



1994

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Recommended Citation

Woods, Christina Galye (1994) "Comments: The Dual Sovereignty Exception to Double Jeopardy: An Unnecessary Loophole," *University of Baltimore Law Review*: Vol. 24: Iss. 1, Article 6.
Available at: <http://scholarworks.law.ubalt.edu/ublr/vol24/iss1/6>

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THE DUAL SOVEREIGNTY EXCEPTION TO DOUBLE JEOPARDY: AN UNNECESSARY LOOPHOLE

I. INTRODUCTION

The Fifth Amendment protection against double jeopardy, which provides that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb,”¹ is the oldest of guarantees in the Bill of Rights.² Having survived the Dark Ages, the belief in double jeopardy protection reflects the pervasive influence of deeply entrenched Western legal doctrine, from canon law to English common law.³ Despite its eloquent simplicity, however, the Double Jeopardy Clause presents underlying complexities for both lay and legal theorists. Like the chameleon, the concept of double jeopardy triggers different interpretations among various state jurisdictions, provokes different judicial standards depending on whether a defendant is acquitted or convicted, and may allow multiple trials that produce multiple punishments.⁴ The interpretation of this seemingly simple Clause may affect three distinct protections afforded to a defendant: the bar of a second prosecution for the same offense after an acquittal, the bar of a second prosecution for the same offense after a conviction, and the bar of multiple punishments for the same offense after a conviction.⁵

The dual sovereignty⁶ exception (the Exception)⁷ to the Double Jeopardy Clause, which allows for successive prosecutions of the

1. U.S. CONST. amend. V.

2. George C. Thomas, III, *An Elegant Theory of Double Jeopardy*, 1988 U. ILL. L. REV. 827, 828 (1988).

3. *Id.* at 836-37.

4. *Id.* at 830-31.

5. *Id.* at 830.

6. “Sovereignty” is defined as the “[s]upremacy of authority or rule as exercised by a sovereign.” THE AMERICAN HERITAGE DICTIONARY 1169 (2d ed. 1982). A sovereign is a “person, body, or state in which independent and supreme authority is vested.” BLACK’S LAW DICTIONARY 1395 (6th ed. 1990).

7. The Exception was created to address those situations where a criminal offense violates the laws of separate sovereigns. See Michael Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 290-92 (1992). Such a violation may arise whenever sovereigns derive their power from different sources. *Id.* While either the federal government or the state may prosecute an offender, neither may preempt the power of the other without specific statutory mandates. See, e.g., *United States v. Vignola*, 464 F. Supp. 1091, 1099 n.23 (E.D. Pa.), *aff’d*, 605 F.2d 1199 (3d Cir. 1979),

same offense by separate governing bodies, is but one aspect of double jeopardy protection which leads to confusion and controversy in the delicate balance between individual rights and the government's police power. A classic example of this controversy was illustrated when the Exception was used to allow the successive prosecutions of police officers involved in the Rodney King beating.⁸ In the wake of the most devastating urban riot in recent years, the United States Department of Justice brought charges of federal civil rights violations against those officers after their state trial had concluded.⁹ To many citizens, the officers' second trial was a violation of the Fifth Amendment to the Constitution.¹⁰ A substantial number of the judiciary agreed, including thirty percent of state and ten percent of federal judges who responded to a Gallup poll of 401 members of the judiciary.¹¹

The apparent lack of judicial uniformity regarding the use of the Exception in the King case is somewhat surprising, in light of a 1959 Supreme Court decision which held that a single offense can violate both the sovereignty of the state where the act occurred and the sovereignty of the United States.¹² Under this theory, the state and the federal government act as separate governing bodies, each having the opportunity to prosecute conduct in violation of their respective laws.¹³ Accordingly, despite the protections afforded by the Double Jeopardy Clause, an individual may remain in jeopardy of successive adjudications emanating from a single act if that act violates the laws of separate sovereigns.

Territorial distinctions further obfuscate the meaning of the Double Jeopardy Clause in situations where an accused initiates a criminal offense in one state and completes the offense in another.¹⁴

cert. denied, 444 U.S. 1072 (1980) (reiterating that the power to regulate racketeering activities is not reserved to the states by the Commerce Clause). See generally Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, 1965 (1962) (expressly limiting proper venue to any United States District Court).

8. Seth Mydans, *Verdict in Los Angeles; 2 of 4 Officers Found Guilty in Los Angeles Beating*, N.Y. TIMES, Apr. 18, 1993, at 1.

9. *Id.*

10. See *supra* note 1 and accompanying text.

11. Gary A. Hengstler, *How Judges View Retrial of L.A. Cops*, A.B.A. J., Aug. 1993, at 70.

12. *Abbate v. United States*, 359 U.S. 187, 193-96 (1959) (concluding that two crimes have been committed, one against each sovereign).

13. *Id.* at 191-92.

14. See, e.g., *Heath v. Alabama*, 474 U.S. 82, 92-93 (1985) (continuing nature of crime traversing two different states gave both states the necessary jurisdiction to successively prosecute accused without violating double jeopardy); *Frasher v. State*, 8 Md. App. 439, 447, 260 A.2d 656, 661, *cert. denied*, 400 U.S. 959 (1970) (holding that continuous travel into Maryland from another state gave

Unless one of the states has a statutory provision prohibiting dual prosecutions based on territorial jurisdiction alone, an accused may be put in jeopardy twice merely by driving into the other state.¹⁵ Similarly, an accused may also be tried twice if the offense occurs on American-Indian territory, because the American-Indian tribunal and the federal government are each separate sovereigns with independent prosecutorial powers.¹⁶

As the above examples demonstrate, the use of the Exception to allow successive prosecutions of the same offense by separate governing bodies erodes much of the protection afforded to a defendant by the Double Jeopardy Clause. This Comment further explores this erosion by examining the relationship between the Exception and the constitutional guarantee against double jeopardy. First, the Comment explores the history and development of the Exception and focuses on the interpretations which Maryland and the Fourth Circuit have given to issues inherent in its application. The Comment also surveys the constitutional, statutory, and common-law policies that other jurisdictions have in place regarding double jeopardy. Finally, the Comment explores alternatives to the Exception, including arguments for an absolute bar to its use and suggested alternatives to Maryland's current legislative silence on the Exception.

II. THE HISTORY AND DEVELOPMENT OF THE EXCEPTION

A. *An Historical Perspective*

As originally worded, the Double Jeopardy Clause stated that "[n]o person shall be subject . . . to more than one punishment or one trial for the same offense."¹⁷ Interestingly, a proposed addendum to the Bill of Rights, which would have added the words "by any law of the United States" to the conclusion of the foregoing provision, was defeated.¹⁸ If adopted, this addendum would have limited successive prosecutions in federal court, but not those between federal and state courts.¹⁹ It has been argued that failure to gain passage of the addendum strengthens the argument that the Fifth Amendment

Maryland proper jurisdiction to successively prosecute, without violating defendant's double jeopardy rights).

15. *Heath*, 474 U.S. at 92-93; *Frasher*, 8 Md. App. at 447, 260 A.2d at 661.

16. *United States v. Wheeler*, 435 U.S. 313, 328-32 (1978).

17. Comment, *Successive Prosecutions by State and Federal Governments for Offenses Arising Out of Same Act*, 44 MINN. L. REV. 534, 537 n.17 (1960).

18. *Id.*

19. *See id.*

bars successive trials between any jurisdiction, and not merely those occurring in federal courts.²⁰

The argument for a broad interpretation of the Double Jeopardy Clause is further strengthened when one considers that at the time of the Fifth Amendment's passage, common law prohibited second prosecutions after previous convictions in other jurisdictions.²¹ Because federal law was then in its infancy, common law provided the minimal standards under which the Bill of Rights was interpreted.²² Since the first ten amendments have subsequently been interpreted as providing broader individual liberties than those provided by common law,²³ reading the Double Jeopardy Clause to bar dual prosecutions in any two jurisdictions would have been a logical extension of then existing standards.

Nonetheless, a broad interpretation of the Double Jeopardy Clause was rejected by the United States Supreme Court in the leading case of *United States v. Lanza*.²⁴ In that case, the Court permitted a federal prosecution for violations of the National Prohibition Act following the defendant's prior conviction in state court for the same offense.²⁵ The Court reasoned that the Fifth Amendment protection against double jeopardy applied only to successive trials in federal court for the same offense.²⁶ The Court's decision was predicated on the concept of federalism,²⁷ which is the driving force behind the dual sovereignty principle that a citizen owes allegiance to both the state and the federal government.²⁸ Thus, the theory

20. *Id.*

21. *Id.* at 537 n.18.

22. *Id.*

23. *Id.*

24. 260 U.S. 377 (1922).

25. *Id.* at 385. The *Lanza* opinion represented the first time the Court interpreted the scope of protection afforded by the Fifth Amendment where state and federal courts had concurrent jurisdiction to enforce the law. Dawson, *supra* note 7, at 290-92.

26. *Lanza*, 260 U.S. at 380. Thus, because the defendant's two trials were in state and federal court, the Fifth Amendment protection against double jeopardy was inapplicable.

27. Federalism is the term which describes the "interrelationships among the states and relationship between the states and the federal government." BLACK'S LAW DICTIONARY 612 (6th ed. 1990).

28. Moore v. Illinois, 55 U.S. (14 How.) 13, 20 (1852); see also *Bartkus v. Illinois*, 359 U.S. 121, 137 (1959). In *Bartkus*, Justice Frankfurter stated:

Some recent suggestions that the Constitution was in reality a deft device for establishing a centralized government are not only without factual justification but fly in the face of history. It has more accurately been shown that the men who wrote the Constitution as well as the citizens of the member States of the Confederation were fearful of the power of centralized government and sought to limit its power.

Id. at 137.

behind the Exception is that an individual subjected to successive state and federal prosecutions for a single offense is not in double jeopardy, because the wrongdoer has committed the legal fiction of two offenses—one against the state and one against the United States.²⁹

Nearly forty years after *Lanza*, the Court reiterated its reluctance to broaden double jeopardy protection when the Exception was significantly reinforced in *Bartkus v. Illinois*³⁰ and *Abbate v. United States*.³¹ In *Bartkus*, a defendant who was first acquitted in federal court of robbing a federally insured bank was later successfully convicted in state court on essentially the same facts.³² Conversely, in *Abbate* the defendants first pled guilty and were convicted in state court for conspiring to destroy telephone facilities.³³ Thereafter, the defendants were tried and convicted in federal court for the same offense.³⁴

The convictions that resulted from the second prosecutions in both *Bartkus* and *Abbate* were upheld by the United States Supreme Court.³⁵ In upholding the defendants' federal conviction in *Abbate*, the Court restated and reinforced its holding in *Lanza* that a federal prosecution following a state conviction is not barred by the prohibition against double jeopardy.³⁶ The Court also relied on practical considerations of law enforcement to conclude that neither the federal nor state government should be displaced in its ability to administer criminal sanctions.³⁷ Although the Court observed that our system of federalism gives "the States . . . the principal responsibility for defining and prosecuting crime,"³⁸ it opined that "the efficiency of federal law enforcement [would] suffer if the Double Jeopardy Clause prevents successive state and federal prosecutions."³⁹

The Court used an entirely different rationale to uphold the defendant's conviction in *Bartkus*. Having concluded that the robbery committed by the defendant created two separate offenses—one against the federal government and one against the state⁴⁰—the Court

29. *Moore*, 55 U.S. (14 How.) at 20.

30. 359 U.S. 121 (1959).

31. 359 U.S. 187 (1959).

32. *Bartkus*, 359 U.S. at 121-22. The state conviction was upheld notwithstanding unrefuted evidence that FBI investigations continued after completion of the federal trial, and that there was active cooperation and participation between federal and state prosecutors. *Id.* at 122-23.

33. *Abbate*, 359 U.S. at 187-88.

34. *Id.* at 188-89.

35. *Abbate*, 359 U.S. at 196; *Bartkus*, 359 U.S. at 139.

36. *Abbate*, 359 U.S. at 195.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Bartkus*, 359 U.S. at 124, 131-33.

found it unnecessary to extend the protection of the Double Jeopardy Clause to the states through the Due Process Clause of the Fourteenth Amendment.⁴¹ Justice Frankfurter emphasized that "the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments,"⁴² including the Fifth Amendment right not to be put in jeopardy twice.⁴³ The Court supported its holding with its earlier decision in *United States v. Barnhart*,⁴⁴ where the federal conviction of two white defendants who shot a native on the Umatilla American-Indian reservation was upheld after the defendants' state court acquittal.⁴⁵

As a result of *Bartkus* and *Abbate*, the order or sequence of dual prosecutions between federal and state trials has no effect on the applicability of the Exception,⁴⁶ thus negating any perceived need to rush to the courthouse to preserve jurisdiction. Whether the accused has been acquitted or convicted in the first trial is also immaterial to the Exception.⁴⁷

In the years following the *Bartkus* and *Abbate* decisions, the Exception was strengthened as the federal government became increasingly concerned about the ineffectiveness of some southern state courts in prosecuting white defendants charged with murdering civil rights workers.⁴⁸ While the federal government stepped up legislative action to end discrimination, it was not until the Court's decision in *United States v. Guest*⁴⁹ that real justice was served.⁵⁰ In *Guest*, the Court refused to uphold the state court dismissal of an indictment charging six defendants with criminal conspiracy to deprive certain African-Americans of their civil rights.⁵¹ The Court held, *inter alia*,

41. *Id.* at 136.

42. *Id.* at 124.

43. *Id.* at 127.

44. 22 F. 285 (C.C.D. Or. 1884).

45. *Id.* at 286. With refreshing clarity, the Court recognized the bias of the judicial system in civil rights cases: "No white man was ever hung for killing an Indian, and no Indian tried for killing a white man ever escaped the gallows." *Id.* at 289.

46. See *supra* notes 32-35 and accompanying text.

47. See *supra* notes 32-35 and accompanying text.

48. Michael R. Belknap, *The Legal Legacy of Lemuel Penn*, 25 How. L.J. 467, 475-77 (1982). During the years between 1955 and 1965, although there were 66 killings of blacks or civil rights activists, only three persons were convicted on appropriate state charges. *Id.* at 475-76. In 70% of the cases studied by the Legislative Reference Service of the Library of Congress, southern justice failed to arrest suspects, failed to charge deaths as homicides, or failed to obtain grand jury indictments against those who stood accused of the murders. *Id.*

49. 383 U.S. 745 (1966).

50. Belknap, *supra* note 48, at 492-93.

51. *Guest*, 383 U.S. at 746-47, 749.

that the allegation of state involvement in the defendants' conspiracy was sufficient to prevent dismissal of the indictment.⁵² Thus, although two of the six defendants had previously been acquitted in state court of killing one of the African-Americans, the subsequent federal prosecution of those defendants was implicitly authorized by the Court.⁵³ *Guest* therefore represented the foundation for federal enforcement of civil rights statutes when the southern system of jurisprudence failed to protect civil rights demonstrators.⁵⁴

The expansion of federal law to enforce civil rights was a necessary response by our centralized government to eradicate the vestiges of slavery within the states. Congressional power to make laws regulating state or private conduct, and thus protect individual civil rights, has been firmly established by the long history of federal involvement in civil rights enforcement. This history began with the Reconstruction Amendments to the Constitution⁵⁵ and flourished through congressional activity in the 1960s⁵⁶ and the Court's response thereto.⁵⁷ The Rodney King case is therefore not unique in the use of federal law to protect against discrimination based on racial animus.⁵⁸ Notwithstanding the need to retain federal enforcement of civil rights in a country as diverse as ours, however, a similarly substantial argument justifying the use of the Exception in non-civil rights cases is not readily apparent.

B. *The Extension of the Double Jeopardy Clause to the States*

In the years following the Supreme Court's decision in *Bartkus v. Illinois*,⁵⁹ that the prohibition against double jeopardy was inap-

52. *Id.* at 756-57.

53. *Id.* at 748 n.1.

54. Belknap, *supra* note 48, at 492-93.

55. See U.S. CONST. amend. XIII (outlawing slavery); U.S. CONST. amend. XIV (guaranteeing to all persons the privileges and immunities of United States citizenship, due process of law, and equal protection); U.S. CONST. amend. XV (protecting voting rights).

56. See Civil Rights Act of 1964, 42 U.S.C. § 2000a-2000h-6 (1988); Voting Rights Act of 1965, 42 U.S.C. § 1973-1973(p) (1988) (proscribing violations based on race).

57. See, e.g., *Jones v. Mayer Co.*, 392 U.S. 409 (1968) (enforcing the Thirteenth Amendment); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (enforcing the Fourteenth Amendment); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (enforcing the Fifteenth Amendment).

58. See, e.g., *United States v. Price*, 383 U.S. 787, 790-92 (1966) (involving the brutal killing of three civil rights workers by a deputy sheriff and seventeen others in violation of civil rights under 18 U.S.C. § 242); *Johnson v. Davis*, 582 F.2d 1316, 1317 (4th Cir. 1978) (involving violation of prisoners' civil rights under 42 U.S.C. § 1983); *Scott v. Vandiver*, 476 F.2d 238, 240 (4th Cir. 1973) (involving violation of civil rights under 42 U.S.C. § 1983).

59. 359 U.S. 121 (1959).

plicable to the states,⁶⁰ a defendant had no basis for challenging successive prosecutions for the same offense. Accordingly, although the Exception itself was likewise inapplicable to the states, the successive prosecutions that it allowed could nevertheless take place without any violation of a defendant's rights. It was not until 1969, when the right to be free from double jeopardy was extended to the states through the Due Process Clause of the Fourteenth Amendment,⁶¹ that the legality of such successive prosecutions was questioned. In *Benton v. Maryland*,⁶² a defendant who was acquitted in state court on larceny charges, but convicted in the same trial on burglary charges, was subsequently reindicted on each charge and subjected to a new trial.⁶³ Although the defendant argued that his reindictment on the larceny charge would put him in jeopardy twice for the same offense, his motion to dismiss that charge was denied and he was subsequently convicted on both the larceny and burglary charges.⁶⁴

On appeal, the Supreme Court overturned both of the defendant's convictions.⁶⁵ In doing so, the Court overturned its earlier decision in *Palko v. Connecticut*,⁶⁶ where it held that the Double Jeopardy Clause of the Fifth Amendment was inapplicable to the states.⁶⁷ The *Benton* Court reasoned that the double jeopardy prohibition is "a fundamental ideal in our constitutional heritage,"⁶⁸ and should thus be incorporated to the states through the Due Process Clause of the Fourteenth Amendment.⁶⁹

The *Benton* Court's extension of the prohibition against double jeopardy to the states meant that the Exception could now be utilized by states to allow successive prosecutions for the same offense. In the year following *Benton*, however, the Court decided two cases which curtailed that ability. In *Waller v. Florida*,⁷⁰ the Court held

60. See *supra* notes 40-45 and accompanying text.

61. See *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

62. 395 U.S. 784 (1969).

63. *Id.* at 785-86. The defendant's reindictment and new trial was prompted by an unrelated court of appeals' decision which held that jury selection could not be based on an allegiance to God. See *Schowgurow v. State*, 240 Md. 121, 124-31, 213 A.2d 475, 478-82 (1965). Because the jurors in the defendant's first trial were selected under the unconstitutional allegiance provision, the defendant was offered and accepted the option of reindictment and a new trial. *Benton*, 395 U.S. at 785-86.

64. *Benton*, 395 U.S. at 786.

65. *Id.* at 787.

66. 302 U.S. 319 (1937), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969).

67. *Id.* at 322-23.

68. *Benton*, 395 U.S. at 794.

69. *Id.* at 795.

70. 397 U.S. 387 (1970).

that state, municipal, city, or local governments are not considered separate sovereigns under the Exception.⁷¹ Specifically, because the judicial power of both the city and the state government was derived from the same "organic law,"⁷² the *Waller* court held that a defendant who was convicted or acquitted by a municipal court of violating certain city ordinances could not be subjected to a second trial by the state.⁷³

The Court demonstrated similar concerns for a defendant's Fifth Amendment rights in *Price v. Georgia*.⁷⁴ In that case, a petitioner who was tried in state court for murder, but found guilty only on the lesser included offense of voluntary manslaughter,⁷⁵ was retried on the murder charge after the state court verdict was reversed.⁷⁶ On appeal, the Supreme Court held that the petitioner's retrial should have been confined to the lesser included offense of voluntary manslaughter.⁷⁷ The Court reasoned that the petitioner's jeopardy for murder ended with the first trial, where there was an implicit acquittal of the murder charge by the conviction on the lesser offense.⁷⁸ In so holding, the Court reiterated that the Fifth Amendment prohibition against double jeopardy was applicable to the states through the Fourteenth Amendment.⁷⁹

The extension of the double jeopardy prohibition to the states⁸⁰ led at least one court to conclude that the Exception was slowly being eroded.⁸¹ Other courts have offered similar predictions. In an

71. *Id.* at 395.

72. *Id.* at 393. The "organic law" to which the Court referred was Florida's state constitution, from which both the municipal court and the state court derived their power. *Id.*

73. *Id.* at 395.

74. 398 U.S. 323 (1970).

75. *Id.* at 324.

76. *Id.* The verdict was reversed because of erroneous jury instructions. *Id.*

77. *Id.* at 327.

78. *Id.* at 328-29.

79. *Id.* at 330 n.9.

80. See *supra* notes 61-69 and accompanying text.

81. See *People v. Cooper*, 247 N.W.2d 866 (Mich. 1976), where the court stated: The trend in United States Supreme Court decisions leads us to conclude that the permissibility of Federal-state prosecutions as a requirement of our Federal system is open to reassessment. Indeed, the reasoning supporting *Bartkus* has been seriously undermined. In *Benton v. Maryland*, the Court declared the Fifth Amendment guarantee against double jeopardy to be a fundamental right which was applicable to the states through the due process clause of the Fourteenth Amendment. Subsequent United States Supreme Court decisions have also cut away at *Bartkus*' remaining rationale, the dual sovereignty theory.

Id. at 869 (citing to *Benton v. Maryland*, 395 U.S. 784, 786 (1969), and *Bartkus v. Illinois*, 359 U.S. 121 (1959)).

even earlier decision in which it observed the trend toward broader double jeopardy protection, the United States Court of Appeals for the Fourth Circuit speculated that "the two sovereignties rule may be abandoned."⁸² Perhaps even more interesting, when commenting on the impact of the extension of the double jeopardy prohibition to the states, a federal district court in Virginia boldly but erroneously stated that "*Benton* overrules *Bartkus*. But, does it overrule *Abbate*? By logic, it would seem so. What is sauce for the goose ought to be sauce for the gander."⁸³

Despite these and other similar prophecies, the predicted erosion of the Exception in favor of defendants' rights was premature. The drift toward defendants' rights evidenced by the *Benton*, *Waller*, and *Price* decisions was checked, if not totally obliterated, in *Heath v. Alabama*.⁸⁴ In *Heath*, a defendant who conspired to have his wife murdered by hired assassins pled guilty to conspiracy to commit murder in a Georgia state court in exchange for a life sentence.⁸⁵ Subsequently, the defendant was tried in an Alabama state court on the same charge and ultimately sentenced to death.⁸⁶ In upholding the defendant's Alabama conviction, the Supreme Court soundly reaffirmed the separate sovereignty rule, stating that "[t]he dual sovereignty doctrine, as originally articulated and consistently applied by this Court, compels the conclusion that successive prosecutions by two States for the same conduct are not barred by the Double Jeopardy Clause."⁸⁷ Taking a mechanistic approach, Justice O'Connor made clear that balancing the interests of concurrent jurisdictions has no place where dual sovereignties exist.⁸⁸ Instead, the legal fiction of two offenses should prevail when the accused is prosecuted by different sovereigns.⁸⁹

82. *United States v. Smith*, 446 F.2d 200, 203 n.1 (4th Cir. 1971). In rejecting the defendant's double jeopardy claim on collateral estoppel grounds, the court opined that the Exception may be overruled in the future. *Id.* The court cautioned, however, that while "[t]his is an interesting speculation, . . . a subordinate court should not reach out to anticipate the Supreme Court's future resolution of the point, especially in this case where, as we have seen, the record does not present a sufficient basis for the collateral estoppel claim." *Id.* (quoting Justice Schaefer, *Unresolved Issues in the Law of Double Jeopardy: Waller and Ashe*, 58 CAL. L. REV. 391, 401 (1970)).

83. *United States v. Treadway*, 312 F. Supp. 307, 310 (E.D. Va. 1970).

84. 474 U.S. 82 (1985).

85. *Id.* at 83-84.

86. *Id.* at 83-86. The defendant's prosecution in Alabama arose because his hired assassins kidnapped his wife from that state. *Id.* at 83-84. After her kidnapping, the assassins transported the defendant's wife to Georgia, where her body was actually found. *Id.*

87. *Id.* at 88.

88. *Id.* at 92.

89. *Id.* at 93.

The *Heath* decision clarified the Court's position that prosecutorial discretion is best left to the individual states.⁹⁰ In its first opportunity to address successive state prosecutions where two states have concurrent territorial jurisdiction over the accused, the Court soundly rejected any alternative approach to the Exception.⁹¹ In so doing, the Court explicitly rejected a "balancing of the interests approach,"⁹² which would have allowed Alabama to prosecute the defendant only upon a showing that Alabama's interest was not vindicated by the first trial in Georgia.⁹³

C. *The Current State of the Dual Sovereignty Exception*

Notwithstanding any ambiguity that may be read into the Court's use of interchangeable terminology when interpreting the scope of state statutory double jeopardy provisions,⁹⁴ the Court has steadfastly held onto the Exception regardless of whether the accused is prosecuted for the same act,⁹⁵ the same conduct,⁹⁶ or the same offense,⁹⁷ and irrespective of which plenary body is the first to prosecute.⁹⁸ As recently as 1978 the Court, in *United States v. Wheeler*,⁹⁹ affirmed this hard line interpretation of the Exception and held that the defendant's dual prosecutions by an American-Indian tribunal and the federal government were not barred under the Double Jeopardy Clause.¹⁰⁰ The Court reasoned that dual prosecutions were appropriate because both the tribunal and the federal government acted as separate sovereigns,¹⁰¹ each deriving their power

90. *Id.*

91. *Id.*

92. *Id.* at 92.

93. *Id.* at 91-92.

94. See Comment, *Successive Prosecutions by State and Federal Governments for Offenses Arising Out of Same Acts*, 44 MINN. L. REV. 534, 542-44 (1960) (discussing usage of terms such as conduct, offense, act, and transaction, all of which may imply single or multiple violations of statutory provisions depending upon the interpretations given to each).

95. See *Heath*, 474 U.S. at 93 (defining a single act as an "offense" against each sovereign).

96. See *id.* at 88.

97. See *id.* at 87-88 (conceding that successive trials for the same offense in only one state would be barred by the prohibition against double jeopardy). It should also be noted that adjudication of a lesser included offense precludes prosecuting the accused for the greater offense. See *supra* notes 74-79 and accompanying text.

98. See *supra* notes 30-39, 45-47 and accompanying text.

99. 435 U.S. 313 (1978).

100. *Id.* at 328.

101. *Id.*

to punish from different sources.¹⁰²

Although applicability of the Exception might seem well-settled, the *Bartkus*¹⁰³ opinion suggests a possible restriction to what might otherwise appear to be a bright line approach governing its applicability. When the *Bartkus* Court examined the evidence of federal involvement in the defendant's state trial, it questioned whether the state trial was merely a cover for the federal prosecution.¹⁰⁴

The Court did not believe, however, that the degree of federal participation and involvement in defendant's state trial rose to the level of a sham.¹⁰⁵ In contrast, the Court viewed federal involvement in the state trial as support for the argument that state and federal police powers may work closely together in subsequent trials when both powers have concurrent jurisdiction.¹⁰⁶ Accordingly, because the level of cooperation required to establish a sham has not yet been defined by the Court, and because few cases have turned on the sham defense,¹⁰⁷ successful use of that defense to prohibit subsequent

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102. *Id.* at 320-28. The federal government's power to prosecute originated from the Constitution and the legislature. *Id.* at 320. The American-Indian tribunal's power stemmed from a "primeval sovereignty" which has never been relinquished. *Id.* at 328. *Wheeler* was therefore distinguished by the Court from those cases where concurrent territorial jurisdiction involves territories that derive their power from the same source, thereby prohibiting subsequent prosecutions between those territories and the federal government under double jeopardy principles. *See id.* at 318-20; *see also* *Puerto Rico v. Shell Co.*, 302 U.S. 253, 264-66 (1937) (affirming that because Puerto Rico is a territory for dual sovereignty purposes, subsequent prosecutions of defendants by Puerto Rico and the federal government are prohibited); *Grafton v. United States*, 206 U.S. 333, 354-55 (1907) (affirming the territorial status of the Philippines and the prohibition against subsequent prosecutions of defendants in both federal and territorial courts); *United States v. Sanchez*, 992 F.2d 1143, 1151 (11th Cir.) (barring successive prosecutions by Puerto Rico and the federal government, despite Puerto Rico's self-governance), *modified per curiam*, 3 F.3d 366, 367 (11th Cir. 1993) (allowing prosecution by the federal government because the Puerto Rican and federal murder charges required different elements of proof), *cert. denied*, 114 S. Ct. 1051 (1994); *United States v. Alston*, 609 F.2d 531, 537 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 918 (1980) (confirming that the District of Columbia is a territory; subsequent prosecutions of defendants in both the District and the federal courts are therefore barred by double jeopardy).
103. *Bartkus v. Illinois*, 359 U.S. 121 (1959); *see supra* notes 40-47 for a discussion of *Bartkus*.
104. *Bartkus*, 359 U.S. at 124.
105. *Id.*
106. *See id.* at 123 (observing that it is an orthodox practice throughout the country for federal officials and state authorities to act in cooperation with each other when prosecuting certain defendants).
107. *See, e.g.*, *United States v. Belcher*, 762 F. Supp. 666 (W.D. Va. 1991). Although the *Belcher* court criticized the prosecutor in that case, who was both the Assistant United States Attorney and the Commonwealth's attorney, the case

state and federal prosecutions of a defendant may be more fiction than reality.¹⁰⁸

The sham defense, however, is not the sole method by which a defendant may be protected from subsequent state and federal prosecutions. In the interests of fairness to the accused, the United States Department of Justice (the Department) adopted the Petite Policy, which is used to determine when federal prosecutions may follow prosecutions by a state.¹⁰⁹ The Petite Policy states that a second federal prosecution may not follow a state prosecution unless there is a compelling governmental interest at stake.¹¹⁰ In the absence of a compelling governmental interest, subsequent prosecutions in federal courts will not be sought based on the same "act, acts, or transactions."¹¹¹ If a compelling governmental interest is demonstrated, a federal prosecutor must seek authorization from the appropriate Assistant Attorney General before any multiple prosecutions may be undertaken.¹¹²

Unfortunately, because the Petite Policy is an internal policy of the Department, it grants no substantive or procedural rights to a defendant.¹¹³ Additionally, although there have been attempts to defend or appeal successive prosecutions on the grounds that the

was ultimately reversed on other grounds. *Id.* at 671. The Court's criticism, however, is nonetheless worthy of note:

In fact, it seems to the court that if the same prosecutor simultaneously derives power from both a State and the federal government, then the whole underpinning of federalism is destroyed. The fact that the two sovereigns have essentially pooled their powers in one prosecutor . . . creates one "super sovereign."

Id.

108. Dawson, *supra* note 7, at 296.

109. For a description of the Petite Policy and the guidelines that should be followed when exercising federal prosecutorial discretion, see *Rinaldi v. United States*, 434 U.S. 22, 27 n.13 (1977). As set forth therein, then Attorney General William Rogers recognized the need for cooperation between state and federal law enforcement officials and therefore supported the Petite Policy as a means of ensuring that the public interest in justice remained of tantamount importance. *Id.* According to Rogers, if the jurisdiction was "determined accurately, and is followed by efficient and intelligent cooperation of state and federal law enforcement authorities, then consideration of a second prosecution very seldom should arise." *Id.*

110. *Id.* at 25 n.5.

111. See Jean F. Rydstrom, Annotation, *Effect on Federal Criminal Prosecution or Conviction of Prosecutor's Noncompliance with Petite Policy Requiring Prior Authorization of Attorney General for Federal Trial Where Accused Has Been Previously Prosecuted for Same Acts in State Court*, 51 A.L.R. FED. 852, 853 (1992 & Supp. 1994).

112. *Id.* at 854.

113. See *United States v. Belcher*, 762 F. Supp. 666, 674-75 (W.D. Va. 1991) (denying substantive rights under the Petite Policy).

federal prosecutor did not follow the Petite Policy,¹¹⁴ these attempts have been largely unsuccessful¹¹⁵ and have not defined when a governmental interest becomes compelling.

Nevertheless, given the Court's firm stance on the Exception, the Petite Policy should act as a safeguard to unbridled prosecutorial discretion. But for the Petite Policy, there would be no limit to successive prosecutions for the same offense when state and federal jurisdictions have concurrent jurisdiction.¹¹⁶ Federal prosecutors have themselves occasionally attempted to limit prosecutorial discretion in accordance with the Petite Policy by seeking reversal of successful verdicts obtained by their colleagues in disregard of the Petite Policy's mandates.¹¹⁷ Such an attempt was successful in *Rinaldi v. United States*,¹¹⁸ where a defendant who was convicted in both state and federal court on robbery charges had his federal conviction reversed after the prosecutor filed a motion to dismiss the federal charges because of a failure to comply with the Petite Policy.¹¹⁹

In reversing the case based upon the prosecutor's motion, rather than upon a similar motion made by the defendant, the Court was merely following its obligation to favor petitions from federal prosecutors seeking reversals of decisions based on Petite Policy viola-

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114. See, e.g., *United States v. Alston*, 609 F.2d 531, 536 & n.25 (D.C. Cir. 1979) (recognizing that Petite Policy provides no basis for substantive relief), *cert. denied*, 445 U.S. 918 (1980); *Delay v. United States*, 602 F.2d 173, 178 (8th Cir. 1979) (denying defendant's theory of appeal based on the Petite Policy), *cert. denied*, 444 U.S. 1012 (1980); *United States v. Howard*, 590 F.2d 564, 567-68 (4th Cir.) (rejecting defendant's argument that noncompliance with the Petite Policy affords grounds for appeal), *cert. denied*, 440 U.S. 976 (1979); *United States v. Musgrove*, 581 F.2d 406, 407 (4th Cir. 1978) (ruling that a defendant has no right to relief on the basis of noncompliance with the Petite Policy); *United States v. Thompson*, 579 F.2d 1184, 1186-87 (10th Cir.) (denying defendant's appeal based on Petite Policy infractions), *cert. denied*, 439 U.S. 896 (1978); *United States v. Byars*, 762 F. Supp. 1235, 1240 n.6 (E.D. Va. 1991) (denying that the Petite Policy confers substantive rights to a defendant); *United States v. Belcher*, 762 F. Supp. 666, 674-75 (W.D. Va. 1991) (denying the defendant's argument that the Petite Policy confers any substantive rights to criminal defendants).
115. Cf. *Belcher*, 762 F. Supp. at 674-75 & n.6 (expressing sympathy for the defendant because of Petite Policy violations, but reversing the case on other grounds).
116. *Rinaldi v. United States*, 434 U.S. 22, 28-29 (1977).
117. See, e.g., *Thompson v. United States*, 444 U.S. 248, 248-49 (1980) (reversing a conviction at prosecutor's request); *Rinaldi v. United States*, 434 U.S. 22, 23 (1977) (granting a motion to dismiss at prosecutor's request); *Petite v. United States*, 361 U.S. 529, 530-31 (1960) (vacating a judgment and a dismissal of an indictment against the defendant at the government's request).
118. 434 U.S. 22, 23 (1977) (per curiam).
119. *Id.* at 32.

tions.¹²⁰ However, it has also been argued that using the Petite Policy to reverse decisions resulting from the use of prosecutorial powers under the Exception is a wasteful use of the justice system in an attempt to enforce internal, administrative affairs.¹²¹ Because the Exception permits these re prosecutions, some justices would instead choose to deny the Department's request for subsequent reversals and thereby avoid entanglement in its internal affairs.¹²² A denial of this nature, however, would obviate the protections afforded to a defendant by the Petite Policy, especially where no case has ever been reversed because of non-compliance with the Petite Policy when the defendant made the request for such reversal.¹²³

III. MARYLAND COMMON LAW AND THE POSITION OF THE FOURTH CIRCUIT

A. *Maryland Common Law*

Although Maryland has no statutory or express constitutional provision barring double jeopardy, the adoption of English common law prohibiting successive prosecutions for the same offense established the same prohibition in Maryland.¹²⁴ Nevertheless, in one of the more politically disruptive cases in Maryland, the court of special appeals permitted the state prosecution of the Catonsville Nine after their first trial in federal court ended in a conviction.¹²⁵ The defendants' prosecution in federal court was based on violations of federal statutes under the Military Service Act,¹²⁶ while their prosecution in state court was based on robbery, battery, and assault charges.¹²⁷

120. *Id.* at 29. The Court noted that "the federal courts should be receptive, not circumspect, when the Government seeks leave to implement [the Petite] [P]olicy." *Id.*

121. See *Watts v. United States*, 422 U.S. 1032, 1035-36 (1975) (Burger, C.J., dissenting) (opining that the Court should not be involved in the Department's internal affairs).

122. *Id.* (Burger, C.J., Rehnquist & White, JJ., dissenting).

123. See, e.g., cases cited *supra* note 114.

124. The adoption of English common law is reflected in Article 5 of the Declaration of Rights to the Maryland Constitution, which states that "the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of the Law." MD. CODE ANN., CONST. Decl. of Rts. art. V.

125. *Melville v. State*, 10 Md. App. 118, 121, 268 A.2d 497, 498 (1970) (per curiam). The Catonsville Nine were nine highly visible Roman Catholic lay people and clergy opposed to the Vietnam war. *Id.* at 120, 268 A.2d at 498.

126. 18 U.S.C. §§ 1361, 2071(a) (1988).

127. *Melville*, 10 Md. App. at 120-21, 268 A.2d at 498-99. The Act essentially sanctioned the destruction of United States property. *Id.* at 120-21 n.1, 268 A.2d at 498-99 n.1.

Although both the federal and state charges arose from the same events,¹²⁸ the court focused on sufficient differences in those charges to determine that they were not the same offense.¹²⁹ Rather than emphasizing the technical distinction of separate sovereignties,¹³⁰ the court found that Maryland's interest in bringing charges against the defendants was to protect the person harmed by the assaultive conduct, whereas the federal government's interest in bringing charges was to protect United States property.¹³¹

Years later, finding a distinction between the charges against a defendant became unnecessary when the court of appeals adopted the Exception in *Evans v. State*¹³² and its companion case, *Grandison v. State*.¹³³ In these cases, the defendants sought dismissal of state charges following their convictions in federal court on charges stemming from conspiracy to murder witnesses in Grandison's unrelated narcotics trial.¹³⁴ In an effort to prevent the state prosecutions from moving forward on charges of murder, conspiracy, and the use of a handgun in the commission of a felony, defense counsel argued that the federal and state charges were the "same offense."¹³⁵ Under this theory, the state's prosecution of the defendants after their federal convictions subjected the defendants to double jeopardy.¹³⁶ Alternatively, defense counsel argued that Maryland's adoption of the English common-law prohibition against successive prosecutions should prevail, even if the federal Constitution would have allowed such prosecutions through the use of the Exception.¹³⁷

The court of appeals rejected both arguments presented by defendants' counsel,¹³⁸ relying in part on the Supreme Court's reaffirmance of the Exception in *United States v. Wheeler*.¹³⁹ Although the court acknowledged that the Exception did not exist in Maryland as of 1776,¹⁴⁰ it nonetheless declared that "the common law is not

128. *Id.* at 124, 268 A.2d at 500. The court agreed that the offenses arose from the same facts, but noted that the state charged the defendants with different conduct. *Id.*

129. *Id.* at 124-26, 268 A.2d at 500-01.

130. *See id.* at 125-26, 268 A.2d at 500-01.

131. *Id.* at 124-25, 268 A.2d at 500-01.

132. 301 Md. 45, 481 A.2d 1135 (1984).

133. 301 Md. 45, 481 A.2d 1135 (1984).

134. *Id.* at 48-49, 481 A.2d at 1136-37.

135. *See id.* at 49-50, 481 A.2d at 1137-38 (assuming state and federal charges are the same, the Exception removes the case from the prohibition against double jeopardy).

136. *Id.* at 49-50, 481 A.2d at 1137.

137. *Id.* at 50, 481 A.2d at 1137.

138. *Id.* at 53-58, 481 A.2d at 1139-41.

139. 435 U.S. 313 (1978); *see supra* notes 99-102 and accompanying text.

140. *Evans*, 301 Md. at 57, 481 A.2d at 1141.

static and may be changed by decisions of the Court Therefore this Court has adopted, as a matter of Maryland common law, the dual sovereignty concept delineated in the Supreme Court's *Bartkus* and *Abbate* cases."¹⁴¹

Although *Evans* involved the separate sovereigns of state and federal government, the Exception has also been adopted by the Court of Appeals of Maryland when the separate sovereigns are two states. In *Bailey v. State*,¹⁴² the defendant was tried and convicted in New Jersey for receiving stolen goods.¹⁴³ Because Maryland had territorial jurisdiction for the crime, which continued through both states,¹⁴⁴ the defendant was subsequently tried and convicted in Maryland for robbery with a deadly weapon.¹⁴⁵ In rejecting the defendant's argument that Maryland common law prohibited his multiple prosecutions, the court maintained a strict adherence to the Exception, holding steadfast to the theory that New Jersey and Maryland are separate sovereigns.¹⁴⁶

The use of the Exception in situations where the two sovereignties are separate states was recently reaffirmed by Maryland in *Gillis v. State*.¹⁴⁷ There, the defendant was acquitted by the State of Delaware on charges of murder.¹⁴⁸ After the victim's body was found in Maryland, the defendant was subsequently charged and convicted of first degree murder by the State of Maryland.¹⁴⁹

On appeal from the Maryland conviction, the court of appeals rejected the defendant's argument that Maryland violated the Full Faith and Credit Clause of the United States Constitution by refusing to honor Delaware's decision of acquittal.¹⁵⁰ Opining that the "double jeopardy door [was] slammed tightly shut,"¹⁵¹ the court held that the dual sovereignty rationale was also applicable to the Full Faith and

141. *Id.* at 57-58, 481 A.2d at 1141. The dual sovereignty concept permits dual prosecutions by state and federal sovereigns. *See supra* notes 29-47 and accompanying text.

142. 303 Md. 650, 496 A.2d 665 (1985).

143. *Id.* at 660, 496 A.2d at 670.

144. *See id.* at 653-54, 496 A.2d at 666-67.

145. *Id.* at 654, 496 A.2d at 667.

146. *Id.* at 660, 496 A.2d at 670.

147. 333 Md. 69, 633 A.2d 888 (1993).

148. *Id.* at 71, 633 A.2d at 889.

149. *See id.* at 71-72, 633 A.2d at 889. At the time of the Delaware trial, the victim's body had not been located. *Id.* at 71, 633 A.2d at 889.

150. *Id.* The Full Faith and Credit Clause reads as follows: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1.

151. *Gillis*, 333 Md. at 76, 633 A.2d at 891.

Credit Clause.¹⁵² The court observed that a contrary result would deny Maryland the power to enforce its laws if the defendant first raced to the court house in Delaware.¹⁵³

B. *The Position of the Fourth Circuit*

Like Maryland, the Fourth Circuit also adheres to the Exception.¹⁵⁴ One of the earliest cases to signify this adherence was *Singleton v. United States*,¹⁵⁵ where the court affirmed the defendant's federal conviction for violation of the National Prohibition Act following her previous conviction in state court for possession of liquor.¹⁵⁶ Although the defendant argued that her subsequent prosecution in federal court subjected her to double jeopardy,¹⁵⁷ the court relied on *United States v. Lanza*¹⁵⁸ to support its holding that a federal prosecution following a state court conviction does not violate the prohibition against double jeopardy.¹⁵⁹

In a more recent decision, the Fourth Circuit held that a violation of the prohibition against double jeopardy also does not occur when a federal prosecution follows a state court acquittal.¹⁶⁰ In *United States v. Sutton*,¹⁶¹ a defendant who was acquitted in state court for receiving and stealing securities was subsequently indicted in federal court for violating a federal statute prohibiting the interstate transportation of false securities with fraudulent intent.¹⁶² Although the court analyzed and compared the elements of the state and federal charges,¹⁶³ it noted that under *Abbate v. United States*¹⁶⁴ and *Bartkus*

152. *Id.* The court's refusal to apply the Full Faith and Credit Clause in a manner that would preclude multiple prosecutions between states was based on principles of federalism; namely, "the historic right and obligation of the States to maintain peace and order within their confines." *Id.* at 74, 633 A.2d at 890 (quoting *Heath v. Alabama*, 474 U.S. 82, 93 (1985) (quoting *Bartkus v. Illinois*, 359 U.S. 121, 137 (1959))).

153. *Id.* at 83, 633 A.2d at 895.

154. See *United States v. Sutton*, 363 F.2d 845, 846 (4th Cir. 1966) (finding no prohibition against successive prosecutions involving state and federal trials).

155. 287 F. 353 (4th Cir. 1923).

156. *Id.* at 353-54.

157. *Id.*

158. 260 U.S. 377 (1922); see *supra* notes 24-29 and accompanying text.

159. *Singleton*, 287 F. at 353-54. *Lanza* involved a fact pattern strikingly similar to that presented to the court in *Singleton*. In *Lanza*, the defendant was charged and convicted under the National Prohibition Act with the manufacture, transportation, and possession of intoxicating liquor, after his conviction in state court for the same acts. *Lanza*, 260 U.S. at 378-79.

160. *United States v. Sutton*, 363 F.2d 845, 845 (4th Cir.), *cert. denied*, 385 U.S. 1014 (1966).

161. *Id.*

162. *Id.* at 845-46.

163. *Id.* at 846.

164. 359 U.S. 187 (1959).

v. Illinois,¹⁶⁵ “there is no violation of any constitutional right in successive prosecutions.”¹⁶⁶ The defendant’s federal prosecution was thus not barred by his state court acquittal.¹⁶⁷

In a similar sequence of events, a defendant who was acquitted in state court of trying to pass a postal money order attempted to invoke the defense of collateral estoppel to overturn a conviction resulting from his subsequent federal prosecution.¹⁶⁸ The defendant alleged that because he was previously acquitted in a Virginia state court for trying to pass the money order, the government was collaterally estopped from relitigating the same issue in federal court.¹⁶⁹ Although the Fourth Circuit recognized the collateral estoppel defense in criminal cases,¹⁷⁰ it held that a defendant in one sovereign jurisdiction cannot avail itself to the preclusion of issues litigated in another sovereign jurisdiction where, as here, the litigation was commenced by different parties.¹⁷¹

In so holding, the Fourth Circuit followed the predictable pattern of recent Supreme Court decisions in issues of dual sovereignty¹⁷² and collateral estoppel.¹⁷³ In *United States v. Belcher*,¹⁷⁴ however, a district court within the Fourth Circuit went beyond that pattern by

165. 359 U.S. 121 (1959).

166. *Sutton*, 363 F.2d at 846.

167. *Id.*

168. *United States v. Smith*, 446 F.2d 200, 202 (4th Cir. 1971). Collateral estoppel defenses are generally unsuccessful because of the nonmutuality between state and federal sovereigns. *See, e.g.*, *United States v. Ricks*, 882 F.2d 885, 889-90 (1989) (holding that dual sovereignty precludes the collateral estoppel prong of double jeopardy), *cert. denied*, 493 U.S. 1047 (1990). *But see United States v. Ward*, 676 F.2d 94, 97 (4th Cir.) (comparing the elements of charges to ascertain whether charges between sovereigns are distinct or the same), *cert. denied*, 459 U.S. 835 (1982).

169. *Smith*, 446 F.2d at 202.

170. *Id.*

171. *Id.* In this case, those parties were the state and federal governments. *Id.*

172. *See supra* notes 84-102 and accompanying text.

173. *See Ashe v. Swenson*, 397 U.S. 436 (1970). In *Ashe*, a defendant who was acquitted of robbing a participant in a poker game was subsequently tried again on charges that he had robbed another participant in the same poker game. In addressing the defendant’s contention that the second prosecution violated his right against double jeopardy, the Court held that the doctrine of collateral estoppel was “embodied in the Fifth Amendment guarantee against double jeopardy” and should thus “protect [] a man who has been acquitted from having to ‘run the gauntlet’ a second time.” *Id.* at 445. The Supreme Court has yet to decide whether an acquittal in one jurisdiction would bar reprosecution in another jurisdiction due to collateral estoppel principles. *See Susan N. Herman, Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. REV. 609, 643-44 (1994) (opining that a collateral estoppel defense across jurisdictional lines would probably fail).

174. 762 F. Supp. 666, 670 (W.D. Va. 1991).

forbidding successive state and federal prosecutions because of the sham exception alluded to in *Bartkus v. Illinois*.¹⁷⁵ The defendant in *Belcher* was prosecuted by the state for the manufacture of marijuana and the use of a firearm while committing a felony.¹⁷⁶ Although the state's case was ultimately dismissed,¹⁷⁷ the prosecutor, who also served as a Special Assistant United States Attorney, switched hats and brought charges against the defendant in federal court.¹⁷⁸ Because the power to prosecute emanated from the lone prosecutor, who acted for both the state and the federal government,¹⁷⁹ the court concluded that the second prosecution was a "sham and a cover" for the first and thus forbidden under collateral estoppel principles.¹⁸⁰

Although a fair reading of the *Belcher* decision indicates the Fourth Circuit's cognizance of collusion among prosecutors, or situations similar to the sham alluded to in *Bartkus*, defendants frequently find themselves unable to substantiate claims of this nature.¹⁸¹ The inability to substantiate a sham defense is exemplified in *United States v. Byars*.¹⁸² In *Byars*, a Virginia State's Attorney brought drug charges against Byars.¹⁸³ When the evidence in the state trial was suppressed because of an illegal search and seizure,¹⁸⁴ the prosecutor voluntarily withdrew the charges.¹⁸⁵ Subsequently, the same prosecutor became a Special Assistant United States Attorney, and in that capacity brought federal drug charges against Byars.¹⁸⁶ Byars argued that the attorney's role in both the state and federal prosecutions was a sham¹⁸⁷ and an oppressive dual prosecution.¹⁸⁸

While the *Byars* court recognized the validity of the sham defense, it narrowed the applicability of that defense by suggesting that an element of vindictiveness may be required to prove the

175. *Id.*; see *supra* notes 104-08 and accompanying text.

176. *Belcher*, 762 F. Supp. at 670.

177. *Id.* The dismissal was based, in part, on an unexplained destruction of evidence.

178. *Id.* at 668-69.

179. *Id.* at 671.

180. *Id.*

181. *Id.* at 671 n.3 (observing that cooperation between state and federal governments to battle criminal activity normally does not rise to the collusion necessary for the sham defense); see also *United States v. Byars*, 762 F. Supp. 1235, 1241 (E.D. Va. 1991) (observing that federal and state cooperation while investigating a crime is ordinarily desirable).

182. 762 F. Supp. 1235 (E.D. Va. 1991).

183. *Id.* at 1236-37.

184. *Id.* at 1236.

185. *Id.*

186. *Id.* at 1236-37.

187. *Id.* at 1241.

188. *Id.* at 1237.

existence of an actual sham.¹⁸⁹ That element was lacking in *Byars*, where the previous state's attorney had minimal involvement in the federal case as a Special Assistant United States Attorney, and where the federal investigation was independent of any investigation performed by the state.¹⁹⁰ The existence of this independent investigation or involvement by one sovereign was sufficient to defeat charges of collusion,¹⁹¹ regardless of whether the Petite Policy¹⁹² was followed.¹⁹³ Although no bright line distinctions are currently available, *Byars* stands for the proposition that something more than cooperative investigation and assistance between sovereigns is required to destroy the presumption that the Petite Policy permits cooperation between state and federal investigations.¹⁹⁴

IV. ALTERNATIVE APPROACHES—A SURVEY OF OTHER STATES

A. *A Solution to Territorial Unfairness*

One of the most striking and inherently uneven aspects of dual sovereignty is the dependence on territorial distinctions.¹⁹⁵ Because

189. *Id.* at 1240-41.

190. *Id.* at 1241-42.

191. *Id.* at 1241.

192. See *supra* notes 109-23 and accompanying text.

193. *Byars*, 762 F. Supp. at 1240 n.6. The Fourth Circuit has held that deviation from the Petite Policy alone will not bar the subsequent prosecution of a defendant after a state court acquittal or conviction. See, e.g., *United States v. Howard*, 590 F.2d 564, 567-68 (4th Cir.) (opining that the Petite Policy is merely a "housekeeping" provision), *cert. denied*, 440 U.S. 976 (1979). In *Howard*, the arresting officer testified at the defendants' state and federal trials. *Id.* at 567. Evidence from the state trial was also introduced in the federal trial. *Id.* Notwithstanding the defendants' objection that the federal prosecutor did not follow the Petite Policy, the court held that the defendants had no right to have an otherwise valid conviction reversed due to that noncompliance. *Id.* at 567-68; accord *United States v. Musgrove*, 581 F.2d 406, 407 (4th Cir. 1978) (concluding that a failure to follow the Petite Policy does not afford a defendant any arguable grounds for reversal after dual prosecution). *But cf.* *United States v. Belcher*, 762 F. Supp. 666, 675 n.6 (W.D. Va. 1991) (objecting to the lack of substantive rights which the Petite Policy confers upon the defendant, one district court judge commented that "the Petite [Policy] should confer substantive rights on criminal defendants").

194. See *Byars*, 762 F. Supp. at 1241-42; accord *United States v. Aboumoussalem*, 726 F.2d 906, 910 (2d Cir. 1984) (concluding that joint investigations by federal and state authorities fall short of proving "manipulation" necessary for finding a "sham or a cover").

195. Dominic T. Holzhaus, Note, *Double Jeopardy and Incremental Culpability: A Unitary Alternative to the Dual Sovereignty Doctrine*, 86 COLUM. L. REV. 1697, 1701-02 (1986).

federal and state police powers emerge from separate sources,¹⁹⁶ a crime committed in a particular region may be subject to different sources of police power.¹⁹⁷ Although only one crime has actually been committed, the defendant may be tried and sentenced by several successive jurisdictions. To avoid this result, a number of states have constitutional,¹⁹⁸ common-law,¹⁹⁹ or statutory bars²⁰⁰ to dual prosecution. Jurisdictional and substantive issues, rather than strict terri-

196. See *supra* text accompanying notes 28-29.

197. For example, a crime committed on an American-Indian reservation may be tried successively by tribal courts and federal courts. See *United States v. Wheeler*, 435 U.S. 313 (1978); *United States v. Barnhart*, 22 F. 285 (C.C.D. Or. 1884). Modern day courts are bound by similar territorial concerns that serve a limited contemporary purpose. For instance, if a crime has been committed in the District of Columbia or a United States territory, double jeopardy precludes successive prosecutions because the police power flows from the same source, the federal government. See, e.g., *United States v. Sanchez*, 992 F.2d 1143, 1151 (11th Cir.) (barring successive prosecutions by Puerto Rico and the federal government, despite Puerto Rico's self-governance), *modified per curiam*, 3 F.3d 366, 367 (11th Cir. 1993) (allowing prosecution by the federal government because the Puerto Rican and federal murder charges required different elements of proof), *cert. denied*, 114 S. Ct. 1051 (1994); *United States v. Alston*, 609 F.2d 531, 537 (D.C. Cir. 1979) (barring successive prosecutions in the District of Columbia and the federal courts), *cert. denied*, 445 U.S. 918 (1980).

198. See, e.g., ALA. CONST. art. I, § 9; ALASKA CONST. art. I, § 9; ARIZ. CONST. art. II, § 10; ARK. CONST. art. 2, § 8; CAL. CONST. art. I, § 15; COLO. CONST. art. II, § 18; DEL. CONST. art. I, § 8; FLA. CONST. art. I, § 9; GA. CONST. art. I, § I, Par. XVIII; HAW. CONST. art. I, § 10; IDAHO CONST. art. I, § 13; ILL. CONST. art. I, § 10; IND. CONST. art. I, § 14; IOWA CONST. art. I, § 12; KAN. CONST. BILL OF RIGHTS § 10; KY. CONST. § 13; LA. CONST. art. I, § 15, ME. CONST. art. I, § 8; MICH. CONST. art. I, § 15; MINN. CONST. art. I, § 15; MISS. CONST. art. 3, § 22; MO. CONST. art. II, § 25; NEB. CONST. art. I, § 12; NEV. CONST. art. I, § 8; N.H. CONST. pt. I, art. 16.

199. See, e.g., *State v. Hogg*, 385 A.2d 844, 845 (N.H. 1978) (interpreting a clause in the state constitution as barring successive prosecutions after an initial acquittal in another court); *People v. Cooper*, 247 N.W.2d 866, 870 (Mich. 1976) (interpreting the state constitution as barring successive prosecutions in state court after federal trial, unless the interests of the state are substantially different); *Pennsylvania v. Mills*, 286 A.2d 638, 641-42 (Pa. 1971) (barring a second prosecution in state court after conviction in another jurisdiction, unless the interests of Pennsylvania are substantially different).

200. See ARK. CODE ANN. § 5-1-114 (Michie 1993); CAL. PENAL CODE § 656 (West 1993); COLO. REV. STAT. ANN. § 18-1-303 (West 1993); DEL. CODE ANN. tit. 11, § 209 (1992); GA. CODE ANN. § 16-1-18 (1993); HAW. REV. STAT. § 701-112 (1993); IDAHO CODE § 19-315 (1993); ILL. ANN. STAT. ch. 720, § 5/3-4 (Smith-Hurd 1993); KAN. STAT. ANN. § 21-3108 (1992); KY. REV. STAT. ANN. § 505.050 (Michie/Bobbs-Merrill 1993); MINN. STAT. ANN. § 609.045 (1993); MISS. CODE ANN. § 99-11-27 (1991); MONT. CODE ANN. § 46-11-504 (1993); NEV. REV. STAT. ANN. § 171.070 (Michie 1993). *But cf.* LA. CODE CRIM. PROC. ANN. art. 597 (West 1993) ("[W]here several sovereigns prosecute, the principles of double jeopardy do not apply.").

torial considerations, therefore determine whether a second trial may be brought in a state court after a federal prosecution.²⁰¹ Looking beyond territorial considerations alone negates the conclusion "that the only penological justification for permitting a second prosecution and punishment for the same offense even where different sovereigns are involved is out and out punishment."²⁰² As a result of the Supremacy Clause, however, a state's common-law, statutory, or constitutional bar to double jeopardy will only preclude a second trial in state court if the first trial was under federal jurisdiction.²⁰³

B. State Constitutional and Common-Law Application of Double Jeopardy

Although Maryland has no explicit constitutional provision barring double jeopardy, a number of other states do have such provisions.²⁰⁴ New Hampshire's constitution, for example, declares that "[n]o subject shall be liable to be tried, after an acquittal, for the same crime or offense."²⁰⁵ This provision was interpreted by the Supreme Court of New Hampshire, in *State v. Hogg*,²⁰⁶ to preclude the defendant's state prosecution for bank robbery after his federal acquittal on the same charges.²⁰⁷ The court observed that the "universal practice [prior to the ratification of the United States Constitution] in Great Britain, and in this country [was] that persons shall not be brought to a second trial for the same offence."²⁰⁸ The court further observed that because New Hampshire's constitutional provision predated federalism, and its bill of rights preceded the formation of the Union,²⁰⁹ New Hampshire's constitution could be interpreted to afford greater protection to its citizens than that afforded by the federal bill of rights.²¹⁰

201. See sources cited *supra* notes 198-200.

202. *Mills*, 286 A.2d at 641.

203. See, e.g., *United States v. Engesser*, 788 F.2d 1401, 1403 (9th Cir.) (recognizing that the state statute can only bar state trials after a federal prosecution due to the Supremacy Clause), *cert. denied*, 479 U.S. 869 (1986). The relevant section of the Supremacy Clause states that "the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. CONST. art. VI, § 2.

204. See *supra* notes 198-200.

205. N.H. CONST. pt. I, art. 16.

206. 385 A.2d 844 (N.H. 1978).

207. *Id.* at 847.

208. *Id.* at 846.

209. *Id.* at 845-46.

210. *Id.* at 845. *But see* *State v. Heinz*, 407 A.2d 814, 819 (N.H. 1979) (interpreting the state constitution so that double jeopardy will not bar successive prosecutions when the offenses with which the defendant is charged are substantially different).

Michigan has similarly interpreted its state constitution to provide greater protection to its citizens than the United States Constitution.²¹¹ In *People v. Cooper*,²¹² a defendant who was previously acquitted in federal court on charges stemming from a bank robbery was subsequently convicted in state court on essentially the same charges.²¹³ Although the defendant did not preserve a double jeopardy appeal at trial, the Supreme Court of Michigan reversed his state court conviction on double jeopardy grounds.²¹⁴ According to the court's interpretation of the double jeopardy clause in Michigan's constitution, subsequent prosecutions are barred "where the interests sought to be protected by the Federal statute are not substantially different than those sought to be protected by the . . . state statutes."²¹⁵

Other states have taken a more narrow view of their constitutional provisions barring double jeopardy.²¹⁶ Although Ohio's constitution provides that "[n]o person shall be twice put in jeopardy for the same offense,"²¹⁷ its court of appeals has interpreted this clause to offer no greater protection than that offered to a defendant by the United States Constitution, including the Exception.²¹⁸

A similar conclusion was reached by the Kansas court of appeals in *In re Coulter*.²¹⁹ In that case, a constitutional provision stating that "[n]o person . . . [shall] be twice put in jeopardy for the same offense"²²⁰ was interpreted by the court to afford the same degree of rights to Kansas citizens as does the Fifth Amendment to the United States Constitution.²²¹ Accordingly, Kansas state courts may apply the Exception to successive prosecutions between Kansas and

211. See *People v. Carter*, 330 N.W.2d 314, 325 (Mich. 1982).

212. 247 N.W.2d 866 (Mich. 1976).

213. *Id.* at 867-68. The defendant was also convicted for attempted murder in the state trial, but this charge was dismissed on other grounds. *People v. Cooper*, 227 N.W.2d 319, 321 (Mich. Ct. App. 1975), *rev'd on other grounds*, 247 N.W.2d 866 (Mich. 1976).

214. *Cooper*, 247 N.W.2d at 870-71.

215. *Id.* at 871. The double jeopardy clause in Michigan's Constitution states as follows: "No person shall be subject for the same offense to be twice put in jeopardy." MICH. CONST. art. 1, § 15.

216. See, e.g., *State v. Rogers*, 566 P.2d 1142, 1143-44 (N.M. 1977) (applying the Exception to successive federal and state trials); *State v. McKinney*, 609 N.E.2d 613, 615-16 (Ohio Ct. App. 1992) (permitting successive prosecutions between two states).

217. OHIO CONST. art. I, § 10.

218. See *McKinney*, 609 N.E.2d at 616.

219. 860 P.2d 51 (Kan. Ct. App. 1993).

220. KAN. CONST. BILL OF RIGHTS § 10.

221. Cf. *Kansas v. Henwood*, 756 P.2d 1087, 1090 (Kan. 1988) (noting that in the absence of state statutes, the prohibition against double jeopardy is inapplicable between separate sovereigns).

the courts of another state if the offenses charged are different,²²² or between Kansas and federal courts.²²³

C. *State Statutory Provisions that Affect the Exception*

The State of Maryland has no statutory provision on double jeopardy. A number of other states, however, have enacted legislation that covers a variety of issues relevant to a defendant's protection against double jeopardy.²²⁴ Of those states that have statutory bars prohibiting successive prosecutions, there is no general consensus or uniformity in the scope of double jeopardy protection. The range of legislation varies from the extremely vague and simple to the highly complex and exclusive.²²⁵ When the statutory bars are too vague,²²⁶

222. *Id.* at 1090.

223. *In re Coulter*, 860 P.2d 51, 55 (Kan. Ct. App. 1993).

224. See sources cited *supra* note 200.

225. One of the more complex and exclusive statutes was enacted by the State of Illinois. That statute reads, in pertinent part:

(a) A prosecution is barred if the defendant was formerly prosecuted for the same offense, based upon the same facts, if such former prosecution:

(1) Resulted in either a conviction or an acquittal or in a determination that the evidence was insufficient to warrant a conviction; or

(2) Was terminated by a final order or judgment, even if entered before trial, which required a determination inconsistent with any fact or legal proposition necessary to a conviction in the subsequent prosecution; or

(3) Was terminated improperly after the jury was impaneled and sworn or, in a trial before court without a jury, after the first witness was sworn but before findings were rendered by the trier of facts, or after a plea of guilty was accepted by the court

ILL. ANN. STAT. ch. 720, para. 5/3-4 (Smith-Hurd 1993). In contrast to the Illinois statute, a Mississippi statute relating to double jeopardy protection merely states that

[e]very person charged with an offense committed in another state, territory, or country may plead a former conviction or acquittal for the same offense in such other state, territory, or country; and, if such plea be established, it shall be a bar to any further proceedings for the same offense here.

STAT. MISS. CODE. ANN. § 99-11-27 (1991).

226. See, e.g., CAL. PENAL CODE § 656 (West 1992), which states as follows:

Whenever on the trial of an accused person it appears that upon a criminal prosecution under the laws of another State, Government, or country, founded upon the act or omission in respect to which he is on trial, he has been acquitted or convicted, it is a sufficient defense.

Id. In cases where a defendant has been charged by state and federal governments, or where a defendant has been charged by the State of California and another state and the charged offenses contain different elements but are essentially the same crime, this statute has been interpreted to grant more rights to a defendant under the Exception than the federal Constitution. See, e.g., *People v. Belcher*, 520 P.2d 385, 390-91 (Cal. 1974).

courts must often resort to common law to determine when federal and state charges are sufficiently similar to bar a second prosecution under principles of double jeopardy.²²⁷ The methods by which this determination is made are often as varied as the statutes themselves. While some states utilize the *Blockburger* test,²²⁸ where each case requires "proof of a different element,"²²⁹ other states utilize tests that focus on whether the crimes with which a defendant is charged spring from the same transaction²³⁰ or the same conduct.²³¹

The recent case of *Smith v. Lowe*²³² illustrates the difficulties that may be encountered when a statutory bar to double jeopardy is too vague. Kentucky's double jeopardy statute bars prosecution in Kentucky if another state or the United States has concurrent jurisdiction for the offense and previously prosecuted the defendant.²³³ Subsequent trials are barred after an acquittal or conviction that involved the same conduct, *unless* each prosecution requires proof of a fact not required in the other prosecution.²³⁴

In *Lowe*, the defendant was acquitted on federal charges of disabling a truck.²³⁵ Because the conduct for which the defendant stood accused resulted in the death of the truck's driver,²³⁶ the defendant was subsequently charged with murder in state court.²³⁷ The Supreme Court of Kentucky held that the second prosecution in its court was barred, notwithstanding the nonmutuality of parties

227. *Belcher*, 520 P.2d at 392.

228. *Blockburger v. United States*, 284 U.S. 299 (1932).

229. *Id.* at 304. The Supreme Court of Kentucky has held that the *Blockburger* test must be applied to its statute barring successive prosecutions. *See Smith v. Lowe*, 792 S.W.2d 371 (Ky. 1990).

230. *See, e.g.*, MONT. CODE ANN. § 46-11-504 (1993) (eliminating use of the Exception if a defendant has been tried in federal court for the same conduct during the same transaction); *see also* *United States v. Engesser*, 788 F.2d 1401, 1403 (9th Cir.) (holding that Montana's statute barring prosecution for crimes previously prosecuted in other jurisdictions did not bar the federal government from prosecuting charges which arose from the same incident as the crime for which the defendant was previously prosecuted in Montana), *cert. denied*, 479 U.S. 869 (1986). The term "same transaction" is defined by statute. *See* MONT. CODE ANN. § 46-11-410 (1993). The statute bars, *inter alia*, conviction of a lesser included offense and conviction of both conspiracy to commit the offense and the offense itself. *See id.*

231. *See* GA. CODE ANN. § 16-1-8 (1993). Although Georgia's statute uses language prohibiting dual prosecutions for the same conduct, the statute expressly excludes conduct that "requires proof of a fact not required in the other prosecution," *id.* § 16-1-8(b)(1), which is essentially the *Blockburger* rule.

232. 792 S.W.2d 371 (Ky. 1990).

233. KY. REV. STAT. ANN. § 505.050 (Michie/Bobbs-Merrill 1993).

234. *Id.*

235. *Lowe*, 792 S.W.2d at 371-73.

236. *Id.*

237. *Id.* at 373.

that is ordinarily fatal to a defendant's collateral estoppel defense.²³⁸ The court reasoned that under Kentucky's statutory bar to double jeopardy, the elements of the *Blockburger* test²³⁹ should not be applied in the "hypertechnical and archaic approach of a 19th century pleading book,"²⁴⁰ which would have permitted the second prosecution, but should rather be applied "with realism and rationality."²⁴¹

Although Kentucky courts have demonstrated some flexibility in interpreting their state's statutory bar to double jeopardy, Kansas courts have taken a stricter approach with their state's statutory prohibition against double jeopardy. The Kansas statute provides, in pertinent part:

A prosecution is barred if the defendant was formerly prosecuted in a district court of the United States or in a court of general jurisdiction of a sister state or in the municipal court of any city of this state for a crime which is within the concurrent jurisdiction of this state, if such former prosecution:

(a) resulted in either a conviction or an acquittal, and the subsequent prosecution is for the same conduct, unless each prosecution requires proof of a fact not required in the other prosecution²⁴²

The inclusion of the phrase "of the United States" in the Kansas statute extends double jeopardy protection to defendants who are successively prosecuted in federal and state courts. By including the phrase "unless each prosecution requires proof of a fact not required in the other prosecution,"²⁴³ the Kansas statute also addresses the closely connected issue of what constitutes the same conduct between sovereigns. If the charges require proof of different elements, the defendant's conduct is not considered identical for purposes of a subsequent prosecution.²⁴⁴ If, however, the charges are identical in each separate sovereign, the Kansas statute would protect the accused against successive prosecutions.²⁴⁵

This statutory protection is illustrated in *Kansas v. Henwood*,²⁴⁶ where a defendant who stole a car and crossed both Kansas and

238. See *id.* at 374-75.

239. See *supra* notes 228-29 and accompanying text.

240. *Lowe*, 792 S.W.2d at 374 (quoting *Ashe v. Swenson*, 397 U.S. 436, 444 (1970)).

241. *Id.*

242. KAN. STAT. ANN. § 21-3108(3) (1988 & Supp. 1993).

243. *Id.* This phrase defines the *Blockburger* test, whereby each charge is examined for its elements. See *Blockburger v. United States*, 284 U.S. 299 (1932).

244. See *Kansas v. Henwood*, 756 P.2d 1087, 1088-89 (Kan. 1988).

245. *Id.* at 1091.

246. 756 P.2d 1087 (Kan. 1988).

Missouri territorial boundaries was first convicted of receiving a stolen car under Missouri law.²⁴⁷ Subsequently, the defendant was prosecuted on the theft charge by Kansas authorities.²⁴⁸ Although the defendant asserted that the Kansas prosecution violated his right against double jeopardy, the prosecution argued that the elements of the Missouri and Kansas charges were different.²⁴⁹ Specifically, the prosecution asserted that its charge against the defendant required that the theft be committed in Kansas, whereas the Missouri charge required that the stolen car actually be received in Missouri.²⁵⁰ The court agreed that the elements of the charges were not identical if consideration was given to differences in venue.²⁵¹ However, the court ruled that differences in venue cannot be used as proof of a fact not required in the other state's prosecution.²⁵² Because all of the elements of the Missouri charge were included within the Kansas charge, Kansas was barred from re-prosecuting the defendant under the express limitations of the Kansas statute barring double jeopardy.²⁵³ The court reasoned that to hold otherwise would render the Kansas statute meaningless if double jeopardy protection was afforded to a defendant based on pure venue requirements.²⁵⁴

The State of Arkansas also examined the elements of each charge to determine whether a defendant is entitled to double jeopardy protection under Arkansas law. The relevant Arkansas statute, which permits an affirmative defense of double jeopardy for defendants tried in concurrent state or United States jurisdictions, states as follows:

When conduct constitutes an offense within the concurrent jurisdiction of this state and of the United States or another state or territory thereof, a prosecution in any such other jurisdiction is an affirmative defense to a subsequent prosecution in this state . . . unless:

(A) The offense of which the defendant was formerly convicted or acquitted and the offense for which he is subse-

247. *Id.* at 1087.

248. *Id.* at 1087-88.

249. *Id.* at 1089-90.

250. *Id.*

251. *See id.* at 1090.

252. *See id.*

253. *Id.* at 1089-90. The Kansas statute does not bar successive prosecutions if the factual elements are different. *See Smith v. Atkins*, 565 F. Supp. 721 (D. Kan. 1983). When that occurs, a prior federal prosecution will not bar a subsequent state prosecution under the statute. *Id.* at 732 (holding that a prior federal conviction on charges of bank robbery did not bar a subsequent state trial for kidnapping, aggravated kidnapping, and aggravated robbery under the state statute).

254. *Henwood*, 756 P.2d at 1091.

quently prosecuted each requires proof of a fact not required by the other, and the law defining each of the offenses is intended to prevent a substantially different harm or evil

...²⁵⁵

The language of this statute reflects the legislature's intent to evaluate both the substance of the crime and the harm to the state, and to apply the *Blockburger* test²⁵⁶ to the elements of the charges.²⁵⁷

Accordingly, to avoid double jeopardy in the State of Arkansas, a defendant previously tried in another jurisdiction must be prosecuted on different charges in Arkansas, and the defendant's conduct must have resulted in substantially different harm to that state.²⁵⁸ This dual requirement was recognized by the Supreme Court of Arkansas in *Bateman v. State*,²⁵⁹ where a defendant convicted of transportation of firearms in a federal district court was subsequently convicted in Arkansas state court for receiving the same firearms as stolen goods.²⁶⁰ The supreme court conceded that arguably, under a "proof of fact" test, the federal and state court charges against the defendant would be different,²⁶¹ thus permitting a successive state court prosecution.²⁶² However, even if the charges against the defendant were found to be different, the prosecution did not redress a harm substantially different from that already redressed by the trial in federal court and the defendant's state court conviction was reversed.²⁶³

Thus, although Maryland and other states may be guided by the Supreme Court's interpretation of the Exception, the enactment of a statute similar to that of Arkansas may grant a defendant more substantive rights. Of course, a state may alternatively enact a statute limiting a defendant's rights against successive prosecutions, as has the State of Louisiana. The Louisiana statute reads as follows:

255. ARK. CODE ANN. § 5-1-114 (Michie 1993).

256. See *supra* notes 228-29 and accompanying text.

257. See, e.g., *Bateman v. State*, 578 S.W.2d 216, 217 (Ark. 1979) (recognizing that the Arkansas statute offers protection against double jeopardy when concurrent jurisdictions seek to prevent substantially the same harm or evil, and the elements of each charge are the same). The use of the conjunctive "and" between the phrase identifying the same elements test and the phrase indicating that substantially different harm or evil must be found is further evidence that Arkansas intends for both tests to be applied. See Ark. CODE ANN. § 5-1-114 (Michie 1993).

258. *Bateman*, 578 S.W.2d at 217.

259. 578 S.W.2d 216 (Ark. 1979).

260. *Id.* at 217.

261. *Id.* The test referred to is essentially the *Blockburger* test. See *supra* notes 228-29 and accompanying text.

262. See *Bateman*, 578 S.W.2d at 217.

263. *Id.* (finding neither prong of the dual requirement test satisfied).

"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 or the United States."²⁶⁴ The clear and unambiguous meaning of this statute comports with the Supreme Court's interpretation of the Exception.²⁶⁵

D. Suggested Scholarly Alternatives to the Use of the Exception

As the subsequent parts of this Comment should illustrate, the extent to which a defendant is protected by the prohibition against double jeopardy varies according to the jurisdiction in which the preclusive prosecution takes place.²⁶⁶ These disparities have led a number of scholars to propose changes to the Exception. One such scholar, Walter T. Fisher, has suggested that the federal government should merely apply its preemptive powers to foreclose state prosecutions in matters of high national priority and importance.²⁶⁷ Fisher has also proposed a more novel approach, whereby the accused is permitted to select the court where prosecution will take place if federal and state courts have concurrent jurisdiction.²⁶⁸ Under Fisher's proposal, if the defendant selects federal court, a subsequent state prosecution is precluded if the federal prosecutor accepts the case and obtains an indictment within a certain time period.²⁶⁹ If the federal prosecutor declines the case, however, the state may proceed with its own prosecution.²⁷⁰

Although this approach is indeed novel, it is problematic in at least two respects. First, it conflicts with the notion of federalism because a state may lose the ability to enforce its own laws. When a state legislature passes laws, the legislature is held accountable to its political constituents, whose individual rights are affected by those laws. If Fisher's alternative is adopted, and a defendant chooses federal court, that defendant will be able to unilaterally circumvent the enforcement of state law.

The second major problem with Fisher's alternative approach is the inherent disparity between the federal and state criminal systems—namely, the enhanced, mandatory sentencing utilized in the federal

264. LA. CODE CRIM. PROC. ANN. art. 597 (West 1993 & Supp. 1995).

265. See *supra* notes 30-39, 46-47 and accompanying text.

266. See sources cited *supra* notes 198-201 and accompanying text.

267. Walter T. Fisher, *Double Jeopardy and Federalism*, 50 MINN. L. REV. 607, 610-13 (1966).

268. *Id.* Fisher recognized, however, that because Congress can remove state involvement in matters where concurrent jurisdiction exists, historically vital areas of concern such as civil rights may be retained exclusively by the federal courts. *Id.* at 611.

269. *Id.*

270. *Id.*

system.²⁷¹ For a defendant, the choice between state or federal courts is not a choice between similar systems of justice, but rather the lesser of two possible sentences. If a defendant chooses the federal system in an effort to avoid double jeopardy, the defendant may be subjected to mandatory sentencing.²⁷² On the other hand, choosing the state system may subject the defendant to a subsequent prosecution in federal court. Furthermore, even if the sentencing between the state and federal systems was comparable, flooding the federal system to avoid double jeopardy would create new administrative and economic problems. Fisher's proposal to allow the defendant a choice of forum therefore does not seem to be a viable solution to double jeopardy concerns.

Another scholarly alternative calls for the replacement of the dual sovereignty doctrine by the unitary theory that relies on a determination of the defendant's incremental culpability.²⁷³ Both the defendant and the defendant's intent to produce a harmful result are closely scrutinized along a continuum of moral blame.²⁷⁴ The degree of the defendant's criminality is then contrasted with society's need for retribution.²⁷⁵ If society's need is great, and a second sovereign prosecutes the defendant after an initial trial in another sovereign, the prosecutor in the second trial must prove that the second prosecution was justified by a societal need for retribution.²⁷⁶ This balance between the defendant's conduct and the need for retribution must favor the second prosecution; otherwise, the second case will be dismissed for failure to prove justifiable culpability.²⁷⁷

The unitary theory is a more accurate reflection of the spirit behind double jeopardy protection. Because the second trial is deter-

271. See generally Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61 (1993). The federal system uses a hybrid form of sentencing, combining strict guidelines from Congress in the form of statutory minimums with conduct driven mandatory sentencing guidelines from the United States Sentencing Commission. *Id.* at 86-91.

272. See *id.* (discussing federal mandatory sentencing).

273. Dominic T. Holzhaus, Note, *Double Jeopardy and Incremental Culpability: A Unitary Alternative to the Dual Sovereignty Doctrine*, 86 COLUM. L. REV. 1697, 1706-11 (1986).

274. See *id.* at 1706.

275. See *id.* at 1706-11.

276. See *id.* at 1709-10 & n.62.

277. See *id.* In theory, the defendant would be convicted or acquitted in a first trial on the merits of the case. *Id.* If a second sovereign, either federal or state, brings subsequent charges against the defendant, the defendant may raise a double jeopardy defense after the initiation of the second suit. *Id.* The burden to continue with the second trial thus rests upon the prosecutor to prove adequate culpability. *Id.* Regrettably, an exposure to pretrial proceedings is inevitable, but a full trial will be avoided if the prosecution fails to meet the test of incremental culpability. *Id.*

mined on more than just territorial considerations, something more than a wooden application of the Exception guides the courts. While this is desirable, it is unfortunate that the ultimate decision to re prosecute rests with a judge, rather than with the people through the democratic process, where the decision should more properly reside.

V. SUGGESTED REFORM

The wide variation between state and federal protections against double jeopardy often impedes an individual's right to be free from vexation and anxiety arising from repetitive criminal prosecutions. Reform measures are necessary to guarantee the basic constitutional protection against double jeopardy, especially where the trend of woodenly applying the Exception creates an unjust loophole based on meaningless, territorial considerations. The advantage gained by this bright line application has the ironic effect of giving those living in territories without statehood more protection than that which is afforded to other citizens of the United States.

The self-policing of prosecutors encouraged by the Petite Policy is also a similarly inefficient solution. Supreme Court justices have been critical of the Policy's administration, evidencing a genuine concern about manipulation of the system.²⁷⁸ Allowing prosecutors to engage in a second trial, and then reversing the trial verdict at the request of those prosecutors, suggests that the Petite Policy has not always effectively guided the administration of scarce public resources. Furthermore, because a defendant may not challenge the Petite Policy on appeal, there is no check on a prosecutor's power to use the second trial as a tool to coerce cooperation of a witness or extract pleas. Accordingly, a first phase of reforming the constitutional protection against double jeopardy would require a simple codification of the Petite Policy into an administrative regulation that may be challenged by a defendant when the Petite Policy is not followed.

The second phase of reform requires legislative action and may thus not be as easily accomplished as the first suggested phase of reform. If the parameters of the issues inherent in double jeopardy protection are defined through legislative action, the citizens of Maryland will have uniform guidelines which control their important substantive right not to be put in jeopardy twice. Perhaps more importantly, legislative definition will allow for greater citizen participation and legislative accountability in the judicial aspects of the issues.

278. See *supra* notes 121-22 and accompanying text.

In formulating appropriate legislation to protect its citizens' rights, Maryland would benefit from an examination of the statute of its sister state, Delaware, which permits subsequent prosecutions between state and federal jurisdictions only when "[t]he offense for which the defendant is subsequently prosecuted requires proof of a fact not required by the former offense and the law defining each of the offenses is intended to prevent a substantially different harm or evil."²⁷⁹ This statute effectively requires the state prosecutor to evaluate each case falling within the Exception by using both the *Blockburger* test²⁸⁰ and an examination of the harm or evil caused by the defendant's conduct.²⁸¹

If desired, an additional safeguard could be added to the statute in order to retain state prosecutorial discretion. That safeguard might take the form of the following: A prosecution is not barred if the former prosecution "[w]as procured by the defendant without the knowledge of the proper prosecuting officer, and with the purpose of avoiding the sentence which otherwise might be imposed."²⁸² Statutory regulation with this safeguard would also preserve the choice of forum for the prosecution.²⁸³

While enacting statutory protection against double jeopardy would protect Maryland citizens, it would not usurp the federal government's power to prosecute in areas of compelling national interest, such as civil rights. Federal jurisdiction would still preempt the state jurisdiction in those areas where it has been historically necessary or in areas of federal statutory regulation. In fact, greater cooperation, coordination, and participation of federal and state resources may ultimately result from adherence to the true spirit of the constitutional bar to double jeopardy.

VI. CONCLUSION

Pervasive undermining of the constitutional right not to be put in jeopardy twice continues to elude adequate justification. A person tried once can never be fairly tried again without giving irreversible, prejudicial advantage to the adversarial party. A policy that allows a "dry run" at prosecution in one jurisdiction is inherently unfair

279. DEL. CODE ANN. tit. 11, § 209(1)(a) (1987).

280. See *supra* notes 228-29 and accompanying text.

281. See DEL. CODE ANN. tit. 11, § 209(1)(a) (1987).

282. See ILL. REV. STAT. ch. 720, § 5/3-4(d)(2) (Smith-Hurd 1993 & Supp. 1994). This safeguard is contained within an Illinois statute relating to double jeopardy protection. See *id.*

283. Preserving jurisdictional decisions by the prosecution, without the opportunity for double jeopardy, has the practical effect of forcing determinations of incremental culpability at the outset.

because of the advantage gained by observing the jury's reaction to evidence and strategy.²⁸⁴ Additionally, the tactical mistakes in the first trial can be corrected in the second trial,²⁸⁵ and any adverse publicity or tension from the first trial may fester and create pressure on the second jury to acquit or convict.²⁸⁶ Obviously, any case of sufficient magnitude will place pressures on a jury; these pressures can be eliminated, however, in a second trial under a system prohibiting the use of the Exception, which is based purely upon territorial considerations.

Finally, the ideal standard of equal justice for all is perhaps even more fundamental than the basic right not to be put in jeopardy twice.²⁸⁷ An internal federal policy like the Petite Policy, which may or may not be applied and is generally misunderstood, cannot foster reassurance in the equal administration of the law. Furthermore, a federal prosecution following a state prosecution for the same criminal conduct directly conflicts with many state statutes and constitutions limiting dual prosecutions. This conflict of laws is unnecessary when state and federal interests are one.

Christina Galye Woods

284. Dawson, *supra* note 7, at 300.

285. Erwin Chemerinsky, *How a Fair Trial Produced an Unfair Verdict*, CONN. L. TRIB., May 18, 1992 at 18 (indicating that federal prosecutors in the second trial of Rodney King may benefit by their ability to correct errors in the first trial, such as limiting the frequency of the jury's examination of the videotaped beating and calling King to the stand).

286. *Id.* As Chemerinsky observed, the jurors in the federal trial of the officers accused of beating Rodney King "could be influenced by knowledge that [the] earlier [state] jury found the defendants not guilty. On the other hand—and more important—future jurors obviously will fear that their voting for acquittal or no liability could touch off another wave of urban violence." *Id.*

287. The concept of equal justice was deemed fundamental by Thomas Jefferson, who wrote: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these, are Life, Liberty, and the pursuit of Happiness." THE DECLARATION OF INDEPENDENCE (U.S. 1776).