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mindful that first amendment freedoms require "breathing space" to survive, the Court was reluctant to depart from the traditional interpretations of the case-or-controversy doctrine that have evolved from article III. More specifically, a litigant must show that his rights are in imminent danger from a particular, well-defined governmental restriction, even though the real threat may derive from the fact that the restriction is *not* particular, but rather unknowable, insidious, or pervasive. Since *Tatum* was without precedent on its facts, however, it is possible that more experience with these facts in future litigations⁸⁵ will lead the Court to a more flexible approach to "chilling effect" claims in cases of surveillance of civilian activities.

David J. Mathews

CONSTITUTIONAL LAW — DOUBLE JEOPARDY — STATE PROSECUTION BARRED AFTER FEDERAL PROSECUTION FOR SAME OFFENSE — BURDEN ON STATE TO SHOW SUBSTANTIALLY DIFFERENT INTERESTS FROM THOSE OF INITIAL PROSECUTING JURISDICTION.

Commonwealth v. Mills (Pa. 1971)

Appellant Mills was arrested for the robbery of a federally insured savings and loan association in Philadelphia, Pennsylvania.¹ He was indicted by the Commonwealth of Pennsylvania for state criminal code violations of carrying a concealed deadly weapon, unlawfully carrying a firearm without a license, and aggravated robbery.² He was also indicted by the United States for federal code violations of bank robbery and assault.³ Mills pleaded guilty to the federal indictment and was sentenced

85. For examples of the effect of time on changing the Court's approach to a problem, compare *Tileston v. Ullman*, 318 U.S. 44 (1943), with *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Colegrove v. Green*, 328 U.S. 549 (1946), with *Baker v. Carr*, 369 U.S. 186 (1962).

1. 447 Pa. 163, 165, 286 A.2d 638, 639 (1971).

2. Ronald Mills was indicted under sections 4416, 4704, and 4628 of the Pennsylvania Criminal Code. The indictment under section 4416 for carrying a concealed deadly weapon was not attacked on appeal because sentence had been suspended on this charge following Mill's guilty plea. Section 4704 provides in part:

Whoever robs another, or steals any property from the person of another, or assaults any person with intent to rob him, or by menace or force, demands any property of another, with intent to steal the same, is guilty of a felony

PA. STAT. tit. 18, § 4704 (1963). Section 4628 provides:

No person shall carry a firearm in any vehicle or concealed on or about his person, except in his place of abode or fixed place of business, without a license therefor as hereinafter provided.

PA. STAT. tit. 18, § 4628(e) (Supp. 1972).

3. See 18 U.S.C. § 2113 (1970) which provides in part:

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$100 belonging to, or in

to five years imprisonment. He subsequently filed a motion in Pennsylvania state court to dismiss the indictments there pending on the grounds that successive prosecutions violated the proscription against double jeopardy.⁴ Upon a denial of the motion, appellant pleaded guilty and was sentenced to pay a fine, costs of prosecution, and to five years probation to begin at the expiration of the federal sentence.⁵

On appeal to the superior court, the orders of the trial court were affirmed.⁶ The Supreme Court of Pennsylvania granted allocatur and reversed the superior court's orders, *holding* that a second prosecution and imposition of sentence will only be allowed if there is a showing by the Commonwealth that its interests were not sufficiently protected in the initial prosecution. *Commonwealth v. Mills*, 447 Pa. 163, 286 A.2d 638 (1971).

The proscription against double jeopardy is found in the fifth amendment to the United States Constitution⁷ and has been held to apply to the states through the due process clause of the fourteenth amendment.⁸ This proscription is founded on the fundamental notion of fairness⁹ and has found acceptance, in some form, in virtually every known system of law throughout recorded history.¹⁰ Without it, not only could an individual be constantly threatened with multiple prosecutions for the same offense,

the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than \$5,000 or imprisoned not more than ten years, or both

(d) Whoever, in committing, or in attempting to commit, any offense defined [herein], or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not more than twenty-five years, or both.

4. The plea of a former conviction (*autrefois convict*) or a former acquittal (*autrefois acquit*) for the same offense is a proper defense to a criminal charge pursuant to section 464 of the Pennsylvania Criminal Procedure Code. PA. STAT. tit. 19, § 464 (1964). But it was unclear in the instant case whether the plea of *autrefois convict* had been properly pleaded in defense. A motion to quash would have been improper. *Commonwealth v. Hahn*, 63 Pa. D. & C. 269 (C.P. 1949). However, since there was no indication of waiver in the record, the superior court held that it would review the denial of the plea. *Commonwealth v. Mills*, 217 Pa. Super. 269, 278 n.3, 269 A.2d 322, 327 n.3 (1970), *citing* *Commonwealth v. Yahnert*, 216 Pa. Super. 159, 264 A.2d 180 (1970).

5. 477 Pa. at 166, 286 A.2d at 639.

6. 217 Pa. Super. 269, 269 A.2d 322 (1970), *rev'd*, 477 Pa. 163, 286 A.2d 638 (1971).

7. Specifically, the amendment provides:

No person . . . shall . . . be subject for the same offense to be twice put in jeopardy of life or limb

U.S. CONST. amend. V.

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

9. See Sigler, *A History of Double Jeopardy*, 7 AM. J. LEGAL HIST. 283 (1963); Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538, 1539-40 (1967).

10. The concept of a proscription against double jeopardy developed as part of the common law and had also been a part of the early Roman and Greek law. M. FRIEDLAND, *DOUBLE JEOPARDY* 5-17 (1969). Further, a study of the development of the laws within the British Empire reveals the broad international acceptance of the doctrine. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 U.C.L.A.L. REV. 1 (1956).

but also the concept of the finality of court judgments would be emasculated.¹¹

The early history of the United States indicates that the judiciary opposed successive prosecutions based upon the double jeopardy proscription.¹² However, beginning in 1847, the United States Supreme Court, in *Fox v. Ohio*,¹³ *United States v. Marigold*,¹⁴ and *Moore v. Illinois*¹⁵ — a succession of cases upholding the constitutionality of concurrent federal and state criminal jurisdiction — articulated the concept of dual sovereignty. Although not faced directly with the issue of successive prosecution,¹⁶ the opinions in these cases provided strong dicta supporting the dual sovereignty doctrine.

By reviewing *Fox*, *Marigold*, and *Moore* in chronological sequence, the progression of the development of the dual sovereignty doctrine can clearly be seen. In *Fox*, the Court said that even assuming that the fifth amendment proscription against double jeopardy applied to the states:

[T]his would by no means justify the conclusion, that offences falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration.¹⁷

Marigold, citing the *Fox* case, reinforced this concept in almost identical terms.¹⁸ And in *Moore*, the Supreme Court articulated the fully developed concept that:

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

11. Fisher, *Double Jeopardy, Two Sovereignities and the Intruding Constitution*, 28 U. CHI. L. REV. 591, 592-94 (1961). The author discussed the social value of certainty of criminal judgments and the inequities which would result from a policy allowing multiple prosecutions. *Id.* at 593.

12. In *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820), the Court, in dictum, rejected the doctrines of successive prosecutions. *Id.* at 31. In the same year, the Court also recognized the availability of a plea of *autrefois acquit* between international sovereigns. *United States v. Furlong*, 18 U.S. (5 Wheat.) 184 (1820) (dictum). See Newman, *Double Jeopardy and the Problem of Successive Prosecution: A Suggested Solution*, 34 S. CAL. L. REV. 252, 252-58 (1961).

13. 46 U.S. (5 How.) 410 (1847).

14. 50 U.S. (9 How.) 560 (1850).

15. 55 U.S. (14 How.) 13 (1852).

16. In *Fox*, a prosecution and conviction in state court under a state law for counterfeiting was upheld despite the existence of a federal law prohibiting the same acts. 46 U.S. (5 How.) at 423. *Marigold* upheld a federal prosecution and conviction in federal court under the federal counterfeiting statute notwithstanding the defendant's claim that since *Fox* had upheld the state statute and he could be prosecuted under it, the federal government was precluded from prosecuting him under the federal statute. 50 U.S. (9 How.) at 569. *Moore* concerned a situation similar to *Fox* involving state and federal statutes prohibiting the harboring and secreting of a negro slave. Again the state prosecution was upheld. 55 U.S. (14 How.) at 21. However, in none of these cases was a second prosecution actually attempted by the other sovereign.

17. 46 U.S. (5 How.) at 435.

18. 50 U.S. (9 How.) at 569, wherein the Court stated:

[T]he same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each.

may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both That either or both may (if they see fit) punish such an offender, cannot be doubted.¹⁹

It is possible, however, to view these cases in light of their historical environment. At the time these cases were decided state sovereignty was a volatile issue, and the dicta regarding separate federal and state sovereignties in the area of criminal prosecution might be properly regarded as a political damper rather than the embryo of a judicial precept.²⁰ Despite this foundational flaw, the concept of federalism, coupled with the practical necessity of allowing both federal and state governments to enforce their laws where there is concurrent jurisdiction, lends strong support to the validity and viability of the dual sovereignty doctrine. It was the dicta from *Fox*, *Marigold*, and *Moore* that provided the support for the elucidation of this principle in *United States v. Lanza*,²¹ a decision upholding a federal prosecution following a state conviction for the same acts.

In *Lanza*, the majority opinion by Mr. Chief Justice Taft, promulgated the principle:

[A]n act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.²²

The Supreme Court, faced directly with the issue of successive prosecutions, based its holding on dual sovereignty and held that prosecution by the federal government following prosecution by the state for the same offense did not constitute double jeopardy within the meaning of the fifth amendment.²³

The *Lanza* rule was subsequently affirmed by the Supreme Court in *Bartkus v. Illinois*²⁴ and *Abbate v. United States*,²⁵ which viewed together, held the dual sovereignty doctrine applicable to both state prosecutions following federal prosecutions and to federal prosecutions following state

19. 55 U.S. (14 How.) at 20.

20. Newman, *supra* note 12, at 260; Note, *supra* note 9, at 1541-42. The *Marigold* Court indicated that its opinion regarding dual sovereignty was made "[w]ith the view of avoiding conflict between the State and Federal jurisdictions" 50 U.S. (9 How.) at 569.

21. 260 U.S. 377 (1922). In *Lanza*, the defendants had been convicted under a state liquor prohibition statute and subsequently indicted for violation of the National Prohibition Act. *Id.* at 378-79.

22. *Id.* at 382. The *Lanza* principle was acknowledged in a number of subsequent cases. See *Screws v. United States*, 325 U.S. 91, 108 (1945); *Jerome v. United States*, 318 U.S. 101, 105 (1943); *Puerto Rico v. Shell Co.*, 302 U.S. 253, 264-66 (1937); *Westfall v. United States*, 274 U.S. 256 (1927); *Herbert v. Louisiana*, 272 U.S. 312 (1926).

23. 260 U.S. at 382.

24. 359 U.S. 121 (1959).

25. 359 U.S. 187 (1959).

prosecutions. In *Abbate*, the defendants were convicted for violating a state statute making it a crime to conspire to injure or destroy the property of another. Subsequently, they were indicted for the same conspiracy under a federal law making it a crime to conspire to violate section 1362 of the criminal code which forbade the injury or destruction of communication facilities operated or controlled by the United States Government.²⁶ *Bartkus* involved a defendant who was tried and acquitted in federal court for violation of a federal statute making robbery of a federally insured bank a federal offense. He was subsequently tried and convicted under the state robbery statute for a violation which arose out of the same acts.²⁷ In both cases, decided the same day, the subsequent prosecutions were upheld by the Supreme Court on the basis of the dual sovereignty doctrine as enunciated by the *Lanza* court.²⁸ In rejecting the argument that due process would be a bar to a second prosecution, Justice Frankfurter, writing for the majority in *Bartkus*, said:

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.²⁹

This same idea was enunciated in the Court's opinion in *Abbate*.³⁰

In the instant case, the Pennsylvania Supreme Court was faced with a strikingly similar fact situation to that presented in *Bartkus*.³¹ Appellant Mills contended, however, that more recent decisions — namely, *Elkins v. United States*³² and *Murphy v. Waterfront Commission*³³ — had the effect of eroding the principle of dual sovereignty upon which *Bartkus*

26. Petitioners were involved in a plot to dynamite facilities of the Southern Bell Telephone Company during a labor dispute. *Id.* at 188.

27. In *Bartkus*, the defendant was accused of the robbery of the federally insured General Savings and Loan Association of Cicero, Illinois. *Bartkus v. Illinois*, 359 U.S. 121, 122 (1959).

28. *Id.* at 132; *Abbate v. United States*, 359 U.S. 187, 194 (1959).

29. 359 U.S. at 137.

30. Justice Brennan stated:

[N]o one would suggest that, in order to maintain the effectiveness of federal law enforcement, it is desirable completely to displace state power to prosecute crimes based on acts which might also violate federal law.

359 U.S. at 195.

31. 447 Pa. at 166, 286 A.2d at 639. Both *Bartkus* and *Mills* had been tried in federal court for robbing a federally insured bank, and both were subsequently prosecuted by the state in which the bank was located. See notes 2 & 25 and accompanying text *supra*.

32. 364 U.S. 206 (1960). *Elkins* destroyed the "silver platter" doctrine by holding that the federal government could not use evidence illegally obtained by state officials in a federal prosecution, even though the evidence was the result of actions completely independent of federal authority. *Id.* at 223-24. See generally Grant, *The Tarnished Silver Platter: Federalism and Admissibility of Illegally Seized Evidence*, 8 U.C.L.A.L. Rev. 1 (1961).

33. 378 U.S. 52 (1964). *Murphy* held that a state witness could not be compelled to give testimony by granting immunity from prosecution under state laws if the testimony could be used against the witness in a federal court. *Id.* at 79. However, the Court said such testimony, if given under grant of immunity, could not be used against him in federal court. *Id.*

relied. Appellant further contended that, subsequent to *Benton v. Maryland*,³⁴ successive prosecutions for the same act were constitutionally impermissible, an interpretation which would effectively overrule *Bartkus*.³⁵ The *Mills* court rejected this view of *Benton* on the grounds that *Benton* did not specifically overrule *Bartkus*³⁶ and that the continued viability of *Bartkus* was impliedly recognized in *Waller v. Florida*.³⁷

However, the *Mills* court was compelled to refrain from a blind application of the *Bartkus* holding because it felt that the *Bartkus* Court failed to recognize and sufficiently examine the interests of the individual to be free from being prosecuted and punished twice for the same offense when the interests of the sovereign might be the same.³⁸ Instead, the *Mills* opinion examined the penological justifications for successive prosecutions and found little value in successive imprisonment of an individual in two separate prisons for the same offense.³⁹ Justice Black's dissent in *Bartkus* suggests that if additional punishment were the only justification for successive prosecution by separate sovereigns, the conclusion must be that, from the defendant's standpoint, there is little difference between the interests of the state and federal jurisdictions regardless of who conducts the initial prosecution.⁴⁰ Therefore, the court promulgated a separate interest test as a method of protecting the individual against being prosecuted twice, while simultaneously preserving both federal and state interests.⁴¹

While the *Mills* court could have reached the same result had they accepted the appellant's interpretation of the *Benton* case, they rejected this interpretation and relied upon the *Waller* case as a reaffirmance of *Bartkus*. However, the *Waller* Court's holding was predicated on a determination that municipal courts and state courts are separate arms of a single sovereign,⁴² thereby compelling the Court to rely on *Grafton v. United States*⁴³ rather than *Abbate* or *Bartkus*. Thus, the question of

34. 395 U.S. 784 (1969). See text accompanying note 8 *supra*.

35. 447 Pa. at 168, 286 A.2d at 640. The court noted that in *State v. Fletcher*, 22 Ohio App. 2d 83, 259 N.E.2d 146 (1970), the Ohio Court of Appeals had applied this interpretation. However, the Ohio Supreme Court reversed on the grounds that *Bartkus* was unaffected by *Benton* and should be strictly applied. *State v. Fletcher*, 26 Ohio St. 2d 221, 271 N.E.2d 567, *cert. denied*, 404 U.S. 1024 (1972).

36. 447 Pa. at 168, 286 A.2d at 640.

37. 397 U.S. 387 (1970). In *Waller*, the defendant was tried and convicted in a municipal court for destruction of city property and disorderly breach of the peace. The State of Florida then attempted to try him on the charge of grand larceny for the same acts. The Supreme Court held that the second trial was barred by the fifth amendment since political subdivisions of a state are not considered separate sovereigns for purposes of double prosecution. *Id.* at 395.

38. 447 Pa. at 169, 286 A.2d at 641.

39. *Id.* at 171, 286 A.2d at 641.

40. 359 U.S. at 155 (Black, J., dissenting).

41. 447 Pa. at 171-72, 286 A.2d at 642. See Note, *supra* note 9, at 1561; 45 CORNELL L.Q. 574 (1960).

42. 397 U.S. at 393.

43. 206 U.S. 333 (1907). In this case, the Court held that the territorial court of the Philippine government and the United States federal courts must be considered a single sovereign.

successive prosecutions by separate sovereigns was not adequately raised in the *Waller* case, and consequently, it is questionable authority for the continuing force of the *Barthkus* holding.

The *Mills* opinion, however, is stronger in its treatment of the *Elkins* and *Murphy* cases. While conceding that these cases might indicate some erosion of the dual sovereignty doctrine, the *Mills* court, nevertheless, limited their effect in the area of independent prosecutions by distinguishing them. The court recognized that these cases involved attempts by the prosecuting jurisdiction to use the efforts of the other jurisdiction⁴⁴ whereas utilizing the dual sovereignty doctrine as a basis for allowing dual prosecutions mandates the assumption of independent action by the separate sovereigns.⁴⁵ This distinguishing factor seems especially valid when it is noted that the *Barthkus* Court had taken particular care to note that the state and federal prosecutions had been independently conducted.⁴⁶ Therefore, it would appear that the separate interest test, enunciated by the *Mills* court, can only be applied when the prosecuting jurisdictions are acting independently and are not considered to be separate jurisdictions within the same sovereign.⁴⁷

Mr. Justice Barbieri dissented in the instant case on the grounds that the separate interest test stated by the majority was "technically impractical and substantially fraught with unnecessary opportunities for inequality in the treatment of offenders."⁴⁸ He felt that the trial court would now be compelled to review the sentences imposed by a court of a separate sovereign whenever a plea of double jeopardy is raised.⁴⁹ Significantly, he raised questions concerning only the protection of the Commonwealth's interests in the situation where a prior conviction has been set aside or significantly altered.⁵⁰ Moreover, Justice Barbieri seemed to imply that the interests of the Commonwealth, however defined, could

44. 447 Pa. at 167-68, 286 A.2d at 640.

45. A high degree of cooperation between the prosecuting jurisdictions places the accused in the position of being effectively tried twice by the same sovereign. 359 U.S. at 168-69 (Brennan, J., dissenting).

46. *Id.* at 122-24. While conceding that the record showed some degree of cooperation between federal and state officials, the *Barthkus* majority felt it was insufficient to support the conclusion "that the state trial was a sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution." *Id.* at 124.

47. Such a limitation would apparently allay the fears expressed by Justice Brennan in *Abbate*. Although he wrote the majority opinion, he felt compelled to issue a separate opinion specifically rejecting the separate interest test urged by the Government as an alternative ground for the Court's decision. 359 U.S. at 196. He was primarily concerned that the separate interest test, if applied to uphold two successive federal prosecutions for the same offense, would be clearly violative of the fifth amendment:

I think not violence to, but virtual extinction of, the guarantee [against double jeopardy] results if the Federal Government may try people over and over again for the same criminal conduct just because each trial is based on a different statute protecting a separate federal interest.

Id. at 201.

48. 447 Pa. at 175, 286 A.2d at 643 (Barbieri, J., dissenting).

49. *Id.* at 175, 286 A.2d at 644.

50. *Id.* at 176, 286 A.2d at 644.

be protected only by a determination of guilt and imposition of appropriate punishment, indicating that the only factor the trial court need consider is the degree of punishment.⁵¹ It is submitted that such an interpretation fails to appreciate the purpose of the separate interest test as applied to effectuate the underlying theme of the double jeopardy doctrine, namely, to prevent one from being placed in jeopardy twice, not merely to prevent one from being convicted twice.⁵²

Justice Barbieri was additionally concerned that, when a defendant is confronted with the possibility of two prosecutions, inequality of treatment might arise, depending upon which jurisdiction prosecuted the defendant initially.⁵³ While the state might be precluded from initiating a second prosecution following the federal adjudication, the federal prosecution has no such constraint following a state prosecution. This, therefore, places added pressure upon a defendant to plead guilty to a federal indictment before the state initiates its prosecution. However, this danger has been minimized to a great extent by the announced policy of the United States Department of Justice — a federal prosecution should not be conducted after a state prosecution has been completed unless there is some compelling reason for proceeding with the second prosecution.⁵⁴ Although this policy does not have the legislative or judicial sanction required to completely eliminate this pressure on the defendant, it should provide some means for mitigating such pressure.

What the *Mills* court failed to do, however, was to identify specifically what state and federal interests should be examined and what guidelines should be utilized. Differing interests might be found in the legislative purpose behind the enactment of a particular statute⁵⁵ or in the purpose of the sanction imposed for violation of the statute.⁵⁶ With respect to potential guidelines, an examination of the approaches taken by other states might prove beneficial. For example, a number of states have enacted statutes expressly forbidding successive prosecution in their courts after jeopardy has attached in a federal court,⁵⁷ while a number of other

51. *Id.* at 175-76, 286 A.2d at 644.

52. Implicit in a discussion of double jeopardy is the notion that the policies underlying the doctrine are applicable regardless of the verdict in the first trial. *See* Fisher, *supra* note 11, at 592.

53. 447 Pa. at 176, 286 A.2d at 644 (Barbieri, J., dissenting).

54. The policy against duplicating federal-state prosecutions was formally announced by the United States Attorney General in a memorandum on April 6, 1959. 27 U.S.L.W. 2509.

55. For example, in *Abbate*, there was a separate and distinct federal interest involved in protecting interstate communication facilities quite apart from the state's interest in protecting each citizen's property from damage by another. *See* note 26 and accompanying text *supra*. The separate interest test could have been applied to reach the same result as the *Abbate* court did. *But see* note 47 and accompanying text *supra*.

56. In this regard, the State of Illinois had a peculiar interest in *Bartkus* because a felony conviction by the state exposed him to life imprisonment under the Illinois Habitual Criminal Statute. 359 U.S. at 122.

57. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-146 (1956); ARK. STAT. ANN. §§ 43-1224.1-3 (1964); CAL. PENAL CODE §§ 656, 793 (West 1970); GA. CODE ANN. § 26-307(c) (1969); MINN. STAT. § 609.45 (1969); N.Y. CRIM. PRO. LAW § 40.20

states have statutes which can be construed by implication to bar subsequent prosecutions by the state.⁵⁸ In this regard, a bill was recently introduced in the Pennsylvania General Assembly which would lend support for and, to some degree, codify the *Mills* holding.⁵⁹

A significant problem in applying the separate interest test is determining how much weight must be given to these particular state interests when they are balanced against individual rights. The court gives some guidance by enunciating the policies underlying the double jeopardy proscription; the prosecution should not be used simply to increase the chance of conviction by placing the case before another jury, to search for a more severe sentence, or to badger individuals.⁶⁰ If any of these motives permeate the decision to initiate a second prosecution for the same offense, such a prosecution would violate the spirit of the double jeopardy proscription and should be barred.⁶¹ Even in the absence of what might be deemed improper motive, there still exists the individual's right to be free from double prosecution and to have his verdict be final.⁶² It is in consideration of these rights that the *Mills* holding requires a positive showing by the Commonwealth that its interests in the second prosecution are substantially different from the interests protected by the initial prosecution.⁶³

By placing the burden on the Commonwealth, an additional consideration is required of the prosecutor in deciding whether a certain case should go to trial. Arguably, the prosecutor already makes similar considerations at the various investigatory and pre-trial stages of a criminal prosecution. However, at these procedural stages, his focus is directed toward determining whether there is sufficient evidence to convict, not whether the protection of the Commonwealth's interests might not require

(McKinney 1971); OKLA. STAT. tit. 21, § 25 (1961); VA. CODE ANN. § 19.1-259 (1960).

58. See, e.g., HAWAII REV. STAT. §§ 706-1, 706-4 (1968); MISS. CODE ANN. § 2432 (1957); MONT. REV. CODES ANN. § 94-4703 (1969); NEV. REV. STAT. §§ 171.070, 208.020 (1971); N.D. CENT. CODE §§ 12-05-05, 29-03-13 (1960); ORE. REV. STAT. § 131.240(1) (1971); S.D. COMPILED LAWS ANN. §§ 22-2-13, 22-5-8 (1967); UTAH CODE ANN. § 77-8-8 (1953); WIS. STAT. ANN. § 939.71 (1958).

59. For example, this bill would obviate the necessity of considering the outcome of the initial prosecution by focusing on the intent of the statutes involved. S.B. 45, Pa. Gen. Assembly, 1972 Sess., § 111. This section provides in pertinent part:

When conduct constitutes an offense within the concurrent jurisdiction of this Commonwealth and of the United States or another State, a prosecution in any such other jurisdiction is a bar to a subsequent prosecution in this Commonwealth under the following circumstances:

(1) The first prosecution resulted in an acquittal or in a conviction . . . and the subsequent prosecution is based on the same conduct unless:

(i) the offense of which the defendant was formerly convicted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of such offense is intended to prevent a substantially different harm or evil

60. 447 Pa. at 169-70, 286 A.2d at 641.

61. *Abbate v. United States*, 359 U.S. 187, 198-99 (Brennan, J., separate opinion).

62. 447 Pa. at 171, 286 A.2d at 641-42.

63. *Id.* at 171-72, 286 A.2d at 642.

prosecution regardless of the guilt of the accused. Unfortunately, because of the lack of specific guidelines, the prosecutor's discretion at this point is virtually unchecked.⁶⁴

Initially, then, the general criteria for determining whether to proceed to trial will evolve from the policies made by the prosecuting attorney's office. With the prosecutor's decision to proceed being subject to review at the trial level,⁶⁵ it is expected that more specific guidelines will be developed through judicial decisions. This approach would appear to be in keeping with the spirit of the *Bartkus* decision in which Justice Frankfurter, recognizing the difficulty of determining when state and federal statutes are so similar that a prosecution under one should bar a prosecution under the other, said:

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.⁶⁶

The separate interest doctrine is now established as the rule in Pennsylvania in cases of state prosecution following a federal prosecution.⁶⁷ It will not, of course, eliminate dual prosecutions, but it should reduce considerably the number of cases that can be prosecuted by the state subsequent to a federal adjudication. The approach of the *Mills* court, in barring the second prosecution, indicates a conscientious effort to apply the spirit of the double jeopardy proscription.

Of course, it remains to be seen whether other state courts will follow Pennsylvania's lead in the absence of legislative action setting forth guidelines. Indeed, the majority opinion in *Mills* can easily be criticized for the obvious lack of specificity in establishing guidelines for the state's prosecutors. Nevertheless, this deficiency may prove to be the strength of the court's holding in that it will allow a judicial development of guidelines to remain sensitive to societal demands in an area vitally dependent upon the dynamic concept of individual rights.

Ronald J. Examitas

64. For an analysis of prosecutorial discretion in the double jeopardy area, see J. SIGLER, *DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY* 155-87 (1969).

65. By statute, Pennsylvania makes this review available through the plea of *autrefois convict* or *acquitt*. PA. STAT. tit. 19, § 464 (1964). See note 4 *supra*.

66. 359 U.S. at 138.

67. The Pennsylvania Supreme Court accorded full retroactivity to the *Mills* decision in *Commonwealth v. Pope*, 447 Pa. 576, 287 A.2d 902 (1972).