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THE DUAL SOVEREIGNTY DOCTRINE EXTENDED TO SUCCESSIVE STATE PROSECUTIONS—Heath v. Alabama.

INTRODUCTION

The fifth amendment of the United States Constitution guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb . . . ." Generally, this means that once jeopardy attaches, a defendant cannot be tried again for charges arising from the same incident for which jeopardy attached. However, the United States Supreme Court has consistently recognized the dual sovereignty doctrine, which has been a controversial exception to the prohibition against double jeopardy.

The dual sovereignty doctrine allows successive prosecutions for the same course of conduct by separate sovereigns whose authority to punish an offender comes from "distinct sources of power." The traditional application of this doctrine has generally been to situations where both the state and federal governments have prosecuted defendants on charges arising from the same acts. The doctrine has also been applied to successive prosecutions by Indian tribes and the federal government.

In the case of Heath v. Alabama the Supreme Court had the opportunity to determine the applicability of the dual sovereignty doctrine to successive prosecutions by neighboring states. The Court held in Heath that indeed the dual sovereignty doctrine ap-

1. U.S. Const. amend. V.
2. This note will not touch upon the issue of when jeopardy actually attaches.
3. This constitutional provision was applied to the states in the case of Benton v. Maryland, 395 U.S. 784 (1969).
6. Id. at 443 (Marshall, J., dissenting). See also Bartkus, 359 U.S. 121; Abbeate, 359 U.S. 187.
8. 106 S. Ct. 433.
9. Id. at 437.
plies to successive prosecutions by two different states and thus such prosecutions are not barred by the double jeopardy clause.\textsuperscript{10} By this ruling the Court has solidified and clarified the acknowledged validity of the doctrine as applied to the state and federal governments. In addition, the Court has opened a new area for successive prosecutions by state governments.

The purpose of this note is to emphasize that while the dual sovereignty doctrine is legally sound in its application to successive prosecutions by different states, care must be taken to prevent abuse of the doctrine. This note proposes that individual states develop consistent policies to deal with the unique situation in which the facts of the case allow for the possibility of successive prosecutions. By doing this, the states can assure that the operation of the doctrine will not result in an injustice to the defendant.\textsuperscript{11}

\textbf{The Case}

The petitioner, Larry Gene Heath, hired two men to kidnap and murder his wife, Rebecca Heath, who was nine months pregnant at the time.\textsuperscript{12} Heath was instrumental in bringing about the crime by giving his house keys and car keys to the hired killers.\textsuperscript{13} Mrs. Heath was kidnapped from her home in Russell County, Alabama, and taken across the state line to Troup County, Georgia, where her body, with a fatal gunshot wound to the head, was later found.\textsuperscript{14} The evidence indicated that the murder took place in Georgia and this was not disputed by the respondent, the State of Alabama.\textsuperscript{15}

Heath was arrested by Georgia authorities about five days after his wife's murder following a dual investigation by Georgia and Alabama officials in which there was some cooperation.\textsuperscript{16} Heath confessed to arranging the kidnapping and murder and was indicted in Troup County, Georgia, on the charge of "malice" murder.\textsuperscript{17} The indictment basically alleged that Heath caused the

\begin{itemize}
  \item \textsuperscript{10} Id.
  \item \textsuperscript{11} In his dissent, Justice Marshall points out the events which he says resulted in Heath receiving a fundamentally unfair trial in Alabama. \textit{Id.} at 435.
  \item \textsuperscript{12} \textit{Id.} at 435.
  \item \textsuperscript{13} \textit{Id.}
  \item \textsuperscript{14} \textit{Id.}
  \item \textsuperscript{15} \textit{Id.}
  \item \textsuperscript{16} \textit{Id.}
  \item \textsuperscript{17} \textit{Id.}
\end{itemize}
death of his wife. The State of Georgia informed Heath that it intended to seek the death penalty against him.

Heath subsequently pleaded guilty to "malice" murder in Georgia in exchange for a life sentence. The benefits of this deal to Heath were obvious: it was his understanding that he could be paroled after serving as few as seven years of such a sentence.

Unfortunately for Mr. Heath, this fortuitous plea bargain probably turned out to be a critical factor in the chain of events which led his case to the Supreme Court. In May of 1982, a Russell County, Alabama grand jury indicted Heath for murder during a kidnapping, which is a capital offense. Alabama law allows prosecution in Alabama for a crime which is commenced in Alabama, but which is consummated in another state.

With his life on the line for an offense to which he had already pleaded guilty in a neighboring state—with an accompanying large amount of publicity—Heath sought relief from the foreboding

18. The indictment was quoted in Heath as follows:
The grand jurors in the name and on behalf of the citizens of Georgia, charge and accuse LARRY GENE HEATH [et al.] with the offense of MURDER; for that the said LARRY GENE HEATH [et al.] on the date of August 31, 1981, in the county aforesaid, did then and there unlawfully and with malice aforethought cause the death of Rebecca McGuire Heath, a human being, by shooting her with a gun, a deadly weapon.

19. 106 S. Ct. at 435. This was based on the aggravating circumstance that Heath "caused and directed" the crime.

20. 106 S. Ct. at 435.

21. Id.

22. Id. The indictment read as follows:
Larry Gene Heath did intentionally cause the death of Rebecca Heath, by shooting her with a gun, and Larry Gene Heath caused said death during Larry Gene Heath's abduction of, or attempt to abduct, Rebecca Heath with intent to inflict physical injury upon her, in violation of § 13A-5-40(a)(1) of the Code of Alabama 1975, as amended, against the peace and dignity of the State of Alabama.

23. See Ala. Code § 13A-5-40 (1982): The following are capital offenses: (1) Murder by the defendant during a kidnapping in the first degree or attempt thereof by the defendant.

24. 104 S. Ct. at 441 (Marshall, J., dissenting).
situation. His defense was based primarily on two arguments: 1) that his conviction and sentence in Georgia was a bar to an Alabama prosecution for the same conduct on the grounds of *autrefois convict* and former jeopardy, and 2) that the crime occurred in Georgia and thus Alabama had no jurisdiction to try him.

The trial court held that even if, for the sake of argument, a single state could not have brought the two charges in succession, the double jeopardy clause did not bar successive prosecution by two different states for the same conduct. As to the jurisdictional argument, the trial court went along with the prosecution's argument that "under Alabama Code § 15-2-3 (1982), if a crime commences in Alabama, it may be punished in Alabama regardless of where the crime is consummated." He was convicted at trial in Alabama "of murder during a kidnapping in the first degree" and was sentenced to death. He appealed to the Alabama Court of Criminal Appeals on the basis of *autrefois convict* and former jeopardy under both the United States and Alabama constitutions. Heath's conviction was affirmed at the court of criminal appeals and supreme court level in Alabama. Crucially, Heath failed to raise the jurisdictional issue

25. *Id.* at 436. "Autrefois Convict - formerly convicted. 'A plea by a criminal in bar to an indictment that he has been formerly convicted of the same crime.' " *Black's Law Dictionary* 123 (5th ed. 1979). It must be noted at this point that Heath was not tried or convicted in Georgia but instead pleaded guilty in a bargain that was certainly beneficial to him in view of the circumstances of the crime. *See supra* text accompanying notes 20-21.
26. 106 S. Ct. at 436.
27. *Id.* See *supra* text accompanying note 15.
28. *Id.* at 435.
29. *Id.* at 436. *See supra* text accompanying note 23.
30. *Id.*
31. *Id.* The Alabama state constitutional provision concerning double jeopardy is similar to the provision in the fifth amendment of the United States Constitution: "That no person shall, for the same offense, be twice put in jeopardy of life or limb, but courts may, for reasons fixed by law, discharge juries from the consideration of any case, and no person shall gain an advantage by reason of such discharge of the jury." *ALA. CONST.* art. I § 9.
32. Heath v. State, 455 So. 2d 898 (Ala. Crim. App. 1983) and *Ex parte* Heath, 455 So. 2d 905 ( Ala. 1984). The Alabama Court of Criminal Appeals followed its decision from an earlier case:

A conviction in one State for an act in violation of its laws is not a bar to a prosecution in another for the same act, if it violates the laws of the latter State, unless it is otherwise provided by statute, or unless it has been agreed between the States that the jurisdiction shall vest exclu-
before the Alabama Supreme Court and he was precluded from raising that issue before the United States Supreme Court. The jurisdictional argument was discarded, there remained one clear-cut issue for the high court: "Whether the dual sovereignty doctrine permits successive prosecutions under the laws of different States which otherwise would be held to 'subject [the defendant] for the same offense to be twice put in jeopardy?'" The Court definitively interpreted the dual sovereignty doctrine to allow successive prosecutions by different states for the same acts without violation of the fifth amendment.

BACKGROUND

A. The Double Jeopardy Clause

Man has long held an aversion to the possibility of twice putting an accused in jeopardy. The concept extends back to Roman times, as was expressed in the Digest of Justinian: "[T]he governor should not permit the same person to be again accused of a crime of which he had been acquitted."

The canon law which developed towards the end of the Roman Empire accorded respect to the theory that a man should not be twice placed in jeopardy. Church law during that period also espoused this theory saying that God Himself would punish a single transaction only once.

Despite its historic roots, the right not to be twice placed in jeopardy was held in fairly low regard in the development of the English law. Double jeopardy was never mentioned in the statutes of England prior to its adoption into the United States Constitution. Finally in 1676, the modern English rule, which requires an...
acquittal or conviction to constitute prior jeopardy, was adopted.\textsuperscript{39} The states of Massachusetts and New Hampshire were the primary proponents of the double jeopardy theory prior to the passage of the Bill of Rights.\textsuperscript{40} However, it was James Madison of Virginia who successfully pushed for the inclusion of the double jeopardy clause in the Bill of Rights.\textsuperscript{41}

Inclusion of the double jeopardy clause in the fifth amendment did not foreclose the possibility of successive prosecutions brought by a single state.\textsuperscript{42} Initially, the reason for this was that the Bill of Rights was directed solely at the federal government.\textsuperscript{43} The fourteenth amendment, which provides that no man shall be deprived of life, liberty, or property without due process of law,\textsuperscript{44} slowly changed the Court's perception of the application of certain amendments of the Bill of Rights to the states.\textsuperscript{45}

Only in the last twenty-five years has the Supreme Court "rejected the notion that the fourteenth amendment applies to the states only a 'watered-down,' subjective version of the individual guarantees of the Bill of Rights."\textsuperscript{46} This is evidenced by the Court's holding in the early case of \textit{Palko v. Connecticut},\textsuperscript{47} which was, for practical purposes, the Court's first hearing on the appli-

\begin{itemize}
  \item \textsuperscript{39} \textit{Id.} at 16, \textit{citing} Turner's Case, 89 Eng. Rep. 158 (1676).
  \item \textsuperscript{40} \textit{Id.} at 23.
  \item \textsuperscript{41} \textit{Id.} at 30.
  \item \textsuperscript{42} \textit{See} Dreyer v. Illinois, 187 U.S. 71, 85 (1902). The Dreyer Court, in \textit{dicta}, asked the rhetorical question of whether double jeopardy is "forbidden only by the Fifth Amendment which prior to the adoption of the Fourteenth Amendment had been held as restricting only the powers of the National Government and its agencies?" \textit{Id.}
  \item \textsuperscript{43} Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).
  \item \textsuperscript{44} U.S. CONST. amend. XIV.
  \item \textsuperscript{45} Only recently has the Court begun to strictly apply certain amendments of the Bill of Rights to the states through the operation of the fourteenth amendment. \textit{See, e.g.}, Duncan v. Louisiana, 391 U.S. 145 (1968) (sixth amendment right to a trial by jury); Gideon v. Wainwright, 372 U.S. 335 (1965) (sixth amendment right to counsel for indigent defendants); Pointer v. Texas, 380 U.S. 400 (1965)(sixth amendment right of an accused to confront witnesses against him).
  \item \textsuperscript{46} Malloy v. Hogan, 378 U.S. 1, 10-11 (1964), \textit{quoting} Ohio \textit{ex rel.} Eaton v. Price, 364 U.S. 263, 275 (1960). \textit{Malloy} held that the fourteenth amendment protects the right to remain silent in the state context to the same extent as the fifth amendment does in the federal context. \textit{Id.} at 8.
  \item \textsuperscript{47} 302 U.S. 319 (1937).
\end{itemize}
cability of the double jeopardy clause to the states through the fourteenth amendment.⁴⁸

The defendant in Palko had been convicted of second degree murder and the State appealed. The Connecticut Supreme Court ordered a new trial because of errors in the exclusion of evidence and in the instructions submitted to the jury. On retrial the defendant was found guilty of first degree murder and sentenced to death despite his objection that he had twice been subjected to jeopardy in violation of the fifth amendment.⁴⁹

The Supreme Court distinguished between rights such as the right to freedom of speech in the first amendment and other rights such as the right to a jury trial by saying that the latter are not at the very essence of ordered liberty.⁵⁰ The Court drew the line as to which rights should be applied to the states through the fourteenth amendment by asking this question: "Is that kind of double jeopardy to which the statute has subjected [Palko] a hardship so acute and shocking that our polity will not endure it?"⁵¹ To its question the Court replied, "no," and implied that the successive prosecution was valid because it did not violate "fundamental principles of liberty and justice."⁵²

Thus, the Court freed the states to develop their own standards for double jeopardy. Palko held fast for many years and was reiterated in cases such as Brock v. North Carolina,⁵³ where a retrial after a mistrial caused by the prosecution's witnesses was held not to be barred by the fourteenth amendment.

Finally, in Benton v. Maryland,⁵⁴ the Court rejected the "shocking hardship" standard for invocation of the fourteenth amendment application against the states.⁵⁵ The Court enunciated the standard which had seen its evolution in the Warren Court that once a provision of the Bill of Rights is determined to be

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⁴⁸. The issue was presented in the earlier case of Dreyer v. Illinois, 187 U.S. 71 (1902) (see supra note 42), but was not considered because it was unnecessary to the decision in the case. 187 U.S. at 86.
⁵⁰. Id. at 325.
⁵¹. Id. at 328.
⁵². Id. The Court hinted that its decision could possibly be different if Mr. Palko's original trial had been free from error. Id.
⁵³. 344 U.S. 424 (1953).
⁵⁵. Id. at 795.
“fundamental to the American scheme of justice”56 the same standard applies to state and federal governments alike. The Court went on to note that there was no doubt about the fundamental nature of the right not to be placed in double jeopardy.57 With the ruling in Benton, the full protection of the double jeopardy clause was held to apply equally against the state and federal governments alike.58

B. Development of the Dual Sovereignty Doctrine

The beauty of the Constitution is that it can force states to guarantee inherent rights such as those found in the Bill of Rights without substantially depriving the states of their independence and sovereignty. The Supreme Court has recognized the sovereignty of the states and from this sovereignty arises power which allows the individual states to retain their own unique identities.

Though it retracted the power of states to tax federal entities, the decision in McCulloch v. Maryland59 was beneficial to states in that without qualification it recognized the states as separate sovereigns. McCulloch summed up the dual sovereignty of the state and federal governments by stating: “[P]owers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to objects committed to it, and neither sovereign with respect to the objects committed to the other.”60

The question arose that even if the state and federal governments are two distinct sovereigns, why should they be allowed to render successive criminal prosecutions for offenses arising from the same acts? This issue was confronted in Moore v. Illinois,61 in which the petitioner asserted that state legislation concerning escaped slaves was prevented by federal legislation over the same subject matter. The Court noted that in relation to the state and

57. Id.
58. Id. at 794. In Benton the defendant was acquitted of a larceny charge but was convicted of a separate offense of burglary which he appealed. He was granted a new trial at which he was convicted of the larceny charge for which he had previously been acquitted. This conviction was overturned by the Supreme Court. Id. at 797. The ruling in Benton, of course, overruled the Court’s earlier holding in Palko, 302 U.S. 319. Id. at 794.
60. Id. at 410.
federal governments a citizen owes "allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either." The decision made it clear that a single act could be an offense against the laws of two different sovereigns and could thus be independently prosecuted by both sovereigns.

The developing dual sovereignty doctrine was limited and more specifically defined in *Grafton v. United States*, in which the defendant was charged under the territorial laws of the Philippines for an offense that he had been acquitted of in a court-martial proceeding. The Court refused to apply the dual sovereignty doctrine to successive prosecutions by the federal government and territories.

Since a territory exists only at the whim of the federal government, it has no inherent power and cannot be defined as a separate sovereign. As a result, territorial courts exercise their powers under the authority of the federal government. Thus, a trial by a territory after jeopardy has attached for the same offense under another branch of federal law is barred by the double jeopardy clause.

Cases such as *Moore* recognized the sovereignty and independence of the states in relation to the federal government. In the 1911 case of *Coyle v. Oklahoma*, the Court elucidated the relationship of the states to each other, stating that newly admitted states have the same respect, sovereignty, and independence as the original states. The Court expressed the view that the Constitution looks towards the concept of an "indestructible Union, composed of indestructible States." An important policy consideration emerged from *Coyle* that applied directly to the *Heath* decision.

62. Id. at 20.
63. Id. The Court was precise in its language: "[I]t cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable." Id.
64. 206 U.S. 333 (1907).
65. Id. at 354.
66. Id.
67. Id.
68. 55 U.S. (14 How.) 13 (1852).
69. See text accompanying note 62, supra.
70. 221 U.S. 559 (1911). The Court held that Oklahoma's enabling legislation did not restrict its power to relocate its state capital despite language in the legislation to the contrary. Id. at 579.
71. Id. at 579.
The *Coyle* court stated that the "constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized."\(^{72}\)

The decision in *Coyle* suggested that an application of the early dual sovereignty theory to successive prosecutions by the states was mandated. However, the prior decision in *Nielson v. Oregon*,\(^{73}\) a 1909 case distinguishable because of its unique facts, acted to confuse the application of the developing dual sovereignty doctrine.

In *Nielson*, Congress had given Oregon and Washington concurrent jurisdiction over the waters of the Columbia River, which formed the border between the two states.\(^{74}\) The power over the area did not stem from inherent sovereignty but from a specific grant by Congress.\(^{75}\) The petitioner had fished in the river, an act prohibited by Oregon but allowed by Washington. The Court held that Oregon could not prosecute the petitioner for an act done under Washington authority even though the act was committed in the zone of concurrent jurisdiction.\(^{76}\)

There was language in *Nielson* that could be interpreted to remove any application of the dual sovereignty doctrine from successive prosecutions by the states. The Court stated that if an act was punishable by the laws of both states, "the one first acquiring jurisdiction of the person may prosecute the offense, and its judgment is a finality in both States, so that one convicted or acquitted in the courts of the one State cannot be prosecuted for the same offense in the courts of the other."\(^{77}\) But the effect of this language is negated because the Court limited its holding to the precise and unique question presented by a situation where jurisdiction is granted concurrently by a source, such as Congress, which is detached from the inherent sovereignty of the states.\(^{78}\)

The modern dual sovereignty doctrine found its initial pronouncement in *United States v. Lanza*.\(^{79}\) The *Lanza* Court upheld successive prosecutions for an act which violated both federal and

\(^{72}\) Id. at 580.
\(^{73}\) 212 U.S. 315 (1909).
\(^{74}\) Id. at 316.
\(^{75}\) Id.
\(^{76}\) Id. at 321.
\(^{77}\) Id. at 320.
\(^{78}\) Id. at 321.
\(^{79}\) 260 U.S. 377 (1922).
state law. There, the Court held that the states' power to prosecute liquor offenses arose not from the eighteenth amendment, but from the separate power accorded the states by the tenth amendment. The Court noted that both the federal and state governments had the ability to deal with offenses occurring within the identical geographical area. The Court stated that separate sovereigns have the right to determine what acts are offensive to their particular mores, and they can punish those acts without regard to how another sovereign may have previously dealt with the matter.

The Court in *Bartkus v. Illinois* upheld a state prosecution of the defendant subsequent to his acquittal on federal charges arising from the same incident, a bank robbery. The Court emphasized the role that the separate sovereignty of the states plays in the continued strength of the federal system.

The primary motivation for the *Bartkus* decision was the possibility that an individual could be convicted of a minor offense under federal law and the state could be precluded from bringing more serious charges based on the same act. This would effectively deprive the states of their sovereign obligation to regulate their own societies.

About fifteen states had statutes barring successive prosecutions if the defendant had previously been tried "by another gov-

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80. *Id.* at 385.
81. "After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited." U.S. Const. amend. XVIII, repealed 1933. *Id.* at 379.
83. *Id.*. "We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory." *Id.*
84. *Id.* In the context of the specific case before it, the Court stated that "... 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." *Id.* See also *Screws v. United States*, 325 U.S. 91 (1945); *Jerome v. United States*, 318 U.S. 101 (1941); *Puerto Rico v. The Shell Co.*, 302 U.S. 253 (1937); *Westfall v. United States*, 274 U.S. 256 (1927); *Herbert v. Louisiana*, 272 U.S. 312 (1926).
86. *Id.* at 137.
87. *Id.*
ernment for a similar offense.” The *Bartkus* Court pointed out that “the task of determining when the federal and state statutes are so much alike that a prosecution under the former bars a prosecution under the latter is a difficult one” and the task should be left to the state governments. The decision in *Bartkus* thus did not foreclose the possibility of states limiting successive prosecutions by their own standards.

In *Abbate v. United States*, the Court was asked to overrule *Lanza*, but refused to do so. The Court held that the double jeopardy clause does not prevent successive state and federal prosecutions, in that order. Justice Brennan, however, expressed in a separate opinion the Court’s distaste for successive federal prosecutions for the same offense even if the prosecutions were based on different statutes protecting different interests.

The dual sovereignty doctrine became firmly entrenched with the decisions in *Abbate* and *Bartkus*. Subsequent to *Abbate* and *Bartkus*, the doctrine was analyzed in several different contexts and its basic premises remained intact. This was true even after *Benton v. Maryland*, which clarified the application of the double jeopardy clause bars successive prosecutions by a municipality and its state. The dual sovereignty doctrine does not apply because the municipality has no inherent power of its own as all of its authority is derived from the state.). This relationship is identical to the federal government-territory relationship discussed in *Grafton*, 206 U.S. 333 (see supra note 64 and accompanying text); but cf. United States v. Wheeler, 435 U.S. 313 (1978) (dual sovereignty doctrine allows successive prosecutions by Indian Tribal Courts and the federal government as both are separate sovereigns having their own distinct and inherent powers).

88. *Id.* at 138 (footnote omitted).
89. *Id.*
90. 359 U.S. 187 (1959). The petitioners in *Abbate* pleaded guilty in Illinois to conspiracy to destroy the property of another and were given jail terms. The petitioners subsequently were convicted in federal court for conspiracy to destroy communications facilities under the control of the United States. The charges stemmed from the same acts by the petitioners which occurred in a conspiracy during a labor dispute to destroy microwave towers belonging to Southern Bell and/or the United States. *Id.* at 187-89.
92. *Id.* at 195. The decision was released the same day as that in *Bartkus*, 359 U.S. 121. *Id.* at 189.
93. *Id.* *Abbate* is different from *Bartkus* in that the state prosecution was first, followed by the federal prosecution. *Id.* at 196.
94. *Id.* at 201.
95. See, e.g., *Waller v. Florida*, 397 U.S. 387 (1970) (The double jeopardy clause bars successive prosecutions by a municipality and its state. The dual sovereignty doctrine does not apply because the municipality has no inherent power of its own as all of its authority is derived from the state.). This relationship is identical to the federal government-territory relationship discussed in *Grafton*, 206 U.S. 333 (see supra note 64 and accompanying text); but cf. United States v. Wheeler, 435 U.S. 313 (1978) (dual sovereignty doctrine allows successive prosecutions by Indian Tribal Courts and the federal government as both are separate sovereigns having their own distinct and inherent powers).
jeopardy clause to the states. It was not until *Heath* that the Court confronted the application of the dual sovereignty doctrine to successive state prosecutions.

C. Response of the Federal and State Governments to the Dual Sovereignty Doctrine

1. The Federal Government

Shortly after the *Bartkus* and *Abbate* decisions the Attorney General, in a memorandum to United States attorneys, stressed that Department of Justice policy was to use the privilege of successive prosecutions "sparingly." 97 The memo stated that subsequent to a state prosecution, the federal government should prosecute for the same act only if there are "compelling" reasons as determined by an assistant attorney general in consultation with the Attorney General. 98 The Attorney General reminded Justice Department attorneys that they had "a particular duty to act wisely and with self-restraint in this area." 99 Most importantly, the Attorney General recommended that his subordinates make every effort to insure (while cooperating with state authorities) that prosecution occur "where the public interest is best served." 100 This policy has never had the effect of law, and failure by Justice Department attorneys to follow the policy has apparently not been used to overturn any convictions. 101

2. State Governments

The response of state governments to the dual sovereignty doctrine has been varied. Some, such as New York, have statutorily, with exceptions, barred the state from prosecuting someone for an offense for which that person has previously been prosecuted by another sovereign. 102 Other states have effected the same

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98. *Mechanic*, 454 F.2d at 856.

99. Id.

100. Under this approach, the Attorney General felt that even "consideration of a second prosecution very seldom should arise." Id.

101. *See Note, supra* note 4, at 488-94.

102. N.Y. CRIM. PRO. LAW § 40.20 (McKinney 1970). There are vague excep-
limited bar through case law.\textsuperscript{103} For example, in \textit{People v. Cooper},\textsuperscript{104} the Michigan Supreme Court stated that a second prosecution is prohibited "unless it appears from the record that the interests of the State . . . and the jurisdiction which initially prosecuted are substantially different."\textsuperscript{105} The court went on to say such situations must be analyzed on an individual basis.\textsuperscript{106} In the meantime, states such as Alabama have continued to allow full adjudication of their interests, unhampered by any barriers to successive prosecution.\textsuperscript{107}

\textbf{ANALYSIS}

\textbf{A. The Majority Opinion}

From the outset of its opinion the Court approached the issues in \textit{Heath} purely from the dual sovereignty doctrine perspective.\textsuperscript{108} In order to do this the Court had to dispose of a prickly thorn which complicated the case—the issue of jurisdiction. The Court

\begin{footnotesize}
\begin{enumerate}
\item[103.] See, e.g., \textit{People v. Cooper}, 398 Mich. 450, 247 N.W.2d 866 (1976)(defendant’s acquittal in federal court barred subsequent state prosecution based on same acts for which the federal charges were brought); \textit{Commonwealth v. Mills}, 447 Pa. 163, 286 A.2d 638 (1971)(protection of the individual’s interest outweighed the interests of the state in a successive prosecution and thus such prosecution was barred). Neither case acts as an absolute bar to successive prosecutions.
\item[104.] 398 Mich. 450, 247 N.W.2d 866 (1976).
\item[105.] \textit{Id.} at 462, 247 N.W.2d at 870.
\item[106.] \textit{Id.}
\item[107.] Alabama recognizes the doctrine of \textit{Waller v. Florida}, 397 U.S. 387 (1969), that there is no dual sovereignty between a state and its municipalities. \textit{Smith v. City of Irondale}, 303 So. 2d 126 (Ala. Crim. App. 1974). However, Alabama apparently has no cases concerning application of the dual sovereignty doctrine in the federal-state context.
\item[108.] \textit{Heath}, 106 S. Ct. at 436.
\end{enumerate}
\end{footnotesize}
removed the jurisdictional question from consideration by simply stating that since Heath had not raised the issue before the Alabama Supreme Court he was "jurisdictionally barred" from raising it before the United States Supreme Court.109

The Court positioned itself to consider the case unfettered by the logical implications that the jurisdictional issue might have raised. The Court followed the precedent that the fifth amendment bars prosecutions only when the two offenses are the same.110 Under the dual sovereignty doctrine a single act can constitute two different offenses in the context of a prosecution by separate sovereigns.111

The Court traced the development of the dual sovereignty doctrine and from this history it came up with the key question in the case: "Whether the two entities that seek successively to prosecute a defendant for the same course of conduct can be termed separate sovereigns."112 Important to this distinction is the determination of the source of the sovereign's authority to punish the offender.113 If it is from "distinct sources of power" then the doctrine applies.114

The Court noted that if states are sovereign with respect to the federal government then they are certainly sovereign with respect to each other.115 The decision in United States v. Wheeler116 was a springboard for the Court to justify an expansive approach to the doctrine.117 The Court then distinguished the sovereignty of states to each other from the lack of dual sovereignty contained in the relationship between a territory and the federal government or a municipality and a state.118

Finally the Court smoothly disposed of the sticky issue raised by the Nielson v. Oregon case which barred successive state prosecutions.119 The Court stated that any language barring successive prosecutions was in dicta and that the Nielson case was limited to

109. Id.
110. Id. at 437.
111. See Lanza, 260 U.S. 377, and supra notes 79-84 and accompanying text.
112. 106 S. Ct. at 437.
113. Id.
114. Id.
115. Id. at 438.
118. Id., citing Waller, 397 U.S. 387; Grafton, 206 U.S. 333.
119. Id. at 438-39. See supra note 73 and accompanying text.
its unique facts. The Court stated that *Nielson* was relevant only to jurisdictional issues where "two entities deriv[ed] their concurrent jurisdiction from a single source of authority." The Court spent little time examining the fact that all prior applications of the dual sovereignty doctrine were in situations where both of the sovereigns had physical jurisdiction over the area in which the crime occurred. For example, in *Abbate*, the act committed by the defendant occurred in an area physically within the sovereigns of Illinois and the United States. In addition, the application of the doctrine to the state-federal situation seems to be partially based on the fact that the individual has the rights and responsibilities of citizenship in both entities.

Justice Marshall, in his dissent in *Heath*, summed up the implications of dual federal-state citizenship by saying that "the complementary nature of the sovereignty exercised by the federal government and the states places upon a defendant burdens commensurate with concomitant privileges." The *Heath* decision moves this philosophy onto the higher plateau that when a citizen is in one state he can still be subject to the sovereign powers of another state if his acts are offensive to that other state.

The Court rejected a "balancing of interests" approach offered by *Heath*, saying that even if two offenses are identical they are not the "same offense" for purposes of the double jeopardy clause if prosecuted by different sovereigns. Presenting a multitude of citations, the Court concluded that the sovereign interests of the states required that Alabama be able to enforce its criminal

120. *Id.* at 439.
121. *Id.*
122. *Abbate*, 359 U.S. 187 (1959). This concept was also clearly expressed in *Lanza*, 260 U.S. 377, as was quoted in note 83.
125. This approach would "restrict the applicability of the dual sovereignty principle to cases in which two governmental entities, having concurrent jurisdiction and pursuing quite different interests, can demonstrate that allowing only one entity to exercise jurisdiction over the defendant will interfere with the unvindicated interests of the second entity and that multiple prosecutions therefore are necessary for the satisfaction of the legitimate interests of both entities." *Id.* at 439.
126. *Id.*
laws even though it lost the race to the courthouse.\textsuperscript{127} With its opinion, the Court rejuvenated the idea that a state is a separate sovereign and that "a single act constitutes an 'offense' against each sovereign whose laws are violated by that act."\textsuperscript{128}

*Heath* is generally a well-analyzed opinion in light of the alternatives. The Court took the dual sovereignty doctrine, which rests not only in the Constitution but also in substantial precedent, and extended it to its natural end. Little argument can be raised against the theory that states are independent sovereigns whose powers are inherent. And if those states are independent and sovereign in their relationship to the federal government then they are also independent and sovereign in relation to each other.

Indeed, one could argue that the sovereignty of the states has allowed the diversity of the nation to be retained and has perhaps prevented the usurpation of power by those with autocratic and nationalistic ideas. The *Heath* case does, however, give rise to some questions about the practical applicability of the dual sovereignty doctrine to every case that comes down the pike.

The facts of *Heath* glaringly beg for the answer to a question which the Court ignored: Did both states have subject matter jurisdiction over the crime which Heath committed? The Court ignored the question, ostensibly on procedural grounds.\textsuperscript{129} From a practical approach, a dual sovereignty exception calls for an examination of the jurisdictional issue prior to reaching the issue concerning successive prosecutions. A more complete consideration of the jurisdictional issue could have given the *Heath* case more solid precedential value.

The Court pointed out that the evidence indicated that the murder actually took place in Georgia.\textsuperscript{130} Although the jurisdictional argument was not properly raised, the fact of the location of the crime should have at least raised an eyebrow at the Supreme Court level.\textsuperscript{131} This note does not take issue with the Alabama statute which allows trial in Alabama for an offense which is commenced in Alabama but consummated in another state.\textsuperscript{132} Analysis

\begin{itemize}
  \item \textsuperscript{127} *Id.* at 440.
  \item \textsuperscript{128} *Id.*
  \item \textsuperscript{129} *Id.* 436-37.
  \item \textsuperscript{130} *Id.* at 435.
  \item \textsuperscript{131} Even Justice Marshall in his dissent failed to explore carefully the legal implications which could result depending on where the crime took place.
  \item \textsuperscript{132} See *supra* note 23 and accompanying text.
\end{itemize}
of an earlier Alabama case, Dolvin v. State, should shed light on the propriety of successive prosecutions in the Heath case.

In Dolvin, the defendant was involved in the murder of a potential witness against her husband. The victim was abducted in Alabama and from eyewitness evidence it was apparent that the fatal wounds were administered in Alabama. It was not known where the victim actually died. The victim’s body was later found in Florida.

In the Dolvin situation the Alabama Supreme Court held that “the state in which the fatal blow was given may maintain a prosecution for the crime of murder, although death occurs in another state.” The court did not dispute the validity of jury instructions which stated that “mere abduction” of the victim within the county of trial was insufficient to justify a murder conviction. The trial court required that the jury find that the defendant set in motion such forces which caused the victim’s death within the Alabama county where the trial was held. The jury so found and Dolvin’s conviction was subsequently upheld. Dolvin had apparently not been charged or tried in Florida for the same crime.

When the principles of Dolvin are applied to Heath, it is clear that the Heath Court’s fear of the jurisdictional issue was unfounded. Heath did indeed set into motion the forces that caused his wife’s death and he set those forces in motion within the boundaries of Alabama. Since Heath was the organizer of the crime, his acts, though pervasive, were much more subtle than the administration of the actual death blows.

Heath met the “hit men” in Georgia, led them to Alabama, gave them access to his house and car and then told them to kill his wife. Also, Heath took steps in Alabama to make the murder appear to be an accident. Ordering a killing and furthering its occurrence could arguably beat the “mere abduction” standard

134. Id. at 669-71. (Citation omitted).
135. Id. at 674. This was after the court had noted that ALA. CODE § 15-2-3 (1982) does not apply where the crime is a “single indivisible offense.” Id. (Citation omitted).
136. Id.
137. Id.
138. 106 S. Ct. at 435.
139. Heath put a brick in his wife’s car to be placed on the gas pedal to give the appearance of an accident. Heath also left wire to secure the car’s steering wheel. Heath v. State, 455 So. 2d 898, 902 (Ala. Crim. App. 1983) (Exhibit A).
mentioned in *Dolvin*. 140

It can equally be argued that in Georgia Heath set into motion such forces that caused his wife's death. He procured the hit men in Georgia and the fatal shot was apparently fired in that state. 141

The tougher question would be whether the individuals who actually carried out Mrs. Heath's murder could constitutionally be prosecuted in both Georgia and Alabama. All available information indicates that Heath's accomplices were prosecuted only in Georgia. 142 Although the accomplices carried out the crime, it appears that their acts did not rise above the "mere abduction" standard. 143 In other words, the accomplices did not set in motion the forces which caused Mrs. Heath's death until they fired the fatal shot in Georgia.

This results in an interesting paradox: since the fatal shot was fired in Georgia, the "hired guns" were subject to prosecution only in that state while the instigator, apparently because of his pervasive command over the events, was made subject to prosecution in both states. A "but for" test shows why this paradox results. "But for" Mr. Heath's actions in Alabama, the murder would not have taken place. On the other hand, his accomplices could have ultimately foregone the murder despite their actions in Alabama. 144 The Supreme Court did not analyze the case in this context but it certainly helps to explain the logic of the Alabama courts.

140. 391 So. 2d 666.
141. 106 S. Ct. at 435.
142. Heath v. State, 455 So. 2d at 900-01. The court listed as follows the disposition of the cases against Heath's accomplices:

The defendant's girlfriend, Denise Paige Lambert, pled guilty to conspiracy to commit murder and was sentenced to ten years' imprisonment. Sanders Williams, who was hired to commit the murder but disappeared after several attempts "fell through," also pled guilty to conspiracy to commit murder and received a ten-year sentence.

Jerry Heath, the defendant's brother, who allegedly furnished the defendant with the name of someone who would commit the murder, was tried and acquitted. The two hired assassins, Charles Edward Owens and Gregory Hughes Lumpkin, were convicted of murder and received life sentences.

*Id.* at 901.

143. As discussed in *Dolvin*, 391 So. 2d 666, and *supra* note 133 and accompanying text.

144. Conceivably Mr. Heath could have tracked down his accomplices, but he did not. This relieves us of having to consider the obtuse question of whether Mr. Heath could have set in motion the forces which caused his wife's death when she, in fact, did not die.
Prosecutors should not hastily interpret *Heath* to allow successive prosecutions in, for example, every situation where a victim is kidnapped in one state and murdered in another state. Though the Court offers no words of limitation of the law of *Heath*, it is clear that jurisdictional requirements will confine consecutive prosecutions by states to very unique fact situations such as that found in *Heath*.

The dual sovereignty doctrine allowing successive prosecutions by different states is justified in situations where the crime is of a conspiratorial nature and/or is obviously directly offensive to the sensibilities of the citizens of two different states. But this does not withdraw from prosecutors the serious responsibility to insure that the dual sovereignty doctrine is not abused.

For example, had Heath been fully tried in Georgia, found guilty and given life in prison without the possibility of parole, Alabama officials would have had to seriously debate whether they had a substantial residual interest in the case. Had such a situation arisen and if Heath was subsequently prosecuted in Alabama and given the death penalty, the Court might not have been quite so liberal in its interpretation of the dual sovereignty doctrine. Unquestionably, in such a situation the Court would have to seriously consider invocation of the eighth amendment's prohibition against cruel and unusual punishment, due to the psychological impact on the defendant.

With the recognition of the dual sovereignty doctrine comes a responsibility of the states to draw guidelines which will prevent abuse of the doctrine. Such abuse could lead to a future overruling of *Heath* or at least a limitation of it to its particular facts.

States could determine if successive prosecutions are appropriate in the following manner:

145. See, e.g., State v. Straw, 626 S.W.2d 286 (Tenn. Crim. App. 1981) (the defendant swindled a Tennessee man out of $500,000 and deposited the money in a Massachusetts bank. Massachusetts saw fit to give the defendant only twenty months in prison while the Tennessee court gave him five years. The appellate court held this action to be justified by the dual sovereignty doctrine.).

146. Although the Court made a similar assumption for argument's sake, the Court's assumption was used merely for the purpose of showing that the *Heath* decision was based on a situation where jeopardy normally would have attached. 106 S. Ct. at 437.

147. Although crimes against separate sovereigns are by definition different offenses, it is hard to conceive that the Court would look favorably upon an obvious "shotgun" effort to prosecute a defendant in different states until he received the death penalty.
1) When it becomes apparent that the same act could give rise to offenses in two different states, the respective prosecutors should meet to discuss which state has the most substantial interest in the crime. That state would then prosecute the defendant.

2) If the other state felt that for some reason (such as a fortuitous plea bargain as in the Heath case) its interests were not represented in the initial prosecution, a second prosecution could be studied.

3) If, after consultation with the state attorney general the county prosecutor determined that there were “compelling” reasons for another prosecution, a second prosecution could be ordered.148

These standards of self-regulation could be used to prevent abuse of the opportunity for successive prosecutions. They would also help to insure that successive prosecutions would remain a viable option.

States desiring strict adherence to standards such as those above could codify them. This would allow review by the state courts of the propriety of a second prosecution.

An additional safeguard could be created by use of the judiciary. In cases such as Heath, a special judge in the “second state” could conduct a hearing after the case is completed in the initial prosecuting state. This hearing would be similar to a probable cause hearing in that the prosecutor would submit evidence to the court to show why the defendant should be tried in the second state. The evidence would have to rise to a level which shows “compelling” reasons for prosecution in the second state. Such reasons would relate primarily to whether there was a failure to vindicate the second state’s interest in the initial prosecution. Independent review by an initial court, not the trial court, would help to keep the real issues in perspective. Evidence concerning the prior trial and the sentence would be admissible before the judge for the purpose of determining whether there was complete adjudication in light of the laws of the second state.

B. Justice Marshall’s Dissent

Justice Marshall pointed out in his dissent149 that Heath’s

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148. This policy would be similar to the voluntary Petite policy (used by the Justice Department) which was described in the text to note 97-100, supra.

149. With whom Justice Brennan joined. 106 S. Ct. at 441. Justice Brennan also wrote a short dissent in which he held to his separate opinion in Abbate, 359
trial was unfair in that seventy-five of the eighty-two potential jurors were aware of Heath's prior guilty plea in Georgia. Marshall sardonically characterized the resulting jury as "well-informed." 150

Marshall is probably correct in his assertion that Heath's trial was not held under ideal circumstances. However, this is one of the necessary by-products of successive prosecutions. By the same token, had Heath been acquitted in Georgia, it could have been equally as well-known and might have prejudiced the Alabama jury in his favor.

Delving into the legal argument, Justice Marshall warned that the reasons for the dual sovereignty doctrine should be investigated before extending it to a new area. 151 Marshall's view was that the doctrine, as applied to the state-federal government relationship, arose from the distinct interests the two sovereigns might have in adjudicating a matter. 152 Marshall went on to say that the sovereign concerns of the states are identical. 153

Obviously the sovereign concerns of the states are different—in fact, if not in theory—as is evidenced by the widely disparate laws that are found in the fifty states. For example, some states favor capital punishment while others do not. 154 While there is no definitive evidence that capital punishment acts as a general deterrent, 155 a rule of law preventing a state which has capital punishment from prosecuting a defendant who has commenced a murder in that state, but consummated it across the state line, would be a serious affront against the sovereignty of the original state. It could also lead to eventual abuse of the criminal law applying to less serious offenses in situations where neighboring states offer widely disparate penalties for identical crimes.

CONCLUSION

The Court in Heath held that successive prosecutions by two states for identical acts are not barred by the double jeopardy clause of the fifth amendment due to application of the dual sover-
succession doctrine. This holding is consistent with previous rulings of the Court as applied to separate sovereign units.

The ruling allows states to prosecute someone who has already been adjudicated for the same offense in another state as long as the crime avails itself to the jurisdiction of the prosecuting state. Defense attorneys should be aware of the possibility of successive prosecutions, especially when making plea bargain arrangements.

Most importantly, the states should make efforts to insure that successive prosecutions are used only to further legitimate state interests.

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156. 106 S. Ct. at 437.