FEDERALISM VS. DOUBLE JEOPARDY: A COMPARATIVE ANALYSIS OF SUCCESSIVE PROSECUTIONS IN THE UNITED STATES, CANADA AND AUSTRALIA

A potential hardship facing citizens of federal states is the possible application of two sets of penal laws to the same conduct.[1] Within the federal systems of the United States and Canada, an individual accused of committing an act that concurrently violates both state and federal law may be subjected to successive prosecutions by each government.[2] This injustice is unique to a federal system because of the concept of dual sovereignty.[3] It is the independent regulatory control of each government comprising a dual sovereignty system that results in potential multiple prosecutions.

Australia has a federal system similar to that of the United States and Canada.[4] However, the Australian system protects the defendant from facing a second prosecution by affording him the opportunity to utilize the common law evidentiary pleas of *autrefois acquit*[5] and *autrefois convict*.[6] These pleas serve to

1. Friedland, *Double Jeopardy and the Division of Legislative Authority in Canada*, 17 U. TORONTO L.J. 66 (1967) [hereinafter cited as Friedland].

2. *See* United States v. Lanza, 260 U.S. 377 (1922); Rex v. Kissick, 78 Can. Crim. Cas. Ann. 34 (1942).

3. The concept of dual sovereignty, in essence, states that every citizen of the United States is also a citizen of a state or territory, that he owes allegiance to two sovereignties, and that he may be punished for a single act which violates the laws of both sovereignties. The clearest formulation of this doctrine can be found in United States v. Lanza, 260 U.S. 377 (1922); and in Moore v. Illinois, 55 U.S. (14 How.) 13 (1852).

The general rule regarding the issue of double jeopardy when the state and federal governments have concurrent jurisdiction or "dual sovereignty" is summarized in 21 AM. JUR. 2d, *Criminal Law* § 192 (1965) as follows:

> The same act may constitute a violation of both federal and state laws, and it has been held that a conviction or acquittal in one jurisdiction will not prevent a subsequent prosecution in the other if the case is one over which both sovereignties have jurisdiction.

(footnotes omitted).

4. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 U.C.L.A. L. REV. 1 (1956-57) [hereinafter cited as Grant].

5. The name of a plea in bar to a criminal action, stating that the defend-

bar a subsequent indictment on the grounds that the defendant has previously been acquitted or convicted of the same offense. Consequently, Australian citizens are not subjected to the dangers of successive prosecutions by the state and commonwealth governments.

The utilization of these pleas ameliorates the injustice inherent in allowing a defendant to be tried twice for the same offense.[7] By focusing upon the United States, Canadian and Australian systems, it shall become apparent that the Australian system exemplifies an approach whereby the rights of the defendant are meaningfully safeguarded while the interests of the two sovereignties are adequately represented. It will be the purpose of this comment to illustrate the necessity of the adoption of the pleas of *autrefois acquit* and *autrefois convict* in the United States and Canada.

I. DOUBLE JEOPARDY IN THE UNITED STATES

The prohibition against double jeopardy was brought to the United States by the early colonists.[8] It appeared in constitutions and declarations of rights as early as 1681,[9] and was codified by Blackstone in his *Commentaries.*[10] Notwithstanding this prohibition, the Supreme Court, in three major decisions,[11] upheld the

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ant has been once already indicted and tried for the same alleged offense and has been acquitted. BLACK'S LAW DICTIONARY 170 (4th ed. 1968).

6. The name of a plea in bar to an indictment that he has been formally convicted of the same crime. *Id.*

7. For a discussion of what is the "same offense," *see* Comment, *Double Jeopardy—Defining the Same Offense,* 32 LA. L. REV. 87 (1971-72).

8. R. PERRY & J. COOPER, SOURCES OF OUR LIBERTIES 385 (1959). *See* Comment, *Twice in Jeopardy,* 75 YALE L.J. 262 n.1 (1965-66). The double jeopardy principle existed during the Greek and Roman eras. Canon law contained a similar principle. There is evidence that a plea similar to double jeopardy may have appeared in English law as early as the fourteenth century, but the earliest conclusive evidence of the principle appears in the writings of Hale and Coke (seventeenth century), and later in Blackstone (eighteenth century). *See also* J. Sigler, *A History of Double Jeopardy,* 7 AM. J. LEGAL HIST. 283, 283-97 (1963).

9. R. PERRY & J. COOPER, SOURCES OF OUR LIBERTIES 385 (1959).

10. The plea of *autrefois acquit,* or a formal acquittal, is grounded on the 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 offense. W. BLACKSTONE, COMMENTARIES BOOK IV (1759 ed.). *See* SIGLER, DOUBLE JEOPARDY 16 (1969).

11. *See* Moore v. Illinois, 55 U.S. (14 How.) 13 (1852); United States v. Marigold, 50 U.S. (9 How.) 560 (1850); Fox v. Ohio, 46 U.S. (5 How.) 410 (1847); *see also* Grant, *The Lanza Rule of Successive Prosecutions,* 32 COLUM. L. REV. 1309, 1314 n.27 (1932).

constitutionality of concurrent state and federal criminal jurisdiction.[12] The Court did not confront the question of successive trials, but did address the issue of the necessity of concurrency by reasoning that concurrent jurisdiction did not involve a power struggle between the state and federal governments, but rather that it protected citizens from the arbitrary control of one sovereignty.[13] The Court held that since each citizen owed allegiance to both sovereignties, he could be punished by both.[14]

> The doctrine was not established without severe opposition within the Court itself. In the *Fox* and *Moore* cases, Mr. Justice McLean wrote a ringing dissent. Reasoning that neither government could be required to accept a plea in bar based upon a previous prosecution in the courts of the other, he continued: "Nothing can be more repugnant or contradictory than two punishments for the same act. It would be a mockery of justice, . . . a reproach to civilization, [and] would violate not only the common principles of humanity, but would be repugnant to the nature of both governments. . . . It follows that the power to punish being in the general government, it does not exist in the states."

(footnotes omitted).

12. *Accord,* State v. Antonio, 3 S.C. (3 Brev.) 562, 578 (1816); where the majority held that the state law punishing the counterfeiting of foreign coins was still in force, notwithstanding the passage of a national law on the same subject.

13. "It has more accurately been shown that the men who wrote the Constitution as well as the citizens of the member States of the Confederation were fearful of the power of centralized government and sought to limit its power." Bartkus v. Illinois, 359 U.S. 121, 137 (1959). *See also* Myers v. United States, 272 U.S. 52 (1926).

14. *See* United States v. Lanza, 260 U.S. 377 (1922), where the same act was an offense against the state of Washington, because a violation of its law, and was also an offense against the United States under the National Prohibition Act. The defendants thus committed two different offenses by the same act, and a conviction by a court of Washington of the offense against that state is not a conviction of the different offense against the United States, and is therefore not subject to double jeopardy. *See, e.g.,* Screws v. United States, 325 U.S. 91 (1945); Jerome v. United States, 318 U.S. 101 (1943); Westfall v. United States, 274 U.S. 256 (1927).

The consideration of policy which may have grounded the *Lanza* decision is articulated in a ruling of the West Virginia Supreme Court. The court reasoned that it would deprive each separate government of one of the essentials of sovereignty to hold that it was powerless to punish an offender for violating its law simply because the wrongful act committed also constituted an offense against another sovereignty. State v. Henson, 91 W. Va. 701, 114 S.E. 273 (1922).

This contention is not unanswerable.. By very definition, the purpose of the Bill of Rights is to restrict sovereignty through placing limitations upon an otherwise legally omnipotent government. It appears that the court assumes "sovereignty" to rest in the government, rather than in the people.

See J. STONE, LEGAL SYSTEM AND LAWYERS REASONINGS 76 (1964) *quoted in* Note, *Multiple Prosecution: Federalism vs. Individual Rights,* 20 U. FLA. L. REV. 355, 363 (1967-68) [hereinafter cited as *Multiple Prosecution*].

> The importance of the federalism argument makes it necessary to examine some of the hypotheses upon which it is based. The concept of crime against the sovereign is traceable partly to the work of John Austin. To Austin, law was a set of commands issued by a sovereign

This analysis indicates that a violation of national and state law results in commission of distinct crimes in two separate jurisdictions, thus giving both governments the right to prosecute.

Several modern decisions of the United States Supreme Court pertain to the concept of dual sovereignty. The two most notable cases are *Bartkus v. Illinois*,[15] and *Abbate v. United States*.[16] In consecutively reported decisions, the Court upheld successive prosecutions by the state and federal governments for crimes arising from the same conduct.[17]

In *Bartkus*, the defendant was tried in a federal district court for the robbery of a federally insured savings and loan association located in the state of Illinois.[18] Subsequent to an acquittal in the federal district court, he was indicted by the state grand jury for an offense[19] consisting of the same alleged conduct.[20] Bartkus was tried,[21] convicted,[22] and sentenced to life imprisonment under the Illinois Habitual Criminal Statute.[23] On appeal,

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for the violation of which definite penalties, or sanctions, were prescribed. Austin's sovereign was that individual or group of individuals to whom the larger part of society habitually gave obedience and who, at the same time, was not subject to the dictates of any other higher authority. Disobedience was therefore a personal transgression against another person—the sovereign.

Id. at 363.

15. 359 U.S. 121 (1959).

16. 359 U.S. 187 (1959).

17. For purposes of this comment, it is assumed that the "identical offense" requirement is met.

18. Bartkus v. Illinois, 359 U.S. 121 (1959). The United States prosecuted under 18 U.S.C. § 2113 (1970):

> Whoever, by force and violence, or by intimidation, takes . . . property . . . in the care, custody, control, management, or possession of . . . any savings and loan association;
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> . . . .
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> Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

19. The Illinois proceeding was brought pursuant to ILL. REV. STAT. ch. 38, § 501 (1951).

20. The Illinois grand jury came to a completely opposite conclusion than did the federal courts. The confusion is compounded by the similarity of the evidence in the two cases.

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

22. The Illinois trial court considered and rejected petitioner's plea of *autrefois acquit*. *See also* United States v. Barnhart, 22 F. 285 (1884), *cited in* Bartkus v. Illinois, 359 U.S. 121, 134 (1959), where the Oregon Circuit Court was presented with a case just the opposite of *Bartkus*. The prior trial and acquittal was by a state court; the subsequent trial was by a federal court. The circuit court rejected defendant's plea of *autrefois acquit*, saying that the hardship of the second trial might operate to persuade against the bringing of a subsequent prosecution but could not bar it.

23. ILL. REV. STAT. ch. 38, § 603 (1951). The State of Illinois had a spe-

the Illinois Supreme Court affirmed the conviction, and the case was petitioned to the United States Supreme Court.[24]

In a 5-4 decision, the Court affirmed Bartkus' conviction.[25] The decision was based upon two principles: that the double jeopardy clause of the fifth amendment[26] was not binding upon the states;[27] and, that the concept of dual sovereignty compels the maintenance of both a strong state and federal system of justice.[28]

In his majority opinion, Justice Frankfurter emphasized that the state prosecution was not a sham and a cover for a federal prosecution, and concluded that they were separately conducted.[29]

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cial interest in the defendant beyond the commission of a particular crime. Finding Bartkus guilty as charged made him an habitual offender under Illinois law and thereby subjected him to life imprisonment. Thus, the Illinois court felt that a rule barring successive federal-state prosecutions could work to defeat the interest of sovereignties in implementing effective law enforcement policies.

24. The United States Supreme Court affirmed the decision by an equally divided court. Bartkus v. Illinois, 355 U.S. 281 (1958). The court subsequently granted a rehearing and revoked the earlier judgment. Bartkus v. Illinois, 356 U.S. 969 (1958).

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

26. The fifth amendment to the United States Constitution provides: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb. . . ." U.S. CONST. amend. V.

27. Bartkus v. Illinois, 359 U.S. 121, 124 (1959). This had been decided in *Palko v. Connecticut*, 302 U.S. 319 (1937).

28. MILLER, DOUBLE JEOPARDY AND THE FEDERAL SYSTEM at 74 (1968).

29. Although Frankfurter concluded that the two prosecutions were separately conducted, he did offer the following:

> It is true that the agent of the Federal Bureau of Investigation who conducted the investigation on behalf of the Federal Government turned over to the Illinois prosecuting officials all the evidence he had gathered against the petitioner. Concededly, some of that evidence had been gathered after acquittal in the federal court.
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> The only other connection between the two trials is to be found in a suggestion that the federal sentencing of the accomplices who testified against petitioner in both trials was purposely continued by the federal court until after they testified in the state trial.

Bartkus v. Illinois, 359 U.S. 121, 122-23 (1959).

Note that Justice Brennan dissented in *Bartkus* for a different reason than did Justice Black. Brennan dissented because of the federal interference in the state trial. It would appear that he agreed with Frankfurter's analysis of dual sovereignty, because he wrote the majority opinion in *Abbate v. United States*, 359 U.S. 187 (1959). In the dissent in *Bartkus*, Brennan wrote:

> It is clear that federal officers solicited the state indictment, arranged to assure 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."

Therefore, by finding that the federal prosecution had no relationship to the state prosecution, the Court excused the application of the double jeopardy clause.

In further support of the majority position, the Court relied on the precedent set in the landmark case of *Palko v. Connecticut*.[30] In *Palko*, Justice Cardozo conceived of a new standard to determine which rights under the first ten amendments of the United States Constitution were applicable to the states through the due process clause of the fourteenth amendment.[31] The test applied was whether or not a deprivation of the fundamental right in question violated "the concept of ordered liberty."[32] Frankfurter applied this test in *Bartkus*, and concluded that the "concept of ordered liberty" was not violated by a successive multi-governmental prosecution. He also analyzed the effects that multiple prosecutions have on the state government:

> It would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines. It would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States.[33]

This statement suggests that if successive prosecutions were disallowed, the result would be a federal pre-emption of state's rights. As this is inconsistent with the concept of dual sovereignty, the Court could not countenance such a result. A better understanding of this holding may be reached by analyzing a theory of jurisdiction.[34] Historically, countries implementing the com-

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> I think that the record before us shows that the extent of participation of the federal authorities here constituted this state prosecution actually a second federal prosecution of Bartkus.

Bartkus v. Illinois, 359 U.S. 121, 165-66 (1959).

30. 302 U.S. 319 (1937); the Court held that the double jeopardy clause of the fifth amendment was not incorporated into the due process clause of the fourteenth amendment.

> 31. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

U.S. CONST. amend. XIV.

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

33. Bartkus v. Illinois, 359 U.S. 121, 137 (1959).

34. Continental countries based their concept of jurisdiction upon the social dangers involved in allowing multi-jurisdictional prosecutions. *See* Grant, *supra*

mon law have stressed the *locus* of the act in determining proper jurisdiction.[35] Frankfurter's analysis is consistent with this theory. Since Bartkus' act occurred within the boundaries of two governments, or "in two places," it follows that both governments should have a legal right to prosecute.

The legality of successive prosecutions by two governments was re-examined in *Abbate v. United States*.[36] Abbate was convicted in an Illinois state court of conspiracy to damage property.[37] He was subsequently indicted and convicted in a federal court for a violation stemming from the same conspiracy.[38]

Abbate appealed the federal conviction to the United States Supreme Court and it was affirmed.[39] The question presented was whether or not the prosecution by the federal government violated the double jeopardy clause of the fifth amendment. The issue and the facts differ slightly from the *Bartkus* case. In *Bartkus*, the state government conducted the second prosecution, while in *Abbate*, the federal government conducted the second prosecution.[40] Since the second trial was a federal prosecution, the fifth amendment was directly involved. The Supreme Court held that the fifth amendment was applicable, but it had not

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note 11 at 1317 n.40 wherein he writes:

> In Scotland, which follows the civil law, a criminal charge recites that the accused "ought to be punished with the pains of the law in order to deter others from committing the like crimes in all time coming." Note what a different mental reaction is called for by such a statement than by an indictment charging that the accused has violated "the peace and dignity of the United States of America."

35. *See* authorities cited note 11, *supra*. *Locus* refers to the place where a thing is done. BLACK'S LAW DICTIONARY 1090 (4th ed. 1968).

36. 359 U.S. 187 (1959).

37. *Id.*; Abbate was prosecuted pursuant to ILL. REV. STAT. ch. 38, § 139 (1957).

38. The federal prosecution was brought under 18 U.S.C. § 371 (1970) which provides:

> If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1362 (1970) provides:

> Whoever wilfully or maliciously injures or destroys any of the works, property, or material of any . . . telephone or cable, line, station or system, or other means of communication, operated or controlled by the United States . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

39. Abbate v. United States, 359 U.S. 187 (1959).

40. If one were prosecuted first by the federal government and then by the state government, *Bartkus* would be dispositive, regardless of whether the first prosecution resulted in conviction or acquittal. If one were prosecuted first by the state government and then by the federal government, *Abbate* would control.

been violated since the prosecutions were by two independent governments.[41]

Once again the Supreme Court emphasized the *locus* of the act by analyzing the problem in terms of the legal right of each government to enforce their penal laws. The Court found:

> [I]f the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered. For example, the petitioners in this case insist that their Illinois convictions resulting in three months' prison sentences should bar this federal prosecution which could result in a sentence up to five years. Such a disparity will very often arise when, as in this case, the defendants' acts impinge more seriously on a federal interest than on a state interest.[42]

This statement and Frankfurter's statement in *Bartkus* have a similar impact. In *Bartkus*, the court suggested that the prevention of successive prosecutions could result in *federal* pre-emption of a *state* right. In *Abbate*, the court suggests that disallowing successive prosecutions would result in state pre-emption of a federal right. Neither result was felt to be tolerable. Thus, the dual sovereignty rationale for successive prosecutions currently remains predicated on two presumptions. First, the state judicial system should remain strong. Second, the states must not be allowed to prevent the effective administration of federal laws by being the first jurisdiction to prosecute an individual for a crime cognizable by both jurisdictions, prosecuting for a relatively minor state offense, and precluding the federal government from prosecuting the individual for what may be a much more serious federal offense.[43]

The United States Supreme Court has reviewed and retested the established dual sovereignty and double jeopardy standards in several cases since *Bartkus* and *Abbate*.[44] In *Ben-*

41. Abbate v. United States, 359 U.S. 187, 193 (1959).

42. *Id.* at 195.

43. *See, e.g.*, Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538 (1966-67).

44. *See, e.g.*, Hill v. Beto, 390 F.2d 640 (5th Cir.), *cert. denied*, 393 U.S. 1007 (1968), *aff'd*, 422 F.2d 840 (1970); United States v. Hutul, 416 F.2d 607 (7th Cir. 1969); Bankston v. State, 236 S.2d 757 (Miss. 1970). *Contra*, State v. Fletcher, 15 Ohio Misc. 336, 240 N.E.2d 905 (1968). *Fletcher* proceeded to evaluate the validity of *Bartkus* after *Benton* and concluded:

> [T]ime and circumstance have so eroded the Bartkus decision, that the

ton v. Maryland,[45] the defendant was indicted in a Maryland state court on burglary and larceny charges. He was convicted of the burglary charge and acquitted of the larceny charge. Due to a procedural error in the lower court,[46] Benton was subsequently reindicted and retried in the state court on both charges. The judge denied Benton's motion to dismiss the larceny charge despite his objection that a retrial following an acquittal was violative of the constitutional prohibition against double jeopardy.[47] Benton was convicted of both charges.[48]

On appeal, the United States Supreme Court reversed the larceny conviction. The decision was predicated upon finding that the double jeopardy clause of the Fifth amendment was applicable to the states through the due process clause of the fourteenth amendment.[49] Thus, *Benton* prohibits the state from subjecting a defendant to successive state prosecutions.

The facts in *Benton* are distinguishable from those in *Bartkus* where a successive federal-state prosecution occurred.[50] In *Benton*, both trials were conducted by the same government,

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case is no longer a binding authority upon this court, that its dissenting opinions represent the current constitutional philosophy of a majority of the United States Supreme Court . . . .

Accordingly . . . the plea of former jeopardy . . . is well taken . . . .

Id. at 907.

In conclusion, the Court held that state and federal constitutions prohibited a state prosecution of a defendant who had previously been placed in federal jeopardy for the same act.

45. 395 U.S. 784 (1969).

46. After his notice of appeal was filed, the Maryland Court of Appeals declared invalid a provision of the Maryland Constitution which required grand and petit jurors to declare their beliefs in the existence of God. *See* Schowgurow v. State, 240 Md. 121, 213 A.2d 475 (1965). As a result of this decision, the Court of Appeals remanded petitioner's case to the trial court, where he chose not to accept the conviction and requested a new trial.

47. Maryland was one of five states whose constitution did not prohibit placing an accused in jeopardy more than once for the same offense. *See* LEGISLATIVE DRAFTING RESEARCH FUND OF COLUMBIA UNIVERSITY, INDEX DIGEST TO STATE CONSTITUTIONS at 576 (2d ed. 1959). However, Maryland had recognized the prohibition against double jeopardy as part of their common law in some instances. *See* Gilpin v. State, 142 Md. 464, 121 A. 354 (1923).

48. Benton was given concurrent sentences of fifteen years on the burglary charge and five years on the larceny charge. On appeal, the Maryland court of special appeals rejected petitioner's double jeopardy claim, *Benton v. State*, 1 Md. App. 647, 232 A.2d 541 (1967); and the Maryland court of appeals denied discretionary review.

49. Benton v. Maryland, 395 U.S. 784 (1969).

50. Bartkus v. Illinois, 359 U.S. 121 (1969).

whereas in *Bartkus*, the prosecutions were conducted by two independent governments. Nevertheless, the *Benton* decision casts considerable doubt upon the strength of the *Bartkus* decision. In *Bartkus*, Justice Frankfurter did not view double jeopardy as being directly in issue since the prosecutions were not consecutively conducted by the federal government, and the *Palko* standard involving the concept of ordered liberty was not violated. However, the Court might hold differently if *Bartkus* was decided today because *Benton v. Maryland* overruled *Palko v. Connecticut*.[51] Therefore, one of the two principles upon which the *Bartkus* decision was based is now obsolete. The Court, in overruling *Palko*, stated:

> Palko represented an approach to basic constitutional rights which this Court's recent decisions have rejected . . . i.e., that basic constitutional rights can be denied by the States as long as the totality of the circumstances does not disclose a denial of "fundamental fairness."[52]

The above discussion reveals some deterioration in the narrow interpretation of the double jeopardy clause. The court's position in *Benton* resembles that taken by Justice Black's dissent in *Bartkus*.[53] Black analyzed the problem of successive prosecutions by two governments under an incorporation theory, and under the *Palko* standard.[54] His vigorous dissent analyzed the situation from the viewpoint of a criminal defendant rather than from the viewpoint of maintaining a state's prerogatives:

> 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

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51. Benton v. Maryland, 395 U.S. 784, 794 (1969).

52. *Id.* at 794-95.

53. *See* Bartkus v. Illinois, 359 U.S. 121, 150 (1959) (Black, J., dissenting), where the history and rationale of the double jeopardy clause, the effect of successive prosecutions on the accused, and the common law approach to double jeopardy in a multi-jurisdictional context are discussed. *See also* State v. Fletcher, 15 Ohio Misc. 336, 240 N.E.2d 905, 907 (1968); where the lower court referred to *Bartkus* as an "historic pile of rubble" and predicted its reversal. Black further suggested that the rule fails because it assumes that the state and federal governments will, whenever possible, seek to subvert the other by trying to impede the functioning of the other's law enforcement agencies.

54. *Palko* held that the double jeopardy clause was not binding upon the states, but certain aspects of that protection which are basic to our notion of due process bind the state governments. Palko v. Connecticut, 302 U.S. 319 (1937).

> State. Looked at from the standpoint of the individual who is being prosecuted, this notion is too subtle for me to grasp.[55]

To properly understand the rationale underlying the decisions upholding successive prosecutions, one must consider that state and federal laws may reflect different policies. The penal laws of each sovereignty serve to protect disparate interests of two separate and distinct governments. However, this does not justify successive prosecutions. State and federal laws frequently complement each other so that a prosecution by one government would seem to vindicate the interests of both.[56] This view has been adopted in several instances. Soon after the *Bartkus* decision, Illinois provided a statutory double jeopardy defense for any person prosecuted in an Illinois state court after being tried in a federal court for the same offense.[57] Another example is found in the Model Penal Code which bars a second prosecution in another jurisdiction when the offenses are identical, require the same proof, and arise from the same criminal transaction.[58] Further, the Attorney General of the United States has announced a policy of limited multiple prosecutions:

> After a state prosecution, there should be no federal trial for the same act . . . unless the reasons are compelling. We should continue to make every effort to cooperate with state and local authorities to the end that the trial occur in the jurisdiction, whether it be state or federal, where the pub-

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55. Bartkus v. Illinois, 359 U.S. 121, 155 (1959) (Black, J., dissenting). *See also* Abbate v. United States, 359 U.S. 187, 203 (1959), where Justice Black captured the inherent weakness of the majority position:

> It is just as much an affront to human dignity and just as dangerous to human freedom for a man to be punished twice for same offense, once by a State and once by the United States, as it would be for one of these two Governments to throw him in prison twice for the offense.

56. For example, both statutes which Bartkus allegedly violated regulated robbery.

57. ILL. REV. STAT. ch. 38, § 601(1) (1959).

58. *See* MODEL PENAL CODE § 1.10(1)(a)(b) (Proposed Official Draft 1962):

> When conduct constitutes an offense within the concurrent jurisdiction of this State and of the United States or another State, a prosecution in any such other jurisdiction is a bar to a subsequent prosecution in this State under the following circumstances:
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> (1) The first prosecution resulted in an acquittal or in a conviction . . . and the subsequent prosecution is based on the same conduct, unless (a) the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of such offenses is intended to prevent a substantially different harm or evil or (b) the second offense was not consummated when the former trial began . . . .

> lic interest is best served. If this be determined accurately, and is followed by efficient and intelligent cooperation by state and federal law enforcement authorities, the consideration of a second prosecution very seldom should arise.[59]

United States Attorneys are now required to seek permission before proceeding to trial subsequent to a state trial for the same offense.[60] If closely adhered to, this regulation may reduce the number of successively prosecuted cases.

The lower federal courts and the state courts have generally continued to permit successive trials,[61] despite apparent indications from the United States Supreme Court that *Bartkus* and *Abbate* have waning constitutional validity.[62] A principle reason for allowing both trials is to give each government an opportunity to represent its separate interests. Once more, the *locus* of the act is emphasized.[63] It would appear that an individual's double jeopardy protection is subservient to the governmental interest in maintaining a strong system of law enforcement.

Although the lower federal courts and state courts adhere to the holdings in *Bartkus* and *Abbate*, they apparently recognize the harsh results that they inflict upon the defendant. In *Cullen v. Ceci*,[64] the Wisconsin Supreme Court followed the precedent set in

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59. Statement of Attorney General William P. Rogers, Press Release, N.Y. Times, Apr. 6, 1959, at 1, col. 4.

60. Former Attorney General William P. Rogers stated:

> 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. No such recommendation should be approved by the appropriate Assistant Attorney General in charge of the division without having it first brought to [the Attorney General's] attention.

Quoted in 27 U.S.L.W. 2509 (U.S. Apr. 7, 1959).

Nevertheless, no legal barriers exist to prevent a second prosecution by the federal government. Moreover, the Attorney General's statement has no effect upon prosecution by a State following a federal conviction or acquittal. *See* Fisher, *Double Jeopardy and Federalism*, 50 MINN. L. REV. 607 (1966); *Multiple Prosecution, supra* note 14, at 358.

61. *See, e.g.*, Hill v. Beto, 390 F.2d 640 (5th Cir.), *cert. denied*, 393 U.S. 1007 (1968), *aff'd*, 422 F.2d 840 (1970); Caton v. United States, 407 F.2d 367 (8th Cir.), *cert. denied*, 395 U.S. 984 (1969); Broyhill v. Morris, 408 F.2d 820 (4th Cir. 1969); Groppi v. Froehlich, 311 F. Supp. 765 (W.D. Wis. 1970); Brant, *Overruling Bartkus and Abbate: A New Standard for Double Jeopardy*, 11 WASH. L.J. 188, 201 (1971-72).

62. Benton v. Maryland, 395 U.S. 784 (1969).

63. For further discussion, see Fisher, *Double Jeopardy, Two Sovereignties, and the Intruding Constitution*, 28 U. CHI. L. REV. 591 (1960-61).

64. 45 Wisc. 2d 432, 173 N.W.2d 175 (1970).

Bartkus. However, the court was sympathetic to the defendant's position, and evidenced a deep concern for the rights of the defendant.

> Cullen urges that he ought not be punished or threatened with punishment by both the state of Wisconsin and the United States for a single act. The argument, although asserted only obliquely, is a powerful one, and carries with it the appealing argument that it is fundamentally unfair to punish a man twice for a single act. We can only say that our law has not yet concluded that punishment by separate sovereignties for the same act constitutes double jeopardy.[65]

Cullen exemplifies the struggle that lower federal courts and state courts are currently facing. The courts must respect and abide by the United States Supreme Court decision in *Bartkus*. However, by doing so, the defendant is subjected to the harshness of a double prosecution. It would appear that the courts eschew considerations of the combined effects of state and federal action on the defendant in exchange for preserving the name of federalism. The federal system should not demand such results. The majority opinion in *Bartkus* quotes Justice Brandeis as saying that the separation of powers was adopted in the Constitution "not to promote efficiency but to preclude the exercise of arbitrary power."[66] Successive prosecutions by two independent sovereignties do not prevent arbitrariness, for one government does not serve to "check" or "balance" the other. Rather, after the first trial is concluded, the remaining government may arbitrarily elect to prosecute.

It is doubtful that the framers of the Constitution intended to overemphasize institutional interests when they drafted the fifth amendment. Perhaps they had some very practical considerations in mind. For example, defendants have a constitutional right "not to be harassed or perhaps even impoverished by successive prosecutions for the same offense."[67] It would seem that guilt or innocence should be established by proving the elements of a crime to the satisfaction of a single jury. Counsel for Bartkus addressed this issue:

> If we are dissatisfied with the verdict of a jury in the state court, would it be a sound remedy, *even if constitution-*

65. *Id.* at 187.

66. Bartkus v. Illinois, 359 U.S. 121, 137 (1959).

67. Ferlito v. Judges Of County Court, Suffolk County, 31 N.Y.2d 416, 292 N.E.2d 779 (1972).

> *ally possible*, to call a jury in the federal court of the locality in order to have a second crack at the accused? Would that, in the long run, promote respect for our principles and our courts? We submit that it would not. Far from being a practical though unprincipled necessity for law enforcement, duplicate prosecutions are as unnecessary as they are unprincipled.[68]

By respecting the judgment of a single judge or jury, a defendant upon acquittal could resume his role in society knowing that the decision is final.[69] Each of these considerations applies equally to successive multi-governmental prosecutions and to successive prosecutions by the same government.

In view of the legal and practical considerations involved, there appears to be an erosion of the foundations upon which the dual sovereignty concept rests.[70] However, despite the erosion, the United States continues to permit the state and federal governments to do jointly that which neither can do alone: namely, to reprosecute in furtherance of obtaining a conviction.[71]

II. DOUBLE JEOPARDY IN CANADA

The policy considerations in support of the American rule permitting consecutive state and federal prosecutions are not recognized in Canada.[72] The structure for the administration of criminal justice in Canada differs considerably from that in the United States.[73] In the United States, the federal government and

68. Brief for Petitioner at 11, Bartkus v. Illinois, 359 U.S. 121 (1959).

69. Benton v. Maryland, 395 U.S. 784, 792-94 (1969).

70. *See, e.g.*, Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52 (1964); Elkins v. United States, 364 U.S. 206 (1960).

71. *See* Abbate v. United States, 359 U.S. 187, 203 (1959) (Black J., dissenting). "I am also not convinced that a State and the Nation can be considered two wholly separate sovereignties for the purpose of allowing them to do together what, generally, neither can do separately."

72. *See* Friedland, *supra* note 1; Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545 (1924-25).

73. As one scholar writes

> Whereas our United States Congress has chosen to vest exclusive jurisdiction over most federal crimes in a separate system of federal courts, and to restrict the trial of state crimes in federal courts to a small but increasing number of cases, the Parliament of Canada, with few exceptions, has vested all Dominion jurisdiction in the regularly established provincial courts. Since the provinces tend to pattern their procedures for the prosecution of provincial crimes after the Dominion's code sections on summary convictions, often the procedure and generally the courts concerned will be the same whether one is charged with violating a Dominion or a provincial law. But there are many exceptions, especially as to the right to jury trial.

Grant, *supra* note 4, at 17.

the individual state governments have their own penal laws, their own law enforcement agencies, and their own court systems. In Canada, there is only one system of criminal courts and only one body, the province, charged with administering the criminal law.[74] It would appear that Canadian criminal defendants would not face the threat of successive prosecutions. However, a Canadian citizen is subject to the same danger of facing multiple trials as is an American citizen.

The problem stems from the fact that the federal government and the provincial governments concurrently regulate the same criminal activity. Historically, the federal government had complete control over penal legislation. However, exclusive legislative authority was soon discovered to be unworkable. As one court pointed out, "Matters which from one point of view and for one purpose, fall exclusively within the dominion authority, may, nevertheless be proper subjects for legislation by the province from a different point of view. . . ."[75] Thus, to insure adequate representation of their disparate interests, the Canadian provinces and the federal government have concurrently passed penal legislation.[76]

The two governments are granted the power to regulate the criminal law by the British North America Act (B.N.A.).[77] Section 91(27) of the B.N.A. confers upon the federal government exclusive ". . . legislative authority over The Criminal Law . . . including the Procedure in Criminal Matters."[78] The primary

74. Friedland, *supra* note 1.

75. Provincial Secretary of P.E.I. v. Egan, [1941] S.C.R. 396, 401.

76. Several decisions of the Canadian Supreme Court have upheld the validity of provincial legislation in spite of the existence of federal laws covering similar activity. *See* O'Grady v. Sparling, 128 Can. Crim. Cas. Ann. 1 (1960); Stephens v. The Queen, 128 Can. Crim. Cas. Ann. 21 (1960); Smith v. The Queen, 128 Can. Crim. Cas. Ann. 145 (1960). *See also* Mann v. The Queen, [1966] S.C.R. 238.

77. The British North America Act (1867).

78. *Id.* § 91(27). For a constitutional analysis of the criminal law power, see LASKIN, CANADIAN CONSTITUTIONAL LAW (2d ed. 1960); LEFROY, CANADA'S FEDERAL SYSTEM (1913). *See, e.g.*, A.G. for Ont. v. Hamilton St. Ry., [1903] A.C. 524 (Can.); Johnson v. A.G. for Alta., [1954] 2 D.L.R. 625; Switzman v. Elbing, [1957] 1 D.L.R. 473; *see also* Friedland, *supra* note 1. The main reason for so assigning the criminal law power was expressed as follows by a Chief Justice of Ontario shortly after Confederation:

> It is important that the law of a country as to crime and criminal procedure shall be uniform, so that the rights of all citizens shall be, as much as possible, equally respected, and the public wrongs of any citizen, as much as possible, equally punished.

Friedland, *supra* note 1 at 66.

reason for allocating this authority to the federal government was to establish a uniformity of procedure so that regardless of provincial habitancy, the rights of each citizen would be adequately protected. To enforce the penal laws, section 92(15) grants the provinces exclusive authority to provide for "the imposition of punishment by fine, penalty, or imprisonment."[79]

Canadian dual sovereignty is thus based upon a system of coordinate governments. The essence of dual sovereignty is present since each government enjoys a sovereign power within its own field of legislative competency with neither being subordinate to the other.[80] Therefore, the potential overlap of penal laws is inherent within the British North America Act, and successive prosecutions by the dominion and provincial governments are a distinct possibility.

Early Canadian case law dealing with the relationship between federal and provincial offenses suggests that there are no restrictions on successive prosecutions by the two sovereignties.[81] In one instance, counsel for the province of Ontario discussed the problem:

> The jurisdiction of the Provinces and the Dominion overlap. The Dominion can declare anything a crime but this only so as not to interfere with or exclude the powers of the Province . . . so that though the result might be an inconvenient exposure to double liability, that possibility is no argument against the right to exercise that power.[82]

This statement would appear to correctly state the Canadian law and has since been widely quoted.[83]

This position was applied in *Forques v. Gauvin*.[84] Gauvin was prosecuted by the provincial government of Quebec. The

79. The British North America Act § 92(15) (1867).

80. *See* Rex v. Arcadia Coal Co. Ltd., 26 Alta. 348 (App. Div. 1932).

81. Friedland, *supra* note 1, at 73. *See, e.g.*, Couture v. Lauzon School Comm'rs., 97 Can. Crim. Cas. Ann. 218 (1950); Rex v. Kissick, 78 Can. Crim. Cas. Ann. 34 (1942); Lohse v. Taylor, 37 Can. Crim. Cas. Ann. 123 (1922). *Contra*, Dickie, [1955] 2 D.L.R. 757, 768.

82. Wason, 17 Ont. 221, 225 (1890).

83. *See, e.g.*, Scott, 37 Ont. L.R. 453, 456 (1916); Couture v. Lauzon School Comm'rs., 97 Can. Crim. Cas. Ann. 218, 236 (1950); Rex v. Kissick, 78 Can. Crim. Cas. Ann. 34, 40 (1942); Lohse v. Taylor, 37 Can. Crim. Cas. Ann. 123, 126 (1922). *See also* CLEMENT, CANADIAN CONSTITUTION 567 *et seq.* (3d ed. 1916). *But cf.* Egbert J. in Dickie, [1955] 2 D.L.R. 757, 768 (Atla.) who felt that Blake's statement is "a quite incorrect statement of the law."

84. 30 Can. Crim. Cas. Ann. 302 (1919).

action was dismissed because of errors in pleading. Instead of correcting these errors, a new action was brought by the federal government. The defendant plead *autrefois acquit*, but the plea was rejected. The federal court reasoned, "both the federal and provincial governments have made an offence of a certain act, to which they have attached a penalty; both have the right to sue for that offense . . ."[85] This reasoning is analogous to the reasoning used in the early American cases.[86] By emphasizing the *locus* of the act, the court permits a second prosecution.[87]

Canadian cases involving successive prosecutions are often upheld under the theory that each sovereignty has a right to prosecute for a violation of its penal law. However, some cases appear to be based on the theory that the double jeopardy prohibition is not applicable to successive federal-provincial prosecutions. *Rex v. Kissick*[88] is the leading case adopting this approach. Kissick was initially prosecuted by the federal government for a violation of the Federal Excise Act. After federal acquittal, he was subsequently convicted in a Manitoba provincial court for possessing the same liquor in violation of a provincial act. On appeal, the Court upheld the provincial conviction. The opinion reflected the analysis of the American cases:

> Here are two authorities, each acting within its own jurisdiction, taking cognizance of the same facts, which violate the law of each. It cannot be said that an acquittal or conviction under one ousts the jurisdiction of the other or expiates the offense against it. Jurisdiction is not to be held to be exclusive according to the order of time in which proceedings are commenced and concluded. The facts may be the same, but the offense is against a different law of a different origin. Each law was passed by its enacting authority for its purpose within its own field.[89]

It is evident that a violation of an overlapping penal law may result in a multiple prosecution. This result would appear to mar the Canadian system which allows overlapping penal legislation. A defendant should not be subjected to the harsh result

85. *Id.* at 303-04.

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

87. *See generally* Lederman, *The Concurrent Operation of Federal and Provincial Laws in Canada*, 9 McGILL L.J. 185 (1962).

88. 78 Can. Crim. Cas. Ann. 34 (1942).

89. *Id.* at 43.

of a successive prosecution in order to insure that each government is adequately represented. Apparently, double jeopardy protection is non-existent if both governments are able to prosecute for violations arising from the same act. Further, the need for successive prosecutions in Canada seems minimal. Unlike the situation in the United States, the court structure of Canada allows the individual governments to be closely represented at one trial regardless of which governmental body is prosecuting. In Canada, the same prosecutor will normally handle both trials, and because both trials will probably take place in the same court, there is little reason for doubting the quality of justice administered at the former trial.

By continuing to allow overlapping penal legislation without a pre-emption system or a double jeopardy prohibition, the Canadian government does not protect its citizens from the severity of double prosecutions.

III. DOUBLE JEOPARDY IN AUSTRALIA

The Australian federal system, composed of the commonwealth and state governments, is modeled after the federal systems of the United States and Canada.[90] The Australian Constitution of 1900 specifically enumerated the powers of the commonwealth;[91] all others remained with the states. The commonwealth was not granted the power to try criminal cases until the adoption of of the Commonwealth Crimes Act in 1914. Nevertheless, the commonwealth prosecuted a select number of cases prior to 1914.

In 1911, The High Court of Australia was faced with the issue of successive prosecutions in *Gould v. Sin On Lee.*[92] The defendant was convicted of possession of opium in violation of the Commonwealth Customs Act. He had served only seven days of his sentence when his conviction was set aside. The commonwealth could not reprosecute the defendant for the same offense. Subsequently, proceedings were brought under a state act, and the defendant was convicted of the unlawful possession of opium. On

90. Grant, *supra* note 4, at 24.

91. "The word Commonwealth here ([*e.g.*], in the preamble to the Constitution) means the whole of the people of Australia," or "the Commonwealth" can simply mean the Federal Government. A.G. for Vict. v. The Commonwealth, 71 Commw. L.R. 237, 273 (1945).

92. 6 Queensl. 15 (1911).

appeal, the Australian High Court held that since the offenses were essentially the same, the commonwealth prosecution barred the state prosecution.[93] It appears that "[w]hen concurrent powers are exercised, the law of the Commonwealth is supreme and the law of the State, on so much of a subject as is covered by a Commonwealth law . . . is . . . inoperative."[94]

Unlike the United States Constitution, the Australian Constitution does not contain numerous safeguards against potential misuse of the criminal justice system.[95] Instead, the protections afforded an Australian citizen are quite limited. Those that do exist are generally less comprehensive in character.[96] Although only limited safeguards exist, the constitutions of all Australian jurisdictions presuppose fundamental common law doctrines. For example, it remains an established common law rule that a defendant cannot be tried twice for the same offense.[97] In implementing this rule, an accused who had previously been convicted or acquitted of the same offense can enter an appropriate plea of *autrefois acquit* or *autrefois convict*.[98] Before allowing these pleas, the court must determine whether both offenses contain the same elements. In essence, the facts constituting the first crime must include the same requisite elements that are necessary to justify a conviction for the second offense. Therefore, the defendant can assert these pleas if the charges in the second prosecution constitute those of which the defendant could have been convicted in the initial prosecution. These pleas safeguard the defendant from successive prosecutions and can be asserted in a state or a federal prosecution.[99]

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93. *Id.*

94. AUSTL. CONST., § 303 (2d ed. Sydney).

95. *See, e.g.*, U.S. CONST., amends IV, V, XIV.

96. For example, one safeguard is found in § 80 of the Australian Constitution and provides that trial on indictment of any offense against the law of the Commonwealth shall be by jury. The section adopts the basic language of Article III, § 2, of the Constitution of the United States:

> The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the state where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

AUSTL. CONST. § 80 (2d ed. Sydney).

97. *See* 2 HAWKINS, PLEAS OF CROWN 86 (8th ed. 1824).

98. While this plea works to the advantage of the defendant, the burden of proving that the conviction or acquittal is legally given is also upon the defendant.

99. Cases declarative of the common law contain most of the law as to what constitutes a conviction or acquittal in bar of trial. Those cases have held that

In Australia, federal trials are conducted in the state and territorial courts. To insure a uniformity of procedure between a state and federal trial, the Commonwealth Judiciary Act specifies that the laws of the state in which the trial is held shall apply to the federal prosecution. There are also two provisions in the Commonwealth Judiciary Act which regulate appeals by the prosecution. Sections 76(1)[100] and 76(2)[101] authorize appeals from arrests of judgment, and section 77[102] concerns appeals to the High Court of Australia. These sections specifically restrict the prosecution's method of appealing a judgment. The prosecutor does not write the appeal; instead the "[c]ourt shall on the application of counsel for the prosecution state a case for the consideration of a higher court."[103] Thus, the procedure more approximates an internal review than the re-argument and re-evaluation that is known in the appellate process of United States courts. These procedural restrictions take on greater significance if the appellate court rejects the applicability of the special pleas of *autrefois acquit* and *autrefois convict.*

The common law principles regarding double jeopardy, and

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a conviction and bar to further trial does not result from: (1) a binding over, Rex v. London Quarter Sessions Appeals Comm., [1948] 1 K.B. 670; (2) a conviction that has been reversed on appeal as erroneous in law, Rex v. Drury, 18 L.J.K.B. 189 (1849); (3) a discharge by a jury without a verdict being given, Regina v. Charlesworth, 1 B. & S. 460 (1861); and (4) an acquittal by a court that had no jurisdiction a bar to a subsequent trial, AUST. CONST. § 35, Regina v. McLellan, 15 L.R. 426 (1894). However, an acquittal before a court of competent jurisdiction in a foreign country is such a bar. Rex v. Rothe, 1 Leach 134 (1775). *See, e.g.*, United States v. Jakalski, 267 F.2d 609 (7th Cir. 1959), *cert. denied*, 362 U.S. 936 (1960).

100. Commonwealth Juduiciary Act of 1903, § 76(1) *as amended* provides:

> (1) When the court before which an accused person is convicted on indictment for an offense against the laws of the Commonwealth arrests judgment at the trial, the Court shall on the application of counsel for the prosecution state a case for the consideration of a Full Court of the High Court of the State in manner hereinafter provided.

101. Commonwealth Judiciary Act of 1903, § 76(2) *as amended* provides "On the hearing of the case the Full Court may affirm or reverse the order arresting judgment . . . ."

102. Commonwealth Judiciary Act of 1903, § 77 *as amended* provides:

> Except . . . for appeals by accused and appeals in accordance with section 76, and except in the case of error apparent on the face of the proceedings, an appeal shall not without the special leave of the High Court be brought to the High Court from a judgment or sentence pronounced on the trial of a person charged with an indictable offence against the laws of the Commonwealth.

103. Commonwealth Judiciary Act of 1903, §§ 68 and 79 *as amended.* Similarly, such appeals in the various territories also follow the applicable laws of the particular territory concerned.

sections 76(1)-(2) and 77 are protections afforded an accused individual. The special pleas, the strongest protection offered to the defendant, have been expressly retained by statute in the Crimes Acts of each Australian jurisdiction. A typical statute would read:

> In any plea of *autrefois convict* or of *autrefois acquit*, it shall be sufficient for the accused to allege that he has been *lawfully convicted or acquitted*, as the case may be, of the said offence charged in the information, without specifying the time or place of such previous conviction or acquittal.[104]

The Australian code jurisdictions also contain double jeopardy provisions which are substantially similar to those in the common law codes.[105] In addition to retaining the pleas of *autrefois acquit* and *autrefois convict*, most code jurisdictions have a statute similar to the following:

> It is a defence to a charge of any offence to show that the accused person has already been tried, and convicted or acquitted upon an indictment on which he might have been convicted of the offence with which he is charged, or has already been acquitted upon indictment, or has already been convicted, of an offence of which he might be convicted upon the indictment or complaint on which he is charged.[106]

The combined effect of the Australian legislation is to create substantial protection. The protective rights of the accused are not only safeguarded by the special pleas of *autrefois acquit* and *autrefois convict* but are also codified in the form of double jeopardy proscriptions.

The general attitude of the United States and Australia towards guarding against multiple prosecutions can be detected by

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104. South Australian Criminal Law Consolidation Act of 1903, § 285 *as amended* (emphasis added).

105. See Queensland Criminal Code Act of 1899, §§ 598(3)(4)(5), 602 *as amended*; Western Australian Criminal Code Act of 1913 §§ 616(3)(4)(5), 620 *as amended;* Tasmanian Criminal Code Act of 1924, § 538 *as amended.*

106. See Queensland Criminal Code Act of 1899, §§ 16, 17 *as amended*; Tasmanian Criminal Code Act 1924, § 11 *as amended*; which authorizes a second conviction upon death of the victim only if the death occurs after the first punishment. *See also* Western Australia Criminal Code Act 1913, § 16, which states:

> A person cannot be twice punished, either under the provisions of this Code or under the provisions of any other law, for the same act or omission, except in the case where the act or omission is such that by means thereof it causes the death of another person, in which case he may be convicted of the offence of which he is guilty by reason of causing such death, notwithstanding that he has already been convicted of some other offence constituted by the act or omission.

examining article 8, section 8 of the United States-Australia Status of Forces Agreement which provides:

> Where an accused has been tried in accordance with the provisions of this Article either by the military authorities of the United States or by the authorities of Australia and has been acquitted, or has been convicted . . . he may not be tried again for the same offence within Australia. However, nothing in this paragraph shall prevent the military authorities of the United States from trying a member of the United States forces for any violation of rules of discipline arising from an act or omission which constituted an offence for which he was tried by the authorities of Australia.[107]

While realizing that procedure differs between civilian and military courts, it would appear that the Australian government firmly believes in determining the outcome of an issue in a single trial. This procedure is adhered to regardless of the outcome in the first trial. Unlike the Australian government, the United States reserves the right to reprosecute. Although a second prosecution by a different country is distinguishable from successive prosecutions within a federal system, it does reflect a general tolerance by the United States government to condone successive prosecutions.

The Australian government's respect for the rights of a criminal defendant is exemplified by its reluctance to subject a defendant to a second trial for the same offense. By affording a defendant the opportunity to plead *autrefois acquit* and *autrefois convict*, the protection against double jeopardy, not adequately safeguarded in the United States and Canada, is strongly established in Australia.

IV. SUMMARY AND RECOMMENDATIONS

The North-American authority in support of permitting successive multi-governmental prosecutions has been severely eroded by recent decisions.[108] The archaic common law concept of emphasizing the *locus* of the act to determine jurisdiction is impractical and unnecessary in a federal system. Multiple prosecutions are not required to insure the representation of disparate govern-

107. Status of United States Forces in Australia, May 9, 1963, [1964] 14 U.S.T., T.I.A.S. 5349.

108. *See* Benton v. Maryland, 395 U.S. 784 (1969); Murphy v. Waterfront Comm'ns of N.Y. Harbor, 387 U.S. 52 (1964); Elkins v. United States, 364 U.S. 206 (1960); Palko v. Connecticut, 302 U.S. 319 (1937).

mental interests, for the primary issue involved, guilt or innocence, could be determined in a single trial. Additionally, it is difficult to find constitutional support for permitting a second trial, and the decision in *Benton v. Maryland* casts considerable doubt upon the legal basis for allowing such successive prosecutions.[109] Nevertheless, the United States and Canada continue to permit the state, province, and federal governments to do jointly that which neither can do alone; namely, to reprosecute in furtherance of obtaining a conviction.[110]

It is imperative that the United States and Canada examine the system employed in Australia in order to focus upon the proper direction to pursue in alleviating this problem. However, they must first be cognizant of the motivation behind guaranteeing individuals double jeopardy protection. It was originated to prevent the prosecution from subjecting a defendant to the hardship of a second trial.[111] The need to conduct a second trial for the same offense is heavily outweighed by the effect it has on the defendant.

The United States policy remains consistent with the purpose of preventing multiple prosecutions by disallowing successive state or federal trials.[112] However, allowing successive state-federal, or federal-state prosecutions is inconsistent with this purpose. Double jeopardy protection becomes meaningless if a defendant must face the burden of two trials merely because the prosecution is conducted by a different government. To the defendant, it is immaterial whether his constitutional right against double jeopardy has been invaded by a state or federal trial. If Justice Harlan is correct in his assertion that, "[t]his Court has . . . abolished the two sovereignties rule,"[113] then the policy arguments which support successive prosecutions by the state and federal governments are obsolete.

However, federal-state prosecutions cannot be categorized as repugnant to the fifth amendment. In light of this, the constitutionality of multi-governmental prosecutions will remain unchanged absent an express overruling of *Bartkus v. Illinois*, and *Abbate v. United States*. Until these cases are denunciated, suc-

109. *Id.*
110. *See* note 65, *supra.*
111. *See* authority cited note 8, *supra.*
112. U.S. CONST., amends. V, VIV.
113. Stevens v. Marks, 383 U.S. 234, 250 (1966) (Harlan, J., dissenting).

cessive prosecutions will continue, limited only by the United States Attorney General's mandate[114] or an infrequent decision by a federal district court.[115]

Proponents of successive prosecutions argue in favor of permitting a second trial to prevent an inadequate prosecution from precluding the possibility of obtaining a conviction.[116] If a second trial is barred, a defendant might avoid punishment entirely. If a second prosecution was disallowed, the situation may result in a "race to the courthouse" by the state and federal prosecutors.[117] This situation could be remedied by enacting legislation which would either vest jurisdiction in the federal court or provide the federal government with the election to initiate prosecution.[118] These alternatives would vest more prosecutorial control in the federal government, but this may be an unavoidable consequence. Justice Brennan reasons that stricter enforcement of fundamental rights inevitably results in the readjustment of the federal-state relationship, and a diminution of state power.[119]

Public policy also operates against multiple prosecution. The double jeopardy guarantee represents fairness and protection for the defendant. A second prosecution results in harassment of the accused and unfair advantage to the prosecutor.[120] "The mere necessity of defending successive prosecutions and the time, trouble and mental anxiety associated with such an endeavor is sufficient to show harassment without more."[121] In addition, conducting a second defense is expensive and if bond is not

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114. Note 59, *supra.*

115. *See* State v. Fletcher, 15 Ohio Misc. 336, 240 N.E. 2d 905 (1968).

116. *See* United States v. Guest, 383 U.S. 745 (1966). A further consideration for allowing successive prosecutions stems from the fear that administration of justice may be impaired if a second trial is prohibited. Offsetting that consideration is the importance of the individual's right to be free from double prosecution. Many American courts resolve the dilemma of successive prosecutions by permitting a second trial but avoid its harsh effects, through use of nominal penalties or concurrent sentences. *See* Comment, *Successive Prosecutions by State and Federal Governments for Offenses Arising Out of Same Act*, 44 MINN. L. REV. 534, 540 (1960).

117. Brant, *Overruling Bartkus and Abbate: A New Standard for Double Jeopardy*, 11 WASH. L.J. 188, 201 (1972).

118. *See* comment, *Successive Prosecutions by State and Federal Governments for Offenses Arising Out of Same Acts*, 44 MINN. L. REV. 534, 540 (1960).

119. Brennan, *Some Aspects of Federalism*, 39 N.Y.U.L. REV. 945, 956 (1964).

120. Green v. United States, 355 U.S. 184, 187 (1957).

121. Multiple Prosecution, *supra* note 14, at 361.

posted, the defendant may serve months in jail pending trial. The hardships of a second trial rest solely on the defendant.

Finally, there may be adverse societal effects which result from a second prosecution. Punishment for crime serves a number of purposes, one of which is preparing the offender to return to society to take up a normal, law abiding role. However, a released prisoner often has his travel rigidly controlled and his employment opportunities restricted. Being subjected to a second trial engenders hostility. It increases, rather than diminishes, his feeling of alientation from the community and "sabotages objectives of probation and parole."[122]

Canada and the United States should revise their double jeopardy policies. A workable adjustment between the competing claims of the province or state and the federal government may be achieved without successive prosecutions. In the spirit of individual rights, new legislation is needed. The American and Canadian legislators should consider the measures used to prohibit successive prosecutions in Australia. The Australian system results in justice to the defendant and a representative prosecution by the two sovereignties.

The common law pleas of *autrefois acquit* and *autrefois convict* should become an integral part of the United States and Canadian double jeopardy policies. Had these pleas been utilized in *Bartkus, Abbate* and *Gauvin*, the results may have been different. All three men were prosecuted and retried for the same offense by an independent sovereignty. If the trials had been in an Australian Court, Bartkus could have plead *autrefois acquit* and Abbate and Gauvin *autrefois convict*. If the court then found that the second trial was for the same offense, the pleas may have barred the second prosecution.

The courts and legislature will better serve the people by abandoning mechanical and archaic applications of the dual sovereignty principles. By de-emphasizing the *locus* of the act, and re-emphasizing the individual rights of the citizens, results such as occurred in *Bartkus, Abbate*, and *Gauvin* may be avoided. Certainly if the United States Constitution forbids successive prosecutions by the same government, *a fortiori*, it should do so when the former judgment was obtained in a court that represents a

122. See D. DRESSLER, PRACTICE AND THEORY OF PROBATION AND PAROLE (1959).

similar governmental interest. Justice Black summarized the problem when he aptly stated:

> Ultimately the Court's reliance on federalism amounts to no more than the notion that, somehow, one act becomes two because two jurisdictions are involved. [One author] . . . long ago disposed of a similar contention made to justify two trials for the same offense by different counties as "a mere Fiction or Construction of Law, which shall hardly take Place against a Maxim made in Favour of Life." It was discarded as a dangerous fiction then, it should be discharged as a dangerous fiction now.[123]

Jeffrey S. Raynes

123. Bartkus v. Illinois, 359 U.S. 121, 158 (1959) (Black, J. dissenting).