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Dual Sovereignty, Due Process, and Duplicative Punishment: A New Solution to an Old Problem

ABSTRACT. The Double Jeopardy Clause prohibits the government from prosecuting or punishing a defendant multiple times for the same offense. Double jeopardy protections, however, come with a major exception. Under the dual sovereignty doctrine, different sovereign states can prosecute a defendant multiple times for the same offense. This Note argues that the due process protection from punishment without legislative authorization should prevent jurisdictions from imposing duplicative punishments. Specifically, I argue that when the interests of a sovereign state are partially vindicated, the sovereign should be able to impart only as much additional punishment as is necessary to fully vindicate its interests.

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INTRODUCTION

The Double Jeopardy Clause provides three types of protection: "[i]t protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."[1] While the protections afforded by the Clause are, in a sense, quite broad, the Clause carries with it a major exception: the dual sovereignty doctrine. The Supreme Court explained this doctrine in *Heath v. Alabama*:

> The dual sovereignty doctrine is founded on the common-law conception of crime as an offense against the sovereignty of the government. When a defendant in a single act violates the "peace and dignity" of two sovereigns by breaking the laws of each, he has committed two distinct "offences." As the Court explained in *Moore v. Illinois*, "[a]n offence, in its legal signification, means the transgression of a law." Consequently, when the same act transgresses the laws of two sovereigns, "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."[2]

Under the dual sovereignty doctrine, so long as two offenses are defined by different jurisdictions,[3] they cannot constitute the "same offense." This is true even if the offenses contain identical elements and even if the underlying statutes contain identical language. The result is that the Double Jeopardy Clause does not apply in a multi-sovereign context. For example, a defendant who commits a kidnapping across two states can be charged, convicted, and punished three times – once by each state and once by the federal government.

The dual sovereignty doctrine has been the subject of substantial scholarly criticism. Most opponents believe the doctrine is fundamentally unfair to defendants, that it is directly at odds with the values underlying the Double Jeopardy Clause, and that it lacks historical and constitutional legitimacy. As a

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1. North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (footnotes omitted). Some scholars have argued that the Double Jeopardy Clause does not protect against multiple punishments for the same offense. *See infra* note 18.

2. Heath v. Alabama, 474 U.S. 82, 88 (1985) (citations omitted).

3. Throughout this Note, the terms "jurisdiction" and "sovereign" refer to government units that have the power to make rules and charge defendants. Specifically, this means municipalities and local governments do not qualify as sovereigns. Further, pursuant to the Supreme Court's decision in *United States v. Wheeler*, 435 U.S. 313 (1978), Native American tribes are considered separate sovereigns. Finally, for the purposes of the dual sovereignty doctrine, the military is considered part of the federal government.

result, scholars have argued that the doctrine should be abolished,[4] replaced,[5] or otherwise modified[6] to protect rights and ensure fairness. The problem with most of these criticisms is that they focus too much on the Double Jeopardy Clause and the dual sovereignty doctrine itself, to the exclusion of other provisions of the Constitution that can provide a solution.

In this Note, I will look to the Due Process Clause to show that, notwithstanding the dual sovereignty doctrine, a jurisdiction should not have the unfettered ability to punish a defendant after the defendant has already received punishment for the same crime from another jurisdiction. Specifically, I will argue that when the interests of one sovereign state are fully or partially vindicated by another state, the sovereign should be able to impart only as much additional punishment as is necessary to fully vindicate its interests. Any further punishment would violate a defendant's due process rights.

This Note has four parts. In Part I, I will explore the constitutional protection from multiple punishments for the same offense. I will show how the protection against multiple punishments is rooted not just in the Double

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4. *E.g.*, Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1, 10 (1992); Erin M. Cranman, Comment, *The Dual Sovereignty Exception to Double Jeopardy: A Champion of Justice or a Violation of a Fundamental Right?*, 14 EMORY INT'L L. REV. 1641, 1671-74 (2000); Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 302 (1992); Kevin J. Hellmann, Note, *The Fallacy of Dueling Sovereignties: Why the Supreme Court Refuses to Eliminate the Dual Sovereignty Doctrine*, 2 J.L. & POL'Y 149, 153-55 (1994).

5. *E.g.*, Ophelia S. Camina, Note, *Selective Preemption: A Preferential Solution to the* Bartkus-Abbate *Rule in Successive Federal-State Prosecutions*, 57 NOTRE DAME LAW. 340, 362-63 (1981) (proposing a system that would avoid successive state-federal prosecutions by allowing the federal government to intervene and selectively preempt a state prosecution); Dax Eric Lopez, Note, *Not Twice for the Same: How the Dual Sovereignty Doctrine Is Used to Circumvent* Non Bis in Idem, 33 VAND. J. TRANSNAT'L L. 1263, 1300-02 (2000) (arguing that the dual sovereignty doctrine should be replaced with joint trials).

6. *E.g.*, Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 2-3 (1995) (proposing to abolish the dual sovereignty doctrine except for offenses "committed by state officials and implicating the federal government's unique role under Section 5 of the Fourteenth Amendment"); Cranman, *supra* note 4, at 1677-78 (allowing a second prosecution only if the first prosecution was incompetent); James E. King, Note, *The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution*, 31 STAN. L. REV. 477, 496-97 (1979) (proposing a rule that would require governments to initiate a joint proceeding whenever their interests in obtaining a conviction are sufficiently similar); 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, 354-55 (1997) (arguing that successive prosecutions should not be allowed if the first prosecution results in an acquittal).

Jeopardy Clause, but also in the Due Process Clause.[7] In Part II, I will show how the protection from multiple punishments can limit the punishment a sovereign can impose on a defendant who has already received punishment for the same offense. In Part III, I consider how the protection from multiple punishments can impact the plea bargaining process. Finally, in Part IV, I will introduce and respond to some of the objections that can be levied against my proposal.

I. THE DUE PROCESS PROTECTION FROM MULTIPLE PUNISHMENTS

While the Supreme Court has long recognized that the Double Jeopardy Clause protects individuals from multiple punishments for the same offense, the Court's reasoning in multiple-punishment cases suggests that the protection can be found not only in the Double Jeopardy Clause, but also in the Due Process Clause. In this Part, I will show how each of these sources independently provide protection from multiple punishments. In doing so, I will show how the Due Process Clause can protect defendants from multiple punishments even when the Double Jeopardy Clause does not.

A. Origins of the Protection

The protection from multiple punishments can be traced back to *Ex Parte Lange*.[8] In that case, a defendant was charged under a statute that authorized one of two punishments: a fine, not to exceed $200, or imprisonment for up to a year.[9] Despite the fact that the statute authorized only one of these sentences, the trial court imposed both.[10] In an opinion written by Justice Miller, the Supreme Court rejected the punishment. Justice Miller explained his decision using two rationales. First, he argued that the sentence at issue in the case violated the Double Jeopardy Clause and the common law understanding of

7. While this Note focuses on the protection from multiple punishments afforded by the Due Process Clause, it is also likely that the punishments imposed in multi-sovereign prosecutions would be limited by the Eighth Amendment prohibition on excessive punishment. *See generally* Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101 (1995) (suggesting that multiple punishments imposed for the same crime might qualify as "excessive" under the Eighth Amendment).

8. 85 U.S. 163 (1873).

9. *Id.* at 164.

10. *Id.*

double jeopardy.[11] Second, he found that the sentence violated Lange's due process right to receive a punishment authorized by Congress. Specifically, he explained that the punishment should be void "because [the judge] had no power to render such a judgment."[12]

In subsequent cases, the Supreme Court extended both of these rationales. For example, in *North Carolina v. Pearce*, the Court cited *Lange*'s reference to common law double jeopardy principles when it concluded that a defendant should receive credit for time served when he is resentenced following a successful appeal.[13] Similarly, in *Whalen v. United States*, the Court extended the due process justification when it found that "the dispositive question" when it comes to multiple punishments is whether the sentence at issue is authorized by the legislature.[14] According to the *Whalen* court: "If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers . . . ."[15]

While the Supreme Court has extended both due process and double jeopardy rationales, the Court has, unfortunately, conflated the two, making it difficult to see how the due process protection differs from the double jeopardy protection.[16] In *Ohio v. Johnson*, for example, the Court referred to the double jeopardy rationale while applying due process reasoning:

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11. *Id.* at 170 ("It is very clearly the *spirit* of the instrument to prevent a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection.").

12. *Id.* at 176; *see also* Dep't of Revenue v. Kurth Ranch, 511 U.S. 767, 799 (1994) (Scalia, J., dissenting) ("[I]n fact, Justice Miller's opinion for the Court rested the decision on principles of the common law, and both the Due Process and Double Jeopardy Clauses of the Fifth Amendment.").

13. 395 U.S. 711, 716-18 (1969).

14. 445 U.S. 684, 689 (1980).

15. *Id.* While the concepts of separation of powers and due process are distinct, a violation of separation of powers, especially in the criminal context, often constitutes a due process violation. *See, e.g.*, Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1677, 1679 (2012) ("From at least the middle of the fourteenth century, however, due process consistently referred to the guarantee of legal judgment in a case by an authorized court in accordance with settled law. It entailed an exercise of what came to be known as the judicial power to interpret and apply standing law to a specific dispute.").

16. One scholar has even gone so far as to call the due process/double jeopardy conflation a "Gordian knot." Anne Bowen Poulin, *Double Jeopardy and Multiple Punishment: Cutting the Gordian Knot*, 77 U. COLO. L. REV. 595, 599-600 (2006).

> [T]he final component of double jeopardy—protection against cumulative punishments—is designed to ensure that the sentencing discretion is confined to the limits established by the legislature. Because the substantive power to prescribe crimes and determine punishments is vested with the legislature, the question under the Double Jeopardy Clause whether punishments are "multiple" is essentially one of legislative intent.[17]

Somehow, the double jeopardy protection from multiple punishments, if one ever really existed,[18] morphed into the due process protection. Indeed, one need only replace the phrase "double jeopardy" with "due process" in the quote above to see that the Court's reasoning in *Johnson* is, to put it mildly, confused.[19] Unfortunately, *Ohio v. Johnson* is not an isolated incident. The Court's conflation of double jeopardy and due process protections is rather extensive.[20] As Justice Scalia once recognized, the dispositions of the Court's

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17. Ohio v. Johnson, 467 U.S. 493, 499 (1984) (citations omitted).

18. Some have argued that the Double Jeopardy Clause does not provide *any* protection from multiple punishments—that the language in *Ex parte Lange* amounts to dicta and that the protection from multiple punishments lies *solely* in the Due Process Clause. *See* Witte v. United States, 515 U.S. 389, 407 (1995) (Scalia, J., concurring) (quoting Dep't of Revenue v. Kurth Ranch, 511 U.S. 767, 804-05 (1994) (Scalia, J., dissenting)); *Kurth Ranch*, 511 U.S. at 798-99, 805 (Scalia, J., dissenting) (noting that the Double Jeopardy Clause "by its terms . . . prohibits, not multiple punishments, but only multiple prosecutions"); United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 555-56 (1943) (Frankfurter, J., concurring); Bruce A. Antkowiak, *Picking up the Pieces of the Gordian Knot: Towards a Sensible Merger Methodology*, 41 NEW ENG. L. REV. 259, 263 (2007); Poulin, *supra* note 16, at 599-600; Eva Maria Floyd, Note, *Criminal Procedure: Allowing the Prosecution a "Second Bite at the Apple" in Non-Capital Sentencing:* Monge v. California, 53 OKLA. L. REV. 299, 302 (2000). *But see* Carissa Byrne Hessick & F. Andrew Hessick, *Double Jeopardy as a Limit on Punishment*, 97 CORNELL L. REV. 45, 47 (2011) (arguing that "a limitation on the government's ability to impose repeated punishment against one individual for a single offense" lies "at the core of the prohibition on double jeopardy"); King, *supra* note 7, at 104 ("[T]he contours of constitutional limits on the *amount* of punishment that can be inflicted for a particular wrong, traditionally a part of . . . due process law, are inseparable from the . . . double jeopardy doctrine."); Peter Michael Bryce, Note, *Second Thoughts on Second Punishments: Redefining the Multiple Punishments Prohibition*, 50 VAND. L. REV. 167, 169 (1997) ("This Note suggests that a double jeopardy prohibition on multiple punishments is neither wrong nor unworkable.").

19. For a more in-depth discussion of how courts ended up conflating due process and double jeopardy, see Poulin, *supra* note 16.

20. *See Kurth Ranch*, 511 U.S. at 800-01 (Scalia, J., dissenting) (quoting *Johnson*, 467 U.S. at 499 & n.8) ("[P]rotection against cumulative punishment[] is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature."); Albernaz v. United States, 450 U.S. 333, 344 (1981) ("[T]he question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed."); United States v. DiFrancesco, 449 U.S. 117,

double jeopardy cases is "entirely consistent with the proposition that the restriction [on multiple punishments] derive[s] exclusively from the due process requirement of legislative authorization."[21] As a consequence, there are only a handful of cases following *Lange* that properly reference the Due Process Clause as a protection from multiple punishments.[22] By and large, it is a forgotten right.

B. Scope and Significance of the Problem

It is worth taking a moment at the outset to consider why this is an interesting problem. The fact that a protection from multiple punishments resides in the Due Process Clause means that defendants should receive this protection even when the Double Jeopardy Clause does not apply. More specifically, it means that defendants should have protection from multiple punishments in a dual-sovereign context.[23]

The protection from multiple punishments can be understood in two parts: first, as a protection from multiple punishments imposed "at a single criminal trial," and second, as a protection from "attempts to secure additional punishment after a prior conviction and sentence."[24] For the most part, courts

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139 (1980) ("No double jeopardy problem would have been presented in *Ex parte Lange* if Congress had provided that the offense there was punishable by both fine and imprisonment, even though that is multiple punishment."); *Whalen*, 445 U.S. at 688 ("[T]he question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized."); *Whalen*, 445 U.S. at 697 (Blackmun, J., concurring in judgment) ("The *only* function the Double Jeopardy Clause serves in cases challenging multiple punishments is to prevent the prosecutor from bringing more charges, and the sentencing court from imposing greater punishments, than the Legislative Branch intended."); Brown v. Ohio, 432 U.S. 161, 165 (1977) ("The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments . . . .").

21. *Kurth Ranch*, 511 U.S. at 800 (Scalia, J., dissenting).

22. *See Kurth Ranch*, 511 U.S. at 799 (Scalia, J., dissenting) (noting that the Due Process Clause "assures prior legislative authorization for whatever punishment is imposed"); *Whalen*, 445 U.S. at 689-90 n.4 (1980); *In re* Kaufman, 136 F. Supp. 626, 629 (D.N.J. 1955) ("Judgments rendered unauthorizedly deprive defendants of the fundamental rights guaranteed them by the 14th Amendment . . . .").

23. The Supreme Court recognized as much in *Whalen*, 445 U.S. at 689-90 n.4 (acknowledging that when the Double Jeopardy Clause cannot protect defendants, the Due Process Clause would function independently to "prohibit state courts from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law").

24. Brown v. Ohio, 432 U.S. 161, 165-66 (1977); *see also* Bryce, *supra* note 18, at 168 (observing that "[t]he Court appears to have defined the prohibition in two ways" and characterizing

have focused only on the former,[25] to the exclusion of the latter.[26] On closer inspection, this is not surprising. If the government cannot *prosecute* a defendant multiple times for the same offense, then it follows immediately that the government cannot *punish* a defendant across multiple prosecutions for the same offense. After all, if a defendant cannot be tried, he cannot be punished. Viewed in this light, the traditional double jeopardy protection from multiple prosecutions supersedes much of the protection from multiple punishments. The result is that courts have not had much need to explore the contours of the protection from multiple punishments across different trials.

What makes the dual-sovereign context interesting is that it allows us to understand, define, and test the due process protection from multiple punishments in a setting where double jeopardy protections do not apply. As a result, we can start to understand how rights might be protected by due process if double jeopardy protections were more limited.

Dual-sovereign prosecutions that result (or could result) in dual convictions and dual punishments are not uncommon.[27] Moreover, there are

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the two definitions as the "legislative deference model" and the "separate proceedings model").

25. Almost all of the Court's multiple-punishment cases have involved multiple punishments imposed at a single criminal trial. *See, e.g.*, Jones v. Thomas, 491 U.S. 376 (1989) (involving a defendant convicted of felony murder and the underlying felony); Ball v. United States, 470 U.S. 856 (1985) (involving a defendant convicted of receipt of a firearm by a felon and possession of firearm by a convicted felon); Missouri v. Hunter, 459 U.S. 359 (1983) (involving a defendant convicted and sentenced for both robbery and armed criminal action); Albernaz v. United States, 450 U.S. 333 (1981) (involving defendants who received consecutive sentences for conspiracy to import marijuana and for conspiracy to distribute marijuana).

26. The most significant cases that have dealt with protections across multiple proceedings are *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S., and *United States v. Halper*, 490 U.S. 435 (1989). While these cases involve the protection from multiple punishments, neither involves successive criminal prosecutions. Instead, these cases were about the legitimacy of a civil penalty imposed following a criminal proceeding. Moreover, *Halper*, and arguably *Kurth Ranch*, were overturned by the Supreme Court in *Hudson v. United States*, 522 U.S. 93, 101-02 (1997) (finding that "*Halper*'s deviation from longstanding double jeopardy principles was ill considered" and that "*Halper*'s test . . . has proved unworkable"). The result is that there are no controlling cases that adequately elucidate or defend the protection from multiple punishments in a multiple-prosecution context.

27. *E.g.*, Heath v. Alabama, 474 U.S. 82 (1985) (Alabama obtained a conviction and the death penalty after the defendant pleaded guilty to avoid the death penalty in Georgia); United States v. Wheeler, 435 U.S. 313 (1978) (a defendant pleaded guilty in a tribal court to disorderly conduct and contributing to delinquency of a minor, only to be charged by the federal government for statutory rape); Abbate v. United States, 359 U.S. 187 (1959) (defendants pleaded guilty in Illinois to conspiring to destroy property and were subsequently charged and convicted by the federal government for conspiring to destroy a telephone system); United States v. Lanza, 260 U.S. 377 (1922) (defendants were convicted

good reasons to believe that advances in technology will make it easier for multiple sovereigns to claim jurisdiction over the same crime. First, because the Internet transcends traditional geographic boundaries, it is much easier for both states and the federal government to establish jurisdiction over defendants.[28] Second, the growth of the Internet has been accompanied with a corresponding growth in Internet crime. With online black markets such as Silk Road and secure electronic currency such as BitCoin, technology has made it easier for individuals to engage in illegal activities across state lines.[29] Finally, in recent years, state and federal governments have started defining crimes in broader language.[30] The end result is that dual-sovereign prosecutions are here

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of and punished for violating state prohibition laws in Washington and were then charged for the same offense by the federal government); United States v. Ng, 699 F.2d 63 (2d Cir. 1983) (defendants pleaded guilty to state firearms charges in Massachusetts and were then convicted of federal firearms charges); United States v. Grimes, 641 F.2d 96 (3d Cir. 1981) (Grimes was found guilty of armed robbery by the federal government and was sentenced to twenty years in prison; he then pleaded guilty to state charges for the same offense and received an additional twenty-two to twenty-four year prison sentence, to be served consecutively); Evans v. State, 481 A.2d 1135 (Md. 1984) (defendants were convicted in federal court of conspiracy to violate victims' civil rights and were then indicted in state court for murder and conspiracy to commit murder for the same offense); Commonwealth v. Mills, 286 A.2d 638 (Pa. 1971) (defendants pleaded guilty to federal bank robbery charges and were then convicted under a similar state statute in Pennsylvania); Peter J. Henning, *In Goldman Programmer Case, a Way Around Double Jeopardy*, N.Y. TIMES, Oct. 1, 2012, http://dealbook.nytimes.com/2012/10/01/in-goldman-programmer-case-a-way-around-double-jeopardy [http://perma.cc/MQ5N-HURB].

28. *See, e.g.*, Patrick J. Carleton, Note, *Internet Activity and the Commerce Clause: Expansion of Federal Subject Matter Jurisdiction and Limitation of States' Police Power?*, 79 U. DET. MERCY L. REV. 659, 663 (2002) ("[U]se of the Internet will satisfy the jurisdictional element that a particular activity has been transmitted in interstate commerce."); Note, *No Bad Puns: A Different Approach to the Problem of Personal Jurisdiction and the Internet*, 116 HARV. L. REV. 1821, 1826 (2003) (reviewing the doctrine and concluding that "it takes very little to establish contact sufficient to constitute purposeful availment").

29. *See, e.g.*, Michele Martinez Campbell, *The Kids Are Online: The Internet, the Commerce Clause, and the Amended Federal Kidnapping Act*, 14 U. PA. J. CONST. L. 215, 217-19 (2011) (noting how an "ordinary" kidnapping might now make use of the Internet and consequently defending the expanded jurisdiction of the amended Federal Kidnapping Act); Danton Bryans, Note, *Bitcoin and Money Laundering: Mining for an Effective Solution*, 89 IND. L.J. 441, 441 (2014) (discussing some of the ways that technology, and Bitcoin in particular, have facilitated illegal activity); Derek A. Dion, Note, *I'll Gladly Trade You Two Bits on Tuesday for a Byte Today: Bitcoin, Regulating Fraud in the E-Conomy of Hacker-Cash*, 2013 U. ILL. J.L. TECH. & POL'Y 165, 166-67 (noting how the Silk Road and Bitcoin facilitate illegal activity and flagging some of the legal complexities).

30. *See, e.g.*, L. Gordon Crovitz, *You Commit Three Felonies a Day*, WALL ST. J., Sept. 27, 2009, http://online.wsj.com/news/articles/SB10001424052748704471504574438900830760842 [http://perma.cc/YE3C-A8W9] (discussing the harms of overbroad and outdated laws in an age of rapid technological change).

and, in all likelihood, will not disappear anytime soon. As a result, judges and practitioners should consider the rights to which dual-sovereign defendants are entitled.

In the next Part, we will see what the due process protection from multiple punishments looks like in a dual-sovereign context.

II. AVOIDING REDUNDANT PUNISHMENTS

As we saw in Part I.A, the due process protection from multiple punishments can be understood as a protection from punishment without legislative authorization. Specifically, we saw that the due process right is violated when a defendant receives a punishment that is inconsistent with the intent of the legislature, as indicated by statute. In this Part, I will explore the limitations imposed by the Due Process Clause in the context of dual-sovereign sentencing.

Consider two similarly situated states: Alabama and Balabama. Suppose the states have separate criminal justice systems, but identical criminal statutes. Suppose Alice commits a kidnapping that takes place in both states. Alabama charges Alice with kidnapping, obtains a conviction, and imposes the maximum possible sentence—twenty years in prison. After Alice receives her sentence, Balabama decides to charge Alice with its version of the same crime. Alice is once again convicted and receives an additional twenty-year sentence.[31]

Does the second twenty-year sentence violate the Due Process Clause? The answer would seem to be yes. Legislatures assign punishments to advance interests—an interest in keeping order, deterring crime, and so on. A legislative determination that a certain sentence or sentencing range is appropriate indicates that the legislature believes a sentence in the approved range, if properly assigned, is sufficient to fully vindicate the state's interest with respect to that crime. Any additional punishment would be redundant and would therefore run contrary to the intent of the legislature.

While this conclusion follows directly from the premise that legislatures assign punishments to advance interests, one could reach the same conclusion by examining the text of criminal statutes. When writing punishments into law, legislatures at both the federal and state level typically express punishments in the passive voice. Consider the following examples of statutory language describing punishments: "whoever . . . is guilty of an assault *shall be*

31. The jurisdictional questions surrounding multi-sovereign prosecutions are beyond the scope of this Note. For now, it is sufficient to understand that the fact patterns referenced throughout this Note—though simplified for the sake of conceptual understanding—were inspired by real cases and real fact patterns. *See supra* note 27 and accompanying text.

punished . . . by imprisonment for not more than twenty years";[32] "a person convicted of burglary *shall be imprisoned* not more than 15 years";[33] "[e]very person who shall falsely assume or pretend to be any . . . officer . . . *shall be punished* by imprisonment in the county jail not more than one (1) year . . . ."[34] This statutory form, which seems consistent across jurisdictions, verifies that legislatures, even by their own terms, do not care *who* punishes a defendant. Instead, they care about *what punishment* a defendant is to receive. The statutes state that a defendant "*shall be*" punished, not that "the State shall impose a punishment."[35] All told, this means that the determination that a given punishment is sufficient to satisfy a sovereign's interest is made on the basis of the punishment itself—not on how or by whom the punishment is dispensed.[36]

The example of Alice's cumulative forty-year sentence shows how the Due Process Clause can limit the extent to which a court can assign punishment to a dual-sovereign defendant. Where multiple sovereigns pursue compatible interests by punishing a defendant for the same offense, the court of a punishing sovereign should view punishments *cumulatively*: if a court would, in a single-sovereign context, assign a punishment of X, that court should, in a

32. 18 U.S.C. § 113 (2012) (emphasis added).

33. VT. STAT. ANN. tit. 13, § 1201 (2013) (emphasis added).

34. OKLA. STAT. ANN. tit. 21, § 263 (West 2013) (emphasis added).

35. One might argue that this proves too much—if a legislature is indifferent to who dispenses punishment, does that mean I can capture a murderer and hold him in my basement-dungeon for twenty or more years? The answer, of course, is no. The Due Process Clause requires that all punishments must be authorized by the relevant legislature. Legislatures regularly authorize imprisonment, even by different states, *see infra* note 56, but they do not and would not authorize basement-dungeon detention, or any other punishment dispensed by a non-state actor. The term "imprisonment" as it is used in statutes does not mean imprisonment in the abstract. Instead, "imprisonment" refers to a specific punishment in specific regulated conditions. For more analysis on the extent to which punishments can differ in terms, see *infra* Part II.B.2.

36. A similar argument can be made on different statutory grounds. 18 U.S.C. § 3553(a) governs how courts determine specific sentences. The statute requires courts to "impose a sentence sufficient, but not greater than necessary" to advance Congress's interests in punishment. If courts were to take this seriously, they would have to consider the extent to which punishments previously dispensed could independently satisfy federal interests. *See* Steven F. Hubachek, *The Undiscovered* Apprendi *Revolution: The Sixth Amendment Consequences of an Ascendant Parsimony Provision*, 33 AM. J. TRIAL ADVOC. 521, 523 (2010) (describing § 3553(a) as the "'overarching' principle of post-*Booker* sentencing") (citation omitted). While the parsimony provision is most prominent in federal sentencing guidelines, the idea that punishments should not be harsher than is necessary to advance those interests was recognized at common law and plays a role in state sentencing practices.

multi-sovereign context, assign a punishment of *X-Y*, where *Y* is the cumulative punishment the defendant has received to date.[37]

In order to adopt this approach, a second sentencing court would have to make two determinations: first, that the two sovereigns are punishing a defendant for the same offense, and second, that the punishment imposed by the first sentencing sovereign advances the interests of the second sentencing sovereign. I will explore each of these determinations in turn.[38]

A. Same Offense

The premise underlying my advocacy is that a legislature would not intend for a defendant to receive punishment for a single offense in excess of what it has authorized by statute for that offense. This premise demands an inquiry into how a court would determine whether two offenses are the "same" for the purposes of legislative intent to punish. For if two offenses were the same, then the punishment assigned for one would count towards the punishment allowed for the other.

First, it is worth noting that, at its core, this is a question of legislative intent. Any test or rule to discern legislative intent would do nothing more than establish a *presumption* that a legislature would view two crimes as the same. A legislature could, in theory, decide to create two criminal offenses with identical elements, intending that prosecutors would be able to charge, convict, and punish defendants for one or both of the crimes.[39] Likewise, a legislature could issue a statement indicating that, despite the presence of identical elements, it does not intend for its crimes to be considered the "same" as

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37. Note that if $Y>X$, the second court should not assign any additional punishment. Because a court cannot alter the punishment assigned by another sovereign, *X-Y* cannot take a negative value. Note also that *Y* only refers to punishments the defendant received with respect to the sentenced crime and in furtherance of the second sovereign's interests. This sentencing calculus will be described in more detail *infra* Part II.B.2.

38. This analysis applies without loss of generality to successive prosecutions and punishments by any number of sovereigns. If a court can compare the punishments of two sovereigns, it can do so with any number of sovereigns by comparing the sovereigns in successive groups of two. This analysis also applies without loss of generality to the federal government and state governments, though the federal government is more likely to have interests that cannot or would not be advanced by state punishments. See *infra* Part II.B.2 for a discussion of how sentences should be adjusted when one jurisdiction's interests cannot be advanced by another jurisdiction's punishments.

39. Double jeopardy protections would prevent the prosecution of these crimes in successive proceedings, but nothing would prevent a prosecutor from charging both crimes at the same time.

analogous crimes in other jurisdictions. Such a statement of intent would supersede any presumptive test or rule.

In the absence of these statements, there are a number of heuristics that courts can use to discern legislative intent and determine whether a legislature would want to count part or all of one sentence towards another.

In *Blockburger v. United States*, the Supreme Court created a rule to determine whether two crimes are the same for purposes of multiple prosecutions.[40] While we are interested in the question of sameness for multiple punishments rather than prosecutions, it follows naturally that if a legislature does not want a defendant to be prosecuted for two crimes, then the legislature also would not want a defendant to be punished for both crimes. Accordingly, *Blockburger* provides a good starting point for our analysis. Under the Court's decision in *Blockburger*, there is a presumption that two offenses are different if each contains at least one statutory element the other does not.[41] In effect, *Blockburger* means that two offenses are the *same* if they contain identical elements or if one is a lesser-included offense of the other.

It is worth noting that the *Blockburger* test was introduced in the context of single-sovereign prosecutions. As a result, it focuses heavily on statutory language and considers elements to be the same only if the underlying text describing the respective elements is identical.[42] This poses a problem in a multi-sovereign context, as different legislatures often express the same idea in different ways.[43] Rather than focusing on the letter of the statutory language, courts should adopt a functional version of *Blockburger*, according to which elements are evaluated according to the concepts and actions they represent. Under this model, courts would be able to compare statutes from different states. This approach "would seek to discern whether in fact the statutes substantively describe the same offense."[44]

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40. 284 U.S. 299, 304 (1932).

41. *Id.*

42. Albernaz v. United States, 450 U.S. 333, 336-39 (1981); Amar & Marcus, *supra* note 6, at 39-40.

43. A good example is provided by Akhil Amar and Jonathan Marcus in *Double Jeopardy Law After Rodney King*. Amar and Marcus compare the definitions of second-degree murder from Florida and California to show that legislatures can employ different language to describe the same elements. Amar & Marcus, *supra* note 6, at 39 ("Because different legislatures often do not work from the same linguistic building blocks, they will not use uniform language to describe an offence, even when each is indeed outlawing the same crime with the same elements . . . .").

44. *Id.* at 44.

For the most part, the *Blockburger* test will have few false positives;[45] it is unlikely that a legislature would intend to assign independent punishments for two crimes with identical elements. Similarly, because a lesser-included offense is, by definition, *included* in the corresponding greater offense, the punishment for one necessarily incorporates all or part of the punishment for the other, meaning that a legislature would probably not intend to punish one person for both a greater offense and a lesser included offense. These logical presumptions are strengthened by the fact that the *Blockburger* test has been in

45. One potential complication involves statutes that incorporate other laws by reference. Consider a fact pattern similar to *United States v. Dixon*, 509 U.S. 688 (1993). Suppose State *A* releases a defendant on bond subject to a court order that the defendant refrain from committing "any criminal offense." Further suppose that the defendant violates the court order by committing a crime punishable by both State *A* and State *B*. If State *A* charges, convicts, and punishes the defendant for criminal contempt, would the defendant be entitled to a multiple punishment reduction if he is subsequently convicted by State *B* of the substantive crime underlying his contempt conviction?

In *Dixon*, the Supreme Court grappled with the question whether the two crimes (criminal contempt and the underlying substantive crime) should be considered the "same" under *Blockburger*. Under one reading, the two crimes are different: one contains elements involving drug trafficking, while the other contains elements involving the violation of a court order; both contain one element the other does not. Under another reading of *Blockburger*, however, the two crimes constitute the same offense: in order to convict the defendant of criminal contempt, the jury necessarily had to find that he was guilty of drug trafficking. Therefore, in application, the drug trafficking offense did not contain any element that the contempt offense did not. While the Supreme Court adopted the latter view, *id.* at 698, the holding was anything but clear; Justice Scalia's majority opinion was accompanied by four other opinions: one adopted the competing view of *Blockburger*, *id.* at 717 (Rehnquist, C.J., concurring in part and dissenting in part); one disagreed with the Court's view of *Blockburger*, arguing that the *Blockburger* test should apply in cases of multiple prosecution, but not cases of multiple punishment, *id.* at 735 (White, J., concurring in the judgment in part and dissenting in part); one argued that the *Blockburger* test should not be the sole test used to evaluate criminal contempt, *id.* at 741-42 (Blackmun, J., concurring in the judgment in part and dissenting in part) (noting that contempt of court is a "special situation"); and one argued that the *Blockburger* test does not adequately protect defendants from multiple prosecutions and that the case should have been resolved by the Court's decision in *Grady v. Corbin*, 495 U.S. 508 (1990); *Dixon*, 509 U.S. at 749, 757-58 (Souter, J., concurring in the judgment in part and dissenting in part).

Fortunately, the wrinkle created by statutes that incorporate other crimes by reference is one we can resolve easily. A court need not even consider whether two offenses are "the same" for the purposes of multiple punishments if the interests underlying those crimes are different. In the example posed above, it is clear that State *A*'s interest in prosecuting a criminal contempt violation is wholly (or almost wholly) orthogonal to its interest in prosecuting the underlying substantive offense – the former is to ensure citizens have proper respect for court orders and the terms of their pre-trial release, while the latter is to prevent the harms associated with drugs and drug smuggling. Accordingly, regardless of whether the offenses are the "same," no sentence reduction would be appropriate.

effect, virtually continuously, since 1932, meaning that legislatures almost certainly take the test into account when drafting legislation.[46]

But while the *Blockburger* test avoids false positives, it does not completely avoid the problem of false negatives. In other words, the test may view certain pairs of crimes as different that a legislature would likely want to punish as the same offense. Akhil Amar explains:

> Suppose Roberta is charged in a single trial with eight-year armed robbery and nine-year bank robbery for a single act in which she robbed a bank with a gun. Under the *Blockburger* test, armed robbery is not the same as bank robbery—and so the maximum penalties can be cumulated under *Blockburger*. But this cumulation ends up double-counting the common-predicate robbery: (robbery plus gun) plus (robbery plus bank)—(five plus three) plus (five plus four). Notwithstanding *Blockburger*, this double-counting should be treated as presumptively violative of due process. If *Blockburger* would (presumptively) prohibit double-counting the robbery in a robbery-plus-armed-robbery trial, or in a robbery-plus-bank-robbery trial, surely the true logic at work here should (presumptively) bar the similar double-counting of the robbery in an armed-robbery-plus-bank-robbery trial.[47]

This example shows how crimes with overlapping elements can pose problems for the *Blockburger* test.

So how should a court deal with two crimes whose elements overlap only in part? Unfortunately, there is no simple heuristic. Courts should compare the elements of the two offenses, recognize the ways in which the crimes differ, and then use common sense to determine whether the differences between the crimes fundamentally change the character of one crime relative to the other. If there is a significant overlap between the elements and if both statutes are aimed at the same *kind* of offense, as was the case with Roberta's robbery charges, then a court could reasonably conclude that at least part of the punishment from one offense should count towards the punishment of the other. If, alternatively, there are a small number of overlapping elements, or if the similarities are insubstantial and do not constitute the essence of either crime, then it would make more sense to view each punishment independently.

One way to determine whether the difference between two statutes is significant is to ascertain the extent to which the *punishments* for the two crimes

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46. *See, e.g.*, McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496 (1991) (recognizing that legislatures consider rules of statutory interpretation when creating laws).

47. Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1820 (1997).

can be attributed to the shared elements. In the example above, both crimes for which Roberta was charged contained elements corresponding to robbery. If robbery, viewed independently, carries a five-year sentence, then the punishment for robbery would seem to account for most of the punishment for both armed robbery (eight years) and bank robbery (nine years). This would suggest that the two crimes (armed robbery and bank robbery) are simply aggravated instances of plain robbery and thus that they are substantially similar in character. If, alternatively, robbery, viewed on its own, would carry a one-year sentence, then it would be much easier to conclude that the shared robbery element does not contribute very much to either sentence – that bank robbery and armed robbery represent distinct offenses and that each should be punished independently.

For another example, consider 18 U.S.C. § 113, which authorizes punishment for assaults that take place in the "special maritime and territorial jurisdiction of the United States," and 18 U.S.C. § 81, which authorizes punishment for arsons committed in the same region. Both contain an identical jurisdictional element. But the shared element is just that – jurisdictional. It is not related to the substance of either crime, nor can the punishment from either crime be attributed to the jurisdictional element. This example shows how the presence of a common element is not sufficient. Here, notwithstanding their similarities, the crimes clearly constitute fundamentally different offenses and should thus be punished independently.

It is worth noting that the determination of whether two crimes are the same is not wholly different from the question of whether two crimes advance different interests.[48] In the ambiguous or difficult cases, where two crimes have many of the same elements but are not necessarily of the same character, a judge could resolve the problem by comparing the specific interests or motivations implicated by the crimes at issue. If, read narrowly, the two crimes advance, in whole or in part, substantially similar interests, then it would be reasonable to assign at least part of the punishment of one crime to the other. This is not to say that the question of interests is controlling. It is but one tool in the toolbox and, like other heuristic tools, should be applied with sound judgment and common sense. It also bears emphasis that judges are already expected to implement the standard *Blockburger* test and to determine a legislature's interest based on the text and history of a statute. The heuristics described in this Part seek simply to combine these standard techniques with context-specific reasoning.

[48] *See infra* Part II.B.I.

B. Non-Conflicting Interests

The protection from redundant punishment applies only if two sentencing sovereigns have the same interests or different interests that can be advanced simultaneously. As argued above, legislatures assign punishments in order to advance interests. If two legislatures pursue their interests in the same way, then neither legislature would have reason to care which jurisdiction imposed the punishment; regardless of who imposes the punishment, the interest would be vindicated. This is what would allow the court of one jurisdiction to adopt the punishment assigned by the court of another.

If, however, two legislatures pursue conflicting or incompatible interests, then *each* jurisdiction would need to implement its punishment in order to vindicate its interests. If the punishment of one were imputed to the other, then at least one of the interests would remain at least partially neglected.[49] But how do we know which interests a sovereign seeks to advance? Moreover, how do we know whether these interests conflict?

1. Discerning Interests

Before a judge can decide whether two interests are compatible, the judge must first determine which interests he is dealing with. This determination, as one might expect, is made on the basis of legislative intent.

In most instances, it will not be difficult for a judge to discern the legislative interests involved in a given statute. Many jurisdictions have adopted explicit statements of purpose that explain the legislature's reasons for passing and maintaining criminal statutes.[50] Unfortunately, congressional intent is not always clear. In the absence of a well-articulated legislative interest, judges can consider several aspects of a statute to determine which interests the statute is supposed to advance. For example, judges can look to the elements needed to sustain a conviction, the type of punishment authorized by the statute, and the extent to which the severity of the punishment tracks the severity of the crime. Judges could also consider the common law understanding of the crime at issue.

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49. In some instances, both interests can be accomplished simultaneously with the same sentence. *See infra* Part II.B.2.

50. *See* Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1318-19 (2000) (discussing the adoption of statements of interest modeled after the Model Penal Code and listing the states that have adopted explicit statements of interest). The most common interests are deterrence, retribution, rehabilitation, and incapacitation. *Id.* at 1313.

Absent evidence to the contrary, it is generally safe for a court to assume that legislatures pass criminal statutes in order to simultaneously advance interests in deterrence, rehabilitation, and, where appropriate, incapacitation. Depending on the jurisdiction, a judge might also conclude that a legislature was interested in retribution. These interests reflect the purpose of punishment at common law and are almost always included in any explicit statement of purpose adopted by a legislature.[51] All told, even absent this presumption, a judge could accurately determine the legislative interests implicated by a given crime.[52] Indeed, judges are obligated to take legislative interests into account whenever they dispense punishment.[53]

When ascertaining legislative interests, a judge need only consider the interests of the jurisdiction over which he presides. Because the first sentencing jurisdiction has already advanced its interests (through the imposition of the first punishment), the only relevant question facing a judge is whether the punishment imposed by the first jurisdiction adequately advances the interests of the second sovereign's legislature. A judge would not need to consider the statutory history or legislative goals of any other jurisdiction.

2. *Evaluating Interests in Light of Punishments*

After discerning interests, a judge must determine whether the sentence imposed by the first jurisdiction advances the interests of the second jurisdiction. What happens when two sovereigns attempt to advance incompatible interests, or when two sovereigns pursue similar interests, but the punishment imposed by one does not advance the interests of the other? Consider the interests of deterrence, respect for a sovereign's authority, and restoring the community. Each of these interests could be advanced by a punishment requiring convicts to perform 100 hours of community service. As the service is performed, the convict is at once improving the community he harmed, showing others that criminals will be brought to justice, and investing himself in the community. The value of the punishment, however, is predicated on the defendant's performance of community service in the community of the sentencing jurisdiction. This shows that, with respect to certain punishments, some interests can only be understood and vindicated in the context of the punishing sovereign—Alabama's interest in deterrence is not

51. *Id.* at 1315-18.

52. *Id.* at 1346-47 n.158 (indicating that even when states have not adopted explicit statements of interest, the traditional purposes of punishment—deterrence, rehabilitation, incapacitation, and, in some cases, retribution—"still operate in the system").

53. *See* Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 466-73 (1992).

an interest in deterring crime generally, but is rather an interest in deterring crime in *Alabama*.

At first, this sovereign-specific aspect of some crimes would seem to defeat my proposition: if every interest can be articulated as a local concern, unique to each sovereign, then we can never say that two sovereigns are advancing the *same* interest.

The problem with this view is that it exaggerates the role of localized punishments. Many punishments can advance the interests of multiple sovereigns at the same time. The best example is prison. Suppose two legislatures impose punishment to keep their citizens safe from dangerous criminals. As we saw above, this *could* be articulated as two distinct interests: the interest in protecting citizens of the first state, and the interest in protecting citizens of the second state. Nevertheless, the fact remains that one prison sentence effectively and completely addresses the concerns of *both* legislatures at the same time and in the same way. So while almost every interest *can* be viewed as distinct and localized, it makes sense to adopt such a construction only when the first punishment at issue leaves a local interest unresolved.

On the other hand, what if two states assign the same punishment, but in pursuit of different interests? Suppose both Alabama and Balabama impose a five-year sentence for theft—Alabama, because it believes it takes five years for a thief to reform, and Balabama because it believes a punishment of less than five years will not adequately deter future crime. These interests do not overlap. In such a scenario, should the Due Process Clause prevent the imposition of both sentences? As we saw in the discussion above, the operative test is whether the interests can be fully accomplished at the same time with the same sentence. If so, any additional punishment would be redundant and would therefore fall outside the scope of punishment authorized by either legislature. Since both deterrence and rehabilitation can be satisfied fully and completely by a single five-year sentence, no further punishment was intended, and none would be authorized.

Under my proposal, if a court would ordinarily assign a punishment of X, it should instead assign a punishment of $X - Y$, where Y is the cumulative punishment the defendant has received for the same crime up to that time. Because courts can, in effect, address multiple interests simultaneously and without conflict, it will be helpful to think of Y in two parts: $Y_{compatible}$ and $Y_{incompatible}$. $Y_{compatible}$ represents the portions of the first sentence that are compatible with the interests advanced by the typical second sentence, while $Y_{incompatible}$ represents the portions of the first sentence that are incompatible. Note that $Y_{compatible}$ and $Y_{incompatible}$ are complements, such that $Y_{total} = Y_{compatible} + Y_{incompatible}$. The amount by which a sentencing court would have to reduce its usual sentence would be the full amount of the cumulative sentence received until that point, excepting those portions that do not and cannot resolve the

interests of the second sentencing sovereign. That is, the second sentencing court should assign a punishment of $X - (Y_{total} - Y_{incompatible})$, or, equivalently, $X - Y_{compatible}$.

As an example, suppose two states, *A* and *B*, attempt to advance interests in payback to the community. State *A* sentences first and assigns a punishment of 100 hours of community service, to be performed in *A*. *B*, the second sentencing state, would ordinarily assign a punishment of 100 hours of community service, to be performed in *B*. Because *B* is punishing to advance local interests, the punishment dispensed by State *A* does not at all vindicate the interests of State *B*. Accordingly, no sentence reduction is appropriate, and *B* should assign its full punishment of 100 hours of community service, to be performed in *B* (in other words, $Y_{incompatible} = Y_{total}$, $Y_{compatible} = 0$, *and* $X - Y_{compatible} = X$).[54]

But what happens if two interests overlap? If the punishment dispensed by one state *partially* vindicates the interests of another? Suppose State *A* assigns 100 hours of community service to instill a sense of loyalty and community engagement,[55] while State *B* assigns the same amount of community service to deter future crimes. If *A* sentences first, it cannot be said that *B*'s interest is left *completely* unvindicated; citizens of *B* would know that a crime took place and that the culprit was captured, convicted, and punished. At the same time, at least some of the deterrent benefit is predicated on *B*'s citizens *seeing* the criminal performing community service and recognizing the personal embarrassment they would experience if they were to commit the crime. In such a situation, the determination of how much a punishment vindicated a legislature's interest would be left to the discretion of the sentencing judge. In this example, a judge could reasonably decide that the bulk of the deterrent effect is simply in the assignment of a punishment, and therefore that B's interests are, for the most part, vindicated by the defendant's community service to State *A*. If the second sentencing judge found that *A*'s sentence vindicated 80% of *B*'s interests, then he would only need to impose an additional 20 hours of community service, to be performed in State *B*. In terms of the variables described above, X = 100 hours of community service, $Y_{compatible}$

54. Two other interests that cannot be satisfied by the same punishment are retribution and deterrence (or, for that matter, retribution and most other interests). Many believe that the purpose of retribution is to "impos[e] merited harm upon [a] criminal," to the exclusion of any social benefit. Cotton, *supra* note 49, at 1315-17.

55. I indicate the interests of State *A* for illustrative purposes only. As indicated above, a second sentencing judge does not need to consider the interests of the first sentencing jurisdiction. *See supra* p. 466. He need only consider the extent to which the sentence imposed by the first jurisdiction advances or fails to advance the interests of his state legislature.

= 80 hours, and $Y_{incompatible}$ = 20 hours, yielding an additional punishment of 100 – 80 = 20 additional hours of community service, to be performed in State *B*.

Note that when sentences are of a different type, the sentencing judge has considerable discretion when it comes to determining the values of $Y_{compatible}$ and $Y_{incompatible}$. A judge's finding that part of a prior sentence can be included in $Y_{compatible}$ is equivalent to a finding that the legislature would have authorized that portion of punishment (and thus that any additional punishment would be unauthorized and in violation of the Due Process Clause). While it is sometimes possible to make such a finding, it is not always clear that the legislature would have adopted the sentence imposed by another jurisdiction—even in part.

Suppose, for example, that State *A* assigns a punishment of imprisonment, while State *B* assigns a hefty fine. A judge from State *A* might not be able to determine with confidence the extent to which a fine adequately substitutes for time in prison. Equivalently, a judge from State *B* might not be able to determine the extent to which a fine should be reduced on account of the time the defendant will spend in prison.

The situation is analogous to one in which a second-shift chef comes on duty and is told he must have 50 liters of cider ready for distribution by the end of his shift. Suppose the chef finds a note left by the first-shift chef indicating that 20 liters of cider have already been prepared. In this scenario, the second-shift chef would know to make 50 - 20 = 30 additional liters of cider. Suppose instead that the note indicated that 0.5 *cubic feet* of cider had been prepared. Absent a conversion table, the note would be useless (50 liters - 0.5 cubic feet = ?). To ensure he had 50 liters ready for sale, the chef would have no choice but to prepare all 50 liters during his shift.

These examples show why the due process protection from multiple punishments would likely play a much smaller role where dual-sovereign prosecutions involve different types of sentences. When different types of punishments are involved, reducing one sentence on account of another can be quite difficult: 20 years imprisonment - 5 years imprisonment = 15 years of additional imprisonment,[56] but 20 years imprisonment - $10,000 in fines = ?.

56. One might argue that prison terms assigned by different sovereigns constitute different types of sentences—each sovereign operates its own corrections system and prison quality differs considerably from state to state. If a convict would have a substantially different incarceration experience in one facility than he would in another, then it is likely that the interests of a sentencing jurisdiction would be advanced at a different rate in each facility. In this way, incarceration in different prisons can be qualitatively different in the same way (though perhaps to a lesser extent) that a fine is qualitatively different from incarceration. As a result, one could argue that a prison sentence assigned by one sovereign would not necessarily have been approved by the legislature of another.

In the face of such uncertainty, the only way to ensure that both sovereigns' interests are fully vindicated would be for the second sentencing court to assign its punishment in full.

Of course, if a judge can determine with sufficient certainty that the punishment imposed by an earlier sentencing court would have been approved and adopted, in whole or in part, by the legislature, then the due process requirement would apply with full force and the judge would have to reduce the sentence accordingly. In terms of the analogy above, this determination would be equivalent to the chef's determination that 0.5 cubic feet is equivalent to 14 liters or, using a more conservative estimate, that 0.5 cubic feet is certainly greater than 10 liters. To make such determinations, judges can look to the different types of sentences authorized by the statute at issue as well as to other statutes that contain both types of punishments. If State *B*'s legislature regularly passed statutes allowing a court to impose either a fine or a term of imprisonment, then the judge from State *B* might be able to ascertain a "conversion rate," of sorts, between the two types of sentences. The judge could then determine a reasonable value for $Y_{compatible}$. It is also possible that if this type of sentencing reduction were recognized, legislatures would provide more explicit guidance.

This principle extends to instances in which legislatures authorize mixed sentences. Suppose a judge from State *A* assigns a mixed punishment of two years' imprisonment and a $500 fine. If a judge from State *B* would ordinarily

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The problem with this argument is that it does not accurately reflect the way prisons and correctional facilities work. State governments and the federal government treat correctional facilities as though they were interchangeable. Both state governments and the federal government contract their prison operations to one another and to private corporations. Moreover, legislatures do not calibrate their authorized sentences to take into account the harshness of prison conditions or the evolving standards of the prison industry. Nat'l Inst. of Corr., *Interstate Transfer of Prison Inmates in the United States*, U.S. DEP'T JUSTICE 2 (Feb. 2006), http://static.nicic.gov/Library/021242.pdf [http://perma.cc/43C5-5FUS] (noting that "[n]early every state [Department of Corrections] . . . does or can transfer inmates to destinations in other states"); *see also, e.g.*, *Interstate Compact*, MISS. DEP'T CORR., http://www.mdoc.state.ms.us/interstate_compact.htm [http://perma.cc/R8S4-8XU9] ("At the discretion of the sending state, any offender who has three months or more or an indefinite period of supervision remaining shall be eligible for transfer of supervision to a receiving state under the compact . . . ."); Sam Howe Verhovek, *Texas Jail Video Puts Transfer Programs in Doubt*, N.Y. TIMES, Aug. 22, 1997, http://www.nytimes.com/1997/08/22/us/texas-jail-video-puts-transfer-programs-in-doubt.html [http://perma.cc/8A6P-ZEJ2].

Additionally, the Supreme Court has held that inmates have no justifiable expectation to be incarcerated in any specific prison or even in any specific state. Olim v. Wakinekona, 461 U.S. 238, 245 (1983). The fact that a prisoner can be transferred to any facility in any state and at any time means that prison terms in the United States are, as a matter of both fact and perception, a common currency.

assign a punishment of four years' imprisonment (with no fine), then the Due Process Clause would require the *B*-state judge to impute the two years of imprisonment from the first sentence to the second sentence ($Y_{compatible}$ = two years). Because the remaining portion of the first sentence is of a different kind, the second sentencing court would have to assign two additional years of imprisonment (X - $Y_{compatible}$) to vindicate its interests. Note that the *B*-state court cannot necessarily impute the $500 fine to *B* because fines constitute a different type of punishment than imprisonment. The end result is that when dealing with mixed sentences, judges would evaluate each component of the sentence separately.

3. *"Phantom" Due Process Violations*

What happens when interests are advanced asymmetrically? Suppose State *A* would normally assign 100 hours of community service in order to advance an interest in restoring the community to the condition it was in prior to the defendant's commission of the crime. Suppose State *B* would normally assign 100 hours of community service to deter future crimes. In this scenario, *A*'s punishment would significantly advance *B*'s interests, but *B*'s punishment would not advance *A*'s interests at all.

Interestingly, the total sentence a defendant would receive depends on which state punishes first. If *A* punishes first, then *B* would not need to assign much (if any) additional punishment. As discussed above, the defendant might receive a total sentence of 120 hours of community service, 100 of which must be served in *A* and 20 of which must be served in *B*. If, however, *B* punishes first, *B* would impose its sentence and, since *B*'s punishment does not advance *A*'s interests in the slightest, *A* would then impose *its* full sentence. The defendant would thus receive a total of 200 hours of community service (evenly split between the two states)—80 hours *more* than is needed to satisfy the interests of both legislatures.

In essence, this punishment constitutes something of a phantom-error. There *is* a due process violation, since the defendant received a punishment greater than what was needed. Yet, we cannot point to a specific error or mistake that created the violation; both sentencing courts acted appropriately. To make things more difficult, the phantom-error could not have been avoided—the second sentencing court (*A*) needed to impose the full sentence to vindicate its interests, and it lacked the authority to reduce the sentence imposed by the first sentencing court (*B*). The absence of a procedural error would make it very difficult to obtain a sentence adjustment using normal

procedural mechanisms.[57] Nevertheless, courts are fully capable of modifying sentences in light of new developments.[58] Accordingly, the Due Process Clause should allow a defendant in such a situation to seek a sentence adjustment after each additional punishment is received.[59]

III. THE IMPACT ON PLEA BARGAINS

Thus far, this Note has focused on how dual-sovereign defendants can benefit from the protection from multiple punishments during the sentencing phase of their trials. While the sentencing phase of a trial is significant, it is important to recognize that over ninety percent of state and federal prosecutions end with plea bargains.[60] In this Part, I will show how the protection from multiple punishments, if recognized, would also enhance the efficiency and fairness of plea negotiations.

In a world with protection from multiple punishments, the worst-case scenario for a defendant would be the imposition of the most severe punishment from the harshest sovereign that could charge him. In contrast, if there were *no* protections from multiple punishments, then the worst-case scenario would be the imposition of the most severe punishment from *each* of the sovereigns that could charge him. This difference significantly impacts a defendant's bargaining power in negotiations with prosecutors.

Where there is protection from multiple punishments, sentences are evaluated cumulatively. As a result, the plea agreement that a defendant makes with one jurisdiction would decrease the punishment he could receive from another. In scenarios where multiple sovereigns want to prosecute, this would effectively allow defendants to carry plea agreements and sentences from jurisdiction to jurisdiction. Therefore, when it comes to future plea negotiations, a defendant would have less to lose by going to trial. Rather than risk the imposition of a full sentence, a defendant would risk only the

57. It would be even more difficult to obtain relief because by the time the second sentencing court assigns its punishment, the first case will likely have concluded, meaning there would not be an opportunity to address the issue on direct appeal.

58. *See, e.g.*, North Carolina v. Pearce, 395 U.S. 711, 723 (1969); S. David Mitchell, *In with the New, Out with the Old: Expanding the Scope of Retroactive Amelioration*, 37 AM. J. CRIM. L. 1, 7-10 (2009).

59. While the specific procedural mechanism is beyond the scope of this Note, it is worth noting that the question of how such a remedy might be obtained is interesting and worthy of further consideration.

60. Erica Goode, *Stronger Hand for Judges in the 'Bazaar' of Plea Deals*, N.Y. TIMES, Mar. 22, 2012, http://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html [http://perma.cc/YV5T-UVQ2].

imposition of the difference between the sentence he *already* received (whether through a plea deal or otherwise) and the sentence pursued by the prosecutor.

Interestingly, this means that the "worse" a defendant does in one set of plea negotiations, the better his position will be in the next. Defendants can use this to their advantage to obtain a plea agreement that will optimize their multi-sovereign result. As an example, suppose Bob commits a crime that can be charged in State *A* and State *B*. Both states' versions of the crime have a maximum sentence of twenty years' imprisonment. Suppose the prosecutor from State *B* would only charge Bob if he could obtain a sentence of greater than six years. State *A* prosecutes Bob first and offers him a plea agreement of ten years. If Bob accepts the deal, then *B* will prosecute and Bob could receive an additional sentence of up to ten years. If, however, Bob requests a plea agreement of fourteen years, then *B*'s interests would be satisfied and *B* would have no need to prosecute. Strangely, by adding four years to his plea agreement, Bob reduced his overall sentence by up to six years. This example shows how, if we recognize a protection from multiple punishments, defendants would approach plea bargains from a multi-sovereign perspective—with the knowledge that the plea they make in an early prosecution will have significant ramifications in a later one. In such a system, defendants would attempt to obtain a plea agreement that would satisfy *all* interested sovereigns, rather than one that would simply satisfy the sovereign involved in the specific prosecution.[61]

In contrast, consider how plea bargains work where there is no protection from multiple punishments. Because sentences are *not* evaluated cumulatively, each prosecution is completely independent. This means prosecutors have just as much to gain from a second prosecution as they do from a first (and just as much to gain from a third prosecution as they do from a second)—regardless of the punishments a defendant has already received. To extend the previous example, State *B* would prosecute Bob regardless of the deal he arranged with *A*, because no matter what, the *B*-state prosecutor would be able to obtain a sentence of up to twenty years—well above the six-year threshold.

61. Of course, this type of gamesmanship is not without its risks. From the outset, it might be difficult to predict what will motivate a prosecutor. A defendant might angle to obtain a more severe punishment from one prosecutor (in an attempt to reduce his overall cumulative sentence) only to find that he miscalculated and will still be prosecuted by another. Similarly, a defendant could enter into a plea agreement with an incorrect understanding of the maximum cumulative penalty he could receive. In order to avoid these miscalculations, a defendant would likely enter into multi-sovereign plea negotiations to make sure he is not misled. At the very least, defendants would make these types of decisions only with the guidance and advice of their defense counsel who, like prosecutors, are repeat players and should have a sense of what would motivate potential prosecutors.

With protection, the bargaining power of a defendant *increases* with each subsequent prosecution. Without protection, the bargaining power of a defendant decreases, or, at the very least, remains the same. This increase in bargaining power is a positive development for two reasons.

First, as suggested above, the increase in bargaining power is functionally conditioned on defendants entering plea negotiations from a multi-sovereign perspective. If a defendant determines that the prosecuting sovereigns are only interested in obtaining a certain cumulative sentence, then he can adjust his negotiation strategy accordingly. Likewise, if a defendant determines that the sovereigns are interested only in obtaining a sentence of a certain length, then he can avoid a second prosecution by ensuring that his first punishment is sufficiently large. In sum, applying cumulative sentences allows defendants to pursue an inter-sovereign plea bargaining strategy so as to satisfy multiple interests (including his own) simultaneously.

The second reason why increasing defendants' bargaining power is a positive development is that it compensates for many of the systemic disadvantages facing defendants in multi-sovereign prosecutions. The mere fact of successive prosecutions disadvantages defendants for two reasons. First, in successive prosecutions, prosecutors have access to more information about defendants' preferences and bargaining limits than they would if they started from a blank slate. This information, in turn, provides prosecutors with more leverage in negotiations, as they have a greater idea of just how far they can push defendants.

The second reason that successive prosecutions disadvantage defendants is that multiple prosecutions can wear down defendants and decrease the vigor with which they approach the plea bargaining process.[62] Indeed, the Supreme

62. *E.g.*, United States v. Scott, 437 U.S. 82, 91 (1978); Green v. United States, 355 U.S. 184, 187-88 (1957). For examples of cases where prosecutors from different jurisdictions have benefited from plea bargains and from the lack of protection from multiple prosecutions, see *Heath v. Alabama*, 474 U.S. 82 (1985), in which Alabama obtained a conviction and the death penalty after the defendant pleaded guilty to avoid the death penalty in Georgia; *United States v. Wheeler*, 435 U.S. 313 (1978), where the defendant pleaded guilty to disorderly conduct and contributing to delinquency of a minor, only to be charged by a different sovereign for statutory rape; *Abbate v. United States*, 359 U.S. 187 (1959), where the defendants pleaded guilty in state court to conspiring to destroy property and were subsequently charged and convicted in federal court for conspiring to destroy a telephone system; *United States v. Ng*, 699 F.2d 63 (2d Cir. 1983), where the defendants pleaded guilty to state firearms charges and were then convicted of federal firearms charges; and *Commonwealth v. Mills*, 286 A.2d 638 (Pa. 1971), where the defendants pleaded guilty to federal bank robbery charges and were then convicted under a similar state statute.

While I cannot claim that a protection from multiple punishments would have spared these defendants from second prosecutions, the prevalence of a plea-first, conviction-second fact pattern highlights the fact that plea bargains are prevalent in dual sovereign

Court has long recognized the burden successive prosecutions can have on defendants. This burden is no less significant in the context of successive multi-sovereign prosecutions as it is in successive single-sovereign prosecutions. If anything, the exhaustion and anxiety experienced by defendants would be *worse* in a multi-sovereign context: inherent in any multi-sovereign prosecution is a shuttling of the defendant from jurisdiction to jurisdiction, from prison to prison, and from courthouse to courthouse. This shuttling would destroy whatever minimal sense of stability, reliability, and security a defendant would have been able to muster in the case of successive single-sovereign prosecutions. Even worse, the further a defendant travels, the more likely it is that he will be further away from friends and loved ones who can provide critical moral support.[63] By increasing defendants' bargaining power, the protection from multiple punishments helps counterbalance the systemic disadvantages facing defendants in multi-sovereign cases.[64]

IV. SOME OBJECTIONS

In this Part, I will introduce and respond to some possible objections to my argument.

A. Legislatures Intend to Assign Multiple Punishments

In response to my advocacy, one could argue that legislatures intend to assign multiple punishments to defendants whose crimes extend across several states.[65] The Supreme Court has often recognized that legislatures are

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prosecutions and that defendants would benefit greatly if the punishment they received from one plea agreement could offset the punishment they would receive from a second prosecution.

63. This point is most applicable in successive state-state prosecutions. In successive state-federal (or federal-state) prosecutions, a defendant might not need to travel any extended distance.

64. My claim in this Note is that increased bargaining power for defendants is good in the context of successive multi-sovereign prosecutions. Others have argued, persuasively, that increased bargaining power might be good for defendants in *any* prosecution. *See, e.g.*, Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1139-41 (2011) (explaining how plea bargaining puts defendants at an inherent disadvantage); Douglas D. Guidorizzi, Comment, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 753 n.5 (1998) (listing scholarly criticisms of the plea bargaining process).

65. *Cf.* King, *supra* note 7, at 149 (suggesting that some legislatures might intend to impose duplicative punishments in a multi-sovereign context).

presumed to understand the current state of the law.[66] As it stands, there is no prohibition on assigning duplicative punishments to inter-sovereign defendants. Because legislatures operate against a backdrop of multiple punishments, one could argue that the legislatures tacitly accept and support multiple punishments for inter-sovereign defendants – that legislatures believe interstate crimes are so problematic as to warrant additional punishment beyond what the legislature would normally assign. Moreover, one could argue that legislatures intend the severity of the additional punishment to track the punishments assigned by the other punishing sovereigns. Because due process rights are implicated only when a redundant punishment is assigned *without* legislative authorization, it follows that, if legislatures intended a defendant to receive multiple punishments, there would be no constitutional problem.

This argument is problematic for two reasons. First, the Due Process Clause does not provide a right to be free from punishment absent *tacit legislative approval*. It provides a right to be free from punishment absent *legislative authorization*. The fact that a legislature does not explicitly address a practice does not mean the legislature *approves* of the practice.[67]

The second problem with this argument is that it leaves the scope of additional punishment to the discretion of another sovereign. In order for a legislature to adopt a punishment, it must know what it is adopting. Here, if a legislature thought the interstate nature of a crime warranted additional punishment, it would have to specify what additional punishment was warranted. As it stands, there is no way for one legislature to control or limit the punishment dispensed by another. This means the additional punishment a legislature would "intend" to assign would depend not on that legislature's *own* interest, but rather on the interests of another jurisdiction. If allowed, this would create unpredictable and disproportionate results. As an example, suppose one state assigned a punishment of five years for a given offense while another state assigned a punishment of forty years and a third state assigned a punishment of fifty years. It would be preposterous to contend that the first legislature intended the interstate nature of the crime to increase the

66. *E.g.*, McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496 (1991).

67. As an example, consider the poor state of the New Orleans prison system. Sabrina Canfield, *New Orleans Prison Described as a Gulag*, COURTHOUSE NEWS SERVICE, Apr. 4, 2012, http://www.courthousenews.com/2012/04/04/45303.htm [http://perma.cc/73EA-WULY]. The Louisiana legislature is certainly aware of the poor prison conditions, but the fact that the legislature has not taken action to improve the prisons is not equivalent to a legislative seal of approval.

defendant's sentence from five years to forty-five years, let alone from five years to ninety-five years.[68]

Clearly, legislatures do not intend to supplement their punishments with those assigned by other jurisdictions. Moreover, the exceedingly disproportionate result of such incorporation[69] suggests that legislatures would not be able to adopt the punishments assigned by other jurisdictions, even if they wanted to.[70]

B. Prohibiting Multiple Punishments Will Enable Quashing

Another objection one might make is that prohibiting multiple punishments will enable one jurisdiction to frustrate the interests of another. This argument, which is sometimes used to defend the dual sovereignty

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68. The fact that legislatures do not intend to adopt the punishments of other states derives some support from the point that, to my knowledge, no legislature has incorporated the punishment of another jurisdiction into its criminal statutes. If we accept the premise that legislatures articulate their intentions, then the complete lack of such an incorporation is telling.

    Another potential response to this objection is that a sentencing enhancement adopted to solve the unique problems related to interstate crimes might be unconstitutional on federalism grounds. It is the federal government, rather than the states, that has the power to regulate and respond to interstate problems. U.S. CONST. art. I, § 8, cl. 3; AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 107-08 (2005); *see also* Arizona v. United States, 132 S. Ct. 2492, 2495 (2012) ("States are precluded from regulating conduct in a field that Congress has determined must be regulated by its exclusive governance. Intent can be inferred from a framework of regulation 'so pervasive . . . that Congress left no room for the States to supplement it' or where a 'federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" (citations omitted) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))). While it is not altogether clear that the federal government's regulation of interstate crime is "pervasive" enough to prevent state action, the scope of the federal criminal justice system and of the federal Commerce Clause power in general, for example, *Gonzales v. Raich*, 545 U.S. 1 (2005), suggests there is a case to be made. *See also* S. Ry. Co. v. R.R. Comm'n of Indiana, 236 U.S. 439, 446 (1915) ("[T]he principle that the offender may, for one act, be prosecuted in two jurisdictions has no application where one of the governments has exclusive jurisdiction of the subject-matter, and therefore the exclusive power to punish.").

69. King, *supra* note 7, at 154-55, 186-96 (recognizing that cumulative punishments across several jurisdictions would violate the Eighth Amendment prohibition of excessive punishments and explaining how courts should determine whether a cumulative punishment is excessive).

70. Note that the problem of disproportionality does not arise in the status quo because the adopted view is that each punishment is assigned for a distinct crime. But if the *cumulative* punishment were assigned by a single state or jurisdiction, then the Eighth Amendment proportionality requirements would come into play.

doctrine,[71] maintains that one jurisdiction could use a "sham trial" or sham sentence to preclude a subsequent prosecution. In the context of multiple punishments, one could argue that a jurisdiction could convict a defendant and impose a punishment large enough to vindicate the interests of any other jurisdiction. In light of the sentence imposed by the first jurisdiction, other sovereigns that would ordinarily prosecute would have nothing more to gain. After the practical prosecution period has passed,[72] the first jurisdiction would commute the sentence, effectively allowing the defendant to get away with much less punishment than he otherwise would have received, and preventing other jurisdictions from fully and effectively vindicating their interests.

While prosecution preclusion poses serious problems for those opposed to the dual sovereignty doctrine, it has much less force when applied to the protection from multiple punishments. The Due Process Clause prohibits a second sentencing court from imposing a redundant sentence, but it does not prevent the court from *conditionally* adopting the sentence imposed by the first jurisdiction. Such an adoption would recognize that the defendant would normally have received a full sentence, but that imposition of the sentence can be suspended, so long as the first sentencing jurisdiction follows through with its assigned punishment.[73] Under such a view, one jurisdiction acting alone would not be able to commute a defendant's sentence in full. Instead, it would only be able to commute the portions of the defendant's sentence that do not advance the interests of the second sentencing court.[74] Functionally, it would

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71. *See, e.g.*, United States v. Lanza, 260 U.S. 377, 382 (1922); Amar & Marcus, *supra* note 6, at 16-18; Charles L. Pritchard, Jr., *The Pit and the Pendulum: Why the Military Must Change Its Policy Regarding Successive State-Military Prosecutions*, ARMY LAW., DEP'T ARMY PAMPHLET No. 27-50-414, Nov. 2007, at 1, 9, http://www.loc.gov/rr/frd/Military_Law/pdf/11-2007.pdf [http://perma.cc/ZTJ5-KR4E].

72. Although a jurisdiction can technically prosecute any time before the statute of limitations expires, there are practical limits to how long after a crime a prosecution can take place. The more time passes, the more difficult it is to adequately investigate a crime, find witnesses, and mount a case strong enough to obtain a conviction. In this sense, the preclusion would not be absolute, as it is in the double jeopardy context where, as a matter of law, one prosecution precludes another. Nevertheless, the objection is still worthy of discussion.

73. States would use a similar mechanism in cases where the punishment assigned by the first sentencing sovereign is not final. For example, if the first sovereign obtains a conviction but the conviction (or sentence) is subject to appeal, a second sentencing court can impose a sentence but allow it to be commuted if the sentence imposed by the first jurisdiction is upheld.

74. Using the terminology from Part II, a jurisdiction, acting alone, would only be able to commute the portions of the sentence that were not adopted by any other court—the portions that compose $Y_{incompatible}$. In order for a multi-sovereign defendant to have his full sentence commuted, all sentencing jurisdictions would have to agree to commute the portions of the sentence they adopted.

be as though the two jurisdictions imposed concurrent sentences. Commuting one of two concurrent sentences does not, in actuality, reduce the sentence a convict actually receives.

Unfortunately, a conditional adoption of another sovereign's punishment does not fully solve the problem. The conditional adoption can only take place if the second sovereign brings a case in the first place. But if the first punishing sovereign imposes a full punishment, other sovereigns would accomplish little through a second prosecution. As described above, the first sovereign could wait until a second prosecution becomes infeasible before commuting the sentence, thereby frustrating or, at the very least, significantly hampering other sovereigns' ability to pursue their interests. The reason why this scenario does not constitute a significant problem is that interactions between sovereigns are not one-time events. The way different jurisdictions approach successive prosecutions in any given case will be informed by their prior experiences. Accordingly, if one sovereign quashes or frustrates the interests of another, other jurisdictions will be on notice and will, in subsequent cases, initiate their prosecutions without regard to the actions of the quashing sovereign. In doing so, they will impose their own punishment and will thus avoid the potential commutation of their preferred sentences.

C. Prosecutorial Discretion

1. Prosecutors, Not Judges, Should Evaluate Interests

Under my proposal, the determination of whether a punishment satisfies the interests advanced by a legislature would be made by a judge. In opposition to my advocacy, one could argue that it would be better if this determination were left to the discretion of prosecutors. More specifically, one could argue that a prosecutor's decision to bring a second set of charges reflects a determination that the punishment imposed by the first sentencing jurisdiction is insufficient and that additional punishment is needed. Because prosecutors regularly consider the extent to which a defendant has already been punished and potentially the extent to which the sovereign's interests have already been vindicated,[75] one could argue that prosecutorial discretion functions as an

75. *See, e.g.*, Petite v. United States, 361 U.S. 529 (1960) (describing the considerations made by U.S. Attorneys' offices and by the Department of Justice when considering whether to pursue charges in a multi-sovereign case); United States v. Ng, 699 F.2d 63, 65-66 (2d Cir. 1983) (describing how a prosecutor declined to prosecute a defendant on account of punishments the defendant had received from a different jurisdiction); Braun, *supra* note 4, at 5 ("Approximately half the states have interpreted their constitutions or have enacted

effective proxy for legislative intent and therefore that there is no due process violation.

While this objection seems persuasive, there are two reasons why it does not undermine the need for judges to engage in the due process multi-punishment inquiry. First, due process rights are guaranteed by the Constitution and so cannot be left to the discretion of a prosecutor. Just as a court cannot enter a judgment for a non-existent crime, so too a court cannot assign a punishment that is in excess of the punishment authorized by a legislature. This is true regardless of whether a prosecutor exercises discretion when bringing a charge or requesting a sentence.

Second, by statute, prosecutors often lack authority to exercise discretion over sentences. For instance, suppose State *A* convicts a defendant of a crime and assigns a punishment of ten years' imprisonment. Further suppose that State *B* has an equivalent version of the same crime, but that State *B*'s version of the crime has a mandatory minimum sentence of eleven years' imprisonment. An additional year of imprisonment is needed to satisfy State *B*'s interests. The problem is that a prosecutor from State *B* has no control over mandatory minimums. If a State *B* prosecutor were to charge the defendant, he would not have the power to assign the appropriate punishment, even if he wanted to. Only the judge would have the authority to reduce the sentence on due process grounds.[76] In short, while it is certainly a sound practice for prosecutors to consider the extent to which additional prosecution is necessary, judicial review and discretion are still essential.

2. *Selective Charging*

While some may be concerned that my proposal does not leave enough room for prosecutorial discretion, others might argue that my proposal does not do enough to limit prosecutorial discretion. Specifically, one could argue that prosecutors could avoid a net sentence reduction by charging defendants

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legislation to restrict the power of state prosecutors to bring charges against individuals for offenses for which they have already stood trial in federal court.").

76. A discussion of mandatory minimum sentences might lead to an additional objection. One could argue that judges are required to adhere to mandatory minimum sentence guidelines and that, as a result, judges would have only a limited ability to reduce sentences (regardless of the punishment imposed by a previous sentencing sovereign). This objection has a very simple answer. When assigning a sentence, a judge need only incorporate the cumulative sentences assigned by other sovereigns for the same crime. As argued *supra* in Part II.B, when a judge reduces a sentence, he is really imputing a sentence from one jurisdiction to another. That is, the judge adopts the previous sentence as though it were his own. By imputing previous sentences in this way, judges can satisfy both mandatory minimum sentences *and* the Due Process Clause.

with offenses carrying higher penalties. Suppose Arthur commits a crime across States *A* and *B*. State *A* convicts Arthur and assigns a punishment of five years' imprisonment. Normally, the prosecutor and State *B* would seek to obtain a sentence similar to that of State *A*. In this case, however, the prosecutor knows that if he adopts his usual strategy and obtains a five-year sentence, then the sentencing judge would use Arthur's prior punishment to functionally reduce the sentence to zero years. To avoid this outcome, the prosecutor decides to charge Arthur with a more serious version of the same offense. If he obtains a conviction, Arthur will receive a sentence of ten years (or five years, after taking into account Arthur's previous punishment). One could argue that if prosecutors can avoid a sentence reduction by exercising their charge discretion, then my proposal would have little impact. This objection is flawed for two reasons.

First, it assumes the existence of a more severe charge containing the same (or similar) elements. This creates something of a double-bind. If a more severe charge does not exist, then the objection crumbles, even if accepted on its own terms. If, however, a more severe charge *does* exist, then it is safe to conclude that it exists because the state legislature wants it to exist. In other words, if a more severe charge exists, then no due process violation would be implicated by sentencing a defendant under that charge. The due process protection discussed in this paper is concerned only with the question of whether a sentence is authorized by the legislature. It is not concerned with whether a prosecutor exercises his discretion consistently. That is, the appropriate sentence baseline to consider is the punishment authorized by the legislature of the sentencing state, as indicated by statute—*not* the sentence that, all things considered, would have been imposed had the defendant only been charged by one sovereign.

Second, the objection fails to consider that prosecutorial discretion is not absolute. Even in a dual-sovereign context, concerns of selective and vindictive prosecution still apply and still protect defendants. If a prosecutor charges Betty (and dozens of other similarly situated individuals), a single-sovereign defendant, under one statute, and Arthur, a multi-sovereign defendant who committed an identical crime under identical circumstances (but for the interstate nature of his crime) under a different statute, then Arthur would likely have a strong claim for selective prosecution. While prosecutors have broad discretion,[77] their discretion is not unlimited. Specifically, prosecutors are not allowed to retaliate against defendants for exercising their

77. United States v. Armstrong, 517 U.S. 456, 464 (1996).

constitutional rights.[78] If a prosecutor assigns a more severe charge and/or attempts to obtain a more severe sentence because a defendant has invoked or would likely invoke his due process right to be protected from punishment absent legislative authorization, then a defendant could reasonably argue that the more severe charge is illegitimate. As the Supreme Court recognized in *Bordenkircher v. Hayes*, "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort."[79]

CONCLUSION

The Double Jeopardy Clause provides protection from multiple prosecutions and from multiple punishments. Except when it doesn't. Where two or more sovereigns are involved, double jeopardy protections seem to disappear. The criticisms leveled against the dual sovereignty doctrine have been varied and plentiful. But when it comes to solutions, something always seems to get lost in the mix. What makes the doctrine difficult to grapple with is the fact that the Constitution protects not just the interests of defendants, but also the integrity of our federalist system. Any solution to the dual sovereignty problem must therefore take seriously the validity and integrity of sovereign interests, both at the state and federal level. But recognizing sovereign interests is not enough. Proposed reforms must also take seriously a defendant's right to receive only as much punishment as is needed to advance the interests of the sentencing legislatures.

The problem is that essentially every proposed reform fails to take into account one or both of these interests. Abandoning the doctrine whole hog would allow any sovereign to nullify the law of every other sovereign. Replacing the doctrine with a requirement that all interested sovereigns take part in a joint prosecution would prevent each jurisdiction from pursuing its own preferred strategy, would be unwieldy and inefficient, and would not prevent one state from nullifying the interests of another. Likewise, replacing the doctrine with a rule that allows a second prosecution to go forward only if a court determines *ex ante* that the first proceeding advanced "different interests" would fail to take into account the *extent* to which the first proceeding failed to sufficiently advance those interests and would allow the first sovereign to quash the interests of the second *ex post* through an after-the-fact pardon.

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78. Wayte v. United States, 470 U.S. 598, 608 (1985) ("[T]he decision to prosecute may not be 'deliberately based upon an unjustifiable standard' . . . including the exercise of protected statutory and constitutional rights." (citations omitted)).

79. 434 U.S. 357, 363 (1978).

Where each of these proposals fails, mine succeeds. On the sovereign side, any jurisdiction would be free to pursue a prosecution to advance its interests; the proceedings of one jurisdiction would not be able to undermine those of any other, either ex ante or ex post; and all judgment calls relating to the decision to prosecute or to the optimal trial strategy would be left to the discretion of a jurisdiction's prosecutors, where they belong.

On the defendant side, viewing sentences cumulatively allows a defendant to avoid excessive, unauthorized, and unnecessary punishments; the relative certainty associated with sentencing maximums would alleviate much of the anxiety and tension associated with multiple prosecutions and multiple trials; and the protection from multiple punishments would have a spillover effect that makes multiple prosecutions less likely.

In *Double Jeopardy Law Made Simple*, Akhil Amar argues that the due process principle of collateral estoppel can fill in the gaps and protect defendants where double jeopardy cannot.[80] It seems the Due Process Clause is at it again. While the dual sovereignty doctrine constitutes a giant blind spot in double jeopardy jurisprudence, the Constitution has not left defendants high and dry. The due process protection from punishment without legislative authorization addresses the flaws of the dual sovereignty doctrine without sacrificing the principles of sovereignty and independent governance that justify the doctrine in the first place. If the dual sovereignty doctrine is a blind spot, then due process is double jeopardy's rear-view mirror.

80. Amar, *supra* note 47, at 1827–29.