

CONSTITUTIONAL LAW: SUCCESSIVE MUNICIPAL AND STATE PROSECUTIONS FOUND PERMISSIBLE DESPITE ASSUMED APPLICATION OF DOUBLE JEOPARDY CLAUSE

Although founding its decision upon the present inapplicability of the double jeopardy clause to the states, the District Court for the Eastern District of Louisiana has determined that, even assuming such an imposition, successive municipal and state prosecutions remain constitutionally permissible. Based, however, upon an erroneous analogy to the justifications underlying successive state and federal prosecutions, the court's conclusion seems unconvincing. Moreover, the court failed to consider the significant question of whether such state and municipal prosecutions are consistent with the requirements of due process.

IN many states, municipal ordinances and state statutes purport to proscribe virtually identical conduct. Upon the commission of an act violating both provisions, prosecution of the offender may ordinarily be initiated by either the state or local authorities. On occasion, however, the governmental unit not participating in the initial adjudication may undertake a subsequent prosecution and impose further punishment for the same misconduct¹ despite state constitutional provisions prohibiting double jeopardy.² Recently, in *Louisiana ex rel. Ladd v. Middlebrooks*,³ it was contended that such successive prosecutions contravened the double jeopardy prohibition of the fifth amendment of the Federal Constitution. Hypothesizing the applicability of this provision to the states, the United States District Court for the Eastern District of Louisiana rejected this contention by drawing an erroneous analogy to the standards applicable to complementary prosecutions by the state and federal governments.⁴ Moreover, the court failed to consider the contempo-

¹ See, e.g., *Bueno v. State*, 40 Fla. 160, 23 So. 862 (1898); *State v. Clifford*, 45 La. 558, 13 So. 281 (1893); *State v. Tucker*, 137 Wash. 162, 242 P. 363 (1926). See also Comment, *Double Jeopardy Where Both City and State Prosecute the Same Act*, 38 WASH. L. REV. 819 (1963); notes 24-28 *infra* and accompanying text.

² All but five states have constitutional provisions which prohibit a second trial for the same offense. Those states which do not—Connecticut, Maryland, Massachusetts, North Carolina, and Vermont—accept such a prohibition as a part of their statutory or common law. Newman, *Double Jeopardy and the Problem of Successive Prosecutions: A Suggested Solution*, 34 S. CAL. L. REV. 252, 252-53 nn.2-3 (1961).

³ 270 F. Supp. 295 (1967).

⁴ See notes 37-49 *infra* and accompanying text.

rarily more significant question of whether successive prosecutions are consistent with the standards of due process mandated by the fourteenth amendment.⁵

Convicted of theft in violation of a New Orleans city ordinance, Melvin Ladd was given a ninety-day sentence.⁶ Soon thereafter, he was indicted for the same act of theft by the State of Louisiana under a state statute.⁷ Upon the defendant's plea of guilty, a two-year sentence was imposed.⁸ While serving the latter sentence and after exhausting his state court remedies, Ladd applied for a writ of habeas corpus to the United States district court on the ground that his prosecution by the state subsequent to his prosecution by the municipality for the same act of theft violated the double jeopardy clause of the fifth amendment.

The prohibition of the double jeopardy provision does not necessarily preclude successive prosecutions by separate governmental authorities.⁹ As established in *United States v. Lanza*,¹⁰ prosecution by the federal government under a statute proscribing conduct for which the defendant was previously tried by a state tribunal is constitutionally permissible since the fifth amendment prohibits only multiple federal prosecutions.¹¹ A state criminal proceeding is not regarded as a prosecution by the federal government since the units receive their power from independent sources: the states' original power to define and punish crime was reserved to them by the tenth amendment; in contrast, the federal government

⁵ See notes 60-76 *infra* and accompanying text.

⁶ Ladd was convicted of "theft of merchandise valued at \$45 from a New Orleans department store, Maison Blanche, Inc.," in violation of New Orleans, La., Ordinance 828 MCS. 270 F. Supp. at 295.

⁷ Ladd was charged with "theft of a jacket of the value of Forty-Five (\$45.00) Dollars" in violation of LA. REV. STAT. § 14:67 (1950). 270 F. Supp. at 295.

⁸ The court in *Ladd* did not explicitly indicate whether the defendant's sentences were to be served concurrently or consecutively. However, the court stated that the defendant had served the ninety days and "is presently serving two years." 270 F. Supp. at 295.

⁹ See generally Fisher, *Double Jeopardy, Two Sovereignities and the Intruding Constitution*, 28 U. CHI. L. REV. 591 (1961); Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309 (1932).

¹⁰ 260 U.S. 377 (1922). In *Lanza* the Supreme Court sustained a defendant's conviction under federal law for manufacturing, possessing, and transporting liquor although he had already been convicted for the same conduct in Washington. See Note, 2 ORE. L. REV. 124 (1923); Note, 1 TEXAS L. REV. 343 (1923); Note, 9 VA. L. REG. (n.s.) 53 (1923); Note, 8 VA. L. REG. (n.s.) 740 (1923).

¹¹ 260 U.S. at 382.

derives its authority from specific provisions of the Constitution.¹² The state and federal governments thus constitute independent sovereignties which may exercise concurrent jurisdiction. One "act" prohibited by both sovereignties constitutes two separate "offenses," prosecution of which is not precluded by the double jeopardy clause.¹³

In *Abbate v. United States*,¹⁴ the Supreme Court re-examined and re-affirmed the *Lanza* rule, emphasizing that federal law enforcement would be hindered if a federal prosecution for a serious federal offense were to be barred by a state adjudication under a statute imposing a nominal penalty.¹⁵ Reiterating that the state and federal governments constitute independent sovereignties, the Court broadened the *Lanza* rationale by stressing that each government may possess a different interest affected by the conduct in question, necessitating two prosecutions for adequate vindication.¹⁶ Noting that successive sanctions could be precluded by application of a doctrine of preemption prohibiting concurrent state and federal jurisdiction, the Court considered such a procedure inconsistent with the proper distribution of power under the federal system, in which the states possess primary responsibility for enacting and enforcing criminal laws.¹⁷

¹² *Id.* at 381-82. The federal government derived its power to punish an individual for manufacturing, possessing, and transporting liquor from the eighteenth amendment. *Id.* at 379-81.

¹³ *Id.* at 382. The fifth amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy" (emphasis added). In *Lanza* the Supreme Court also reasoned that if an individual could secure immunity from a federal prosecution by submitting himself to prosecution by the state, respect for federal laws would be undercut and their deterrent effect lessened. 260 U.S. at 385. This rationale was subsequently given greater emphasis in *Abbate v. United States*, 359 U.S. 187 (1959). See notes 14-17 *infra* and accompanying text. It has been contended that the "separate sovereignties" concept of *Lanza* is fundamentally incorrect since the only "sovereign" in the United States is the citizenry and both the state and federal governments exercise power received from that source. See Gross, *Successive Prosecutions by City and State—The Question of Double Jeopardy*, 43 ORE. L. REV. 281, 304-07 (1964).

¹⁴ 359 U.S. 187 (1959). In *Abbate* the Court held that a state prosecution for conspiring to destroy certain telephone lines did not bar a subsequent federal prosecution based upon the same conspiracy. See Note, 11 HASTINGS L.J. 204 (1959); Note, 53 Nw. U.L. Rev. 521 (1958); Note, 13 Sw. L.J. 528 (1959).

¹⁵ 359 U.S. at 195. In *Abbate*, in fact, the petitioners wished to use their convictions under Illinois law, which resulted in sentences of only three months, to bar prosecution under a federal statute which carried a maximum sentence of five years. *Id.*

¹⁶ *Id.* at 193-95.

¹⁷ *Id.* at 195.

Having found prosecution by federal authorities after a similar state action unproscribed by the fifth amendment in *Lanza* and *Abbate*, the Supreme Court determined in *Bartkus v. Illinois*¹⁸ that state prosecution subsequent to federal proceedings was not inconsistent with the due process clause of the fourteenth amendment.¹⁹ Echoing the *Lanza-Abbate* rationale, the Court emphasized the dichotomy of interests affected to conclude that allowing a prior federal adjudication to preclude state proceedings would improperly eviscerate the state's power to vindicate its interest in the conduct involved²⁰ and displace the reserved power of the states over crimes.²¹ Suggesting that the Constitution was primarily intended to limit the power of the federal government rather than that of the states, the Court held that recognition of the importance of the state's police power was necessary to preserve the federal system as originally envisioned.²²

While the rules governing successive prosecutions by state and federal authorities devolve from an interpretation of the allocation of powers to each authority as delineated by the Constitution, all powers within an individual state repose in the state government, subject to allocation according to the requirements of the state constitution and preferences of the legislature.²³ In all states, some

¹⁸ 359 U.S. 121 (1959), noted in Note, 19 LA. L. REV. 877 (1959); Note, 38 TEXAS L. REV. 114 (1959); and Note, 34 TUL. L. REV. 197 (1959).

¹⁹ The defendant had been convicted by an Illinois state court of a bank robbery after having been acquitted in a United States district court in Illinois of a charge based upon the same conduct. The Supreme Court upheld his conviction. The defendant could not rely on the double jeopardy provision of the fifth amendment as a bar to his second prosecution, the state prosecution, since the Supreme Court has not extended federal double jeopardy standards to the states. 359 U.S. at 139; see *Brock v. North Carolina*, 344 U.S. 424, 426 (1953); *Palko v. Connecticut*, 302 U.S. 319, 322-28 (1937); note 37 *infra*.

²⁰ 359 U.S. at 137. The conduct involved was robbery of a federally insured bank. Thus, the argument is relatively easily made that the state and federal governments had separate interests in this act, for the federal government's interest in protecting the integrity of its banking system may be distinguished from the interest of the state in maintaining peace and order.

²¹ See note 41 *infra* and accompanying text.

²² See 359 U.S. at 137. The Court also carefully reviewed the precedents in this area, concluding that: "[W]ith 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." *Id.* at 136.

²³ See notes 42-48 *infra* and accompanying text. See also Annot., 174 A.L.R. 1343 (1948).

part of the police power is delegated to municipal corporations which are authorized to enact ordinances regulating conduct within the municipality. Where such ordinances proscribe acts identical to those prohibited by a state enactment, the majority of states have determined separate and successive prosecutions permissible upon a variety of rationales.²⁴ Some courts consider municipal prosecu-

²⁴ The question of successive municipal and state prosecutions arises, of course, when an individual is prosecuted first by a municipality and then by a state. See, e.g., *State v. Clifford*, 45 La. 558, 13 So. 281 (1893); *State v. Reid*, 19 N.J. Super. 32, 87 A.2d 562 (1952); *State v. Tucker*, 137 Wash. 162, 242 P. 363 (1926). The issue might also arise if a municipal prosecution were to follow a state proceeding. However, although the reasoning of many cases would seem to allow such prosecutions, it seems that they simply do not occur. The issue does arise when a defendant, having been prosecuted only by a municipality, appeals from the municipal prosecution alleging that the ordinance under which he was prosecuted is invalid because a state statute provides a punishment for the same conduct. The basic argument is that since successive prosecutions for the same offense are prohibited by the state constitution, a municipal proceeding would preclude a state prosecution, thereby interfering with the administration of state laws and thus requiring the invalidity of the ordinance. See, e.g., *Theisen v. McDavid*, 34 Fla. 440, 16 So. 321 (1894) (ordinance held valid); *Billings v. Herold*, 130 Mont. 138, 296 P.2d 263 (1956) (ordinance held invalid); *Ex parte Sloan*, 47 Nev. 109, 217 P. 233 (1923) (ordinance held valid). See generally Grant, *Penal Ordinances and the Guarantee Against Double Jeopardy*, 25 GEO. L.J. 293 (1937); Gross, *supra* note 13; Kneier, *Prosecution Under State Law and Municipal Ordinance as Double Jeopardy*, 16 CORNELL L.Q. 201 (1931); Comment, *Double Jeopardy Where Both City and State Prosecute the Same Act*, 38 WASH. L. REV. 819 (1963).

The problem of successive prosecutions may arise between nations as well as between state and municipality or the state and federal governments. When two or more nations have concurrent jurisdiction, trial in a foreign country would seem to bar retrial in the United States. See *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 197 (1820). An exception is made for certain acts, generally political in nature, which raise different issues in each jurisdiction. Thus, an American in a foreign country who steals secret American documents may be prosecuted abroad for theft and in the United States for treason. See Franck, *An International Lawyer Looks at the Barthus Rule*, 34 N.Y.U.L. REV. 1096, 1101-02 (1959). See also Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 U.C.L.A.L. REV. 1 (1956).

Moreover, treaties or acts of Congress may give rise to concurrent jurisdiction between states over waterways in which each has an interest. See, e.g., Act of Feb. 14, 1859, ch. 33, §§ 1-2, 11 Stat. 383. In this situation, the Supreme Court has proscribed successive prosecutions by providing that the judgment of the state first acquiring jurisdiction of the person will be binding upon both states. *Nielsen v. Oregon*, 212 U.S. 315, 320 (1909).

It may be noted that a prosecution by a municipality does not bar a subsequent prosecution by the federal government. *Smith v. United States*, 243 F.2d 877 (6th Cir. 1957); *United States v. Peterson*, 268 F. 864 (W.D. Wash. 1920). Opportunities for repetitive prosecutions also arise between a territorial government and the federal government, as well as between military and civil courts. See note 50 *infra* and accompanying text. The problem of successive prosecutions based upon the same conduct is to be distinguished from the problem of determining when particular acts have violated two statutes, or two ordinances. If more than one state statute has been

tions "civil" in nature and consequently no bar to state criminal proceedings.²⁵ Others maintain that certain acts are of greater gravity when committed within a municipality,²⁶ or characterize one act as a separate offense against each government.²⁷ It is also

violated, for example, the defendant may be punished twice by the state, once for each violation. The rule in many states and in the federal courts is that one act may be an "offense" against more than one statute, if each statute requires proof of an additional fact. This is termed the "same evidence" test. See *Gavieres v. United States*, 220 U.S. 338 (1911); Lugar, *Criminal Law, Double Jeopardy and Res Judicata*, 39 IOWA L. REV. 317 (1954); Note, *Twice in Jeopardy*, 75 YALE L.J. 262 (1965).

²⁵ See, e.g., *State v. Garner*, 360 Mo. 50, 226 S.W.2d 604 (1950); *State v. Muir*, 164 Mo. 610, 65 S.W.2d 285 (1901); *State v. Hauser*, 137 Neb. 138, 288 N.W. 518 (1939); *Mullins v. State*, 214 Tenn. 366, 380 S.W.2d 201 (1964); *Milwaukee v. Johnson*, 192 Wis. 585, 213 N.W. 335 (1927). Characterizing a municipal proceeding as a "civil" proceeding has consequences not only with regard to protection against double jeopardy, but also with regard to other rights of the defendant, such as the right to trial by jury. See *State v. Amick*, 173 Neb. 770, 114 N.W.2d 893 (1962) (defendant denied trial by jury). See generally 1 C. ANTEAU, MUNICIPAL CORPORATION LAW §§ 4A. 00-14 (1967). The civil character of proceedings to enforce municipal ordinances is a reflection of common law procedure. At common law, municipal ordinances could prescribe only pecuniary penalties. C. TIEDEMAN, A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS IN THE UNITED STATES § 154 (1894). The method of enforcing the ordinances was by an action of debt or assumpsit brought in the name of the municipal corporation or the proper official against the wrongdoer. However, the action could not be brought in a municipal court "for to suffer this would be to allow one to be judge in his own case;" thus, resort to some other court was necessary, "usually one of the courts at Westminster Hall." J. BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES § 403, at 270 (1873). At common law, the proceeding to enforce a municipal ordinance was clearly a civil proceeding. However, the differences between the common law procedure and a present-day prosecution in a municipal court empowered to impose jail sentences would seem evident. Thus, characterizing the latter proceeding as "civil" seems untenable. See Gross, *supra* note 13.

²⁶ See *Van Buren v. Wells*, 53 Ark. 368, 14 S.W. 38 (1890); *Ex parte Sloan*, 47 Nev. 109, 217 P. 233 (1923). A statute has since limited one of these cases. ARK. STAT. ANN. § 43-1225 (1964). It has also been argued that a municipality and a state should both be allowed to prohibit and punish the same conduct since "[t]he offense against the corporation and the State . . . are distinguishable, and wholly disconnected, and the prosecution at the suit of each proceeds upon a different hypothesis—the one contemplates the observance of the peace and good order of the city—the other has a more enlarged object in view, the maintenance of the peace and dignity of the State." *Mayor & Aldermen v. Allaire*, 14 Ala. 400, 403 (1848); *accord*, *State v. Quong*, 8 Idaho 191, 67 P. 491 (1902); *State v. Clifford*, 45 La. 558, 13 So. 281 (1893); *State v. Mills*, 108 W. Va. 31, 150 S.E. 142 (1929). See also 6 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 23.10 (1949).

²⁷ See, e.g., *Bueno v. State*, 40 Fla. 160, 23 So. 862 (1898); *Theisen v. McDavid*, 34 Fla. 440, 16 So. 321 (1894); *People v. Behymer*, 48 Ill. App. 2d 218, 198 N.E.2d 729 (1964); *State v. Lee*, 29 Minn. 445, 13 N.W. 913 (1882); *St. Louis v. Mueller*, 313 S.W.2d 189 (Mo. 1958); *In re Monroe*, 13 Okla. Crim. 62, 162 P. 233 (1917); *State v. Tucker*, 137 Wash. 162, 242 P. 363 (1926). Terming one "act" an "offense" against two governments is, of course, the same sort of reasoning which has been used to support successive state-federal prosecutions. See notes 12-13 *supra* and accompanying text. This analogy has not been overlooked by the state courts. See *Theisen v. McDavid*, *supra* at 443, 15 So. at 322. In other cases, the courts have distinguished

contended that impermissible detriment to state law enforcement would ensue if municipal adjudications barred subsequent state proceedings.²⁸ Conversely, a minority of states have prohibited successive state and local proceedings by reference to a double jeopardy provision in the state constitution,²⁹ judicial rule invalidating ordinances prohibiting conduct punishable under state statutes,³⁰ or legislative proscription.³¹

According to the allegations in *Ladd*, no special rule or statute is necessary to preclude successive prosecutions by state and municipal authorities since such a proscription is compelled by the fifth amendment. Rejecting *Ladd's* contention, the district court held that the

between the "police regulations" enforced by the municipalities and the "judicial power" of the state. *Shafer v. Mumma*, 17 Md. 331 (1861); *State v. Sly*, 4 Ore. 277 (1872). See generally *Kneier*, *supra* note 24; Note, 36 MINN. L. REV. 143 (1952).

²⁸ See *Robbins v. People*, 95 Ill. 175 (1880). It has been noted that if a municipal prosecution were to preclude a state prosecution, the result would be "the anomaly of the same crime being liable to be punished in as many various ways as there are cities and villages in the state, and of the same crimes when committed within the limits of a city or village being punishable only by a petty fine, which, if committed in the rural districts of the state, would be punishable by imprisonment in the state prison." *State v. Lee*, 29 Minn. 445, 461, 13 N.W. 913, 919 (1882) (concurring opinion). Other courts have allowed successive municipal and state prosecutions by yielding to the weight of authority without considering the rationale involved. See *Inman v. State*, 39 Ala. App. 496, 497, 104 So. 2d 448, 450 (1958); *Taylor v. Curry*, 215 Ga. 734, 113 S.E.2d 398 (1960); *Johnson v. State*, 59 Miss. 543 (1882); *Koch v. State*, 53 Ohio St. 433, 41 N.E. 689 (1895).

²⁹ *People v. Hanrahan*, 75 Mich. 611, 42 N.W. 1124 (1889); *cf. Northville v. Westfall*, 75 Mich. 603, 42 N.W. 1068 (1889).

³⁰ See *In re Sic*, 73 Cal. 142, 14 P. 405 (1887); *State v. Welch*, 36 Conn. 215 (1869); *Southport v. Ogden*, 23 Conn. 128 (1854); *Billings v. Herold*, 130 Mont. 138, 296 P.2d 263 (1956); *Grant*, *Penal Ordinances and the Guarantee Against Double Jeopardy*, 25 GEO. L.J. 293 (1937); Comment, 36 S. CAL. L. REV. 430 (1963).

³¹ For example, the Rhode Island statute provides: "No ordinance or regulation whatsoever, made by a town council, shall impose or at anytime be construed to continue to impose, any penalty for the commission or omission of any act punishable as a crime, misdemeanor or offense, by the statute law of the state." R.I. GEN. LAWS ANN. § 45-6-6 (1956). Other states allow concurrent jurisdiction but permit only one prosecution. Thus, for example, the Kentucky constitution provides: "No municipal ordinance shall fix a penalty for a violation thereof at less than that imposed by statute for the same offense. A conviction or acquittal under either shall constitute a bar to another prosecution for the same offense." KY. CONST. § 168. Protection from double punishment but not double prosecution is provided by still other states. An Arkansas statute provides: "Whenever any party shall have been convicted before any police or mayor's court or before any justice of the peace or circuit court said conviction shall be a bar to further prosecution before any police or mayor's court or justice of the peace or circuit court for such offense or for any misdemeanor embraced in the act committed; Provided, no such conviction before any police or mayor's court shall be a bar unless the penalty imposed is at least the minimum penalty prescribed by state laws for the same offense or act." ARK. STAT. ANN. § 43-1225 (1947). See generally *Gross*, *supra* note 13, at 291-95.

double jeopardy provision was ineffective in this context since it is not presently applicable to the states.³² Moreover, the court added that even were the provision applicable, Ladd's petition would nevertheless be denied since prosecution for the same conduct by both the state and the municipality is indistinguishable from the constitutionally permissible practice of repetitive adjudications by the state and federal governments.³³

Although the court's analogy may seem superficially correct,³⁴ an analysis of the nature of the municipality/state and state/federal relationships indicates that they are not comparable.³⁵ Thus, the district court may have incorrectly concluded that an application of the double jeopardy provision would permit successive local and state prosecutions. Moreover, it may be contended that regardless of the requirements of the double jeopardy clause, such successive

³² 270 F. Supp. at 296.

³³ *Id.* Citing *Lanza, Abbate, and Bartkus*, the court relied on two Louisiana cases, *State v. Fourcade*, 45 La. 408, 13 So. 187 (1893); and *State v. Clifford*, 45 La. 558, 13 So. 281 (1893), in which the state court had held that successive municipal and state prosecutions were permissible. The court also relied on a Louisiana statute which provides: "Double jeopardy does not apply to a prosecution under a law enacted by the Louisiana Legislature if the prior jeopardy was in a prosecution under the laws of another state, the United States, or under a municipal or parochial ordinance." LA. CODE CRIM. PROC. ANN. art. 597 (1967). In addition, the court cited *Barnett v. Gladden*, 255 F. Supp. 450 (D. Ore. 1966). In that case the court stated, "a single act may constitute an offense against a municipality and a crime against a state," because the municipal and state courts do not derive "their authority from the same sovereign. Here, the municipal ordinance derive[s] its authority from the city of Pendleton, while the statute derive[s] its authority from the state of Oregon." *Id.* at 453-54.

³⁴ The relationship of the states to the federal government under the United States Constitution is somewhat analogous to the relationship of municipalities to the states under the constitutions of home-rule states, such as Louisiana. Control of local matters is reserved to the states by the Federal Constitution. U.S. CONST. amend. X. Similarly, power over local matters is explicitly reserved to municipalities by constitutional home-rule provisions. For example, the Louisiana constitution provides: "The City of New Orleans . . . shall have the right and authority to adopt and enforce local police, sanitary and similar regulations to do and perform all of the acts pertaining to its local affairs, property, and government, which are necessary or proper in the legitimate exercise of its corporate powers and municipal functions." LA. CONST. art. 14, § 22; see *State v. Steward*, 152 Md. 419, 137 A. 39 (1927) (statute purporting to regulate vehicular traffic in Baltimore held to be unconstitutional attempt to legislate on a subject reserved to municipality by state constitution). See generally 1 C. ANTEAU, *supra* note 25, §§ 3.00-36; Comment, 36 S. CAL. L. REV. 430, 431 (1963). However, regardless of the relationship between municipalities and the state which is established by a state constitution, the recognition which is given to municipalities under the Federal Constitution would seem to be controlling in determining the validity of successive municipal and state prosecutions under the double jeopardy provision of the fifth amendment or the due process clause of the fourteenth amendment. See notes 42-48 *infra* and accompanying text.

³⁵ See notes 39-48 *infra* and accompanying text.

prosecutions are violative of the standards imposed by the due process clause of the fourteenth amendment.³⁶

Assuming that the double jeopardy proscription of the fifth amendment is applicable to the states through the fourteenth amendment,³⁷ the rationale in *Lanza* and *Abbate*³⁸ by which successive state and federal prosecutions are made consistent with that provision is arguably unavailable when the prosecuting entities are the municipality and the state. The permissibility of multiple state-federal prosecutions is based upon the constitutionally delineated nature of the governmental units. As interpreted by the Supreme

³⁶ Ladd's limitation of his petition to the double jeopardy contention may be ascribable to the fact that he drew the petition without the aid of an attorney. 270 F. Supp. at 295. However, the court receiving a habeas corpus petition is not limited to considering the arguments there raised. See *Price v. Johnson*, 334 U.S. 266 (1948). In *Price* the Supreme Court held that a lower court had improperly denied a writ of habeas corpus since "[t]he primary purpose of a *habeas corpus* proceeding is to make certain that a man is not unjustly imprisoned. And if for some justifiable reason he was . . . unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief. . . . Since [prisoners] . . . act so often as their own counsel in *habeas corpus* proceedings, we cannot impose on them the same high standards of the legal art which we might place on the members of the legal profession." *Id.* at 291-92. See also *De Coster v. Madigan*, 223 F.2d 906, 909 (7th Cir. 1955).

³⁷ In *Palko v. Connecticut*, 302 U.S. 319 (1937), the Supreme Court decided that the double jeopardy clause of the fifth amendment was not applicable to the states. However, the court in *Ladd* notes that there is a "distinct possibility" that the double jeopardy provision will soon be applied to the states through the fourteenth amendment. 270 F. Supp. at 296, citing *Chicos v. Indiana*, 385 U.S. 76 (1966); accord, *Robinson v. Henderson*, 268 F. Supp. 349, 350-51 (E.D. Tenn. 1967). In *Chicos* the "petitioner presented a single question in his petition for certiorari Is the Fifth Amendment's prohibition against placing an accused in double jeopardy applicable to state court prosecutions under the Due Process Clause of the Fourteenth Amendment?" 385 U.S. at 77. Because of other considerations, the Court did not reach this question, dismissing the writ as improvidently granted. However, the mere fact that certiorari was granted in *Chicos* may indicate a willingness on the part of the Court to re-examine the applicability of the double jeopardy provision to the states. Moreover, the Supreme Court in recent years has substantially increased the procedural safeguards afforded criminal defendants in the state courts through incorporation of various provisions of the first eight amendments into the due process clause of the fourteenth amendment. See, e.g., *Klopper v. North Carolina*, 386 U.S. 213 (1967) (sixth amendment right to speedy trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (sixth amendment right to confront witnesses); *Malloy v. Hogan*, 378 U.S. 1 (1964) (fifth amendment privilege against self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (sixth amendment right to assistance of counsel). Thus, there seems at least a possibility that *Palko* will be overruled and federal double jeopardy standards applied to the states. See *United States ex rel. Hetenyi v. Wilkins*, 348 F.2d 844, 854-56, 868 (2d Cir. 1965), cert. denied, 383 U.S. 913 (1966). For a discussion of the extent and process of incorporation see Henkin, "Selective Incorporation" in the *Fourteenth Amendment*, 73 *YALE L.J.* 74 (1963); Weithofen, *Supreme Court Review of State Criminal Procedure*, 10 *AM. J. LEGAL HIST.* 189 (1966).

³⁸ See notes 10-17 *supra* and accompanying text.

Court, the Constitution recognizes the federal and state governments as independent sovereignties,³⁹ each possessing inherent powers.⁴⁰ One of these powers belonging to the states is the police power,⁴¹ under which the state governments may define and punish crimes. In contrast, municipalities are given no cognizance by the Constitution; but rather, are regarded as instrumentalities of the state created to assist in its governmental functions.⁴² Thus, in enacting and enforcing ordinances, these local units merely exercise a delegated portion of the states' police power.⁴³ The dominion of state legislatures over such units is virtually unlimited.⁴⁴ The legislatures may create or destroy municipalities, change their boundaries,⁴⁵ or limit their powers.⁴⁶ In light of these considerations and the fact that the state

³⁹ Recognition of the state and federal governments as independent sovereignties under the Constitution is fundamental to the *Lanza*, *Abbate*, and *Barthus* decisions. See notes 10-22 *supra* and accompanying text. In *Lanza* the Court emphasized, "We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other." 260 U.S. at 382. This characterization was echoed by *Abbate* and *Barthus*. In both cases the Court quoted from *Moore v. Illinois*, 55 U.S. 13 (1852): "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." *Abbate v. United States*, 359 U.S. at 192; *Barthus v. Illinois*, 359 U.S. at 131.

⁴⁰ See note 12 *supra* and accompanying text.

⁴¹ *United States v. Constantine*, 296 U.S. 287, 295-96 (1935). The Supreme Court has been careful to recognize the importance of the police power in the role of the states under the federal system. For example, in *Barthus* the Court spoke of "the historic right and obligation of the States to maintain peace and order within their confines," 359 U.S. at 137, and in *Hoag v. New Jersey*, 356 U.S. 464, 468 (1958), noted that "it has long been recognized as the very essence of our federalism that the States should have the widest latitude in the administration of their own systems of criminal justice."

⁴² *Reynolds v. Sims*, 377 U.S. 533, 575 (1964). See notes 46 & 48 *infra*.

⁴³ See *Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U.S. 394, 397-99 (1919); *Williams v. Eggleston*, 170 U.S. 304, 310 (1898); *New Orleans v. New Orleans Water Works Co.*, 142 U.S. 79, 90-91 (1891); *Laramie County v. Albany County*, 92 U.S. 307, 308 (1875).

⁴⁴ The power of state legislatures over municipalities is not limited by the privileges and immunities clause of the fourteenth amendment. *Williams v. Baltimore*, 289 U.S. 36, 40 (1933). Nor is it limited by the equal protection clause, *Newark v. New Jersey*, 262 U.S. 192, 196 (1923), nor by the contract clause, *Trenton v. New Jersey*, 262 U.S. 182, 188 (1923). *But cf.* note 45 *infra*.

⁴⁵ See *Hunter v. Pittsburgh*, 207 U.S. 161 (1907). The power of the state legislature to alter municipal boundaries is, however, limited by the fifteenth amendment as demonstrated by *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). In *Gomillion* the Court held that an act of the Alabama legislature modifying the boundaries of the city of Tuskegee would be unconstitutional if it were shown that the consequence of the act was the deprivation of Negro voting rights.

⁴⁶ See *Atkin v. Kansas*, 191 U.S. 207 (1903).

government is not considered a subordinate unit of the federal government,⁴⁷ the Supreme Court has fully rejected the contention that a municipality is related to the state as the latter is to the federal government.⁴⁸ Consequently, since the municipality/state relation may not validly be considered the equivalent of the state/federal relationship, the "separate sovereignties" concept by which successive state and federal prosecutions are justified is inapplicable to permit multiple adjudications by municipal and state governments under an application of the double jeopardy clause. Rather, since the local government is in theory at one with the state as only a subordinate unit thereof, local and state prosecutions in series may constitute double jeopardy on the ground that they are in reality successive prosecutions by the state itself.⁴⁹

⁴⁷ See note 12 *supra* and accompanying text.

⁴⁸ Explaining why representation in state legislatures must be apportioned on the basis of population, although representation in the United States Senate is not so determined, the Supreme Court stated: "Admittedly, the original 13 States surrendered some of their sovereignty in agreeing to join together 'to form a more perfect Union.' But at the heart of our constitutional system remains the concept of separate and distinct governmental entities which have delegated some, but not all, of their formerly held powers to the single national government. . . . *Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities.* Rather, they have been traditionally regarded as *subordinate governmental instrumentalities* created by the State to assist in the carrying out of state governmental functions. As stated by the Court in *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178, these governmental units are 'created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them,' and the 'number, nature and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercised rests in the absolute discretion of the State.' The relationship of the States to the Federal Government could hardly be less analogous." *Reynolds v. Sims*, 377 U.S. 533, 574-75 (1964) (emphasis added).

⁴⁹ The double jeopardy provision has led to a number of rules regarding federal prosecutions which would likely similarly govern state prosecutions if the provision were extended to them. Since multiple punishments are considered to be contrary to the policies embodied in the double jeopardy provision, retrial after a conviction is forbidden. *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168-70 (1873). Moreover, retrial for the same offense after an acquittal is proscribed. *United States v. Ball*, 163 U.S. 662 (1896). Thus, the federal government may not appeal a verdict of acquittal. *Cf. Kepner v. United States*, 195 U.S. 100 (1904). Similarly, re prosecution after an "implicit" acquittal is prohibited. Thus, a defendant cannot be retried for first degree murder after an appeal from a conviction of second degree murder since he has been impliedly acquitted of the former charge. *Green v. United States*, 355 U.S. 184 (1957).

Jeopardy is said to attach when the jury has been impanelled and sworn, *Cornero v. United States*, 48 F.2d 69 (9th Cir. 1931), or when a court in a non-jury trial has begun to hear evidence, *McCarthy v. Zerbst*, 85 F.2d 640 (10th Cir.), *cert. denied*, 299 U.S. 610 (1936). After jeopardy attaches, if the trial is terminated for reasons other than those of "manifest necessity," retrial is not allowed. *Downum v. United States*, 372 U.S. 734 (1963) (reprosecution not permitted when absence of government wit-

This application of the double jeopardy proscription is further compelled by analogy to the treatment accorded successive territorial and federal adjudications. Since the laws and judicial authority of the federal and territorial governments emanate from a single sovereignty—the federal government—the Supreme Court has indicated that multiple prosecutions by these governmental units would contravene fifth amendment requirements.⁵⁰ Moreover, because neither territorial nor municipal governments have independent powers, the relationship of a territory to the federal government has been characterized by the Court as analogous to the relationship of a municipality to a state.⁵¹ Thus, the single source of power rationale which precludes prosecution by both territorial and federal governments would seem equally compelling in the context of successive municipal and state prosecutions and would suggest a result contrary to that

ness led to discharge of first jury and impanelling of second only two days later); *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824) (retrial permitted when the first trial ended with a hung jury); see Note, *Double Jeopardy: The Re prosecution Problem*, 77 HARV. L. REV. 1272 (1964).

⁵⁰ See *Puerto Rico v. Shell Co.*, 302 U.S. 253, 264 (1937). In addition to proscribing successive prosecutions by a territorial government and the federal government in *Puerto Rico*, the Supreme Court in *Grafton v. United States*, 206 U.S. 333 (1907), held that a defendant cannot be prosecuted by a territorial court after having been acquitted in a United States military court of charges arising out of the same conduct. In *Grafton* the Court explicitly rejected the reasoning of those cases allowing successive state and federal prosecutions, stating that they are inapplicable "where the two tribunals . . . exert all their powers under and by authority of the same government . . ." *Id.* at 355. Adopting the rationale of these decisions, it has been held that an individual who has been placed in jeopardy in a federal court cannot subsequently be tried in a military court for the same conduct. *United States ex rel. Pasela v. Fenno*, 76 F. Supp. 203 (D. Conn. 1947), *aff'd*, 167 F.2d 593 (2d Cir.), *cert. granted*, 334 U.S. 857, *cert. dismissed per stipulation*, 335 U.S. 806 (1948). Similarly, the Court of Appeals for the Fifth Circuit has held that a defendant who has been convicted by the United States Court of the Allied High Commission of Germany cannot be retried by a federal court because both tribunals derive their authority from the same sovereign. *Harlow v. United States*, 301 F.2d 361 (5th Cir.), *cert. denied*, 371 U.S. 814 (1962). However, consistent with the separate sovereignties concept supporting successive state and federal prosecutions, prosecutions in both a state court and a military court have been permitted. *Thompson v. Willingham*, 217 F. Supp. 901 (M.D. Pa. 1962), *aff'd*, 318 F.2d 657 (3d Cir. 1963); *People v. Wendel*, 59 Misc. 354, 112 N.Y.S. 301 (Sup. Ct. 1908).

⁵¹ Discussing the nature of territorial authority, the Court stated that a territory "is not a distinct sovereignty. It has no independent powers. It is a political community organized by Congress, all whose powers are created by Congress, and all whose acts are subject to Congressional supervision. Its attitude to the general government is no more independent than that of a city to the State in which it is situated, and which has given to it its municipal organization." *Talbott v. Silver Bow County*, 139 U.S. 438, 446 (1891); see *National Bank v. Yankton*, 101 U.S. 129 (1879) (congressional control over territories comparable to state power over municipalities).

reached by the *Ladd* court. Clearly, insofar as the rationale permitting prosecution by both the state and federal governments is based upon the nature of those governments as independent sovereignties, it is inapplicable to successive prosecutions by a city government and a state.⁵²

In conjunction with the theory of separate sovereignties, successive state and federal prosecutions are sustained by resort to the assertion that each unit may have a separate interest in particular conduct.⁵³ Since the state and federal governments derive their authority from separate sources,⁵⁴ it may be assumed that their criminal laws represent independent interests related to the particular powers by which they are enacted.⁵⁵ On the other hand, both state and local govern-

⁵² In *Robinson v. Henderson*, 268 F. Supp. 349 (E.D. Tenn. 1967), it was recognized that the rationale justifying successive federal and state prosecutions cannot be used to support successive municipal and state prosecutions. In that case, the petitioner alleged that his trial in county criminal court for assault with intent to commit first degree murder following his trial in a city court for assault and battery, both trials arising out of the same occurrence, violated rights guaranteed to him by the United States Constitution. *Id.* at 350. Noting that the United States Constitution does not bar federal prosecution following prosecution by the state, nor the obverse, the district court nevertheless concluded that the principles governing such prosecutions were not controlling in the case at hand "because of the distinction between the federal-state relationship and the state-city relationship." *Id.* at 351-52. However, the court denied the petition on other grounds. See note 69 *infra*.

⁵³ See notes 16 & 20 *supra* and accompanying text.

⁵⁴ See note 12 *supra* and accompanying text.

⁵⁵ The argument that the state and federal governments have separate interests in particular conduct and that therefore a federal prosecution is necessary and proper after a state prosecution in order to protect a separate federal interest is especially compelling in the civil rights area, since certain states have demonstrated a reluctance to punish those interfering with the interests of disfavored minority groups. For example, prosecution under a federal statute prohibiting denial of rights secured by the United States Constitution would presumably not be permissible in the absence of the *Lanza* and *Abbate* rule if the defendants had already been acquitted in a state court proceeding of charges based on the same conduct. However, *Lanza* and *Abbate* act to permit prosecutions as in *United States v. Guest*, 383 U.S. 745 (1966), where after acquittal in a state alleged murderers of a Negro in a southern state were indicted in the federal court. In such a case, the state's interest in maintaining peace and order, reflected in its statute proscribing murder, may be distinguished from the interest of the federal government in protecting the civil rights of all citizens. See Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538 (1967).

However, the arguments in favor of multiple prosecutions by the state and federal governments have not been convincing to all those who have considered the problem. In fact, dissatisfaction with the *Lanza*, *Abbate*, and *Barthus* decisions was manifest soon after they were announced. After *Lanza*, New York repealed its alcohol prohibition law. Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309, 1310 (1932). Subsequent to *Abbate*, the U.S. Attorney General ordered that no federal prosecution be brought after a state prosecution without his personal approval. Attorney General's Directive, 27 U.S.L.W. 2509 (1959); see *Petite v. United States*, 361

ments derive their power from the inherent authority of the former, and the local unit may not assert an independent interest.⁵⁶ When the state delegates the authority to enact and enforce an ordinance to a municipality, the effect is merely to permit the local government to protect a state interest rather than to give rise to an independent municipal interest. Underlying such a delegation may be the assumption that the concentration of population within the municipality's boundaries will lead to a greater likelihood of transgression of the state's interest. Administrative efficiency, therefore, dictates

U.S. 529, 531 (1960), citing Department of Justice Press Release, April 6, 1959. Following *Bartkus* Illinois passed a statute prohibiting retrial by the state after a federal trial. See ILL. ANN. STAT. ch. 38, § 3-4 (Smith-Hurd 1964). The Illinois statute provides that a "prosecution is barred if the defendant was formerly prosecuted in a District Court of the United States or in a sister State for an offense which is within the concurrent jurisdiction of this State . . ." *Id.* A number of other states also have promulgated statutes barring a state prosecution after a prosecution by the federal government. See MODEL PENAL CODE § 1.11, Comment (Tent. Draft No. 5, 1956).

Many commentators have criticized the *Lanza*, *Abbate*, and *Bartkus* cases. See Fisher, *supra* note 9; Franck, *supra* note 24; Grant, *supra*; Newman, *Double Jeopardy and the Problem of Successive Prosecutions: A Suggested Solution*, 34 S. CAL. L. REV. 252 (1961); Pontikes, *Dual Sovereignty and Double Jeopardy: A Critique of Bartkus v. Illinois and Abbate v. United States*, 14 W. RES. L. REV. 700 (1963); Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538 (1967). But see Note, 45 CORNELL L.Q. 574 (1960).

In *Bartkus* the Supreme Court itself seemed somewhat dissatisfied with the result. After noting "the concern of the Founders in devising a federal system," 359 U.S. at 137, the Court added: "The greatest self-restraint is necessary when that federal system yields results with which a court is in little sympathy." *Id.* at 138. Mr. Justice Black, joined by Chief Justice Warren and Mr. Justice Douglas, protested strongly in dissents to both *Bartkus* and *Abbate*. *Bartkus v. Illinois*, 359 U.S. at 150-64; *Abbate v. United States*, 359 U.S. at 201-04. In *Bartkus* he wrote: "I think double prosecutions for the same offense are so contrary to the spirit of our free country that they violate . . . the prevailing view of the Fourteenth Amendment . . ."

"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." 359 U.S. at 150-51, 155. In *Abbate* he added: "I am also not convinced that a State and the Nation can be considered two wholly separate sovereignties for the purpose of allowing them to do together what, generally, neither can do separately. . . . I believe the Bill of Rights' safeguard against double jeopardy was intended to establish a broad national policy against federal courts trying or punishing a man a second time after acquittal or conviction in any court." 359 U.S. at 203.

Chief Justice Warren's views on successive state-federal prosecutions are revealed in his opinion in *Pennsylvania v. Nelson*, 350 U.S. 497 (1956): "We are not unmindful of the risk of compounding punishments which would be created by finding concurrent state power. . . . Without compelling indication to the contrary, we will not assume that Congress intended to permit the possibility of double punishment." *Id.* at 509-10.

⁵⁶ See notes 43-46 *supra* and accompanying text.

localized attention. Further, to the extent that possible infringements of state interests stem from conditions which are local in nature, such as industrialization, high population density, or concentration of minority groups, understanding of these peculiarities necessitates the continued and immediate contact best achieved through local administrative units.⁵⁷ Although local officials may have an immediate interest in certain conduct which is particularly troublesome within the municipality, no power to punish such conduct is given municipal courts unless the state considers its interest so strong as to require local enforcement.⁵⁸ An argument based upon separate interests seems incompetent to justify multiple municipal and state prosecutions, and since such adjudication is in effect a double prosecution by the state,⁵⁹ a violation of the double jeopardy clause should ensue.

⁵⁷ Professor McQuillin, reflecting the views of many state courts, has advanced an argument which suggests that successive municipal and state prosecutions should be allowed because each governmental unit has an interest in the acts of misconduct committed within municipalities. For him, "common experience has shown that in view of the rapid increase of urban development more rigid and detailed regulations ordinarily are required in urban than in rural sections of the state. Clearly many acts are far more injurious and the temptation to commit them is much greater in congested centers than in the state at large, and when these acts are committed in such centers they are not only injurious to the public at large in the same way that they would be if they were committed outside these centers, but they constitute additional injury to the inhabitants of the congested centers where they occur. It follows that there is a basis for regarding such an act both as an offense against the people of the state at large and against the inhabitants of the local community." 6 E. McQUILLIN, *supra* note 26, § 23.10. However, contrary to Professor McQuillin's analysis, it would seem that an act of misconduct committed within a municipality is *not* a separate offense against the people of the state *and* against the inhabitants of the local community. Rather, it is an offense against the state *only* as it is an offense against the local community. It is, thus, one offense, not two. The fact that the municipality possesses an interest does not mean that interest is perceptibly distinguishable from that held by the state.

⁵⁸ See notes 43-46 *supra* and accompanying text.

⁵⁹ See note 49 *supra* and accompanying text. The court in *Canon City v. Merris*, 137 Colo. 169, 323 P.2d 614 (1958), recognized that "[a] municipality is an agency of the state The state may not prosecute a defendant twice for an offense, and this being so, it is difficult to find a sanction for permitting the state to do indirectly through its agent what it cannot do directly." *Id.* at 181, 323 P.2d at 620. However, other courts, while recognizing that municipalities are merely subordinate units of the state government, have nevertheless held that successive municipal and state prosecutions are not precluded by the double jeopardy provision of the state constitution. See *State v. Reid*, 19 N.J. Super. 32, 87 A.2d 562 (1952); *State v. Tucker*, 137 Wash. 162, 242 P. 363 (1926).

It has been suggested that the latter result is defensible, although the reasoning is unsound, because "constitutional rights can be disregarded in petty cases. . . . The elements of oppression or harassment historically aimed at by the constitutional and common law prohibition [against double jeopardy] are not significantly involved."

Even in the absence of the double jeopardy provision, it may be contended that successive prosecutions by local and state governments are violative of the standards presently imposed on the states by the due process clause of the fourteenth amendment. In *Palko v. Connecticut*⁶⁰ the Supreme Court ruled that multiple prosecutions by a state would, at an indeterminate point, offend the standards imposed upon the the states by the due process clause.⁶¹ Conceiving the proper test to be whether the successive prosecutions in a particular case violate "fundmental principles of liberty and justice,"⁶² the

State v. Currie, 41 N.J. 531, 543, 197 A.2d 678, 685 (1964), quoted in Fisher, *Double Jeopardy: Six Common Boners Summarized*, 15 U.C.L.A.L. REV. 81, 94 (1967). It has been noted that other constitutional guaranties, such as trial by jury, have been held to be inapplicable to petty offenses. "Today, the economic burden on society and the accused would be prohibitive if petty cases were to be tried with the full paraphernalia now required to protect the accused in trials involving his constitutional rights." Fisher, *supra* at 95. However, it would seem that these contentions do not justify successive municipal and state prosecutions. Imprisonment for ninety days (Ladd's punishment in the municipal court) cannot be considered minor. The consequences in terms of reputation or loss of employment, for example, may be quite far-reaching. Although, historically, successive municipal and state prosecutions probably were not comprehended by the prohibition against double jeopardy, the character of municipal proceedings has changed greatly since then. See note 25 *supra*. Moreover, the practical considerations of judicial economy and administrative efficiency, which would suggest that such safeguards as trial by jury be dispensed with in certain cases, do not suggest that the protection afforded by the double jeopardy provision be disregarded; rather, convenience would seem to demand that it be applied.

⁶⁰ 302 U.S. 319 (1937). See note 63 *infra*.

⁶¹ "In a series of cases commencing ten years after *Palko*, an assumption, certainly of the persuasion of a holding, gradually arose that the Due Process Clause of the Fourteenth Amendment did impose some restrictions on the power of a state to re-prosecute an individual for the same crime." United States *ex rel. Hetenyi v. Wilkins*, 348 F.2d 844, 851 (2d Cir. 1965), cert. denied, 383 U.S. 913 (1966). Thus, in Louisiana *ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), the Supreme Court stated: "Our minds rebel against permitting the same sovereignty to punish an accused twice for the same offense." *Id.* at 462. In *Gryger v. Burke*, 334 U.S. 728 (1948), the Court was willing to consider the petitioner's claim that sentencing under a state recidivist statute unconstitutional subjected him to double jeopardy. Moreover, the opinion in *Brock v. North Carolina*, 344 U.S. 424 (1953), quoted from *Palko* to ask: "Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it?" *Id.* at 427 (emphasis added). Ultimately, in *Bartkus v. Illinois*, 359 U.S. 121 (1959), the Court clearly found *Palko* to mean that "at some point the cruelty of harassment by multiple prosecutions by a state would offend due process . . ." *Id.* at 127; see *Hoag v. New Jersey*, 356 U.S. 464 (1958). See also *Ciucci v. Illinois*, 356 U.S. 571 (1958). However, the procedure involved in each of these cases was determined to be constitutionally permissible. Nevertheless, it may be contended that the point of impermissible harassment may be passed in successive prosecutions by state and municipality. See Comment, *Double Jeopardy Where Both City and State Prosecute the Same Act*, 38 WASH. L. REV. 819, 830 (1963); note 65 *infra* and accompanying text.

⁶² 302 U.S. at 328. Some protection against successive prosecutions would seem to be fundamental to our law since the principle of double jeopardy was a part of the

Court determined that the procedure in *Palko*, retrial of an accused after an appeal by the state on questions of law, was not inconsistent with due process.⁶³ Significantly, however, the Court distinguished this procedure from retrial by the state after a trial free of error prejudicial to that party,⁶⁴ thereby implicitly suggesting that trial subsequent to an error-free prosecution would transgress constitutional standards.⁶⁵ If validity is given the contention that the municipality is but a subordinate unit of the state, representing the state's interest and utilizing its power, successive prosecutions by the state and local governments arguably constitute double prosecution by the state alone.⁶⁶ Thus, to allow such prosecutions would be to permit the state indirectly to accomplish what would otherwise appear constitutionally impermissible. Moreover, *Palko* suggests that an aspect of repetitive state prosecutions bringing them within the proscription of due process would be their use to "wear out" an initially successful defendant.⁶⁷ Since prosecution by a local government and a

English common law. COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND *213-14. By the time of the adoption of the Constitution, four special pleas in bar were recognized: *autrefois acquit* (former acquittal), *autrefois convict* (former conviction), *autrefois attain* (former attain), and former pardon. However, the protection of these pleas was limited to felony prosecutions. 4 BLACKSTONE, COMMENTARIES 335 (8th ed. 1778). The double jeopardy concept was also a part of colonial law. See Sigler, *A History of Double Jeopardy*, 7 AM. J. LEGAL HIST. 283 (1963). That the same protection against double jeopardy inheres in due process because such protection was a part of the common law was recognized in *Ex parte Ulrich*, 42 F. 587 (W.D. Mo. 1890).

⁶³ In *Palko* a defendant convicted of second degree murder and sentenced to life imprisonment was retried after appeal by the state pursuant to a statutory provision, convicted of first degree murder, and sentenced to death. In upholding the death penalty and the right of the state to appeal, the Court concluded: "If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege, subject at all times to the discretion of the presiding judge . . . has now been granted to the state." 302 U.S. at 328.

The double jeopardy provision of the fifth amendment has been interpreted as precluding an appeal by the federal government after an acquittal. *Kepner v. United States*, 195 U.S. 100 (1904). Thus, in order to uphold an appeal by the state in *Palko*, the Supreme Court necessarily had to hold that the standards imposed on the federal government by the fifth amendment clause are not applicable to the states through incorporation into the fourteenth amendment.

⁶⁴ 302 U.S. at 328.

⁶⁵ See Fisher, *supra* note 59, at 597; *cf.* *United States ex rel. Hetenyi v. Wilkins*, 348 F.2d 844 (2d Cir. 1965), *cert. denied*, 383 U.S. 913 (1966).

⁶⁶ See note 49 *supra* and accompanying text. See generally Gross, *Successive Prosecutions by City and State—The Question of Double Jeopardy*, 43 ORE. L. REV. 281 (1964).

⁶⁷ 302 U.S. at 328.

state would seem especially susceptible to this practice, the effect of such proceedings as denying due process is enhanced.⁶⁸

Beyond the adumbrations of *Palko*, it may be contended that successive actions by the state and a municipality are so "fundamentally unfair,"⁶⁹ based upon a balancing of the conflicting interests involved,⁷⁰ as to fall short of the standard of due process. When a municipality and a state both prosecute an individual, the interest of the state in enforcing its criminal laws is well protected; it is in fact vindicated twice.⁷¹ Conversely, the accused must bear the expense of two defenses, the ignominy of two arrests and prosecutions, and the burden of two punishments.⁷² Although re prosecution is

⁶⁸ Municipal and state officials might easily collaborate in bringing a municipal proceeding prior to a state prosecution in order to test the strength of the defendant's case or wear down his resistance to contesting his guilt.

⁶⁹ In *Hoag v. New Jersey*, 356 U.S. 464 (1958), the Supreme Court provided that "[t]he question in any given case is whether . . . a course [of successive prosecution] has led to fundamental unfairness." *Id.* at 467. This is an echo of the standard suggested by the Court in *Palko*. See note 62 *supra* and accompanying text. At least one court has rejected the contention that successive municipal and state prosecutions are "fundamentally unfair" and, therefore, violative of due process. *Robinson v. Henderson*, 268 F. Supp. 349 (E.D. Tenn. 1967). However, the rule allowing successive municipal and state prosecutions has borne consistent and extensive criticism. See Grant, *Penal Ordinances and the Guarantee Against Double Jeopardy*, 25 GEO. L.J. 293 (1937); Gross, *supra* note 66; Kneier, *supra* note 24; Comment, *Double Jeopardy Where Both City and State Prosecute the Same Act*, 38 WASH. L. REV. 819 (1963). Moreover, in *State v. Fourcade*, 45 La. 403, 13 So. 187 (1893), one of the cases relied upon by the *Ladd* court, the "unfairness" inherent in successive municipal and state convictions was recognized by the conclusion that although such convictions were permissible, "every fair-minded judge will, when pronouncing judgment in the second prosecution or proceeding, consider a penalty already suffered." *Id.* at 413, 13 So. at 190, quoting *McInerney v. Denver*, 17 Colo. 302, 307, 29 P. 516, 518 (1892) (emphasis added).

⁷⁰ In *Bartkus v. Illinois*, 359 U.S. 121, 128 (1959), the Supreme Court indicated that a balancing of the relevant factors is required in due process adjudication. The Court has also indicated that "in all cases involving what is or is not due process . . . no hard and fast rule can be laid down. The pattern of due process is picked out in the facts and circumstances of each case." *Brock v. North Carolina*, 344 U.S. 424, 427-28 (1953). See generally Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957).

⁷¹ In a municipal prosecution, the state's police power is used to protect citizens of the state who reside in urban areas. If a prosecution by the state follows, it is nothing less than a second vindication of the interest of those citizens, since the state government represents *all* citizens. See note 57 *supra* and accompanying text.

⁷² The Supreme Court, discussing the double jeopardy provision of the fifth amendment, has recognized the defendant's interest in avoiding multiple prosecutions, stating that: "If there is anything settled in the jurisprudence of England and America, it is that no one can be *twice* lawfully *punished* for the same offense." *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168 (1873) (emphasis added). "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . The underlying idea, one that is deeply ingrained in at least the Anglo-

permissible where the initial failure results from error prejudicial to the state,⁷³ this argument does not compel a conclusion that the interest may be *twice* served in light of the heavy burdens placed upon an accused.⁷⁴ Moreover, where the defendant is initially acquitted by the municipality, the operative effect of permitting the state to re prosecute is to grant the state an opportunity to "do better a second time"⁷⁵ and to increase the likelihood of convicting one wrongly accused.⁷⁶ Although a second opportunity may be justifiable so that a societal interest may obtain one vindication, it would appear fundamentally unfair when the sole effect is to double the prosecutor's chances for success.

Several solutions to the problem of successive prosecutions may be suggested which would protect the interests of both the individual and the state. Initially, it would seem that adequate protection of the individual may be obtained only by a rule which bars successive prosecutions. It may be assumed that one prosecution by the *state* itself should provide adequate opportunity for that unit to test the

American system of jurisprudence, is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to *embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.*" *Green v. United States*, 355 U.S. 184, 187-88 (1957) (emphasis added). *See generally* Note, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 *YALE L.J.* 339 (1956).

⁷³ *See Palko v. Connecticut*, 302 U.S. 319 (1937); notes 63-64 *supra* and accompanying text.

⁷⁴ A potential source of "unfairness" would seem to be recidivist statutes, found in many states, which provide that individuals with a record of prior convictions will receive harsher sentences than those who have no such record. *See generally* Note, 40 *N.Y.U.L. REV.* 332 (1965). If a conviction under a municipal ordinance were used in a state proceeding based on the same conduct to invoke the operation of a recidivist statute, the unfairness would seem clear. In effect, an individual would then become an habitual offender by the commission of only one act and would thus qualify upon the second trial for the extended sentences furnished recidivists. Moreover, if the initial conviction were used in this manner, conviction of the defendant in the second trial might be almost a certainty in some states since under the procedure approved by the Supreme Court in *Spencer v. Texas*, 385 U.S. 554 (1967), evidence of former convictions may be presented to the jury along with the evidence of the crime for which the defendant is presently being tried. *See* Note, 1967 *DUKE L.J.* 857. However, in *State v. End*, 232 *Minn.* 266, 45 *N.W.2d* 378 (1950), and *Brooker v. State*, 312 *P.2d* 189 (*Okla. Crim. App.* 1957), it was held that a conviction under a municipal ordinance is not a conviction within the scope of a state recidivist statute.

⁷⁵ *Brock v. North Carolina*, 344 U.S. 424, 429 (1953) (Frankfurter, J., concurring). It seems clearly "fundamentally unfair" to permit a second prosecution where the effect is primarily to allow the prosecutor an opportunity to improve his performance. *United States ex rel. Hetenyi v. Wilkins*, 348 *F.2d* 844, 859 (2d Cir. 1965).

⁷⁶ *See* Note, *Twice in Jeopardy*, 75 *YALE L.J.* 262 (1965).

validity of an alleged interference with its interest.⁷⁷ Therefore, a system of internal resolution could be used by which, prior to prosecution, the municipality would notify the state of an arrest and the state would then have the option of prosecuting the defendant alleged to have committed an act which is punishable under both municipal and state law. Two prosecutions would be avoided since either the state or if deemed more appropriate, the local officials, but not both, would then prosecute the defendant.⁷⁸ The administrative cost in such a scheme would not seem sufficient to impeach practicality. Significantly, such a plan would preserve concurrent jurisdiction, thus providing municipal officials with the means of insuring prosecution of an offender apprehended by them.

On the other hand, a simpler approach to the problem of successive local and state prosecutions would be to dispense with concurrent jurisdiction by a rule that state statutes preempt municipal ordinances proscribing the same conduct. Such a conclusion would reflect the predominant authority of the state government and insure uniformity in the enforcement of the state's policies for only a state prosecution would result, vindicating its interest. Moreover, if preemption were utilized, the administrative difficulties and prob-

⁷⁷ Although situations may arise in which a municipal prosecution might be felt to be adequate to protect a state interest, it would seem that a state legislature could always provide for sufficient protection of that interest by an appropriate proceeding in a state court under a state statute. The possibility of an inadequate presentation of the prosecution's case is lessened if the state judiciary is empowered to impose longer sentences than those available in municipal courts, or if the state police are granted more extensive investigative facilities. Moreover, in determining the sentence to be imposed in a state court, a judge might consider the fact that a crime was committed in a municipality and, thus, may have endangered many people. A single proceeding in a state court would, of course, avoid the dilemma faced by the court in *Ladd*. The court's choice there was narrow: it could allow Ladd to be twice prosecuted and punished or it could allow him to use his relatively minor sentence under a municipal ordinance to escape prosecution under the state statute. While the court chose the former, solution of this action should not be interpreted to mean that two prosecutions are necessary or even that the court would have reached the same conclusion had Ladd's two-year sentence under the state statute preceded his municipal trial.

⁷⁸ A system of resolution among potential prosecutions has been suggested in the context of the state/federal relationship. "[C]ooperation should extend to prosecution, so that the enforcement agencies of both governments contribute to the fullest possible presentation of all the evidence at a *single* trial in the court mutually adjudged most appropriate. It might even be inquired whether such desirable cooperation could not be expedited, on occasion, by state and Congressional enactment authorizing the bringing of actions under federal law in state courts by joinder to the state prosecution. The decision in the *Bartkus* case makes such cooperation unnecessary by giving the prosecutors two tries at a conviction." Franck, *An International Lawyer Looks at the Bartkus Rule*, 34 N.Y.U.L. REV. 1096, 1103 (1959).

lems of cooperation between municipal and state officials which might arise under an internal resolution system would be avoided. In addition, since all individuals committing the same act of misconduct would be prosecuted by the state, all would have the benefit of any procedural safeguards available in state, but not in municipal, proceedings.⁷⁹ Thus, no claims of a denial of equal protection would lie.⁸⁰ Preemption presently obtains in several states and has proved to be a workable solution providing adequate protection for municipal and state residents.⁸¹

In conclusion, it would seem that the court in *Ladd* presented only a superficial analysis of the constitutional problems involved in successive municipal and state prosecutions. The court failed to consider the implications of the due process clause, and its analysis under the double jeopardy clause revealed a misunderstanding of the limitations of the precedent upon which it relied.⁸² Moreover, had the court determined that successive municipal and state prosecutions were unconstitutional, such a decision would have prohibited only successive municipal and state prosecutions based on exactly the same evidence.⁸³ Thus, it would seem that a rewording of municipal ordinances and state statutes so that they proscribe somewhat different acts would remove the constitutional objections raised by the procedure in *Ladd* and would be of minimal practical consequence. Since such an insignificant adjustment would be required to avoid the problem raised by *Ladd*, it would seem but a small step for a court to declare the procedure in *Ladd* unconstitutional. Unfortunately, the court was unwilling to take this step but exercised itself no further than to reaffirm the erroneous analogy between municipality/state and state/federal relationships.⁸⁴

⁷⁹ Many of the procedural safeguards, such as trial by jury, which are customarily available in proceedings in the state courts are not generally available under current municipal procedure. See 1 C. ANTIEAU, MUNICIPAL CORPORATION LAW §§ 4A.00.14 (1967).

⁸⁰ See note 79 *supra*.

⁸¹ See Grant, *Penal Ordinances and the Guarantee Against Double Jeopardy*, 25 GEO. L.J. 293 (1937); Comment, 36 S. CAL. L. REV. 430 (1963); note 30 *supra* and accompanying text.

⁸² See notes 37-59 *supra* and accompanying text.

⁸³ See note 24 *supra* and accompanying text.

⁸⁴ See Gross, *supra* note 66; notes 39-49 *supra* and accompanying text.