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Successive Prosecutions

by State and Federal Governments

for Offenses Arising Out of Same Act

The Supreme Court recently held in *Bartkus v. Illinois*¹ that an acquittal in a federal court was no bar to a subsequent state prosecution for a state offense arising out of the same act and that such a state prosecution was not a denial of due process under the fourteenth amendment.² In a companion case, *Abbate v. United States*,³ the Court held that a subsequent federal prosecution arising out of the same acts which provided grounds for a prior state conviction was not a violation of the protection against double jeopardy under the fifth amendment.⁴

The *Abbate* decision was squarely in line with the rule of "successive prosecutions" first handed down in *United States v. Lanza*.⁵ In *Lanza*, the Court held that a federal prosecution was not barred although the petitioner had been previously convicted for violating a state statute proscribing the identical act.⁶ Although *Lanza* was the first case to expressly reach this holding, there were dicta to the

1. 359 U.S. 121 (1959).

2. U. S. CONST. amend. XIV, § 1: "nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

Petitioner was acquitted in an Illinois federal court for robbery of a federally insured savings and loan association. He was subsequently convicted by an Illinois state court for the same act under an Illinois robbery statute. *Affirmed*, *People v. Bartkus*, 7 Ill. 2d 138, 130 N.E.2d 187 (1958).

3. 359 U.S. 187 (1959).

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

Petitioners had been convicted by an Illinois state court for conspiring to destroy telephone wires, and on the basis of the same conduct, were later convicted by a Mississippi federal court for conspiring to destroy means of communication operated by the United States. *Affirmed*, *Abbate v. United States*, 247 F.2d 410 (5th Cir. 1957).

5. 260 U.S. 377 (1922).

6. *Ibid.* Prior to 1922, when faced with double prosecutions, the Court had always found some technicality on which to base its decision thereby avoiding the double jeopardy issue. For example, in *United States v. Mason*, 213 U.S. 115 (1909), the Court strained to interpret a federal statute in order to prevent a federal prosecution after a state court acquittal. A prior adjudication in a sham trial or court without jurisdiction is not considered to be jeopardy. See, e.g., *United States v. Ball*, 163 U.S. 662 (1895). In *Grafton v. United States*, 206 U.S. 333 (1907), the Court held that a prior conviction by a Philippine court-martial barred a subsequent prosecution by the Philippine criminal court on the basis that the court owed its existence to and derived its powers from the federal government and was therefore not a separate jurisdiction. See also *Coleman v. Tennessee*, 97 U.S. 509 (1878).

same effect in earlier cases.⁷ The importance of *Bartkus* lies in the fact that it is the first case to uphold a prosecution of an accused who had previously been *acquitted* in another jurisdiction.⁸

An examination of the rule of successive prosecutions requires a discussion of four factors. These factors are not mutually exclusive, nor have all courts dealing with the problem recognized their existence; but in order to discuss the present state of the law, all four factors must be taken into consideration. First, it must be determined when a state can legislate in a criminal area already covered by federal law. Second, once this determination is made, it is necessary to strike a balance between the relative powers of the federal and state governments and the rights of an individual accused. Reaching this balance requires the application of the due process and double jeopardy provisions of the Constitution. Third, in finding this balance, the courts often consider the effect on the law enforcement procedures of the various jurisdictions. And finally, in order to apply the concept of double jeopardy, courts must determine whether an accused who has performed one criminal act has committed one offense or several.

I. CONCURRENT LEGISLATION

The *Lanza* holding was based primarily on dicta uttered in cases where the sole concern of the Court was the "dual sovereignty" theory; this theory is based on the postulate that states may legislate concurrently with Congress in the interest of protecting their own citizens.⁹ In recent years, in delimiting the area in which concurrent legislation is appropriate, the Court has been hesitant to find congressional pre-emption in any particular field of criminal law.¹⁰ The

7. In *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820), the Court, holding that the state could pass a statute proscribing an act that was already a federal crime, stated, by means of dicta, that a state or federal conviction could be pleaded in bar to a subsequent prosecution by the other authority for the same act. However, in *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852), *United States v. Marigold*, 49 U.S. (9 How.) 560 (1850), and *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847), cases with holdings similar to that in *Houston v. Moore*, *supra*, the Court stated in dicta that such a prior prosecution could not be pleaded in bar.

8. *Bartkus v. Illinois*, 359 U.S. 121, 150 (1959) (dissenting opinion). The majority opinion in *Bartkus* scarcely notices this fact.

9. See cases cited note 7 *supra*. When opponents of the dual sovereignty theory posed the problem of enforcing legislation against an accused already prosecuted by the other jurisdiction, the Court answered this with dicta to the effect that conviction in one jurisdiction would be no bar to a prosecution in the other. This dicta evoked rousing dissents from Mr. Justice McLean who felt that if double prosecutions would ensue, the state statutes should be declared unconstitutional. See *Fox v. Ohio*, 46 U.S. (5 How.) 410, 434 (1847).

10. See Cramton, *The Supreme Court and State Power to Deal With Subversion and Loyalty*, 43 MINN. L. REV. 1025, 1034 (1959). For a comprehensive discussion of concurrent power and pre-emption, see generally, Grant, *The Scope and Nature of*

existence of concurrent legislation led naturally to the conclusion that states must be permitted to enforce their legislation, and the result was the prospect of double prosecution by both state and federal authorities. It is therefore not surprising that the Court in *Lanza* determined that the need for giving efficacy to state legislation was greater than the inescapable adverse effects of successive prosecutions.¹¹

Strict adherence to the *Lanza* rule, with its emphasis on protection of state interests, has led courts to apply the rule in situations substantially different from the facts of *Lanza*.¹² Thus, the affirmance of a conviction after a prior acquittal, in *Bartkus*, was not an unforeseeable decision, since concern with the dual sovereignty theory apparently continues to outweigh protection of the rights of an individual accused. In any event, individual freedom against harassing successive prosecutions has taken an impressive step backward.¹³

II. SUCCESSIVE PROSECUTIONS: DOUBLE JEOPARDY AND DUE PROCESS

Courts have paid scant attention to the factual distinction between a subsequent trial in a state court and one in a federal court.¹⁴ Many

Concurrent Power, 34 COLUM. L. REV. 995 (1934). For purposes of this discussion it is important to note that in areas where the Constitution has not specifically delegated a power to Congress, the Court will base its decision on the constitutionality of a state statute on (1) specific congressional indication that the legislation is or is not to be exclusive, (2) a clear-cut conflict with the federal statute or (3) the intention of Congress to pre-empt the field as evidenced by factors such as predominant national interest, probable inconsistencies, pervasiveness, etc. See Note, *Preemption by Federal Criminal Statutes*, 55 COLUM. L. REV. 83 (1955). It is in area (3) above, that the possibility of double prosecution may be a factor influencing the Court's determination. See, e.g., *Pennsylvania v. Nelson*, 350 U.S. 497 (1951).

The prevalent theory today is that where the states retain the authority to legislate against offenses which are already federal crimes, they do so under their police power to punish offenses against the state. However, where the purport of the state statute is to aid the federal government in maintaining respect for federal institutions, that statute is more likely to be declared unconstitutional than if it purports to protect a purely local interest. Cramton, *supra*, at 1033.

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

12. For example, a state conviction following a federal conviction was affirmed on the basis of the precedent of *Lanza*. *Hebert v. Louisiana*, 272 U.S. 312 (1926). Because of the nature of the federal system, this is a substantial factual difference. See notes 16-25 *infra* and accompanying text.

13. In Cramton, *supra* note 10, at 1029, there is an interesting observation which seems applicable to the entire field of successive prosecutions:

Finally, the cases reviewing state power in this field reveal most clearly the continuing struggle of libertarian ideals with federalist principles. At times libertarian victories have produced novel and creative constitutional doctrine. But a resurgence of federalist concepts . . . has in most instances revived state power and cast doubt on the precedent value of the earlier decisions upholding freedom against state action.

And see *State v. Cooper*, 13 N.J.L. 361, 376 (1833): "it is better that the residue of the offense go unpunished, than . . . to sanction a practice which might be rendered an instrument of oppression to the citizen."

14. See note 12 *supra* and accompanying text.

relevant policy arguments—premised on fundamental rights of an accused—for prohibiting second prosecutions are equally applicable to both courts, but there are significant constitutional differences.

When, as in *Abbate*, the subsequent prosecution is in a federal court, the fifth amendment is relevant. And pursuant to the *Lanza* test, the fifth amendment prohibits “a second prosecution under authority of the Federal government after a first trial for the *same offense* under the *same authority*.”¹⁵ But the edict of the fifth amendment need not be restricted to those prosecutions delineated in the *Lanza* test. As pointed out by the dissent in *Abbate*,¹⁶ it is arguable, on the basis of the language of that amendment and the debate surrounding its adoption,¹⁷ that the framers of the Bill of Rights intended to prohibit a prosecution by the federal government of any offender who had previously been prosecuted for the same offense in *any* jurisdiction.¹⁸

The standards of procedure in the federal courts are not limited by the “minimal historic safeguards of due process” but are based upon broader standards consonant with liberal theories of criminal justice.¹⁹ The concept of double jeopardy was not meant to be hinged

15. *United States v. Lanza*, 260 U.S. 377, 382 (1922). (Emphasis added.) Before any case determining the scope of concurrent power under the eighteenth amendment reached the Supreme Court, the lower courts divided on the interpretation of concurrent jurisdiction. This was partly due to the peculiar phraseology of the eighteenth amendment which led some courts to believe that state laws governing prohibition were passed in enforcement of the federal statute. Compare *United States v. Holt*, 270 Fed. 639 (D.N.D. 1921); *United States v. Bostow*, 273 Fed. 535 (S.D. Ala. 1921), with *United States v. Peterson*, 268 Fed. 864 (W.D. Wash. 1920). But cf. *State v. Smith*, 101 Ore. 127, 199 Pac. 194 (1921).

16. *Abbate v. United States*, 359 U.S. 187, 203 (1959) (dissenting opinion).

17. See 1 ANNALS OF CONG. 753 (1789) (1789-1824). As originally worded, the double jeopardy provision read: “No person shall be subject . . . to more than one punishment or one trial for the same offense.” A proposed amendment, seeking to add the words “by any law of the United States” at the conclusion of the provision was defeated in the first Congress. *Ibid.*

18. This argument is bolstered by the fact that at the time the fifth amendment was promulgated, the common law prohibited prosecutions after a prior conviction for the same offense in another jurisdiction. Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309, 1329 (1932). This is significant in that common law rights have been stated to provide the *minimum* standard in interpreting the first ten amendments, and that constitutional safeguards of civil liberties are to be interpreted to give the individual an even wider protection than that given by the common law. *Boyd v. United States*, 116 U.S. 616, 635 (1885); Grant, *supra* at 1329. Also see Franck, *An International Lawyer Looks at the Bartkus Rule*, 34 N.Y. U.L. REV. 1096 (1959); Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparison*, 4 U.C.L.A.L. REV. 1 (1956).

19. *McNabb v. United States*, 318 U.S. 332, 340 (1943):

[T]he scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure. . . . Cf. *Rea v. United States*, 350 U.S. 214 (1956).

upon technical refinements,²⁰ nor need it be.²¹ In *McNabb v. United States*²² the Court exercised its supervisory authority over the federal courts to exclude improperly obtained evidence. The majority in *McNabb* did not consider itself confined to *minimal* tests of constitutional validity, but looked more toward "the formulation and application of proper standards for the enforcement of Federal Criminal Law in the Federal courts."²³ Accordingly, in a case such as *Abbate*, the Court should not feel confined to *minimal* constitutional safeguards when reviewing convictions in the lower federal courts following a conviction for the same offense in a state court. Rather, the supervisory powers of the Court should be exercised on a case-by-case basis to protect an offender from the harassment inherent in multiple trials. In this respect, the Court need do no more than it did in *McNabb*.²⁴

But when, as in *Bartkus*, the second trial is in a state court, the Court has stated that it must give greater weight to the state court's expressions of criminal justice.²⁵ Although the double jeopardy provision of the fifth amendment does not apply to the states as such, there is no question that at some point harassment of an accused will violate the due process clause of the fourteenth amendment.²⁶ In *Palko v. Connecticut*²⁷ it was held that a state statute permitting the state to appeal upon an allegation of error in a criminal case was not a violation of the fourteenth amendment. In *Bartkus*, the Court apparently relied on *Palko* for establishing the proposition that putting a man on trial twice for the same offense is *never* a violation of the fourteenth amendment.²⁸ In view of the express limitations

20. E.g., *People v. Spitzer*, 148 Misc. 97, 102, 266 N.Y.S. 522, 528 (Sup. Ct. 1933).

21. In Clark, *Forward: A Symposium in Fitting the Punishment to the Criminal*, 31 IOWA L. REV. 191 (1946), the author states "We now realize that harsh punishment does not protect society or prevent the offender from again engaging in crime." The aims of criminal law are controversial. Among the many aims advanced are protection of society, deterrence of future crime and rehabilitation of the criminal. See HALL & GLUECK, *CRIMINAL LAW AND ENFORCEMENT* 14-28 (2d ed. 1958). Among these various theories only the retributive or revenge motive would appear to justify successive prosecutions. Few modern legal writers espouse this theory.

In *United States v. Candelaria*, 131 F. Supp. 797 (S.D. Cal. 1955), the federal judge, incensed at the fact that the state intended to prosecute the defendant immediately upon his release from federal prison and believing that this further prosecution would entirely ruin the efficacy of the rehabilitation program set up for the defendant (who, because of state law, could no longer be allowed the freedom of the prison farm but was placed under maximum security when the state government placed a detainer on him), reduced sentence from five years to sixty days.

22. 318 U.S. 332 (1943).

23. *Id.* at 340.

24. Brief for Petitioner, pp. 18-22, *Abbate v. United States*, 359 U.S. 187 (1959).

25. *McNabb v. United States*, 318 U.S. 332, 340 (1943).

26. *Palko v. Connecticut*, 302 U.S. 318 (1937).

27. 302 U.S. 318 (1937).

28. See *Bartkus v. Illinois*, 359 U.S. 121, 124-25 (1959).

placed on the decision in *Palko*,²⁹ the Court's reliance is unnecessarily strong.

A reading of decisions applying the rule of successive prosecutions both before and after *Lanza* reveals a great hesitancy on the part of judges to subject an accused to double prosecutions. These decisions rendered suspended sentences, nominal penalties, or admonitions to other courts and prosecuting officials to enforce double penalties only in extraordinary circumstances.³⁰ Fifteen state legislatures, apparently sharing this attitude toward successive prosecutions, have enacted statutes setting up prosecutions in other jurisdictions as a bar to prosecutions in their own jurisdictions for the same offense.³¹ In order to determine whether a state has violated the fourteenth amendment by prosecuting an accused subsequent to a federal conviction or acquittal arising out of the same act, the Court need only look to statements of courts reiterating the seemingly fundamental proposition that defendants are denied justice if prosecuted twice for the same offense.³² It is clear that a denial of fundamental justice is a denial of due process.³³

29. "What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider." *Palko v. Connecticut*, 302 U.S. 318, 328 (1937).

30. Some examples of judicial attitudes on successive prosecutions can be found in: *United States v. Candelaria*, 131 F. Supp. 797 (S.D. Cal. 1955) (see note 21 *supra*); *United States v. Regan*, 273 Fed. 727, 729 (D.N.H. 1921) (double jeopardy is obnoxious to the ordinary conception of right); *United States v. Ratagczak*, 275 Fed. 558 (N.D. Ohio 1921) (judge will give full weight to any former punishment); *United States v. Holt*, 270 Fed. 639 (D.N.D. 1921) (nominal penalty); *United States v. Palan*, 167 Fed. 991, 992 (S.D.N.Y. 1909); *United States v. Amy*, 24 Fed. Cas. 792, 811 (No. 14445) (D. Va. 1859) ("the court would have felt it its duty to suspend sentence. . ."); *People v. Welch*, 141 N.Y. 266, 280, 36 N.E. 328, 342 (1894); *Jett v. Commonwealth*, 59 Va. (18 Gratt.) 933, 959 (1868); *State v. Antonio*, 3 Brev. 562 (S.C. 1816).

31. ARIZ. CODE ANN. § 43-6102 (1939); CAL. PENAL CODE ANN. § 656 (Deering 1949); IDAHO CODE ANN. § 19-315 (1949); IND. STAT. ANN. § 9-215 (Burns 1933); MINN. STAT. § 610.23 (1957); MISS. CODE ANN. § 2432 (1942); MONT. REV. CODES ANN. §§ 94-4703, -5617 (1947); NEV. COMP. LAWS § 9963 (Hillyer 1929); N.Y. PEN. LAW § 33, and N.Y. CODE CRIM. PROC. § 139; N.D. REV. CODE §§ 12-0505, 29-0313 (1943); OKLA. STAT. ANN. tit. 21, § 25, tit. 22, § 130 (1951); ORE. REV. STAT. § 131.240(1) (1953); S.D. CODE §§ 13.0506, 34.0813 (1939); UTAH CODE ANN. §§ 76-1-25, 77-8-8 (1953); WASH. REV. CODE § 10.43.040 (1951). See also TEX. CODE CRIM. PROC. ANN. art. 208 (1954); WIS. STAT. § 939.71 (Supp. 1957).

In MODEL PENAL CODE § 1.11, comment (Tent. Draft No. 5, 1956), there is a provision pursuant to which a former prosecution in another jurisdiction would be a bar to further prosecution for the same offense in the jurisdiction adopting the provision.

32. See *Brock v. North Carolina*, 344 U.S. 424, 429 (1953); *Ciucci v. Illinois*, 356 U.S. 571 (1958) (dissent). In *Green v. United States*, 355 U.S. 184, 187-88 (1957), the Court stated that:

the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty.

33. *E.g.*, *Palko v. Connecticut*, 302 U.S. 318, 325 (1937), where the Court says

III. THE EFFECT OF THE LAW ENFORCEMENT PROCESS ON THE RULE OF SUCCESSIVE PROSECUTIONS

An underlying problem raised by the instant cases is the apparent fear by each government that the other will somehow subvert its law enforcement process through a sham or otherwise ineptly conducted trial, minimal penalty or executive pardon.³⁴ Moreover, there may be apprehension that the offender, knowing of a bar to further prosecution, would submit himself to the jurisdiction having the lesser penalty in order to avoid trial in the jurisdiction having the more severe.

However, Congress can, in any field where it is empowered to legislate, *specifically* pre-empt that field or, at least, impose minimum penalties binding upon the states.³⁵ If Congress does not expressly pre-empt a field of criminal law, it has been shown that in some instances *courts* will look for remedies against double prosecutions,³⁶ either reading pre-emption into or narrowly interpreting a federal statute, in order to restrict the area of concurrence between the federal and state laws.³⁷ In the event of federal pre-emption, the states would find themselves powerless to exercise means of the self-protection that is at the root of the concurrent legislation issue.³⁸

The *Bartkus* case might have been resolved in favor of petitioner on the narrow grounds that "the extent of participation of the federal authorities here constituted this state prosecution actually a second federal prosecution."³⁹ At the least, the high degree of federal-state cooperation in *Bartkus* seriously undercuts the argument that if a

that a violation of due process is a violation of "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

34. *Bartkus v. Illinois*, 359 U.S. 121, 156 (1959) (dissenting opinion).

35. See Note, *Preemption by Federal Criminal Statutes*, 55 COLUM. L. REV. 83 (1955).

36. See text accompanying note 30 *supra* and cases cited therein.

37. In *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), the Court found that Congress had pre-empted the area of sedition on the basis of implied congressional intent plus dominant federal interest and said in dicta, "we will not assume that Congress intended to permit the possibility of double punishment." *Id.* at 510. In *Jerome v. United States*, 318 U.S. 101 (1943), the non-existence of a bar to further prosecution by the state led the Court to define a federal statute narrowly in order to restrict the area in which the two statutes overlapped.

38. *Cf.* notes 9-13 *supra* and accompanying text.

39. *Bartkus v. Illinois*, 359 U.S. 121, 165-66 (1959) (Mr. Justice Brennan dissenting joined by Mr. Chief Justice Warren and Mr. Justice Douglas). Mr. Justice Brennan points out, *id.* at 165, 167:

It is clear that federal officers solicited the state indictment, arranged to secure the attendance of key witnesses, unearthed additional evidence to discredit *Bartkus* and one of his alibi witnesses, and in general prepared and guided the state prosecution. Thus the State's Attorney stated at the state trial: "I am particularly glad to see a case where the federal authorities came to see the state's attorney." And Illinois conceded with commendable candor on the oral argument in this Court "that the federal officers did instigate and guide this state prosecution" and "actually prepared this case." Indeed, the State argued the case on the

conviction by one "sovereignty" barred a prosecution by the other, an offender could simply surrender to the jurisdiction with the smaller penalty. Not only is it unlikely that a person will voluntarily submit to the police of *any* jurisdiction, but assuming that he does, it by no means follows that the sovereignty which first gains control over him will try him. Rather, as the facts of *Bartkus* indicate, it is quite likely that federal and state authorities would make a *joint* decision to bring him to trial in the jurisdiction which imposes the higher penalty.⁴⁰

The argument that one jurisdiction could subvert the law enforcement processes of the other is put forth by a few of the same officials who protest most loudly against certain exclusionary rules,⁴¹ on the grounds that citizens must have faith in their officials to do their jobs properly and that this confidence must not be undercut by court-imposed restrictions.⁴² A leading public figure has stated that "democracy is a failure" unless trust of law enforcement officials exists.⁴³ Therefore, the anomalous conclusion: law enforcement officials are

basis that the record showed as a matter of "fair inference" that the case was one in which "federal officers bring to the attention of the state prosecuting authority the commission of an act and furnish and provide him with evidence of defendant's guilt."

.....

Pursel's testimony at the state trial, that Bartkus had told him he participated in the robbery, was obviously damaging. Yet, indicative of the attitude of the federal officials that this was actually a federal prosecution, the FBI agent arranged no interview between Pursel and any state authority. The first time that Pursel had any contact whatsoever with a state official connected with the case of [the two self-confessed participants in the robbery for which Bartkus was prosecuted], Pursel's sentencing was postponed until after he testified against Bartkus at the state trial.

Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1182-83 n.342 (1959).

The danger that the federal system may be exploited to circumvent the procedural rights of the accused far transcends the double jeopardy context. For the view that federal-state "cooperation" is seriously cutting into the protections against self-incrimination, unreasonable search and seizure and illegal detention, as well as double jeopardy, see Kamisar, *supra*, at 1177-90.

40. Cf. Testimony of Assistant Attorney General Warren Olney, pointing out that "frequently [in narcotic cases] Federal and local officers work in close cooperation, and the cases, depending on [inter alia] . . . the extent of the penalties that can be imposed." *Hearings Before the Subcommittee on Traffic in, and Control of, Narcotics, Barbiturates and Amphetamines of the House Committee on Ways and Means*, 84th Cong., 2d Sess. 1190, 1197 (1956). (Emphasis added.)

It is interesting to note that in *Jett v. Commonwealth*, 59 Va. (18 Gratt.) 938, 958-59 (1868), the court discounted any possibility of collusion arising from the rule of successive prosecutions on the ground of its high degree of faith in the state and federal authorities.

41. See 1 NEW YORK CONSTITUTIONAL CONVENTION, REVISED RECORD 373 (1938). For an example of the exclusion of improperly obtained evidence in the federal courts, see *McNabb v. United States*, 318 U.S. 332 (1943).

42. 1 NEW YORK CONSTITUTIONAL CONVENTION, REVISED RECORD, *supra* note 41, at 373.

43. Statement of Thomas E. Dewey in 1 NEW YORK CONSTITUTIONAL CONVENTION REVISED RECORD, *supra* note 41, at 373.

to be trusted in certain areas of criminal procedure, such as search and seizure and detention, but not in other areas, such as successive prosecutions.

It may be argued that the "power" to re-prosecute does not necessarily mean that any offender will be so prosecuted unless extraordinary circumstances demand. The Attorney General of the United States sent a statement to all United States Attorneys immediately after the *Abbate* decision to the effect that the authority given them by that decision was to be used sparingly and only with his personal approval.⁴⁴ The gist of this statement is to set up the criterion that successive prosecutions may occur only under extraordinary circumstances,⁴⁵ with the Attorney General of the United States as final arbiter of when these circumstances exist. The prosecutor's discretion is hardly a substitute for a constitutional safeguard. In any event, if extraordinary circumstances which existed in *Abbate* (a more severe federal penalty) and in *Bartkus* (failure of federal officials to obtain a conviction at the first trial) are examples of the limitations which the Court (or the Attorney General) will place on the rule of successive prosecutions, the criterion is worthless. For, as a practical matter, these are virtually the *only* circumstances in which a jurisdiction will feel it worthwhile to try an accused already prosecuted elsewhere.

IV. SEPARATE OFFENSES

The application of the fifth amendment's prohibition against the federal government's twice placing a person in jeopardy hinges upon a determination that the accused was twice tried for the *same offense*.⁴⁶ It is conceivable that one act could violate two or more statutory provisions, and to discover whether several distinguishable statutes create one offense or several, the legislative intent must be ascertained.⁴⁷ The test presently used by the Court to determine legislative intent in such circumstances⁴⁸ is that set forth in *Block-*

44. See 27 U.S.L. WEEK 2509 (April 7, 1959).

45. In *Fox v. Ohio*, 46 U.S. (5 How.) 410, 434 (1847), the dictum to the effect that a conviction in one jurisdiction would be no bar to a prosecution in the other was modified by the confidence of the Court that such double prosecutions would only be brought in extraordinary circumstances. This confidence was echoed in *United States v. Lanza*, 260 U.S. 377 (1922).

46. According to the *Lanza* test, the fifth amendment prohibits prosecutions by the federal government of an offender previously tried for the *same offense* by the same authority. See note 15 *supra* and accompanying text.

47. See Kircheimer, *The Act, The Offense and Double Jeopardy*, 58 YALE L.J. 513 (1949). Historically, the courts have set up a variety of tests and rules of statutory interpretation to make this determination. For purposes of this discussion the most important are the "same evidence" and "same transaction" tests.

48. *Gore v. United States*, 357 U.S. 386, 388 (1958). A recent reaffirmation of the *Blockburger* test can be found in *United States v. Sabella*, 28 U.S.L. WEEK 2227 (U.S. Nov. 24, 1959).

burger v. United States:⁴⁹ "ascertain whether each statutory provision requires proof of an additional fact which the other does not."⁵⁰

In *Abbate*, the Government made an alternative argument, contending that the fifth amendment had no application to the case because the two prosecutions were under statutes which required slightly different evidence for conviction and which protected different social and political interests.⁵¹ In effect, the Government asserted that the *Blockburger* test, which had theretofore only been applied to multiple indictments at one federal trial, should be applied to the area of successive prosecutions. A strict application of the *Blockburger* test to the facts in *Abbate* would have resulted in a holding that the defendant had committed two distinct offenses and had no grounds for appealing on the basis of the fifth amendment.

In applying the *Blockburger* test, no distinction has been made between successive trials for multiple offenses committed in one transaction, and multiple indictments at one trial for each statute violated or offense committed.⁵² However, this distinction is presented for the first time in *Abbate* in a separate opinion written by Mr. Justice Brennan which did not form part of the holding but refuted the Government's alternative argument.⁵³ Mr. Justice Brennan feared that a theory such as that proposed by the Government could be applied to two *federal* prosecutions for separate statutory violations arising out of the same act if that act were a violation of federal statutes designed to protect separate federal interests. Accordingly, he refuted the Government's contention on the ground that this would constitute such harassment of the defendant as to be forbidden by the fifth amendment. He supported his argument by noting the fact that the *Blockburger* test has never been used to subject a defendant in the federal courts to multiple trials for several offenses arising out of the same act but merely to permit multiple indictments

49. 284 U.S. 299 (1933).

50. *Id.* at 304:

where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each requires proof of an additional fact which the other does not.

This is often referred to as the "same evidence" test as opposed to the "same transaction" test.

51. A vital element of the *Blockburger* test is the existence of separate interests protected by the statutes as well as separate evidentiary requirements. See Kirchner, *supra* note 47, at 524.

52. See *Ciucci v. Illinois*, 356 U.S. 571 (1958) (dissenting opinion). Although Mr. Justice Brennan points out in his separate opinion in *Abbate* that the Supreme Court has never upheld multiple trials for offenses arising out of the same act, this appears to be the first time any Justice on the Court has made this observation, and it has never been so held.

53. *Abbate v. United States*, 359 U.S. 187, 196 (1959) (separate opinion).

at one trial.⁵⁴ He added that technical tests based on determining whether two statutes protect different interests or have different evidentiary requirements cannot stand when the "prime consideration is the protection of the accused from the harassment of successive prosecutions."⁵⁵ In his opinion, the constitutional alternative to multiple trials would be multiple indictments at one trial, and the federal cases holding that one act constituted multiple offenses have dealt with just this fact situation.⁵⁶

It is interesting to note that Mr. Justice Brennan dissented in *Ciucci v. Illinois*,⁵⁷ a case holding that a state may prosecute by multiple trials for separate offenses arising out of one transaction, since the basis of the dissent was the unreasonableness of multiple trials in state courts when the state might have served multiple indictments at one trial.⁵⁸ Moreover, it is also significant that Mr.

54. *Id.* at 197.

55. *Id.* at 200.

56. See, e.g., *Gore v. United States*, 357 U.S. 386 (1958); *Bell v. United States*, 349 U.S. 81 (1955); *Blockburger v. United States*, 284 U.S. 299 (1933); *Morgan v. Devine*, 237 U.S. 632 (1915); *Contra*, *Gavieres v. United States*, 220 U.S. 338 (1911). Although this latter case involved two trials, Mr. Justice Brennan distinguishes it on the basis of the peculiarities of Philippine common law. 359 U.S. at 198.

Although a criminal accused would, in most cases, receive an identical sentence with multiple indictments at one trial as with multiple trials, the abuse that Mr. Justice Brennan envisages is that of a defendant, acquitted at one trial, being successively retried by the state until a conviction is secured. In *Ciucci v. Illinois*, 356 U.S. 571 (1958), the defendant, accused of murdering his wife and three children at the same time, had been placed on trial for each killing separately until a jury finally brought in the death penalty at his third trial. At this point the state ceased trying him. The Court held no double jeopardy or violation of the fourteenth amendment, Mr. Justice Brennan dissenting.

57. 356 U.S. 571 (1958). *Hoag v. New Jersey*, 356 U.S. 464 (1958), affirms the *Ciucci* holding. That case also involved the question of *res judicata* in criminal proceedings. *Res judicata* can be invoked in criminal proceedings. *Sealfon v. United States*, 332 U.S. 575 (1948). In the case of a prior acquittal on a separate charge involving substantially the same facts, arguments have been made for invoking the doctrine of collateral estoppel. The problems here are basically (1) in the event of a jury verdict it is usually indeterminable exactly what the factual basis for the verdict was; (2) it is doubtful whether a failure to apply collateral estoppel can be collaterally attacked; and (3) in cases involving trials in two jurisdictions the issue arises whether the requisite identity of parties is present. The Supreme Court has said, however, that in certain instances, by looking at the instructions given to the jury and the general circumstances surrounding the case it is possible to ascertain the actual basis of the verdict (especially in the situation where an acquittal could not have been rendered in the absence of a specific factual determination). *Sealfon v. United States*, *supra*. For a general discussion of this topic see Lugar, *Criminal Law, Double Jeopardy and Res Judicata*, 39 IOWA L. REV. 319 (1954).

58. 356 U.S. at 575.

No constitutional problem would have arisen if petitioner had been prosecuted in one trial for as many murders as there were victims. But by using the same evidence in multiple trials the State continued its relentless prosecutions until it got the result it wanted. . . . This is . . . unseemly and oppressive use of a criminal trial that violates the concept of due process. . . .

Justice Brennan uses *Palko v. Connecticut*,⁵⁹ a case involving two state trials, in support of the proposition that no government shall wear out an accused by a multitude of trials. Thus, it would seem that the same reasoning which led Mr. Justice Brennan to declare that two federal trials for offenses arising out of the same transaction would be unconstitutional under the fifth amendment, would apply equally to the states under the fourteenth amendment.

In a situation where the defendant is prosecuted by two jurisdictions, multiple trials are inevitable. Mr. Justice Brennan also wrote the majority opinion in *Abbate*, and in that opinion he accepted the theory expounded by most of the cases he used as authority: successive prosecutions are constitutional because each jurisdiction has a separate interest to protect. However, this is inconsistent with the theme of his separate opinion that technical tests such as separate interests are not valid in the face of continued harassment. Logically, it cannot be said that a defendant is any less harassed in two trials when the prosecuting attorneys bear the authority of two jurisdictions than when they represent only one.⁶⁰

Beyond discussing a long-neglected distinction in the area of separate offenses, that is, the distinction between multiple indictments and multiple trials, the separate opinion is important in its potentially far-reaching effects. Suppose successive prosecutions by state and federal authorities were to be held unconstitutional and the Government retained its alternative argument. Assuming this argument to be valid, a slight change in a state statute, perhaps the addition of a few minor evidentiary requirements, would have the effect of taking the prosecution beyond the reach of attack on constitutional grounds by creating separate offenses. Moreover, an excellent argument could be made that, by definition, the statutes of two jurisdictions create separate offenses for purposes of double jeopardy. In this situation, rather than applying the *Blockburger* test, the courts should look beyond such technical evidentiary tests to the substance of the statutes in an attempt to determine whether two substantively different crimes exist.

Assume a situation, such as that in *Bartkus*, where the state and federal statutes differ basically only to the extent that the federal statute requires an allegation that the robbery occurred on federal property while the state statute requires an allegation of robbery. Thus, if the only defense in a prior federal trial was that the pro-

59. 302 U.S. 318 (1937).

60. In Franck, *An International Lawyer Looks at the Bartkus Rule*, 34 N.Y.U.L. Rev. 1096, 1103 (1959), a solution was proposed whereby the state and federal authorities would cooperate to present all evidence at one trial, perhaps with multiple indictments. This procedure would be consonant both with the theories of dual sovereignty and Mr. Justice Brennan's separate opinion.

perty in question did not belong to the federal government, and the defendant was acquitted, a subsequent prosecution should not be barred. In this event, the defendant would not have been tried *substantively* for the same offense which the state condemns.⁶¹ This should be the only situation whereby the defendant should be put to a retrial.

Although not binding as authority, Mr. Justice Brennan's separate opinion may be a ray of hope to those who would see the Court considering each case on its substantive merits to the end of more justice in criminal procedure and disregarding mechanical formulae in the administration of the criminal law.

* * *

There are many who argue that the unrestricted holdings in the instant cases are inconsistent with the protection given a criminal defendant by the double jeopardy and due process provisions of the Constitution.⁶² Moreover, at least one member of Congress has advanced a solution which would abrogate the instant decisions.⁶³ The displeasure of many courts with prosecuting any man twice has taken many forms.⁶⁴ That the rule of successive prosecutions causes such difficulty is strong evidence that it is not consonant with our notions of fairness in criminal procedure.

61. In this fact situation the problems encountered in the area of *res judicata* (see note 57 *supra*) are avoided. Thus, the defendant, by his plea, could effectively bar the use of his acquittal for any purpose other than a showing that the property did not belong to the federal government. The issue of his commission of the act has not been adjudicated.

62. See, e.g., *Franck*, *supra* note 60; Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309 (1932); Note, *Preemption by Federal Criminal Statutes*, 55 COLUM. L. REV. 83 (1955).

63. See H.R. 6176, 86th Cong., 1st Sess. (1959). "A Bill to Amend title 18 U.S.C. entitled 'Crimes and Criminal Procedure' to provide that prior adjudication on the merits by any court of competent jurisdiction, State or Federal, should bar prosecution for similar acts committed against the same person and State." This bill has as yet not been acted upon by the House Judiciary Committee. The avowed purpose of its sponsor was to give effect to the minority opinions in the instant cases. Letter from Thomas J. Lane, Member U.S. House of Representatives Committee on the Judiciary, sent to and on file in the offices of *Minnesota Law Review*, Sept. 29, 1959.

64. See notes 30, 35-37 *supra* and accompanying text.