute is also five years and that Abbate was given a small sentence because of his cooperation in disbanding the conspiracy.

31. Bartkus v. Illinois, 359 U.S. 187, 201-03 (1959) (dissenting opinion).

32. "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." *Id.* at 204 n. 6, quoting from 1 ANNALS OF CONG. 434 (1789). This proposed wording was changed considerably before the present clause was adopted.

33. 1 Sid. 179, 82 Eng. Rep. 1043 (K.B. 1663).

34. 26 & 34 Hen. 8, c. 8.

35. 27 Hen. 8, c. 8.

36. 1 Leach 160, 168 Eng. Rep. 169 (Cr. Cas. 1775). See Grant, *The Lanza Rule of Successive Prosecutions,* 32 COLUM. L. REV. 1309, 1318-20 (1932).

the Cape of Good Hope would bar prosecution for the same crime in England.

The *Roche* and *Thomas* cases have often been cited for the proposition that a judgment of a foreign court will bar prosecution in England. But it is clear that there was only a single sovereign in these cases, since both Wales and the Cape of Good Hope were under English domination. The real question in these cases was whether courts having concurrent jurisdiction under the same sovereign could prosecute twice for the same crime. Therefore, the cases cannot be considered good authority on the question of successive prosecutions between two sovereigns.[37]

Rex v. Hutchinson,[38] a habeas corpus proceeding, seems to be squarely in point, holding that an acquittal of a murder charge in Portugal barred a prosecution for that crime in England. The first two cases in which this decision is reported held that under *Hutchinson* an adjudication for the same crime under a foreign sovereign would bar prosecution in England.[39] In a third case, *Gage v. Buckley,*[40] the court stated that *Hutchinson* did not support this position, but rather allowed judges in their discretion to dismiss a second prosecution where there had already been a prosecution in a foreign jurisdiction.

On the basis of these cases, Justice Frankfurter in *Bartkus* asserts that the precedents are dubious. Furthermore, on the basis of *Gage,* he claims that only a question of judicial discretion is involved.[41] However, the *Roche* case and a much later case, *Regina v. Azzopardi,*[42] adopt the original interpretation of the two earliest cases. These cases, decided after the *Gage* case, made it clear that the rule was fairly well established at the English common law that a prior foreign prosecution for the same offense barred prosecution in England.

With this background in mind, the position in the United States when the Constitution was adopted can be examined. What is extremely interesting here is that the first Congress, in 1789, rejected an amendment to what later became the fifth amendment to the Constitution which would have restricted the double jeopardy protection to federal offenses.[43] It is possible that this rejection was based upon the English common-law

37. Note, 35 IND. L.J. 444 (1960).

38. Reported in Burrows v. Jemino, 2 Strange 733, 93 Eng. Rep. 815 (K.B. 1726); Beak v. Thyrwhit, 3 Mod. 194, 87 Eng. Rep. 124 (K.B. 1688); Gage v. Bulkeley, Ridg. T.H. 263, 27 Eng. Rep. 824 (Ch. 1744).

39. Burrows v. Jemino, *supra* note 38; Beak v. Thyrwhit, *supra* note 38.

40. Ridg. T.H. 263, 27 Eng. Rep. 824 (Ch. 1744).

41. Bartkus v. Illinois, 359 U.S. 121, 128, n. 9 (1959).

42. 2 Mood. 366, 169 Eng. Rep. 115 (Cr. Cas. 1843).

43. See Abbate v. United States, 359 U.S. 187, 201-04 (1959) (dissenting opinion). See note 32 *supra.*

view that successive state-federal prosecutions for the same offense should be barred. But this, admittedly, is speculative.

Justice Frankfurter in *Bartkus* points out that seven state courts had discussed the problem before the decision in *Fox v. Ohio*,[44] the first of the landmark decisions cited in *United States v. Lanza*.[45] Three courts decided that prosecution by either state or federal authority barred prosecution by the other for the same offense; three decided there would be no bar; and one had conflicting precedents.[46] During this period, however, there was only one Supreme Court opinion which discussed this issue, *Houston v. Moore*.[47] The Court upheld a Pennsylvania statute defining the crime of failure to answer the call of the militia, which was also a federal crime. The majority and concurring opinions seemed to hold, as Justice Frankfurter said,[48] that state or federal prosecution for the same act would constitute a bar to a second prosecution only when a violation of federal law has occurred.[49] Here, the state court had concurrent jurisdition under the federal statute. Justice Story, dissenting, was disturbed by the possibility of a double prosecution.[50]

From the foregoing discussion, it can be concluded that at the English common law, there was fairly clear rule that foreign prosecution for the same crime would bar prosecution in England. However, a conflict of authority existed as to whether this rule applied between the states and federal government.

Pre-Lanza Development

The next significant precedent is that upon which the decision in *United States v. Lanza*[51] is based. The first case is *Fox v. Ohio*.[52] This case held that the State of Ohio may punish the passing of counterfeit money as a private cheat on the citizens of Ohio without colliding with the exclusive federal power to punish the actual counterfeiting, as expressly granted in the United States Constitution.[53] They were two different offenses.[54] But the Court went on to say that even if the offenses were the same, each government would have the right to prosecute and

44. 46 U.S. (5 How.) 410 (1847).
45. 260 U.S. 377 (1922).
46. 359 U.S. 121, 129-30 (1959).
47. 18 U.S. (5 Wheat.) 1 (1820).
48. Bartkus v. Illinois, 359 U.S. 121, 129-30 (1959).
49. *Id.* at 130-35.
50. Houston v. Moore, 18 U.S. (5 Wheat.) 1, 72 (1820) (dissenting opinion).
51. 260 U.S. 377 (1922).
52. 46 U.S. (5 How.) 410 (1847).
53. "To provide for the Punishment of counterfeiting the Securities and current coin of the United States." U.S. CONST. art. I, § 8, cl. 6.
54. Fox v. Ohio 46 U.S. (5 How.) 410 (1847).

punish independently for the same crime.[55] This statement is dictum because the Court did not have a case of successive state-federal prosecutions before it. The decision rested on the view that the Ohio statute dealt with a different offense than that punishable by the federal government. Although the dual sovereignty theory was not enunciated, the Court seemed to assume it.

The next case which forms part of the precedent in *Lanza* is *United States v. Marigold.*[56] Citing the *Fox* case, the defendent challenged the right of Congress to punish the circulation of counterfeit currency, as distinct from its manufacture. The Court, however, found that Congress could punish the circulation on the basis of its right to regulate currency,[57] not on its power to prevent counterfeiting.[58] It also stated that the *Fox* decision was not controlling, as it was limited to the right of the state to prosecute the circulation as a private cheat.[59] The Court reaffirmed the right of the state *and* federal governments to prosecute where the same act violates a statute of each without one prosecution barring the other.[60] Again, the statement was dictum, since the issue was whether Congress could punish the circulation of counterfeit money. Moreover, the issue of successive prosecutions was not before the Court.

In *Moore v. Illinois,*[61] the Court decided that an Illinois law against the harboring of fugitive slaves was neither in conflict with a congressional law nor a constitutional provision. It found that preventing unwanted persons from entering the state was a valid exercise of Illinois police power. When the issue of double jeopardy was raised, the Court phrased its answer in terms of dual sovereignty for the first time, stating that there were two offenses because the same act violated the laws of two sovereigns.[62] Since the issue in this case was whether Illinois could pass a statute in an area in which Congress has spoken, and there was no question of successive prosecutions, the statements of the Court are dicta.

United States v. Cruikshank[63] is the next case in the precedent. The discussion of the dual sovereignty concept is very tangential, since the central question in the case was the sufficiency of a complaint under the Civil Rights Act. This discussion is moot with reference to the central issue.

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55. *Id.* at 435.
56. 50 U.S. (9 How.) 560 (1850).
57. "To coin money, regulate the value thereof . . . ." U.S. CONST. art I, § 8.
58. United States v. Marigold, 50 U.S. (9 How.) 560, 567-68 (1850).
59. *Id.* at 568.
60. *Id.* at 569.
61. 55 U.S. (14 How.) 13 (1852).
62. *Id.* at 20.
63. 92 U.S. 542 (1875).

Ex parte Siebold[64] involved the constitutionality of a federal statute controlling election procedure. The Court rejected the argument that the statute was unconstitutional because the federal government did not exclusively control the election procedure and thus did not pre-empt state authority. In answer to the argument that there is a possibility of double punishment for violation of both state and federal election laws, the Court cited the now impressive dicta in *Fox, Marigold, Moore,* and *Cruikshank*: when one act violates the statutes of two sovereigns, there are two separate offenses.[65] This discussion, however, is also dictum.

The next decision in the *Lanza* precedent is *Cross v. North Carolina.*[66] In this case, the defendant was prosecuted for circulating a false note. He challenged the jurisdiction of the state court on the grounds that he had violated a federal statute which outlawed making false entries on the books of national banks. The Supreme Court, however, upheld the jurisdiction of the state court, finding that circulating a forged note and falsifying bank books were different offenses. Furthermore, there were two offenses in any event, since the act violated the laws of two sovereigns.[67] Again, this statement is dictum, as the Court does not discuss successive prosecutions.

In *Pettibone v. United States,*[68] the defendants were charged with conspiring to obstruct the administration of a federal court. The Court found that the conspiracy alleged in the indictment did not violate both state and federal stautes, but discussed the dual sovereignty theory only peripherally for the purpose of contrast. The indictments against the defendants were found to be insufficient.

The first case in which the dual sovereignty theory was necessary to the decision was *Crossley v. California.*[69] The defendant was convicted in California for causing the death of an engineer by derailing a train. He appealed on the grounds that since the train carried mail exclusively, California had no jurisdiction. The Court answered this argument by stating that because the state and federal governments were separate sovereignties, each could punish an act which was an offense under its law. The case is not in point, however, because the controlling issue was whether California could punish an act which was punishable by federal statute. The problem of successive prosecutions was never raised.

Southern Ry. v. Railroad Comm'r,[70] is the only case cited in *Lanza* which dealt with successive federal-state prosecutions for the same offense. The

64. 100 U.S. 371 (1879).
65. *Id.* at 389-91.
66. 132 U.S. 131 (1889).
67. *Id.* at 139.
68. 148 U.S. 197 (1893).
69. 168 U.S. 640 (1898).
70. 236 U.S. 439 (1915).

defendant was charged with a violation of the Indiana Safety Appliance Act for failure to provide safety equipment on its railroad cars. The defendant had previously been convicted under the Federal Safety Appliances Act for the same omissions. The Court found that Congress had pre-empted the field under the interstate commerce clause.[71] The cases which enunciated the dual sovereignty theory were distinguished on the ground that in those cases the state had concurrent jurisdiction. The fact that double prosecution was not allowed in this case, however, did not seem to disturb Chief Justice Taft when he cited it in *Lanza.*

The next decision in the precedent is *Gilbert v. Minnesota.*[72] The defendant was charged with violating a Minnesota statute which outlawed advocating against conscription for the United States Army. The constitutionality of the statute was challenged on the ground that regulation of the Army was exclusively vested in Congress. The Court replied that it was a valid purpose of the state to build up the army and inspire patriotism, so that there was virtually no possibility of conflict between the state and federal governments.[73] The Court then discussed the dual sovereignty concept, but only as an additional theoretical justification. The decision was based primarily on the policy ground already stated. Although punishment for the same offense was prescribed by Congress in the Espionage Act of 1917, the possibility of successive prosecutions is not mentioned. This case, therefore, is not in point.

In *McKelvey v. United States,*[74] which is the final case cited in the *Lanza* precedent, the defendants were charged with the federal offense of obstructing free passage over lands owned by the United States. They argued that the federal statute was unconstitutional since it encroached upon the police power of the state. The Court replied that the state offense involved would be one of personal violence, a crime quite different from the obstruction of free passage.[75] Then the Court discussed the dual sovereignty theory, observing that the same act may be an offense against both sovereigns.[76] This discussion is dictum because the issue in the case is whether the federal statute encroached upon the police power of the state. Moreover, the case is not in point because successive prosecutions were not involved.

There is one case, *Nielsen v. Oregon,*[77] which was not cited in *Lanza,* but should have been. By act of Congress, Washington and Oregon had

71. *Id.* at 447.
72. 254 U.S. 325 (1920).
73. *Id.* at 329-30.
74. 260 U.S. 353 (1922).
75. *Id.* at 358.
76. *Id.* at 358-59.
77. 212 U.S. 315 (1909).

concurrent jurisdiction over the Columbia River. The precise issue in the case was whether the state of Oregon could punish a crime *malum prohibitum* under its statute, when the state of Washington authorized the act, and the act was committed on the Washington side of the river. The Court held that Oregon could not prosecute. In dictum, however, it said that where an offense is prescribed by the laws of both states, prosecution by one will bar prosecution by the other.[78] No mention is made of the precedent which spawned the dual sovereignty theory.

United States v. Lanza

With this background, a discussion of *United States v. Lanza*[79] is now possible. In this case, the defendants were charged with manufacturing, transporting, and possessing intoxicating liquor in violation of the Volstead Act. The defendants claimed that this prosecution was barred by a prior prosecution under a Washington statute for manufacturing, transporting, and possessing intoxicating liquor.[80] They argued that this second prosecution was in violation of the double jeopardy clause of the fifth amendment. Chief Justice Taft, writing for the majority, stated that there was no violation of the fifth amendment. He dismissed the argument that there was a single sovereignty here, since the state derived its power of prohibition from the eighteenth amendment.[81] Furthermore, before the passage of this amendment, the states had the power to prohibit intoxicating liquor.[82] He then argued that the fifth amendment was inapplicable because the state and federal governments were two sovereignties. Two offenses were involved, even though the acts were identical in all other respects.[83]

In support of this view, all of the cases analyzed above were cited. Chief Justice Taft made his conclusion unmistakably clear:

> But it is not for us to discuss the wisdom of legislation, it is enough for us to hold that, in the absence of special provision by Congress, conviction and punishment in a state court under a state law for making, transporting and selling intoxicating liquors is not a bar to a prosecution in a court of the United States under the federal law for the same acts.[84]

What is disturbing about this decision is that it does not critically ex-

78. *Id.* at 320.

79. 260 U.S. 377 (1922).

80. The federal government in its indictment had included two other counts. *Id.* at 379. But it did not raise the point that two of its counts were not included in the state prosecution. Thus the Court's decision apparently was based on its assumption that the indictments were identical.

81. *Id.* at 381. "The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation." U.S. CONST. amend. XVIII, § 2.

82. United States v. Lanza, 260 U.S. 377, 381 (1922).

83. *Id.* at 382.

84. *Id.* at 385. Chief Justice Taft apparently was in error in referring to the third count as "selling" instead of "possessing."

amine its authority or give much of a policy discussion, except to remark in a sentence that fines in state courts might undercut federal enforcement.[85] Furthermore, the authority cited for the proposition that conviction in a state court is not a bar to prosecution in a federal court for the same crime is weak for the following reasons: (1) In almost every case on this point, the discussion is dictum. Either the Court is discussing a problem that is not before it, (successive state-federal prosecutions) or it is deciding whether there is concurrent federal-state jurisdiction over a certain act. In these cases, the Court had already found that there is concurrency on the ground that the federal and state offenses are distinct in policy. (2) The *Crossley* case, where it might be argued that the dual sovereignty determination was necessary to the decision, is not in point because it dealt with the extent of the jurisdiction of a state court, not successive state-federal prosecutions. (3) The fact that the *Southern Ry.* case disallowed a state prosecution after a federal conviction for exactly the same offense is ignored by the Court, and (4) the *Nielsen* case is not cited. The majority also misunderstood the original purpose of the eighteenth amendment. At the time the amendment was passed, authorities believed that Congress had not intended it to allow for successive state-federal prosecutions.[86] The *Lanza* decision, therefore, can only be described as extremely unsatisfactory.

After *Lanza,* the dual sovereignty doctrine receded into the background. It was reaffirmed, however, in *Herbert v. Louisiana,*[87] a case very similar to *Lanza.* The theory was not re-examined until *Bartkus* and *Abbate.*

From the foregoing discussion, it is obvious that there was no clear and binding precedent which forced the Court to allow successive state-federal prosecutions for the same offense in *Bartkus* and *Abbate.* The English precedent seems to go the other way, and the American precedent is contradictory and inconclusive, there being only a single holding, *Lanza,* based on unsatisfactory authority. Justice Frankfurter put the matter quite well in his dissent in *Mitchell v. Trawler Racer, Inc.:*

> When it appears that a challenged doctrine has been uncritically accepted as a matter of course by the inertia of repetition — has just "grow'd" like Topsy — the Court owes it to the demands of reason, on which judicial law-making power ultimately rests for its authority, to examine its foundations and validity in order appropriately to assess claims for its extension.[88]

The author can add nothing to that.

85. *Id.* at 385.

86. Grant, *The Lanza Rule of Successive Prosecutions,* 32 COLUM. L. REV. 1309, 1311 (1932).

87. 272 U.S. 312 (1926).

88. 362 U.S. 539, 551 (1960).

CRITICAL EXAMINATION OF BARTKUS AND ABBATE IN LIGHT OF DOUBLE JEOPARDY PROTECTION

The rule announced in *Bartkus* and *Abbate* violates the policy of protection against double jeopardy and should be barred on that account. The argument will be developed primarily in terms of the interaction of the dual sovereignty theory with the double jeopardy protection. Once the analysis is complete, it will be applied to the particular decisions in *Bartkus* and *Abbate.*

Dual Sovereignty Theory vs. Double Jeopardy Protection

First, it is necessary to delineate the policy embodied in the protection against double jeopardy. At the English common law, the plea of *auterfois convict* or *auterfois acquit* would have been a good plea in bar to a present prosecution if a prior prosecution was for the same offense.[89] The double jeopardy doctrine was later adopted in the fifth amendment of the United States Constitution and in the constitutions of most of the states, the rest adopting it as a matter of common law.[90] What is the policy behind this protection? Basically, the prohibition has the purpose of avoiding multiple prosecution and multiple punishment for the same offense.[91] Although it may not be evident at first glance, these are distinct policy considerations. For example, a defendant may be subject to successive prosecutions for the same offense without being once convicted. This violates the first policy consideration. On the other hand, he may be convicted in a single prosecution on a multiple-count indictment, each count charging the same offense. Consecutive sentences, one for each count, would transgress the second policy aspect.

Under the English common law, it was not clear whether there was protection against multiple punishment. Although it might be argued that no such policy existed, the policy was there, but was never articulated because there was no distinction between act and offense until late in common-law development. There was a single count charged in the indictment for which there was either a single punishment or an acquittal.[92] Moreover, the bar to a second prosecution for the same act, in effect, barred a second punishment. This policy never had to be articulated because judges were never faced with the question of a second punishment apart from a second prosecution.[93] The modern use of the multiple

89. 2 BLACKSTONE, COMMENTARIES §§ 378-79 (Jones ed. 1916).

90. For a list of state constitutions with the double jeopardy provision, see Kneier, *Prosecution Under State Law and Municipal Ordinance as Double Jeopardy,* 16 CORNELL L.Q. 201, 202 n.4 (1931).

91. For an excellent discussion on this point see Comment, 65 YALE L.J. 339-44 (1956).

92. *Id.* at 341-43.

93. The maxim *nemo debt bis puniri pro uno delicto* was recognized at the English common law. See, *e.g.,* Hudson v. Lee, 4 Co. Rep. 43a, 76 Eng. Rep. 989 (K.B. 1590).

count indictment brought the problem of multiple punishment to the foreground.

Each of these basic policy considerations needs to be analyzed a little further. Why do we want to avoid multiple prosecution? First, there is the desire to avoid harassing the defendant because of the stigma associated with repeated charges. Citizens should suffer no more than a single intrusion for a single alleged infraction. Closely allied with this reasoning is the second consideration: the citizen should not suffer from fear of future prosecution. Once the matter is finally adjudicated, he should have the psychological security of knowing that the charge cannot be raised again. Third, there is a waste of the resources, both of the state and the citizen, if the same charge is repeatedly litigated. Finally, the state should not be given the power to continually prosecute until it finds a friendly tribunal which will convict.[94] These then, are the reasons for prohibiting multiple prosecution.

The underlying reasoning for protection against multiple punishment is that if multiple punishment is allowed, there can be no rule of law. A rule of law presupposes that each defendant will receive the punishment established according to certain standards and limitations which cannot be superseded. Thus, if armed robbery has a maximum sentence of twenty years, that is a definite limitation which guarantees that no one convicted of that crime will receive a sentence of more than twenty years. The rule of law places a check upon the judge so that he cannot act arbitrarily. If multiple punishment were allowed, these limitations could be transgressed at the will of the judge by giving more than one punishment for the same crime. A prohibition against multiple punishment is a necessary element in any legal system which claims to be based upon the concept of a rule of law.[95]

If this discussion properly formulates the reasons for the double jeopardy protection, is it not clear that the dual sovereignty theory as applied in *Bartkus* and *Abbate* is inconsistent with all of these policy considerations? It may be argued that because there are two sovereigns there are two offenses so that all of the considerations of the protection against double jeopardy are irrelevant. This, however, is a misconception. If statutes of both state and federal governments are based on substantially the same policy, a single act is violative of a single policy, and thereby can constitute only one offense. Two policies, which are otherwise substantially similar, cannot be distinguished merely on the basis of different sovereigns. In such a situation, the considerations of the pro-

94. The first three are expounded in Comment, 65 YALE L.J. 339, 340-41 (1956). The fourth is found in the MODEL PENAL CODE § 1.08, comment (Tent. Draft No. 5, 1956).

95. Comment, 65 YALE L.J. 339 (1956).

tection against double jeopardy are very relevant, precisely because both statutes embody policies which are substantially the same.

When the term "policy" is used here, it is meant to be synonymous with what might often be called the purpose of the statute. If it can be found that both statutes aim to prevent essentially the same act or omission, then the purpose or policy of both statutes will be substantially similar. For example, sovereign *A* and sovereign *B* might both declare that a trespassory taking and carrying away of personal property with intent to permanently deprive the owner of it is a crime. How can it be said that there are two offenses when both statutes prescribe the same offense, or, to put it another way, the purposes are identical? But, it might be said that each has a different "interest." If the policies of both statutes are substantially similar, what is the difference between the "interest" of one sovereign and that of the other? To continue the above example, if sovereign *A* captures, prosecutes, and convicts or acquits a defendant charged with this crime, the interest of *B* is fully satisfied as well. What other "interest" can *B* have? It appears to be clear that under these circumstances there can be only a single offense for the purposes of the protection against double jeopardy.

If there is only a single offense when two sovereigns have statutes with closely related policies, does the mere fact of two sovereigns have any further theoretical significance?[96] It is clear the answer must be no. This directs attention to the basic problem: the traditional definition of crime in the Anglo-Saxon system. Both at the English common law and in the United States, a crime has been classically defined as "A breach of the sovereign's peace."[97] This has not been the view in other legal systems.

> Quite a different conception prevails in the non-English-speaking world. There a crime is laid, not as a breach of the sovereign's peace, but as a breach of the offender's absolute duty. Thus in Scotland, where the practice is founded on the Roman Law, the indictment does not conclude "against the peace and dignity of the crown," but instead recites that the accused "ought to be punished with the pains of the law in order to deter others from committing like crimes in all time coming."[98]

In other words, where the statutes have substantially similar policies, and one act violates the two, the argument that there are two crimes because of dual sovereignty hangs upon a metaphysics of what constitutes a crime. In this situation, if crime is defined without reference to a sovereign, the fact that there are two sovereigns loses all relevance.

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96. The problem of the interference of one sovereign in practice with another will be discussed in the next section of the paper. See p. 720 *infra.*

97. Grant, *The Lanza Rule of Successive Prosecutions,* 32 COLUM. L. REV. 1309, 1316 (1932).

98. POUND, CRIMINAL JUSTICE IN AMERICA 85 (1930).

It is obvious that the phrase "substantially similar policy" has been deliberately used in the discussion, instead of another expression, such as the "same policy." The reason that such wording has been adopted is simply because it is often difficult to decide when statutes do and do not have similar policies. This difficulty disturbed Justice Frankfurter in the *Bartkus* case.[99] There may be decisions where the two statutes do not have exactly the same policy, but where the policy is so similar that prosecution by one sovereignty should bar prosecution by another. It might be argued that this very difficulty should be a conclusive reason for not letting the first prosecution be a bar. However, this process is very similar to the decision which a court must make as to whether a certain case comes within a certain law. To some extent, it must define the policy of the law involved to make the decision. This process is often extremely difficult and is likely to give rise to the celebrated "hard case." If the courts must define policy in this regard, there is no reason why it cannot be done to decide whether the policies of two statutes are substantially similar. The problem of "drawing the line" is a universal one in legal analysis.

In bringing the problem to bear on a concrete situation, the case of *Screws v. United States*[100] should be analyzed. Citing *Screws,* the majority of the Court in both *Bartkus* and *Abbate* felt that unless the dual sovereignty theory was applied, prosecution by either the state or the federal government would bar prosecution by the other.[101] But, would this be so? If the preceding argument is accepted, the answer is clearly no.

Sheriff Screws was charged with beating to death a Negro prisoner in his custody. Under Georgia law, he would probably have been guilty of murder. He was prosecuted by the federal authorities under what is now the Civil Rights Act.[102] Each statute had a distinct policy consideration. The Georgia law had the policy of preventing the taking of life, in this case by the individual, Screws. The federal statute was designed to prevent Screws, as the representative of the state's police power, from depriving the Negro defendant of certain rights guaranteed by the Constitution or laws of the United States. The state policy against homicide, and the federal policy against allowing states to deprive in-

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99. See discussion at p. 701-02 *supra.*

100. 325 U.S. 91 (1945).

101. Bartkus v. Illinois, 359 U.S. 121, 137 (1959); Abbate v. United States, 359 U.S. 187, 195 (1959).

102. 18 U.S.C. § 242 (1948), which provides in part: "Whoever, under color or any law, . . . subjects any inhabitant . . . to the deprivation of any rights . . . secured . . . by the Constitution or laws of the United States . . . by reason of his color, or race . . . shall be fined or imprisoned . . . ."

dividuals of certain rights on account of race or color were both transgressed by this one beating. Screws, in fact, committed two offenses.

A variation of the hypothetical might make the situation clearer. Suppose Screws left his jail, and during this period the Negro was lynched. He left the jail knowing that this would happen to avoid facing the mob. He would probably be violating the Civil Rights Act, but would probably not be guilty of murder under Georgia law.[103] On the other hand, suppose that he beat a white prisoner to death. Then, he would probably be guilty of murder, but not guilty of violating the Civil Rights Act. In these two situations, only one of the statutes is being violated — only one policy is being transgressed. But in the actual case, the single act violated both policies.

To take a third example, imagine that Georgia had a law, comparable to the Civil Rights Act, which made it a crime for a state officer to deprive any person of any rights guaranteed by the Georgia Constitution or Georgia law on account of race or color. Screws could then be subject to a two-count indictment: one court charging murder, the other charging deprivation of the defendant's Georgia rights. There would be no problem of double jeopardy here because he has violated two statutes embodying two separate state policies. By analogy, the same rule would apply to successive state-federal prosecutions if the dual sovereignty approach is discarded.

The following is an example of a "hard case." Suppose prohibition returned and there was a state statute prohibiting the "manufacture, sale, or possession" of alcohol in addition to the Volstead Act, which also prohibited the "manufacture, sale, or possession" of alcohol. *X* is charged by the state with selling alcohol illegally. He is convicted. The federal government then charges him with possession under the Volstead Act. The only evidence is that on a certain day, *X* sold so many gallons of bathtub gin to *Y*. The federal prosecutor argues that the state prosecuted *X* for sale and not possession of alcohol. The latter is a separate offense because there are two policies in the act: one to prevent the sale, the other possession. The problem is that although Congress has established two policies, in this particular case the two merge. Since sale and possession are indistinguishable, they merely represent two names for the same act the federal government seeks to prevent. This author believes the best formulation is that which allows a separate prosecution and punishment for possession only if it is not an incident of a sale. A similar problem arose in successive federal prosecutions under the Volstead Act.[104]

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103. See Williams v. United States, 341 U.S. 97 (1951).

104. See Note, 45 HARV. L. REV. 535 (1932).

From the above analysis, therefore, we may conclude that when the same act violates statutes or laws of two sovereigns, and these laws embody substantially the same policy, there is a single offense for the purpose of the double jeopardy protection; the fact of a dual sovereignty has no significance. In light of the above discussion, it is clear that if the state should prosecute first, a federal prosecution should be barred by the double jeopardy clause of the fifth amendment. What if the state should attempt the second prosecution? Should it be barred under the due process clause of the fourteenth amendment? A dichotomy exists because the due process clause does not make the double jeopardy clause automatically effective against the states. This was clearly indicated in *Palko v. Connecticut.*[105]

It might be argued that the fifth amendment, as well as the rest of the Bill of Rights, should be part of the due process clause, as Justice Black has maintained since his dissent in *Adamson v. California.*[106] If this were the case, the problem would disappear since the standard in both the fifth amendment and the fourteenth amendment would be the same. This question, however, is beyond the scope of this article and cannot be justly treated in a few sentences. The author only wishes to comment that without more than a cursory look into the question, in the general area of the double jeopardy protection, there is no necessity of having a different standard for the states and the federal government.

Assuming, however, that the fifth amendment is not applicable through the fourteenth, should the due process clause prohibit a state prosecution after a federal prosecution for violation of statutes representing substantially similar policies? The author would argue that it should. If the federal government cannot prosecute after a state has prosecuted for the same offense, the prohibition is easily avoided by having the federal authorities prosecute first. In effect, there would be no protection at all. It does not appear sensible to allow the result to hinge upon who prosecutes first. Furthermore, this result is much more shocking to one's moral conscience than the result in *Palko v. Connecticut,*[107] and as in *Palko,* should be considered a violation of the "concept of ordered liberty."

In *Palko,* a Connecticut statute, which allowed the prosecution to appeal an acquittal for error, was challenged on the ground that it violated the due process clause of the fourteenth amendment. Justice Cardozo found that there was no violation.

> 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?

105. 302 U.S. 319, 323-25 (1937).

106. 332 U.S. 46, 68 (1947) (dissenting opinion).

107. 302 U.S. 319 (1937).

> Does it violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?" . . . . The answer surely must be "no."[108]

When the prosecution is allowed to appeal for error, the second trial is in a real sense a continuation of the first. The various considerations of the prohibition against multiple prosecution do not have a direct application because the first trial is not finished until the judgment is error-free. This really depends upon one's differentiation between a final adjudication and a new prosecution. But there are independent reasons for allowing the prosecution to appeal, namely, that under the existing law, there can be a second prosecution after a successful appeal by the defendent — this is logically indistinguishable from allowing a second trial after appeal by the prosecution; and that defense counsel "runs wild" in trial, knowing that in most states if there is an acquittal, the prosecution cannot appeal for error because of double jeopardy protection. These considerations do not apply when the state seeks to prosecute after a federal prosecution because the state can prosecute after non-appealed, error-free judgment. This appears to the author to be much harsher and violative of "fundamental principles." It is a question of how much is too much, and the author thinks this is too much.[109]

The conclusion of the discussion is this: When a single act violates a state and a federal statute, such statutes embodying very similar policies, prosecution by one government should bar prosecution by the other, either under the double jeopardy clause of the fifth amendment or the due process clause of the fourteenth amendment.

Application of Analysis to Bartkus and Abbate

If we assume this conclusion as a general consideration, how does it apply specifically to *Bartkus* and *Abbate*? First, looking at *Bartkus,* it would appear that the policy of the Illinois Robbery Act is almost identical with that of the National Bank Robbery Act.[110] Both seek to avoid the taking of property by threats of violence, although the federal act is limited to banks and savings associations. There are, however, two possible arguments which demonstrate the policy differences in the statutes. It might be said that the federal statute is limited to banks and savings institutions because the federal government has an interest in insuring the soundness of the fiscal system, while the states have an

108. *Id.* at 328 (citations omitted).

109. The reaction of each individual depends upon his own sensitivity. Reason has relatively little to do with it. The author must confess that the Supreme Court would probably not agree with him, in light of Hoag v. New Jersey, 356 U.S. 464 (1957) and Ciucci v. Illinois, 356 U.S. 571 (1957).

110. See notes 5 & 7 *supra.*

interest in property. Therefore, these statutes in fact represent two policies, and separate offenses are involved.

However, this argument cannot stand. The connection between a sound fiscal system and the robbing of a bank is so remote that it is a rationalization to say that there is a federal interest here. It is entirely ephemeral. The federal statute was not passed to safeguard the fiscal system, but to aid the states in capturing and punishing persons violating their laws. The argument actually confuses the purpose of the statute with the congressional power to enact the statute. Since the federal government can act only upon the basis of an express or implied power in the Constitution, Congress must limit the scope of this legislation to financial institutions, so that it stays within its power to control and regulate the currency and its value.[111] Certainly, the purpose of the legislation is to protect the larcenous taking of property by intimidation, but Congress is limited by the constitutional power.[112] Even if it is agreed that the federal government's interest in the fiscal system is a genuine one, there is still no separate offense under the federal statute because the protection of the fiscal system is a policy interest in the general protection of property. To say that the policy of protecting property has been adopted is only to give a short-hand expression for the varied reasons for adopting this policy, one of which may be the protection of the fiscal system. Therefore, the offense is the same under both statutes.

Moreover, it might be argued that in *Bartkus,* the state of Illinois has a separate interest, since after this conviction, Bartkus would be subject to the Habitual Criminal Act.[113] This argument has no relevance because the question is: What is the Illinois policy under its robbery statute? The Habitual Criminal Act comes into consideration only after there is a decision as to whether there can be a prosecution under the prior statute.

The *Abbate* case is more difficult to rationalize. Both the Illinois and federal conspiracy statutes have the policy of prohibiting conspiracies formed for the purpose of destroying property.[114] The federal statute is framed in terms of injuring any property of any communications system controlled by the United States. This, of course, is based utimately on the interstate commerce clause, since the United States can control only interstate communications. What makes this case more difficult is the fact that the federal prosecutor introduced evidence to show that

111. See note 60 *supra.*

112. This point is readily observable in statutes like the Mann Act, 18 U.S.C. § 2421 (1948). It is based on the interstate commerce clause, but it is obviously aimed at pimping or pandering. It can be no more than a metaphor to say that Congress wanted to keep interstate commerce clear of women used for immoral purposes.

113. ILL. REV. STAT. ch. 38, § 602 (1883).

114. See statutes cited in notes 25, 27, & 28 *supra.*

the facilities of Southern Bell were a part of the communication system used for the defense of the nation, thus supporting the argument for a distinct federal policy. But, as stated above, the general policy might embody a number of policy considerations responsible for its adoption. For example, one of the reasons for adopting a criminal statute against conspiring to injure property was the safe-guarding of defense communications. Both statutes, nevertheless, represent a policy of preventing such conspiracies, regardless of the reasons for adopting this policy. Therefore, the prior state prosecution should have barred the federal one.

Lack of Practical Consideration to Support the Theory of Dual Sovereignty

The last section has shown that prosecution by state or federal authorities should bar prosecution by the other where the same act violates statutes of each, with substantially the same policy. Thus, the next question to consider is whether there is any practical need for the dual sovereignty concept. There would be such a necessity if it could be shown that federal and state authorities might interfere with the enforcement activities of one another. Some discussion will show that no such problems exist.

First, it seems clear that state and federal authorities work closely with one another.[115] However, if any antagonism should develop, both the federal and state governments have powerful weapons with which to protect the effectiveness of their law enforcement. The federal government has the supremacy clause, and the states have their respective representatives in Congress. Therefore, this author must conclude that there is no practical necessity for upholding the dual sovereignty theory where both statutes seek to prevent the same offense.

The Result of Combining the Dual Sovereignty Theory with Theories of the Double Jeopardy Protection in State Law

The purpose of this section is to analyze the practical consequences of the *Bartkus* and *Abbate* decisions. To do this, they must be considered in light of the "same evidence" test and the rule that successive prosecutions by a state and a municipality for the same offense are not in violation of the state prohibition against double jeopardy. Initially, however, there must be an explanation of the same evidence test and the rule that successive state-municipal prosecutions do not put a defendant in double jeopardy.

115. Bartkus v. Illinois, 359 U.S. 121, 123 n. 1 (1959).

The Same Evidence Test

The "same evidence" test is the criterion used by a great number of states when determining whether a second indictment charges the same offense charged in an earlier prosecution. The test was first announced in *The King v. Vandercomb & Abbott.*[116]

> These cases establish the principle, that unless the first indictment were [sic] such as the prisoner might have been convicted upon [sic] by the proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second.[117]

This formulation was used to by-pass the technical rule of variance. The test has been employed in this country to determine the intent of the legislature in defining various offenses. The "same evidence" test, however, has been defined narrowly, so that in many states, double jeopardy protection has been greatly impaired. Any slight variation of the facts is called new evidence, although, reasonably, the offense charged is the same. One of the primary reasons for this situation is the rule in most states that the prosecution cannot appeal for error from an acquittal.[118]

One of the most flagrant examples of the appalling results produced by this test is the case of *Johnson v. Commonwealth.*[119] Defendant participated in seventy-five hands of poker from nine in the evening until one in the morning. He was convicted for violation of the gaming laws on the basis of the first hand and was being charged in a second prosecution for the same violation on the basis of the second hand. The court held that each hand was itself a complete offense, so that conviction or acquittal on the first hand would not bar a prosecution for the second.[120] He could then be prosecuted and punished for all seventy-five hands. Although few decisions have reached this point, there are many odd decisions on record.[121]

In recent cases, the Supreme Court has upheld the use of this test as not being violative of the due process clause of the fourteenth amendment. In *Hoag v. New Jersey,*[122] the defendant robbed four persons

116. 2 Leach 816, 168 Eng. Rep. 455 (Cr. Cas. 1796).

117. The King v. Undercomb & Abbott, 168 Eng. Rep. 455, 461 (Cr. Cas. 1796). The first indictment charged breaking and entering and taking property away. It failed because of a variance between the proof and the indictment. The second charged breaking and entering with intent to steal, which was upheld as a different offense.

118. See generally Horack, *The Multiple Consequences of a Single Criminal Act,* 21 MINN. L. REV. 805 (1937); Kirchheimer, *The Act, the Offense and Double Jeopardy,* 58 YALE L.J. 513 (1949); Comment, 65 YALE L.J. 339 (1956).

119. 201 Ky. 314, 256 S.W. 388 (1923).

120. *Id.* at 316, 256 S.W. at 389.

121. See Commonwealth v. Butterick, 100 Mass. 1 (1868) (defendant was charged with embezzling five bonds; the court held that he had committed five offenses because each bond was new evidence); Barton v. State, 23 Wis. 587 (1869) (five drafts of forged notes all uttered at once constituted five offenses under the "same evidence" test).

122. 356 U.S. 464 (1958).

simultaneously. After being acquitted for robbing three of the alleged victims, the Supreme Court upheld the prosecution for the fourth. During the same term, in *Ciucci v. Illinois*,[123] the Court upheld a third conviction of a defendant who was charged with the murder of his wife and three children. The first conviction was for murdering his wife, the second for murdering his oldest child, and the third for murdering another child. The prosecution was seeking the death penalty, which it finally obtained after the third conviction. The evidence in each case was the same. The only difference in the cases was the name of the victim. The Court upheld the *Hoag* and *Ciucci* decisions on the grounds that the double jeopardy protection was not a part of the due process clause of the fourteenth amendment, and furthermore, there was no fundamental unfairness. Thus far, the Court has not found an unconstitutional use of the "same evidence" test.[124]

Successive State-Municipal Prosecutions

The second theory in regard to state double jeopardy protection allows successive municipal-state prosecutions for the same offense.[125] This rule is followed in a majority of the states. For example, a city may prosecute a violation of its municipal code for keeping a disorderly house, and the state may also prosecute under its statute for the same violation. There are two rationales to support this position. One states that the city and the state are separate sovereignties, so that there are two offenses. This seems ridiculous since the municipality is ordinarily the creation of the state. The second theory is that the action by the city is not really a criminal action, but more like a civil action. The municipality, as a corporation, is suing to recover its debt by collection of a fine. This also seems dubious, particularly if a jail sentence is part of the judgment. The Supreme Court has not passed upon the question of whether or not this double prosecution violates the due process clause of the fourteenth amendment, but in the light of *Hoag* and *Ciucci*, it appears unlikely that it does.

These fundamentals now make it possible to construct a hypothetical. *X*, president of a local free-love society, is accused of stealing six packages of stamps from the local post office, each worth twenty dollars. City *Z* in Illinois prosecutes *X* for violation of the provision of its municipal code which reads: "Anyone who steals the property of another, and

123. 356 U.S. 571 (1958).

124. The same test is used in federal prosecutions. See, *e.g.*, Blockburger v. United States, 284 U.S. 299 (1932). In Prince v. United States, 352 U.S. 322 (1957), it was used more sensibly. Here, a single shotgun blast which wounded two federal marshals simultaneously was considered a single offense.

125. Kneier, *Prosecution Under State Law and Municipal Ordinance as Double Jeopardy*, 16 CORNELL L.Q. 201 (1931).

the value of such property is more than ten dollars, shall be subject to a one hundred dollar fine, or a jail sentence of not more than thirty days, or both." He is fined and given the maximum sentence. Then, *X* suffers six separate prosecutions under Illinois law for violation of the larceny statutes.[126] There are six prosecutions because the stealing of each package is a separate offense under the statute, each package being new evidence in every prosecution.[127] Double jeopardy does not exist because the city suit is civil in nature.[128] For each conviction defendant is sentenced to ten years in jail, the sentences running consecutively. Finally, the federal authorities prosecute him for stealing property used by the Post Office.[129] He is fined and given a three-year sentence to run consecutively with those of the state.

The above situation can arise when the rule in *Bartkus* and *Abbate* is coupled with the rule of the *Hoag* and *Ciucci* decisions. The state prosecutions are probably valid under the due process clause of the fourteenth amendment; the dual sovereignty theory allows the federal prosecution. There would probably be ready agreement that if this should happen, it would be intolerably unfair. Since all the statutes proscribe the same act, all policy aspects of the double jeojardy protection would be violated. Finally, the number of possible prosecutions is left in the hands of the prosecutor, a situation which could involve the danger of persecution. This could be the case in the above hypothetical, *X* being president of a local free-love society. This result demonstrates the reason why the rule in *Bartkus* and *Abbate* should be reversed.

CONCLUSION

It seems apparent that successive state-federal prosecutions for violations of state and federal statutes with substantially the same policy should be barred. The fact that there is no binding precedent prior to the *Bartkus* and *Abbate* cases; that allowance of successive prosecutions in such circumstances clearly violates the protection against double jeopardy; that the practical problem of state-federal interferences with one another's law enforcement is minimal; and that the dual sovereignty theory combined with certain state practices might lead to unjust results, leads to that single conclusion.

126. ILL. REV. STAT. ch. 38, §§ 387, 389 (1951). § 387 provides in part: "Larceny is the felonious stealing . . . the personal goods of another." § 389 provides in part: "Every person convicted of larceny if the property stolen exceeds the value of fifteen dollars . . . shall be imprisoned . . . not less than one, nor more than ten years . . . ."

127. See Ciucci v. Illinois, 356 U.S. 571 (1958), where the "same evidence" test was employed in its extreme form.

128. City of Chicago v. Williams, 254 Ill. 360, 98 N.E. 666 (1912).

129. 18 U.S.C. § 1707 (1948) which provides in part: "Whoever steals . . . any property used by the Post Office Department . . . shall be fined not more than $1,000 or imprisoned not more than three years, or both [if the property stolen exceeds $100 in value] . . . ."