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# Double Jeopardy and Dual Sovereignty: A Critical Analysis

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# *NOTES*

## DOUBLE JEOPARDY AND DUAL SOVEREIGNTY: A CRITICAL ANALYSIS

The fifth amendment to the United States Constitution reflects the deeply rooted fear and abhorrence of a governmental power which allows an individual to be subjected to multiple prosecution for the same offense. It provides: "No person . . . shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." [1] This amendment encompasses both the practice of the common law[2] and of the international law[3] in allowing the plea of *autrefoits acquit*, or former acquittal, when a defendant had been tried previously in another jurisdiction. Yet in 1959, the Supreme Court in *Bartkus v. Illinois*[4] and *Abbate v. United States*[5] developed a rule that the Constitution does not prevent a federal or state reprosecution of an individual for an offense arising out of the same act. This was done, without denying the abhorrence of multiple prosecutions by our system, because a majority of the Court felt that the appropriate function of our federal system requires the application of a dual sovereignty principle. The rationale of the dual sovereignty principle being that because the laws of both state and the federal governments, as two sovereigns, were applicable, the same act produced two offenses, and therefore an individual could not be placed in jeopardy for the "same" offense.

The following discussion will focus upon the validity of the *Bartkus* and *Abbate* rationale by considering the historical perspective of the problem, the weakness of the arguments presented in its defense, and

1. U. S. CONST. amend. V.

2. *See, e.g.*, Fisher, *Double Jeopardy, Two Sovereignties, and the Intruding Constitution*, 28 U. CHI. L. REV. 591 (1961); Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 U.C.L.A. REV. 1 (1956); Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. MIAMI L. REV. 306 (1963).

3. Franck, *An International Lawyer Looks at the Bartkus Rule*, 34 N.Y.U. L. REV. 1096 (1959). The Supreme Court accepted this rule in United States v. Furlong, 18 U. S. (5 Wheat.) 184, 197 (1820) in dealing with a prosecution for piracy.

4. 359 U. S. 121 (1959).

5. 359 U. S. 187 (1959).

the subsequent change in the jurisprudential tenor of the Court. From this discussion the conclusion will be drawn that *Bartkus* and *Abbate* should be overruled.

## HISTORICAL PERSPECTIVE

As one of the oldest restraints on governmental power known to the western legal tradition, the double jeopardy prohibition has been traced to the Hebrew Talmud and has found expression in the Continental and English system as well as having been part of the Roman and Canon law.[6] In 1759, Blackstone was to suggest that the "plea of the *autrefoits acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence." [7] This "universal maxim" has been established in English precedent[8] since *Roy v. Thomas*[9] in 1664, *Rex v. Hutchinson*,[10] 1678, and *King v. Roche*,[11] in 1775 and has been described as a part of all advanced systems of law.[12]

It is, therefore, not surprising that after the introduction of the doctrine by this country's earliest settlers, and after having become deeply engrained in the conscience of its people,[13] that a double jeopardy provision was incorporated in the Bill of Rights of our Constitution in 1791.[14] The provision having been adopted in its present form, after

6. Newman, *Double Jeopardy and the Problem of Successive Prosecution: A Suggested Solution*, 34 S. CAL. L. REV. 252-55 (1961).

7. 4 W. BLACKSTONE, COMMENTARIES BOOK *335; W. HAWKINS, PLEAS OF THE CROWN 515-529 (8th ed. 1824).

8. Although, as Mr. Justice Frankfurter asserted in *Bartkus*, there was some question as to the early English cases due to confusing reporting, still it is clear that those cases have always been treated as establishing the principle. Pontikes, *Dual Sovereignty and Double Jeopardy: A Critique of Bartkus* v. *Illinois and Abbate* v. *United States*, 14 W. RES. L. REV. 700, 705 (1963). *See also* Fisher, *supra* note 2, at 605-06; Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309, 1316-29 (1932).

9. 82 Eng. Rep. 1043 (K.B. 1664) (subsequent prosecution barred in an adjoining English county after an acquittal of a felony in Wales).

10. Reported in Burrows v. Jemino, 93 Eng. Rep. 815 (K.B. 1726) (an acquittal of a felony in Portugal barred a prosecution in England).

11. 168 Eng. Rep. 169 (Cr. Cas. 1775) (dictum that a prior trial in the Cape of Good Hope was a bar to English prosecution).

12. AMERICAN LAW INSTITUTE, DOUBLE JEOPARDY 7 (1935) (introductory note).

13. *See* Bartkus v. Illinois, 359 U.S. 121, 155 (1959) (Black, J., dissenting).

14. All but five states expressly recognize the principle in their constitutions, with

the first Congress, in 1789, had rejected an amendment to the provision which would have restricted the double jeopardy protection to federal offenses.[15]

In the early years of our country, the courts were to deal with the inherent conflicts between the states and the union in the area of concurrent jurisdiction. Initial considerations were given to those areas between the two governments where their laws were in substantial conflict,[16] a problem to which the Constitution[17] and its framers[18] had addressed themselves in some detail. But more relevant to this discussion, the problem arose, particularly in the criminal law, as to the laws of duplication of the two jurisdictions or "dual sovereigns." The problem presented itself as whether to declare unconstitutional successive prosecutions and thereby protect the individual, as the common law had done, or to uphold a dual sovereignty doctrine in order that one sovereign would not interfere with the administration of the other's criminal laws. Before 1847, the case law in the United States had given strong indications that it would oppose successive prosecutions and follow the former course.[19]

*Houston v. Moore*[20] was the first significant comment by the Supreme Court in the dual sovereignty area. Houston, as a member of the Pennsylvania militia, was prosecuted under a Pennsylvania statute for refusing to serve under order of the state's governor in compliance with a requisition by the President of the United States. Penalties were defined in the Act of Congress of 1795. In answer to the argument that "[t]he exercise of this jurisdiction by a state court-martial would either oust the United States courts of their jurisdiction, or might subject the alleged delinquents to be twice tried and punished for the same offence . . . ," [21] the Court was to reason that, since the jurisdiction of the two courts was concurrent, "the sentence of either court, either of conviction or acquittal, might be pleaded in bar of the prosecution before the other. . . ." [22] And later, by way of dictum in *United States v.*

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the remaining five providing the protection within their common law. Note, *Multiple Prosecution: Federalism vs. Individual Rights*, 20 U. OF FLA. L. REV. 355 n.1 (1968).

15. 1 ANNALS OF CONG. 753 (1789). A delegate had requested that the provision be changed such that the words "by any law of the United States . . ." be inserted.

16. *See generally* Harrison, *supra* note 2, at 309-10.

17. *E.g.*, U. S. CONST. amend. X.

18. *E.g.*, THE FEDERALIST No. 32, at 169 (Scott ed. 1898) (Hamilton).

19. Newman, *supra* note 6, at 257.

20. 18 U. S. (5 Wheat.) 1 (1820).

21. *Id.* at 6.

22. *Id.* at 31.

*Furlong*,[23] the Court was again to draw on the "universal maxim" of double jeopardy. It stated: ". . . and there can be no doubt that the plea of *autrefoits acquit* would be good, in any civilized state, though resting on a prosecution instituted in courts of any other civilized state. . . ." [24]

Later, state court decisions were to serve to point up the problem.[25] But it was not until the decisions of *Fox v. Ohio*,[26] *United States v. Marigold*,[27] and *Moore v. Illinois*,[28] in the period 1847-52, that the Supreme Court was to lend its support to the conceptual framework of a dual sovereignty doctrine, as advanced by the states. The Court was to assert that each citizen owes "allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either." [29] The overriding considerations for this rationale, it has been suggested, was simply the balancing of the interests of two governments in a period of our nation when the slavery question and state sovereignty doctrine were politico-legal questions embroiled in an emotional setting.[30] With the questions of the federal system's survival at stake, individualistic or libertarian interests must have been rather insignificant considerations. The limited value as precedent of these cases for the double sovereignty doctrine of *Bartkus* and *Abbate* can be emphasized when one looks further at the *Moore* decision. In *Moore*, the plaintiff was indicted under the criminal code of Illinois for secreting and harboring a fugitive black slave, while a federal statute also dealt with the same conduct. In dealing with this, the most politically explosive issue of the times, the majority was to assume the "correctness" of the doctrine that "a slave owner was clothed with the entire authority, in every State in the Union, to seize and recapture his slave." [31] Given this context of the antebellum period, it would appear inevitable that the federal and state govern-

23. 18 U.S. (5 Wheat.) 184 (1820) (the defendants were indicted for robbery committed at sea). For application of the doctrine in multijurisdictional situations see the discussion in Note, *Double Prosecution By State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538, 1543 (1967).

24. 18 U. S. (5 Wheat.) at 197 (1820).

25. *See, e.g.*, Harlan v. People, 1 Douglass 207 (Mich. 1843); State v. Randall, 2 Aikens 89 (Vt. 1827).

26. 46 U.S. (5 How.) 470 (1847).

27. 50 U.S. (9 How.) 560 (1850).

28. 55 U.S. (14 How.) 13 (1852).

29. *Id.* at 20.

30. Harrison, *supra* note 16, at 313. The author feels that the "individual was only a sacrificed pawn in a game that had higher stakes—the survival or demise of the federal union." *Id. See also* Newman, *supra* note 6, at 260.

31. Fox v. Ohio, 46 U.S. (5 How.) 410, 439 (1847) (McLean, J., dissenting).

ments would be recognized as distinct and independent entities. Justice McLean was to dissent to the Court's rationale:

> There is no principle better established by the common law, none more fully recognized in the federal and State constitutions, than that an individual shall not be put in jeopardy twice for the same offence. This, it is true, applies to respective governments; but its spirit applies with equal force against double punishment, for the same act, by a State and the federal government.[32]

*United States v. Lanza*[33] in 1922 was the first case in which the Supreme Court formally held that successive prosecutions could be entertained for the same offense in federal and state courts. For in the *Lanza* case, a federal conviction for violation of the Volstead Act was upheld after the defendant was convicted by the state of Washington for manufacturing intoxicating liquor.[34] Yet, when considered in the context of legislative history of the Volstead Act and the eighteenth amendment little is offered to justify *Lanza*.[35] In addition, it must be remembered that both the Act and the amendment have ceased to exist in modern law. But it was in *Lanza* where Chief Justice Taft was to offer the classic formulation of the dual sovereignty framework as cited by *Bartkus* and *Abbate*:

> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.
>
> It follows 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.[36]

## THE *Bartkus* AND *Abbate* DECISIONS

In the context of this historical development, on March 30, 1959, the Supreme Court in *Bartkus v. Illinois* and its companion case *Abbate v. United States* dealt with the problem of dual prosecutions by federal

32. 55 U.S. at 20.
33. 260 U.S. 377 (1922).
34. *Id.*
35. *See generally* Newman *supra* note 6, at 262.
36. 260 U.S. at 382. For more detailed criticisms of the *Lanza* decision *see* Grant, *supra* note 8.

and state governments. In *Bartkus*, the defendant having been tried under the National Bank Robbery Act[37] for the robbery of a federally insured Illinois savings and loan association, was acquitted in a federal district court. Three weeks later, he was indicted by an Illinois grand jury on substantially the same evidence for violating the Illinois Robbery Act.[38] Bartkus was subsequently convicted and sentenced to life imprisonment under the Illinois Habitual Criminal Act.[39] The Illinois Supreme Court affirmed and certiorari was granted to the United States Supreme Court.[40] The Supreme Court in a 5-4 decision held that since the state prosecution was not a sham, the fourteenth amendment's due process clause did not prohibit the state reprosecution of an offense arising out of the same act after an acquittal in a federal court.

In *Abbate*, the defendants had pleaded guilty to conspiring to dynamite facilities of a telephone company during an extended labor dispute, and were sentenced to three months imprisonment under a state statute. In a federal district court, the defendants were subsequently convicted a second time for a conspiracy, based upon the same acts, to destroy integral parts of a United States communication system.[41] The Supreme Court held, as it had in *Lanza*, that a state conviction followed by a federal conviction for the same act is not barred by the double jeopardy clause of the fifth amendment.

Mr. Justice Frankfurter speaking for the majority in *Bartkus* and Mr. Justice Brennan in *Abbate* were to offer the contentions that the state-federal reprosecutions did not respectively violate either the fourteenth amendment in *Bartkus* or the fifth in *Abbate*. Mr. Justice Frankfurter concluded that "[p]recedent, experience, and reason" supported his conclusion that the defendant had not been deprived of due process through dual prosecutions.[42] In doing so he placed the greatest reliance: (1) upon the principle that the Bill of Rights was not to be incorporated into the fourteenth amendment and thereby made applicable to the States; (2) upon the rule of *Palko v. Connecticut*;[43] and (3) upon the rationale of *Lanza*. In addition, Mr. Justice Frankfurter

37. 18 U.S.C. § 2113 (1964) (a federal criminal offense occurs with the robbery of a federally insured banking institution).

38. ILL. REV. STAT. ch. 38, § 501 (1957) (repealed 1961).

39. *Id.* § 602 (repealed 1963).

40. People v. Bartkus, 7 Ill. 2d 138, 130 N.E.2d 187 (1955), *aff'd by an equally divided court without opinion*, 355 U.S. 281, *rehearing granted*, 356 U.S. 969 (1958).

41. Abbate v. United States, 247 F.2d 410 (5th Cir. 1957), *cert. granted*, 355 U.S. 902 (1957).

42. 359 U.S. at 139.

43. 302 U.S. 319 (1937).

argued that to overrule this precedent required extremely persuasive reasons which he felt were not of merit. He felt on the contrary that two policy considerations in support of federalism made it necessary to uphold a dual sovereignty doctrine: (1) there is danger of federal encroachment on state enforcement, particularly in reference to civil rights;[44] and (2) substantial difficulty could arise in determining when one offense could bar another because of their similarity.[45] Mr. Justice Brennan dealt with the problem in an almost identical manner. In relying on the *Lanza* decision and its rationale that the same act produced two offenses and therefore Abbate could not be put in jeopardy for the "same" offense, Brennan also spoke of the fact that federal law enforcement might be hindered if prior state prosecutions precluded subsequent federal action.

Mr. Justice Black, as noted already, offered in dissent, three countering arguments to the reasoning in *Bartkus* and *Abbate*: (1) the fifth amendment should be applied through the fourteenth to the states; (2) allowing reprosecutions would violate the "concept of ordered liberty" [46] since it would be in strict contravention of the "universal maxim" that had become so fundamental to our western legal tradition; and (3) the dual sovereignty doctrine ought to be rejected as a fiction that endangered individual rights while placing an unjustified emphasis on the need to protect the state and federal interests involved. He stated also:

> The Court apparently takes the position that a second trial for the same act is somehow less offensive if one of the trials is conducted by the Federal Government and the other by a State. Looked at from the standpoint of the individual who is being prosecuted, this notion 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.[47]

## The Weakness of *Bartkus* and *Abbate*: Federalism v. The Individual

Mr. Justice Frankfurter's first two principles were completely under-

44. Justice Frankfurter cited Screws v. United States, 352 U.S. 91 (1945) (defendant charged with a lesser offense under 1948 Civil Rights Act when guilty of murder under Georgia law). 359 U.S. at 132.

45. *See* Pontikes, *supra* note 8 at 702. *See generally* Kirchheimer, *The Act, the Offense and Double Jeopardy*, 58 Yale L.J. 513 (1949).

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

47. 359 U.S. at 155.

mined when, on June 23, 1969, the Supreme Court of the United States, in *Benton v. Maryland*[48] overruled *Palko v. Connecticut* and held that the Double Jeopardy Clause of the fifth amendment is applicable to the States through the fourteenth amendment. In addition, Mr. Justice Harlan in dissent, was to accurately reflect *Benton* as part of a "so far unchecked march towards 'incorporating' much, if not all, of the Federal Bill of Rights into the Due Process Clause." [49] This was a continuation of the process of "selective incorporation" into the fourteenth amendment of the specific guarantees enumerated in the first eight amendments as prohibitions against the states. The Court has found this necessary "to maintain . . . a fair and enlightened system of justice . . . ." [50] For the Court in a redefinition of its constitutional philosophy has placed libertarian interests above institutional considerations.[51] It has accomplished this by specifically incorporating certain Bill of Rights guarantees, for instance, the exclusionary rule of the fourth amendment,[52] the self-incrimination clause of the fifth amendment,[53] the right to confrontation,[54] effective assistance of counsel,[55] speedy trial,[56] and cruel and unusual punishment.[57]

It can be seen that the continued recognition of Mr. Justice Frankfurter's rationale in *Bartkus* has been weakened in three basic respects. First, the overruling of *Palko* and the incorporation of the double jeopardy provision into the fourteenth amendment has reflected a change in constitutional philosophy from institutional considerations to greater protections for the individual.[58] Second, the prevailing analysis of the principal precedents for *Bartkus* and *Abbate, Lanza* and three pre-civil war cases, has challenged the validity of those decisions. And finally, the dual sovereignty theory and its policy of overemphasizing institutional interests while correspondingly underemphasizing the

48. 395 U.S. 784 (1969).

49. *Id.* at 808.

50. Palko v. Connecticut, 302 U.S. at 325.

51. For the earlier lower court decisions viewing the *Benton* decision as predictable see, United States v. Wilkins, 348 F.2d 844, 853-54 (1965); People v. Eggleston, 255 Cal. App. 2d 337, 63 Cal. Rptr. 2d 104 (1967).

52. Mapp v. Ohio, 367 U.S. 643 (1961).

53. Malloy v. Hogan, 378 U.S. 1 (1964).

54. Pointer v. Texas, 380 U.S. 400 (1965).

55. Gideon v. Wainwright, 372 U.S. 335 (1963).

56. Klopfer v. North Carolina, 386 U.S. 213 (1967).

57. Robinson v. California, 370 U.S. 660 (1962).

58. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).

defendant's interests, has come increasingly under attack as being conceptually imprecise as well as patently unjust.[59]

In analysis of this latter point, the multiple prosecution rationale will be examined in some detail to see its relevance to the state-federal re-prosecution problem and determine if the arguments supporting the rationale are of sufficient merit to be justified in the *Bartkus-Abbate* situation. Next, the erosion of the dual sovereignty doctrine will be emphasized, and institutional considerations will be discussed in determining which interests are in need of protection in the event that *Bartkus* and *Abbate* are overruled.

## Multiple Prosecution Prohibition: Rationale

As Mr. Justice Black has pointed out,[60] while some writers have emphasized the inherent injustice of two punishments and others have cited the dangers to the innocent, the recurring theme of opposition to multiple prosecutions has simply been that it is wrong for the individual to " 'be brought into Danger for the same Offense more than once.' " [61] Beyond this, the double jeopardy prohibition is premised upon fundamental notions of fairness. It is sustained by society's need to protect both the individual defendant, and the trial as an institution.[62] In addition, public policy militates against the use of successive prosecutions.[63]

From the viewpoint of the protection of the accused, the doctrine's guarantee is necessary in order to protect the accused from the mental anxiety and social disabilities which are inherent in multiple prosecution. It is necessary to thwart any attempted use of multiple prosecutions as a tool of the prosecution to punish or harass the defendant.[64] In addition, the use of multiple prosecutions places the defendant at an unfair advantage in regard to the state, while also increasing the possibility of convicting an innocent man.[65]

59. Note, *supra* note 23 at 1542.

60. In *Bartkus*, Mr. Justice Black offered a masterful dissent which discussed the history of the double jeopardy doctrine, the effect of successive prosecutions on the accused, and the availability of federal preemption as a tool to mitigate any administrative problems created by an overruling of the *Lanza* rule. 359 U.S. at 150.

61. 359 U.S. at 155 citing 2 Hawkins, *supra* note 7, at 377.

62. *See* Fisher, *supra* note 2, at 592-94.

63. Note, *supra* note 14, at 362.

64. Note, *supra* note 23, at 1540.

65. Green v. United States, 355 U.S. 184, 187 (1957). *See also* Note, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 Yale L.J. 339 (1956).

Other writers have suggested that the guarantee is necessary primarily "to furnish essential respect and support for the judicial process." [66] The thinking being that if the trial is to serve as a supposed model of fairness, then it is essential that the initial criminal trial not be disregarded. It is important also that the double jeopardy prohibition serve as the vehicle to uphold "the social value of certainty." [67] For to allow multiple prosecutions is to undermine the definitive nature of the judicial process,[68] and subject the defendant and society to uncertainty.

Still further, it has been urged that there are paramount public policy considerations to be served by a prohibition against multiple prosecutions. "First, multiple trials are expensive." [69] Second, the need "of bringing litigation to an expeditious conclusion is frustrated." [70] Third, multiple prosecutions are contrary to prevailing criminal theory which reasons that society is best served when the aim of the criminal law is the protection of society, the deterrence of future crime and rehabilitation. Multiple prosecutions, instead, tend to serve a retributive or revengeful aim. In the same context, multiple prosecution and its subjection of the defendant to multiple punishment decreases chances of rehabilitation by increasing feelings of alienation and hostility of an offender toward society. In addition, it undermines the objectives of probation and parole.[71] Fourth, it has been suggested that other constitutional guarantees are subject to weakening, such as the right to a speedy trial, protection from stale charges, and the validity of criminal statutes of limitations.[72]

In conclusion it would appear these considerations would be applicable to multiple prosecutions whether in the same jurisdiction or in successive state-federal prosecutions. Looked at from the standpoint of the individual defendant any distinctions caused by these differing contexts would appear to disregard the need for his protection.

## Erosion of Dual Sovereignty and its Practical Approach

The initial erosion of the dual sovereignty approach came in 1960 in *Elkins v. United States*,[73] and in 1962, in *Mapp v. Ohio*,[74] when the

66. Fisher, *supra* note 2, at 593.
67. *Id.*
68. *Id.*
69. Note, *supra* note 14, at 362.
70. *Id.*
71. *See* D. Dressler, Practice and Theory of Probation and Parole (1959).
72. Note, *supra* note 14, at 362.
73. 364 U.S. 206 (1960).
74. 367 U.S. 643 (1961).

Court ruled that when a claim of unreasonable search and seizure has been successfully asserted, evidence illegally seized by officials in one jurisdiction must be excluded from the other jurisdiction's prosecution. Dual sovereignty collapsed in the fifth amendment self-incrimination area in *Murphy v. Waterfront Comm'r*,[75] for there the Court overturned a decision of the Supreme Court of New Jersey which held that New Jersey could constitutionally compel a witness to give testimony which might have been used in a federal prosecution against him. The Court found the whipsawing of a witness under the laws of either sovereignty to be constitutionally repugnant. More important to this discussion is the rejection by *Murphy* of the *Bartkus* spirit, i.e., potential antagonism between the two governments in a federal system. Rather the Court pointed out that this now is an "age of 'cooperative federalism,' where the Federal and State Governments are waging a united front against many types of criminal activity." [76] Two years later Justices Harlan and Stewart announced that *Murphy*, at least in the area of self-incrimination, had "abolished the 'two sovereignties' rule . . . ." [77]

In reference to the practical considerations, offered by the majority in *Bartkus* and *Abbate*, it is not essential to the appropriate balance of the federal system that a "dual sovereignty" philosophy of law enforcement be maintained. In *Bartkus*, the Court had expressed the fear that federal prosecution for minor offenses would preclude more harsh state penalties for the same acts and thereby "the result would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines." [78] But this was to rely on the "unwarranted assumption that State and Nation will seek to subvert each other's laws." [79] In fact, the cases are replete with co-operative efforts of the state and federal governments in the field of law enforcement.[80]

Concerning the institutional interests that are in need of protection, it has been suggested, that the practical necessity of defending state and federal interests, and the overcoming of difficulties that might arise by

75. 378 U.S. 52 (1964).

76. *Id.* at 55-56.

77. Stevens v. Marks, 383 U.S. 234, 250 (1966). *See* Note, *supra* note 23, at 1547-49. This excellent analysis offers distinctions between *Elkins* and *Murphy* and the successive prosecution issue.

78. 359 U.S. 121, 137.

79. *Id.* at 156 (Black, J., dissenting).

80. State v. Fletcher, 15 Ohio Misc. 336, —, 240 N.E.2d 905, 911 (Ct. C.P. 1968).

allowing one prosecution, can be accomplished without multiple federal, state prosecutions. The analysis has been that because the federal interest in areas of concurrent jurisdiction are usually only supplementary to state law enforcement it is unlikely that criminal law enforcement would be disadvantaged.[81] This is true, except in one major area, civil rights, where federal prosecutions have often been necessary in order to protect national interests.[82] Although the Court has fostered the view that the federal government should protect through law enforcement and civil rights legislation constitutionally guaranteed rights, and therefore might be hesitant to allow any situation where federal interests might be undercut,[83] it would appear that there are means to afford the protection.

On the whole, then, the interests of the state and federal law enforcement officials are not in conflict since crime is an offense not against a sovereign but society. It is society that is offended by the crime not the sovereign, and prosecution is undertaken by the government as "protector" of that society.[84] This is the only acceptable view of the function of criminal prosecution and is a view that is inconsistent with a dual sovereignty theory.[85] It would follow that the doctrine must give way, for whether the federal or the state government initiates the prosecution would seem to be immaterial, except in the civil rights area.

This is the line of thought of a recent decision which has forseen the demise of the *Bartkus-Abbate* rule on facts almost indistinguishable from *Bartkus*. The decision was *State v. Fletcher*.[86] The arguments presented there in conclusion seem relevant to this discussion:

> This court is undismayed by this humanitarian trend. For the heart of federalism does not lie in the enforcement of a shallow, abstract and automatic line of demarcation between the state and federal sovereignties. Rather, it lies in the recognition of the fact that an individual is entitled to have his freedom protected by both the state in which he resides and the nation to which he pledges his allegiance, and in the understanding that when one sovereignty fails to provide him justice, he may look to the other for the relief which the constitution guarantees him. When such a conception of federalism has been achieved, our constitutional

81. Note, *supra* note 23, at 1565.
82. *See, e.g.*, United States v. Guest, 383 U.S. 745 (1966).
83. Note, *supra* note 23, at 1565.
84. Note, *supra* note 14, at 363. *See also* Harrison, *supra* note 2, at 327.
85. *Id.*
86. 240 N.E.2d 905 (1968).

> promises will have been fulfilled and, perhaps surprisingly, our law enforcement systems will be more effective, both individually and in cooperation with each other.[87]

But although Mr. Justice Frankfurter was in "little sympathy" [88] with the result reached in *Bartkus* and *Abbate*, still the supposed danger to the federal system, as noted in *Fletcher*, was the alternative ground for the decision. The Court, it is felt, emphasized federalism as an end in itself, and not as a means of securing and protecting individual rights. It is a question of the Court focusing on the instrumentality's protection instead of the rights of the individual that the instrumentality was created to protect.[89] It is Mr. Justice Black's position, in dissent, which appears to offer the solution of maintaining the instrumentality, the federal system, while preserving the individual's rights. He suggests the prohibition of multiple prosecution coupled with use of federal pre-emption to protect national interests.

## Conclusion

Although the individual's constitutional rights as limited by *Bartkus* and *Abbate* might be restored by the use of administrative discretion[90] or state, federal "barring statutes," [91] still a proper interpretation of the fifth amendment guarantees by the Court is the only way to insure that the defendant's rights are protected. "Selective pre-emption" would appear to offer the solution to the problem by allowing federal officials to obtain a stay of a state prosecution on the ground that a federal trial is deemed necessary to protect national interests. This would

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87. *Id.* at 912-13.

88. "The greatest self-restraint is necessary when that federal system yields results with which a court is in little sympathy." Bartkus v. Illinois, 359 U.S. 121, 138 (1959).

89. *See* Neuman, *Federalism and Freedom: A Critique*, in Federalism Mature and Emergent 44 (1955).

90. No federal case should be tried when there has already been a state prosecution for substantially the same act or acts without the United States Attorney first submitting a recommendation to the Assistant Attorney General in the department.

*News Notes, Double Jeopardy*, 27 U.S.L.W. 2509 (April 7, 1959).

91. Model Penal Code § 1.10(1)(a) (Proposed Official Draft, 1962). Statutes have been enacted in 19 states, Note *supra* note 14, at 360, n.57. Alaska's provision has been suggested as representative:

> When an act charged is within the jurisdiction of the United States, another State, or a territory, as well as of this State, a conviction or acquittal in the former is a bar to the prosecution for it in this state. Alaska Stat. § 12.20.010 (1962).

retain the primary responsibility of the states for law enforcement, but would allow for protection from local prejudice and incompetency in prosecution, as well as bringing the full resources of the federal government into play in cases of supreme national interest, particularly civil rights. Although initially some resentment might be felt, such a system would induce more cooperation, because conflicting interests would be removed.

Such a policy of federal pre-emption could be implemented by legislative action or through the use of the federal government's power to enjoin state proceedings to prevent "irreparable injury to a national interest." [92] With this protection of primary federal interests, plus the retention of the state's role as the primary law enforcement mechanism, there would appear to be no justification for the retention of the multiple prosecution rule and the legal fiction of dual sovereignty upon which it is based. This protection, in addition to the extreme criticisms of the *Bartkus* and *Abbate* decisions, the attacks on its precedent, the libertarian trend of the Court, and the erosion of the tenets of a dual sovereignty are significant reasons justifying the overruling of those decisions. The Court in accepting these arguments and overruling *Bartkus* and *Abbate* will return to the protection that the "universal maxim" of the common law and the fifth amendment originally sought to afford the criminal defendant, that is, he should not be placed in jeopardy twice for the same act.

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92. *See* 28 U.S.C. § 2283 (1964) and *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220, 225-26 (1967) (statute does allow an injunction when it is sought by the United States to prevent "irreparable injury to a national interest"). Note, *supra* note 23, at 1555-56.