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Ronald J. Allen
Northwestern University School of Law

John P. Ratnaswamy
Northwestern University School of Law

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Heath v. Alabama: A Case Study of Doctrine and Rationality in the Supreme Court

RONALD J. ALLEN*
JOHN P. RATNASWAMY**

One of the most serious complaints that can be directed at the Supreme Court of the United States is that the Court has confused mechanistic application of verbal formulations of doctrine with rational consideration of the reasons that gave rise to those formulations. The Court, as it reminds us often enough, does not sit as a court of errors.[1] It sits to decide matters of national significance, and thus it continually addresses questions and arguments of policy. Consequently, the Court has substantial experience in distinguishing the arid rules that emerge from a common law process from the live reasons, policies, and concerns that give rise to those rules and from which their meaning should be derived. In addition, the Court

* Professor of Law, Northwestern University School of Law. J.D., University of Michigan, 1973; B.S., Marshall University, 1970. Professor Allen was counsel for Mr. Heath before the Supreme Court of the United States and is presently consulting with Mr. Heath's counsel in Alabama post-conviction relief proceedings.

** J.D., Northwestern University School of Law, 1985; M.A., B.S., Northwestern University, 1982. While Mr. Ratnaswamy was Professor Allen's research assistant he assisted in the preparation of petitioner's pleadings in *Heath*.

[1] "For many years the Court and the Justices have admonished the bar and the public that the Supreme Court 'is not, and never has been, primarily concerned with the correction of errors in lower court decisions.' " Gressman, *Much Ado About Certiorari*, 52 GEO. L.J. 742, 755 (1964) (quoting Chief Justice Vinson's address to the American Bar Association on September 7, 1949). In 1979 all nine Justices of the Court endorsed a bill to reduce its obligatory appeal jurisdiction in a letter to Congress that stated in part: "[At present] the Court is required to devote time and other finite resources to deciding on the merits cases which do not, in Chief Justice Taft's words, 'involve principles, the application of which are of wide public importance or governmental interest, and which should be authoritatively declared by the final court.' " G. GUNTHER, CONSTITUTIONAL LAW 62-63 (10th ed. 1980). *See also* Harlan, *Manning the Dikes*, 13 REC. A.B. CITY N.Y. 541 (1958); HEARINGS BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY, 67TH CONG., 2D SESS. SER. 33, AT 2 (1922) (TESTIMONY OF CHIEF JUSTICE TAFT); SUP. CT. R. 17 ("Considerations governing review on certiorari").

typically has the benefit of hearing issues after they have been considered by numerous lower courts that, through their opinions and decisions, have advanced understanding of the relevant problems.

Nor are these the extent of the Supreme Court's resources. Presumably the Court has presented to it a higher than average level of advocacy in which skilled attorneys probe the background of the relevant and generally competing rules of law in order to convince the Court that one perspective upon those rules is superior to any other.[2] Obviously, this is a process that relies on elucidation of the meaning and source of the relevant rules, not just upon their verbal formulations. Moreover, the Court has its clerks, individuals who have distinguished themselves by their legal abilities in superb law schools and who have the time and skills to rectify failings in research or preparation of the advocates. Perhaps even more importantly, the Supreme Court has no deadlines. It determines when it is ready to decide a case, and thus can study a problem until the members of the Court are satisfied that the matter is understood.[3]

Superimposed over all the resources that the Court possesses to assist its decision-making process is the fact that the Court makes clear that it is aware of the distinction between doctrine and rationale. It does so in its numerous opinions on the role of stare decisis in constitutional adjudication,[4] which necessarily distinguish between acceptance of a prior decision's holding and full deliberation over what rule should govern a case. The Court also demonstrates its cognizance of the significance of reasoned justification in the even more numerous opinions in which it relates its conclusions to acceptable premises in an orderly fashion that can only be the result of an effort to provide a coherent rationale for the conclusions that it draws.[5] Indeed, many dissenting and concurring opinions are

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[2] Perhaps the failing in Mr. Heath's case was the inadequacy of his counsel. That is for others to judge, but such a conclusion would in some ways be more comforting than the thesis of this article, which is that the Court's decision in *Heath* was the result of an abdication of legitimate decision-making methodologies.

[3] Although the caseload of the Court has increased significantly in recent decades, the number of cases disposed of by full opinion has not varied greatly. G. GUNTHER, CONSTITUTIONAL LAW 72 (10th ed. 1980).

[4] *See, e.g.*, Vasquez v. Hillery, 106 S. Ct. 617, 624-25 (1986); Miller v. Fenton, 106 S. Ct. 445, 449-53 (1985); Arizona v. Rumsey, 104 S. Ct. 2305, 2311 (1984); Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm., 461 U.S. 375, 390-93 (1983); Thurston Motor Lines v. Rand, 460 U.S. 533, 535 (1983); United States v. Ross, 456 U.S. 798, 824 (1982); Edelman v. Jordan, 415 U.S. 651, 670-72 (1974); Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965); Swift v. Allwright, 321 U.S. 649, 665 (1941).

[5] The nation's highest appellate court would have no reason to write or publish opinions were it not seeking to explain its decisions. By stating reasons for its rulings, the Court buttresses the authority of its orders and more broadly that of the Court as an institution. The Court's clarification or pronunciation of the law also may make evident

written in which the primary issue is the majority's, or some member of the Court's, "understanding" of a rule's rationale.[6] This "understanding" is of importance, of course, only if rules are based on reasons, and those reasons determine the meaning and scope of the rules. The work product of the Court for the most part reflects a belief that both of these propositions are true.

For the most part, but not always. On occasion the Supreme Court renders decisions that are surprisingly insensitive to the need for a reasoned justification of the Court's conclusions. Almost invariably the results in such cases are highly problematic, which reconfirms the crucial role of reasoned outcomes in constitutional adjudication. Opinions lacking any evident analytical foundation are significant reminders that being last does not ensure being right—a healthy thing to remember in a constitutional democracy that may tend to view the Court with too much rather than too little reverence—thus substantiating the value of all questions always being open in constitutional adjudication.[7] These cases also play an important role in investigations into the nature of the judicial function by providing valuable evidence of how different processes of judicial decision-making may affect the results in cases. The information that emerges from such an inquiry is of great consequence to a common law system of decision, especially to one that invests its courts with the power of judicial review. Such cases also need to be

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the need for new legislation or constitutional amendment. Perhaps most importantly, the common law process could not function effectively without the Court's promulgation of its opinions; judgments or even recitations of holdings absent explication of their underpinnings would provide little or no guidance to lower courts in applying those rulings to anything other than identical factual situations, and possibly not even to those if the facts of the cases before the Court were not made clear. The importance of reasoned opinions is clearly demonstrated by the fact that the Supreme Court itself places considerably less precedential weight on summary dispositions, Caban v. Mohammed, 441 U.S. 380, 390 n.9 (1979); Tully v. Griffin, Inc., 429 U.S. 68, 74-75 (1976); Edelman v. Jordan, 415 U.S. 651, 670-71 (1974); and on opinions which do not treat a particular argument before the Court or which dispose of it *sub silentio*; Penhurst State School v. Halderman, 104 S. Ct. 900, 917-19 (1984); Edelman v. Jordan, 415 U.S. 651, 670-71 (1974).

[6] Examples from the Court's current term include: Davidson v. Cannon, 106 S. Ct. 668 (1986) (the dissenters contested the majority's understanding of the scope of the interests protected by the due process clause of the fourteenth amendment); United States v. Loud Hawk, 106 S. Ct. 648 (1986)(the dissenters disputed the majority's view of the interests served by the speedy trial clause of the sixth amendment); Maine v. Moulton, 106 S. Ct. 477 (1985)(the dissenters challenged the majority's understanding of the rationales of the sixth amendment's right to counsel provision and the exclusionary rule); Green v. Mansour, 106 S. Ct. 422 (1985)(the dissenters disagreed with the majority's view of the rationale of the eleventh amendment).

[7] Constitutional questions can never be finally settled because the rule of *stare decisis* is not absolute. *See* cases cited *supra* note 4.

studied to determine whether there is any justification for the Court's conclusions, despite the Court's failure to consider or articulate it.

We will engage in just such a case study in this Article, focusing on the recent decision of the Supreme Court in *Heath v. Alabama*,[8] in which the Court held that the double jeopardy prohibition does not bar different states from bringing successive prosecutions of the same individual for the same crime. First, we examine the factual background of the case and summarize the three main contentions of the Court's majority opinion.[9] We then discuss the history of the double jeopardy prohibition[10] and its "dual sovereignty" exception.[11] In light of that background, we evaluate the validity of the majority's arguments in *Heath*.[12] This analysis reveals that *Heath* is an example of simplistic application of doctrine unresponsive to the reasons that gave rise to the rules the Court purports to apply. The relevant considerations in *Heath* point unmistakably to a different outcome than that which was reached by the Court, and there are no countervailing justifications for its holding. By establishing these propositions, we will attempt to show that *Heath* is little more than a "derelict on the waters of the law"[13] and that its impact on the development of the law should be primarily as an example of poor judicial craftsmanship. This may be little solace for those unfortunate souls caught within the wake of this particular derelict, but the demonstration may help reduce the incidence of such cases in the future by bringing attention once more to the relative roles of rules and reason in constitutional adjudication. Following our analysis of the Court's opinion, we develop the approach we believe the Court could, and should, have taken.[14] Finally, we briefly discuss some of the likely consequences of the Court's ruling in *Heath*.[15]

I. The Facts and Opinion in Heath

On August 31, 1981, the body of Rebecca Heath, a resident of Alabama, was discovered in Georgia.[16] The cause of death was a gunshot wound to the head.[17] Suspicion immediately centered on

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8 106 S. Ct. 433 (1985).
9 *See infra* notes 16-31 and accompanying text.
10 *See infra* notes 32-61 and accompanying text.
11 *See infra* 62-81 and accompanying text.
12 *See infra* 82-125 and accompanying text.
13 Lambert v. California, 355 U.S. 225, 232 (1957)(Frankfurter, J., dissenting).
14 *See infra* notes 126-42 and accompanying text.
15 *See infra* notes 143-45 and accompanying text.
16 *Heath*, 106 S. Ct. at 435.
17 *Id.*

Mrs. Heath's husband, Larry Heath, who eventually confessed and pleaded guilty to a Georgia indictment for planning his wife's murder.[18] Heath was sentenced to life imprisonment for his crime.[19] Approximately seven months after his confession and ten weeks after having been sentenced to life imprisonment, Heath was called to testify at the trial of his alleged confederates in Georgia.[20] Upon being called to the stand, Heath refused to testify on the ground that he might be subject to a kidnapping charge in Alabama, and thus had a right not to incriminate himself under the fifth amendment as incorporated by the fourteenth amendment. One week after Heath exercised the privilege against self-incrimination in Georgia he was indicted by a grand jury in Alabama, but not for kidnapping; rather, he was indicted for the same murder for which he already had been convicted and sentenced in Georgia.[21]

Heath subsequently was tried in Alabama, convicted, and sentenced to die.[22] On appeal, he argued that his trial and sentence violated the double jeopardy prohibition because he was twice convicted and sentenced for the murder of the same individual.[23] The State defended its actions on the grounds that the "dual sovereignty" exception to the double jeopardy prohibition should apply to successive state prosecutions, as it does to separate prosecutions by a state and the federal government[24] and to separate prosecutions by the federal government and an Indian tribe.[25]

The Supreme Court, with Justice O'Connor writing for the majority, affirmed the conviction and sentence of death in an opinion that purports to be an easy application of the settled dual sovereignty exception. The Court concluded that: "The dual sovereignty doctrine, as originally articulated and consistently applied by this Court, compels the conclusion that successive state prosecu-

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18 *Id.*

19 *Id.*

20 Brief for Petitioner at 3, *Heath*.

21 Petitioner was indicted for "murder during a kidnapping." Ala. Code § 13A-5-40(a)(1) (1982). Respondent did not deny petitioner's contention that the Georgia and Alabama offenses were the same offense for double jeopardy purposes. *Heath*, 106 S. Ct. at 437.

22 106 S. Ct. at 436.

23 In the lower courts, his former counsel also raised the question of Alabama's jurisdiction over those events that had occurred in Georgia. His counsel failed to raise the jurisdictional question before the Alabama Supreme Court. As a result, the U.S. Supreme Court refused to consider the jurisdictional question. 106 S. Ct. at 436-37. This issue, and others, now are pending in state post-conviction relief proceedings.

24 Bartkus v. Illinois, 359 U.S. 121, *reh'g denied*, 360 U.S. 907 (1959); Abbate v. United States, 359 U.S. 187 (1959).

25 United States v. Wheeler, 435 U.S. 313 (1978).

tions by two States for the same conduct are not barred by the Double Jeopardy Clause."[26]

The discussion in *Heath* has three major contentions, each of which upon more careful inquiry than that presented by the Court turns out to be insufficient to support its holding. The Supreme Court first asserted that 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.' "[27] Thus, in the Court's view, "the crucial determination is whether the two entities that seek successively to prosecute a defendant for the same course of conduct can be termed separate sovereigns."[28] According to the Court, states are separate sovereigns for this purpose; thus this test was satisfied.[29]

The Court's second major contention was that it would be unseemly to require states to compete with each other in the enforcement of their respective laws: "To deny a State its power to enforce its criminal laws because another State has won the race to the courthouse 'would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines.' "[30] Finally, the Court asserted that each State has separate interests in the enforcement of its own laws which "by definition can never be satisfied by another State's enforcement of *its* own laws."[31] Thus, each state is justified *a prior* in prosecuting an individual for an offense no matter how many prosecutions already have been brought for the same conduct in the courts of other governments.

II. The History of the Double Jeopardy Clause

An examination of the history of the double jeopardy prohibition reveals that a limitation of the principle to successive prosecutions brought by a particular prosecuting authority is not supported by the available historical evidence. Rather, the bar on multiple trials and punishments for the same conduct has been founded upon individual interests that are implicated by repeated criminal proceedings, regardless of the identity of the prosecuting authority.

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26 *Heath*, 106 S. Ct. at 437.
27 *Id.* (citing United States v. Lanza, 260 U.S. 377, 382 (1922)).
28 *Id.*
29 *Id.* at 438-39.
30 *Id.* at 440 (quoting *Bartkus*, 359 U.S. at 137).
31 *Id.* (emphasis supplied).

Although many of the principles underlying the Bill of Rights originated in the law of England, particularly in the common law, the origins of the prohibition of double jeopardy are much older: "Of all procedural guarantees in the Bill of Rights, the principle of double jeopardy is the most ancient. It is 'one of the oldest ideas found in western civilization,' with roots in Greek, Roman, and canon law."[32] In Roman law, criminal prosecutions were brought not by the state but rather by aggrieved citizens.[33] The principle of double jeopardy therefore was formulated in the *Digest of Justinian* as the precept that " 'the governor should not permit the same person to be again accused of a crime of which he had been acquitted.' "[34] Thus, at its inception the prohibition of double jeopardy was not formulated in terms of who brought charges, but rather barred an individual from being subjected to repeated accusations of the same crime under any circumstances.

Canon law, which began its development at the close of the Roman empire,[35] grew to accept the maxim "*Nemo bis in idipsum*—no man ought to be punished twice for the same offense."[36] In the twelfth century a major element of the conflict between Thomas Becket and Henry II was the king's desire to have clerics who had been convicted in ecclesiastical courts turned over to civil tribunals for further prosecution.[37] Henry conceded the point in 1176 following Becket's martyrdom.[38] The king's concession is significant because the royal and ecclesiastical courts obviously did not draw their power from the same sovereign. The application of the double jeopardy bar to successive religious and secular prosecutions demonstrates that the focus of the prohibition was the defendant, not the prosecutor.

The foundations of the modern understanding of double jeopardy began to emerge in the seventeenth century.[39] Sir Edmund Coke's *Second Institutes* propounded the double jeopardy prohibition

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32 Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81 (1978)(footnotes omitted).

33 J. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 2 (1969).

34 *Id.*

35 *Id.* at 3.

36 M. FRIEDLAND, DOUBLE JEOPARDY 5 (1969).

37 For somewhat different descriptions of the controversy, compare M. FRIEDLAND, *supra* note 36, at 5, with J. SIGLER, *supra* note 33, at 3.

38 M. FRIEDLAND, *supra* note 36, at 5.

39 "The last half of the seventeenth century was a period of increasing consciousness of the importance of double jeopardy. Perhaps this was due partly to the writing of Lord Coke and partly as a reaction against the lawlessness in the first half of the century." *Id.* at 11 (footnote omitted). *See id.* at 11-14 (for further discussion of this point).

as a basic maxim of the common law.[40] Coke recognized the present double jeopardy categories of *autrefois acquit* (former acquittal), *autrefois convict* (former conviction) and former pardon, and, although he seems to have used the term "jeopardy" to refer to the possibility of capital punishment, "[b]y the time the *First Institute* was completed, the double jeopardy doctrine was clearly defined as . . . a protection against the state even for relatively minor offenses."[41] Sir William Blackstone, who wrote one hundred years after Coke, began to use the word "jeopardy" with more frequency to describe the doctrine itself, and he rested his rules of *autrefois convict* and *autrefois acquit* upon a single principle of common law.[42] Blackstone described the doctrine of double jeopardy as limited to government prosecutions alone.[43]

Coke and Blackstone had a profound influence on American understanding of the common law,[44] but to a certain extent early development of double jeopardy law in America took its own path. The civil courts of Massachusetts were forbidden to sentence a defendant twice for the same offense by the *Body of Liberties* of 1641, which was composed at the direction of the governor and the general court.[45] The laws of Massachusetts influenced the development of the laws of many other colonies,[46] and their emphasis on the prohibition of double jeopardy probably contributed to its eventual inclusion in the Bill of Rights.[47] A number of the early post-Revolutionary state constitutions did not bar double jeopardy,[48] however, but this is most likely attributable to the fact that the plea was generally recognized by statute or at common law.[49] During this period, American law generally followed earlier English developments by extending double jeopardy principles to non-capital

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40 J. SIGLER, *supra* note 33, at 16-19.

41 *Id.* at 19. *See id.* at 18-19 (for further discussion).

42 *Id.* at 20.

43 *Id.* In England, the Roman practice of prosecution of criminal suits by private parties still was employed occasionally as late as the eighteenth century; it was banned by statute in 1819. M. FRIEDLAND, *supra* note 36, at 8-9. Blackstone further limited the doctrine of double jeopardy to felony cases alone, and required an actual prior verdict of guilt or innocence for the doctrine's application; both requirements have been rejected in American law. J. SIGLER, *supra* note 33, at 20.

44 J. SIGLER, *supra* note 33 at 16-19.

45 The *Body of Liberties* was "less a code of existing law than it was a compilation of constitutional provisions." G. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS 129 (1960).

46 J. SIGLER, *supra* note 33, at 22.

47 *Id.* at 22-23.

48 *Id.* at 23.

49 *Id.* at 18-19, 24-27.

offenses.[50]

During the ratification process for the Constitution the demand for a bill of rights grew, and among the amendments proposed was that there should be "no second trial after acquittal."[51] After the Constitution was ratified, James Madison proposed various amendments in the House of Representatives, including the provision that: "No person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offense."[52] The House rejected the amendment and other proposed formulations of the prohibition, including one which added the phrase "by any law of the United States" after the words "same offense."[53] The rejection of the latter amendment permits "the speculation by negative inference that the double jeopardy clause may have been intended to apply to the states and the federal government alike."[54] At the least, its rejection suggests that federal courts were not to try an individual for a crime for which that individual already had been prosecuted by another sovereign.[55]

While the House was deliberating, the Senate adopted a proposed amendment providing that "no person shall be subject, except in cases of impeachment to more than one trial, or be twice put in jeopardy of life or limb by any public prosecution."[56] This formulation indicates a sensitivity on the part of the first Congress to the individual interests at stake in successive prosecutions by different governments. In conference committee the present form of the Bill of Rights was drafted, which Congress then approved for submission to the states.[57] There was little debate on the floor of the

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50 *Id.* at 19, 23-24.

51 J. ELLIOTT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1836). *See also* J. SIGLER, *supra* note 33, at 28, 32.

52 J. SIGLER, *supra* note 33, at 28 (footnote omitted).

53 *Id.* at 30.

54 *Id.* (footnote omitted). *See* State v. Moor, 1 Miss. 134 (Miss. 1823). *Cf.* Phillips v. McCauley, 92 F.2d 790 (2d Cir. 1937)(where the court apparently rejected this conclusion). In Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833), the Court stated that the first eight amendments were inapplicable to the states.

55 *See* United States v. Furlong, 18 U.S. (5 Wheat.) 184 (1820)(discussing when prosecution by another nation of a crime in international waters will bar criminal proceedings in federal courts). The history of double jeopardy principles in international law and in the domestic law of other nations casts even further doubt upon the dual sovereignty theory. For a discussion of the prosecution of the same acts and defendant by more than one nation, see M. Friedland, *supra* note 36 at 357-403; J. SIGLER, *supra* note 33, at 118-54; Grant, *Successive Prosecution by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA L. REV. 1 (1956); Comment, *Federalism v. Double Jeopardy: a Comparative Analysis of Successive Prosecutions in the United States, Canada, and Australia*, 5 CAL. W. INT'L L.J. 399 (1975).

56 J. SIGLER, *supra* note 33, at 31 (footnote omitted).

57 *Id.* at 31-32. The fact that the Senate's formulation of the double jeopardy prohi-

Congress as to the meaning of the double jeopardy clause.[58] However, what debate did occur indicates that it was the intention of the framers to implement their understanding of the common law of Great Britain and the former colonies.[59] The available evidence suggests that at the time of the adoption of the Constitution and the Bill of Rights, the common law was understood to apply the double jeopardy bar to successive prosecutions by different sovereigns.[60] This provides additional evidence that the dual sovereignty theory lacks any historical foundation, and that the double jeopardy prohibition was intended to protect the individual from repeatedly being subjected to criminal proceedings arising out of the same charges, no matter who the prosecuting authority is.[61]

III. The History of the Dual Sovereignty Exception

In the middle of the nineteenth century the conception of the double jeopardy clause as prohibiting successive prosecutions by any prosecuting authority was questioned by *dicta* in a series of three cases.[62] These cases were not motivated by mystical conceptions of "sovereignty;" instead, they were motivated by concerns about the

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bition was rejected might be considered an argument in favor of the dual sovereignty theory. However, that would only be so if it is assumed that by the words "the same offense" in the prohibition as adopted only the laws of the federal government are included; that assumption begs the question of the meaning of the double jeopardy prohibition.

58 I Annals of Cong. 753 (J. Gales ed. 1789). The only issue seriously discussed was the concern that the clause not bar appeals by convicted defendants and retrials where those appeals succeeded if appropriate. *Id.*

59 *Id.*

60 Bartkus v. Illinois, 359 U.S. 121, *reh'g denied*, 360 U.S. 907 (1959); Bartkus, 359 U.S. at 156 n.15 (Black, J., dissenting); Brief for Petitioner at 38-39, *Bartus*; Grant, *supra* note 55, at 8-11. *But see* Comment, *Double Jeopardy and Dual Sovereigns*, 35 Ind. L.J. 444, 444-54 (1960). Justice Frankfurter found the English precedents "dubious." *Bartkus*, 359 U.S. at 128 n.9. However, it appears that at the time our Constitution was framed these cases were understood, rightly or wrongly, as rejecting the dual sovereignty theory. Furthermore, these cases apparently were not even brought to the attention of the Court until the *Bartkus* and *Abbate* cases. *See* Grant, *supra* note 55, at 35. Hence, the Court's reliance in *Bartkus* and *Abbate* on its own precedents is highly problematic.

61 There is certainly no evidence that the states intended to preserve unto themselves any right of successive prosecution. Such prosecutions probably were not considered possible because the common law greatly restricted the territorial scope of state criminal jurisdiction. *See infra* notes 65, 144. Of course, if the Supreme Court at some point determines that states may not exercise extra-territorial criminal jurisdiction, the same result would probably be reached in a case like *Heath* on jurisdictional grounds that should have obtained on double jeopardy grounds.

62 The cases discussed in the text were foreshadowed by two cases decided in 1820. Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820)(discussing federal supremacy); United States v. Furlong, 18 U.S. (5 Wheat.) 184 (1820)(discussing when foreign prosecution of a crime on the high seas will bar prosecution in the United States).

different roles of the two levels of American government and by a growing realization that something had to be done to prevent conflict between the states and the national government. Those considerations led to the discussion in these cases of a dual sovereignty exception to the double jeopardy clause, and it is those concerns, along with the individual interests protected by the clause, that should control the scope of any such exception.

In *Fox v. Ohio*,[63] the Supreme Court reviewed an Ohio conviction for passing counterfeit coin.[64] The defendant's primary contention was that the Constitution's explicit grant of power to Congress to punish counterfeiting preempted the Ohio law,[65] but he also argued that the possibility of double prosecution cast doubt on his conviction.[66] The Supreme Court affirmed, apparently on the theory that the Congressional power was limited to punishing the act of producing counterfeit money and did not reach the passing of false coinage.[67] This conclusion temporarily mitigated any double jeopardy concerns. Three years later, however, the Supreme Court sustained a federal conviction for the uttering of false coinage

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63 46 U.S. (5 How.) 410 (1847).

64 *Id.* at 432.

65 *Id.* at 424. The defendant relied upon U.S. CONST. art. I, § 8. In support of the prosecution, the Attorney General of Ohio argued that prosecution by two states of the same crime was impossible because only one state could possess territorial jurisdiction over a particular crime, but that no such limit barred prosecution by the federal government and a state of the same defendant and conduct. Fox v. Ohio, 46 U.S. (5 How.) 410, 419 (1847).

66 *Fox*, 46 U.S. (5 How.) at 428.

67 *Id.* at 433-34. The Court stated that even if duplicate prosecutions were possible, the states were not subject to the fifth amendment, and that in any event:

> It is almost certain, that, in the benignant spirit in which the institutions both of the State and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed, this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor.

Id. at 435. It is unclear what assumption the Court made about the likelihood of a second prosecution following an acquittal.

Justice McLean, the sole dissenter in Fox v. Ohio, vigorously argued that prosecutions by both the federal and state government "would be a mockery of justice and a reproach to civilization. It would bring our system of government into merited contempt." *Id.* at 440. He argued that:

> To punish the same act by the two governments would violate, not only the common principles of humanity, but would be repugnant to the nature of both governments. . . . There is no principle better established by the common law, none more fully recognized in the federal and State constitutions, than that an individual shall not be put in jeopardy twice for the same offence. This, it is true, applies to the respective governments; but its spirit applies with equal force against a double punishment, for the same act, by a State and the federal government.

Id. at 439.

in *United States v. Marigold*.[68] Although the possibility of double prosecution for this crime was now apparent, counsel for the defendant did not argue that this possibility raised any question as to the validity of the federal prosecution.[69] The Court simply held that the federal statute and prosecution were within the federal government's constitutional powers.[70]

Two years later in *Moore v. Illinois*,[71] the Court for the first time directly discussed the problem of duplicate state and federal prosecutions for the same crime. Moore was convicted under an Illinois statute proscribing the harboring or secreting of fugitive slaves.[72] Moore's principal argument was preemption of the state law by the federal Fugitive Slave Act, but he also objected to the possible double jeopardy problem of prosecution under both the state and federal statutes.[73] The Supreme Court found that the Illinois and federal statutes were dissimilar in their essential underlying purpose, in their definition of the offense, and in the nature of the punishment which they authorized.[74] The purpose of the federal government was protection of the property interests of slave owners, while the state's goal was to bar black persons, whether slave or free, from the state's territory.[75] Despite these differences, the Court nevertheless proceeded to articulate for the first time the dual sovereignty theory:

> An offence, in its legal signification, means the transgression of a law. . . . Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns. And may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. . . . That either or both may (if they see fit) punish such an

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68 50 U.S. (9 How.) 560 (1850).

69 *See id.* at 562-65. Counsel for defendant's "utter neglect of the subject may aptly be characterized as sheer folly." L. MILLER, DOUBLE JEOPARDY AND THE FEDERAL SYSTEM 25 (1968). The Court's only statement reflecting recognition of this question was:

> With the view of avoiding conflict between the State and Federal jurisdictions, this court in the case of *Fox v. The State of Ohio* have taken care to point out, that the same act might, as to its character and tendencies, and the consequences it involved, constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each. We think this distinction sound, as we hold to be the entire doctrines laid down in the case above mentioned, and regard them as being in no wise in conflict with the conclusions adopted in the present case.

United States v. Marigold, 50 U.S. (9 How.) at 569.

70 *Id.* at 567.

71 55 U.S. (14 How.) 13 (1852).

72 *Id.* at 17.

73 The reporter's notes of counsel's arguments do not include this point, but there is reference in the opinion to the argument having been made. *Id.* at 16.

74 *Id.* at 18-19.

75 *Id.*

> offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other . . . .[76]

The decision was an inevitable consequence of its historical context. In *Moore*, the Court was asked to strike down a type of state statute that was at the heart of a dispute over the scope of states' rights, a dispute so serious that it would lead to the Civil War. The Court was being asked to do so not only where the laws of neither "sovereign" impinged upon the legitimate interests of the other, but where the Court was beginning to realize that state and federal criminal statutes were going to overlap and intersect in unpredictable ways. Moreover, none of the alternatives available to the Court were feasible, except for the creation of a dual sovereignty exception to the double jeopardy prohibition.

The Court might have required the states to demonstrate in each case where there was a substantial risk of dual prosecutions that the interests served by state prosecution were sufficiently different from those that would be served by federal prosecution to justify the risk, a position later adopted by the United States both in its brief and oral argument in *Abbate*[77] and essentially in its *Petite* policy.[78] It is clear why the Supreme Court did not adopt this approach in *Moore*. To require such a showing would have been an affront to the very dignity of the states that was at the heart of the tumultuous political controversy the nation was then undergoing, and also would have seriously impinged upon local control of law enforcement.

Alternatively, the Court could have concluded that state prosecution precluded subsequent federal prosecution of the same acts or crimes, but to so hold would have resulted in a significant infringement upon federal supremacy, as would a requirement that the federal government demonstrate a separate interest justifying a second

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[76] *Id.* at 19-20 (footnotes omitted).

[77] *See* Abbate v. United States, 359 U.S. 187, 196 (1959)(Brennan, J., separate opinion).

[78] The *Petite* policy basically bars federal prosecution of an individual already subjected to state prosecution where both prosecutions arise out of the same acts unless a compelling federal interest would be served by the second prosecution. The policy is named after Petite v. United States, 361 U.S. 529 (1960), where the Court granted the Justice Department's motion to vacate a federal conviction and remand the case for dismissal where a prior state conviction involving the same acts already had been obtained. The current statement of the policy may be found in United States Attorney's Manual Sec. 9-2.142 (July 1, 1985).

prosecution.[79] Instead of taking these unattractive paths, the Court formulated the dual sovereignty exception, thus providing a means of accommodating the competing interests of the state and national governments[80] a reconciliation perhaps made all the happier because it was dicta in each of the three cases.[81]

"Dual sovereignty," in short, arose as an exception to the normal rules of double jeopardy for certain fundamental reasons related to the structure of American government. Unless there is some other justification for the theory, it should apply only where the reasons which gave rise to it are present: where two governmental entities pursuing quite diverse interests share substantially overlapping territorial jurisdictions, where there is a substantial risk of interference by one governmental entity in the affairs of another, and where multiple prosecutions are necessary for the satisfaction of the legitimate purposes of each governmental unit. The Court in *Heath* virtually ignored these considerations, and the arguments the Court did advance are inadequate to justify its conclusion.

IV. THE SUPREME COURT'S ARGUMENTS

A. "SOVEREIGNTY" AS THE BASIS OF THE DECISION IN HEATH

The Court's assertion that the original articulation of the dual sovereignty doctrine compels its holding in *Heath* suffers from two difficulties. First, the dual sovereignty doctrine does not exist independent of the double jeopardy clause; rather, the doctrine is derivative of it.[82] Thus, the first issue in evaluating the doctrine's

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[79] The government's voluntary adoption and discretionary application of such a policy poses no such threat. *See supra* notes 77-78 and accompanying text.

[80] *See* L. MILLER, *supra* note 69, at 33 ("The Court wanted to chart a sane course between . . . eroding national supremacy and . . . denigrating the law enforcing responsibilities of the states"); Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. MIAMI L. REV. 306, 313 (1963).

[81] No "dual sovereignty" case involved two actual prosecutions until United States v. Lanza, 260 U.S. 377 (1922). *Lanza* involved the unique circumstance of the explicit "concurrent" power of the federal government and the states under the eighteenth amendment. U.S. CONST. amend. XVIII (repealed). It was not until 1959 that the Court upheld a second prosecution outside that context. Bartkus v. Illinois, 359 U.S. 121, *reh'g denied*, 360 U.S. 907 (1959); Abbate v. United States, 359 U.S. 187 (1959). Both these cases preceded the incorporation of the double jeopardy prohibition into the fourteenth amendment. Benton v. Maryland, 395 U.S. 784 (1969). Doubt about the continuing vitality of the dual sovereignty theory also has been created by Elkins v. United States, 364 U.S. 206 (1960) and Murphy v. Waterfront Comm., 378 U.S. 52 (1964), where the Court held that different "sovereigns" were forbidden to act in combination such that they violated a defendant's rights.

[82] *See* United States v. Wheeler, 435 U.S. 313, 329-30 (1978)(prosecutions by two sovereigns each under its own laws are by definition not for the "same offence"); Moore v. Illinois, 55 U.S. (14 How.) 13, 19-20 (1852)(same). Of course, it is our contention

applicability to successive state prosecutions is the meaning of the double jeopardy prohibition and how it relates to the multiple sovereignties created by the United States Constitution. As we have demonstrated, the available evidence indicates that the double jeopardy clause was intended to prohibit a second prosecution for the same crime, regardless of whether the first prosecution was brought by the same or some other government. That historical evidence also leads to the second problem with the Court's contention. The dual sovereignty doctrine arose as a grudging exception to normal double jeopardy principles designed to reduce developing tensions in the federal structure resulting from the differing, and on occasion conflicting, interests of states and the national government. None of the conditions that gave rise to the exception apply to the situation of successive state prosecutions.

First, and most obviously, states do not share concurrent territorial jurisdiction.[83] Thus, the likelihood that states will come into conflict with each other is much less than is the case in federal/state relations. Moreover, the possibility of that conflict resulting in the nullification of one jurisdiction's laws, as was occurring during Prohibition,[84] is a virtual impossibility because the lack of concurrent territorial jurisdiction means that acts that violate the law of more than one state will be rare. Even in those few instances where a single act may violate the laws of two states, nullification of one state's policies by prosecution in another state is highly unlikely. Prosecution by one state for a criminal act in that state will virtually always further, rather than retard, the interests of another state. Unlike the federal/state context where the relevant governmental entities have fundamentally different concerns and objectives,[85] the criminal laws

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that a "definitional" approach to constitutional adjudication devoid of analysis of the reasons underlying constitutional language and doctrine is an improper mode of decision-making.

[83] *See infra* note 144. Occasionally states share concurrent jurisdiction over a border river. The Supreme Court has stated in dictum that in such cases only one state may prosecute an individual for an alleged crime on the boundary. Nielsen v. Oregon, 212 U.S. 315, 320 (1909).

[84] L. MILLER, *supra* note 69, at 42 ("certain localities boasted openly of their antipathy to any kind of legally-compelled abstinence."). *Cf. supra* note 81 (discussing *United States v. Lanza* and the eighteenth amendment).

[85] The Supreme Court stated in 1876 that:

> The people of the United States resident within any State are subject to two governments: one State; and the other National, but there need be no conflict between the two. The powers which one possesses, the other does not. . . . Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home or abroad. True, it may sometimes happen that a person is amenable to both jurisdictions for one and the same act. . . . This does not, however, necessarily imply that the two governments possess powers in common, or bring them into conflict with each other.

of most of the states are highly analogous.

The *Heath* case is a good example of this similarity. Both Alabama and Georgia penalize murder, and in both states it is a serious felony with penalties ranging up to death.[86] There is no evidence that either state was attempting to subvert the policy of the other to deter and penalize such acts, no evidence that either state ever has done so, and no reason to believe that such interference will occur in the future. Therefore it is difficult to discern any important state interest of Alabama that needed vindication by a separate prosecution for a crime already prosecuted in Georgia, and this will almost always be true in the context of state law enforcement. If in some remarkable instance this was not the case, the most sensible way to handle the matter would be through a particularized application of the "sham prosecution" doctrine[87] or the separate state interests test,[88] rather than through a wholesale and unnecessary reduction in the protections afforded by the double jeopardy clause.

The Court is therefore wrong in its assertion that: "The dual sovereignty doctrine, as originally articulated and consistently applied by this Court, compels the conclusion that successive state prosecutions by two States for the same conduct are not barred by the Double Jeopardy Clause."[89] The best evidence of the intent of the framers indicates that the double jeopardy clause was intended to apply to prosecutions by different sovereigns, and that there was no exception for separate federal and state prosecutions for the same act, let alone separate state prosecutions. In addition, the

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United States v. Cruikshank, 92 U.S. 542, 550 (1876). This division of powers is illustrated by *Abbate*. In that case Illinois convicted defendants of conspiring in Illinois to injure and destroy private property of telephone companies outside the state. *Abbate*, 359 U.S. at 188. The subsequent federal convictions based upon the same acts were for conspiracy to destroy communications equipment controlled and operated by the United States. *Id.* at 188-89. The state thus sought to protect private property interests, while the federal government protected means of communication used by its instrumentalities. *Bartkus* is a less convincing example of the different roles of the two levels of American government. In *Bartkus* a federal jury acquitted the defendant of robbery of a federally insured savings and loan association. *Bartkus*, 359 U.S. at 121-22. The state then convicted the defendant of robbery. *Id.* at 122. Both governments largely sought to protect peace and order, although the federal government also was seeking to protect the federal banking scheme.

86 Ala. Code § 13A-5-45 (1981); GA. CODE ANN. § 26-1101 (1968). These statutes were in effect at the time of Mr. Heath's alleged crime(s).

87 Although the Supreme Court has never had to rule on the question, it is commonly believed that sham acquittals or ridiculously low penalties do not constitute jeopardy. *See Bartkus*, 359 U.S. at 161 (Black, J., dissenting); 21 AM. JUR. 2d *Criminal Law* § 257 (1981); MODEL PENAL CODE § 1.18 (Proposed Official Draft 1962).

88 For a discussion of the separate state interests test see *infra* notes 126, 138-41 and accompanying text.

89 *Heath*, 106 S. Ct. at 437.

cases structuring the dual sovereignty doctrine did so for compelling reasons that are not implicated in the context of successive state prosecutions. The Supreme Court has applied a rule in an opinion devoid of any appreciation for the reasons that led to the rule.

In addition to failing to address the history and policies underlying the dual sovereignty exception, the Court did not provide a coherent argument to support its assertion that states are sovereign for the purposes of the dual sovereignty exception to the double jeopardy clause. Again, a closer look at the concepts that underlie the language and rules that the Court used leads to a conclusion opposite to that reached by the Court.

In essence, the Court has invoked the implications of a remarkably simplistic political theory to support is conclusion. According to the Court, governmental entities are sovereign when "the ultimate source of the power under which the respective prosecutions were undertaken"[90] is different in each case. Moreover, according to the Court, state "powers to undertake criminal prosecutions derive from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment."[91] The Court drew sustenance for this argument from its decision in *Wheeler v. United States*,[92] where it held that Indian tribes and the federal government were separate sovereigns for double jeopardy purposes because Indian tribes derived their authority to prosecute violations of their own laws from their "primeval sovereignty" rather than from "a delegation to them of federal authority."[93]

No matter how one interprets the Court's language, the conclusion of the Court is wrong. The states do not possess any "ultimate source of power" to prosecute criminal offenses. For example, nothing would prohibit a constitutional amendment that took from the states this aspect of their police powers. Thus, whatever the relevant ultimate source of power is, it resides elsewhere than in the states simpliciter. Perhaps more to the point, no case decided by the Supreme Court relies on such a power. Each of the dual sovereignty cases in which the Court upheld separate state and federal prosecutions are clearly ones where Congress, if it chose to do so, could preempt state authority over the acts in question. In fact, whenever an act violates both federal and state law, presumably Congress has the power to preempt state authority to prosecute the

90 106 S. Ct. at 438 (quoting United States v. Wheeler, 435 U.S. 313, 320 (1978)).
91 *Id.*
92 435 U.S. 313 (1978).
93 *Id.* at 328.

act as a result of federal supremacy.[94]

By resting its decision solely on an unelaborated notion of sovereignty, the Court has reified the concept of sovereignty and treated it as though it had meaning independent of the complex of issues and relationships that comprise the political structure of this country. This maneuver is highly problematic; "sovereignty" is a function or description of the political choice to allocate certain powers in certain ways, rather than being the reason powers are so distributed. Through the political process, the citizenry has delegated and forbidden certain powers to both the national and the state governments,[95] while other powers are exclusively the province of one or the other level of government.[96] "Sovereignty" in this country refers to a series of highly complex and interrelated allocations of power of this sort. For example, states must give deference to other states in certain circumstances, such as when required by the full faith and credit clause.[97] Similarly, states are forbidden from engaging in many activities that normally are considered part of the sovereign power.[98] A generalization that states are or are not sovereign in the abstract is therefore misleading at best, and in any event is essentially meaningless.[99]

The extent of the problematic reliance on "ultimate sources of power" to define the parameters of sovereignty is most evident in the Court's use of *Wheeler*. The Court in *Wheeler* did refer to the Indian tribes' "ultimate source of power," but then proceeded to point out that congressional authority over the Indian tribes is plenary.[100] In fact, Congress had limited the power of the tribes to prosecute offenses to those that had a maximum penalty of six months imprisonment.[101] This is a glaring antinomy. Indian tribes are being offered as an example of an entity that posses an "ultimate

94 U.S. CONST. art. VI. For examples of preemption, see Pennsylvania v. Nelson, 350 U.S. 497 (1956); Easton v. Iowa, 188 U.S. 220 (1903); *In re* Lorey, 134 U.S. 372 (1890).

95 U.S. CONST. amends. I-VIII, IX, XIV.

96 *See* U.S. CONST. art. I, amend. X.

97 U.S. CONST. art. IV, § 1.

98 For example, the conduct of foreign affairs is entrusted solely to the national government. Zschernig v. Miller, 389 U.S. 429 (1968)(state alien inheritance law barred because it intruded into foreign affairs, a field entrusted to the President and Congress). For a classic discussion of American federalism and its allocation of powers, see I A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 116-24, 162-79 (Bradley ed. 1945).

99 As is the Court's reliance on the equally uninformative argument that the states are "different" and that their "history" is not the same as that of the federal government. In both cases the question should be why any difference is of significance, but such matters are simply ignored in the Court's simplistic approach to "sovereignty."

100 *Wheeler*, 435 U.S. at 327-28.

101 *Id.*

source of power" to try criminal offenses, and thus as a separate sovereign for double jeopardy purposes, while at the same time plenary congressional authority is postulated. How it is that the Indian tribes can possess an "ultimate source of power" and yet Congress can remove that source at its pleasure is left completely unanswered, undoubtedly because there is no answer. The phrase "ultimate source of power" is just attractive but empty rhetoric in this context.[102]

What is perhaps most remarkable about this rhetorical exercise on the part of the Court is that it was completely unnecessary. The Supreme Court has available to it a much more compelling paradigm for resolving issues of "sovereignty" than this puzzling reliance on sophomoric political theory. That paradigm is a functional one. To determine the respective roles of governmental entities, the underlying interests and relationships involved ought to be analyzed. Last term the Court engaged in such an analysis in evaluating the relationship of federal supremacy and the tenth amendment in

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102 The Supreme Court in *Wheeler* noted:

> By emphasizing that the Navajo Tribe never lost its sovereign power to try tribal criminals, we do not mean to imply that a tribe which was deprived of that right by statute or treaty and then regained it by Act of Congress would necessarily be an arm of the Federal Government. That interesting question is not before us, and we express no opinion thereon.

435 U.S. at 328 n.28. This suggestion of a "light bulb" theory of sovereignty illustrates the absurdity of the vacuous political metaphysics underlying the dual sovereignty theory as applied in this manner. There are other problems with the Court's political science. For example, 37 of the 50 states were admitted to the Union by Act of Congress. But while the dual sovereignty theory does not apply to the federal government and a territory, Puerto Rico v. Shell Co., 302 U.S. 253 (1937), it is the "universal practice" to permit newly created states to prosecute crimes committed in the territory before the state existed. Higgins v. Brown, 1 Okla. Crim. 33, 69, 94 P. 703, 717-18 (Okla. 1908); *Ex Parte* Barber, 87 Okla. Crim. 201, 204-10, 196 P.2d 695, 697-700, *cert. denied*, 335 U.S. 847 (1948). This is yet another situation where the outcome cannot be reconciled with an analysis of "sovereignty." In Waller v. Florida, 397 U.S. 387 (1970), the Court ruled that Florida could not prosecute an individual for what was assumed to be the same offense for which he already had been prosecuted in a city court. The Court stated that cities and states are not considered to be separate sovereign entities. *Id.* at 392-93. However, cities are not necessarily creatures of state government. *See, e.g.*, City of New Orleans v. Harrison, 257 La. 923, 244 So. 2d 834 (1971)(state may not infringe upon city's constitutionally created system of traffic courts). Under the Montana Constitution, the state and cities partake of "shared sovereignty." State *ex. rel.* Swart v. Molitor, 38 Mont. 71, 72-3. 621 P.2d 1100, 1102 (1981). Some cities were created by royal charter and have continuously exercised "sovereignty." M. GELFAND, A NATION OF CITIES, 4-5 (1975). It is not clear that such cities are distinguishable from Indian tribes based upon a purely historical sovereignty analysis.

What is clear is that empty generalizations about sovereignty should not determine the scope of the double jeopardy prohibition, but rather that it should be defined by fundamental societal and individual interests as reflected in the evolution of the principle and the "dual sovereignty" exception.

Garcia v. San Antonio Metro. Transit Authority,[103] and the Court has at least implicitly employed that approach in its dual sovereignty decisions. In *Wheeler*, for example, fundamentally different institutions and societal interests were involved. The Court noted these considerations,[104] and although it rested its holding on its generalizations about sovereignty, that holding is more comprehensible if understood to be derivative of the Court's concern about regulating the borderland between two quite different political entities than it is as expressing some *a priori* notions of sovereignty. Had the Court pursued a similar approach in *Heath*, it would have examined the reasons underlying the dual sovereignty cases and determined whether any of them justified extending an exception to the double jeopardy prohibition to multiple state prosecutions. For some unexplained reason, the Supreme Court chose not to engage in such an analysis. Accordingly, one is left to wonder why in cases like *Garcia* the Court approaches its task with a finely honed sense of political reality while in cases like *Heath* the Court appears completely oblivious to identical considerations.

B. THE RACE TO THE COURTHOUSE

The Court did provide one practical argument for its conclusion, although the argument was not developed in any detail. The argument is that if successive state prosecutions are not allowed, the result will be an unseemly competition between states in the prosecution of offenses.[105] However, this may be the weakest argument advanced by the Court. In those cases prior to *Heath* where more than one state had jurisdiction over an individual for the same criminal activity, there is virtually no evidence of states competing with one another to be the first to prosecute a particular criminal act even though prosecution in one state often will bar prosecution for the same offense in another state.[106] In addition, there is no evidence to suggest that the normal relationship of prosecuting offices is one of competition rather than cooperation.

Heath seems to be the paradigm case of interstate cooperation. The Georgia and Alabama officials cooperated closely in the investi-

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[103] 105 S. Ct. 1005, 1016-17, *reh'g denied*, 105 S. Ct. 2041 (1985). *See also* Green v. Mansour, 106 S. Ct. 423 (the Court examined the institutional interests of the states and the federal government in construing the eleventh amendment).

[104] *Wheeler*, 435 U.S. at 331-32.

[105] 106 S. Ct. at 440.

[106] *But see* State v. Straw, 626 S.W.2d 286, 287 (Tenn. Crim. App. 1981)(Tennessee court appeared to imply that a prior Massachusetts prosecution was a sham).

gation of the crime.[107] The prosecuting authorities in each state clearly were apprised of what was occurring in the other state. Georgia did not rush precipitously to an indictment, and after the indictment was filed did not "race" to a trial.[108] Nor did Alabama officials ever show any interest in slowing down the Georgia proceedings or in requesting extradition of Mr. Heath. Over eight months passed between the discovery of the body and the demonstration of any interest on the part of Alabama in prosecuting Mr. Heath in its courts. It was only after Heath refused to testify at his alleged confederates' trial that Alabama began the process leading to his trial in Alabama.[109] There is, in short, no reason to think that Georgia would have refused to extradite Heath had Alabama wished to prosecute Heath for murder prior to Georgia doing so. Nor is there any reason to believe that such a spirit of cooperation would be adversely affected by limiting the two states to a single prosecution for the one offense of murder.

Thus, there is no evidence in the facts of the *Heath* case that justifies the Court's conclusion that the failure to allow separate prosecutions by two or more states is necessary to avoid competition among state prosecutorial authorities. Indeed, if a state in custody of an individual wished to obstruct a prosecution in another state, all it need do is refuse to extradite that person.[110] Such an approach is a much more direct way to interfere in another state's interests, and is not affected by the decision in *Heath*.

Not only is the decision in *Heath* an ineffective means to prevent any feared race to the courthouse, but the application of the dual sovereignty exception to successive state prosecutions ironically may foster interference by states in each others' law enforcement activities. Plea bargaining is a far more problematic matter now that the parties in one state must take into account that prosecutions based upon the same alleged acts may follow in one or more other states. Defense counsel soon will realize that the solution to this particular dilemma is to bargain for agreements not to extradite the suspect, which will create tensions between states and disrupt law

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107 Trial Record at 361-63, 366-67, 372, 381, 383-85, 386-90 and 398-99, *Heath*.

108 Mr. Heath was arrested on September 4, 1981, indicted in November, 1981, and pleaded guilty on February 10, 1982. 106 S. Ct. at 435.

109 On April 28, 1982, Mr. Heath was called to testify at the trial of his supposed confederates. Joint Appendix at 47-48. He refused to testify. *Id.* Seven days later he was indicted in Alabama. 106 S. Ct. at 435. This sequence suggests that Alabama prosecuted Mr. Heath because he claimed the privilege against self-incrimination.

110 *See* Michigan v. Doran, 439 U.S. 282 (1978)(state court has limited authority to refuse extradition *if* governor has granted extradition).

enforcement activity.[111]

C. THE "DEFINITION" OF STATE INTERESTS

In what is the most telling, and most chilling, passage of the Court's opinion, the Court indicates that none of what has been discussed previously matters. States can try individuals for an act that occurred elsewhere and for which the individual already has been tried, convicted, and indeed punished, because "[a] State's interest in vindicating its sovereign authority through enforcement of its laws *by definition* can never be satisfied by another State's enforcement of *its* own laws."[112]

What matters, apparently, are definitions. That would explain the Court's otherwise curious opinion. Not reason, nor history, nor even the structure of federalism or of the Constitution itself matters; only definitions do. According to this theory, it does not matter that this country has a tradition that abhors multiple prosecutions for the same offense.[113] Nor does it matter that the most convincing historical reconstruction indicates that the dual sovereignty doctrine was a grudging concession to the intensifying conflict between state and federal authority,[114] or that the individual has concerns of the utmost importance at stake.[115] Nor does it matter that it seems peculiar to think of one state's interests as extending to prosecuting murders that occur in other states, and that prior to Alabama's actions in *Heath* few states had ever asserted their interests in this manner.[116] All that matters is that a state has arrogated to itself the "power" to prosecute an individual. Apparently such arrogations are to be allowed merely because a majority of the Court is willing to assert something about the definition of "state interests" without any elaboration whatsoever. To us, this appears to represent virtual

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111 There are other pragmatic problems that flow from the Court's decision. The lower federal courts now will have to work out the implications of the Court's vindictiveness cases as applied in the context of multiple state prosecutions. The facts in *Heath* provide a good example of the problem. Alabama showed no interest in prosecuting Heath until after he exercised his privilege not to incriminate himself in Georgia proceedings against his alleged confederates. *Cf.* United States v. Oliver, 787 F.2d 124 (3d Cir. 1986)(rejecting a claim of prosecutorial vindictiveness based on an allegation that a federal firearms charge was brought because the defendant failed to cooperate with state authorities in his pending state firearms prosecution).

112 106 S. Ct. at 440 (emphasis to "by definition" added; emphasis to "its" supplied).

113 Benton v. Maryland, 395 U.S. 784, 794-96 (1969). *See supra* notes 45-61 and accompanying text.

114 *See supra* notes 62-81 and accompanying text.

115 *See infra* notes 131-32 and accompanying text.

116 *See infra* notes 143-44 and accompanying text.

abdication of legitimate modes of constitutional decision-making.[117]

Contrary to the unilluminating assertions of the Court about the definition of "state interests," there is no valid purpose of the criminal law which cannot be served by a single prosecution of a single crime. Deterrence, retribution, the restoration of public confidence and incapacitation do not require more than a single criminal proceeding to be effectuated. Moreover, the double jeopardy prohibition does not forbid even the same sovereign from prosecuting an individual for different offenses arising out of a single act or transaction.[118] This provides a broad qualification of the injunction against multiple prosecutions that surely is adequate to meet the perceived needs of any state interest insufficiently attended to by a previous prosecution. The only interests which cannot be served by a prior prosecution in another state's courts are the desire to inflict upon an individual the very multiple trials and punishments which the double jeopardy clause was meant to bar, and the desire to be the actual agent of punishment, an interest that we submit is entitled to no consideration.

A more realistic approach to ascertaining state interests than the definitional approach of the Court would have been for the Court to examine the extent to which the states actually assert that they have unique interests which cannot be satisfied by prior prosecution in another state. The research of the parties and the Court in *Heath* revealed only a single prior case in which two states actually prosecuted the same individual for the same offense based upon the same acts.[119] In contrast, at least forty states limit or bar criminal prosecutions in their own courts where the prospective defendant already has been prosecuted by another government. Eleven states bar a second prosecution arising out of the same transaction;[120]

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117 *Cf.* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

118 The question of whether two crimes are the "same offense" is one of legislative intent. As to federal criminal laws "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not . . . ." Brown v. Ohio, 432 U.S. 161, 166 (1977). *Accord*, Ohio v. Johnson, 104 S. Ct. 2536, 2541 n.8, *reh'g denied*, 105 S. Ct. 20 (1984); Missouri v. Hunter, 459 U.S. 359, 366 (1983); Albernaz v. United States, 450 U.S. 333, 337 (1981); Whalen v. United States, 445 U.S. 684, 691 (1980); Blockburger v. United States, 284 U.S. 299 (1932); Gavieres v. United States, 220 U.S. 338, 342 (1911); Carter v. McClaughry, 183 U.S. 365, 395 (1902). *Cf.* Illinois v. Vitale, 447 U.S. 410 (1980)(remand on whether failing to reduce speed was lesser included offense of vehicular manslaughter in general or in particular case). State criminal laws may be interpreted differently. *Ohio v. Johnson*, 104 S. Ct. at 2536; *Missouri v. Hunter*, 459 U.S. at 366; *People v. Robideau*, 419 Mich. 458, 355 N.W.2d 542 (1984). *Cf. infra* note 132 (on ascertaining legislative intent).

119 *See supra* note 106.

120 *See* ALASKA STAT. § 12.20.010 (1962); CAL. PENAL CODE § 656 (West 1970); *Id.* § 793 (1985); IDAHO CODE § 19-315 (1979); IND. CODE § 35-41-4-5 (1978); MONT.

eight states bar a second prosecution arising out of the same transaction unless it is for a different offense and serves a distinct societal interest not served by the relevant criminal statute of the first government;[121] and eight states bar a second prosecution for the same offense.[122] Forty states bar a second prosecution in the area of drug offenses.[123]

It may well be that many states bar such prosecutions as a matter of prosecutorial discretion, as does the federal government.[124] Nonetheless, the rarity of such prosecutions, as well as the fact that a majority of states actually have barred them, demonstrates the tenuous nature of the claim that such prosecutions are necessary to vindicate unique state interests. The laws and practices of the states are an important measure of state interests and of what due process requires.[125] The Court's decision to ignore these laws and practices and to find a state's claimed interests superior to those of an individual "by definition" is a sad commentary on the Court's conception of rationality in decisionmaking. It is an even sadder commentary on the Court's apparent view of the importance of what Western civilization has perceived as a fundamental human right. The right to be free from multiple prosecutions falls before the "definition" of state interests where that definition is not informed by anything except an expressed desire on the part of state authorities to prosecute a particular individual.

CONST. art. II, § 25; MONT. CODE ANN. § 46-11-504 (1985); NEV. REV. STAT. § 171.070 (1986); State v. Hogg, 118 N.H. 262, 385 A.2d 844 (1978); N.D. CENT. CODE § 29-03-13 (1974); OKLA. STAT. ANN. tit. 22 § 130 (West 1969); VA. CODE § 19.2-294 (1983)(prior federal prosecution); WASH. REV. CODE ANN. § 10.43.040 (1980).

121 *See* ARK. STAT. ANN. § 41-108 (1977); *Id.* at § 43-1224.1; COLO. REV. STAT. § 18-1-303 (1978); DEL. CODE ANN. tit. 11, § 209 (1979); HAWAII REV. STAT. 701-112 (1976); KY. REV. STAT. § 505.050 (1985); People v. Cooper, 398 Mich. 450, 247 N.W.2d 866 (1976); N.J. STAT. ANN. § 2C:1-11 (1982)(prior federal prosecution, might permit for greater offense in extreme cases; 218 PA. CONS. STAT. ANN. § 111 (Purdon 1983); Commonwealth v. Mills, 447 Pa. 163, 286 A.2d 638 (1971).

122 *See* Criminal Code of 1961, § 3-4(c), ILL. REV. STAT. CH. 38, § 3-4(c)(Smith-Hurd 1972); KAN. STAT. ANN. § 21-3108 (1981); MINN. STAT. ANN. § 609-045 (1983); MISS. CODE ANN. § 99-11-27 (1972); N.Y. CRIM. PROC. LAW § 40.20 (McKinney 1981 & Supp. 1986); N.C. GEN. STAT. § 15A-134 (1983); State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977); UTAH CODE ANN. § 76-1-403 (1978); WIS. STAT. ANN. § 939.71 (West 1982).

123 *See* United States v. Jones, 527 F.2d 817, 832 (D.C. Cir. 1975)(Wright, J., dissenting); L. Miller, *supra* note 69 at 109 n.9. Most of these statutes refer to prior federal prosecutions.

124 *See supra* note 78.

125 *See* Benton v. Maryland, 395 U.S. 784, 795 (1969); Bartkus v. Illinois, 359 U.S. 121, 140-49 (1959); Leland v. Oregon, 343 U.S. 790, 798, *reh'g denied*, 344 U.S. 848 (1952); Solesbee v. Balkcom, 339 U.S. 9, 21-23, *reh'g denied*, 339 U.S. 926 (1950).

V. An Alternative Approach

The approach that the Supreme Court had available to it was to compare the demands of state law enforcement with the interests of the individual. The Court could have evaluated the extent to which the concerns that gave rise to the dual sovereignty doctrine are present in the context of successive state prosecutions for the same offense, and whether there are other considerations that arise in that peculiar setting. Second, the Court could have examined the interests of the individual and how they relate to those of the state. The issue in *Heath* should have been whether there was sufficient justification to permit an exception to an important principle of human rights. We offer here our analysis of this question, not because we believe that the Court is likely to overrule *Heath*, but rather to demonstrate that the analysis can be performed with little difficulty.[126]

In 1969, in *Benton v. Maryland*,[127] the Supreme Court held that the fifth amendment double jeopardy prohibition applied to the states through the fourteenth amendment.[128] Based upon its review of the history of double jeopardy principles and the great number of state laws barring double jeopardy,[129] the Court concluded that

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126 The Court's rejection of a comparison of state and individual interests as "difficult," 106 S. Ct. at 439, is disingenuous at best. In *Heath*, the Court was not asked to authorize or require a case-by-case interest analysis, but rather to compare the fundamental individual interests at stake in successive state prosecutions with whatever legitimate state interests such prosecutions might serve to determine whether the dual sovereignty exception should apply at all. Brief for Petitioner at 36-41, *Heath*. *But see id.* at 41-42 (arguing in the alternative). The Court was not, in short, asked "to discard its sovereignty analysis and to substitute in its stead [a] . . . difficult and uncertain balancing of interests approach." 106 S. Ct. at 439. Rather, the Supreme Court was asked to make a rational inquiry into the interests secured by the double jeopardy prohibition and the dual sovereignty exception and to compare them to the interests advanced by the state of Alabama to justify expanding the scope of the dual sovereignty exception. Such a comparison is not difficult to perform, and it requires the conclusion that in our federal system of government there is no need to apply the dual sovereignty exception to the double jeopardy prohibition to permit successive prosecutions by different states of the same individual for the same offense.

127 395 U.S. 784 (1969).

128 *Id.* at 794.

129 The Court observed that the laws of all fifty states bar double jeopardy. *Id.* at 795. However, the laws of the states are not uniform; rather they vary considerably in the scope of protection provided. It remains true that the laws of all states independently limit double jeopardy. Forty-one states provide basic double jeopardy bars in various forms in their state constitutions. Ala. Const. art. I, § 9; Alaska Const. art. I, § 9; Ariz. Const. art. 2, § 10; Ark. Const. art. 2, § 8. Cal. Const. art. I, § 15; Colo. Const. art. II, § 18; Del. Const. art. I, § 8; Fla. Const. art. I, § 9; Ga. Const. art. I, § 1, para. XVIII; Hawaii Const. art. I, § 19; Idaho Const. art. I, § 13; Ill. Const. art. I, § 10; Ind. Const. art. I, § 14; Kan. Const. Bill of Rights § 10; Ky. Const. Bill of Rights § 13; La. Const. art. I, § 15; Minn. Const. art. I, § 7; Miss. Const. art. 3, § 22; Mont. Const.

"[t]he fundamental nature of the guarantee against double jeopardy can hardly be doubted."[130] The Court recognized three fundamental principles underlying the prohibition of double jeopardy: (1) an individual should not repeatedly be subjected to the "embarrassment, expense and ordeal" of defending against a particular criminal charge; (2) an individual should not live "in a continuing state of anxiety and insecurity" not knowing if he or she again will be prosecuted for the same offense; and (3) the state should not increase the probability of conviction of the innocent by repeated prosecution of the same charges.[131] In other cases the Court also has recognized a fourth principle underlying the double jeopardy prohibition: that an individual should not undergo multiple punishments for the same offense.[132]

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art. II, § 25; NEB. CONST. art. I, § 12; NEV. CONST. art. I, § 8; N.M. CONST. art. II, § 15; N.Y. CONST. art. I, § 6; N.D. CONST. art. I, § 12; OHIO CONST. art. I, § 10; OKLA. CONST. art. 2, § 21; OR. CONST. art. I, § 12; PA. CONST. art. I, § 10; R.I. CONST. amend. XL, § 1; S.C. CONST. art. I, § 12; S.D. CONST. art. VI, § 9; TENN. CONST. art. I, § 10; TEX. CONST. art. I, § 14; UTAH CONST. art. I, § 12; VA. CONST. art. I, § 8; WASH. CONST. art. I, § 9; W. VA. CONST. art. 3, § 5; WIS. CONST. art. I, § 8; WYO. CONST. art. I, § 11. One state has had its constitutional due process clause interpreted to bar double jeopardy. CONN. CONST. art. I, § 8; Kohlfuss v. Warden, 149 Conn. 692, 183 A.2d 626, *cert. denied*, 371 U.S. 928 (1962). Four states bar a second prosecution after a former acquittal. IOWA CONST. art. I, § 12; Mo. CONST. art. I, § 19; N.H. CONST. pt. 1, art. 16; N.J. CONST. art. I, para. 11. The common law of the remaining four states bars double jeopardy. Gilpin v. State, 142 Md. 464, 121 A. 354 (1923); Commonwealth v. Vanetzian, 350 Mass. 491, 215 N.E.2d 658 (1966); State v. Clemons, 207 N.C. 276, 176 S.E. 760 (1934); State v. O'Brien, 106 Vt. 97, 170 A. 98 (Vt. 1934).

130 *Benton*, 395 U.S. at 795.

131 *Id.* at 795-96.

132 *See* Ohio v. Johnson, 104 S. Ct. 2536, 2540 (1984); Brown v. Ohio, 432 U.S. 161, 165 (1977); North Carolina v. Pearce, 395 U.S. 711, 717 (1969). This principle is related to what has become known as due process "vindictiveness" analysis, which limits the ability of the government to raise a defendant's punishment upon retrial or remand in situations where a vindictive purpose, such as a desire to punish exercise of an appeal, may be the motivation behind the harsher sanction. *See* Wasman v. United States, 104 S. Ct. 3217 (1984); Thigpen v. Roberts, 104 S. Ct. 2916 (1984); United States v. Hollywood Motor Car Co., 458 U.S. 263 (1982); United States v. Goodwin, 457 U.S. 368 (1982); Blackledge v. Perry, 417 U.S. 21 (1974); Chaffin v. Stynchcombe, 412 U.S. 17 (1973); Colten v. Kentucky, 407 U.S. 104 (1972); North Carolina v. Pearce, 395 U.S. 711 (1969). However, under certain circumstances the prosecution may be permitted to take an appeal solely to increase the degree of a defendant's punishment. United States v. DiFrancesco, 449 U.S. 117 (1980). The limitation on multiple punishments is itself limited by the notion that the question of "whether punishments are 'multiple' is essentially one of legislative intent." Ohio v. Johnson, 104 S. Ct. 2535, 2541 (1984)(footnote omitted). *See also* Missouri v. Hunter, 459 U.S. 359, 368 (1983). Thus, the principle also functions to bar the infliction of multiple punishments for a single offense where the legislature did not intend to authorize such. The Constitution does not prescribe or require any particular method of ascertaining the purpose of a statute. The Supreme Court has indicated that in the case of federal criminal law, it will be presumed absent clear legislative intent to the contrary that Congress did not intend to authorize multiple punishment for a single offense. Whalen v. United States, 445 U.S. 684, 692 (1980); *Cf.*

From the perspective of the individual subjected to successive prosecutions on the basis of the same allegation, it obviously matters little whether a second proceeding is brought in the courts of a different state. A second prosecution by a different state impinges just as directly upon the interests underlying the double jeopardy prohibition as would successive prosecutions in the same state. Such a prosecution by a second state results in an individual repeatedly being subjected to the ordeal of a trial on the same charges. The possibility of successive prosecutions places an individual in a continuing state of anxiety over the possibility of future prosecution on the basis of the same allegations. The probability of convicting an innocent defendant is increased by repeated trials of the same charges, no matter which government brings the successive prosecutions. Finally, successive prosecutions by different states may result in an individual suffering multiple punishments for the same acts. These concerns are magnified if multiple state prosecutions are permissible. The Court's ruling in *Heath* places no limits on the number of states which could claim the right to prosecute an individual for the same act, despite the fact that most states have highly similar criminal laws serving identical interests.

In contrast with the important interests of the individual in avoiding multiple prosecutions and punishments, there is little to be gained by allowing such prosecutions, and without important and independent state interests at stake, there is no justification for extending the scope of the dual sovereignty exception to include successive state prosecutions. We already have seen that the Court's conclusion that states have distinct interests served by bringing their own criminal prosecutions despite earlier proceedings in other states is unjustified[133] and that the Court's postulate that such interests exist "by definition" is not compelling. The dual sovereignty theory on the other hand is an impingement upon a basic individual right, an impingement previously justified by the implications of the fact that in the federal system of government the states share territorial jurisdiction with the federal government. As the Court said in *Lanza*, the first case in which the dual sovereignty theory was actually applied to uphold a second prosecution:[134] "We have here two sovereignties, deriving power from different sources, capable of dealing

Missouri v. Hunter, 459 U.S. 359 (1983)(regarding state statutes); People v. Robideau, 419 Mich. 458, 355 N.W.2d 592 (1984)(rejecting deviation from normal means of ascertaining legislative interest in double jeopardy questions).

133 *See supra* note 118 and accompanying text.

134 *See supra* note 81.

with the same subject matter within the same territory."[135] Similarly, in a passage in *Heath*, the irony of which was apparently lost on the opinion's author, the Court said that "To deny a State its power to enforce its criminal laws because another State has won the race to the courthouse 'would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order *within their confines*.' "[136] However, states do not share territorial jurisdiction;[137] thus the type of friction that may occur between the federal and state government will occur considerably less frequently, if at all, between states. There is only one other case that we have found where two states tried an individual for the same offense, which is powerful evidence that states do not come into conflict in the same manner as occurs with state and federal law enforcement. Thus, the fundamental premise of the dual sovereignty exception is absent in the context of interstate relationships, and consequently there is no reason to abandon the normal double jeopardy constraint on multiple prosecutions.

To the extent that an extraordinary case may arise where successive state prosecutions are warranted, it is not an undue burden to require the state that desires to bring duplicative criminal proceedings to justify its position.[138] The Court's concern about a "difficult balancing of interests approach" if performed case-by-case has some merit in this context, but a state would not face insurmountable barriers in demonstrating a reason for repeated prosecution. If there are unvindicated state interests at stake a state can articulate them and the courts can judge their merits. Moreover, the possibility that significant state interests may in some unusual case be in need of vindication does not justify creating an irrebuttable presumption that the state wanting to subject an individual to a second (or third . . .) prosecution has interests superior to those of the individual who may be subjected to successive prosecutions. Where a state would seek to justify multiple prosecutions, the courts would be faced with a decision no more difficult than ones they currently perform successfully under state statutes forbidding multiple prosecutions in the absence of unvindicated state interests.[139]

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135 U.S. v. Lanza, 260 U.S. 377, 382 (1922).

136 106 S. Ct. at 440, quoting *Bartkus*, 359 U.S. at 137 (emphasis added).

137 *See infra* note 144.

138 The Model Penal Code supports such an approach. The Code suggests that a former prosecution in another jurisdiction should bar a second prosecution arising out of the same conduct unless the second prosecution is not for the same offense and serves a substantially different societal purpose. MODEL PENAL CODE § 1.10 (Proposed Official Draft 1962).

139 Courts have proven able to engage in such an inquiry. People v. Cooper, 398

One potential criticism of our position is that because normal double jeopardy principles generally bar a prosecution for a crime after prosecution for a lesser included offense of that crime,[140] a second state often may have unvindicated interests in bringing its own prosecution for a more serious crime which nevertheless is for double jeopardy purposes the "same" offense as that earlier prosecuted. However, it is difficult to imagine why the states that are involved in situations where this might occur would not cooperate and permit the state with jurisdiction over the greater offense to prosecute first.[141] In any event, the solution to the problem of limited jurisdiction, assuming one is needed, is to develop and apply a "jurisdictional exception" to double jeopardy that permits a separate jurisdiction to try an individual for an offense where the individual already has been prosecuted for a lesser included offense in a court lacking jurisdiction of the greater offense.[142]

VI. The Unintended Consequences of Heath

What may be the most unfortunate result of the decision in *Heath* is its unintended consequences. There are only a few exam-

Mich. 450, 460-61, 247 N.W.2d 866, 870-71 (1976); Commonwealth v. Mills, 447 Pa. 163, 171-74, 286 A.2d 638, 641-43 (1971)(noting that guidelines on this question have been promulgated by the American Law Institute and by the National Commission on Reform of Federal Criminal Laws). *See, e.g.*, Hernandez v. State, 397 So. 2d 715, 718-19 (Fla. Dist. Ct. App. 1981); Commonwealth v. Bolden, 472 Pa. 602, 627-28, 373 A.2d 90, 102 (1977). *See also* Turley v. Wyrick, 554 F.2d 840, 843-44 (8th Cir. 1977) (Lay, J., concurring)(supporting an interest test).

140 Illinois v. Vitale, 447 U.S. 410, 421 (1980); Brown v. Ohio, 432 U.S. 161 (1977). Prosecution of a lesser included offense does not bar later prosecution of the greater crime if the defendant requested or consented to severance of the charges, Jeffers v. United States, 432 U.S. 137, 152-54 (1977), or if all the events necessary for the greater crime had not occurred when the prosecution for the lesser was begun. *Id.* at 151-52. An equally divided Court upheld a decision of the Supreme Court of New Mexico holding that prosecution of a lesser included offense in a court of limited jurisdiction which has no jurisdiction over a greater offense does not bar later prosecution of that greater crime in a court of general criminal jurisdiction. New Mexico v. Fugate, 101 N.M. 58, 678 P.2d 686 (N.M. 1984), *aff'd mem.*, 105 S. Ct. 1858 (1985)(equally divided Court with Justice Powell not taking part in the decision).

141 *See infra* notes 105-11 and accompanying text. This was certainly not a problem in *Heath*. Mr. Heath was placed in jeopardy for his life for murder in Georgia, 106 S. Ct. at 435, received a sentence of life imprisonment and then was placed once more in jeopardy of his life for the same murder and sentenced to death. *Id.* at 435-36. The fact that Mr. Heath was twice placed in jeopardy of his life for the same crime is a unique circumstance calling for rejection of the application of the dual sovereignty theory to this case. See *infra* note 145. The Court has ruled in the context of prosecution by a single sovereign that a defendant can be "acquitted" of the death penalty. Arizona v. Rumsey, 104 S. Ct. 2305 (1984); Bullington v. Missouri, 451 U.S. 430 (1981). If the proceedings in Georgia "acquitted" Mr. Heath of the death penalty, then only prosecution by a different "sovereign" permitted him to be sentenced to death.

142 This may be the law even as to a single jurisdiction. *See supra* note 140.

ples in the history of the United States where a state has attempted to try someone for a murder committed in another state.[143] The reason for this state of affairs is obvious: the states generally have viewed the scope of their criminal jurisdiction as limited by notions of territoriality and territorial effect.[144]

Thus, the accepted wisdom prior to *Heath* seems to have been that a murder is to be tried where it occurs. In addition, notwithstanding the Court's curious suggestion to the contrary, prosecutorial offices are overworked. Rather than being in competition with each other, their normal reaction is to quite cheerfully let some other office prosecute for an offense if that other office is so inclined. This normal mode of doing business is not likely to be changed by *Heath*.

The normal mode of doing business will be changed, however, in the abnormal case. Prosecutors will take advantage of the powers extended to them in *Heath* in the unusual case. It takes little imagination to foresee what those cases will be. They will, first of all, be

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143 *See* Lane v. State, 388 So. 2d 1022 (Fla. 1980)(Florida had jurisdiction over murder because essential elements of crime could be established beyond reasonable doubt in state even though fatal blow and victim's death occurred in Alabama, but conviction set aside on incompetency grounds); People v. Holt, 91 Ill. 2d 480, 440 N.E.2d 103 (1983)(Illinois had no jurisdiction over felony murder where kidnapping occurred in Illinois, but killing subsequently was planned and committed in Wisconsin); Pollard v. State, 270 Ind. 599, 388 N.E.2d 496 (1979)(assault by stabbing in Indiana followed by abdjuction to Kentucky where the fatal gunshot wound was inflicted was adequate jurisdictional basis for Indiana murder conviction where crime involved "one continuous plan"); Conrad v. State, 262 Ind. 446, 317 N.E.2d 789 (1974)(kidnapping and manslaughter convictions upheld where killing occurred on "State Line Road" between Indiana and Ohio). *But see* Pruett v. Mississippi, 431 So. 2d 1101 (Miss. 1983). None of these cases involved prosecution by a second state.

144 "The common law considers crimes as altogether local, and cognizable and punishable exclusively in the country, where they are committed." J. STORY, CONFLICT OF LAWS 516 (1834). At common law every crime had only one "situs" or "locus" which determined the place of commission for jurisdictional purposes. Levitt, *Jurisdiction Over Crime*, 16 J. CRIM. L. & CRIMINOLOGY 316, 324-25 (1925); Perkins, *The Territorial Principle in Criminal Law*, 22 HASTINGS L.J. 1155, 1157 (1971); Comment, *Jurisdiction over Interstate Felony Murder*, 50 U. CHI. L. REV. 1431, 1434 (1983). It generally is accepted that jurisdiction over a crime resides solely in the courts of the state where the crime was committed, that the laws of each state exclusively govern the nature of the offense, and that states cannot exercise jurisdiction over crimes committed outside their borders. Huntington v. Attrill, 146 U.S. 657, 669 (1892). *Accord*, R. ANDERSON, 4 WHARTON'S CRIMINAL LAW AND PRACTICE § 1501 (1957); Bigelow v. Virginia, 421 U.S. 809, 822-23 (1975); The Antelope, 23 U.S. (10 Wheat.) 66 (1825); Schooner Exchange v. McFadden, 11 U.S. (7 Cranch.) 116, 136 (1812); Commonwealth v. Carroll, 360 Mass. 580, 584, 276 N.E.2d 705, 709 (1971); State v. Karsten, 194 Neb. 227, 229, 231 N.W.2d 335, 336 (1975); State v. Luv Pharmacy, 118 N.H. 398, 405, 388 A.2d 190, 195 (1978); State v. Huginski, 139 Vt. 95, 97-98, 422 A.2d 935, 937 (1980). *See also supra* note 65 (noting that the impossibility of successive state prosecutions of the same crime was suggested at argument in *Fox v. Ohio*).

ones of great public interest where there is political advantage in prosecuting. Thus, the first unintended effect of *Heath* will be to subject an individual's interest in being free from vexatious litigation to individual prosecutors' desires for political advancement. Many of those noteworthy cases are likely to be death penalty cases. Therefore, the second unanticipated consequence of *Heath* will be an increase in the number of capital cases brought; that in turn surely will lead to an increase in the number of executions.

It is this last point that is the most troubling of all. Whatever one's views of the propriety of capital punishment, if it is to be imposed it should be imposed only with the utmost respect for procedural fairness. The Supreme Court now has structured a process in which if one state does not succeed in executing an individual, another state can try. And if that state does not succeed, still another can try. That is a cruel mockery of the ideals cherished by our civilization. At least we hope that it is.[145]

[145] In Ciucci v. Illinois, 356 U.S. 571 (1958), the Court in a per curiam opinion upheld by a 5-4 vote an Illinois conviction and death sentence where the defendant allegedly had killed his wife and three children. He was prosecuted for one death at a trial where evidence of all four killings was introduced, was convicted, and received a twenty year sentence. At a second trial for another death with similar evidence, he received a 45 year sentence. Finally, at a third such trial, he received the death penalty. Justices Harlan and Frankfurther, two of the majority, suggested that if the state's motive was to prosecute until it got a death sentence, that might constitute a violation of due process. *Id.* at 573. Justice Douglas dissented, speaking for Chief Justice Warren and Justice Brennan, on the basis that the repeated prosecutions violated due process. *Id.* at 575. Alabama had no reason to prosecute Mr. Heath except to seek to raise his punishment from life in prison to death.