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Double Jeopardy and Dual Sovereignty: The Impact of Benton v. Maryland on Successive Prosecution for the Same Offense by State and Federal Governments

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DOUBLE JEOPARDY AND DUAL SOVEREIGNTY: THE IMPACT OF BENTON v. MARYLAND ON SUCCESSIVE PROSECUTIONS FOR THE SAME OFFENSE BY STATE AND FEDERAL GOVERNMENTS

Clyde Criminal robs a federally insured bank and is arrested. Subsequently, Clyde discovers that he is being prosecuted for the offense by both state and federal governments. Clyde protests and claims the protection of the double jeopardy clause of the fifth amendment. The prosecutors smile indulgently at Clyde and knowingly at each other and offer Clyde copies of three documents: Bartkus v. Illinois, Abbate v. United States, and Catch 22.

The constitutionality of Clyde's dual prosecution by both state and federal governments has not been reevaluated since 1959 when the companion cases of Bartkus v. Illinois and Abbate v. United States were handed down. However, in 1969, in Benton v. Maryland the double jeopardy clause of the fifth amendment was made applicable to the states through its incorporation into the due process clause of the fourteenth amendment. A reexamination of the continued vitality of the "dual sovereignty" doctrine is warranted now that Benton has classified double jeopardy as "fundamental to our American scheme of justice."

1. 359 U.S. 121 (1959). The petitioner in Bartkus was acquitted in a federal court of robbing a federally insured savings and loan association only to be convicted in an Illinois court of violating the state robbery statute. Since the second prosecution was by a state rather than the federal government, petitioner's claim of unconstitutionality rested upon fourteenth amendment due process. His claim was rejected by a 5-4 vote.
2. 359 U.S. 187 (1959). In Abbate, for allegedly conspiring to dynamite telephone facilities, petitioners were indicted in an Illinois court for conspiring to injure or destroy the property of another, in violation of state law. After pleading guilty, each was sentenced to three months imprisonment. Thereafter, because of the same conspiracy, they were tried in a federal district court for the federal offense of conspiring to injure or destroy communications facilities "operated or controlled by the United States," and again convicted. Abbate was affirmed by the Supreme Court 6-3.
3. 395 U.S. 784 (1969). The petitioner in Benton was tried in a state court on charges of burglary and larceny. The jury found him not guilty of larceny, but convicted him of burglary. Because both the grand and petit juries in his case had been invalidly selected, petitioner was given the option of reindictment and retrial, which he elected. At his second trial, petitioner was again charged with both offenses and this time convicted of both.

Reversing Benton's larceny conviction, Justice Marshall, writing for a 7-2 majority, found that: "The double jeopardy prohibition of the the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the states through the Fourteenth Amendment." Id. at 794.
4. Id. at 795. "Once it is decided that a particular Bill of Rights guarantee is
The "Same Offense" Requirement

The apparently clear and unequivocal language of the fifth amendment indicates that the double jeopardy clause is violated when successive prosecutions by state and federal governments for the same offense are allowed. Crucial to this determination, however, is the construction given the phrase "same offense." Despite its plain meaning, courts have consistently held that because of the sole fact that a man commits an act which is made a crime by two sovereigns, he is deemed to have committed two distinct offenses and may be punished by each sovereign.

Historical Antecedents of the "Dual Sovereignty" Doctrine

Overlapping jurisdictional boundaries of the states and the federal government have produced the situation in which Clyde Criminal can be tried and punished by both sovereignties for the same offense. The case of United States v. Lanza set the precedent for this result. The
defendant in Lanza was indicted for violation of the federal prohibition law subsequent to a state conviction for violation of a similar state statute. Rejecting Lanza's double jeopardy defense, the Supreme Court held that the fifth amendment did not prohibit consecutive prosecutions by state and federal governments. The Court based its decision on the dual sovereignty concept of federalism, reasoning that each government retained the power to prosecute and punish conduct violative of the laws of each and that the fifth amendment double jeopardy protection applied only to successive federal prosecutions.10

The Lanza decision has been severely attacked. Several critics have characterized it as one of the unhappy byproducts of the enforcement problems generated by Volsteadism and the Prohibition era.11 Criticism has also focused on the fact that Lanza relied on the dicta in eleven Supreme Court decisions, in none of which was the issue of dual sovereignty essential to decision.12 Moreover, three of the cases cited as offenses against the property; and thus the conduct prohibited by the two sovereigns is not identical nor does it concern the same subject." Id. at 500. For a thoughtful treatment of the problems associated with "same offense" language, see Harrison, Federalism and Double Jeopardy: A Study in the Frustration of Human Rights, 17 U. MIAMI L. REV. 306, 327-34 (1962).

7. See note 5 supra.

8. The general rule regarding the issue of double jeopardy when the state and federal sovereignies 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 sovereignies have jurisdiction. [citing Bartkus, note 1 supra and Abbate, note 2 supra]


10. Id. at 382. "... [A]n act denounced as a crime by both national and state sovereignies is an offense against the peace and dignity of both, and may be punished by each . . . . [Furthermore, the fifth amendment] "like all the other guaranties of the first eight amendments, applies only to proceedings by the federal government."


The year following Lanza, the State of New York repealed its prohibition act in order to prevent such double prosecutions as Lanza allowed, see LAWS OF NEW YORK, ch. 871 at 1690 (1923).

12. The cited cases in Lanza, note 9 supra, are as follows:

authority were decided in the Civil War period when the issue of state sovereignty was not merely a politico-legal question, but an intensely emotional one as well.\textsuperscript{14}

The Court in \emph{Lanza} minimized the possibility of actual double prosecution by the state and federal governments for the same offense. Quoting from \emph{Fox v. Ohio},\textsuperscript{15} Chief Justice Taft observed:

\begin{quote}
It is almost certain that, in the benignant spirit in which the institutions both of state and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subject to a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor.\textsuperscript{16}
\end{quote}

\textsuperscript{13} Fox v. Ohio, United States v. Marigold, and Moore v. Illinois, \textit{see} note 12 \textit{supra}.

\textsuperscript{14} The historical context of these early cases is discussed at some length by Harrison in \textit{Federalism and Double Jeopardy: A Study in the Frustration of Human Rights}, 17 U. \textit{MIAMI L. Rev.} 306, 312-13 (1962):

\begin{quote}
\ldots [I]t appears that when the Supreme Court in \textit{Fox}, \textit{Marigold}, and \textit{Moore} considered the problem of subjecting a man to the criminal laws of two governments, it never really considered the question on its merits—that is, it never balanced the interests of the respective governments against the rights of individuals involved. Rather, it was concerned only with balancing the rights of the two governments. The individual was only a sacrificial pawn in a game that had higher stakes—the survival or demise of the federal union.
\end{quote}

\textsuperscript{15} 46 U.S. (5 How.) at 435, note 12 \textit{supra}.

\textsuperscript{16} United States v. Lanza, 260 U.S. at 383. Justice McLean, dissenting in \textit{Fox}, was apparently not as convinced of the “benignant spirit” of all prosecutors and made
The *Lanza* court, in their use of *Fox*, intimated that they considered the "dual sovereignty" doctrine to be constitutionally permissible only in extraordinary cases. Their unjustified optimism in the discretionary use of the power rests on a test requiring "instances of peculiar enormity" or situations "where the public safety demanded extraordinary rigor." It is difficult to imagine that the *Lanza* court had the activities of Clyde Criminal in mind when they phrased their test of prosecutorial discretion. Furthermore, the *Lanza* opinion asserts, in reference to the double jeopardy clause, that the fifth amendment "like all the other guarantees in the first eight amendments, applies only to proceedings by the federal government." To the degree that the quoted language is the foundation of *Lanza*, its constitutional support has been removed by *Benton v. Maryland* which overruled *Palko v. Connecticut*.

The following observations:

The point is not whether a State may not punish an offense under an act of Congress but whether the State may inflict, by virtue of its own sovereignty, punishment for the same act as an offense against the State which the federal government may constitutionally punish.

If this be so, it is a great defect in our system. For the punishment under the State law would be no bar to a prosecution under the law of Congress. And to punish the same act by the two governments would violate not only the common principles of humanity, but would be repugnant to the nature of both governments. If there were a concurrent power in both governments to punish the same act, a conviction under the law of either could be pleaded in bar to a prosecution by the other. But it is not pretended that the conviction of Malinda Fox under the State law is a bar to a prosecution under the law of Congress. Each government, in prescribing the punishment, was governed by the nature of the offense, and must be supposed to have acted in reference to its own sovereignty.

There is no principle better established by the common law, none more fully recognized in the federal and state constitutions, than that an individual shall not be put in jeopardy twice for the same offense. This, it is true, applies to the respective governments; but its spirit applies with equal force against a double punishment, for the same act, by a State and the federal government. *Fox v. Ohio*, 46 U.S. (5 How.) at 438-39 (1847).

Twenty-seven years prior to *Fox*, Justice Story had written that successive prosecutions for a single act, even though by distinct sovereignties, each acting under its own laws, would violate both "... the principles of the common law, and the genius of our free government." *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 72 (1820). The *Houston* doctrine of federal supercession survived until renewed emphasis on state sovereignty during the Civil War years produced *Fox v. Ohio* and subsequent cases cited as precedent in United States v. Lanza, see nn. 12 and 14 *supra* and accompanying text.

17. *Id.*
18. *Id.* at 382.
20. 302 U.S. 319 (1937). In *Palko*, the Court rejected appellant's argument that the double jeopardy protections of the fifth amendment were incorporated and thereby applicable to the states through the due process clause of the fourteenth amendment. The general test was set down by Mr. Justice Cardozo in *Palko* as:

In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through
Bartkus v. Illinois and Abbate v. United States

Bartkus and Abbate are companion cases and represent the opposite sides of the same "dual sovereignty" coin. If Clyde Criminal were to be prosecuted first by the federal government and then by the state, Bartkus would be dispositive, regardless of whether the first prosecution resulted in conviction or acquittal. If Clyde were to be prosecuted first by the state and then by the federal government, Abbate would control. Other than the difference in the order of prosecution, Bartkus and Abbate stand for the same proposition: a prior conviction or acquittal by one sovereign will not constitute a bar to a subsequent prosecution for the same offense by a second sovereign where the offense committed is within the jurisdiction of both.

Bartkus and Abbate have been subjected to extensive criticism by judges and legal scholars but none perhaps more penetrating than the lengthy dissent in Bartkus by Justice Black in which he was joined by the fourteenth amendment, become valid as against the states. 302 U.S. at 324-25.

Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?" 302 U.S. at 328.

Cardozo answered his question in the negative and the double jeopardy protection of the fifth amendment remained unincorporated until 1969 when a 7-2 majority in Benton overruled Palko:

The double jeopardy prohibition of the fifth amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the states through the Fourteenth Amendment. 395 U.S. at 794, note 3 supra.

Justice Marshall for the Benton majority observed:

Palko represented an approach to basic constitutional rights which this Court's recent decisions have rejected. . . . Our recent cases have thoroughly rejected the Palko notion 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." Once it is decided that a particular Bill of Rights guarantee is "fundamental to the American scheme of justice," Duncan v. Louisiana, 391 U.S. 145, 149, . . . (1968), the same constitutional standards apply against both the State and Federal Governments. Palko's roots had thus been cut away years ago. We today only recognize the inevitable. 395 U.S. at 795.

23. See note 8 supra.
24. See note 11 supra.
25. 359 U.S. at 150-64, note 1 supra. Tracing the historical evolution of the double jeopardy bar from Greek and Roman times, through the English common law, to the early references in colonial America, Justice Black stressed that "fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization," Id. at 151. Black protested that the majority, while admitting the almost universal abhorrence of such double prosecutions, "[n]evertheless justifies the practice here in the name of "federalism,"" Id. at 155. Justice Black's carefully documented dissent seems even more cognizant after reading the Court's language in Benton that:

[O]nce it is decided that a particular Bill of Rights guarantee is "fundamental
Justice Douglas and Chief Justice Warren. In arguing against the majority's reliance on the Palko doctrine, Justice Black maintained that:

... quite apart from whether that clause is as fully binding on the states as it is on the Federal Government... double prosecutions for the same offense are so contrary to the spirit of our free country that they violate even the prevailing view of the Fourteenth Amendment expressed in *Palko v. Connecticut.*

Mr. Justice Frankfurter, writing for the majority, premised his reliance on *Palko* and *Lanza* as compelled by the American scheme of federalism. He feared that if the federal prosecution were to bar state action:

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

Although Justice Frankfurter used *Palko* to deny relief to the petitioner in *Bartkus,* he did not inquire into whether a state prosecution after a federal *acquittal* was contrary to the "concept of ordered liberty." Instead, he examined the historical development of the successive prosecutions doctrine and, finding that prior to *Fox,* the courts were split as to whether to bar second prosecutions, concluded that this split was evidence that successive prosecutions could not be contrary to the "concept of ordered liberty."

Whereas Justice Frankfurter focused on the interests of the respective governments, the dissenters considered the perspective of the
defendant in asking whether successive prosecutions by different sovereigns for the same offense was a violation of double jeopardy or due process.\textsuperscript{33}

The major difference between \textit{Abbate}\textsuperscript{34} and \textit{Bartkus}\textsuperscript{35} is the reversal of the order of prosecution. In \textit{Abbate}, petitioner was tried in federal court after a state court conviction. Thus, there was no question as to whether the fourteenth amendment incorporated the double jeopardy protection of the fifth amendment since the fifth amendment was directly involved.

As in \textit{Bartkus}, Justice Brennan, writing for a 6-3 majority, relied heavily on \textit{Lanza}\textsuperscript{36} and its predecessors,\textsuperscript{37} particularly \textit{Fox}.\textsuperscript{38} Brennan reiterated the fears previously voiced in \textit{Lanza} that:

\[
\ldots \text{if the states are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered.}\textsuperscript{39}
\]

Justice Black, with whom the Chief Justice and Justice Douglas joined, dissented for reasons set forth more fully in his \textit{Bartkus} dissent. After discussing the precedential weaknesses of \textit{Lanza}\textsuperscript{40} Justice Black indicated his belief in a national policy barring subsequent prosecutions under any circumstance and his unwillingness to accept a dual sovereignty

\begin{flushright}
33. \textit{Id.} at 155 (Black, dissenting opinion) :
Looked at from the standpoint of the individual who is being prosecuted, this notion [of the Court] is too subtle for me to grasp. If double punishment is what is feared, it hurts no less for two "sovereigns" to inflict it than for one. If danger to the innocent is emphasized, that danger is surely no less when the power of state and federal governments is brought to bear on one man in two trials, than when one of these "sovereigns" proceeds alone.
34. 359 U.S. 187, see note 2 supra.
35. 359 U.S. 121, see note 1 supra.
36. 260 U.S. at 382. The relevant language in \textit{Lanza} is:
The Fifth Amendment, like all the other guaranties of the first eight amendments, applies only to proceedings by the Federal Government, \ldots \text{and the double jeopardy therein forbidden is a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority. Here the same act was an offense against the State of Washington, because a violation of its law, and also an offense against the United States [under its law]. The defendants thus committed two different offenses by the same act, and a conviction by a court of Washington of the offense against that State is not a conviction of the different offense against the United States and so is not double jeopardy.}
37. \textit{See} note 28 supra.
40. \textit{See} nn. 12-16 supra.
\end{flushright}
concept which would permit two separate sovereignties to do jointly that which neither could do alone. 41

**Murphy v. Waterfront Commission**

*Murphy v. Waterfront Commission* 42 is a significant case in terms of its impact on *Lanza, Barthkus, and Abbate*. *Murphy* applied the holding of *Malloy v. Hogan* 43 that the fifth amendment guarantee against self-incrimination is fully applicable to the states through the fourteenth amendment. The question in *Murphy* was whether one jurisdiction in the federal structure could constitutionally compel testimony by granting immunity to a witness while leaving the witness open to prosecution in the other jurisdiction on the basis of that testimony. In answering that question, the *Murphy* Court held:

... the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law. 44

In addition to this holding, the *Murphy* Court stated:

... [it is] clear that there is no continuing legal vitality to, or historical justification for, the rule that one jurisdiction within our federal structure may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction. 45

Contrary to *Lanza*, *Murphy* took judicial notice of the fact of "cooperative federalism" 46 and paid little deference to the traditional

41. 359 U.S. at 203 (Black 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. In the first place, I cannot conceive that our States are more distinct from the Federal Government than are foreign nations from each other. And it has been recognized that most free countries have accepted a prior conviction elsewhere as a bar to a second trial in their jurisdiction. In the second place, I believe the Bill of Rights safeguard against double jeopardy was intended to establish a broad national policy against federal courts trying or punishing a man a second time after acquittal or conviction in any court. 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 the 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 same offense.
42. 378 U.S. 52 (1964).
44. 378 U.S. at 78.
45. Id. at 77.
46. Id. at 56. In *Murphy*, the Court took judicial notice of the fact that this is an "age of cooperative federalism" and that the federal and state governments are not...
sovereign interests of the two jurisdictions. It is also significant that Justice Black concurred in the *Murphy* result for the same reasons stated in his dissenting opinions in *Bartkus* and *Abbate*.

The *Murphy* rationale is analogous to the hypothetical problem involving Clyde Criminal. The danger in *Murphy* was that one jurisdiction could prosecute a defendant based on information received from another’s grant of immunity. Just as this danger can result from grants of immunity, it is also present in double jeopardy cases; one jurisdiction can stay its prosecution while the other tries the defendant. Should the first trial end in acquittal, the second jurisdiction can then benefit by an error made in the first trial and more easily secure a conviction. Thus, just as *Murphy* allows state action to infringe upon federal sovereignty by rendering broad areas of relevant information inadmissible, so too should a state prosecution of a defendant for a state crime bar a like prosecution by the federal government and *vice versa*.

*Benton v. Maryland*

There are important policy reasons in favor of the double jeopardy bar to successive prosecutions.47 The most recent statement of these antagonistic toward each other but are in fact “waging a united front against many types of criminal activity.” *Id.* In contrast, *Lanza, Bartkus, and Abbate* are built on a contrary assumption: that the independent sovereignty of each must be protected since if prior jeopardy were to act as a bar to a subsequent prosecution by another sovereign “... law enforcement must necessarily be hindered,” *Abbate*, 359 U.S. at 195. (Brennan for the majority.) In an age of “cooperative federalism” however, the prior jeopardy bar need not “necessarily” hinder law enforcement for either state or federal governments. See, e.g., Fisher, *Double Jeopardy and Federalism*, 50 Minn. L. Rev. 607, 610-13 (1966) and Newman, *Double Jeopardy and the Problem of Successive Prosecutions: A Suggested Solution*, 34 S. Cal. L. Rev. 252, 266-67 (1961).

The problem Brennan raises, however, depends on the differing nature of the state and federal interests in the same case. The argument might be raised, for example, that if the Court were to overrule *Abbate*, thereafter, an individual improperly freed by a state court for the murder of a civil rights worker could not be prosecuted by the federal government for violating the worker’s civil rights since both prosecutions would concern the “same offense.” *See, e.g., United States v. Guest*, 383 U.S. 74 (1966). In such a case, however, clearly separate interests are protected by the state and federal statutes and thus the second prosecution would not be barred. Even so, the burden of showing a vital federal interest should rest upon the federal government before the second prosecution would be allowed. If this burden could not be met, then the federal government should be required to abstain from further prosecution.

For a full discussion of the “separate interest” test applied to successive prosecutions by the state and federal government, see Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 Harv. L. Rev. 1538, 1561 (1967).

47. In *Murphy*, the Court, in effect, abolished the “dual sovereignty” concept as applied to the fifth amendment problem of self-incrimination. Justices Clark, Harlan, and Stewart of the *Bartkus* majority concurred in *Murphy* for a variety of reasons; however, by 1966, Justices Harlan and Stewart were declaring that the *Murphy* case had “abolished the ‘two sovereignties’ rule.” Stevens v. Marks, 383 U.S. 234, 250 (1966).

policies is found in *Benton v. Maryland*.49

Today every state incorporates some form of the prohibition in its constitution or common law. As this Court put it in *Green v. United States*, 355 U.S. 184, 187-188, . . . (1957), "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is 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."50

*Benton* is the most important of four major double jeopardy cases decided recently in which the Supreme Court has been willing to review and revise established double jeopardy concepts.61 *Benton* did not deal with the issue of dual sovereignty; however, *Benton* did overrule *Palko v.Connecticut*62 which is one of the two legs upon which *Bartkus* rests.63 The other leg supporting *Bartkus* is the heavily criticized *Lanza* decision.64

*Abbate* relied not on *Palko* but on *Lanza* and *Fox*.65 Nevertheless, *Bartkus* and *Abbate* have always been considered companion cases and advocates raising the double jeopardy bar (a) to avoid harassing an individual with the anxiety and expense of repeated prosecutions; (b) to avoid increasing the possibility that an innocent man will be convicted; (c) to achieve certainty and provide reliance on judicial determinations—and (d) to achieve finality and furnish essential respect and support for the courts and the law itself.

49. 395 U.S. 784, note 3 supra.

50. Id. at 795-96.

51. *Benton v. Maryland*, Id.; *North Carolina v. Pearce*, 395 U.S. 711,718-19(1969), held, "the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for the same offense"; *Waller v. Florida*, 397 U.S. 387 (1970), held, a defendant may not lawfully be tried by both state and municipal governments for the same acts. The *Waller* Court noted that "In this context, a 'dual sovereignty' theory is an anachronism, and the second trial constituted double jeopardy violative of the Fifth and Fourteenth Amendments of the United States Constitution." Id. at 395. Justice Black concurred in the result while adhering to the views expressed in his dissenting opinions in *Bartkus* and *Abbate*; *Ashe v. Swenson*, 397 U.S. 436 (1970), held, the double jeopardy clause of the fifth amendment incorporates the federal rule of collateral estoppel thus barring a subsequent prosecution for the same offense after a prior acquittal. For a recent examination of the impact of *Ashe* and *Waller* on the "dual sovereignty" doctrine, see Schaefer, *Unresolved Issues in the Law of Double Jeopardy*: *Waller and Ashe*, 58 Cal. L. Rev. 391, 398-404 (1970).

52. 302 U.S. 319, see note 20 supra.

53. See note 27 supra.

54. See nn. 9 and 11 supra.

55. 359 U.S. at 190-95. See nn. 9, 10, 12-14, and 16 supra.
their validity depends not on their order of prosecution but on their underlying rationale.\textsuperscript{56} "[A]n act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both, and may be punished by each."\textsuperscript{57} It is this rationale which \textit{Benton} attacks explicitly by overturning \textit{Palko} and by implication in elevating the double jeopardy protection to the level of "fundamental to our American scheme of justice."\textsuperscript{58}

When \textit{Lanza} was decided in 1922, the double jeopardy clause had not yet been incorporated into the fourteenth amendment and thereby made applicable to the states.\textsuperscript{59} In 1937, \textit{Palko} rejected the petitioner's attempt to have it incorporated.\textsuperscript{60} In 1959, when \textit{Bartkus} and \textit{Abbate} were handed down, \textit{Palko} had been solid precedent for twenty-two years.\textsuperscript{61} It was not until 1969 that \textit{Benton} recognized that "Palko's roots had been cut away years ago"\textsuperscript{62} and held the same constitutional standard to apply against both state and federal government once a particular Bill of Rights guarantee has been incorporated.\textsuperscript{63}

\textit{Post-Benton Treatment of the Dual Sovereignty Doctrine}

Despite the evidence of erosion in the foundations of the "dual sovereignty" doctrine, we continue to permit the state and federal government to do jointly that which neither can do alone. In \textit{Bankston v. State},\textsuperscript{64} the Mississippi Supreme Court held that a conviction for bank robbery in a federal prosecution did not bar a subsequent prosecution in the state court for the same offense. In reaching this conclusion, the court relied upon \textit{Bartkus} and denied that \textit{Benton} had any impact on the "dual sovereignty" doctrine.

In \textit{Cullen v. Ceci},\textsuperscript{65} defendants had burned draft files in a Selective Service branch office. Defendants, not yet convicted by either sovereign, attempted to prevent the second prosecution based on a \textit{Benton} supported double jeopardy argument. The Wisconsin Supreme Court, while sympathetic to the argument, deemed itself bound by \textit{Bartkus}. However, their assessment of the equities involved is revealed in the following language:

\begin{itemize}
  \item \textsuperscript{56} See nn. 8 and 10 supra.
  \item \textsuperscript{57} 260 U.S. at 382.
  \item \textsuperscript{58} See note 25 supra.
  \item \textsuperscript{59} See note 36 supra.
  \item \textsuperscript{60} See note 20 supra.
  \item \textsuperscript{61} Id.
  \item \textsuperscript{62} 395 U.S. at 795, see note 20 supra.
  \item \textsuperscript{63} Id.
  \item \textsuperscript{64} ---Miss.---, 236 S.2d 757 (1970).
  \item \textsuperscript{65} ---Wisc.---, 173 N.W.2d 175 (1970). \textit{Cullen} arose out of facts similar to \textit{Melville v. State}, \textit{supra} note 6.
\end{itemize}
... 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. ... The writer of this opinion, speaking for himself and not necessarily for the Court, nonetheless perceives a fundamental unfairness of *punishing* a defendant twice for the same act, but this state of affairs has not yet arisen.66

The only federal case at the circuit level to consider the "dual sovereignty" issue after Benton is *Hill v. Beto*.67 *Hill* resulted from a habeas corpus proceeding. The district court denied the petition and on appeal Hill argued double jeopardy, relying on Benton. Finding no change in Bartkus as a result of Benton, the Fifth Circuit Court of Appeals, therefore, held Bartkus to be dispositive: "This precise contention has already been considered and denied by this court in an earlier appeal. *Hill v. Beto*, 5 Cir. 1968, 390 F.2d 640. That result is not changed by *Benton v. Maryland*"68 The "precise contention" referred to by the court had been considered in a previous appeal by Hill in which the denial of his petition had been affirmed in an opinion using the traditional Bartkus rationale.69 That decision, however, was one year prior to Benton and the Court in Hill's post-Benton appeal merely asserted that Bartkus had not been changed. No reasons were given for this conclusion.

Contrary to Bankston, Cullen, and Hill is *State v. Fletcher*.70 *Fletcher* arose out of proceedings on a motion to quash a state indictment following federal jeopardy for the same offense. One defendant had pleaded guilty and one had been acquitted in the federal prosecution. The trial court decision preceded Benton by one year and held that one who has been acquitted or convicted on a plea of guilty of a federal crime in a federal court may not thereafter be prosecuted in a state court for the same offense. The court admitted that its holding was contrary to Bartkus; however, it reasoned that the Supreme Court's growing con-

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66. Id. at 187.
67. 422 F.2d 840 (5th Cir. 1970).
68. Id. at 841.
70. 15 Ohio Misc. 336, 240 N.E.2d 965 (1968).
cern for the fundamental rights of individuals over the rights of the state should be reflected in the principal case. The state was invited to appeal and did. In the interim, Benton was decided and the appellate decision in Fletcher remains essentially the only case to seriously evaluate Benton’s impact on the “dual sovereignty” doctrine.

The Fletcher court noted that Benton did not direct itself to the “dual sovereignty” doctrine, but recognized that “[n]onetheless, Benton casts a long shadow that makes it necessary to say that the resolution of the [“dual sovereignty” issue] is in little doubt.” The court continued

71. Id. at 345-46, 240 N.E.2d at 912-13:
But the United States Supreme Court has weighed such traditional state sovereignty against the fact that, in the name of federal principle, hordes of accused persons have been denied important rights guaranteed them by the United States Constitution. Time and time again, so that the pattern is quite clear, the protection of the rights of the accused has triumphed in that court’s deliberations. This court cannot believe that any other result could be reached here.

Whether this affirmation of human rights over states’ rights signals the end of the federal system has been hotly debated in recent times. This court is undismayed by this humanitarian trend. For the heart of federalism does not lie in the enforcement of a shallow, abstract and automatic line of demarcation between the state and federal sovereignties. Rather, it lies in the recognition of the fact that an individual is entitled to have his freedom protected by both the state in which he resides and the nation to which he pledges his allegiance, and in the understanding that when one sovereignty fails to provide him justice, he may look to the other for the relief which the constitution guarantees him. When such a conception of federalism has been achieved, our constitutional promises will have been fulfilled and, perhaps surprisingly, our law enforcement system will be more effective, both individually and in cooperation with each other. It is this court’s hope that this decision will bring that day a little closer.


74. 22 Ohio App. at 88, 259 N.E.2d at 150:
Whatever the uses of history, they provide neither a mechanistic nor universal standard for the application of law. Least of all do they provide an excuse for ignoring the implications of a recent instruction from the highest court in the land. In deciding Benton v. Maryland, supra, Mr. Justice Marshall said, for the majority, that the prohibition against double jeopardy in the Fifth Amendment applied to the states through the Due Process clause of the Fourteenth Amendment. It was, he declared, “Like the right to trial by jury *** clearly ‘fundamental to the American scheme of justice.’” Benton, supra at 796. Double jeopardy could hardly have been characterized otherwise. For if the right to counsel, Gideon v. Wainwright (1963), 372 U.S. 335, and self-incrimination; Malloy v. Hogan (1964), 378 U.S. 1, Murphy v. Water Front Commission of New York Harbor (1964), 378 U.S. 52, are examples of fundamentals, a fortiori double jeopardy is. Moreover, the Benton majority noted a recent tendency of the Court, crucial here, “‘increasingly *** [to look] to the specific guarantees of the [Bill of Rights] to determine whether a state criminal trial was conducted with due process of law.’” 395 U.S. at 794.
by explaining that the major underpinnings of the Bartkus decision were the extensively criticized Lanza opinion and Palko, which Benton specifically overruled. Fletcher proceeded to evaluate the vitality of Bartkus and Abbate after Benton and concluded:

\[
\ldots \text{that the rule of Bartkus is so enfeebled as to lack all binding force.}
\]

The effects are several. Bartkus and cases of the same genus may be eliminated from further consideration. Therefore, whatever support by projection or analogy Bartkus lent Abbate is gone.\(^7\)

Consequently, the court held that state and federal constitutions barred state prosecutions of defendants who had been placed in federal jeopardy for the same act.

**Conclusion**

The purpose of this analysis has been to suggest that a serious reexamination of the “dual sovereignty” doctrine is warranted as a result of Benton. The only post-Benton case to thoroughly analyze Benton's impact on the underpinnings of that doctrine is Fletcher. While providing little of precedential value outside of Ohio, Fletcher may well represent a turning point in the application of the established “dual sovereignty” rationale to questions of subsequent prosecutions by separate sovereignties.

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75. *Id.* at 92, 259 N.E.2d at 152.