

COMMENT

TWICE BITTEN: DENIAL OF THE RIGHT TO COUNSEL IN SUCCESSIVE PROSECUTIONS BY SEPARATE SOVEREIGNS*

TABLE OF CONTENTS

I.	INTRODUCTION	1870
II.	DUAL SOVEREIGNTY, DUE PROCESS, INCORPORATION, AND UN-INCORPORATION	1873
A.	<i>Dual Sovereignty—A Primer</i>	1873
1.	<i>Early Dicta— Fox, Marigold, and Moore.</i>	1874
2.	<i>United States v. Lanza.</i>	1875
3.	<i>The Twin Cases of Bartkus and Abbate.</i>	1877
4.	<i>The Petite Policy—Petite and Rinaldi.</i>	1879
5.	<i>Completing the Web— Wheeler and Heath.</i>	1880
B.	<i>Flawed Protection</i>	1882
1.	<i>Petite Policy.</i>	1882
2.	<i>“Sham Prosecution”</i>	1883
3.	<i>State and Federal Legislation</i>	1884
C.	<i>The Sixth Amendment Right to Counsel</i>	1884

* Candidate for Juris Doctor, University of Houston Law Center, 2009. M.B.A., Harvard University Graduate School of Business Administration; B.S. Econ., University of Pennsylvania. This Comment received the 2008 Susman Godfrey L.L.P. Award for the Outstanding Paper in the Area of General Litigation. I would like to thank Professors Sandra G. Thompson and Brent E. Newton for the very helpful suggestions they made for improving this Comment, and the editors and staff of the *Houston Law Review*, whose efforts are far too unsung. Finally, but most importantly, I thank and acknowledge my best friend for the last forty years, Helaine W. Lane, for her patience, understanding, love, and support for me, for this Comment, and for my entire law school experience.

1870	<i>HOUSTON LAW REVIEW</i>	[45:5
	<i>D. Incorporation: What is Missing</i>	1886
III.	THE CIRCUIT SPLIT IN DUAL SOVEREIGNTY AND THE RIGHT TO COUNSEL	1888
A.	<i>Lower Court Decisions Subsequent to Cobb</i>	1889
1.	<i>The Circuit Split</i>	1890
2.	<i>The Lessons Since Cobb</i>	1896
B.	<i>Clarification? . . . Or Confusion?</i>	1896
1.	<i>Inadequate Policy Justification</i>	1897
2.	<i>Policy Objectives of Dual Sovereignty Need Not Offend Due Process</i>	1898
C.	<i>Potential for Abuse, Risks, and Costs</i>	1898
1.	<i>Collusion Between Sovereigns and the Meaningless “Sham Prosecution” Exception of Bartkus</i>	1899
2.	<i>Inefficiency of Defense Counsel</i>	1900
3.	<i>Successive Prosecutions and Economic Inefficiency</i>	1900
4.	<i>Confusion on the Part of the Defendant.</i>	1900
5.	<i>Breach of the ABA Model Rules of Professional Conduct</i>	1901
6.	<i>Original Intent of the Framers</i>	1901
D.	<i>Conclusion</i>	1902
IV.	TOWARDS A PRINCIPLED DISTINCTION IN DETERMINING THE RIGHT TO COUNSEL IN CASES OF DUAL SOVEREIGNTY	1902
A.	<i>Cobb—A Brief Review</i>	1903
B.	<i>What Cobb Did Not Do</i>	1905
C.	<i>What Cobb May Have Done</i>	1906
D.	<i>What the Supreme Court Must Do Now</i>	1906
V.	CONCLUSION	1908

I. INTRODUCTION

“The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units.”¹

1. *Brown v. Ohio*, 432 U.S. 161, 169 (1977).

The concept of double jeopardy is familiar both to laypeople and to constitutional scholars.² What may be somewhat lesser known are the decisions in *Barthkus v. United States*, *Abbate v. United States*, and *Heath v. Alabama*, cases dealing with an important and controversial exception to the protections of double jeopardy³—that of separate or dual sovereignty—under which a defendant may be liable to more than one sovereign for a crime comprised of identical elements under each sovereign’s laws.⁴ Dual sovereignty in this context could include the federal government and a state government,⁵ the federal government and an Indian tribe,⁶ or even two state governments.⁷ And the crimes charged by each sovereign may be truly separate offenses, or they may be in all material respects identical, with the sole distinction being that of the jurisdiction bringing the charges.⁸ This exception is fraught with prosecutorial temptations: reversing “aberrant” jury verdicts, collusion between the investigators for each sovereign, denial of due process, and excessive punishment.⁹

When the Supreme Court decided *Texas v. Cobb*¹⁰ in 2001, some circuits mistakenly seized on that decision as an endorsement of the dual sovereignty doctrine, particularly as it relates to the attachment of the Sixth Amendment right to counsel.¹¹ In fact, the *Cobb* Court never intended to deal with the issue of dual sovereignty; its decision in that case not only has no

2. U.S. CONST. amend. V (“[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . .”). The term also gained popular familiarity through motion pictures such as the eponymous *Double Jeopardy*, which has been made and remade at least once. DOUBLE JEOPARDY (Paramount Pictures 1999); DOUBLE JEOPARDY (Republic Pictures 1955).

3. A thorough exposition is available of the historical underpinnings and development of double jeopardy, literally from the Garden of Eden through *Benton v. Maryland* in 1969. David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, 14 WM. & MARY BILL RTS. J. 193, 226–42 (2005) (cataloguing the development of the doctrine in the United States).

4. See *United States v. Lanza*, 260 U.S. 377, 382 (1922) (holding that an offense defined as criminal by two sovereignties may be punished by both).

5. *Barthkus v. Illinois*, 359 U.S. 121, 122 (1959).

6. *United States v. Wheeler*, 435 U.S. 313, 314 (1978).

7. *Heath v. Alabama*, 474 U.S. 82, 83 (1985).

8. See *infra* Part II.A.

9. See *infra* Part III.C.

10. *Texas v. Cobb*, 532 U.S. 162 (2001).

11. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”); see also *infra* Part III.A (discussing these erroneous interpretations).

bearing on the doctrine, but interpreting *Cobb* in that manner is in conflict with the holding's basic definition of "offense."¹²

Important policies justify the dual sovereignty exception.¹³ But precisely because the doctrine is more likely to survive than to fail, it is essential that a defendant subject to that doctrine be afforded all possible due process. The Sixth Amendment right to counsel is virtually the only such right that has not been explicitly incorporated into dual sovereignty jurisprudence.¹⁴ This Comment will show that the potential for abuse created by denial of this right is so severe that it must be corrected by the Court. Driven by *Cobb*, there is now an explicit and clear split among several circuits on this issue, giving the Court an ideal opportunity to resolve the question.¹⁵ It is possible for the Court to clarify the jurisprudence that has led to the current split among the circuits, eliminate the potential for abuse of the Sixth Amendment right to counsel, and to do so while protecting the basic policy considerations underlying its dual sovereignty jurisprudence.¹⁶

To fully understand the potential for abuse under dual sovereignty, Part II of this Comment describes the history and precedential underpinnings of the doctrine. It then demonstrates that protections that are generally said to be available to defendants in the context of dual sovereignty are hollow and ineffective—that virtually every other aspect of due process is guaranteed to defendants in the context of dual sovereignty through the Fourteenth Amendment.¹⁷ Part III discusses those dual sovereignty cases that have dealt with the Sixth Amendment right to counsel since *Cobb* and describes the unacceptable potential for abuse that is inherent in the doctrine as implemented in some circuits. Part IV then suggests

12. *Cobb*, 532 U.S. at 173 (“[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.”) (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)); see also *infra* Part IV.C (asserting that the holding in *Cobb* mandates the Sixth Amendment right to counsel in a second, uncharged offense under the dual sovereignty doctrine).

13. See, e.g., *infra* note 43 and accompanying text.

14. See *infra* Part II.D (chronicling the gradual incorporation of other due process protections to the states through the Fourteenth Amendment).

15. See *infra* Part III.A.1 (providing details of the various circuit cases that consider the question of the Sixth Amendment right to counsel with regard to dual sovereignty).

16. See *infra* Part IV.D (proposing necessary clarifications in the Supreme Court's Sixth Amendment jurisprudence to ensure appropriate due process protection to defendants in a Sixth Amendment, dual sovereignty context).

17. U.S. CONST. amend. XIV, § 1 (providing that no state shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”).

2009]

TWICE BITTEN

1873

clarifications that will result in respecting the policy underlying the doctrine while assuring basic due process to the defendants who are suspected or charged with the same crimes by multiple sovereigns. Part V concludes with a summary of the suggested reforms and demonstrates that their implementation will not offend the needs of either sovereign in pursuing its own police powers.

II. DUAL SOVEREIGNTY, DUE PROCESS, INCORPORATION, AND UN-INCORPORATION

Although the idea of dual sovereignty first appeared in dicta in three mid-nineteenth century cases, it was not until the third case that Justice Grier articulated the foundation for the doctrine:

Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. . . . That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable.¹⁸

A. *Dual Sovereignty—A Primer*

The doctrine thus first emerged as a mere sidebar in the context of counterfeiting coin and currency¹⁹ and states' rights and slavery,²⁰ and was then articulated as actual precedent at the time of Prohibition.²¹ Afterwards, the case law remained silent until the twin decisions of *Bartkus*²² and *Abbate*,²³ which were handed down on the same day.

Ultimately, the power of the dual sovereignty doctrine has waxed stronger as a response to four serious issues: (1) states' rights; (2) Prohibition; (3) civil rights; and (4) the dual issues of gun control and drug trafficking.²⁴

18. *Moore v. Illinois*, 55 U.S. 13, 20 (1852).

19. *United States v. Marigold*, 50 U.S. 560, 565 (1850); *Fox v. Ohio*, 46 U.S. 410, 411, 416–19 (1847).

20. *Moore*, 55 U.S. at 14–15.

21. *United States v. Lanza*, 260 U.S. 377, 382 (1922).

22. *Bartkus v. Illinois*, 359 U.S. 121 (1959).

23. *Abbate v. United States*, 359 U.S. 187 (1959).

24. Many writers have extensively discussed the history and precedents of dual

1. *Early Dicta*—Fox, Marigold, and Moore. The earliest references to dual sovereignty arose in three cases decided between 1847 and 1852. The first two, *Fox v. Ohio* and *United States v. Marigold*, dealt with counterfeiting, a crime which both the federal government and the state in which the crime took place sought to punish.²⁵ Neither of these cases actually dealt with successive prosecutions for the same crime by two different jurisdictions.

Then, in 1852, the Court heard *Moore v. Illinois*.²⁶ Moore was executor for Richard Eels, who had been charged with violating an Illinois statute by harboring a slave who had either escaped or had otherwise been brought to Illinois.²⁷ Eels was found guilty in state court.²⁸ The appeal to the Supreme Court was founded on the premise that the law conflicted both with the Constitution and with federal law, and was thus void.²⁹ The Court held that the statute in question was a valid exercise of Illinois's police power and that it did nothing to interfere with the lawful rights of the owner of the slave.³⁰ The Court was not called upon to decide whether Eels could have been punished by both sovereigns, the federal government and the state of Illinois, because both had not charged him; however, Justice Grier's position was clear and would be relied on in future cases as the earliest expression of the dual sovereignty exception to double jeopardy.³¹ And the battle lines for the future would be drawn in Justice McLean's dissent:

It is true, the criminal laws of the Federal and State Governments emanate from different sovereignties; but they operate upon the same people, and should have the same end in view. . . . It is believed that no government, regulated by laws, punishes twice criminally the same act. And I deeply regret that our government should be an

sovereignty, and it is thus not necessary to do so here. For one of the best of these, set against a historical backdrop that may help to explain the genesis of dual sovereignty, see generally Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. REV. L. & SOC. CHANGE 383 (1986). For additional background on dual sovereignty, see also *United States v. Angleton*, 221 F. Supp. 2d 696, 706–13 (S.D. Tex. 2002), which details the history of the doctrine through discussion of case law and responsive government action.

25. *United States v. Marigold*, 50 U.S. 560, 561, 570 (1850); *Fox v. Ohio*, 46 U.S. 410, 432–33 (1847).

26. *Moore v. Illinois*, 55 U.S. 13 (1852).

27. *Id.* at 13, 17.

28. *Id.*

29. *Id.*

30. *Id.* at 18–19.

31. *See supra* note 18 and accompanying text.

2009]

TWICE BITTEN

1875

exception to a great principle of action, sanctioned by humanity and justice.³²

2. *United States v. Lanza*. The seminal case on dual sovereignty was heard by the Court in 1922.³³ In an opinion echoing Justice Grier's dicta in *Moore*,³⁴ Chief Justice Taft wrote:

We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.

It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. . . . The defendants thus committed two different offenses by the same act, and a conviction by a court of Washington of the offense against that State is not a conviction of the different offense against the United States and so is not double jeopardy.³⁵

The defendants in *United States v. Lanza* had been charged with manufacturing, transporting, and possessing intoxicating liquor in violation of a statute of the state of Washington.³⁶ That law had been effective prior to the passage of the Eighteenth Amendment mandating Prohibition.³⁷ The defendants had paid fines on the same day totaling \$750.³⁸ Less than two weeks later, the same defendants were charged with virtually the same violations by the federal government under the National Prohibition Act.³⁹ The defendants moved to dismiss the federal indictment based on double jeopardy and the lower court found for the defendants, dismissing the charges.⁴⁰

While Chief Justice Taft referred to the holdings in *Fox*, *Marigold*, and *Moore*, the opinion seems based more on the Court's then-precedent that the Fifth Amendment bar to double jeopardy, "like all the other guaranties in the first eight amendments [to the Constitution], applies only to proceedings by

32. *Moore*, 55 U.S. at 22 (McLean, J., dissenting).

33. *United States v. Lanza*, 260 U.S. 377 (1922).

34. *See supra* note 18 and accompanying text.

35. *Lanza*, 260 U.S. at 382.

36. *Id.* at 379.

37. *Id.*

38. *Id.*

39. *Id.* at 378–79.

40. *Id.*

the Federal Government.”⁴¹ Moreover, section 2 of the Eighteenth Amendment explicitly granted concurrent authority for enforcement to both the federal government and the several states.⁴²

In addition to firmly establishing the dual sovereignty doctrine, not as dicta but as the holding of the case, *Lanza* provides the first clear articulation of the policy underlying the perceived need for this exception to double jeopardy. Chief Justice Taft stated:

If a State were to punish the manufacture, transportation and sale of intoxicating liquor by small or nominal fines, the race of offenders to the courts of that State to plead guilty and secure immunity from federal prosecution for such acts would not make for respect for the federal statute or for its deterrent effect.⁴³

Indeed, that concern was borne out in *Lanza* where the Washington court imposed fines of only \$750, as opposed to the greater penalties for the federal offenses. The latter included, for the first offense, fines up to \$1,000, prison terms not exceeding six months, and forfeiture of any vehicles or property involved in the offenses, and for second offenses, fines up to \$2,000 and up to five years imprisonment.⁴⁴

Yet if we consider that *Lanza* was decided before the Court held that Fifth Amendment double jeopardy was precluded in state prosecutions through the Fourteenth Amendment⁴⁵ and that the Eighteenth Amendment, repealed in 1933, granted explicit dual jurisdiction to the federal and state governments, one has to wonder whether too much is made of the precedential value of *Lanza*. Nevertheless, even after *Benton v. Maryland* the Court has had ample opportunity to overrule *Lanza* and has not done so.⁴⁶

41. *Id.* at 382 (citing *Barron v. Baltimore*, 32 U.S. 243, 250–51 (1833)).

42. U.S. CONST. amend XVIII, § 2 (repealed 1933) (“The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.”).

43. *Lanza*, 260 U.S. at 385.

44. National Prohibition Act of 1919 (Volstead Act), ch. 85, § 26, 29 Stat. 305, 315–16 (1919) (repealed 1935).

45. *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (overruling *Palko v. Connecticut*, 302 U.S. 319 (1937), and holding that the Fifth Amendment protection against double jeopardy applies to the states through the Fourteenth Amendment).

46. Both *United States v. Wheeler*, 435 U.S. 313, 330 (1978), and *Heath v. Alabama*, 474 U.S. 82, 92–93 (1985), decided after *Benton*, actually extended the dual sovereignty doctrine. See *infra* Part II.A.5 (examining *Wheeler* and *Heath*, which extended dual sovereignty to Indian tribes and successive state prosecutions, respectively).

3. *The Twin Cases of Bartkus and Abbate.* On the same day in 1959, the Court decided *Bartkus* and *Abbate*, expressing its view that dual sovereignty was a two-way street—it does not matter whether the federal government or the state is the first party charging the defendant, nor does it matter whether the first prosecution resulted in conviction or acquittal.⁴⁷

Alfonse Bartkus was charged and acquitted in an Illinois federal court for the crime of robbery of a federally insured bank.⁴⁸ Within three weeks following his acquittal, he was indicted by an Illinois grand jury for robbery.⁴⁹ The state prosecution resulted in a life sentence based on the defendant being considered a habitual criminal.⁵⁰

The primary question raised for the Court's consideration was whether the Fourteenth Amendment protected the defendant from double jeopardy, through the application of the Fifth Amendment to the states.⁵¹ The Court relied on earlier precedent in holding that the Fourteenth Amendment did not incorporate this guarantee to state prosecutions;⁵² it also held that its earlier jurisprudence in *Lanza* did not preclude charging of the same offense by multiple sovereignties.⁵³ Thus, the Fourteenth Amendment was held to be of no avail to defendants seeking to avoid dual prosecutions where the state brought charges that had already been heard and decided in a federal prosecution.⁵⁴

The reverse sequence occurred in *Abbate*: two defendants were charged by the state of Illinois with conspiring to destroy property belonging to Southern Bell Telephone and Telegraph Company.⁵⁵ They pled guilty and received light prison sentences.⁵⁶ Along with two others, they were then indicted in federal court, based on the fact that the facilities they had

47. *Abbate v. United States*, 359 U.S. 187, 193–96 (1959); *Bartkus v. Illinois*, 359 U.S. 121, 136–37 (1959). Both decisions were handed down on March 30, 1959.

48. *Bartkus*, 359 U.S. at 121–22.

49. *Id.* at 122.

50. *Id.*

51. *Id.* at 124.

52. *Id.* at 124–28.

53. *Id.* at 128–33.

54. *Id.* at 138–39. *Bartkus v. Illinois* did, however, give rise to the much discussed, but seldom effective “sham prosecution” exception to dual sovereignty, under which excessive cooperation or collusion by the two prosecuting sovereigns can render the second prosecution a mere “sham,” and thus a breach of due process. *See infra* Part II.B.2 (asserting that the “sham prosecution” exception is ineffective as a protection against abuse by prosecutors).

55. *Abbate v. United States*, 359 U.S. 187, 188 (1959).

56. *Id.*

conspired to destroy were a part of the communications infrastructure of the Strategic Air Command.⁵⁷ A guilty verdict was returned in the federal case, exposing the defendants to prison sentences of up to five years.⁵⁸

The Court accepted certiorari to address the question as to whether the Fifth Amendment prohibition against double jeopardy would protect the defendants from federal prosecution following a verdict in the state matter.⁵⁹ Citing the same precedent as in *Bartkus*, the Court found that the Fifth Amendment was no bar to successive prosecutions in the state-then-federal context, any more than it was a bar through the Fourteenth Amendment in the federal-then-state context.⁶⁰

In writing for the majority in *Abbate*, Justice Brennan repeated the concerns of the *Lanza* Court—articulating the probable reason that the dual sovereignty doctrine has survived for so long and in face of such criticism:

[I]f the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered. . . . Such a disparity will very often arise when, as in this case, the defendants' acts impinge more seriously on a federal interest than on a state interest. But no one would suggest that, in order to maintain the effectiveness of federal law enforcement, it is desirable completely to displace state power to prosecute crimes based on acts which might also violate federal law. This would bring about a marked change in the distribution of powers to administer criminal justice, for the States under our federal system have the principal responsibility for defining and prosecuting crimes.⁶¹

And yet, in dissent, Justice Black compellingly articulates the other side of this dilemma:

I am also not convinced that a State and the Nation can be considered two wholly separate sovereignties for the purpose of allowing them to do together what, generally, neither can do separately. . . . It is just as much an affront to human dignity and just as dangerous to human freedom for a man to be punished twice for the same offense, once by a State and once by the United States, as it would be for

57. *Id.* at 188–89.

58. *Id.* at 189, 195.

59. *Id.* at 189.

60. *Id.* at 193–96.

61. *Id.* at 195.

2009]

TWICE BITTEN

1879

one of these two Governments to throw him in prison twice for the offense.⁶²

4. *The Petite Policy*—Petite and Rinaldi. The then-Attorney General, William P. Rogers, may have felt he was too successful in these companion decisions. Almost immediately, he prepared and published a memorandum restricting dual prosecutions by the federal government in state-then-federal dual sovereignty situations.⁶³ This policy became known as the Petite Policy, named for the first Supreme Court case in which it was applied.⁶⁴ Interestingly, although the matter was appealed by the defendant, the government itself filed a motion to vacate the order of the trial court.⁶⁵ In making the motion, the government described its policy as being “that several offenses arising out of a single transaction . . . should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement.”⁶⁶

That description of the Petite Policy was again heard in *Rinaldi v. United States*, here by the Court, not the government: “Although not constitutionally mandated, this Executive policy serves to protect interests which, but for the ‘dual sovereignty’ principle inherent in our federal system, would be embraced by the Double Jeopardy Clause.”⁶⁷ Thus, the Court acknowledged that dual sovereignty offends the Fifth Amendment guarantee against double jeopardy, but needs to be tolerated to address a potentially larger problem. But the Petite Policy itself is unreliable as an arbiter. It is inconsistently applied, as in cases of gun possession and drug trafficking, and at times ignored by federal prosecutors.⁶⁸

62. *Id.* at 203 (Black, J., dissenting).

63. The decisions in *Abbate v. United States* and *Barthkus* were handed down on March 30, 1959; the Attorney General’s memorandum was promulgated on April 6, 1959. *The Attorney General’s Order on ‘Jeopardy’ Cases*, N.Y. TIMES, Apr. 6, 1959, at 19. It was widely praised in the press almost immediately. See, e.g., Arthur Krock, *In The Nation: An Example of the Wise Use of Power*, N.Y. TIMES, Apr. 7, 1959, at 32 (calling the memorandum a “model for the judicial and legislative branches”). The memorandum has since been incorporated into the U.S. Attorney’s Manual as § 9-2.031. U.S. Attorney’s Manual, § 9-2.031, Dual and Successive Prosecution Policy (“Petite Policy”), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.031 (last visited Jan. 31, 2008).

64. *Petite v. United States*, 361 U.S. 529, 530–31 (1960).

65. *Id.* at 530.

66. *Id.*

67. *Rinaldi v. United States*, 434 U.S. 22, 29 (1977).

68. See *infra* Part II.B.1 (discussing the Petite Policy as an incomplete bar to dual prosecutions).

5. *Completing the Web*—Wheeler and Heath. The Court's decision in *United States v. Wheeler* added Indian tribes to those sovereigns that possessed sufficient "separateness" to merit enforcement of their own laws in addition to those of the federal sovereign.⁶⁹ And *Heath* completed the circle by holding that dual prosecutions by two separate states fell within the doctrine.⁷⁰

Wheeler involved a Navajo charged by the tribal police with contributing to the delinquency of a minor and disorderly conduct, charges to which he pleaded guilty and was sentenced to seventy-five days in jail or fines totaling \$150.⁷¹ He was then indicted by a federal grand jury for statutory rape.⁷² He moved to dismiss the indictment based on the Indian tribes' receiving their authority from the federal government, and thus not being a separate sovereign.⁷³ Dismissal was granted and subsequently upheld on appeal, then further appealed to the Supreme Court.⁷⁴

The Supreme Court overturned the lower courts' decisions, finding that the Indian tribes' "primeval sovereignty, ha[d] never been taken away from them, either explicitly or implicitly, and [was] attributable in no way to any delegation to them of federal authority."⁷⁵ In fact, with the limits placed on tribal punishment, the Court was almost forced to find that dual sovereignty was applicable so that Indians not receive proportionately less punishment for crimes committed on a reservation than a non-Indian would receive for crimes committed either on or off the reservation.⁷⁶

Finally, in *Heath*, the Court rounded out the combinations of sovereignties whose dual prosecutions would be allowed,⁷⁷ but

69. *United States v. Wheeler*, 435 U.S. 313, 331–32 (1978). Because the authority of military courts emanates from the federal government, dual sovereignty also allows for the same defendant to face charges under the Uniform Code of Military Justice as well as by the state in which the crime occurred. *See, e.g.*, *Washington v. Ivie*, 961 P.2d 941, 943, 947–48 (Wash. 1998) (noting that the dual sovereignty doctrine would ordinarily allow state prosecution after U.C.M.J. proceedings because "the U.S. Military qualifies as the equivalent of another state or country," yet holding such prosecution barred by the state's statutory abrogation of dual sovereignty).

70. *Heath v. Alabama*, 474 U.S. 82, 93 (1985).

71. *Wheeler*, 435 U.S. at 314–15.

72. *Id.* at 315.

73. *Id.* at 315–16.

74. *Id.* at 316.

75. *Id.* at 328.

76. *See id.* at 330–31 ("Tribal courts can impose no punishment in excess of six months' imprisonment or a \$500 fine.").

77. *Heath* hired two men to kidnap and murder his wife. He met the men in Georgia, although he and his wife lived in Alabama. She was kidnapped in Alabama and her body was later discovered in an abandoned car in Georgia. *Heath* was charged in Georgia with "malice murder." He confessed and plea-bargained for a reduced sentence of

also showed how far those sovereigns would be allowed to go and still not run afoul of the “sham prosecution” exception.⁷⁸ The state-then-state form of dual sovereignty, which *Heath* addressed, has especially been criticized. A primary criticism is that both sovereigns essentially derive their power from the same source: the powers reserved to the states through the Tenth Amendment.⁷⁹

Thus, in a span of just over sixty years, from *Lanza* in 1922 to *Heath* in 1985, prosecutors representing multiple sovereignties had in their arsenal access to any combination of jurisdictions in which to pursue defendants whose crimes potentially ran afoul of the “peace and dignity” of each jurisdiction. Yet, given the policy of avoiding a race to the courthouse in the jurisdiction with the lighter punishment, and thereby frustrating the interest of the sovereign whose interest may have been more serious, how is the other side of the equation to be addressed? How is the defendant to be assured of sufficient due process to counter the obvious potential of this doctrine for collusion among prosecutors and abuse of the rights of the accused? The remainder of this Comment describes these abuses, demonstrates how commonly proposed protections are insufficient, and develops proposals for guarding against these potential abuses.

life imprisonment. He was then indicted by an Alabama grand jury, tried and convicted of murder during a kidnapping, and sentenced to death. *See generally* *Heath v. Alabama*, 474 U.S. 82, 83–86 (1985).

78. As an example of the type of abuse possible in such a case, the Alabama jurors in *Heath* almost uniformly expressed familiarity with the case, yet the court there nevertheless acquiesced in the jurors’ insistence that they could be impartial. But with full knowledge of the defendant’s Georgia confession, a guilty verdict was inevitable. *Id.* at 96–97 (Marshall, J., dissenting).

79. *See generally* Ronald J. Allen & John P. Ratnaswamy, *Heath v. Alabama: A Case Study of Doctrine and Rationality in the Supreme Court*, 76 J. CRIM. L. & CRIMINOLOGY 801, 817–18 (1985) (criticizing the Court’s extension of dual sovereignty in a state-then-state context as being unjustified by any of the jurisprudence underlying the traditional dual sovereignty doctrine). However, the criticism of *Heath* in that article may be open to skepticism because Allen and Ratnaswamy were both participants on *Heath*’s legal team. *Id.* at 801.

In fact, the American Law Institute’s Model Penal Code contains a provision barring such prosecutions. MODEL PENAL CODE § 1.10 (1985). The Commentary to this provision acknowledges that “[m]ost states have statutes barring successive multijurisdictional prosecutions under some circumstances.” *Id.* § 1.10 cmt.; *see also id.* § 1.10 cmt. nn.15, 17, 18 & 21 (noting that Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming each have some form of bar against successive prosecution by a second sovereign).

B. Flawed Protection

The protections normally suggested as effective for potential dual sovereignty abuses are the Petite Policy, the “sham prosecution” exception, and state or federal legislation.⁸⁰ Each of these is either flawed or nonexistent.

1. *Petite Policy.* The Petite Policy was promulgated by the Attorney General in 1959 in reaction to the government’s success in two Supreme Court cases involving dual sovereignty.⁸¹ The policy ostensibly requires a federal prosecutor to clear four hurdles before bringing federal charges following a prior state prosecution: (1) a substantial federal interest must be involved; (2) the prior proceeding must have “left that . . . interest demonstrably unvindicated”; (3) a true federal offense that is capable of being proven in court must exist; and (4) the permission of an Assistant Attorney General must be obtained.⁸²

Yet this safeguard seems honored more in the breach. There are, for example, numerous instances where the federal government pursues petty dope dealers or felons in possession of a weapon,⁸³ offenses that the state is perfectly capable of “vindicating” without the necessity of cumulative punishment from the U.S. Attorney’s office.⁸⁴

Moreover, the doctrine lends itself to rogue prosecution, discoverable only if the defendant is able to appeal. *Rinaldi* is an example.⁸⁵ The government in *Rinaldi* was forced to petition for

80. See also *infra* Part III.C (detailing potential abuses resulting from dual sovereignty without the protection of the Sixth Amendment right to counsel).

81. See *supra* note 63 and accompanying text.

82. U.S. Attorney’s Manual, *supra* note 63, § 9-2.031A. The same hurdles must be cleared in the case of a previous federal proceeding, but those situations also are likely to enjoy protection under the Double Jeopardy Clause. See *id.* (noting that the substantive prerequisites apply to a “prior state or federal proceeding”); see also *United States v. Dixon*, 509 U.S. 688, 698–700 (1993) (holding that double jeopardy protections precluded prosecution of a defendant in Washington D.C. for a drug offense following a prior conviction for criminal contempt based on the violation of a conditional release order prohibiting drug law violations).

83. See, e.g., *United States v. Alvarado*, 440 F.3d 191, 193–94 (4th Cir. 2006) (federal and state drug conspiracy charges); *United States v. Terrell*, 191 F. App’x 728, 730–31 (10th Cir. 2006) (federal and state drug possession charges); *United States v. Harty*, 476 F. Supp. 2d 17, 22 (D. Mass. 2007) (federal and state charges of illegal possession of a firearm).

84. See, e.g., *Abbate v. United States*, 359 U.S. 187, 195 (1959) (“[T]he States under our federal system have the principal responsibility for defining and prosecuting crimes.”).

85. *Rinaldi v. United States*, 434 U.S. 22, 23–24 (1977); see also *supra* text accompanying note 67 (indicating that the *Rinaldi* Court’s own arguments in favor of the Petite Policy serve to criticize the dual sovereignty doctrine).

reversal of its own case because the prosecutor did not secure permission of an Assistant Attorney General to pursue the case.⁸⁶

2. “*Sham Prosecution.*” *Bartkus* refers to “sham prosecution” in the merest of dicta.⁸⁷ Yet defendants’ counsel try with futility to assert this “exception” as a defense to successive prosecutions.⁸⁸ It is little wonder that courts are themselves confused as to whether this protection is real. Those that discuss it choose either to assert that the exemption does not exist, or to find that the offending conduct of law enforcement authorities does not rise (or sink) to the level required for a finding of such control by one sovereign over the other that a “sham prosecution” may be held to exist.⁸⁹

Bartkus itself operates to negate the existence of the “Bartkus Exception.” After an unsuccessful prosecution for federal bank robbery, the U.S. Attorney offered his evidence to the state, continued investigating the crime, withheld trial of *Bartkus*’s accomplices, presumably in order to bring pressure on them to testify against *Bartkus*, and finally prevailed upon state prosecutors to bring charges in the case.⁹⁰ It is thus doubtful that

86. *Rinaldi*, 434 U.S. at 30 & n.16.

87. *Bartkus v. Illinois*, 359 U.S. 121, 123–24 (1959) (“It does not support the claim that the State of Illinois in bringing its prosecution was merely a tool of the federal authorities . . . It does not sustain a conclusion that the state prosecution was a sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution.”). The courts refer to this “exception” variously as the “sham prosecution exception,” the “sham prosecution doctrine,” or the “Bartkus Exception.”

88. *See, e.g., United States v. Angleton*, 221 F. Supp. 2d 696, 713–22 (S.D. Tex. 2002) (recounting the history and legal standards of the “sham prosecution” exception and concluding that it did not apply to the instant case).

89. *See, e.g., United States v. Baker*, 88 F. App’x 96, 98 (7th Cir. 2004) (“[W]e have never formally recognized or applied such an exception . . .”); *United States v. Tirrell*, 120 F.3d 670, 677 (7th Cir. 2004) (“At any rate, the exception, if it exists at all, is a very narrow one. Even significant cooperation between federal and state agencies is not enough to make the second prosecution a ‘sham.’” (citations omitted)); *United States v. McCloud*, No. CR406-247, 2007 WL 1706353, at *8 (S.D. Ga. June 11, 2007) (“The Eleventh Circuit has ‘repeatedly refused to decide whether such an exception actually exists.’” (quoting *United States v. 817 N.E. 29th Drive*, 175 F.3d 1304, 1311 n.13 (11th Cir. 1999))). *But see United States v. Guzman*, 85 F.3d 823, 827 (1st Cir. 1996) (“We emphasize that the *Bartkus* exception is narrow. It is limited to situations in which one sovereign so thoroughly dominates or manipulates the prosecutorial machinery of another that the latter retains little or no volition in its own proceedings.”); *United States v. Koon*, 34 F.3d 1416, 1438 (9th Cir. 1994) (noting that the Ninth Circuit has recognized a “narrow exception” to the doctrine of dual sovereignty); *United States v. Knight*, No. 05-81155, 2006 WL 1722199, at *3 (E.D. Mich. June 22, 2006) (finding that dual involvement of an officer in both federal and state prosecutions of the defendant invited abuse and constituted a “sham prosecution”). For a summary of case law concerning the *Bartkus* Exception, see *Guzman*, 85 F.3d at 826–27.

90. *Bartkus*, 359 U. S. at 122–23.

the *Bartkus* “sham prosecution” exception offers any real protection to defendants in dual sovereignty cases.

3. *State and Federal Legislation.* Many states have actually enacted legislation precluding prosecution by that state after federal proceedings have taken place.⁹¹ But that step, even if taken by each of the several states, will not protect against a second prosecution by the federal government following a state proceeding.

And federal reform, beyond the arguably ineffective Petite Policy, has been elusive. Provisions proposed as part of a broad revision of federal criminal laws in 1966, generally barring federal prosecutions where the state has already acted, were deleted from the version finally reported by the Senate in 1977.⁹² The revisions that survived were never enacted.⁹³

And yet all of these protections, were they really valid, pertain only to charged offenses.⁹⁴ The true missing protection and the real trap for defendants is that supposedly dealt with in *Cobb*—some circuits still deny to defendants the Sixth Amendment protections of the right to counsel when the defendant has been charged by one sovereign but not the other.⁹⁵

C. *The Sixth Amendment Right to Counsel*

A detailed discussion of the Sixth Amendment right to counsel would be duplicative of the many such analyses of that right appearing as texts and in law reviews over the years.⁹⁶ The important issue for purposes of this Comment is the Court’s current holding that the right is “offense specific,” in the sense that it attaches only when the defendant has been charged, arraigned, or indicted with a crime, and then only to the actual

91. See Murchison, *supra* note 24, at 413 nn.35–39 (collecting statutes). Professor Murchison also notes that Illinois was one state enacting such legislation, having done so shortly after *Bartkus*, emphasizing that the states are not always in accord with the duplicative prosecutions that result from dual sovereignty. *Id.* at 413; see also *supra* note 79 and accompanying text (delineating criticism of dual sovereignty in the state-then-state context).

92. Murchison, *supra* note 24, at 415–16.

93. *Id.* at 416.

94. See U.S. Attorney’s Manual, *supra* note 63, § 9-2.031B.

95. See *infra* Part III.A (detailing circuit cases that adhere to the holding that the Sixth Amendment right to counsel does not attach to offenses under dual sovereignty that arise from the same act or transaction, or are “inextricably intertwined”).

96. See, e.g., Michael J. Howe, Note, *Tomorrow’s Messiah: Towards a “Prosecution Specific” Understanding of the Sixth Amendment Right to Counsel*, 104 COLUM. L. REV. 134, 134 (2004) (discussing the Sixth Amendment right to counsel).

2009]

TWICE BITTEN

1885

charges brought to which the defendant asserts the right.⁹⁷ It does not apply to uncharged offenses.⁹⁸

This distinction between charged and uncharged offenses is precisely the root of the potential for abuse under dual sovereignty. A defendant is charged with a crime, asserts his Sixth Amendment right to counsel, thus believing that he is protected by that assertion, and is subsequently approached for questioning or is otherwise investigated for exactly the same conduct by officers that he may or may not realize represent the interests of another sovereign, against whom he does not have the protection of his right to counsel.⁹⁹

This confusion is understandable. The defendant does not know, in all likelihood, which right to counsel he is invoking—the right arising under the Fifth Amendment protection from self-incrimination or that provided by the Sixth Amendment.¹⁰⁰

These rights are different in their application and in the breadth of their protection.¹⁰¹ The Fifth Amendment right applies generally to custodial interrogations and to all offenses, whether charged or not, so long as the defendant remains in custody.¹⁰² The Sixth Amendment, however, is offense-specific, and may not “be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced.”¹⁰³

None of these distinctions are apparent to the lay defendant, or perhaps even an experienced criminal:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to

97. *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991).

98. *Id.* at 177–78. *Contra Arizona v. Roberson*, 486 U.S. 675, 685 (1988) (holding that the *Fifth Amendment* right against self-incrimination applies to *all* offenses, charged or not).

99. Perhaps no case is more paradigmatic of this danger than that of *United States v. Bird*, 287 F.3d 709, 711–12 (8th Cir. 2002). *See infra* text accompanying notes 146–53 (discussing collusion in *Bird* between federal and tribal prosecutors after counsel had been appointed for the defendant).

100. *See Michigan v. Jackson*, 475 U.S. 625, 633 n.7 (1986) (quoting the Michigan Supreme Court’s observation that laypeople are unlikely to be familiar with the distinctions between the rights afforded by the different amendments (citing *People v. Bladel*, 365 N.W.2d 56, 67 (Mich. 1984), *cert. granted sub nom. Michigan v. Jackson*, 471 U.S. 1124 (1985))).

101. *Id.* at 629–30.

102. *McNeil*, 501 U.S. at 176–77.

103. *Id.* at 175.

prepare his defense, even though he have [sic] a perfect one. He requires the guiding hand of counsel at every stage of the proceedings against him.¹⁰⁴

Even the potential for such confusion may violate due process.¹⁰⁵ This, again, is the essential rub of the Sixth Amendment right to counsel in dual sovereignty, and why the definition of the crimes to which the right attaches must ignore jurisdiction as an element of the offense. The ultimate question is how to define offense, and it is bewildering to the lay defendant to define it other than as the same act or transaction. *This is not to say that the second offense cannot be charged, but that the defendant should not be interrogated about the second offense without counsel present.*

A simple mechanism exists to accomplish this—clarifying the definition of “offense” according to *Blockburger v. United States* and *Cobb*, and coupling this clarification with incorporation of the Sixth Amendment right to counsel into the other due process protections that are now available under dual sovereignty jurisprudence.¹⁰⁶ The next Section describes the current status of the Incorporation process. Then, Part III summarizes the Sixth Amendment dual sovereignty cases that have been heard since *Cobb* and demonstrates the potential for abuse under the current confusing regime.

D. Incorporation: What is Missing

Incorporation, the process of guaranteeing to the states through the Fourteenth Amendment those protections of the first eight amendments to the U.S. Constitution, had been denied by the Court as viable jurisprudence from the time of Chief Justice Marshall’s 1832 opinion in *Barron v. Baltimore*¹⁰⁷ to as late as the *Bartkus* decision in 1959.¹⁰⁸ But then, as the Court began to perceive that “a right is among those ‘fundamental principles of

104. *Maine v. Moulton*, 474 U.S. 159, 169–70 (1985) (citations and internal quotation marks omitted).

105. *See United States v. Bowlson*, 240 F. Supp. 2d 678, 684 (E.D. Mich. 2003) (expressing concern that the potential for circumvention of the Sixth Amendment protections through the forwarding of cases to federal officials by state actors “would offend the spirit of the constitutional rights at issue”).

106. *See infra* Part II.D (cataloguing the due process protections held to have been incorporated into the dual sovereignty doctrine through the Fourteenth Amendment).

107. *Barron v. Baltimore*, 32 U.S. 243, 250–51 (1833) (holding that the Takings Clause binds only the federal government, not the several states).

108. *Bartkus v. Illinois*, 359 U.S. 121, 124 (1959) (“We have held from the beginning and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments as such.”).

liberty and justice which lie at the base of all our civil and political institutions,' whether it is 'basic in our system of jurisprudence,' and whether it is 'a fundamental right, essential to a fair trial,'" the process of incorporation gradually began.¹⁰⁹ Over a roughly ten-year period, most of the protections of the first eight amendments were, one by one, guaranteed to the states through the Due Process Clause of the Fourteenth Amendment.¹¹⁰

Interestingly, one of the first, if not the first, of the incorporation decisions concerned an issue of dual sovereignty.¹¹¹ *Elkins v. United States* involved evidence gathered in a state prosecution that was successfully suppressed by the defendants.¹¹² The federal government then brought an indictment for the same crime as that charged in the state prosecution.¹¹³ In response to the defendant's motion to suppress in the federal case, the lower court held that the evidence was admissible in the absence of a manifestation of involvement of federal officers, even while acknowledging that the evidence had been originally obtained in violation of the Fourth Amendment.¹¹⁴ In the resulting appeal, the Supreme Court held unlawful what had previously been known as the "silver platter" doctrine, under which evidence illegally obtained by state actors and subsequently excluded from trial was "served up" to federal prosecutors for use in companion charges by a second sovereign alleging the same conduct as that unsuccessfully charged by the first sovereign.¹¹⁵ A glaring example of the threat of collusion in dual sovereignty cases was corrected by this decision.

And in a companion case to *Malloy v. Hogan*,¹¹⁶ *Murphy v. Waterfront Commission of New York Harbor* extended the *Malloy*

109. *Duncan v. Louisiana*, 391 U.S. 145, 148–49 (1968) (citations omitted).

110. The cases holding for incorporation of these due process rights include *Benton v. Maryland*, 395 U.S. 784, 787 (1969) (Fifth Amendment prohibition against double jeopardy); *Duncan*, 391 U.S. at 149 (Sixth Amendment right to trial by jury); *Washington v. Texas*, 388 U.S. 14, 19 (1967) (Sixth Amendment right to compulsory process for obtaining witnesses); *Klopfer v. North Carolina*, 386 U.S. 213, 222 (1967) (Sixth Amendment right to a speedy trial); *Pointer v. Texas*, 380 U.S. 400, 403 (1965) (Sixth Amendment right to confrontation of witnesses); *Malloy v. Hogan*, 378 U.S. 1, 3 (1964) (Fifth Amendment right against self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963) (Sixth Amendment right to counsel); *Robinson v. California*, 370 U.S. 660, 667 (1962) (Eighth Amendment prohibition against cruel and unusual punishment); and *Mapp v. Ohio*, 367 U.S. 643, 657 (1961) (Fourth Amendment exclusionary rule).

111. *Elkins v. United States*, 364 U.S. 206, 208 (1960).

112. *Id.* at 207 n.1.

113. *Id.* at 206–07.

114. *Id.* at 207.

115. *Id.* at 208, 223–24.

116. *Malloy v. Hogan*, 378 U.S. 1 (1964).

decision's guarantee of the privilege against self-incrimination into the arena of dual sovereignty.¹¹⁷ After *Murphy*, immunized testimony in one jurisdiction may not later be used to convict the witness in another jurisdiction.¹¹⁸

If *Murphy* precludes dual sovereignty in self-incrimination cases, and *Elkins* forbids it in illegal searches and seizures, how then can the Sixth Amendment right to counsel not also be held applicable to both offenses?¹¹⁹

It is time to accord defendants this final important pretrial due process protection—the right to counsel, once asserted, must apply to all charges that constitute the same offense except for differences among the charging sovereigns.¹²⁰

III. THE CIRCUIT SPLIT IN DUAL SOVEREIGNTY AND THE RIGHT TO COUNSEL

It may have been the Court's intent in *Cobb* to clarify the dual sovereignty exception.¹²¹ But the real result has been to generate still more confusion, as the various circuits who have heard cases relating to dual sovereignty since *Cobb* have been unable to agree on the Court's intent.

117. *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 77–78 (1964). It is interesting that the court undertakes in this opinion a thorough analysis of the historical cases governing immunized testimony, something it has seemed reluctant to do in the context of the dual sovereignty exception to double jeopardy. *Id.* at 58–77.

118. *Id.* at 77–78.

119. See Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1, 51 (1992) (“In overruling [*Feldman v. United States*, 322 U.S. 487 (1944)] and rejecting its rationale, *Murphy* opposes all decisions which rest on the dual sovereignty doctrine.”).

120. The Fifth Amendment right to counsel has been extended even further than is here proposed for the Sixth Amendment right. In *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981), the Court held that an accused could not be further interrogated in the absence of his attorney once he had asserted his Fifth Amendment right to counsel unless the defendant himself initiated further contact. And only a few years later *Arizona v. Roberson*, 486 U.S. 675, 677–78 (1988), extended that same protection to investigations concerning unrelated crimes. The Court need not go so far in guaranteeing the Sixth Amendment right to counsel in the context of dual sovereignty, although *Edwards* and *Roberson* seem to support its doing so.

121. *Texas v. Cobb*, 532 U.S. 162, 164 (2001) (reiterating that *McNeil v. Wisconsin*, 501 U.S. 171 (1991), “meant what it said, and that the Sixth Amendment right is ‘offense specific’”).

A. Lower Court Decisions Subsequent to Cobb

The First,¹²² Fourth,¹²³ Fifth,¹²⁴ Tenth,¹²⁵ and most recently the Eleventh¹²⁶ Circuits have all held that *Cobb* allows the second sovereign to question a properly Mirandized suspect who has already asserted his Sixth Amendment right to counsel in the first charged offense. And the Seventh Circuit, in dicta, has indicated that *Cobb* would apply if they needed to reach that question.¹²⁷

122. See, e.g., *United States v. Coker*, 433 F.3d 39, 44 (1st Cir. 2005) (finding that the dual sovereignty doctrine is applicable in assessing whether the Sixth Amendment right to counsel applies where the offense is distinguished only on a jurisdictional basis).

123. See, e.g., *United States v. Alvarado*, 440 F.3d 191, 194 (4th Cir. 2006) (ruling that the Sixth Amendment right to counsel is not a bar where the second offense has not yet been charged, although the conduct giving rise to the second offense was identical to that of the first charged offense).

124. See, e.g., *United States v. Avants*, 278 F.3d 510, 512–13 (5th Cir. 2002) (holding that the right to counsel did not attach in federal murder prosecution of a Klansman who was acquitted of an earlier state murder charge, and thus a statement given to federal officers at the time of the first prosecution in 1967 was admissible in the second prosecution).

125. *United States v. Terrell*, 191 F. App'x 728, 731, 733 (10th Cir. 2006). *Terrell* is included in this listing for completeness, but its fact pattern seems distinguishable from the other cases discussed because each of the two offenses with which Terrell was charged “requires proof of a fact which the other does not.” *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

126. *United States v. Burgest*, 519 F.3d 1307, 1308 (11th Cir. 2008). Interestingly, nowhere does the court's opinion in *Burgest* cite directly to *Cobb*. The sole mention of the case is through a citation within a quotation from the First Circuit's opinion in *United States v. Coker*. *Id.* at 1310.

127. *United States v. Krueger*, 415 F.3d 766, 771 (7th Cir. 2005). Lower courts in the Sixth Circuit have also considered the issue at least twice since *Cobb*, and have held for the defendant in both cases, relying more on the “sham prosecution” exception than a clear holding as to the applicability of *Cobb*. See *United States v. Knight*, No. 05-81155, 2006 WL 1722199, at *2 (E.D. Mich. June 22, 2006) (“[T]here is no dual sovereignty when one sovereign acts ‘as a tool’ for the other.”); see also *United States v. Bowlson*, 240 F. Supp. 2d 678, 684 (E.D. Mich. 2003) (rejecting the government's claim that dual sovereignty, as used in *United States v. Avants*, applied). Bowlson was charged with five counts of bank robbery, each taking place on a separate occasion. *Bowlson*, 240 F. Supp. 2d at 679. He was initially charged only with the fifth robbery and asserted his right to counsel. *Id.* at 681. The state then dropped its charges in favor of federal charges when requested by an FBI agent working on a joint state–federal task force. *Id.* at 679. Bowlson was then Mirandized and purportedly confessed to all five robberies. *Id.* at 680. The federal prosecutor voluntarily excluded Bowlson's statement concerning the fifth robbery. *Id.* at 681. At the same time, the court distinguished this case from *Avants*, based on the apparent degree of cooperation between state and federal authorities and suppressed the statement as to the fifth robbery. *Id.* at 684–85. On appeal to the Sixth Circuit from the trial verdict, Bowlson again asserted that his Sixth Amendment right to counsel had attached to *all* offenses with which he was charged. *United States v. Bowlson*, 148 F. App'x 449, 454 (6th Cir. 2005). The Sixth Circuit rejected his argument, holding that his Sixth Amendment right to counsel was only effective as to the fifth offense. *Id.*

In *United States v. Knight*, the same court again expressed indignation as to the degree of cooperation in the case between federal and state authorities and suppressed the defendant's statement taken in similar circumstances to those of *United States v.*

On the other hand, the Second Circuit has clearly rejected the doctrine,¹²⁸ while the Eighth Circuit has held that once a suspect has asserted his right to counsel for a charged offense, other offenses that arise from the same act or transaction are so inextricably intertwined with the first that the right to counsel has attached to all, notwithstanding the dual sovereignty doctrine.¹²⁹

1. *The Circuit Split.* It is interesting, however, to peer behind these holdings to see if the division is really as clear as it seems.

a. *Avants.* Virtually the first of these cases to be decided was *United States v. Avants*.¹³⁰ Ernest Henry Avants was a member of the Ku Klux Klan when, in 1966, he and two other Klansmen brutally murdered Ben Chester White, a black sharecropper in rural Mississippi, with the intent of luring Martin Luther King, Jr. to the area so that they could attempt to assassinate him.¹³¹ Avants was acquitted of state charges of murder in the late 1960s.¹³² At approximately the same time, FBI agents interviewed Avants at his home, where he spoke to them voluntarily.¹³³ In the course of that conversation, he admitted to participating in White's murder.¹³⁴ But according to the FBI agents, they "had not been assigned to investigate the White case, [so] they asked no further questions on the matter."¹³⁵

Bowlson. Knight, 2006 WL 1722199, at *2–3 ("Thus, as in *Bowlson*, '[t]he dual nature of the investigation . . . invites abuse' and requires application of a rule that does not permit abuses that 'would offend the spirit of the constitutional rights at issue.'"). The implication is that even if the Sixth Circuit would hold that the Sixth Amendment right to counsel is offense-specific, prosecutions in that jurisdiction would face a high hurdle to escape the "sham prosecution" exception.

128. *United States v. Mills*, 412 F.3d 325, 330 (2d Cir. 2005).

129. *United States v. Bird*, 287 F.3d 709, 715 (8th Cir. 2002).

130. *United States v. Avants*, 278 F.3d 510, 512–13 (5th Cir. 2002). Perhaps the earliest case involving dual sovereignty and the Sixth Amendment right to counsel was *United States v. Montgomery*, 262 F.3d 233, 238 (4th Cir. 2001). But there, the court made only a passing reference to *Cobb* in a "see also" citation, relying instead on the *McNeil* instruction that the right is offense-specific. *Id.* at 246.

131. *Avants*, 278 F.3d at 513; see also *Emmett Till Unsolved Civil Rights Crime Act: Joint Hearing on H.R. 923 Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties and the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 18 (2007) [hereinafter *Joint Hearing*] (testimony of Grace Becker, Deputy Assistant Att'y Gen., U.S. Dep't of Justice).

132. *Avants*, 278 F.3d at 514.

133. *Id.* at 513.

134. *Id.*

135. *Id.* at 513–14.

This episode, along with many similar civil rights atrocities of the mid-1960s, was resurrected in a widely acclaimed investigational broadcast by Connie Chung, reporting on the news program “20/20.”¹³⁶ Subsequent to the newscast, federal murder charges were brought against Avants, with the government finding jurisdiction as a separate sovereign because the offense was committed on federal lands in the Homochitto National Forest.¹³⁷ The government sought to introduce the earlier statements wherein Avants admitted the murders, but the District Court upheld Avants’s motion to suppress, holding that his Sixth Amendment rights were violated by the fact that the agents continued interviewing him after being told that he was represented by counsel in the state charges.¹³⁸

The Fifth Circuit overturned the ruling.¹³⁹ The court quickly embraced *Cobb*: “In evaluating [the] argument that [the federal government may prosecute a defendant on the same charges after an unsuccessful state prosecution], we are significantly assisted by a Supreme Court case that was decided after the district court ruled on the motion to suppress.”¹⁴⁰

Possibly, the political climate of the time might encourage an expansive reading of *Cobb*. Chung’s televised report aired in November 1999.¹⁴¹ Contemporaneously, extensive recapitulations of many of the “Mississippi Burning”¹⁴² events were chronicled in the media.¹⁴³

With his earlier confession now admitted into evidence, Avants’s conviction was a foregone conclusion. The final verdict

136. See, e.g., David Bianculli, *Chung Wins Our Respect*, N.Y. DAILY NEWS, June 14, 2000, at 89 (praising Chung’s reporting and noting that the staff of “20/20” was actually responsible for guiding the government to the “legal loophole” that eventually resulted in Avants’s conviction).

137. *Id.*; see also 18 U.S.C. §§ 1111–12 (2006); *Avants*, 278 F.3d at 512.

138. *Avants*, 278 F.3d at 512.

139. *Id.* at 522–23.

140. *Id.* at 516.

141. Bianculli, *supra* note 136.

142. “Mississippi Burning” is a term used to describe the events of violence in the mid-1960s that surrounded efforts at integration and voter registration accompanying the passage of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964). The term was given popular circularization following the release of the movie of that title in 1988 that chronicled the story of three young civil rights workers abducted and killed near Philadelphia, Mississippi while working on voter registration in the summer of 1964. See, e.g., Manuel Roig-Franzia, *‘Mississippi Burning’ Case Reopened; 1 Man Arrested*, WASH. POST, Jan. 7, 2005, at A1 (reporting on the trial of Edgar Ray Killen for murder in the 41-year-old case).

143. See, e.g., Stephanie Saul, *Their Killers Walk Free*, NEWSDAY, Dec. 15, 1998, at A6 (recounting the 1967 trial for the murder of Ben Chester White); Emily Yellin, *A Changing South Revisits Its Unsolved Racial Killings*, N.Y. TIMES, Nov. 8, 1999, at A1 (reporting on reopened civil rights cases).

in the case was hailed in newspapers across the country as just retribution.¹⁴⁴ And the case was a featured victory in testimony surrounding the adoption in 2007 of the Emmett Till Unsolved Civil Rights Crime Act, named for still another casualty of the civil rights movement in Mississippi.¹⁴⁵

b. Red Bird. The dual sovereigns in *United States v. Red Bird* were the United States and the Rosebud Sioux Tribe.¹⁴⁶ Red Bird was accused of rape on the Rosebud Sioux Reservation.¹⁴⁷ After pleading not guilty, an attorney was appointed for him.¹⁴⁸ Because rape on an Indian reservation is also subject to federal jurisdiction, the tribal authorities informed the FBI of the charges, and an FBI agent accompanied the tribal investigator to an interview with Red Bird.¹⁴⁹ Red Bird was later charged with the same rape in a federal context.¹⁵⁰

The Eighth Circuit found that both federal and tribal authorities were aware that Red Bird was represented by counsel in charges identical to those the FBI agent was pursuing.¹⁵¹ Interestingly, the court did not feel compelled to turn to the “sham prosecution” exception—*Bartkus* is never mentioned in the opinion. The court relied instead on the holding in *Texas v. Cobb*, quoting the same language relied upon as the basis for the opinion in *Avants*: “[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.”¹⁵² Finding that the “identical essential

144. See, e.g., Ken Ellingwood, *Man, 72, Guilty in '66 Racist Murder*, L.A. TIMES, Mar. 1, 2003, at A12 (calling the verdict “a triumphant finish to the U.S. government’s first murder prosecution in a civil rights-era case”); *1960s-era Klansman Convicted of Murder*, HOUSTON CHRON., Mar. 1, 2003, at A3 (referring to the trial as “the latest effort to erase the decades-old stain of racist violence in the South”).

145. See *Joint Hearing*, *supra* note 131, at 18 (noting the “creatively used noncivil rights statutes in prosecuting . . . capital offenses”).

146. *United States v. Bird*, 287 F.3d 709, 711 (8th Cir. 2002).

147. *Id.*

148. *Id.*

149. *Id.* One can easily conjecture the reasons the tribal investigator might have wanted to involve the federal jurisdiction in this matter, because tribal courts are prohibited from imposing punishments that exceed “a term of imprisonment in excess of one year and a fine of greater than \$5,000 or both.” *Id.* at 716 n.8. While comparable federal sentencing would depend on the Federal Sentencing Guidelines, the applicable statutory provision would allow a fine, up to life in prison, or both. 18 U.S.C. § 2241 (2006).

150. *Bird*, 287 F.3d at 712.

151. *Id.* at 714.

152. *Id.* at 715 (quoting *Texas v. Cobb*, 532 U.S. 162, 173 (2001)).

2009]

TWICE BITTEN

1893

elements” were contained in both the tribal and the federal charge, the court held the Sixth Amendment protections were applicable and suppressed Red Bird’s statement taken by the FBI.¹⁵³

c. Mills. In a brief but well-written opinion in *United States v. Mills*,¹⁵⁴ the Second Circuit joined the Eighth in interpreting *Cobb* to define only that which constitutes a separate offense, and refused to allow the dual sovereignty doctrine to preclude Mills’s right to counsel in both offenses:

Cobb makes clear that Sixth Amendment violations are offense specific and, consequently, evidence obtained in violation of the Sixth Amendment is not admissible in subsequent prosecutions for the ‘same offense’ as defined by *Blockburger*. The fact that *Cobb* appropriates the *Blockburger* test, applied initially in the double jeopardy context, does not demonstrate that *Cobb* incorporates the dual sovereignty doctrine: The test is used simply to define identity of offenses.¹⁵⁵

But, the *Mills* court went further by distinguishing *Avants* because the crime being investigated by the FBI, in the course of which Avants made his incriminating statement, was a separate crime than that for which he was later tried.¹⁵⁶

Even more importantly, by focusing on the purpose of the *Cobb* holding—“to define identity of offenses”—the Second Circuit underscored the essential confusing element of *Cobb*.¹⁵⁷ *Cobb*’s purpose was not to import the entirety of the Court’s Sixth Amendment jurisprudence into the double jeopardy context. Instead, it was to preclude the practice that pertained in some circuits of distinguishing offenses that are “factually related” from those that constitute separate offenses under *Blockburger*.¹⁵⁸ The *Mills* court understood the risks of holding otherwise. The court clearly articulated the danger of collusion between prosecuting sovereigns in cases in which the Sixth Amendment right to counsel is not respected in a second offense involving the

153. *Id.* at 715–16.

154. *United States v. Mills*, 412 F.3d 325, 326 (2d Cir. 2005). *Mills* involved charges levied by both the State of Connecticut and the federal government of possession of a firearm by a felon.

155. *Id.* at 330.

156. *Id.* at 330 n.2.

157. *Id.* at 330.

158. *See supra* note 121 and accompanying text.

same elements as the first charged offense, and the court's belief that *Cobb* acts as a safeguard against that eventuality.¹⁵⁹

d. *Coker*. *United States v. Coker* involved different state and federal charges arising out of precisely the same act.¹⁶⁰ *Coker* was accused of starting a fire in a suburban Boston apartment building.¹⁶¹ He was charged with arson and had an attorney appointed for him.¹⁶² It appeared that the fire had been started using a Molotov cocktail-like device, so agents of the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATF) also investigated and interrogated *Coker*, with full knowledge that he was represented by counsel in the first charged offense.¹⁶³

Despite the fact that the local police and the BATF maintained a joint office, and that the BATF was aware of *Coker's* existing representation by counsel, the First Circuit refused to suppress the statement *Coker* made to the BATF officers,¹⁶⁴ relying on the identical language in *Cobb* that the Second Circuit used to support its decision to suppress in *Mills*.¹⁶⁵

The *Coker* decision drew a spirited concurrence from Senior Circuit Judge Cyr.¹⁶⁶ Judge Cyr's opinion relied on the harmless error doctrine, while strongly asserting that *Coker's* Sixth Amendment right to counsel had been breached, basing his concern on the same opportunities for collusion that offended the court in *Mills*.¹⁶⁷ And by pointing out that *Cobb* did not involve a question of dual sovereignty, he effectively disarmed those who would rely on *Cobb* to incorporate that exception into their determination of a "separate" offense.¹⁶⁸

159. *Mills*, 412 F.3d at 330.

160. *United States v. Coker*, 433 F.3d 39, 43 (1st Cir. 2005).

161. *Id.* at 41.

162. *Id.*

163. *Id.*

164. The First Circuit majority attempts to distinguish *United States v. Red Bird* on the basis, surely a gross understatement, that "there was evidence that tribal and federal authorities commonly cooperated." *Id.* at 47.

165. *Id.* at 43. (quoting the *Cobb* Court's reference to *Blockburger*: "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."). But under this definition it is disingenuous to hold, as the First Circuit does in *Coker*, that conduct involving the same essential elements is a different offense solely because of the sovereign whose laws are offended.

166. *Id.* at 49–52.

167. *Id.* at 49–50.

168. *Id.* at 50.

e. Alvarado. The fact pattern of *United States v. Alvarado* provides yet another twist on the application of the dual sovereign exception.¹⁶⁹ Alvarado was initially interrogated by BATF agents, but then charged by the state of Virginia with conspiracy to distribute cocaine and with possession of cocaine with intent to distribute.¹⁷⁰ After the state appointed counsel for him, the charges were dropped in favor of identical federal charges.¹⁷¹ The original arresting agent was the same officer who then interrogated Alvarado immediately after his release on the state charges.¹⁷² The potential for confusion on the part of the defendant (who spoke no English) is clear. Alvarado made a statement, which he later sought to suppress based on his having already asserted his Sixth Amendment right to counsel.¹⁷³

The Fourth Circuit followed the same logical pretext as that of the First Circuit in *Coker*—that *Cobb* imported the Court's Sixth Amendment jurisprudence to all matters of double jeopardy, including the dual sovereign exception.¹⁷⁴ The Fourth Circuit thus found that the charged state offenses were separate from the new federal charges, and that the Sixth Amendment right to counsel asserted by Alvarado in the state charges did not apply to the federal charges.¹⁷⁵

Moreover, the majority proceeded through an elaborate justification of the authority of each sovereign to define what crimes it will punish.¹⁷⁶ But this is a central doctrinal flaw in denying defendants their Sixth Amendment right to counsel under dual sovereignty. It is not whether separate sovereigns have the *right* to define conduct offensive to their own jurisdictions; it is whether a defendant, having asserted *his right* to counsel with regard to prosecution by one sovereign, retains that right as against the investigatory processes of the second sovereign.¹⁷⁷

169. *United States v. Alvarado*, 440 F.3d 191 (4th Cir. 2006).

170. *Id.* at 194–95.

171. *Id.* at 195.

172. *Id.*

173. *Id.* at 195–96.

174. This was despite the fact that, as Judge Cyr pointed out in *Coker*, “the case before [the Court in *Cobb*] did not involve separate sovereigns.” *United States v. Coker*, 433 F.3d 39, 50 (1st Cir. 2005).

175. *Alvarado*, 440 F.3d at 196–99.

176. *Id.* at 196–97.

177. *Contra id.* at 199 (emphasizing that the right to counsel attaches at prosecution rather than investigation).

2. *The Lessons Since Cobb*. Does any clear message emerge from these holdings for circuits that have not yet ruled on this issue? Perhaps.

If the same offense is being pursued by both sovereigns, where the sole material distinction is simply one of jurisdiction, the Sixth Amendment right to counsel, when already asserted in a first charged offense, might be respected by the court.¹⁷⁸ On the other hand, there is no assurance that this would be the outcome in a circuit that more expansively interprets *Cobb*.¹⁷⁹

Where, however, offenses are materially different, as in the case of *United States v. Terrell*,¹⁸⁰ or particularly heinous or otherwise politically charged as in the case of *Avants*,¹⁸¹ the Sixth Amendment right to counsel, once asserted, probably will not, and probably should not attach to the offense the second sovereign is pursuing.¹⁸²

B. Clarification? . . . Or Confusion?

And yet, the lingering lesson from these cases is that the courts still lack clear standards, even after—especially after—*Cobb*. Instead of articulating and clarifying the appropriate standards for defining “separate offense,” which was the essential question in *Cobb*, the Court has left the lower courts in confusion over the issue of dual sovereignty. This confusion results from a misreading of *Cobb* by those circuits that have

178. See, e.g., *United States v. Mills*, 412 F.3d 325, 326 (2d Cir. 2005) (statement made to federal investigator suppressed in charges for possession of a firearm by a convicted felon); *United States v. Bird*, 287 F.3d 709, 711 (8th Cir. 2002) (same, where charge involved rape on Indian lands where Sixth Amendment right to counsel had already attached in same charge made by tribal court).

179. See, e.g., *Coker*, 433 F.3d at 40 (Sixth Amendment right to counsel did not attach to charges of arson by federal government after statement made by defendant represented by counsel in same charges made by the state, despite apparent collusion between state and federal investigators); see also *Alvarado*, 440 F.3d at 194 (Sixth Amendment right to counsel did not attach to second sovereign’s charges against drug dealer, after counsel was appointed in the first charged offense, despite the potential for confusion of the defendant).

180. *United States v. Terrell*, 191 F. App’x 728, 730–31 (10th Cir. 2006).

181. *United States v. Avants*, 278 F.3d 510, 512 (5th Cir. 2002).

182. There is even some argument for disregarding these two cases in analyzing the split among the circuits. In *Terrell*, the offenses were truly different, meeting the separate element test of *Blockburger*. *Terrell*, 191 F. App’x at 733. And, particularly considering the politically charged environment and especially heinous nature of the *Avants* murder, the court might have been willing to interpret *Cobb* in a way that could remedy the aberrant jury verdict almost forty years earlier. Interestingly, without these two cases in the calculus, the circuits are almost evenly divided as to whether *Cobb* provides a rule that is useful in considering the Sixth Amendment right to counsel in dual sovereignty cases. See *supra* Part III.A (discussing the split in circuit opinions regarding the Sixth Amendment right to counsel).

2009]

TWICE BITTEN

1897

used the case to import a rule of dual sovereignty. *Cobb* simply did not address the issue, and the rule of *Brewer v. Williams*, not of *McNeil v. Wisconsin*, should apply to issues of the Sixth Amendment right to counsel in dual sovereignty.¹⁸³

To review the logic of the courts applying *Cobb* expansively: *Cobb* imports the Court's Sixth Amendment jurisprudence to all matters of double jeopardy, including the dual sovereign exception, and thus the offenses charged by the first sovereign (for which counsel has been appointed) must be seen as separate offenses from the new charges brought by the second sovereign. Therefore, the Sixth Amendment right to counsel that has attached to the first sovereign's charges does not attach to those still being investigated by the second sovereign, until that second sovereign actually brings such charges.¹⁸⁴ Thus, it is essential to have a clear answer as to whether the Court, when it held that there is "no constitutional difference between the meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel,"¹⁸⁵ intended that language so broadly as to encompass the dual sovereign exception where there was no question before it having to do with dual sovereignty. This understanding does not exist when different circuits can quote this same phrase and hold that *Cobb* does or does not mandate that the Sixth Amendment right to counsel, once it attaches to the offense charged by the first sovereign, must necessarily attach to an offense with the same material elements potentially to be charged by a second sovereign.¹⁸⁶

1. *Inadequate Policy Justification.* To justify the role that the Sixth Amendment right to counsel does not apply to separate, uncharged offenses, courts commonly advance the policy of avoidance of excessive restraints on police in their investigative work.¹⁸⁷ But as important as this policy is, it justifies only

183. See *infra* Part IV.B (questioning the applicability of *Cobb* in the context of the Sixth Amendment dual sovereignty right to counsel).

184. See, e.g., *Alvarado*, 440 F.3d at 199.

185. *Texas v. Cobb*, 532 U.S. 162, 173 (2001).

186. Compare *Avants*, 278 F.3d at 517–18 (referring to the phrase in supporting the government's contention that the defendant had no protection under the Sixth Amendment because he had not been formally charged with the second offense), with *United States v. Mills*, 412 F.3d 325, 329–30 (2d Cir. 2005) (rejecting the government's proposed interpretation of the phrase as holding that the right to counsel has not attached to the second offense pursuant to the dual sovereignty doctrine).

187. *Cobb*, 532 U.S. at 171–72 ("[I]t is critical to recognize that the Constitution does not negate society's interest in the ability of police to talk to witnesses and suspects, even those who have been charged with other offenses.").

maintaining dual sovereignty; it does not justify denying due process to those who run afoul of the doctrine.

2. *Policy Objectives of Dual Sovereignty Need Not Offend Due Process.* Thus *Cobb's* (and others') focus on investigational interests proves too much in this context. The necessity to allow police investigation does not support denial of due process.¹⁸⁸ To reiterate: the thesis of this Comment is not that society's interests should be disregarded. It is that the due process rights of the suspect must be respected. It seems not to be asking too much to require law enforcement officers to inquire, as part of their routine, into other offenses for which the suspect is currently under arraignment or indictment. It is naïve to assert that professional police investigators do not prepare for their investigations and their interview of suspects.¹⁸⁹ It is a small additional precaution to determine whether a suspect has been charged with other offenses, and if so whether he has retained or been appointed counsel in connection with those offenses. This must be done to avoid confusion on the part of the suspect, assure him of the rights he has already exercised, and lower the risk of tainting an otherwise valid investigation. Indeed, these rights already exist in a Fourth and Fifth Amendment context.¹⁹⁰ They should likewise be preserved under the Sixth Amendment.

C. *Potential for Abuse, Risks, and Costs*

Failure to preserve these rights only exacerbates the potential for abuse under dual sovereignty. A certain amount of risk may be justified to protect against a "race to the courthouse."¹⁹¹ That risk can be mitigated, however, by using the

188. See, e.g., *Weeks v. United States*, 232 U.S. 383, 393 (1914) ("The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.").

189. Not only is it naïve, it is proscribed by the Supreme Court. See, e.g., *Arizona v. Roberson*, 486 U.S. 675, 688 (1988) ("The police department's failure to honor [defendant's request for counsel] cannot be justified by the lack of diligence of a particular officer."); *Michigan v. Jackson*, 475 U.S. 625, 634 (1986) (characterizing as "unavailing" a justification that police may not be aware of a defendant's assertion of the right to counsel).

190. See, e.g., *United States v. Coker*, 433 F.3d 39, 50 (1st Cir. 2005) (Cyr, J., concurring) (describing the anomaly of allowing the governments of two sovereigns to effectively collude in their prosecutions of a suspect "where they are prohibited from undertaking similar . . . actions with respect to Fourth Amendment and Fifth Amendment rights").

191. See *supra* text accompanying note 43 (discussing a policy justification for dual sovereignty).

2009]

TWICE BITTEN

1899

Blockburger definition of “offense” under the Sixth Amendment right to counsel.¹⁹²

Examples abound of the kinds of abuse this doctrine fosters. Many of the criticisms and examples of abuse from dual sovereignty are detailed by numerous commentators.¹⁹³ To any such list of criticisms must be added: (1) the risk of collusion among prosecuting sovereigns; (2) the difficulties defense counsel faces in simultaneously conducting two defenses in disparate jurisdictions with disparate rules and process; (3) economic inefficiency; (4) the potential for confusion on the part of the defendant; (5) breach of the ABA Model Code of Professional Responsibility; and (6) distortion of the Framers’ original intent. Several of these have been mentioned elsewhere in this Comment, but each of them merits additional discussion.

1. *Collusion Between Sovereigns and the Meaningless “Sham Prosecution” Exception of Bartkus.* Although many have interpreted dicta in *Bartkus* to admit an exception to the dual sovereignty doctrine for a “sham prosecution,” sufficiently collusive conduct is seldom found, at least at an appellate level.¹⁹⁴ This is not to say that the conduct does not occur, nor that it is not harmful to defendants when it does occur. Courts have

192. See *supra* text accompanying note 152.

193. Professor King, as an example, describes: (1) prosecutorial harassment; (2) the defendant’s interest in finality; (3) the risk of wrongful conviction; (4) denial of the jury’s right of nullification; and (5) prevention of excessive punishment. Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 130–46 (1995).

Her comments on the impact on jury nullification are especially interesting; particularly because dissatisfaction with a verdict seems to be a principle reason that one sovereign’s prosecutor will encourage that of another to undertake charges affecting the same defendant. See Robert Matz, Note, *Dual Sovereignty and the Double Jeopardy Clause: If at First You Don’t Convict, Try, Try Again*, 24 FORDHAM URB. L.J. 353, 373–74 (1997) (arguing that nullification of jury verdicts denigrates the sovereignty of the people). That risk is clear. One has only to look at the case of Ernest Avants. See *supra* Part III.A.1.a (discussing the *Avants* case). It is easy to argue that Ernest Avants committed a horrible crime. Yet taking him out of the equation, federal prosecutors who were unhappy with the state’s verdict in a capital murder trial resurrected the prosecution as a crime of murder on federal lands, and used Avants’s uncounseled statement to convict him. The actual decision in Avants’s federal murder trial is not reported. However, an appeal from the trial was heard by the Fifth Circuit in 2004, from which it is clear that Avants was tried and found guilty. *United States v. Avants*, 367 F.3d 433, 438 (5th Cir. 2004); see also Rick Bragg, *Former Klansman is Found Guilty of 1966 Killing*, N.Y. TIMES, Mar. 1, 2003, at A12 (reporting on the verdict in the lower court).

194. See *supra* Part II.B.2 (reviewing decisions that have held that conduct on the part of state actors did not rise to the level necessary to constitute denial of due process).

simply set the bar high enough that the “exception” is meaningless, thus encouraging further such collusion.¹⁹⁵

2. *Inefficiency of Defense Counsel.* Having to “fight in two arenas at once” invariably creates disadvantages for the defense counsel, and thus for the defendant. As but one example, the necessity of defending charges in two jurisdictions could make plea bargaining in either of those jurisdictions all but impossible.¹⁹⁶ A plea of “guilty” to the first charging sovereign is just the admission of guilt sought by the second sovereign. Moreover, many defense attorneys may be familiar with the laws, rules, and procedures in only one of the jurisdictions, thus potentially adding the necessity of a second attorney to the defendant’s costs.

3. *Successive Prosecutions and Economic Inefficiency.* Economic inefficiency is certainly related to inefficiency on the part of defense counsel, but it encompasses more. When multiple sovereigns are investigating the same crime, pursuing punishment of the same defendant, and sorting through the inevitable appeals that may result, it is wasteful of police, prosecutorial, and judicial resources.¹⁹⁷ The proclivity of dual sovereignty to discourage plea bargaining further exacerbates this waste of investigative and judicial resources by forcing more such prosecutions to trial.¹⁹⁸

4. *Confusion on the Part of the Defendant.* Where two jurisdictions are both investigating charges arising from the same conduct, the potential for confusion is obvious. The lay defendant cannot appreciate the distinction among the

195. See *supra* note 89 and accompanying text (reviewing decisions limiting the scope of the sham prosecution exception). This may not be true in the Sixth Circuit. See *supra* note 127 (indicating that recent cases in the Sixth Circuit appear to respect the *Barthus* Exception).

196. This is just the situation in which Larry Heath found himself in Alabama after pleading guilty to murdering his wife in Georgia. *Heath v. Alabama*, 474 U.S. 82, 84–85 (1985).

197. See Elizabeth T. Lear, *Contemplating the Successive Prosecution Phenomenon in the Federal System*, 85 J. CRIM. L. & CRIMINOLOGY 625, 647–49 (1995) (discussing the systemic costs of successive prosecutions); Murchison, *supra* note 24, at 428 (noting that multiple convictions obtained in successive prosecutions frequently waste prosecutorial resources).

198. See Allen & Ratnaswamy, *supra* note 79, at 821–22 (asserting that dual sovereignty complicates plea bargaining, because effective plea bargains in this context require prosecutors to agree not to extradite the defendant); Matz, *supra* note 193, at 374 (suggesting that the agreements not to extradite, which are necessary for effective plea bargaining in the dual sovereignty context, “threaten to disrupt the efficient administration of law enforcement”).

2009]

TWICE BITTEN

1901

authorities who are questioning him, particularly in view of the anxiety that must accompany interrogation on the part of even the most hardened criminal.¹⁹⁹

5. *Breach of the ABA Model Rules of Professional Conduct.* The Rules of Professional Conduct may be enough to justify broadening the Sixth Amendment right to counsel in dual sovereignty.²⁰⁰ Contact with the client of another is strictly forbidden by Rule 4.2, as it was in the earlier Code of Professional Responsibility.²⁰¹ A prosecutor's questioning of a suspect concerning uncharged offenses against the second sovereign, after his Sixth Amendment right to counsel has attached in the first offense, is a clear breach of this rule.²⁰²

6. *Original Intent of the Framers.* One can argue that the mere existence of the dual sovereignty doctrine is an abuse of due process. The Court has seldom delved deeply into the historical basis of double jeopardy, nor the original intent of the Framers of the Constitution.²⁰³ In fact, commentators have criticized the essential underpinnings of the dual sovereignty doctrine through

199. See Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 21 (1995).

200. See MODEL RULES OF PROF'L CONDUCT R. 4.2 (2008).

201. *Id.* ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law . . ."). Justice Stevens emphasizes this point in his dissent in *Patterson v. Illinois*:

The Court should not condone unethical forms of trial preparation by prosecutors or their investigators. In civil litigation it is improper for a lawyer to communicate with his or her adversary's client without either notice to opposing counsel or the permission of the court. An attempt to obtain evidence for use at trial by going behind the back of one's adversary would be not only a serious breach of professional ethics but also a manifestly unfair form of trial practice. *In the criminal context, the same ethical rules apply and, in my opinion, notions of fairness that are at least as demanding should also be enforced.*

Patterson v. Illinois, 487 U.S. 285, 301 (1988) (Stevens, J., dissenting) (emphasis added) (footnote omitted).

202. A detailed development of this thesis is beyond the scope of this Comment. The argument that "authorized to do so by law" encompasses different offenses might seem conclusive. However, if "offense" is defined as in *Blockburger*, then all potential charges that require proof of the same elements should be covered. *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

203. See *Heath v. Alabama*, 474 U.S. 82, 98 n.1 (1985) (Marshall, J., dissenting) ("It is curious to note how reluctant the Court has always been to ascertain the intent of the Framers in this area. The furthest the Court has ever progressed . . . was to note: 'It has not been deemed relevant to discussion of our problem to consider dubious English precedents concerning the effect of foreign criminal judgments on the ability of English courts to try charges arising out of the same conduct . . .'" (quoting *Bartkus v. Illinois*, 359 U.S. 121, 128 n.9 (1959))).

an assertion that the only true sovereign in our federal system is “We the People”—the electorate and population of the United States.²⁰⁴

Although the doctrine of dual sovereignty did not become a part of American jurisprudence until 1847,²⁰⁵ some idea of the Framers’ reaction to such an approach may at least be inferred from their brief discussions as to double jeopardy. James Madison introduced a first draft of the prohibition against double jeopardy during discussions of the Bill of Rights, reading as follows: “No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence.”²⁰⁶ The delegates’ chief concern with this wording appeared to be assuring that no possible interpretation would preclude an appeal by the defendant.²⁰⁷ The problem was apparently resolved by resort to traditional wording from Blackstone, retaining the concept of a single jeopardy for the same “offence.”²⁰⁸

D. Conclusion

Despite the substantial potential abuses, costs, and risks of the dual sovereignty doctrine, it occupies a valuable position and serves a valuable purpose in the federal system of jurisprudence. With the doctrine intact, it is possible to minimize or eliminate the risk that the sovereign with the more important interest at stake will not have that interest vindicated. The ultimate question is: What protections will be put in place to protect the interests of those charged under this doctrine? I address that question in the next Part of this Comment.

IV. TOWARDS A PRINCIPLED DISTINCTION IN DETERMINING THE RIGHT TO COUNSEL IN CASES OF DUAL SOVEREIGNTY

Solutions for the abuses of dual sovereignty range from pure abrogation, to partial abrogation by retaining the exception in

204. This argument is more fully developed in Michael A. Dawson, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereign Doctrine*, 102 YALE L.J. 281, 299–300 (1992), which opines that the principle of dual sovereignty demeans both the jury power as well as the ultimate sovereignty of the people. For additional insight into this argument, see Braun, *supra* note 119, at 26, which argues that neither the states nor the federal government is ultimately sovereign in any classical sense.

205. See *supra* Part II.A.1 (developing early history of the concept).

206. 1 ANNALS OF CONG. 434 (1789) (Joseph Gales ed., 1789), *quoted in* United States v. Wilson, 420 U.S. 332, 341 (1975).

207. *Wilson*, 420 U.S. at 341.

208. *Id.* at 341–42.

2009]

TWICE BITTEN

1903

the case of state actors,²⁰⁹ to evaluating the cumulative effect of punishment using an Eighth Amendment cruel and unusual or excessive fines standard,²¹⁰ to a modified doctrine emphasizing the *Barthkus* “sham prosecution” exception.²¹¹ Others have proposed exceptions to the doctrine such as precluding its application in cases of inter-jurisdictional enforcement of drug laws.²¹² Still others propose some form of “balancing” analysis, with or without exceptions.²¹³ Such tests are susceptible to enough criticism that they are unlikely to find broad support as a solution.²¹⁴ While some of these proposals may have value in a limited sense, suffice it to say that none of them addresses the problem of the “race to the courthouse” and are thus unlikely to be implemented.²¹⁵

A. Cobb—A Brief Review

A short summary of the facts in *Cobb* is helpful in understanding that its holding has been incorrectly applied by some circuits to the question of the Sixth Amendment right to counsel in dual sovereignty cases.

Levi Cobb confessed to burglary of a residence in July 1994 and was indicted for that crime shortly thereafter.²¹⁶ Counsel was appointed for him in August. Two residents of the burglarized residence, a mother and her daughter, mysteriously disappeared at the time of the burglary. On two separate occasions, in the fall of 1994 and again in September 1995, authorities asked for and

209. Amar & Marcus, *supra* note 199, at 17–19.

210. King, *supra* note 193, at 154–55.

211. See Braun, *supra* note 119, at 73 (noting that extensive cooperation between multiple sovereigns during the investigative process vindicates a shared interest, making the “sham prosecution” exception reasonable without requiring that the state become a “tool” of the federal government); see also *supra* Part II.B.2 (discussing the *Barthkus* “sham prosecution” exception).

212. See Sandra Guerra [Thompson], *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159, 1209 (1995) (arguing that federal and state drug law enforcement activities have become so collaborative as to render the doctrine unnecessary).

213. Anne Bowen Poulin, *Double Jeopardy Protection from Successive Prosecution: A Proposed Approach*, 92 GEO. L.J. 1183, 1258 (2004).

214. See Braun, *supra* note 119, at 57–58 (discussing the problems inherent in overruling *Barthkus* and *Abbate* generally); Poulin, *supra* note 213, at 1202–03, 1223–24, 1232–33 (criticizing proposals as providing inadequate protection against multiple prosecutions).

215. See King, *supra* note 193, at 156–57 (explaining the “race to the courthouse” and concluding that a defendant’s interests in avoiding multiple punishments for the same crime outweigh the sovereigns’ interests in multiple prosecutions).

216. The facts recited in this following paragraph are taken from *Texas v. Cobb*, 532 U.S. 162, 164–65 (2001).

received permission of Cobb's counsel to question Cobb concerning the disappearances; on both occasions, Cobb denied any knowledge of the matter. However, in November 1995, Cobb told his father that he had killed one of the two missing persons at the time of the burglary. Cobb's father informed police of this confession, who then arrested Cobb, administered Miranda warnings, and interrogated him concerning the missing persons. During this interrogation, Cobb confessed to the murders of both the missing mother and her daughter.

On appeal of his capital murder conviction, Cobb argued that the authorities' interrogation concerning the murder charges constituted a violation of his Sixth Amendment right to counsel, invoked at the time of his indictment on the burglary charges.²¹⁷ The Texas Court of Criminal Appeals upheld his appeal, based on the two offenses being "factually interwoven with the burglary."²¹⁸ The Supreme Court reversed this holding, reasoning that the Court's decision in *McNeil* disposed of any safe harbor for uncharged offenses that were merely "factually related" or "closely intertwined" with charged offenses to which the right of counsel had attached.²¹⁹ In five sentences that form the heart of *Cobb*, the Court went on to make clear that in determining whether authorities are dealing with the same offense or simply a closely related offense, the appropriate test was that which they had articulated almost seventy years earlier in *Blockburger*:

Although it is clear that the Sixth Amendment right to counsel attaches only to charged offenses, we have recognized in other contexts that the definition of an "offense" is not necessarily limited to the four corners of a charging instrument. In *Blockburger* . . . we explained that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." We have since applied the *Blockburger* test to delineate the scope of the Fifth Amendment's Double Jeopardy Clause, which prevents multiple or successive prosecutions for the "same offence." We see no constitutional difference between the meaning of the term "offense" in the contexts of double jeopardy and of the right

217. *Id.* at 166.

218. *Id.* at 166–67; see also *Michigan v. Jackson*, 475 U.S. 625, 629–30 (1986) (holding that defendants have a right to counsel at post-arraignment custodial interrogations).

219. *Cobb*, 532 U.S. at 168 (declining to endorse the view of some lower courts that an exception existed under *McNeil* for uncharged but "factually related" offenses).

2009]

TWICE BITTEN

1905

to counsel. Accordingly, we hold that when the Sixth Amendment right to counsel attaches, it does encompass offenses that, even if not formally charged, would be considered the same offense under the *Blockburger* test.²²⁰

B. What Cobb Did Not Do

Careful reading of these five sentences leads inevitably to the conclusion that *Cobb* should not be interpreted as some circuits have insisted—that in seeing “no constitutional difference between the meaning of the term ‘offense’ in the contexts of double jeopardy and of the right to counsel” the Court intended to apply the dual sovereignty exception to double jeopardy to the context of the Sixth Amendment right to counsel. This cannot be.

First, far from addressing the right to counsel in cases of dual sovereignty, the opinion is silent as to that question, forcing those circuits to strain to connect this phrase and the dual sovereignty exception. But it is the Court’s oft-asserted warning, repeated even in *Cobb*, that “[c]onstitutional rights are not defined by inferences from opinions which did not address the question at issue.”²²¹ The issue addressed by these circuits—the right to counsel under the dual sovereignty doctrine—simply was not before the Court.

Second, the offenses in *Cobb* were remarkably different—capital murder and burglary.²²² The Court’s stated intent in this context was to clarify the rule of *McNeil* as to offense specificity—to make clear that “factually related” was not enough for the right to counsel to attach to an uncharged offense—not to make a finding in the context of dual sovereignty where only the jurisdiction might distinguish the offenses.²²³ The Court never seeks to relate their holding to *Lanza*, only to *Blockburger* and *McNeil*.²²⁴

220. *Id.* at 172–73 (citations omitted).

221. *Id.* at 169; see also *Petite v. United States*, 361 U.S. 529, 531 (1960) (“[T]he Court will not ‘anticipate a question of constitutional law in advance of the necessity of deciding it.’” (quoting *Liverpool, N.Y. & Phila. S.S. Co. v. Comm’rs of Emigration*, 113 U.S. 33, 39 (1885))).

222. *Cobb*, 532 U.S. at 165–66.

223. *Id.* at 168.

224. Neither *United States v. Lanza*, 260 U.S. 377 (1922), nor any other dual sovereignty case is mentioned in any of the *Cobb* opinions.

C. What Cobb May Have Done

But, more interestingly, in holding that “when the Sixth Amendment right to counsel attaches, it does encompass offenses that, even if not formally charged, would be considered the same offense under the *Blockburger* test,”²²⁵ the Court may actually be inferring that where offenses are in fact the same, which is always the case in the context of dual sovereignty, *Blockburger* teaches that the right to counsel does attach to the uncharged offense against the second sovereign.²²⁶ Thus, when the Court says that it sees “no constitutional difference between the meaning of the term ‘offense’ in the contexts of double jeopardy and of the right to counsel,” could it be implying that, if required to do so, it would now mirror its *Benton* holding in the context of dual sovereignty?²²⁷ In other words, does not double jeopardy demand that the right to counsel attach to all conduct that gives rise to charges under dual sovereignty where the sole distinction is one of jurisdiction—where the defendant is liable for conduct that is the “same offense” under *Blockburger*? The second, uncharged offense cannot meet the *Blockburger* decision’s mandate that it require “proof of a fact which the [first charged offense] does not.”²²⁸ Jurisdiction is not an element of a crime, only a determinant of which sovereign’s “peace and dignity” has been breached.²²⁹

D. What the Supreme Court Must Do Now

It is past time for the Court to resolve the split among the circuits with regard to the Sixth Amendment right to counsel in the context of dual sovereignty. It should acknowledge that the potential due process abuses that can result from denial of this

225. *Cobb*, 532 U.S. at 173.

226. At first reading, this argument may seem at loggerheads to that which was made in the preceding Section. But the point is that either *Cobb* supports a holding that impacts dual sovereignty or it does not. If the decision *does* impact dual sovereignty, then it is to hold that offenses that meet the *Blockburger* test, which by definition is the case under dual sovereignty offenses, are the “same offense” and thus the right to counsel attaches at the time the first offense is charged.

227. *Cobb*, 532 U.S. at 173; *Benton v. Maryland*, 395 U.S. 784, 796 (1969) (“[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.’ . . . Like the right to trial by jury, [this notion] is clearly ‘fundamental to the American scheme of justice.’” (quoting *Green v. United States*, 355 U.S. 184, 187–88 (1957))).

228. *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

229. See *Lanza*, 260 U.S. at 382.

2009]

TWICE BITTEN

1907

right are forbidden by the Fifth and the Fourteenth Amendment Due Process Clauses and the Sixth Amendment right to counsel. In so doing, it should make clear either (a) that *Cobb* did not deal with the issue; or (b) that by upholding the *Blockburger* decision's "elements" test, the Court was at the same time holding that, where the only difference in a crime charged by more than one sovereign is that of jurisdiction, the potential crimes are the "same offense," and thus the right to counsel attaches to all such crimes once any one of them is charged.

The Court should further extend its jurisprudence in *Murphy* and *Elkins*,²³⁰ clearly explaining that the Sixth Amendment right to counsel is one of those "fundamental principles of liberty and justice" that are "basic in our system of jurisprudence,"²³¹ and that this right applies in the context of dual sovereignty just as in any other context.

Finally, the Court should clearly hold that the *Bartkus* "sham prosecution" exception does, in fact, exist and will be enforced—that when cooperation becomes collusion (whether through enticing guilty pleas through plea bargaining that are later used in another jurisdiction, rejuvenation or sharing of tainted evidence, or any other obvious attempt to perpetuate or reinvigorate charges against an individual beyond normal investigatory techniques), it will not be condoned.²³²

Precisely because the dual sovereignty doctrine is, and is likely to remain, an exception to the time-honored preclusion of subjecting an individual "to be twice put in jeopardy of life or limb,"²³³ additional due process safeguards are appropriate to

230. *Murphy v. Waterfront Commission of New York Harbor* and *Elkins v. United States* are the two cases in which the Court has previously found that certain due process rights were applicable in the context of dual sovereignty. *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 79 (1964) (Fifth Amendment privilege against coerced self-incrimination); *Elkins v. United States*, 364 U.S. 206, 223 (1960) (Fourth Amendment protection against unreasonable search and seizure).

231. *Powell v. Alabama*, 287 U.S. 45, 67 (1932) (holding that the decision to incorporate due process guarantees against the states depends on whether the rights involve "fundamental principles of liberty and justice"); see also *In re Oliver*, 333 U.S. 257, 273 (1948) (finding that failure to provide notice of charge against defendant violates rights that are "basic in our system of jurisprudence").

232. The proliferation of federal laws that overlap those of the states has only accelerated in the last fifty years. With that proliferation comes a multiplication of the potential abuses that can arise from failure to take these steps. See Guerra [Thompson], *supra* note 212, at 1164 & n.16 ("The expansion of federal criminal laws dates back to the 1950s and has not since abated. Congress has responded to public frustration with violent crime by enacting an array of new federal statutes prohibiting conduct traditionally prosecuted by the states." (citation omitted)).

233. U.S. CONST. amend. V.

ensure proper implementation and protection of the Sixth Amendment right to counsel in that context.

V. CONCLUSION

The dual sovereignty exception to double jeopardy is laden with the potential for abuse of the due process rights of one who is at risk of charges resulting from conduct that offends the laws of more than one sovereign. As the overlay between federal and state criminal statutes increases, so does the risk that the doctrine will lead to unjust results. The cases are filled with second indictments, the timing of which can only lead to the conclusion that they are based on a prosecutorial sense that justice has not been served—a substitution of the judgment of the prosecutor for that of the jury.²³⁴

The Court should act to provide additional due process protection to those exposed to multiple or successive prosecutions due to dual sovereignty. It must hold that the Sixth Amendment right to counsel does attach to all crimes that are the same “offense” under *Blockburger* where the sole difference is that of the charging sovereign. In so doing, it must resolve the split among the circuits with regard to this issue. It must make clear that excessive collusion between sovereigns will violate that Sixth Amendment right, even in an age of cooperative federalism.²³⁵

234. See, e.g., *Heath v. Alabama*, 474 U.S. 82, 84–86 (1985) (defendant confessed to crime in one jurisdiction and was sentenced to life imprisonment, refused to testify to grand jury in separate jurisdiction, and was subsequently charged with and tried for capital murder in that jurisdiction despite widespread publicity); *Bartkus v. Illinois*, 359 U.S. 121, 121–22 (1959) (defendant acquitted of bank robbery in federal district court, then investigated and charged in state court using same evidence supplied by FBI agent who investigated federal case); *United States v. Tirrell*, 120 F.3d 670, 674 (7th Cir. 1997) (defendant granted probation on state charges and state then asked U.S. Attorney to prosecute without success; only after defendant violated probation on the state charges and state renewed request for federal prosecution were federal charges brought); or perhaps the most famous of all, the “Rodney King Case,” *United States v. Koon*, 34 F.3d 1416, 1425 (9th Cir. 1994) (four Los Angeles police officers acquitted in state court on charges of assault with a deadly weapon and excessive use of force by a police officer were later charged with multiple federal crimes, including violation of King’s constitutional rights).

235. There may even be a substantial argument that in this age of cooperative federalism, there can be little justification for dual sovereignty. Professor Sandra G. Thompson makes this point effectively in the area of multijurisdictional drug enforcement, but it could just as easily be made in other contexts. See Guerra [Thompson], *supra* note 212, at 1207 (“When two jurisdictions join forces in this way, the reasons for granting each sovereign the power to enforce its laws disappear. The two sovereignties in effect act as one sovereign; that they represent two governments becomes insignificant.”). That argument, while both relevant and timely, is beyond the scope of this Comment. This Comment instead accepts the dual sovereignty doctrine as an

2009]

TWICE BITTEN

1909

Cobb, with its focus on the *Blockburger* definition of “same offense,” has opened the door to these holdings.²³⁶ With the Court already having held that Fourth Amendment protection against unreasonable search and seizure applies in the context of dual sovereignty,²³⁷ as does the Fifth Amendment proscription of coerced self-incrimination,²³⁸ there is no logic to depriving those subject to dual sovereignty of the protection of the Sixth Amendment right to counsel.

Moreover, there is a substantial argument that dual sovereignty involves, per se, “sham prosecution.” It is naïve to suggest that authorities do not assist each other in their investigations, particularly in modern cooperative federalism. It is as naïve to suggest that the second sovereign to pursue charges cannot easily obtain verification of the suspect’s representation by counsel. In the most simplistic scheme, the prosecutor may ask the suspect. In the absence of a clear answer, the interrogation should be suspended until the representation issue can be clarified.²³⁹

A clear finding is now called for holding that *Barthkus* does indeed create a “sham prosecution” exception—one that it is broad enough to reach any case in which an individual is potentially chargeable with multiple offenses that grow out of the same act or conduct—and a clear articulation of the consequences of the failure to respect the exception. The Court should say, to paraphrase Chief Justice Rehnquist in *Cobb*, “we meant what we said” in *Barthkus*.²⁴⁰

The current precedential backdrop to deciding cases involving dual sovereignty and the Sixth Amendment right to counsel is fraught with opportunities for abuse of due process, collusion between sovereigns, and deprivation of full meaning of

unfortunate fact, and argues the narrower issue that once the Sixth Amendment right to counsel is invoked in an offense charged under the laws of one sovereign, that asserted privilege should apply to all offenses against any other sovereign arising out of the same act or transaction.

236. See *supra* Part IV.C.

237. *Elkins v. United States*, 364 U.S. 206, 223 (1960).

238. *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52, 79 (1964).

239. Courts routinely defend their decisions concerning denial of the Sixth Amendment right to counsel by referring to the public’s interest in the unimpeded investigation of crime. This interest is asserted even in *Cobb*. *Texas v. Cobb*, 532 U.S. 162, 171–72 (2001). But this misconstrues the issue. Ensuring that the right to counsel, once asserted, attaches to all potential offenses arising out of the same act or transaction involves only the defendant’s due process rights, not a preclusion of investigatory powers. Police may still attempt to question the individual concerning breaches of either sovereign’s laws. They simply may not do so in the absence of his counsel.

240. *Id.* at 164.

that right, without regard to any principled decision rule. The risk of confusion on the part of a suspect as to the extent of his right to counsel cautions that these protections must be made a part of the due process that is guaranteed to defendants in the context of dual sovereignty.

One needs no more justification for this result than that expressed by Justice Stewart, writing in the classic Sixth Amendment case of *Brewer v. Williams*: “The pressures on state executive and judicial officers charged with the administration of the criminal law are great.... But it is precisely the predictability of those pressures that makes imperative a resolute loyalty to the guarantees that the Constitution extends to us all.”²⁴¹

David L. Lane

241. *Brewer v. Williams*, 430 U.S. 387, 406 (1977).