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Bartkus Vs. Illinois

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Court : US Supreme Court

Decided On : Mar-30-1959

Appeal No. : 359 U.S. 121

Appellant : Bartkus

Respondent : illinois

Judgement :

Bartkus v. Illinois - 359 U.S. 121 (1959)
U.S. Supreme Court Bartkus v. Illinois, 359 U.S. 121 (1959)

Bartkus v. Illinois

No. 1

Argued November 19, 1957

Affirmed by an equally divided Court January 6, 1958

Rehearing granted, judgment vacated and case restored to

calendar for reargument May 26, 1958

Reargued October 21-22, 1958

Decided March 30, 1959

SYLLABUS

Petitioner was tried and acquitted in a Federal District Court for violation of 18 U.S.C. 2113, which makes it a crime to rob a federally insured bank. On substantially the same evidence, he was later tried and convicted in an Illinois State Court for violation of an Illinois robbery statute.

HELD

1. The cooperation of federal law enforcement officers with Illinois officials did not violate the Double Jeopardy Clause of the Fifth Amendment. Pp. 359 U. S. 122 -124.

2. The Fourteenth Amendment does not impliedly extend the first eight amendments to the States. Pp. 359 U. S. 124 -126.

3. The Illinois prosecution for violation of its own penal law after a prior acquittal for a federal offense, on substantially the same evidence, did not violate the Due Process Clause of the Fourteenth Amendment. Pp. 359 U. S. 127 -139.

7 Ill.2d 138, 130 N.E.2d 187, affirmed.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Petitioner was tried in the Federal District Court for the Northern District of Illinois on December 18, 1953, for robbery of a federally insured savings and loan association,

the General Savings and Loan Association of Cicero, Illinois, in violation of 18 U.S.C. 2113. The case was tried to a jury and resulted in an acquittal. On January 8, 1954, an Illinois grand jury indicted Bartkus. The facts recited in the Illinois

indictment were substantially identical to those contained in the prior federal indictment. The Illinois indictment charged that these facts constituted a violation of Illinois Revised Statutes, 1951, c. 38, 501, a robbery statute. Bartkus was tried and convicted in the Criminal Court of Cook County, and was sentenced to life imprisonment under the Illinois Habitual Criminal Statute. Ill.Rev.Stat., 1951, c. 38, 602.

The Illinois trial court considered and rejected petitioner's plea of *autrefois acquit.* That ruling and other alleged errors were challenged before the Illinois Supreme Court, which affirmed the conviction. 7 Ill.2d 138, 130 N.E.2d 187. We granted certiorari because the petition raised a substantial question concerning the application of the Fourteenth Amendment. 352 U.S. 907, 958. On January 6, 1958, the judgment below was affirmed by an equally divided Court. 355 U. S. 281 . On May 26, 1958, the Court granted a petition for rehearing, vacated the judgment entered January 6, 1958, and restored the case to the calendar for reargument. 356 U.S. 969.

The state and federal prosecutions were separately conducted. It is true that the agent of the Federal Bureau of Investigation who had 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. 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

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trials was purposely continued by the federal court until after they testified in the state trial. The record establishes that the prosecution was undertaken by state prosecuting officials within their discretionary responsibility and on the basis of evidence that conduct contrary to the penal code of Illinois had occurred within their jurisdiction. It establishes also that federal officials acted in cooperation with state authorities, as is the conventional practice between the two sets of prosecutors throughout the country. [Footnote 1] It does not support the claim

that the State of Illinois, in bringing its prosecution, was merely a tool of the federal authorities, who thereby avoided the prohibition of the Fifth Amendment against a retrial of

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a federal prosecution after an acquittal. It does not sustain a conclusion that the state prosecution was a sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution.

Since the new prosecution was by Illinois, and not by the Federal Government, the claim of unconstitutionality must rest upon the Due Process Clause of the Fourteenth Amendment. Prior cases in this Court relating to successive state and federal prosecutions have been concerned with the Fifth Amendment, and the scope of its proscription of second prosecutions by the Federal Government, not with the Fourteenth Amendment's effect on state action. We are now called upon to draw on the considerations which have guided the Court in applying the limitations of the Fourteenth Amendment on state powers. We have held from the beginning and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments as such. [Footnote 2] The relevant historical materials have been canvassed by this Court and by legal scholars. [Footnote 3] These materials demonstrate conclusively that Congress and the members of the legislatures of the ratifying States did not contemplate that the Fourteenth Amendment was a shorthand incorporation of the first eight amendments, making them applicable as explicit restrictions upon the States.

Evidencing the interpretation by both Congress and the States of the Fourteenth Amendment is a comparison of the constitutions of the ratifying States with the Federal

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Constitution. Having regard only to the grand jury guarantee of the Fifth Amendment, the criminal jury guarantee of the Sixth Amendment, and the civil jury

guarantee of the Seventh Amendment, it is apparent that, if the first eight amendments were being applied verbatim to the States, ten of the thirty ratifying States would have impliedly been imposing upon themselves constitutional requirements on vital issues of state policies contrary to those present in their own constitutions. [Footnote 4] Or, to approach the matter in a different way, they would be covertly altering provisions of their own constitutions in disregard of the amendment procedures required by those constitutions. Five other States would have been undertaking procedures not in conflict with, but not required by, their constitutions. Thus, only one-half, or fifteen, of the ratifying States had constitutions in explicit accord with these provisions of the Fifth, Sixth, and Seventh Amendments. Of these fifteen, four made alterations in their constitutions by 1875 which brought them into important conflict with one or more of these provisions of the Federal Constitution. One of the States whose constitution had not included any provision on one of the three procedures under investigation adopted a provision in 1890 which was inconsistent with the Federal Constitution. And so, by 1890, only eleven of the thirty ratifying States were in explicit accord with these provisions of the first eight amendments to the Federal Constitution. Four were silent as to one or more of the provisions, and fifteen were in open conflict with these same provisions. [Footnote 5]

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Similarly imposing evidence of the understanding of the Due Process Clause is supplied by the history of the admission of the twelve States entering the Union after the ratification of the Fourteenth Amendment. In the case of each, Congress required that the State's constitution be "not repugnant" to the Constitution of the United States. [Footnote 6] Not one of the constitutions of the twelve States contains all three of the procedures relating to grand jury, criminal jury, and civil jury. In fact, all twelve have provisions obviously different from the requirements of the Fifth, Sixth, or Seventh Amendments. And yet, in the case of each admission, either the President of the United States or Congress or both have found that the constitution was in conformity with the Enabling Act and the Constitution of the United States. [Footnote 7] Nor is there warrant to believe that the States, in

adopting constitutions with the specific purpose of complying with the requisites of admission, were, in fact, evading the demands of the Constitution of the United States.

Surely this compels the conclusion that Congress and the States have always believed that the Due Process Clause brought into play a basis of restrictions upon the States other than the undisclosed incorporation of the original eight amendments. In *Hurtado v. California,* 110 U. S. 516 , this Court considered due process in its historical setting, reviewed its development as a concept in Anglo-American law from the time of the Magna Carta until the time of the adoption of the Fourteenth

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Amendment and concluded that it was intended to be a flexible concept, responsive to thought and experience -- experience which is reflected in a solid body of judicial opinion, all manifesting deep convictions to be unfolded by a process of "inclusion and exclusion." *Davidson v. New Orleans,* 96 U. S. 97 , 96 U. S. 104 . Time and again, this Court has attempted by general phrases not to define but to indicate the purport of due process, and to adumbrate the continuing adjudicatory process in its application. The statement by Mr. Justice Cardozo in *Palko v. Connecticut,* 302 U. S. 319 , has especially commended itself and been frequently cited in later opinions. [Footnote 8] Referring to specific situations, he wrote:

"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 the Fourteenth Amendment, become valid as against the states."

302 U.S. at 302 U. S. 324 -325. About the meaning of due process, in broad perspective unrelated to the first eight amendments, he suggested that it prohibited to the States only those practices "repugnant to the conscience of mankind." 302 U.S. at 302 U. S. 323 . In applying these phrases in *Palko,* the

Court ruled that, while at some point the cruelty of harassment by multiple prosecutions by a State would offend due process, the specific limitation imposed on the Federal Government by the Double Jeopardy Clause of the Fifth Amendment did not bind the States.

Decisions of this Court concerning the application of the Due Process Clause reveal the necessary process of

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balancing relevant and conflicting factors in the judicial application of that Clause. In *Chambers v. Florida,* 309 U. S. 227 , we held that a state conviction of murder was void because it was based upon a confession elicited by applying third-degree methods to the defendant. But we have also held that a second execution necessitated by a mechanical failure in the first attempt was not in violation of due process. *Louisiana ex rel. Francis v. Resweber,* 329 U. S. 459 . Decisions under the Due Process Clause require close and perceptive inquiry into fundamental principles of our society. The Anglo-American system of law is based not upon transcendental revelation, but upon the conscience of society ascertained as best it may be by a tribunal disciplined for the task and environed by the best safeguards for disinterestedness and detachment.

Constitutional challenge to successive state and federal prosecutions based upon the same transaction or conduct is not a new question before the Court, though it has now been presented with conspicuous ability. [Footnote 9] The Fifth

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Amendment's proscription of double jeopardy has been invoked and rejected in over twenty cases of real or hypothetical successive state and federal prosecution cases before this Court. While *United States v. Lanza,* 260 U. S. 377 , was the first case in which we squarely held valid a federal prosecution arising out of the same facts which had been the basis of a state conviction, the validity of such a prosecution by the Federal Government has not been questioned by this Court since the opinion in *Fox v. Ohio,* 5 How. 410, more than one hundred years ago.

In *Fox v. Ohio,* argument was made to the Supreme Court that an Ohio conviction for uttering counterfeit money was invalid. This assertion of invalidity was based in large part upon the argument that, since Congress had imposed federal sanctions for the counterfeiting of money, a failure to find that the Supremacy Clause precluded the States from punishing related conduct would expose an individual to double punishment. Mr. Justice Daniel, writing for the Court (with Mr. Justice McLean dissenting), recognized as true that there was a possibility of double punishment, but denied that from this flowed a finding of preemption, concluding instead that both the Federal and State Governments retained the power to impose criminal sanctions, the United States because of its interest in protecting the purity of its currency, the States because of their interest in protecting their citizens against fraud.

In some eight state cases decided prior to *Fox,* the courts of seven States had discussed the validity of successive state and federal prosecutions. In three, Missouri, [Footnote 10] North Carolina, [Footnote 11] and Virginia, [Footnote 12] it had been said that there would be no plea in bar to prevent the second prosecution.

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Discussions in two cases in South Carolina were in conflict -- the earlier opinion [Footnote 13] expressing belief that there would be a bar, the later, [Footnote 14] without acknowledging disagreement with the first, denying the availability of a plea in bar. In three other States, Vermont, [Footnote 15] Massachusetts, [Footnote 16] and Michigan, [Footnote 17] courts had stated that a prosecution by one government would bar prosecution by another government of a crime based on the same conduct. The persuasiveness of the Massachusetts and Michigan decisions is somewhat impaired by the precedent upon which they relied in their reasoning. In the Supreme Court case cited in the Massachusetts and Michigan cases, *Houston v. Moore,* 5 Wheat. 1, there is some language to the effect that there would be a bar to a second prosecution by a different government. 5 Wheat. at 18 U. S. 31 . But that language by Mr. Justice Washington reflected his belief that the state statute imposed state sanctions for violation of a federal

criminal law. 5 Wheat. at 18 U. S. 28 . As he viewed the matter, the two trials would not be of similar crimes arising out of the same conduct; they would be of the same crime. Mr. Justice Johnson agreed that, if the state courts had become empowered to try the defendant for the federal offense, then such a state trial would bar a federal prosecution. 5 Wheat. at 18 U. S. 35 . Thus, *Hoston v. Moore* can be cited only for the presence of a bar in a case in which the second trial is for a violation of the very statute whose violation by the same conduct has already been tried in the courts of another government empowered to try that question. [Footnote 18]

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The significance of this historical background of decisions prior to *Fox* is that it was, taking a position most favorable to advocates of the bars of *autrefois acquit* and *autrefois convict* in cases like that before this Court, totally inconclusive. Conflicting opinions concerning the applicability of the plea in bar may manifest conflict in conscience. They certainly do not manifest agreement that to permit successive state and federal prosecutions for different crimes arising from the same acts would be repugnant to those standards of outlawry which offend the conception of due process outlined in *Palko.* (It is worth noting that *Palko* sustained a first degree murder conviction returned in a second trial after an appeal by the State from an acquittal of first degree murder.) The early state decisions had clarified the issue by stating the opposing arguments. The process of this Court's response to the Fifth Amendment challenge was begun in *Fox v. Ohio,* continued in *United States v. Marigold,* 9 How. 560, and was completed in *Moore v. Illinois,* 14 How. 13. Mr. Justice Grier, writing for the Court in *Moore v. Illinois,* gave definitive statement to the rule which had been evolving:

"An offence, in its legal significantion, means the transgression of a law."

14 How. at 55 U. S. 19 .

"Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for

an infraction of the laws of either. The same act may be an offence or transgression of the laws of both."

14 How. at 55 U. S. 20 .

"That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot

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be truly averred that the offender has been twice punished for the same offence; but only that, by one act, he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other."

Ibid.

In a dozen cases decided by this Court between *Moore v. Illinois* and *United States v. Lanza,* this Court had occasion to reaffirm the principle first enunciated in *Fox v. Ohio.* [Footnote 19] Since *Lanza,* the Court has five times repeated the rule that successive state and federal prosecutions are not in violation of the Fifth Amendment. [Footnote 20] Indeed, Mr. Justice Holmes once wrote of this rule that it "is too plain to need more than statement." [Footnote 21] One of the post- *Lanza* cases, *Jerome v. United States,* 318 U. S. 101 , involved the same federal statute under which Bartkus was indicted, and, in *Jerome,* this Court recognized that successive state and federal prosecutions were thereby made possible because all States had general robbery statutes. Nonetheless, a unanimous Court, as recently as 1943, accepted as unquestioned constitutional law that such successive prosecutions would not violate the proscription of double

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jeopardy included in the Fifth Amendment. 318 U.S. at 318 U. S. 105 . [Footnote 22]

The lower federal courts have, of course, been in accord with this Court. [Footnote 23] Although some can be cited only in

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that they follow the decisions of this Court, others manifest reflection upon the issues involved and express reasoned approval of the two sovereignty principle. In *United States v. Barnhart,* 22 F. 285, the Oregon Circuit Court was presented with a case just the obverse of the present one: 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.

The experience of state courts in dealing with successive prosecutions by different governments is obviously also relevant in considering whether or not the Illinois prosecution of Bartkus violated due process of law. Of the twenty-eight States which have considered the validity of successive state and federal prosecutions as against a challenge of violation of either a state constitutional double jeopardy provision or a common law evidentiary rule of *autrefois acquit* and *autrefois convict,* twenty-seven have refused to rule that the second prosecution

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was or would be barred. [Footnote 24] These States were not bound to follow this Court and its interpretation of the Fifth Amendment. The rules, constitutional, statutory, or common law which bound them, drew upon the same

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experience as did the Fifth Amendment, but were and are of separate and independent authority.

Not all of the state cases manifest careful reasoning, for, in some of them, the language concerning double jeopardy is but offhand dictum. But in an array of state cases there may be found full consideration of the arguments supporting and

denying a bar to a second prosecution. These courts interpreted their rules as not proscribing a second prosecution where the first was by a different government and for violation of a different statute.

With this body of precedent as irrefutable evidence that state and federal courts have for years refused to bar a second trial even though there had been a prior trial by another government for a similar offense, it would be disregard of a long, unbroken, unquestioned course of impressive adjudication for the Court now to rule that due process compels such a bar. A practical justification for rejecting such a reading of due process also commends

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itself in aid of this interpretation of the Fourteenth Amendment. In *Screws v. Uted States,* 325 U. S. 91 , defendants were tried and convicted in a federal court under federal statutes with maximum sentences of a year and two years, respectively. But the state crime there involved was a capital offense. Were the federal prosecution of a comparatively minor offense to prevent state prosecution of so grave an infraction of state law, 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 power of States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States. [Footnote 25]

Some recent suggestions that the Constitution was in reality a deft device for establishing a centralized government are not only without factual justification, but fly in the face of history. 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. Mr. Justice Brandeis has written that separation of powers was adopted in the Constitution "not to promote efficiency, but to preclude the exercise of arbitrary power." [Footnote 26] Time has not lessened the concern of the Founders in devising a federal system which would likewise be a safeguard

against arbitrary government.

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The greatest self-restraint is necessary when that federal system yields results with which a court is in little sympathy.

The entire history of litigation and contention over the question of the imposition of a bar to a second prosecution by a government other than the one first prosecuting is a manifestation of the evolutionary unfolding of law. Today, a number of States have statutes which bar a second prosecution if the defendant has been once tried by another government for a similar offense. [Footnote 27] A study of the cases under the New York statute, [Footnote 28] which is typical of these laws, demonstrates that the task of determining when the federal and state statutes are so much alike that a prosecution under the former bars a prosecution under the latter is a difficult one. [Footnote 29] The proper solution of that problem frequently depends upon a judgment of the gravamen of the state statute. It depends also upon an understanding of the scope of the bar that has been historically granted in the State to prevent successive state prosecutions. Both these problems are ones with which the States are obviously more competent to deal than is this Court. Furthermore, the rules resulting will intimately affect the efforts of a State to develop a rational and just body of criminal law in the protection of its citizens. We ought not to utilize the Fourteenth Amendment

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to interfere with this development. Finally, experience such as that of New York may give aid to Congress in its consideration of adoption of similar provisions in individual federal criminal statutes or in the federal criminal code. [Footnote 30]

Precedent, experience, and reason alike support the conclusion that Alfonse Bartkus has not been deprived of due process of law by the State of Illinois.

Affirmed.

[For dissenting opinion of MR. JUSTICE BLACK, *see post,* p. 359 U. S. 150 .]

[For dissenting opinion of MR. JUSTICE BRENNAN, *see post,* p. 359 U. S. 164 .]

[Footnote 1]

See Proceedings of the Attorney General's Conference on Crime (1934). At the conclusion of the state trial of Bartkus, State's Attorney Gutknecht thus reviewed the cooperation between federal and state officials:

"We have had a number of cases where the state's attorney's office have been cooperating very well with the federal authorities, particularly in the narcotics cases, because in that connection the federal government should have the first authority in handling them because narcotics is a nationwide criminal organization, and so, when I see people going through this town and criticising the County of Cook and the City of Chicago because of the police, the state's attorney and the judges cooperating with the federal authorities, and giving that as proof of the fact that, since we don't take the lead, we must be negligent in our duties, I am particularly glad to see a case where the federal authorities came to the state's attorney."

"We are cooperating with the federal authorities, and they are cooperating with us, and these statements in this city to the effect that the fact that the federal authorities are in the county is a sign of breakdown in law enforcement in Cook County is utter nonsense."

"The federal authorities have duties and we have duties. We are doing our duty, and this is an illustration of it, and we are glad to continue to cooperate with the federal authorities. Give them the first play where it is their duty, as in narcotics, and we take over where our duty calls for us to carry the burden. . . ."

[Footnote 2]

Hurtado v. California, 110 U. S. 516 ; *In re Kemmler,* 136 U. S. 436 ; *Maxwell v. Dow,* 176 U. S. 581 ; *Twining v. New Jersey,* 211 U. S. 78 ; *Palko v. Connecticut,* 302 U. S. 319 ; *Adamson v. California,* 332 U. S. 46 .

[Footnote 3]

Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan.L.Rev. 5.

[Footnote 4]

See Appendix, *post,* p. 140, in which are detailed the provisions in the constitutions of the ratifying States and of the States later admitted to the Union which correspond to these federal guarantees in the Fifth, Sixth, and Seventh Amendments.

[Footnote 5]

Cf. 46 U. S. Ohio, 5 How. 410, 46 U. S. 435 , in which, in ruling that the Fifth Amendment was not to be read as applying to the States, Mr. Justice Daniel wrote:

"it is neither probable nor credible that the States should have anxiously insisted to ingraft upon the federal constitution restrictions upon their own authority. . . ."

[Footnote 6]

See, e.g., 36 Stat. 569.

[Footnote 7]

See, e.g., 37 Stat. 1728.

[Footnote 8]

See, e.g., Leland v. Orevon, 343 U. S. 790 , 343 U. S. 801 ; *Rochin v. California,* 342 U. S. 165 , 342 U. S. 169 ; *Bute v. Illinois,* 333 U. S. 640 , 333 U. S. 659 .

[Footnote 9]

It has not been deemed relevant to discussion of our problem to consider dubious English precedents concerning the effect of foreign criminal judgments on the ability of English courts to try charges arising out of the same conduct -- dubious in part because of the confused and inadequate reporting of the case on which much is based, *see* the varying versions of *Rex v. Hutchinson* found in *Beak v. Thyrwhit,* 3 Mod.194, 87 Eng.Rep. 124 (reported as *Beake v. Tyrrell* in 1 Show. 6, 89 Eng.Rep. 411, and as *Beake v. Tirrell* in Comberbach 120, 90 Eng.Rep. 379), *Burrows v. Jemino,* 2 Strange 733, 93 Eng.Rep. 815 (reported as *Burrouqhs v. Jamineau* in Mos. 1, 25 Eng.Rep. 235, as *Burrows v. Jemineau* in Sel.Cas. 70, 25 Eng.Rep. 228, as *Burrows v. Jemineau* in 2 Eq.Ca.Abr. 476, and as *Burrows v . Jemino* in 22 Eng.Rep. 443), and explained in *Gage v. Bulkeley,* Ridg.Cas. 263, 27 Eng.Rep. 824. Such precedents are dubious also because they reflect a power of discretion vested in English judges not relevant to the constitutional law of our federalism.

[Footnote 10]

Mattison v. State, 3 Mo. *421.

[Footnote 11]

State v. Brown, 2 N.C. *100.

[Footnote 12]

Hendrick v. Commonwealth, 5 Leigh (Va.) 707.

[Footnote 13]

State v. Antonio, 2 Treadway's Const.Rep. (S.C.) 776.

[Footnote 14]

State v. Tutt, 2 Bailey (S.C.) 44.

[Footnote 15]

State v. Randall, 2 Aikens (Vt.) 89.

[Footnote 16]

Commonwealt v. Fuller, 8 Metcalf (Mass.) 313.

[Footnote 17]

Harlan v. People, 1 Douglass' Rep. (Mich.) 207.

[Footnote 18]

Mr. Justice Story's dissenting opinion in *Houston v. Moore,* 5 Wheat. 1, 18 U. S. 47 , displays dislike of the possibility of multiple prosecutions, *id.* at 18 U. S. 72 , but also suggests the possibility that, under some circumstances a state acquittal might not bar a federal prosecution, *id.* at 18 U. S. 74 -75.

[Footnote 19]

United States v. Cruikshank, 92 U. S. 542 ; *Coleman v. Tennessee,* 97 U. S. 509 ; *Ex parte Siebold,* 100 U. S. 371 ; *United States v. Arjona,* 120 U. S. 479 ; *Cross v. North Carolina,* 132 U. S. 131 ; *In re Loney,* 134 U. S. 372 ; *Pettibone v. United States,* 148 U. S. 197 ; *Crossley v. California,* 168 U. S. 640 ; *Seton v. California,* 189 U. S. 319 ; *Matter of Heff,* 197 U. S. 488 ; *Grafton v. United States,* 206 U. S. 333 ; *Ponzi v. Fessenden,* 258 U. S. 254 .

[Footnote 20]

Hebert v. Louisiana, 272 U. S. 312 ; *Westfall v. United States,* 274 U. S. 256 ; *Puerto Rico v. The Shell Co.,* 302 U. S. 253 ; *Jerome v. United States,* 318 U. S. 101 ; *Screws v. United States,* 325 U. S. 91 .

[Footnote 21]

Westfall v. United States, 274 U. S. 256 , 274 U. S. 258 .

[Footnote 22]

In a chapter in Handbook on Interstate Crime Control, a book prepared in 1938 by the Interstate Commission on Crime, Gordon Dean, then Special Executive Assistant to the Attorney General of the United States, wrote:

"Mention should also be made of the National Bank Robbery statute. This statute punishes robberies of national banks, banks which are members of the Federal Reserve System, and banks the funds of which are insured by the Federal Deposit Insurance Corporation. And here again, there has been no usurpation by the federal government. The states still may prosecute any robbery of any bank within their jurisdiction, and they frequently do. There have been several cases in the last few years where men have been convicted both under the state and federal law for robbing the same bank. In fact, there have been cases where men have been tried under the law of one jurisdiction, acquitted, and, on the same facts, tried under the law of the other sovereignty and convicted. Bank robbers know today that 'flight,' their most valuable weapon, has, under the operation of the National Bank Robbery statute, proved quite impotent. The bank robbery rate has been cut in half, and there has been a fine relation between state and federal agencies in the apprehension and trial of bank robbers."

Id. at 114.

[Footnote 23]

McKinney v. Landon, 209 F. 300 (C.A. 8th Cir.); *Morris v. United States,* 229 F. 516 (C.A. 8th Cir.); *Vandell v. United States,* 6 F.2d 188 (C.A.2d Cir.); *United States v. Levine,* 129 F.2d 745 (C.A.2d Cir.); *Serio v. United States,* 203 F.2d 576 (C.A. 5th Cir.); *Jolley v. United States,* 232 F.2d 83 (C.A. 5th Cir.); *Smith v. United States,* 243 F.2d 877 (C.A. 6th Cir.); *Rios v. United States,* 256 F.2d 173 (C.A. 9th Cir.); *United States v. Amy,* 24 Fed.Cas. No. 14,445 (C.C.Va.); *United States v. Given,* 25 Fed.Cas. No. 15,211 (C.C.Del.); *United States v. Barnhart,* 22 F. 285 (C.C.Ore.); *United States v. Palan,* 167 F. 991 (C.C.S.D.N.Y.); *United States v. Wells,* 28 Fed.Cas. No. 16,665 (D.C.Minn.); *United States v. Casey,* 247 F. 362 (D.C.S.D.Ohio); *United States v. Holt,* 270 F. 639 (D.C.N.Dak.); *In re Morgan,* 80 F.Supp. 810 (D.C.N.D. Iowa); *United States v. Mandile,* 119 F.Supp.

266 (D.C.E.D.N.Y.). Of the many prohibition cases in the lower federal courts only *United States v. Holt* has been included; its inclusion is meant to represent that body of cases, and is particularly justified by its careful reasoning concerning the entire question of dual sovereignties and double jeopardy. It is believed that the list contains most of the nonprohibition cases in the lower federal courts discussing and favoring the rule that trial in one jurisdiction does not bar prosecution in another for a different offense arising from the same act. Three lower federal court cases have been found questioning the validity of the rule: *Ex parte Houghton,* 7 F. 657, 8 F. 897 (D.C.Vt.); *In re Stubbs,* 133 F. 1012 (C.C.W.D. Wash.); *United States v. Candelaria,* 131 F.Supp. 797 (D.C.S.D.Cal.).

[Footnote 24]

STATES DENYING THE BAR.

Arizona. *Henderson v. State,* 30 Ariz. 113, 244 P. 1020 (despite a limited statutory bar, holding successive federal and state prosecutions permitted where one is for possession and the other for transportation).

Arkansas. *State v. Duncan,* 221 Ark. 681, 255 S.W.2d 430.

California. *People v. McDonnell,* 80 Cal. 285, 22 P. 190; *People v. Candelaria,* 139 Cal.App.2d 432, 294 P.2d 120; *People v. Candelaria,* 153 Cal.App.2d 879, 315 P.2d 386 (these two *Candelaria* cases indicate that the California statutory bar, a statute of the kind discussed below, prevents a state robbery prosecution after a federal robbery prosecution, but not a state burglary prosecution in the same circumstances).

Georgia. *Scheinfain v. Aldredge,* 191 Ga. 479, 12 S.E.2d 868; *Bryson v. State,* 27 Ga.App. 230, 108 S.E. 63.

Illinois. *Hoke v. People,* 122 Ill. 511, 13 N.E. 823.

Indiana. *Heier v. State,* 191 Ind. 410, 133 N.E. 200; *Dashing v. State,* 78 Ind. 357.

Iowa. *State v. Moore,* 143 Iowa 240, 121 N.W. 1052.

Kentucky. *Hall v. Commonwealth,* 197 Ky. 179, 246 S.W. 441.

Louisiana. *State v. Breaux,* 161 La. 368, 108 So. 773, *aff'd per cur.,* 273 U.S. 645.

Maine. *See State v. Gauthier,* 121 Me. 522, 529-531, 118 A. 380, 383-385.

Massachusetts. *Commonwealth v. Nickerson,* 236 Mass. 281, 128 N.E. 273.

Michigan. *In re Illova,* 351 Mich. 204, 88 N.W.2d 589.

Minnesota. *State v. Holm,* 139 Minn. 267, 166 N.W. 181.

Missouri. *In re January,* 295 Mo. 653, 246 S.W. 241.

New Hampshire. *State v. Whittemore,* 50 N.H. 245.

New Jersey. *State v. Cioffe,* 130 N.J.L. 160, 32 A.2d 79.

New York. *People v. Welch,* 141 N.Y. 266, 36 N.E. 328.

North Carolina. *See State v. Brown,* 2 N.C. *100, 101.

Oregon. *State v. Frach,* 162 Ore. 602, 94 P.2d 143.

Pennsylvania. *See Commonwealth ex rel. O'Brien v. Burke,* 171 Pa.Super. 273, 90 A.2d 246.

South Carolina. *State v. Tutt,* 2 Bailey 44.

Tennessee. *State v. Rhodes,* 146 Tenn. 398, 242 S.W. 642; *State v. Rankin,* 4 Coldw. 145.

Vermont. *State v. O'Brien,* 106 Vt. 97, 170 A. 98.

Virginia. *Jett v. Commonwealth,* 18 Gratt. (59 Va.) 933.

Washington. *State v. Kenney,* 83 Wash. 441, 145 P. 450.

West Virginia. *State v. Holesapple,* 92 W.Va. 645, 115 S.E. 794. *See Moundsville v. Fountain,* 27 W.Va. 182, 197-198.

Wyoming. *See In re Murphy,* 5 Wyo. 297, 304-309, 40 P. 398, 399-401.

STATE RAISING THE BAR

Florida. *Burrows v. Moran,* 81 Fla. 662, 89 So. 111 (this case may be limited to the interpretation given by the Florida court to the Eighteenth Amendment. *See Strobhar v. State,* 55 Fla. 167, 180-181, 47 So. 4, 9).

[Footnote 25]

Illinois had an additional and unique interest in Bartkus beyond the commission of this particular crime. If Bartkus was guilty of the crime charged, he would be an habitual offender in Illinois, and subject to life imprisonment. The Illinois court sentenced Bartkus to life imprisonment on this ground.

[Footnote 26]

Myers v. United States, 272 U. S. 52 , 272 U. S. 240 , 272 U. S. 293 (dissenting opinion).

[Footnote 27]

Some fifteen such statutes are listed in Tentative Draft No. 5 of the American Law Institute's Model Penal Code (1956), p. 61.

[Footnote 28]

N.Y.Penal Code 33 and N.Y.Code Crim.Proc. 139.

[Footnote 29]

People ex rel. Liss v. Superintendent of Women's Prison, 282 N.Y. 115, 25 N.E.2d 869; *People v. Mangano,* 269 App.Div. 954, 57 N.Y.S.2d 891 (2d Dept.) *aff'd sub*

nom. People v. Mignona, 296 N.Y. 1011, 73 N.E.2d 583; *People v. Spitzer,* 148 Misc. 97, 266 N.Y.S. 522 (Sup.Ct.); *People v. Parker,* 175 Misc. 776, 25 N.Y.S.2d 247 (Kings County Ct.); *People v. Eklof,* 179 Misc. 536, 41 N.Y.S.2d 557 (Richmond County Ct.); *People v. Adamchesky,* 184 Misc. 769, 55 N.Y.S.2d 90 (N.Y.County Ct.).

[Footnote 30]

In specific instances Congress has included provisions to prevent federal prosecution after a state prosecution based upon similar conduct. *See, e.g.,* 18 U.S.C. 2117 (burglary of vehicle of transportation carrying interstate or foreign shipments).

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APPENDIX TO OPINION OF THE COURT

r Year of ratification of the Fourteenth Amendment

c Year of adoption of constitution in effect on date of ratification or admission

ad Year of admission to the Union

bwm:

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FIFTH AMENDMENT SIXTH AMENDMENT SEVENTH AMENDMENT

"No person shall be held to answer for a "In all criminal prosecutions the accused "In suits at common law, where the value

capital, or otherwise infamous crime, shall enjoy the right to a speedy and in controversy shall exceed twenty dol-

unless on a presentment or indictment public trial, by an impartial jury. . . ." lars, the right of trial by jury shall be

of a Grand Jury. . . ." preserved. . . ."

STATES LISTED IN PROCLAMATION OF RATIFICATION

Connecticut Art. I, 9, gives right to grand Art. I, 9, similar. Art. I, 21: "The right of trial

1866 *r* jury indictment only if crime by jury shall remain inviolate."

1818 *c* is punishable by death or im

prisonment for life.

New Hampshire Silent Art. XVI guarantees jury trial Art. XX similar, but amendments to

1866 *r* only in capital cases. Part II, 77, ratified in 1852,

1834 *c* permitted trial by Justices of the

Peace in cases under one hundred dollars

Tennessee Art. I, 14, similar. Art. I, 9, 14, similar Art. I, 6, similar.

1866 *r*

1834 *c*

New Jersey Art. I, 9, similar. Art. I, 8, similar. Art. I, 7, preserves jury right

1844 *r* except that legislature may

1844 *c* authorize trial by jury of six

when the amount in controversy

is less than fifth dollars.

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Oregon Silent. Art. I, 11, similar. Art. I, 18, similar.

1866 *r*

1857 *c*

Vermont Silent. Chap. I, Art. 10, similar. Chap. I, Art. 12, similar.

1866 *r*

1793 *c*

New York Art. I, 6, similar. Art. I, 2, similar.

1867 *r*

1846 *c*

Ohio Art. I, 10, similar. See Fair- Art. I, 10, similar. Art. I, 5, similar.

1867 *r* man, p. 97.*

1851 *c*

Illinois Art. XIII, 10, similar. Constitution Art. XIII, 9, similar. Art. XIII. 6, similar. Constitution

1867 *r* of 1870 provided that the grand jury of 1870 provided that the legislature

1848 *c* could be abolished in all cases. could provide for jury of less than

Art. II, 8. twelve in civil cases before Justices

of the peace. Art. II, 5.

West Virginia Art. II, 1, similar. Art. II, 8, similar. Art. II, 7, similar. Constitution of

1867r@ 1872 provided that legislature could

1861-63 *c*

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Kansas Silent. See Fairman, p. 101. Bill of Rights, 10, similar. Bill of Rights, 5, similar.

1867 *r*

1859 *c*

Maine Art. I, 7, similar. Art. I, 6, similar. Art. I, 20. similar

1867 *r*

1819 *c*

Nevada Art. I, 8, similar. Art. I, 3, similar. Art. I, 3, provides for a three-fourths

1867 *r* vote of the jury in civil cases.

1864 *c*

Missouri Art. I, 24, similar. In the Consti- Art. I, 18, similar. The Constitution Art. I, 17, similar. The Constitution

1867 *r* tution of 1875, it is provided that of 1875 permits juries of less than of 1875 permits juries of less than

1865 *c* nine of the twelve men on the grand twelve in courts not of record, Art. 11, twelve in courts not of record, Art. II,

jury may indict. Art. II, 28. 28, and does not specify the limits 28, and does not specify the limits

of the jurisdiction of such courts. of the jurisdiction of such courts.

Indiana Art. VII, 17: "The General Assembly Art. I, 13, similar. Art. I, 20, similar.

1867 *r* may modify or abolish the Grand Jury

1851 *c* system." See Fairman, p. 106.

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Minnesota Silent. Art. I, 6, similar. Art. I, 4, similar. But in 1890, the

1867 *r* constitution was amended to permit the

1857 *c* legislature to provide for a five-sixths

verdict after not less than six hours'

debate.

Rhode Island Art. I, 7, similar. Art. I, 10, similar. Art. I, 15, similar.

1867 *r*

1842 *c*

Wisconsin Art. I, 8, similar. In 1870, the Art. I, 7, similar. Art. I, 5, similar.

1867 *r* constitution was amended to permit

1848 *c* prosecutions without a grand jury

indictment. Amendments, Art. I.

See Fairman, pp. 119-111.

Pennsylvania Art. IX, 10, similar. Art., 9, similar. Art. IX, 6, similar

1867 *r*

1838 *c*

Michigan Silent. See Fairman, pp. 115-116. Art. VI, 28, permits juries of less Art. VI, 27, similar.

1867 *r* than twelve in courts not of record.

1850 *c* The constitution does not specify the

limits of the jurisdiction of such courts.

Massachusetts Silent. First Part, Art. XII, restricts jury First Part, Art. XV, similar

1867 *r* right to trial of cases involving

"capiral or infamous punichment."

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Nebraska Art. I, 8, similar. The Constitution Art. I, 7, similar. Art. I, 5, permits legislature to

1867 *r* of 1875 provided that the legislature authorize juries of less than twelve

1866-67 *c* could abolish the grand jury system. in "inferior courts." In the Consti-

Art. I, 10. See Fairman, pp. 123-124. tution of 1875, the provision was alter-

ed to read in "courts inferior to the

district court." Art. I, 6. County

courts, which are such inferior tribu-

nals, were given jurisdiction up to one

thousand dollars by the Constitution of

1875. Art. VI, 16. See Fairman, pp.

122-123.

Iowa Art. I, 11, similar. An amendment in Art. I, 10, similar. Art. I, 9, authorizes juries of less

1868 *r* 1884 permitted prosecutions without than twelve "in inferior courts."

1857 *r* indictment.

Arkansas Art. I, 9, similar. Art. I, 8, similar. Art. I, 6, similar.

1868 *r*

1868 *c*

Florida Art. I, 9, similar. Art. I, 4, similar. Art. I, 4, similar.

1868 *r*

1868 *c*

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North Carolina Art. I, 12, similar. Art. I, 13, similar. Art. I, 19, may limit the guarantee

1868 *r* to "controversies at law respecting

1868 *c* property."

South Carolina Art. I, 19, similar. Art. I, 13, 14, similar. Art. I, 11, similar.

1868 *r*

1868 *c*

Louisiana Title I, Art. 6, permits prosecutions Title I, Art. 6, similar. In Constitution No provision in Bill of Rights. Title

1868 *r* to be begun by indictment or information. of 1879, it is provided that, where IV, Art. 87, indicates that, at least up

1868 *c* See Fairman, p. 127. "penalty is not necessarily imprison- to one hundred dollars, no jury trial

ment at hard labor or death," the legis- need be provided. In Constitution of

lature may provide for a jury of less 1879, the legislature is empowered to

than twelve. Art. 7. provide for less than unanimous ver-

dicts. Art. 116.

Alabama Art. I, 10, similar. Art. I, 8, similar. Art. I, 13, similar.

1868 *r*

1867 *c*

Georgia Silent. Art. I, 7, appears to be similar. But Art. V, 13, appears to be similar. But

1868 *r* Art. V, 4, cl. 5, states that offenses Art. V, 3, cl. 3, states that the

1868 *c* before a District Judge shall be tried Superior Court can render judgment

to a jury of seven. Art. V, 4, cl. 2, without jury "in all civil cases founded

defines the jurisdiction of District on contract, where an issuable defence

Courts; they try all crimes not punish- is not filed on oath."

able with death or imprisonment in the

penitentiary.

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Virginia Silent. Art. I, 8, similar. Art. I, 11, similar.

1869 *r*

1864 *c*

Mississippi Art. I, 31, similar. Art. I, 7, similar. Art. I, 12, similar.

1870 *r*

1868 *c*

Texas Art. I, 8, permits institutions of crim- Art. I, 8, 12, similar. Art. 16, similar.

1870 *r* inal proceedings on indictment or infor-

1868 *c* mation.

STATES ADMITTED TO THE UNION AFTER THE RATIFICATION OF THE FOURTEENTH AMENDMENT

Colorado Art. II, 23, provides grand jury shall Art. II, 16, 23, similar. Art. II, 23, permits legislature to set

1876 *ad* have only twelver, nine of whom can the size of the jury at less than

1876 *c* indict. It also provides that "The twelve.

general assembly may change, regulate,

or abolish the grand jury system."

North Dakota Art. I, 8, guarantees indictment for Art. I, 7, similar. Art. I, 7, limits its guarantee to

1889 *ad* felonies, but also states that the courts of record, but the delineation

1889 *c* legislature may abolish the grand jury of jurisdiction is not clear.

system.

Montana Art. III, 8, permits prosecution by Art. III, 16, 23. The latter section Art. III, 23, provides for a two-thirds

1889 *ad* information and provides that, if a provides that, in criminal actions not verdict. Furthermore, the jury in a

1889 *c* grand jury be established, it shall amounting to a felony a two-thirds Justice's court is composed of not more

have seven persons, five of whom vote is sufficient to convict. than six persons. Such courts have

can indict. jurisdiction up to three hundred

dollars. Art. VIII, 20.

South Dakota Art. VI, 10, provides for institution Art. VI, 6, 7, similar. Art. VI, 6, permits legislature to

1889 *ad* of criminal actions by information or provide for three-fourths vote. In

1889 *c* indictment and permits the legislature courts not of record, juries of less

to abolish the grand jury entirely. than twelve are permitted.

Washington Art. I, 25, sanctions the use of infor- Art. I, 21, similar. Art. I, 21, provides for a three-fourths

1889 *ad* nation to initiate criminal proceedings. verdict in courts of record and for

1889 *c* juries of less than twelve in courts

not of record.

Idaho Art. I, 8, provides for institution Art. I, 7, provides that, for misde- Art. I, 7, provides for three-fourths

1890 *ad* of criminal actions by information or meanors, a five-sixths verdict can verdict.

1889 *c* indictment. convict.

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Wyoming Art. I, 13, continues grand jury until Art. I, 9, similar. Art. I, 9, permits the legislature to

1890 *ad* otherwise provided. Art. I, 9, establish juries of less than twelve.

1889 *c* provides that the grand jury will be com-

posed of twelve, nine of whom can indict.

The legislature is empowered to change or

abolish the grand jury system.

Utah Art. I, 13, offers alternatives: the Art. I, 10, preserves traditional jury Art. I, 10, provides that, in courts of

1896 *ad* charge may be brought before a com- only in capital cases. In other prose- general jurisdiction, trial shall be to

1895 *c* mitting magistrate, and if the accused cutions, if in courts of general juris- a jury of eight, verdict by three-

is held by such magistrate, he may be diction, there shall be a jury of eight; fourths vote. In courts of inferior

tried on information; the alternative if in courts of inferior jurisdiction, jurisdiction, trial is to a jury of

is indictment, but by a grand jury of there shall be a jury of four. four, verdict by three-fourths vote.

seven, five to indict.

Oklahoma Art. II, 17, permits prosecution by Art. II, 19, requires unanimous verdict Art. II, 19, provides for a three-

1907 *ad* indictment or information. Art. II, in felony cases, but only three-fourths fourths verdict.

1907 *c* 18, provides that a grand jury, if in trial of other crimes. Inferior

any, is to be composed of twelve courts are established with juries of six.

jurors, nine needed to indict.

Arizona Art. II, 30, permits initiation of Art. II, 23, permits juries of less Art. II, 23, provides that the legis-

1912 *ad* criminal proceedings by either in- than twelve in courts not of record. lature may establish a three-fourths

1910 *c* formation or indictment. Art. VI, 6, 10, may indicate legis- verdict in courts of record and juries

lature can vest such courts with juris- of less than twelve in courts not of

diction over all misdemeanors. record.

New Mexico Art. II, 14, permits initiation of crim- Art. II, 12. similar. Art. II, 12, permits the legislature

1912 *ad* inal proceedings by either information to provide for a less-than-unanimous

1911 *c* or indictment. If by indictment, grand vote. In cases triable by courts lower

jury must have at least twelve jurors; than the District Courts (Justices of

if there are twelve jurors, eight can the Peace can be given jurisdiction up

indict, if more than twelve, a majority to two hundred dollars, Art. VI, 26),

can indict. the legislature can establish juries of

six.

Alaska Art. I, 8, guarantees grand jury, but Art. I, 11, permits legislature to pro- Art. I, 16, provides for a jury only if

1959 *ad* the grand jury is of twelve, a major- vide for juries of between six and more than two hundred and fifty dollars

1958 *c* ity of whom can indict. twelve in courts not of record, and is involved. Furthermore, the verdict

does not specify jurisdictional limits in such cases is to be by three-fourths

of such courts. vote if the legislature so desires.

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ewm:

* Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan.L.Rev. 5 (hereinafter cited as Fairman).

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MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS concur, dissenting.

Petitioner, Bartkus, was indicted in a United States District Court for bank robbery. He was tried by a jury and acquitted. So far as appears, the trial was conducted fairly by an able and conscientious judge. Later, Bartkus was indicted in an Illinois state court for the same bank robbery. This time, he was convicted and sentenced to life imprisonment. His acquittal in the federal court would have barred a second trial in any court of the United States because of the provision in the Fifth Amendment that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." The Court today rejects Bartkus' contention that his state conviction after a federal acquittal violates the Fourteenth Amendment to our Constitution. I cannot agree.

The Court's holding further limits our already weakened constitutional guarantees against double prosecutions. *United States v. Lanza,* 260 U. S. 377 , decided in 1922, allowed federal conviction and punishment of a man who had been previously convicted and punished for the identical acts by one of our States. Today, for the first time in its history, this Court upholds the state conviction of a defendant who had been *acquitted* of the same offense in the federal courts. I would hold that a federal trial following either state acquittal or conviction is barred by the Double Jeopardy Clause of the Fifth Amendment. *Abbate v. United States, post,* p. 359 U. S. 201 (dissenting opinion). And, quite apart from whether that clause is as fully binding on the States as it is on the Federal Government, *see Adamson v. California,* 332 U. S. 46 , 332 U. S. 68 (dissenting opinion), I would hold that Bartkus' conviction cannot stand. For I think 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

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Fourteenth Amendment, expressed in *Palko v. Connecticut,* 302 U. S. 319 . [Footnote 2/1]

The Fourteenth Amendment, this Court Said in *Palko,* does not make all of the specific guarantees of the Bill of Rights applicable to the States. But, the Court noted, some of "the privileges and immunities" of the Bill of Rights, "have been taken over . . . and brought within the Fourteenth Amendment by a process of absorption." 302 U.S. at 302 U. S. 326 . The Court indicated that incorporated in due process were those "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." 302 U.S. at 302 U. S. 325 . [Footnote 2/2] It then held that a statute allowing a State to appeal in a criminal case did not violate such fundamental principles. But it expressly left open the question of whether "the state [could be] permitted after a trial free from error to try the accused over again." 302 U.S. at 302 U. S. 328 . That question is substantially before us today.

Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. Its roots run deep into

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Greek and Roman times. [Footnote 2/3] Even in the Dark Ages, when so many other principles of justice were lost, the idea that one trial and one punishment were enough remained alive through the canon law and the teachings of the early Christian writers. [Footnote 2/4] By the thirteenth century, it seems to have been firmly established in England, [Footnote 2/5] where it came

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to be considered as a "universal maxim of the common law." [Footnote 2/6] It is not surprising, therefore, that the principle was brought to this country by the earliest settlers as part of their heritage of freedom, [Footnote 2/7] and that it has been

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recognized here as fundamental again and again. [Footnote 2/8] Today it is found, in varying forms, not only in the Federal Constitution, but in the jurisprudence or constitutions of every State, as well as most foreign nations. [Footnote 2/9] It has, in fact, been described as a part of all advanced systems of law, [Footnote 2/10] and as one of those universal principles

"of reason, justice, and conscience, of which Cicero said: 'Nor is it one thing at Rome and another at Athens, one now and another in the future, but among all nations it is the same.' [Footnote 2/11]"

While some writers have explained the opposition to double prosecutions by emphasizing the injustice inherent in two punishments for the same act, [Footnote 2/12] and others have stressed the dangers to the innocent from allowing the full power of the state to be brought against them

in two trials, [Footnote 2/13] the basic and recurring theme has always simply been that it is wrong for a man to "be brought into Danger for the same Offence more than once." [Footnote 2/14] Few principles have been more deeply "rooted in the traditions and conscience of our people."

The Court apparently takes the position that a second trial for the same act is somehow less offensive if one of the trials is conducted by the Federal Government and the other by a State. Looked at from the standpoint of the individual who is being prosecuted, this notion is too subtle for me to grasp. If double punishment is what is feared, it hurts no less for two "Sovereigns" to inflict it than for one. 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. In each case, inescapably, a man is forced to face danger twice for the same conduct.

The Court, without denying the almost universal abhorrence of such double prosecutions, nevertheless justifies the practice here in the name of "federalism." This, it seems to me, is a misuse and desecration of the concept. Our Federal Union was conceived and created "to establish Justice" and to "secure the Blessings of Liberty," not to destroy any of the bulwarks on which both freedom and justice depend. We should, therefore, be suspicious of any supposed "requirements" of "federalism" which result in obliterating ancient safeguards. I have been shown nothing in the history of our Union, in the writings of its Founders, or elsewhere, to indicate that individual rights deemed essential by both State and Nation were to

be lost through the combined operations of the two governments. Nor has the Court given any sound reason for thinking that the successful operation of our dual system of government depends in the slightest on the power to try people twice for the same act.

Implicit in the Court's reliance on "federalism" is the premise that failure to allow double prosecutions would seriously impair law enforcement in both State and Nation. For one jurisdiction might provide minor penalties for acts severely punished by the other, and, by accepting pleas of guilty, shield wrongdoers from justice. I believe this argument fails on several grounds. In the first place, it relies on the unwarranted assumption that State and Nation will seek to subvert each other's laws. It has elsewhere been persuasively argued that most civilized nations do not and have not needed the power to try people a second time to protect themselves, even when dealing with foreign lands. [Footnote 2/15] It is inconceivable to me, as it was to the Constitutional Court of South Carolina in 1816, that,

"If this prevails among nations who are strangers

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to each other, [it could] fail to [prevail] with us who are so intimately bound by political ties."

State v. Antonio, 2 Treadway's Const.Rep. (S.C.) 776, 781. *Cf. Testa v. Katt,* 330 U. S. 386 .

The Court's argument also ignores the fact that our Constitution allocates power between local and federal governments in such a way that the basic rights of each can be protected without double trials. The Federal Government is given power to act in limited areas only, but, in matters properly within its scope, it is supreme. It can retain exclusive control of such matters, or grant the States concurrent power on its own terms. If the States were to subvert federal laws in these areas by imposing inadequate penalties, Congress would have full power to protect the national interest, either by defining the crime to be punished and establishing minimum penalties applicable in both state and federal courts or by excluding the States altogether. Conversely, in purely local matters, the power of the States is supreme and exclusive. State courts can and should, therefore, protect all essentially local interests in one trial without federal interference. *Cf. Rutkin v.*

United States, 343 U. S. 130 , 343 U. S. 139 (dissenting opinion). In areas, however, where the Constitution has vested power in the Federal Government, the States necessarily act only to the extent Congress permits, and it is no infringement on their basic rights if Congress chooses to fix penalties smaller than some of them might wish. In fact, this will rarely occur, for Congress is not likely to use indirect means to limit state power when it could accomplish the same result directly by preempting the field. [Footnote 2/16]

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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. Hawkins, in his Pleas of the Crown, 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." [Footnote 2/17] It was discarded as a dangerous fiction then, it should be discarded as a dangerous fiction now.

To bolster its argument that successive state and federal prosecutions do not violate basic principles of justice, the Court cites many cases. It begins with eight early state decisions which, it says, "clarified the issue by stating opposing arguments." Four of these cases held that prosecution by one government must bar subsequent prosecutions elsewhere. [Footnote 2/18] Two of the remaining four refused to hold that concurrent jurisdiction could exist, since they feared that such a holding might bring about two trials for the same offense, a result they considered too shocking to tolerate. "This is against natural justice," said the North Carolina Superior Court in 1794, "and therefore I cannot believe it to be law." [Footnote 2/19] The seventh case cited is an inconclusive discussion coming from a State whose highest court had previously stated

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unequivocally that a bar against double prosecutions would exist. [Footnote 2/20] Thus, only one of these early state cases actually approves the doctrine the

Court today advances, and that approval is in dicta. [Footnote 2/21] Significantly, the highest court of the same State later expressed the view that such double trials would virtually never occur in our country. [Footnote 2/22]

The Court relies mainly, however, on a later line of decisions starting with *Fox v. Ohio,* 5 How. 410. Most of these, like *Fox* itself, involved only the question of whether both State and Federal Governments could make the same conduct a crime. Although some, in dicta, admitted the possibility that double prosecutions might result from such concurrent power, others did not discuss the question. [Footnote 2/23] Many, especially among the earlier cases, pointed out that double punishment violates the genius of our

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free country, and therefore would never occur. As Chief Justice Taney, on circuit, said in one of them,

"Yet, in all civilized countries, it is recognized as a fundamental principle of justice that a man ought not to be punished twice for the same offence, and, if this party had been punished . . . in the state tribunal, the court would have felt it to be its duty to suspend sentence, and to represent the facts to the president to give him an opportunity of . . . granting a pardon. [Footnote 2/24]"

While a limited number of cases after *Fox* are cited in which a double conviction was upheld, in several of these, the second court was so troubled by the result that only nominal sentences were imposed. [Footnote 2/25] In fact, before *United States v. Lanza,* 260 U. S. 377 (1922), where this Court upheld and encouraged the practice, the cases of actual double punishment found are so few, in relation to the great mass of criminal cases decided, that one can readily discern an instinctive unwillingness to impose such hardships on defendants. [Footnote 2/26]

Despite its exhaustive research, the Court has cited only three cases before *Lanza* where a new trial after an acquittal was upheld. In one of these, *United States v. Barnhart,* 22 F. 285, the state court in which the defendant had been

acquitted did not have jurisdiction of the action. The Federal Circuit Court relied on this lack of jurisdiction in allowing a retrial, but made

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an alternate holding based on the same general arguments used by the Court today. [Footnote 2/27] The Barnhart opinion also intimated that the first trial may have been a sham. [Footnote 2/28] Sham trials, as well as those by courts without jurisdiction, have been considered by courts and commentators not to be jeopardy, and might therefore not bar subsequent convictions. [Footnote 2/29] In the second case cited by the Court, the state conviction followed acquittal by a federal court-martial at a time when, as the state court seemed to recognize, a military trial was thought by many not to be a trial for the purpose of double jeopardy even when both trials were conducted by the same "Sovereign." [Footnote 2/30] The third case relied on, a 1915 decision from the State of Washington, is the only one of the three where it can fairly be said that a defendant acquitted in a proper

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jury trial was subsequently tried again by a jury and convicted. [Footnote 2/31]

One may, I think, infer from the fewness of the cases that retrials after acquittal have been considered particularly obnoxious, worse even, in the eyes of many, than retrials after conviction. [Footnote 2/32] I doubt, in fact, if many practices which have been found to violate due process can boast of so little actual support. Yet it is on this meager basis that the Court must ultimately rest its finding that Bartkus' retrial does not violate fundamental principles "rooted in the traditions and conscience of our peoples." Nor are these scattered and dubious cases unchallenged, for, balanced against them we have a firm holding by this Court sustaining an extremely narrow construction of a federal statute in order to make a state acquittal conclusive in the federal courts, and thereby avoid the evil approved today. *United States v. Mason,* 213 U. S. 115 . That case, as well as the

"sacred duty . . . to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman,"

Ex parte Lane, 18 Wall. 163, 85 U. S. 178 , should make us doubly hesitant to encourage so blatant a violation of constitutional policies against double trials by giving an "illiberal construction . . . to the words of the fundamental law in which they are embodied." *Ibid.*

Since *Lanza,* people have apparently become more accustomed to double trials, once deemed so shocking, just

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as they might, in time, adjust themselves to all other violations of the Bill of Rights should they be sanctioned by this Court. The Court is therefore able to find a 1943 state case, as well as four federal cases in the last five years, in which a conviction following acquittal was sustained. [Footnote 2/33] Thus, this practice, which for some 150 years was considered so undesirable that the Court must strain to find examples, is now likely to become a commonplace. For, after today, who will be able to blame a conscientious prosecutor for failing to accept a jury verdict of acquittal when he believes a defendant guilty and knows that a second try is available in another jurisdiction, and that such a second try is approved by the Highest Court in the Land? Inevitably, the victims of such double prosecutions will most often be the poor and the weak in our society, individuals without friends in high places who can influence prosecutors not to try them again. The power to try a second time will be used, as have all similar procedures, to make scapegoats of helpless, political, religious, or racial minorities and those who differ, who do not conform and who resist tyranny. *See Chambers v. Florida,* 309 U. S. 227 , 309 U. S. 236 .

There are some countries that allow the dangerous practice of trying people twice. I am inserting below a recent news item about a man who was tried, convicted, sentenced to prison and then was tried again, convicted and sentenced to death. [

Footnote 2/34] Similar examples are not hard

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to find in lands torn by revolution or crushed by dictatorship. I had thought that our constitutional protections embodied in the Double Jeopardy and Due Process Clauses would have barred any such things happening here. Unfortunately, last year's holdings by this Court in *Ciucci v. Illinois,* 356 U. S. 571 , and *Hoag v. New Jersey,* 356 U. S. 464 , and today's affirmance of the convictions of Bartkus and Abbate cause me to fear that, in an important number of cases it can happen here.

I would reverse.

[Footnote 2/1]

While I participated in the Court's holding and opinion in *Palko,* I have since expressed my disagreement with both, as has MR. JUSTICE DOUGLAS. *Adamson v. California,* 332 U. S. 46 , 332 U. S. 68 (dissenting opinion). *See also Rochin v. California,* 342 U. S. 165 , 342 U. S. 174 , 342 U. S. 177 (concurring opinions); *Hoag v. New Jersey,* 356 U. S. 464 , 356 U. S. 477 , 356 U. S. 480 , n. 5 (dissenting opinion).

[Footnote 2/2]

The Court expressed the same thought in various other ways. The crucial principles were termed those "implicit in the concept of ordered liberty," 302 U.S. at 302 U. S. 325 ; those without which it would be impossible "to maintain a fair and enlightened system of justice," *ibid.;* or without which "neither liberty nor justice would exist," *id.* at 302 U. S. 326 ; those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," and those whose absence creates "a hardship so acute and shocking that our polity will not endure it." *Id.* at 302 U. S. 328 .

[Footnote 2/3]

See Bonner, Lawyers and Litigants in Ancient Athens, 195; 1 Potter, Grecian Antiquities (1808), 194; Radin, Roman Law, 475, n. 28; 2 Sherman, Roman Law in the Modern World (3d ed.1937), 488489; Berner, *Non bis in idem,* 3 Archiv fur Preussisches Strafrecht (1855), 472; Digest of Justinian: Digest 48.2.7.2, translated in 11 Scott, The Civil Law, 17, as "The governor should not permit the same person to be again accused of crime of which he has been acquitted ."

[Footnote 2/4]

The canon law opposition to double trials stemmed from a reading given by St. Jerome in 391 A. D. to I Nahum 9 (Douay version), "there shall not rise a double affliction." (In the King James version, I Nahum 9, is given as "affliction shall not rise up the second time.") Jerome drew from this the rule that God does not punish twice for the same act. *See* 25 Migne, Patrologia Latina (1845), 1238. This maxim found its way into church canons as early as 847 A.D., and was subsequently given as, "Not even God judges twice for the same act." *See* Brooke, The English Church and the Papacy, 205; 2 Maitland, Collected Papers (Fisher ed.1911), Essay, Henry II and the Criminous Clerks, 239; 1 Pollock and Maitland, History of English Law (2d ed. 1899), 448-449; Poole, Domesday Book to Magna Carta, 206. *See also* Berner, *op. cit. supra,* note 3, emphasizing the Roman antecedents of the canon law rule.

[Footnote 2/5]

See 2 Bracton, De Legibus et Consuetudinibus Angliae (Woodbine ed.1922), 391, 397, applying the concept even to acquittals in trial by battle. *Cf.* 2 Hawkins, Pleas of the Crown (4th ed. 1762), 368-379; 2 Staundeforde, Les Plees Del Corone (rev. ed. 1583), 105-108.

In the twelfth century, avoidance of double punishment was a major element in the celebrated controversy between St. Thomas Becket and King Henry II. Henry wanted clerics who had been convicted of crimes in church courts turned over to lay tribunals for their punishment. Whether Becket was, in fact, correct in his assertions that Henry's proposals would result in double punishment for the clerics

has been much debated by historians. In all events, Henry's plan was abandoned after Becket's murder. *See* Brooke, *op. cit. supra,* note 4, at 190-214; 2 Maitland, *op. cit. supra,* note 4; 1 Pollock and Maitland, *op. cit. supra,* note 4, at 447-456; Poole, *op. cit. supra,* note 4, at 203-218.

[Footnote 2/6]

2 Cooley's Blackstone (4th ed. 1899), *335, 336. *See also* 2 Staundeforde, *op. cit. supra,* note 5, at 105-108; Lambert, Crompton and Dalton, Manuall or Analecta (rev. ed. 1642), 69-70; 3 Coke, Institutes (6th ed. 1680), 213-214; 2 Hawkins, *op. cit. supra,* note 5, at 368-379. One commentator has stated that the concept was borrowed by English law from the canon law doctrine of criminal procedure. Radin, Anglo-American Legal History, 228.

In 1487, an exception was made in the rule by a statute dealing with the "Authority of the Court of Star Chamber," 3 Hen. 7, c. 1. At the time, criminal proceedings could be brought in two ways, by government indictment and by the parties who suffered injury from the crime. 3 Hen. 7, c. 1, provided that, in "Death or Murder" cases, a defendant acquitted or attainted under government prosecution could be tried again on charges brought by "the Wife, or next Heir to him so slain." The Act was apparently never broadened, and was given an extremely narrow construction. *See* Hawkins, *op. cit. supra,* note 5, at 373-374, 377-379. *See also* Staundeforde, *op. cit. supra,* note 5, at 106-108. It soon fell into disuse, and the legal profession was greatly shocked when, in 1818, the statute was relied on to justify the retrial of a defendant who had previously been acquitted. After many maneuvers, which included upholding the defendant's right to trial by battle, a second acquittal was obtained, and the loophole in the "universal rule" against double trials was formally plugged by Parliament. *See* Radin, Anglo-American Legal History, 226-227, n. 24; Kirk, "Jeopardy" During the Period of the Year Books, 32 U.Pa.L.Rev. 602, 608 609.

[Footnote 2/7]

The Body of Liberties of Massachusetts (1641), clause 42, reads, "No man shall be twise sentenced by Civille Justice for one and the same Crime, offence, or Trespasse." *See also* The Laws and Liberties of Massachusetts (1648) (Farrand ed.1929) 47,

"everie Action . . . in *criminal* Causes shall be . . . entered in the *rolls* of everie Court . . . that such Actions be not afterwards brought again to the vexation of any man."

Similarly, the pleas of former conviction and acquittal were recognized in colonial Virginia. Scott, Criminal Law in Colonial Virginia, 81-82, 102.

[Footnote 2/8]

See, e.g., *85 U. S.* 18 Wall. 163; *Green v. United States,* 355 U. S. 184 , 355 U. S. 198 (majority and dissenting opinions); *Commonwealth v. Olds,* 5 Litt.Rep. (Ky.) 137 (1824); *State v. Cooper,* 13 N.J.L. 361, 370 (1833).

[Footnote 2/9]

All but five States recognize the principle in their constitutions. Each of these five prohibits double jeopardy as part of its common law. *See Brock v. North Carolina,* 344 U. S. 424 , 344 U. S. 429 , 435 (dissenting opinion); American Law Institute, Double Jeopardy (1935), 61-72.

The maxim " *non bis in idem* " is found throughout the civil law. *See* Batchelder, Former Jeopardy, 17 Am.L.Rev. 735. *See also* Berner, *Non bis in idem,* 3 Archiv fur Preussisches Strafrecht (1855), 472; Kussner, *Non bis in idem, id.* at 198; Donnedieu de Vabres, Droit Criminel (3d ed.1947), 886-887; It. Codice di Procedura Penale, Art. 90, 579 (Ludus ed.1955). *But cf.* Radin, Anglo-American Legal History, 228.

[Footnote 2/10]

American Law Institute, Double Jeopardy (1935), Introductory note, p. 7.

[Footnote 2/11]

Batchelder, Former Jeopardy, 17 Am.L.Rev. 735.

[Footnote 2/12]

See, e.g., *85 U. S.* 18 Wall. 163, 85 U. S. 168 -169.

[Footnote 2/13]

See, e.g., Commonwealth v. Olds, 5 Litt. Rep. (Ky.) 137, 139 (1824); *State v. Cooper,* 13 N.J.L. 361, 370-371 (1833); 2 Tucker, Constitution of the United States, 675.

[Footnote 2/14]

2 Hawkins, *op. cit. supra,* note 5, at 372. *See also id.* at 377.

[Footnote 2/15]

Grant, The *Lanza* Rule of Successive Prosecutions, 32 Col.L.Rev. 1309; Grant, Successive Prosecutions by State and Nation, 4 U.C.L.A.L.Rev. 1; Developments in the Law -- Conspiracy, 72 Harv.L.Rev. 920, 968, n. 347. *Cf. Feldman v. United States,* 322 U. S. 487 , 322 U. S. 494 (dissenting opinion); *Knapp v. Schweitzer,* 357 U. S. 371 , 357 U. S. 382 (dissenting opinion). In England the doctrine that a foreign acquittal is a good plea in bar seems to antedate the American Revolution. *See Rex v. Hutchinson,* as reported in *Beak v. Thyrwhit,* 3 Mod.194, 87 Eng.Rep. 124 (1689), and *Burrows v. Jemino,* 2 Str. 733, 93 Eng.Rep. 815 (1726), *but compare* the report of the same case in *Gage v. Bulkeley,* Ridg.T.H. 263, 27 Eng.Rep. 824 (1744); *Rex v. Roche,* 1 Leach 134, 135n, 168 Eng.Rep. 169, 169n (1775). *Cf. Rex v. Thomas,* 1 Sid. 179, 82 Eng.Rep. 1043; 1 Lev. 118, 83 Eng.Rep. 326; 1 Keb. 663, 83 Eng.Rep. 1172 (1664); 2 Hawkins, *op. cit. supra,* note 5, at 372. *See also Rex v. Aughet,* 26 Cox C.C. 232, 238 (C.C.A.1918); 10 Halsbury, The Laws of England (3d ed.1955), 405.

[Footnote 2/16]

See, e.g., Hines v. Davidowitz, 312 U. S. 52 . *Cf. Weber v. Anheuser-Busch, Inc.,* 348 U. S. 468 . Significantly, *United States v. Lanza,* 260 U. S. 377 , involved the only situation where the Court's argument may have had some slight validity. For that case was concerned with a prohibition violation, and the Eighteenth (Prohibition) Amendment could be taken to have established an area of concurrent state and national power where the Federal Government was not supreme. *See Pennsylvania v. Nelson,* 350 U. S. 497 , 350 U. S. 500 .

[Footnote 2/17]

2 Hawkins, *op. cit. supra,* note 5, at 370. *See also* 2 Staundeforde, *op. cit. supra,* note 5, at 105-106.

[Footnote 2/18]

State v. Antonio, 2 Treadway's Const. Rep. (S.C.) 776 (1816); *State v. Randall,* 2 Aikens (Vt.) 89 (1827); *Harlan v. People,* 1 Doug.Rep. (Mich.) 207 (1843); *Commonwealth v. Fuller,* 8 Met. (Mass.) 313 (1844).

[Footnote 2/19]

State v. Brown, 2 N.C. *100, 101 (1794). *See also Mattison v. State,* 3 Mo. *421 (1834).

[Footnote 2/20]

State v. Tutt, 2 Bailey (S.C.) 44 (1830). *Compare State v. Antonio,* 2 Treadway's Const.Rep. (S.C.) 776 (1816).

[Footnote 2/21]

Hendrick v. Commonwealth, 5 Leigh (Va.) 707 (1834).

[Footnote 2/22]

Jett v. Commonwealth, 18 Gratt. (59 Va.) 933, 947, 959 (1867).

[Footnote 2/23]

See, e.g., State v. Duncan, 221 Ark. 681, 255 S.W.2d 430; *Dashin v. State,* 78 Ind. 357; *State v. Gauthier,* 121 Me. 522, 118 A. 380; *Commonwealth v. Nickerson,* 236 Mass. 281, 128 N.E. 273; *State v. Holm,* 139 Minn. 267, 166 N.W. 181; *State v. Whittemore,* 50 N.H. 245; *State v. Frach,* 162 Ore. 602, 94 P.2d 143; *Commonwealth ex rel. O'Brien v. Burke,* 171 Pa.Super. 273, 90 A.2d 246; *Jett v. Commonwealth,* 18 Gratt. (59 Va.) 933. *See also State v. Tutt,* 2 Bailey (S.C.) 44; *State v. Brown,* 2 N.C. *100. Dicta can, of course, be found which runs against the Court's holding. *See, e.g., Nielsen v. Oregon,* 212 U. S. 315 , 212 U. S. 320 , where this Court said:

"Where an act is . . . prohibited and punishable by the laws of both States, the one first acquiring jurisdiction of the person may prosecute the offense, and its judgment is a finality in both States, so that one convicted or acquitted in the courts of the one State cannot be prosecuted for the same offense in the courts of the other."

And *United States v. Furlong,* 5 Wheat. 184, 18 U. S. 197 ,

"Robbery on the seas is . . . within the criminal jurisdiction of all nations . . . , and there can be no doubt that the plea of *autre fois acquit* would be good in any civilized State, though resting on a prosecution instituted in the Courts of any other civilized State."

[Footnote 2/24]

United States v. Amy, 24 Fed.Cas. No. 14,445, at 811. *See also* *Fox v. Ohio,* 5 How. 410, 46 U. S. 435 ; *United States v. Wells,* 28 Fed.Cas. 522, No. 16,665; *Jett v. Commonwealth,* 18 Gratt. (59 Va.) 933, 947.

[Footnote 2/25]

See, e.g., United States v. Palan, 167 F. 991, 992-993, "to punish a man twice for the same offence shocks the sense of justice." *See also United States v. Holt,* 270 F. 639, 642-643.

[Footnote 2/26]

The Court also relies on cases arising since *Lanza* where fear of that holding caused tight construction of federal laws to avoid double prosecutions. *See Jerome v. United States,* 318 U. S. 101 ; *Screws v. United States,* 325 U. S. 91 . *Cf. Pennsylvania v. Nelson,* 350 U. S. 497 , 350 U. S. 509 . These cases can hardly be thought to approve the result they sought to avoid.

[Footnote 2/27]

The case involved the killing of an Indian by white men on an Indian reservation. The court said:

"The defendants have never been tried for the offense charged in this indictment. For either, the state court before which they were tried had no jurisdiction in the premises, and then the proceeding set forth in the pleas was a nullity; or if it had, it was an offense against the law of the state, and not the United States."

22 F. at 291. The court was correct in its belief that the state court had no jurisdiction. *See Williams v. Lee,* 358 U. S. 217 . The decision was on a demurrer to a plea of former acquittal, and it does not appear whether the federal jury convicted.

[Footnote 2/28]

The court noted, "No white man was ever hung for killing an Indian, and no Indian tried for killing a white man ever escaped the gallows." 22 F. at 289.

[Footnote 2/29]

See, e.g., United States v. Ball, 163 U. S. 662 , 163 U. S. 669 ; *Edwards v. Commonwealth,* 233 Ky. 356, 25 S.W.2d 746. *Cf. United States v. Mason,* 213

U. S. 115 , 213 U. S. 120 , 213 U. S. 125 . *See also* 2 Hawkins, *op. cit. supra,* note 5, at 370.

[Footnote 2/30]

State v. Rankin, 4 Cold. (Tenn.) 145, 157 (1867). The Ranking court cited an account of a federal court-martial following acquittal by Florida territorial courts. Similarly, *United States v. Cashiel,* 25 Fed.Cas. 318, No. 14,744 (1863), upheld a federal prosecution following prosecution by the United States military authorities.

[Footnote 2/31]

State v. Kenney, 83 Wash. 441, 145 P. 450.

[Footnote 2/32]

See, e.g., Commonwealth v. Olds, 5 Litt.Rep. (Ky.) 137, 139; *State v. Cooper,* 13 N.J.L. 361, 370-371. *See also* Iowa Const., Art. I, 12; Mich.Const., Art. II, 14; Mo.Const., Art. I, 19; N.H.Const., Pt. First Art. 16; N.J.Const., Art. I, 11; R.I.Const., Art. I, 7; Tex.Const., Art. I, 14. The Federal Bill of Rights did not, of course, differentiate between retrials after acquittal and retrials after conviction; it banned both.

[Footnote 2/33]

New Jersey v. Cioffe, 130 N.J.L. 160, 32 A.2d 79 (1943); *Serio v. United States,* 203 F.2d 576 (1953); *Jolley v. United States,* 232 F.2d 83 (1956); *Smith v. United States,* 243 F.2d 877 (1957); *Rio v. United States,* 256 F.2d 173 (1958).

[Footnote 2/34]

The New York Times for October 22, 1958, p. 4, col. 6, carried the following item under the Moscow date line:

"A 19-year-old 'stilyag' (zoot-suiter) was re-tried and sentenced to death following public protests that the original ten to twenty-five-year term imposed for killing a militiaman during a robbery was too lenient, the newspaper Komsomolskaya

Pravda said today."

"The condemned youth was Victor Shanshkin, leader of a gang of four youths who tried to break into a Moscow store last May, according to the newspaper of the Young Communist Organization."

"He pumped seven bullets into the militiaman, who tried to prevent the robbery."

"The four escaped, but were later arrested and sentenced to prison terms ranging from ten to twenty-five years. The sentences aroused widespread public protests."

"At the second trial, held recently, Shanshkin was sentenced to die. The other three, all under 20 years of age, were ordered to serve prison terms ranging from ten to twenty years."

MR. JUSTICE BRENNAN, whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join, dissenting.

Bartkus was tried and acquitted in a Federal District Court of robbing a federally insured savings and loan association in Cicero, Illinois. He was indicted for the same robbery by the State of Illinois less than three weeks later, and subsequently convicted and sentenced to life imprisonment. The single issue in dispute at both trials was whether Bartkus was the third participant in the robbery, along with two self-confessed perpetrators of the crime.

The Government's case against Bartkus on the federal trial rested primarily upon the testimony of two of the robbers, Joseph Cosentino and James Brindis, who confessed

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their part in the crime and testified that Bartkus was their confederate. The defense was that Bartkus was getting a haircut in a barber shop several miles away at the time the robbery was committed. The owner of the barber shop, his son and other witnesses placed Bartkus in the shop at the time. The federal jury in acquitting Bartkus, apparently believed the alibi witnesses and not Cosentino and

Brindis.

The federal authorities were highly displeased with the jury's resolution of the conflicting testimony, and the trial judge sharply upbraided the jury for its verdict. *See* some of his remarks printed in *United States v. Vasen,* 222 F.2d 3, 9-10 (dissenting opinion). The federal authorities obviously decided immediately after the trial to make a second try at convicting Bartkus, and, since the federal courthouse was barred to them by the Fifth Amendment, they turned to a state prosecution for that purpose. 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." Indeed, the State argued the case on the basis that the record showed as a matter of "fair inference" that the case was one in which

"federal officers bring to the attention of the state prosecuting authority the commission of an act and furnish and provide him with evidence of defendant's guilt."

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

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prosecution of Bartkus. The federal jury acquitted Bartkus late in December, 1953. Early in January, 1954, the Assistant United States Attorney who prosecuted the federal case summoned Cosentino to his office. Present also were the FBI agent who had investigated the robbery and the Assistant State's Attorney for Cook County who later prosecuted the state case. The Assistant State's Attorney said to Cosentino, "Look, we are going to get an indictment in the state court against

Bartkus, will you testify against him?" Cosentino agreed that he would. Later, Brindis also agreed to testify. Although they pleaded guilty to the federal robbery charge in August, 1953, the Federal District Court postponed their sentencing until after they testified against Bartkus at the state trial, which was not held until April, 1954. The record does not disclose what sentences were imposed after they testified at the state trial or whether sentences have yet been imposed. Both Cosentino and Brindis were also released on bail pending the state trial, Brindis on his own recognizance.

In January, also, an FBI agent who had been active in the federal prosecution purposefully set about strengthening the proofs which had not sufficed to convict Bartkus on the federal trial. And he frankly admitted that he "was securing it [information] for the federal government," although what he gathered had "gone to the state authorities." These January efforts of the agent were singularly successful, and may well have tipped the scales in favor of conviction. He uncovered a new witness against Bartkus, one Grant Pursel, who had been enlarged on bail pending his sentencing on his plea of guilty to an indictment for violation of the Mann Act. Pursel testified that, "about two weeks after the federal trial, in the first part of January," the FBI agent sought him out to discuss an alleged conversation between Pursel and Bartkus

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during September, 1953, when both were in jail awaiting their respective federal trials. Pursel's testimony at the state trial, that Bartkus had told him he participated in the robbery, was obviously very damaging. Yet, indicative of the attitude of the federal officials that this was actually a federal prosecution, the FBI agent arranged no interview between Pursel and any state authority. The first time that Pursel had any contact whatsoever with a state official connected with the case was the morning that he testified. And, as in the case of Cosentino and Brindis, Pursel's sentencing was postponed until after he testified against Bartkus at the state trial. Here too, the record does not disclose what sentence was imposed, or whether any has yet been imposed.

Also within a month after the federal acquittal, the FBI agent sought out the operator of the barber shop who had placed Bartkus in his shop at the time of the robbery. The barber testified at both federal and state trials that Bartkus entered his shop before 4 o'clock, about which time the robbery was committed. The agent testified as a rebuttal witness for the State that the barber had told him in January that it might have been after 4:30 o'clock when Bartkus entered the shop. And the significance of the federal participation in this prosecution is further evidenced by the Assistant State's Attorney's motion at the beginning of the trial, which was granted over defense objection, to permit the FBI agent to remain in the courtroom throughout the trial although other witnesses were excluded.

The Court, although not finding such to be the case here, apparently acknowledges that, under certain circumstances it would be necessary to set aside a state conviction brought about by federal authorities to avoid the prohibition of the Fifth Amendment against a second federal prosecution. Our task is to determine how much

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the federal authorities must participate in a state prosecution before it so infects the conviction that we must set it aside. The test, I submit, must be fashioned to secure the fundamental protection of the Fifth Amendment

"that the . . . [Federal Government], 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. . . ."

Green v. United States, 355 U. S. 184 , 355 U. S. 187 . Under any test based upon these principles, this conviction cannot stand. In allowing the use of federal resources to bring about this second try at Bartkus, the Court denies Bartkus the protection which the Fifth Amendment assures him. Given the fact that there must always be state officials involved in a state prosecution, I cannot see how there can be more complete federal participation in a state prosecution than there was in

this case. I see no escape from the conclusion that this particular state trial was, in actuality, a second federal prosecution -- a second federal try at Bartkus in the guise of a state prosecution. If this state conviction is not overturned, then, as a practical matter, there will be no restraints on the use of state machinery by federal officers to bring what is in effect a second federal prosecution.

To set aside this state conviction because infected with constitutional violations by federal officers implies no condemnation of the state processes as such. The conviction is set aside not because of any infirmities resulting from fault of the State, but because it is the product of unconstitutional federal action. I cannot grasp the merit of an argument that protection against federal oppression in the circumstances shown by this record would do violence to the principles of federalism. Of course, cooperation

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between federal and state authorities in criminal law enforcement is to be desired and encouraged, for cooperative federalism in this field can indeed profit the Nation and the States in improving methods for carrying out the endless fight against crime. But the normal and healthy situation consists of state and federal officers cooperating to apprehend lawbreakers and present the strongest case against them at a single trial, be it state or federal. Cooperation in order to permit the Federal Government to harass the accused so as to deny him his protection under the Fifth Amendment is not to be tolerated as a legitimate requirement of federalism. The lesson of the history which wrought the Fifth Amendment's protection has taught us little if that shield may be shattered by reliance upon the requirements of federalism and state sovereignty to sustain this transparent attempt of the Federal Government to have two tries at convicting Bartkus for the same alleged crime. What happened here was simply that the federal effort which failed in the federal courthouse was renewed a second time in the state courthouse across the street. Not content with the federal jury's resolution of conflicting testimony in Bartkus' favor, the federal officers engineered this second prosecution, and, on the second try, obtained the desired conviction. It is exactly this kind of successive prosecution by federal officers that the Fifth Amendment

was intended to prohibit. This Court has declared principles in clearly analogous situations which I think should control here. In *Rea v. United States,* 350 U. S. 214 , the Court held that an injunction should issue against a federal agent's transference of illegally obtained evidence to state authorities for use as the basis of a state charge. If the federal courts have power to defeat a state prosecution by force of their supervision of federal officers, surely the federal courts have power to defeat a state

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prosecution transparently employed by federal authorities in violation of the Fifth Amendment. In *Knapp v. Schweitzer,* 357 U. S. 371 , 357 U. S. 380 , we declared: "Of course, the Federal Government may not take advantage of . . . the States' autonomy in order to evade the Bill of Rights." *See also Feldman v. United States,* 322 U. S. 487 , 322 U. S. 494 ; *cf. Byars v. United States,* 273 U. S. 28 . These principles require, I think, that we set aside this state conviction.

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