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Double Jeopardy and Dual Sovereignty

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COMMENT

DOUBLE JEOPARDY AND DUAL SOVEREIGNTY

This Comment has been prompted by two recent United States Supreme Court decisions, *Bartkus v. Illinois*,[1] and *Abbate v. United States*.[2] In the former decision Bartkus, the defendant, was tried in the Federal District Court for the Northern District of Illinois on December 18, 1953, for the robbery of a federally insured savings and loan association of Cicero, Illinois, in violation of a federal statute.[3] There was a jury trial and Bartkus was acquitted. Then on January 8, 1954, Bartkus was indicted by an Illinois grand jury charging a violation of a *state* robbery statute.[4] This time Bartkus was convicted, and under an habitual criminal statute sentenced to life imprisonment. Between these two trials additional evidence to refute the defendant's alibi was obtained, and either for this reason or some other, the second panel of Illinois jurors came to an opposite conclusion from that of their federal predecessors. The Illinois court rejected the plea of *autrefois acquit*,[5] and the Supreme Court of the United States upheld in a five-to-four decision the Illinois court, indicating that its rejection of the plea in bar was not a violation of the defendant's right to due process of law under the fourteenth amendment.

The pattern of events leading to the *Bartkus* case, *supra*, presented themselves in reverse order in *Abbate v. United States*.[6] The Illinois state court convicted defendant for conspiring to dynamite facilities of a telephone company which were located outside the state of Illinois. Thereafter, on charges growing out of the identical facts supporting the Illinois conviction, defendant and others were indicted in the District Court of Mississippi for having conspired to destroy parts of a federally operated and controlled communications system. The defendant was again found guilty and in affirming this action Justice Brennan, speaking for a majority of six,[7] held that the double jeopardy provision of the fifth amendment did not bar the federal

[1] 27 U.S.L. WEEK 4233 (1959).
[2] 27 U.S.L. WEEK 4225 (1959).
[3] 62 STAT. 683, 18 U.S.C. § 2113 (1948).
[4] ILL. STAT. ANN. ch. 38, § 501 (1934).
[5] *Autrefois acquit*, and *convict*, are pleas in bar of a second prosecution for the same offense. They mean formerly acquitted or formerly convicted. BLACK, LAW DICTIONARY (4th ed. 1951).
[6] 27 U.S.L. WEEK 4225 (1959).
[7] Black, Warren, and Douglas, dissenting.

prosecution, since the prior state conviction was a separate and distinct offense against a distinct sovereign and would not constitute a plea in bar to a subsequent federal prosecution. Both of these decisions reaffirm the so-called settled law, whereby state and federal government constitute separate sovereigns to which a citizen owes dual allegiance and from which the citizen in turn demands dual protection. Under this concept of a federal system the citizen is required to obey two masters, concurrently, in a number of cases. One act[8] may be offensive to both sovereigns simultaneously; hence, the citizen may anticipate the possibility of being tried twice for a single act.[9]

The separate offense analysis is indebted to the early case of *Fox v. Ohio*,[10] in which it was held that the state of Ohio had concurrent power with the federal government to punish the act of passing counterfeit coin. Thus, striving to structure notions of federalism by allowing both sovereigns to police the area, and also to prevent one from usurping the power to prosecute, which is also held by the other, the court hit upon the separate offense theory. This answer has been reaffirmed until today many observers view the notion of dual punishment as commonplace.

A number of prior cases dealing with the same contentions advanced in the *Fox* case, *supra*, were decided earlier by the state courts.[11] On the one hand, some states had determined that they had concurrent

[8] An "act," as used in this Comment, refers to a single physical transaction, realizing that one physical event can constitute a number of crimes. "Act" is used to refer to a particular physical event that fulfills the usual requirements of a specific crime, despite the fact that this crime can constitute two separate offenses.

[9] When jeopardy attaches—a person is in legal jeopardy when he is put on trial, before a court of competent jurisdiction, on an indictment or information which is sufficient in form and substance to sustain a conviction and a jury has been charged with his deliverance, 15 AM. JUR., *Crim. Law* § 369 (1938).

Jeopardy means exposure to danger; and where a person is put on trial on a charge of a crime before a jury sworn to decide the issue between the state and himself, he is then exposed to danger in that he is in peril of life or liberty: "The protection is not, as the court below held, against the peril of second punishment, but against being again tried for the same offense." Kepner v. United States, 195 U.S. 100, 130 (1903).

[10] 5 How. 410 (1847). The attorney general, arguing in support of the state statute and concurrent jurisdiction cited the cases of Houston v. Moore, 5 Wheat. 1 (1820), and State v. Antonio, 7 S.C.L. 776 (1816), both of which had held that concurrent jurisdiction existed; but both cases had dissenting opinions specifically for the reason that double prosecutions might have followed; and in both cases the majority stated that their decision was made upon the understanding that a conviction or acquittal by one sovereign would constitute a good plea in bar to a prosecution by the other. It is difficult to interpret these cases as indicating that double prosecutions would be tolerated.

[11] State v. Antonio, 7 S.C.L. 776 (1816); State v. Tutt, 18 S.C.L. 44 (1830). This latter case recognized that the federal government and the state had different interests to protect, but relying upon Houston v. Moore, *supra* note 7, stated that the state statute was valid and if anything the Congressional laws were inoperative in the area because of the way the court interpreted the federal statute. The case did not condone the possibility of double punishment.

jurisdiction; that the sovereign first taking jurisdiction would have the right to enforce it by trial and judgment, and the supporting rationale was that this determination would be a good plea in bar to prosecution by the other lawmaking body.[12] Perceiving that the nonprosecuting sovereign might not tolerate a deprivation of its jurisdiction by a plea in bar, and repulsed by thoughts of dual punishment, other states held their state statutes providing criminal penalties for coin counterfeiting unconstitutional, as being repugnant to the federal constitution.[13] All of these early cases, except *Fox, supra,* seem to indicate that the possibility of a double trial or double punishment for the same act would be highly obnoxious. This position is presented lucidly by Justice McLean in his dissenting opinions in the *Fox* case, *supra,* and in *Moore v. Illinois.*[14] The *Fox* case initiated the concurrent

[12] Commonwealth v. Fuller, 44 Mass. 313 (1844), also recognized the concurrent power of the state in the coin counterfeiting area, but Judge Hubbard explained his position thusly:

> It is contended also that it is unconstitutional to subject a person to the operation of two distinct laws upon the same subject, and inflicting different pains and penalties. But I hold that the delinquent cannot be tried and punished twice for the same offense, and that the supposed repugnancy does not, in fact, injuriously affect any individual. If he were indeed liable to be punished twice for the same offense, he might well argue against oppression, and the existence of such liability would go far to prove the unconstitutionality of the law. . . . The court which first exercises jurisdiction has the right to enforce it by trial and judgment.

Harlan v. People, 1 Dougl. 207 (Mich. 1843), was another counterfeiting case which also agreed that the state had concurrent power, explaining its position thusly: "It is true, as has been argued at the bar, that this rule may lead in some instances to disparity of punishment for the same act; but it is equally true, that there may be reasons for such disparity of punishing in the different states. . . . It can, at all events, be no argument against a concurrent jurisdiction. . . . But if such concurrent jurisdiction in fact exists, we apprehend such conviction would be admitted in federal courts as a bar."

[13] Mattison v. State, 3 Mo. 421 (1834), stated that the state statute empowering state officials to punish coin counterfeiters would be repugnant to the Federal Constitution. This result was reasoned by Judge M. Girk who stated: "To be subject to two masters in respect to one and the same duty, is in its nature intolerable." In essence the Mattison case concluded that a potential plea in bar would be insufficient to protect the citizen against the imposition of a double punishment. Judge Washington dissented stating that the state should assume concurrent power. "When one competent power has commenced to take jurisdiction, it cannot be interfered with or ousted of the jurisdiction, but must be left to decide freely; and that decision will bar any other or further prosecution for the same offense, by the same *or any other power,* and may be so pleaded. . . ." (Emphasis added). State v. Brown, 2 N.C. 100 (1794), a prosecution for stealing a horse in another state, declared that to convict in this state would be no satisfaction for the offense committed where the horse was stolen and if a number of states imposed successively their own punishment for horse stealing this would be "against natural justice, and therefore I cannot believe it to be the law." The court stated that at the time, eight states followed this view while nine did not. While this case was relied upon in the dissent in Bartkus, it does not have a background similar to the other early cases dealt with.

[14] 5 How. 411 (1847).

> [B]ut whether the state may inflict by virtue of its own sovereignty, punishment for the same act as an offense against the state, which the federal government may constitutionally punish. If this be so, it is a great defect in our

jurisdiction theory in the federal courts indicating that states would be allowed to protect their citizens from fraud and that the federal government would be allowed to punish in order to protect the purity of its currency. Although this case did not in itself deal with a plea of *autrefois convict* or *acquit*, the Court did answer defendant's argument, that failure to hold the state statute repugnant to the federal constitution would place a defendant in a position where he could be punished twice by the same country for a single act. The court replied, in effect, that the spirit in which state and federal systems are administered would most likely preclude double punishment, but even if this were not so the state's power to punish could not be restrained.[15] It was not until *United States v. Lanza*,[16] however, that the doctrine became solidified, and since then it has been reiterated and approved.[17]

The majority in the *Bartkus* case, reasoning from the historical background outlined above, assert that:

> [C]onflicting 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*.[18]

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system. For the punishment under the state law would be no bar to a prosecution under the law of congress and to punish the same act by two governments would violate not only the common principles of humanity, but would be repugnant to the nature of both governments. . . . There is no principle better established by the common law, none more fully recognized in the federal and state constitutions, than that an individual shall not be put in jeopardy twice for the same offense. This, it is true, applies to the respective governments; but its spirit applies with equal force against a double punishment for the same act by a state and federal government. . . . *Nothing is more repugnant or contradictory than two punishments for the same act.* . . . It would bring our system of government into merited contempt. [Emphasis added.]

Justice McLean said he spoke alone but that when the case was first discussed he gained the impression that the lamented Justice Story agreed with his views. In Moore v. Illinois, 14 How. 13 (1852), Justice McLean again dissenting: "It is contrary to the nature and genius of our government to punish an individual twice for the same offense. . . . It is no satisfactory answer to this to say that the state and federal government constitute different sovereignties, and consequently may each punish offenders under its own laws. . . . It is believed that no government regulated by laws, punishes twice criminally the same act." The majority opinion in this case held that, "the same act may be an offense or transgression of the laws of both . . . may be liable to punishment for an infraction of the laws of either."

[15] 5 How. 411 (1847).

[16] 260 U.S. 377 (1922). The case stated in emphatic terms that a federal prosecution can arise out of the same facts which had been the basis of a state conviction.

[17] Herbert v. Louisiana, 272 U.S. 312 (1926); Westfall v. United States, 274 U.S. 256 (1926); and Jerome v. United States, 318 U.S. 101 (1943).

[18] Bartkus v. Illinois, 27 U.S.L. WEEK 4233, 4236 (1959).

This represents the principal point of departure between the majority and dissenters in *Bartkus,* with the latter group interpreting the earlier cases as standing solidly against the thought of double punishment.

The section of the fifth amendment relating to former jeopardy applies only to the federal government. Of course, the question is whether this protection will be incorporated into the due process clause of the fourteenth amendment, thereby affecting the states. This basically appears to be a matter of conscience,[19] and it is not beyond the realm of speculation that some time in the future there may be more than the current three members[20] of the United States Supreme Court who would vote for such incorporation. Will such double punishment, or the harrassment of two prosecutions for the same act be considered "repugnant to the conscience of mankind?"[21] The *Bartkus* case answered this question in the negative. What due process will be tomorrow is uncertain, and as subject to change as the value standards by which justice is motivated.[22]

Subsequent to the *Fox* case there have been state holdings which accept the separate offense principle, and these helped persuade the *Bartkus* majority to conclude that the states were substantially in agreement with the dual-sovereignty approach to double jeopardy, thereby negating the idea that the former jeopardy provision of the fifth amendment should be applied to the states through the fourteenth amendment due process clause. It is true that at least fifteen states[23] have chosen to surrender what was thought to be a basic individual right in exchange for efficiency of prosecution at home. At least six of these states have enacted statutes designed to bar a second prosecution if the defendant has been tried by another *country* for the same act.[24] But, among the sovereigns that comprise our federal

[19] As was indicated in Bartkus, *supra* at 4236, n. 15.

[20] Black, Warren, and Douglas; also Brennan dissented but for different reasons.

[21] Justice Cardozo in Palko v. Connecticut, 302 U.S. 319 (1937).

[22] "What then does 'due process' as used in the Fourteenth Amendment include? It includes those guarantees that are 'implicit in the concept of ordered liberty.'" Palko v. Connecticut, 302 U.S. 319, 325 (1937). It outlaws practices "repugnant to the conscience of mankind." *Id.* at 323. "That is a highly *subjective* test, turning on the reactions of a majority of the court to particular practices." DOUGLAS, THE RIGHT OF THE PEOPLE (1958).

[23] Arizona, Arkansas, California, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New York, North Carolina, Oregon, Pennsylvania, South Carolina, Tennessee, Vermont, Virginia, Washington, West Virginia, Wyoming. Washington was one of the first states so to hold. State v. Kenney, 83 Wash. 441, 145 Pac. 450 (1915), held that an accused might be punished by both the federal and state authorities for the same act.

[24] Model Penal Code P. 61 (Tent. Draft No. 5, 1956). The states are: California, Idaho, Indiana, Montana, Minnesota, Mississippi, Nevada, New York, North Dakota,

system, one will not have to accord to the other the plea in bar of former jeopardy which it customarily would accord to a person put in jeopardy by a foreign tribunal. As was pointed out in a recent article by Thomas Franck: "Public opinion, at least in countries having a liberal tradition, is even more concerned with respect for individual rights than with efficiency of prosecution."[25] Nevertheless, a court in the United States may declare to a (probably astonished) defendant who has committed but a single act, that he is not being placed in double jeopardy at a second trial for the same crime, but rather that he is "merely" being tried for a different offense. As Justice Black stated in his dissenting opinion to *Bartkus:* "looked at from the standpoint of the individual who is being prosecuted, this notion is too subtle for me to grasp."[26]

The idea of double punishment for a single act occuring in one country, despite its dual character, should still be shocking, even to a people accustomed to a separate offense analysis. The fact that glaring examples such as *Bartkus* seldom arise is a poor excuse for denying a fundamental human right which receives protection in most civilized nations.[27]

Besides case precedent there are two formidable arguments flowing from the notion of federalism which are opposed to including double jeopordy protection in what is considered due process of the fourteenth amendment: First, such a holding would disturb the states in their effort to develop a rational and just body of criminal law based upon the interests which they have to protect. Secondly, the same act might be more offensive to one sovereign than to the other and thereby would necessarily command a different penalty. In answer to these arguments, it is conceivable that, in fact, state and federal authorities are not always at odds with each other, and that the sovereign first acquiring jurisdiction may willingly relinquish a defendant to the other. A showing by one sovereign that it has a stiffer penalty or a greater

South Dakota, Oklahoma, Oregon, Texas, Wisconsin, Utah and Washington. (RCW 10.43.040, referring only to another state or county.)

[25] Thomas Franck, *An International Lawyer Looks at the Bartkus Rule,* 34 N.Y. L. REV. 1096, 1100 (1959). Franck remarks, at 1103: "If American courts can trust foreign courts, is it too much to expect them to trust each other?"

[26] Bartkus v. Illinois, 27 U.S.L. WEEK 4233 (1959).

[27] "Penal Offenses committed in a foreign country by a Mexican against Mexicans, may be punished in the Republic (Mexico) and according to its laws, subject to the following conditions: . . . III. That the accused shall not have been definitively tried in the country where the offense was committed, or if tried, that he shall not have been acquitted, included in an amnesty, or pardoned." 2 MOORE, DIGEST OF INTERNATIONAL LAW § 200 at 225, 230 (1906).

interest in a particular defendant, should go a long way toward persuading the other sovereign that it could turn the defendant over and rest assured that he would be diligently prosecuted.

If state and federal authorities are unable to cooperate, with the result that federal policy is frustrated, Congress could act and make clear that the federal interest in uniformity must preempt the area, because federal laws are supreme in their delegated area. True, a defendant such as Bartkus might be acquitted and later evidence could turn up which would probably insure a conviction, but is this an unreasonable price to pay for the retention of a basic principle of fairness? An individual should not be subjected to more than one trial by his country for a single act.

THE FIFTH AMENDMENT AND FEDERAL TRIALS

The reasoning in the area of successive military and territorial court prosecutions is best exemplified in the case of *Grafton v. United States*,[28] in which a soldier stationed in the Philippine Islands was acquitted before a general court martial on a charge of manslaughter which occurred off the enclave and was subsequently indicted by the Iloilo provincial court of the Philippine Islands. He was convicted upon a charge similar to second degree murder. The convicting court rejected defendant's plea of *autrefois acquit*. On appeal, the lower Philippine court was reversed, and defendant was ordered to be released from custody. This lower territorial court was duly constituted and had jurisdiction of the defendant. The United States Supreme Court stated:

> If therefore a person be tried for an offense in a tribunal deriving its jurisdiction and authority from the United States, and is acquitted or convicted, he cannot again be tried for the same offense in another tribunal deriving its jurisdiction and authority from the United States.[29]

The Court went on to say that military jurisdiction is not exclusive, but rather concurrent with civil territorial courts. If either acquires jurisdiction first, its judgment cannot be disregarded by the other for mere error or for any reason not affecting jurisdiction. The Court continued:

> It is not necessary to establish the defense *'autrefois acquit'* or *'convict'* that the offense in each indictment should be the same in name. If the

[28] 206 U.S. 333 (1906).
[29] 206 U.S. 333, 352 (1906).

> transaction is the same, or if each rests upon the same facts between the same parties, it is sufficient to make good the defense . . .[30]

The Court asserted, however, that the federal government and the sovereign states were not on an agency basis, and hence, each could punish separately for the same factual transaction. This would indicate then, that within the federal government and its constituent parts, a defendant can not be subjected to double punishment. It is disturbing that this reasoning has not had an appreciable effect on many states, including Washington, which permit trials under a city ordinance and then deny the plea in bar for a subsequent prosecution under a state statute with regard to the same transaction.[31] It is, therefore, possible in a state such as Washington[32] and others,[33] for a defendant to be punished for violating a city ordinance, then be tried again and punished for violation of a state statute and tried and punished for a violation of a federal law, all with respect to one transaction.

THE WASHINGTON SCENE

Washington was one of the first states specifically denying a plea in bar by a defendant who had been acquitted in a federal district court with respect to the same transaction and a similar charge.[34] In convicting defendant for selling intoxicating liquor to a person of Indian blood, in violation of a state statute, the court stated:

> As the same transaction may constitute a crime under the laws of the United States and also under the laws of a state, the accused may be punished for both crimes, and an acquittal or conviction in the courts of either is no bar to an indictment in the other.[35]

The Washington State Constitution, Article I, section 9 states:

> Rights of accused persons—No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy *for the same offense.* [Emphasis added].

In order to overcome any constitutional objection, Washington has conveniently chosen to use the separate offense doctrine. The Washing-

[30] 206 U.S. 333, 351 (1906).
[31] State v. Tucker, 137 Wash. 162, 242 Pac. 363 (1926), where first the city of Everett prosecuted and then the State of Washington prosecuted for the same acts. Judge Parker dissented based on United States Supreme Court reasoning in the Grafton case.
[32] *Example* of such a possibility, if federal authorities had seen fit to prosecute the defendant in State v. Tucker, *supra* note 31.
[33] See 3 MCQUILLIN, LAW OF MUNICIPAL CORPORATIONS §§ 925, 926 (1928).
[34] State v. Kenney, 83 Wash. 441, 145 Pac. 450 (1915).
[35] State v. Kenney, 83 Wash. 441, 145 Pac. 450 (1915).

ton court has preferred to sacrifice a basic principle for the sake of more proficient prosecutions. Since the case of *State v. Kenney*[36] has not been overruled it represents the law in Washington and thus aligns this state with the majority reasoning in *Bartkus*. A later case in Washington illustrates even more clearly the enthusiasm which the Washington court has for efficient prosecutions. In *State v. Jewett*,[37] the court stated with respect to the trial court's action of rejecting evidence of a prior federal prosecution convicting the defendant on facts concerning the same transaction:

> It is our opinion that the ruling of the court was correct, because the testimony offered and rejected tended to show that the appellant had been convicted of the crime of unlawful transportation of the liquor in question, whereas in this case he was being tried for the offense of carrying about with him, for purposes of unlawful sale, the same liquor. The offenses were not the same. One concerned transportation in violation of the Volstead Act, and the other concerned the violation of the state bootlegging act. Under no circumstance could the conviction for the one offense be a bar to his trial and conviction of the other.[38]

This holding is an example of the technical refinements which our court has indulged in order to add weight to the separate offense doctrine and also to justify their overlooking what is, in many places, considered a basic individual right. There are a number of other cases where the Washington court has had occasion to distinguish between offenses thereby eliminating a plea of double jeopardy.[39]

Washington has aligned its reasoning with the United States Supreme Court on the subject of separate offenses (state and federal) but it appears that this state has gone even further than the federal government in its intrastate sphere. In the area of prosecution under city and state laws, Washington has rejected the analogous reasoning of the United States Supreme Court dealing with the federal military-terri-

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[36] 83 Wash. 441, 145 Pac. 450 (1915).

[37] 120 Wash. 36, 207 Pac. 3 (1922).

[38] State v. Jewett, 120 Wash. 36, 207 Pac. 3 (1922).

[39] State v. Wilson, 91 Wash. 136, 157 Pac. 474 (1916); State v. Woods, 116 Wash. 140, 198 Pac. 737 (1921) (maintaining a place for the sale of liquor and having in one's possession liquor are two separate offenses); State v. Whitehouse, 123 Wash. 461, 212 Pac. 1043 (1923) (a prosecution for liquor in possession was not included in a charge of being a "jointest" although sustained by the same evidence, since they are not identical in law); State v. Peck, 146 Wash. 101, 261 Pac. 779 (1927) (the offense of unlawful transportation of liquor is not identical with or included in the offense of bootlegging, so former jeopardy would not apply as between the two charges); State v. Danhof, 161 Wash. 441, 297 Pac. 195 (1931) (fishing without a hook and unlawfully fishing are two different offenses); State v. Phillips, 179 Wash. 607, 38 P.2d 372 (1934).

torial jurisdiction and does not follow *Grafton v. United States.*[40] In *State v. Tucker*,[41] Washington recognized the persuasiveness of *Grafton* but rejected it stating that the weight of authority is contra; that the offenses are distinct despite their intrastate character; and that they constitute separate offenses against distinct laws (the city and the state). This clearly allows the state once directly, and once indirectly, through its agency, to try a defendant twice for the same transaction. This holding clearly constitutes an obnoxious situation, and a circumvention of the double jeopardy provision of the state constitution.

In an area of intrastate application of the Washington constitutional provision regarding former jeopardy, a recent case is noteworthy as it may represent a trend toward more recognition of the basic right to be put in jeopardy but once for a single transaction. In *State v. Schoel*,[42] a five to four decision handed down July 2, 1959, the court saw fit, prompted by persuasive reasoning in another recent United States Supreme Court case, *Green v. United States*,[43] to overrule a prior position taken in *State v. Ash.*[44] In the case where a defendant is charged with a particular crime and is convicted of a lesser but included degree of that crime, the rule in Washington was formerly that if the defendant appealed and won a new trial he had waived his right to assert former jeopary as to the higher degree of the crime of which he had been acquitted. For example, on the new trial he was subject to being convicted of first degree murder when at the first trial he had only been convicted of manslaughter.[45]

State v. Schoel[46] indicates the rule in Washington now is that where a defendant is convicted of murder in the second degree and requests a new trial, this will not constitute a waiver of his right to rely upon the acquittal as to the higher offense for which he had formerly been charged and acquitted.[47] Thus the court reinstated the rule as it was put forth in the early case of *State v. Murphy.*[48] The dissenters in

[40] 206 U.S. 333 (1906), holding that territorial and military courts both represent agencies of the federal government so that a trial for a transaction by one will constitute a bar to a prosecution by the other, and the protection of the Fifth Amendment insures this.

[41] 137 Wash. 162, 242 Pac. 363 (1926). See also Note, *Former Jeopardy—Conviction or Acquittal*, 1 WASH. L. REV. 286 (1925). Also Ellis, *Dual Sovereignty and the Supreme Court*, 1 WASH. L. REV. 1 (1925).

[42] 154 Wash. Dec. 479, 341 P.2d 481 (1959).

[43] 355 U.S. 184 (1957).

[44] 68 Wash. 194, 122 Pac. 995 (1912).

[45] State v. Ash, 68 Wash. 194, 122 Pac. 995 (1912).

[46] 154 Wash. Dec. 479, 341 P.2d 481 (1959).

[47] Gershon, *Former Jeopardy—Identity of Offenses*, 11 WASH. L. REV. 111 (1936).

[48] 13 Wash. 229 (1895); see also State v. Chapman, 64 Wash. 140, 116 Pac. 592 (1911).

State v. Schoel,[49] of course, relied upon the idea that the accused requests the new trial and if it is granted the state should be allowed to start anew again also. The dissent cited, in support of this argument, the early United States Supreme Court case of *Trono v. United States*,[50] which has been effectively overruled by *Green v. United States*.[51] It is hoped that this might indicate a tendency on the part of the state as well as the federal courts to place more value upon individual rights, disregarding whatever slight effect it might have on efficient prosecutions.[52]

CONCLUSION

The separate offense doctrine is still the law. The rejection of a plea of *autrefois acquit* or *convict* by a state will not be a violation of the due process clause of the fourteenth amendment. Moreover, a rejection by a federal court of a plea of *autrefois acquit*, or *convict* by a state court will not be a violation of the double jeopardy provision of the fifth amendment. In matters intrastate, Washington applies the same reasoning and in addition rejects a plea in bar, making it possible that a conviction for both municipal and state offenses will not be a violation of the Washington constitutional prohibition of double jeopardy.

The conviction for a lesser but included offense now constitutes former jeopardy as to the higher offenses charged despite the fact that the accused requests and obtains a new trial, in both Washington and under federal prosecutions. The accused is no longer deemed to have waived this protection.

The strong and persuasive dissent in the *Bartkus* case and the result of the *Green* case, may well indicate that in the future, the United States Supreme Court might place more value upon an individual's fundamental right to be prosecuted but once by one's country for a single unlawful act.

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[49] 154 Wash. Dec. 479, 341 P.2d 481 (1959).
[50] 199 U.S. 521 (1905).
[51] 355 U.S. 184 (1957).
[52] An article by Louis H. Pollak, *In Double Jeopardy*, New Republic, May 4, 1959, p. 13, makes reference to a letter sent by Attorney General Rogers to the U.S. attorneys after the Bartkus case which summed up the case and added a caveat: "Applied indiscriminately and with bad judgment it, like most rules of law, could cause considerable hardship. Applied wisely, it is a rule that is in the public interest. Consequently, as the court clearly indicated, those of us charged with law enforcement responsibilities have a particular duty to act wisely and with self-restraint in this area. . . . No federal case should be tried when there has already been a state prosecution for substantially the same acts without having it first brought to my attention."