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"THE COST OF DUAL CITIZENSHIP": THE SIXTH AMENDMENT RIGHT TO COUNSEL, DUAL SOVEREIGNTY, AND THE (REASONABLE) PRICE OF FEDERALISM

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> The powers delegated by the . . . Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.
>
> —James Madison[1]

> In America, the powers of sovereignty are divided between the government of the Union, and those of the states. They are each sovereign, with respect to the objects committed to it, and neither sovereign, with respect to the objects committed to the other.
>
> —Chief Justice John Marshall[2]

INTRODUCTION

The Sixth Amendment to the United States Constitution requires, inter alia, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[3] This right has long been considered "indispensable to the fair administration of our adversary system of criminal justice"[4] and, since its enshrinement in modern form in *Massiah v. United States*,[5] has protected criminal defendants from government interrogation

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1 THE FEDERALIST NO. 45, at 108 (James Madison) (Jack N. Rakove ed., 2003).

2 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 410 (1819).

3 U.S. CONST. amend. VI.

4 Brewer v. Williams, 430 U.S. 387, 398 (1977).

5 377 U.S. 201 (1964).

outside of counsel's presence after the institution of adversarial proceedings.[6] The right to counsel, however, is not unbounded; among its important limitations is its "offense specific" nature.[7] In *Texas v. Cobb*,[8] the Supreme Court clarified the meaning of this offense-specificity constraint, holding that the proper test for attachment of the right to counsel is the same test articulated in *Blockburger v. United States*[9] for purposes of double jeopardy.[10] Despite a vigorous dissent, the Court found that there was "no constitutional difference between the meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel."[11] After *Cobb*, a defendant charged with one crime is not constitutionally entitled to the assistance of counsel regarding investigations for another crime requiring proof of an additional fact.

The adoption of *Blockburger* in the right to counsel context has raised an important question for the lower courts interpreting *Cobb*: did *Cobb* adopt *Blockburger* wholesale and with it the dual sovereignty

6 *Id.* at 205–06; *see also* 2 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 4.02, at 43 (4th ed. 2006) ("The Sixth Amendment right to counsel applies only after the commencement of adversarial judicial proceedings; the Court has concluded that this commencement starts the 'criminal prosecution' for right-to-counsel purposes."). In this context, the word "interrogation" is used loosely—as the Court has found Sixth Amendment violations in cases involving informal conversations with government informants, *see* Maine v. Moulton, 474 U.S. 159, 163–65 (1985); United States v. Henry, 447 U.S. 264, 266–67 (1980); *Massiah*, 377 U.S. at 203, and responses to a policeman's appeal to a defendant's conscience, *see Brewer*, 430 U.S. at 392–93—on the grounds that these statements were "deliberately elicited" from the accused in contravention of his right to counsel. *Massiah*, 377 U.S. at 206; *cf.* Paul M. Bator & James Vorenberg, *Arrest, Detention, Interrogation, and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 67 (1966) (calling the question of when and under what conditions interrogation may take place "[p]erhaps the most difficult and controverted question in American criminal procedure").

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

8 532 U.S. 162 (2001).

9 284 U.S. 299 (1932).

10 *Cobb*, 532 U.S. at 173. The *Blockburger* test states that, where one must determine whether multiple offenses are at issue, the determinative question is "whether each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304 (citing Gavieres v. United States, 220 U.S. 336, 342 (1911)).

11 *Cobb*, 532 U.S. at 173. Justice Breyer's dissent countered that importation of the *Blockburger* test would permit law enforcement officers to circumvent the right to counsel by "'spinn[ing] out a . . . series of offenses from a single . . . criminal transaction.'" *Id.* at 182 (Breyer, J., dissenting) (quoting Ashe v. Swenson, 397 U.S. 436, 445 n.10 (1970)). Furthermore, Justice Breyer felt that the new rule would "threaten[ ] the legal clarity necessary for effective law enforcement" by adopting a test which is complex in application. *Id.* at 184–85.

doctrine which has informed its application?[12] That is, may the officials of one sovereign permissibly question a suspect outside of counsel's presence regarding a crime for which she has already been charged by another sovereign, even though the two sovereigns' crimes would otherwise be the same offense under *Blockburger*? This question has been nettlesome, with important values implicated on both sides. On one hand is a defendant's interest in having the full complement of counsel's assistance as granted by the Constitution; on the other is the sovereign's interest in protecting the safety and welfare of its people. On this point the U.S. Courts of Appeals are not in agreement; in fact, they are nearly evenly split on the issue. The Second and Eighth Circuits have rejected the idea that *Cobb* adopted the dual sovereignty doctrine in the Sixth Amendment context as being too susceptible of collusive manipulation,[13] and the Seventh Circuit has indicated a similar inclination on its part in dicta.[14] However, the First, Fourth, and Fifth Circuits have reached the opposite conclusion,[15] finding that in *Cobb* "the Court effectively foreclosed any argument that the dual sovereignty doctrine does not inform the definition of 'offense' under the Sixth Amendment."[16]

In this Note, I argue that the latter approach is, properly understood, the correct one, comporting with the plain language of the Court's decision in *Cobb*, the underlying purposes of the Sixth Amendment, and the federalism values embodied in the dual sovereignty doctrine. In Part I, I shall analyze the development of the Sixth Amendment right to counsel, its dramatic expansion and recent contraction, and the values underlying that development. In Part II, I shall discuss the growth of the dual sovereignty doctrine as a federalism concern in the double jeopardy context. Finally, in Part III, I shall

12 The dual sovereignty doctrine recognizes that a criminal offense is an offense against the government, and thus when a single act violates the criminal laws of two different sovereigns, the actor has committed two discrete offenses. *See* Heath v. Alabama, 474 U.S. 82, 88 (1985); *see also* Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1, 3 (1992) ("The rationale is that an individual can, in a single act, violate the laws of each sovereign; and each government, as a sovereign, retains the power to try and punish that individual for the breach of the order that it protects.").

13 *See* United States v. Mills, 412 F.3d 325, 330 (2d Cir. 2005); United States v. Bird, 287 F.3d 709, 715 (8th Cir. 2002).

14 *See* United States v. Krueger, 415 F.3d 766, 777 (7th Cir. 2005).

15 *See* United States v. Alvarado, 440 F.3d 191, 196–97 (4th Cir. 2006), *cert. denied*, 127 S. Ct. 81 (2006); United States v. Coker, 433 F.3d 39, 44 (1st Cir. 2005); United States v. Avants, 278 F.3d 510, 517 (5th Cir. 2002).

16 *Avants*, 278 F.3d at 517.

explain why the dual sovereignty doctrine is appropriately applied to the Sixth Amendment right to counsel.

I. THE SIXTH AMENDMENT RIGHT TO COUNSEL

A. *Pre-*Massiah *History*

The right to counsel as it exists today cuts a much broader swath than it did early in our republic's history. In fact, its pedigree in early Anglo-American criminal law can scarcely be called venerable.[17] In medieval Britain, the right to counsel was restricted solely to pleading matters of law at trial, at least for felons.[18] Gradually these restrictions were loosened, with access to counsel first being permitted for those charged with treason, and finally to all felony defendants in 1836.[19] In the colonies, this harsh approach was never followed. Most of the states had statutory or constitutional provisions providing for some form of the right to counsel prior to ratification of the Constitution.[20] However, the right was not considered to be one of the more impor-

17 *See* United States v. Ash, 413 U.S. 300, 306–07 (1973) (observing the severe limitations on the British common law right to counsel); Crooker v. California, 357 U.S. 433, 439 (1958) (noting the right's lack of firm historical fixation, despite its significance), *overruled by* Miranda v. Arizona, 384 U.S. 436 (1966); *see also* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE SIXTH AMENDMENT RIGHT TO COUNSEL UNDER THE MASSIAH LINE OF CASES (1986) [hereinafter ATTORNEY GENERAL REPORT] ("The right to counsel as it now exists had no counterpart at common law."), *reprinted in* 22 U. MICH. J.L. REFORM 661, 672 (1989); James J. Tomkovicz, *An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the* Massiah *Doctrine*, 22 U.C. DAVIS L. REV. 1, 10 (1988) ("The right to counsel does not have the illustrious Anglo-American heritage one might expect."). For a detailed history of the right to counsel in England and colonial America, see generally Comment, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1018–34 (1964) [hereinafter *Historical Argument*] (examining the development of the English and early American rights to counsel).

18 *See, e.g.*, ATTORNEY GENERAL REPORT, *supra* note 17, at 672. Ironically, misdemeanor and civil defendants were permitted greater freedom of access to counsel, despite the lesser severity of the charges against them. Felons were viewed by the Crown as especially dangerous, yielding this seemingly incongruous system of defense. *See Ash*, 413 U.S. at 306–07 (citing Powell v. Alabama, 287 U.S. 45, 60 (1932)); ATTORNEY GENERAL REPORT, *supra* note 17, at 672.

19 *See* ATTORNEY GENERAL REPORT, *supra* note 17, at 672–73; *Historical Argument*, *supra* note 17, at 1027–28. The abolition of the distinction between questions of law and questions of fact finally afforded this right to felons; however, there is some indication that felons were accorded the right as early as the mid-eighteenth century. *See id.*

20 *See, e.g.*, *Powell*, 287 U.S. at 61–65 (surveying colonial right to counsel provisions).

tant inclusions in the Bill of Rights largely because, as understood at the time, it referred solely to assistance at trial by an attorney retained by the defendant.[21] Thus, the right lay relatively dormant until the twentieth century.

The Supreme Court first indicated that the right to counsel might have increased bite in *Powell v. Alabama*.[22] In holding that the defendants were entitled to assistance of counsel under the Sixth and Fourteenth Amendments,[23] the Court noted in dicta that "during perhaps the most critical period of the proceedings . . . , from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants . . . were as much entitled to [the assistance of counsel] during that period as at the trial itself."[24] *Powell* emphasized, for the first time, a constitutional right to assistance of counsel at pretrial stages and set the stage for the Court's later more sweeping proposals.[25]

The Court revisited the right-to-counsel issue in *Spano v. New York*.[26] In *Spano*, the defendant had been involved in a shooting after an altercation at a bar.[27] Following indictment, the defendant retained counsel and turned himself in to the police.[28] After repeatedly requesting his attorney's presence during the subsequent interrogation, and repeatedly having these requests denied, the defendant confessed to the shooting.[29] As in *Powell*, the Court, per Chief Justice Warren, rested its reversal of the defendant's murder conviction on the denial of due process.[30] However, Justice Douglas, joined by Justices Black and Brennan, went further in concurrence. Relying on *Powell*, Justice Douglas stated that "[d]epriving a person, formally charged with a crime, of counsel during the period prior to trial may

21 *See* Tomkovicz, *supra* note 17, at 10–11.

22 287 U.S. 45 (1932).

23 Specifically, the Court held that due process required the appointment of counsel in capital cases, regardless of whether the defendant requested counsel, where the defendant could not employ counsel and was unable to defend himself due to "ignorance, feeble mindedness, illiteracy, or the like." *Id.* at 71.

24 *Id.* at 57.

25 *See* Martin Bahl, Comment, *The Sixth Amendment as Constitutional Theory: Does Originalism Require That* Massiah *Be Abandoned?*, 82 J. CRIM. L. & CRIMINOLOGY 423, 427 (1991).

26 360 U.S. 315 (1959).

27 *Id.* at 316.

28 *Id.* at 316–17.

29 *Id.* at 317–19.

30 *Id.* at 320 ("[W]e find use of the confession obtained here inconsistent with the Fourteenth Amendment under traditional principles.").

be more damaging than denial of counsel during the trial itself,"[31] since this phase may be the only one at which counsel's legal acumen is of use to the accused.[32] Justice Stewart, concurring separately with Justices Douglas and Brennan, also believed that the right to counsel had been violated by the government's conduct.[33] These strong words, coupled with the application of the Sixth Amendment to the states via the Fourteenth Amendment,[34] set the stage for the Court's creation of the modern right to counsel.

B. Massiah *and the Expansion of the Sixth Amendment Right to Counsel*

Following the concurrences in *Spano* to their logical extremity, the Supreme Court announced a dramatic expansion of the Sixth Amendment right to counsel in *Massiah*.[35] In *Massiah*, the defendant, a merchant seaman, was arrested and indicted for possession of cocaine aboard a United States ship; another man, Colson, was similarly charged.[36] Following their release on bail, and without Massiah's knowledge, Colson agreed to assist the government in its investigation through installation of a radio transmitter in his vehicle.[37] Thereafter, while the two conversed in Colson's automobile, Massiah made a number of incriminating statements to Colson, which were subsequently used against Massiah at his trial.[38]

The Supreme Court, relying principally on the concurring opinions of Justices Douglas and Stewart in *Spano* and the Court's decision in *Powell*, found Massiah's Sixth Amendment rights had been vio-

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31 *Id.* at 325 (Douglas, J., concurring).

32 *Id.* at 326 ("When [a defendant] is deprived of th[e] right [to counsel] after indictment and before trial, he may indeed be denied effective representation by counsel at the only stage when legal aid and advice would help him.").

33 *Id.* at 327 (Stewart, J., concurring) ("Surely a Constitution which promises [the right to counsel during trial] can vouchsafe no less to the same man under midnight inquisition in the squad room of a police station.").

34 *See* Gideon v. Wainwright, 372 U.S. 335, 342–43 (1963) (holding that the right to counsel is a "fundamental right" under the Fourteenth Amendment).

35 Massiah v. United States, 377 U.S. 201 (1964). The *Massiah* decision has been called "a giant step in a wholly new direction" by "an intrepid majority," but has nonetheless proven "strangely durable." H. Richard Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1155–56 (1987); *see also* United States v. Henry, 447 U.S. 264, 282 (1980) (Blackmun, J., dissenting) ("*Massiah* certainly is the decision in which Sixth Amendment protections have been extended to their outermost point.").

36 *Massiah*, 377 U.S. at 202.

37 *Id.* at 202–03.

38 *Id.* at 203.

lated.[39] The Court gave little constitutional support for its decision, instead asserting that "the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime" dictated the outcome.[40] Thus, the Court held, where "federal agents had deliberately elicited [incriminating statements] from [the defendant] after he had been indicted and in the absence of his counsel," the defendant had been denied the "basic protections" of the Sixth Amendment.[41] Justice Stewart's majority found it inconsequential that Massiah's statements had been elicited while he was free on bail, believing that "indirect and surreptitious interrogations" must be covered to make the right to counsel truly effective.[42] Justice White, joined by Justices Clark and Harlan, criticized the majority's reasoning in dissent, stating that "the right to counsel ha[d] never meant as much before."[43] There was no reason, in Justice White's estimation, to assume that statements made outside of an attorney's presence were involuntary, and voluntariness had been the Court's prior touchstone for admissibility.[44] The Court's new rule, Justice White believed,

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39 *Id.* at 204–05.

40 *Id.* at 205 (citing People v. Waterman, 175 N.E.2d 445, 448 (N.Y. 1961)). This lack of constitutionally based reasoning has been one of the most frequent criticisms of *Massiah*. *See, e.g.*, *Henry*, 447 U.S. at 290 (Rehnquist, J., dissenting) ("The doctrinal underpinnings of *Massiah* have been largely left unexplained . . . ."); ATTORNEY GENERAL REPORT, *supra* note 17, at 684–90 (criticizing the *Massiah* rule as having "no support in history, logic, or considerations of sound policy"); Martin R. Gardner, *The Sixth Amendment Right to Counsel and Its Underlying Values: Defining the Scope of Privacy Protection*, 90 J. CRIM. L. & CRIMINOLOGY 397, 401 (2000) ("The *Massiah* Court offered little explanation for the basis of its holding."); Tomkovicz, *supra* note 17, at 8 ("The Court's explorations of the *Massiah* right have failed to justify adequately the constitutional recognition of a counsel safeguard against informants' attempts to secure incriminating admissions."). Instead, the theme of trial fairness, protected by ensuring that the defendant has not already been convicted through the State's pretrial conduct, has been the predominant underlying value. *See* Gardner, *supra*, at 403; *see also* ATTORNEY GENERAL REPORT, *supra* note 17, at 683 (discussing the role of ensuring a fair trial and the integrity of the truth-finding process as the primary goals in the Court's post-*Massiah* Sixth Amendment jurisprudence).

41 *Massiah*, 377 U.S. at 206.

42 *Id.*

43 *Id.* at 209 (White, J., dissenting). Justice White noted that there had been no hindrance of trial preparation or consultation between the defendant and his attorney, and that it was "only a sterile syllogism . . . to say that because Massiah had a right to counsel's aid before and during the trial, his out-of-court conversations and admissions must be excluded if obtained without counsel's consent or presence." *Id.*

44 *Id.* at 210 (citing Cicenia v. LaGay, 357 U.S. 504 (1958); Crooker v. California, 357 U.S. 433 (1958)).

would hamper law enforcement and provide unprecedented and unwarranted protection against betrayal by partners in crime.[45]

Following *Massiah*, the Court did not revisit the right to counsel until *Brewer v. Williams*,[46] where it further enlarged that right. In *Brewer*, the defendant had been arrested and arraigned for the abduction of a missing girl and was being transported from Davenport, Iowa, to Des Moines.[47] Although the defendant had told the accompanying detectives that he would tell them what had happened after consulting with his attorney in Des Moines, one of the detectives, knowing the defendant to be a religious man, remarked on the right of the girl's parents to give their child a Christian burial.[48] The detective did not ask the defendant for a response, and instead told the defendant not to answer him, but to think about what he had said.[49] Later during his transport, the defendant led the detectives to the girl's body.[50]

The Supreme Court, finding a violation the defendant's rights, stated that

> the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[51]

According to Justice Stewart, again writing for the Court, *Massiah* made clear that the commencement of adversary proceedings against a defendant gave him the constitutional right to legal representation during government interrogation; the case was "constitutionally indistinguishable" from *Massiah*, notwithstanding the fact that Williams' statements had not been surreptitiously elicited.[52] The Court further held that the defendant had not waived his Sixth Amendment right. Waiver, said the Court, requires proof of "'an intentional relinquish-

45 *Id.* at 211–12.

46 430 U.S. 387 (1977). The Court did decide *Escobedo v. Illinois*, 378 U.S. 478 (1964), as a Sixth Amendment case shortly after *Massiah*. However, the Court later read its opinion in *Escobedo* to be—like *Miranda v. Arizona*, 384 U.S. 436 (1966)—an implementation of the Fifth Amendment privilege against self-incrimination, rather than a vindication of the right to counsel. *See* Kirby v. Illinois, 406 U.S. 682, 689 (1972).

47 *Brewer*, 430 U.S. at 390–91.

48 *Id.* at 392–93.

49 *Id.*

50 *Id.*

51 *Id.* at 398 (quoting *Kirby*, 406 U.S. at 689).

52 *Id.* at 400–01.

ment or abandonment of a known right or privilege,'"[53] and, because the defendant had expressly asserted his right to counsel and the detectives thereafter elicited incriminating statements without making any attempt to determine whether he desired to relinquish that right, waiver was absent.[54] The public's interest in law enforcement, though important, did not outweigh the defendant's interest in assistance of counsel.[55]

The majority's opinion was not lightly received by the dissenters, particularly Chief Justice Burger, who called it "intolerable."[56] The dissenters found *Massiah* to be eminently distinguishable because of the lack of covert elicitation of Williams' statements.[57] The Chief Justice noted that the defendant had been informed of his constitutional rights, that he understood them, and that he voluntarily waived those rights.[58] To find otherwise simply because of the absence of the defendant's attorney "denigrates an individual to a nonperson whose free will has become hostage to a lawyer" and deprives the suspect of his right to decide whether to make disclosures without his lawyer's consent.[59] Furthermore, found the Chief Justice, "the fundamental purpose of the Sixth Amendment is to safeguard the fairness of the trial and the integrity of the factfinding process."[60] Because the defendant's disclosures were "voluntary and uncoerced," these values were not served by the statements' exclusion.[61] Similarly, Justice White, joined by Justices Blackmun and Rehnquist, voiced objection to the idea that the *Massiah* right to counsel was "a right not to be asked any questions in counsel's absence rather than a right not to answer any questions in counsel's absence," especially where such "wafer-thin distinctions" permitted an admittedly guilty murderer to

53 *Id.* at 404 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

54 *Id.*

55 *Id.* at 406 ("'[D]isinterested zeal for the public good does not assure either wisdom or right in the methods it pursues.'" (quoting Haley v. Ohio, 332 U.S. 596, 605 (1948) (Frankfurter, J., concurring))).

56 *Id.* at 415 (Burger, C.J., dissenting).

57 *Id.* at 426 n.8; *see also id.* at 440 n.3 (Blackmun, J., dissenting) (noting that the surreptitious nature of the interrogation in *Massiah* was not "constitutionally irrelevant" to that decision).

58 *Id.* at 417–18 (Burger, C.J., dissenting).

59 *Id.* at 419.

60 *Id.* at 426.

61 *Id.*; *see also id.* at 437 (White, J., dissenting) (insisting that the action of the detectives "did not, and was not likely to, jeopardize the fairness of [the defendant]'s trial or in any way risk the conviction of an innocent man—the risk against which the Sixth Amendment guarantee of assistance of counsel is designed to protect").

go free.[62] Finally, Justice Blackmun's dissent, in which Justices White and Rehnquist joined, asserted that the majority's interpretation of *Massiah* was "far too broad," making any attempt to elicit information, even where there was no deliberate deprivation of counsel's assistance, to be "tantamount to interrogation."[63]

Massiah continued to metastasize in *United States v. Henry*,[64] where the Supreme Court, per Chief Justice Burger, found that use of statements obtained by a paid informant placed in the defendant's cellblock violated the defendant's Sixth Amendment right to counsel, despite the fact that the informant had not "question[ed]" or "initiate[d] any conversations with" the defendant.[65] Although the Court recognized that use of undercover informants did not violate either the Fourth or Fifth Amendments,[66] the Sixth Amendment had been violated because the information was "deliberately elicited" from the defendant.[67] The defendant did not know that his cellmate was working for the government, thus obviating the possibility of waiver; further, the Court believed the defendant's confinement could make him even more vulnerable to the informant's ploys.[68] "By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel," the government violated the Sixth Amendment.[69]

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62 *Id.* at 436; *see also* Uviller, *supra* note 35, at 1162 (noting that *Brewer*'s "unmistakable thrust" is that "interrogation or its equivalent is precluded after accusation").

63 *Brewer*, 430 U.S. at 439–40 (Blackmun, J., dissenting). "When there is no interrogation, such statements should be admissible as long as they are truly voluntary." *Id.* at 440.

64 447 U.S. 264 (1980).

65 *Id.* at 268. Not all commentators view *Henry* as an expansion of *Massiah*. *See* Tomkovicz, *supra* note 17, at 17 & n.69 (interpreting *Henry* to require a basis for attributing the informant's actions to the government, in addition to the "deliberate elicitation" requirement). However, most agree that *Henry* extended *Massiah* beyond its previous bounds. *See* Bahl, *supra* note 25, at 434; Kevin T. Kerr, Note, United States v. Henry*: The Further Expansion of the Criminal Defendant's Right to Counsel During Interrogations*, 8 PEPP. L. REV. 451, 451 (1981).

66 *Henry*, 447 U.S. at 272 (citing United States v. White, 401 U.S. 745 (1971); Hoffa v. United States, 385 U.S. 293, 302 (1966)).

67 *Id.* The Court later noted in *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), that "deliberate elicitation" requires more than pure passivity on the part of the listener. *Id.* at 459 ("[T]he defendant must demonstrate . . . some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.").

68 *Henry*, 447 U.S. at 272–74.

69 *Id.* at 274; *cf. id.* at 276 (Powell, J., concurring) ("The rule of *Massiah* serves the salutary purpose of preventing police interference with the relationship between a suspect and his counsel once formal proceedings have been initiated.").

Justice Blackmun, joined by Justice White, argued in dissent that the Court had "cut[ ] loose from the moorings of *Massiah*" by finding the elicitation to be "deliberate," which Justice Blackmun equated with intentional extraction of information, and expanding that requirement by adopting a "likely to induce" test that resulted in a violation even where, as here, the informant had not stimulated the divulgence.[70] Justice Rehnquist went further, encouraging the reconsideration of *Massiah* itself.[71] Justice Rehnquist looked to *Powell* for the notion that the Sixth Amendment was properly interpreted as requiring assistance in the preparation of the defendant's case at trial in order to assure its fairness.[72] Because the right to counsel extended to "critical stages" of the proceedings, the key issue for Justice Rehnquist was the lawyer's traditional role as "legal expert and strategist," a role ignored in *Massiah* as well as in *Henry*, where meetings with the defendants' attorneys were not obstructed or interrupted and trial preparation was not impeded.[73] To Justice Rehnquist, the entire *Massiah* view of the right to counsel was divorced from the proper understanding of "counsel" and its role in the proceedings, a role which did not encompass presence at every interrogation simply because proceedings had been instituted.[74]

The Court's adherence to an expansive view of *Massiah* persisted in *Maine v. Moulton*,[75] where the Sixth Amendment was deemed to give the accused "the right to rely on counsel as a 'medium' between

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70 *Id.* at 277, 280 (Blackmun, J., dissenting).

71 *Id.* at 289 (Rehnquist, J., dissenting).

72 *Id.* at 291; *see also id.* at 292–93 ("[T]he concerns underlying the Sixth Amendment right to counsel are to provide aid to the layman in arguing the law and in coping with intricate legal procedure, and to minimize the imbalance in the adversary system that otherwise resulted with the creation of the professional prosecuting official." (citing United States v. Ash, 413 U.S. 300, 307–09 (1973))).

73 *Id.* at 293. Justice Rehnquist further stated:

> If the event is not one that requires knowledge of legal procedure, involves a communication between the accused and his attorney concerning investigation of the case or the preparation of a defense, or otherwise interferes with the attorney-client relationship, there is in my view simply no constitutional prohibition against the use of incriminating information voluntarily obtained from an accused despite the fact that his counsel may not be present.

Id. at 293–94. In such circumstances, the defendant's *Miranda* warnings were adequate to inform him of his rights. *Id.* at 294.

74 *Id.* at 291–94.

75 474 U.S. 159 (1985).

him and the State" once formal proceedings have commenced.[76] Although the facts were strikingly similar to *Massiah*,[77] the informant in *Moulton* had been hired to investigate a crime separate from the one with which the defendant had been charged.[78] While admitting the government's interest in investigating crimes for which formal charges have been brought as well as additional crimes, Justice Brennan's opinion held that evidence regarding the pending charges must be excluded lest the Court "invite[ ] abuse by law enforcement personnel in the form of fabricated investigations" which could "eviscerat[e] . . . the Sixth Amendment."[79]

In dissent, Chief Justice Burger, joined by Justices Rehnquist, White, and (in relevant part) O'Connor,[80] called the majority's decision a "judicial aberration conferring a windfall benefit to those who are the subject of criminal investigations for one set of crimes while already under indictment for another."[81] In his view, the Sixth Amendment, even as broadly interpreted in *Massiah*, was not violated by the use of incriminating statements obtained by investigators in good faith while investigating another crime; violation of the Sixth Amendment focused on whether the government "deliberately circumvented counsel" with respect to the indictment.[82] Where the statements were gathered for a legitimate reason separate from the charged offenses, there was no such deliberate circumvention.[83] *Massiah* was not intended to inoculate charged defendants against investigation of their involvement in uncharged offenses.[84] As for the majority's concern about official misconduct, this was, in Chief Justice Burger's opinion, better dealt with by excluding evidence in those

76 *Id.* at 176. "The Sixth Amendment protects the right of the accused not to be confronted by an agent of the State regarding matters as to which the right to counsel has attached without counsel being present." *Id.* at 178 n.14.

77 Indeed, in a strange case of déjà vu, the informant in *Moulton*, like the one in *Massiah*, was named Colson. *Id.* at 162.

78 *Id.* at 162–66.

79 *Id.* at 180.

80 Justice O'Connor did not concur in Chief Justice Burger's criticism of the majority's extension of the exclusionary rule to cover the case. *Id.* at 181, 190–92 (Burger, C.J., dissenting). This "exceptionally controversial" rule, *see* 1 DRESSLER & MICHAELS, *supra* note 6, § 20.01, at 365, has been most often applied by the Court in the Fourth and Fifth Amendment areas, and its place in Sixth Amendment jurisprudence is not entirely clear. *See id.* § 25.07, at 550–55; James J. Tomkovicz, *The* Massiah *Right to Exclusion: Constitutional Premises and Doctrinal Implications*, 67 N.C. L. REV. 751, 752 (1989).

81 *Moulton*, 474 U.S. at 186 (Burger, C.J., dissenting).

82 *Id.* at 187–88.

83 *Id.* at 185–87.

84 *Id.* at 190.

cases where it could be shown that the officers acted in bad faith or charged separate offenses as a pretext to elude *Massiah*.[85]

The Court's final expansive treatment of the Sixth Amendment and *Massiah* occurred in *Michigan v. Jackson*.[86] In *Jackson*, the defendant, at his arraignment for murder, was informed of and invoked his right to appointment of counsel.[87] After the mailing of notice of appointment of counsel to a law firm, but before its receipt, the police informed the defendant of his *Miranda* rights and proceeded to interrogate him.[88] Affirming the Michigan Supreme Court's order overturning his convictions, the Supreme Court held that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid."[89] The Court, per Justice Stevens, extended its Fifth Amendment decision on custodial interrogation in *Edwards v. Arizona*[90] to the Sixth Amendment arena, reasoning that the need to prohibit uncounseled interrogations after a defendant requested an attorney's assistance was "even stronger after he ha[d] been formally charged with an offense than before."[91] Although the Court was careful to state that the right to counsel did not turn on a request for counsel, the Court saw "no warrant for a different view" than the one expressed in *Edwards*, that, after making a request for counsel, a suspect could not validly waive her rights by acquiescing in police-initiated interrogation, notwithstanding her being properly informed of those rights.[92]

This conflation of the Fifth and Sixth Amendment rights to counsel was disputed by Justice Rehnquist's dissent.[93] With Justices

85 *Id.* at 189 (noting that "police misconduct need not be countenanced," notwithstanding the inapplicability of *Massiah* to the investigation of separate crimes (citing United States v. Darwin, 757 F.2d 1193, 1199 (11th Cir. 1985))).

86 475 U.S. 625 (1986).

87 *Id.* at 627.

88 *Id.*

89 *Id.* at 636.

90 451 U.S. 477 (1981).

91 *Jackson*, 475 U.S. at 631.

92 *Id.* at 635.

93 The Fifth Amendment right to counsel is "quite distinct" from the Sixth Amendment right, although the Supreme Court has "blown hot and cold" on this subject. 1 DRESSLER & MICHAELS, *supra* note 6, § 25.08, at 555. The rights differ in several ways. For example, the Fifth Amendment right to counsel does not attach unless a suspect is in custody, but attaches to custodial interrogation prior to indictment. Furthermore, the Fifth Amendment right, unlike its Sixth Amendment counterpart, is not offense-specific. Waiver of the right and application of the exclusionary rule also differ in the two contexts. *See id.* at 538–39; *see also* McNeil v. Wisconsin, 501 U.S. 171, 177–78 (1991) ("The purpose of the Sixth Amendment counsel guaran-

O'Connor and Powell, Justice Rehnquist disputed the very existence of a Fifth Amendment right to counsel,[94] but felt that, in any event, *Edwards*' "prophylactic rule," designed to prevent law enforcement personnel from circumventing a suspect's assertion of his *Miranda* rights by hounding the suspect into a waiver of those rights, "ma[de] no sense at all except when linked to the Fifth Amendment's prohibition against compelled self-incrimination."[95] Because there was no widespread concern over suspects being denied their Sixth Amendment counsel by police, as there had been regarding the Fifth Amendment right, there was no reason to import *Edwards* into the Court's Sixth Amendment jurisprudence.[96] The situation was worsened, in Justice Rehnquist's opinion, by the fact that the importation was artificially limited to instances in which the defendant requested counsel, despite the fact that the Sixth Amendment right to counsel is not dependent on such an assertion.[97]

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tee . . . is to 'protect the unaided layman at critical confrontations' with his 'expert adversary' . . . *after* 'the[ir] adverse positions . . . have solidified' . . . . The purpose of the *Miranda-Edwards* guarantee, on the other hand . . . is to protect a quite different interest: the suspect's 'desire to deal with the police only through counsel.' This is in one respect narrower than the interest protected by the Sixth Amendment guarantee (because it relates only to custodial interrogation) and in another respect broader (because it relates to interrogation regarding *any* suspected crime and attaches whether or not the 'adversarial relationship' produced by a pending prosecution has yet arisen)." (citations omitted)); Patterson v. Illinois, 487 U.S. 285, 297 (1988) (stating that "our cases have recognized a 'difference' between the Fifth Amendment and Sixth Amendment rights to counsel, and the 'policies' behind these constitutional guarantees"); Benjamin F. Diamond, *The Sixth Amendment: Narrowing the Scope of the Right to Counsel*, 54 FLA. L. REV. 1001, 1003 n.22 (2002) (contrasting the Fifth and Sixth Amendment rights to counsel); Uviller, *supra* note 35, at 1155–56 (noting the distinction between the Fifth Amendment right to counsel as enunciated in *Miranda* and the Sixth Amendment right to counsel described in *Massiah*).

94 *Jackson*, 475 U.S. at 639 n.2 (Rehnquist, J., dissenting) ("[O]ur cases make clear that the Fifth Amendment itself provides no such 'right.' . . . Even under *Miranda*, the 'right to counsel' exists solely as a means of protecting the defendant's Fifth Amendment right not to be compelled to incriminate himself." (citations omitted)).

95 *Id.* at 639–40.

96 *Id.*

97 *Id.* at 642 ("The glaring inconsistencies in the Court's opinion arise precisely because the Court lacks a coherent, analytically sound basis for its decision."). The "underlying theory of *Jackson*" was again questioned by the concurrence in *Texas v. Cobb*, where Justice Kennedy, with whom Justices Thomas and Scalia joined, noted that *Jackson* superseded a defendant's volitional decision to speak to the authorities, notwithstanding a proper administration of *Miranda* rights and their waiver. 532 U.S. 162, 174–75 (2001) (Kennedy, J., concurring). Given its application even where it cannot be shown that a defendant did not desire to speak, the rule in *Jackson* was, according to Justice Kennedy, of "question[able] . . . wisdom." *Id.* at 176.

C. *Recent Contraction of the Sixth Amendment*

The Court began, for the first time since *Massiah*, cutting back on its expansive interpretation of the Sixth Amendment right to counsel in *Patterson v. Illinois*.[98] Following indictment for a gang-related murder, the defendant had twice confessed his involvement; both confessions followed administration of *Miranda* warnings and the defendant's signing a waiver of his rights.[99] The Court distinguished *Jackson* on the basis that the defendant had not sought to exercise his right to the presence of an attorney.[100] Justice White's opinion noted the importance not only of "[p]reserving the integrity of the accused's choice to communicate with police only through counsel," but also of "not barring an accused from making an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone."[101] Thus, where one was "made sufficiently aware of his right to have counsel present . . . and of the possible consequences of a decision to forgo the aid of counsel"[102]—goals accomplished by the *Miranda* warnings the defendant had received—there was a sufficient basis to find that the defendant had made an "intentional relinquishment or abandonment of a known right or privilege."[103] The Court noted that its decision was largely informed by the limited role for counsel in post-indictment questioning as opposed to trial proceedings; whereas at trial a defendant's needs are likely to exceed his abilities, in the pretrial interrogation context the lawyer's "unidimensional" function is essentially to advise his client when and when not to answer questions posed.[104] This "simple and limited" role for counsel lent itself naturally to a similarly simple and limited waiver procedure.[105]

Believing that warnings proffered by the government, no matter how detailed, could not provide an accused with full understanding of "the dangers and disadvantages of self-representation," Justice Stevens, with whom Justices Brennan and Marshall concurred, dissented.[106] The only possible justification, in Justice Stevens' eyes, for post-indictment questioning was to bolster the State's case, not to

98 487 U.S. 285 (1988).
99 *Id.* at 287–89.
100 *Id.* at 290–91.
101 *Id.* at 291.
102 *Id.* at 292–93.
103 *Id.* at 292 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).
104 *Id.* at 294 n.6.
105 *Id.* at 299.
106 *Id.* at 307 (Stevens, J., dissenting) (quoting Faretta v. California, 422 U.S. 806, 835 (1975)).

solve a crime, since indictment presumably indicated the State's belief in its ability to prove its prima facie case; thus, it was unethical for the state, after solidifying its adversarial position, to advise the accused in the absence of counsel.[107]

McNeil v. Wisconsin[108] saw the Court establish another important limitation on the right to counsel for Sixth Amendment purposes, namely, the right's offense-specific nature. In *McNeil*, the defendant, who had been charged with armed robbery, was interrogated by a detective regarding a murder, attempted murder, and armed burglary in which the defendant was suspected but for which he had not been arrested.[109] After first denying involvement, the defendant admitted upon a second questioning that he had participated in the crimes. Before both interrogations, the defendant had been given his *Miranda* warnings and had waived his rights.[110]

Justice Scalia's majority had no trouble determining that the Sixth Amendment was not violated by this questioning.[111] The Court rejected the defendant's attempt to conflate the Fifth and Sixth Amendment rights to counsel, noting that the purpose underlying the Sixth Amendment right was to protect the unaided layman during confrontations with the State after formal charges solidified its adversarial position.[112] To adopt a contrary rule, the Court believed, would render a suspect accused of one crime inaccessible to law enforcement personnel having reason to suspect him of other crimes, regardless of whether he has expressed a disinclination to speak.[113] Notably, the Court shifted its focus from the accused to the State; "[s]ince the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good," prohibiting police questioning of indicted defendants for uncharged crimes would make society the loser.[114]

Justice Stevens again dissented, joined by Justices Marshall and Blackmun, believing the offense-specificity limitation enunciated by

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107 *Id.* at 306–10.

108 501 U.S. 171 (1991).

109 *Id.* at 173.

110 *Id.* at 173–74.

111 *Id.* at 175 ("The Sixth Amendment right . . . is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced . . . .").

112 *Id.* at 177–78; *see also supra* note 93 (discussing the distinction between the Fifth and Sixth Amendment rights to counsel and citing sources, including *McNeil*).

113 *McNeil*, 501 U.S. at 181.

114 *Id.* "Admissions of guilt resulting from . . . waivers 'are . . . essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'" *Id.* (quoting Moran v. Burbine, 475 U.S. 412, 426 (1986)).

the Court to be a wellspring of confusion.[115] In favoring the societal interest in confessions over "the importance of fair procedure," the Court, according to Justice Stevens, took a view of defense counsel as a "nettlesome obstacle to the pursuit of wrongdoers" rather than "an aid to the understanding and protection of constitutional rights," and thus preferred an inquisitorial system of justice over an adversarial one.[116] Presciently, Justice Stevens hoped that the contours of the offense-specific restriction would "not be patterned after the Court's double jeopardy jurisprudence."[117]

The *McNeil* Court's increased concern for the State's investigative abilities and its explicit invocation of offense specificity were revisited in *Cobb*, where the Court clarified the meaning of "offense" for Sixth Amendment purposes. The defendant, free on bail after indictment in a burglary case, confessed to his father that he had committed murder in the course of the burglary.[118] The defendant's father contacted police, who arrested the defendant and, after properly administering *Miranda* warnings, obtained a confession to two murders.[119] Chief Justice Rehnquist, stating that the Court's "decision in *McNeil* . . . meant what it said,"[120] defined "offense" with reference to the Court's double jeopardy decision in *Blockburger*.[121] Importantly, the Court stated that it saw "no constitutional difference between the meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel," and so held that the Sixth Amendment right to counsel attached to those offenses that would be the same under the *Blockburger* test.[122] In rejecting the exception to the offense-specific limitation for "factually related" offenses that some lower courts had recognized, the Court distinguished its decisions in *Brewer* and *Moulton* by noting that neither of them squarely addressed the issue at

115 *Id.* at 187 (Stevens, J., dissenting).

116 *Id.* at 188–89 (quoting *Moran*, 475 U.S. at 468 (Stevens, J., dissenting)).

117 *Id.* at 187.

118 Texas v. Cobb, 532 U.S. 162, 165 (2001).

119 *Id.*

120 *Id.* at 164.

121 *Id.* at 173 (citing Blockburger v. United States, 284 U.S. 299, 304 (1932)); *see also supra* note 10 (stating that the *Blockburger* test views offenses as separate when each requires proof of an element not required by the other).

122 *Cobb*, 532 U.S. at 173. The Court also noted that it "could just as easily describe the Sixth Amendment as 'prosecution specific,' insofar as it prevents discussion of charged offenses as well as offenses that, under *Blockburger*, could not be the subject of a later prosecution," a definition which comported nicely with the Sixth Amendment's coverage of all criminal *prosecutions*. *Id.* at 173 n.3.

hand.[123] Responding to the defendant's concerns that *Blockburger*'s importation would impair the constitutional rights of suspects, the Chief Justice made two important observations: first, defendants must still be given *Miranda* warnings, informing them of their rights against compulsory self-incrimination and to meet with a lawyer before questioning;[124] and second, "the Constitution does not negate society's interest in the ability of police to talk to witnesses and suspects" whether they have been indicted for other offenses or not.[125] The majority also dismissed the dissent's charge that the *Blockburger* test would prove unworkable, instead claiming that the dissent's "inextricably intertwined with" proposal was impracticably vague; police, not yet knowing the precise series of events under their investigation, could be deterred by the dissent's rule from questioning defendants at all.[126] Thus, as in *McNeil*, the Court deemed the government's ability to investigate crimes to be an important factor in its analysis of whether the Sixth Amendment had been violated.

In dissent, Justice Breyer, joined by Justices Souter, Stevens, and Ginsburg, criticized the definition of "offense" adopted by the Court as an "unnecessarily technical" one, "undermin[ing] Sixth Amendment protections while doing nothing to further effective law enforcement."[127] Because of the nature of modern criminal codes, application of the *Blockburger* test could permit prosecutors to fashion a "startlingly numerous series of offenses from a single . . . criminal transaction."[128] Thus, simply by charging one of these many offenses and questioning the suspect about the uncharged (but related)

123 *Id.* at 169 ("Constitutional rights are not defined by inferences from opinions which did not address the question at issue.").

124 *Id.* at 171. The Court further noted:

> Even though the Sixth Amendment right to counsel has not attached to uncharged offenses, defendants retain the ability under *Miranda* to refuse any police questioning, and, indeed, charged defendants presumably have met with counsel and have had the opportunity to discuss whether it is advisable to invoke those Fifth Amendment rights. . . . [T]here is no "background principle" of our Sixth Amendment jurisprudence establishing that there may be no contact between a defendant and police without counsel present.

Id. at 171–72 n.2.

125 *Id.* at 171–72.

126 *Id.* at 173–74.

127 *Id.* at 179 (Breyer, J., dissenting).

128 *Id.* at 182 (quoting Ashe v. Swenson, 397 U.S. 436, 445 n.10 (1970)). Justice Breyer gave an example whereby a defendant, having robbed a store, could be charged with "armed robbery, assault, battery, trespass, [and] use of a firearm to commit a felony," all of which could constitute separate offenses under the *Blockburger* test. *Id.*

crimes, the protection of the Sixth Amendment could be circumvented, thereby undermining counsel's role as a channel between her client and the state.[129] Furthermore, Justice Breyer disputed the easy applicability of the *Blockburger* test; although "simple-sounding," the test had, according to the dissent, "proved extraordinarily difficult to administer in practice," and would leave law enforcement puzzled as to when they could or could not question with impunity.[130] Instead, Justice Breyer advocated the test that had been adopted by various lower courts, attaching the Sixth Amendment right to counsel to those crimes that were "closely related to" or "inextricably intertwined with" the charged offense.[131]

Thus, following *Cobb*, some features of the Court's Sixth Amendment case law are clear: (1) the right to counsel attaches at the institution of formal proceedings; (2) following its attachment the government may not question the defendant outside of counsel's presence regarding the charged offense without a valid waiver; (3) a valid waiver may only be made knowingly and voluntarily, and may not be made at the behest of police for state-initiated interrogation where the defendant has asserted her right to counsel; (4) waiver may not occur where the interrogation is surreptitious; (5) analysis of the Sixth Amendment right to counsel involves a balancing of the defendant's interest in a fair trial with society's interest in apprehending criminals; and (6) the right is offense-specific, and in this context the definition of "offense" is that enunciated in *Blockburger*.[132]

However, the Court in *Cobb* did not address one aspect of its introduction of *Blockburger* into the Sixth Amendment sphere: did the Court intend to import its double jeopardy jurisprudence wholesale into the Sixth Amendment context, or did it intend to confine this intertwining strictly to *Blockburger*'s "offense" definition? More specifically, did the Court intend the dual sovereignty doctrine featured in its double jeopardy cases to become a feature of the Sixth Amendment as well? It is this issue that has divided the lower courts.

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129 *Id.* at 182–83. The dissent further disputed the majority's distinguishing of *Brewer* and *Moulton*, claiming that those cases would have been decided differently under the *Blockburger* test. *See id.* at 183–84. However, Justice Breyer also admitted that the Court had not previously decided the issue. *Id.* at 184.

130 *Id.* at 185.

131 *Id.* at 186–87. This test was, in the dissent's view, "far easier to apply" than the *Blockburger* test, and better advanced the Sixth Amendment right to counsel's fairness concerns. *Id.* at 187.

132 For a clear, concise overview of the Court's Sixth Amendment cases and their relation to one another, see 1 DRESSLER & MICHAELS, *supra* note 6, §§ 25.01 to .06, at 525–50.

II. THE DUAL SOVEREIGNTY DOCTRINE

The dual sovereignty doctrine states, in essence, that violations of the laws of separate sovereigns are, by definition, separate offenses; practically speaking, the same conduct may transgress the laws of multiple sovereigns.[133] In the double jeopardy context[134] where it is most often seen,[135] this doctrine dictates that successive prosecutions by different sovereigns (i.e., federal and state governments) are permissible, because the prosecutions are for different offenses.

A. History and Modern Development

The origins of the dual sovereignty doctrine may be traced to the early nineteenth century and the Supreme Court's decision in *Houston v. Moore*,[136] where the Court upheld against constitutional attack a Pennsylvania law which incorporated by reference federal penalties against militiamen failing to report for federal duty.[137] Although the majority's opinion seemed not to recognize a dual sovereignty doctrine,[138] Justice Johnson's concurrence noted that, as each citizen enjoys the protections of and owes allegiance to both the national and state governments, there was in principle no reason why a single criminal act could not be punished by both the state and federal governments.[139]

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133 *See, e.g.*, David Bryan Owsley, Note, *Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study*, 81 WASH. U. L.Q. 765, 766–67 (2003); *see also* Heath v. Alabama, 474 U.S. 82, 88 (1985) ("The dual sovereignty doctrine is founded on the common-law conception of crime as an offense against the sovereignty of the government."); Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 290 (1992) ("The dual sovereignty doctrine derives from the common law notion that a crime is an offense against the sovereign.").

134 U.S. CONST. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .").

135 The dual sovereignty doctrine has been applied in other contexts at various times in the nation's history. *See, e.g.*, Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 11–15 (1995) (discussing the doctrine's application, and subsequent abandonment, in the Fourth Amendment unreasonable search and seizure context and the Fifth Amendment self-incrimination context).

136 18 U.S. (5 Wheat.) 1 (1820).

137 *Id.* at 24–31.

138 The precise scope of the majority's holding is unclear, and in any event was limited essentially to its facts by *Bartkus v. Illinois*, 359 U.S. 121, 130 (1959). *See* Braun, *supra* note 12, at 17–18; Owsley, *supra* note 133, at 771 n.37.

139 *Houston*, 18 U.S. (5 Wheat.) at 33 (Johnson, J., concurring) ("Why may not the same offence be made punishable both under the laws of the States, and of the

The Court began to assert the dual sovereignty rationale more firmly, if not explicitly, in *Fox v. Ohio*,[140] where it upheld an Ohio anticounterfeiting statute as constitutional against a double jeopardy attack.[141] The Court rested its decision on the fact that the Bill of Rights did not apply to state governments.[142] But the Court also displayed comfort with the notion of successive prosecutions, noting that any problems accompanying the notion of duplicative actions would be softened by the discretion of law enforcement.[143] Dissenting, Justice McLean stated that the possibility of redundant prosecutions by the federal and state governments was "a great defect in our system" and offensive to "common principles of humanity," but conceded that the double jeopardy prohibition applied to "the respective governments."[144]

These arguments were reprised in *Moore v. Illinois*.[145] Once more the Court was undisturbed by the prospect of concurrent federal and state jurisdiction and multiple prosecutions thereunder, given the dual allegiances of the federal system under which the citizenry had chosen to operate,[146] and once more Justice McLean dissented on the

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United States? Every citizen of a State owes a double allegiance; he enjoys the protection and participates in the government of both the State and the United States.").

140 46 U.S. (5 How.) 410 (1847).

141 *Id.* at 434–35.

142 *Id.* (citing Barron v. Mayor of Balt., 32 U.S. (7 Pet.) 243 (1833)).

143 *Id.* at 435. The Court went on to note:

> 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. But were a contrary course of policy and action either probable or usual, this would by no means justify the conclusion, that offences falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration.

Id.

144 *Id.* at 439 (McLean, J., dissenting). Justice McLean, who would have invalidated the state law under the Supremacy Clause, stated that the spirit, if not the letter, of double jeopardy "applies with equal force against a double punishment, for the same act, by a State and the federal government." *Id.*

145 55 U.S. (14 How.) 13 (1852).

146 The Court made its position eminently clear:

> 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

grounds that preemption should apply and that concurrent jurisdiction and successive prosecutions were "contrary to the nature and genius of our government."[147]

The Court definitively endorsed the dual sovereignty doctrine in *United States v. Lanza*.[148] Citing both *Fox* and *Moore* for the proposition that dual sovereignty was "supported by a long line of decisions," a unanimous Court held that federal prosecution under the Eighteenth Amendment was permissible despite the defendant's conviction at the state level for violations of Washington's prohibition laws.[149] Chief Justice Taft openly based the Court's decision upon the dual sovereignty doctrine, stating that

> Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.
>
> It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.[150]

And to make clear that this was not a fleeting, fact-specific decision, the Court explicitly noted that the State's authority to legislate was not based upon any provision of the Eighteenth Amendment, but rather was a function of the power reserved to the states under the Tenth Amendment.[151]

The Court revisited, and reaffirmed, the dual sovereignty doctrine in a pair of 1959 decisions: *Bartkus v. Illinois*[152] and *Abbate v. United States*.[153] In *Bartkus*, the Court considered a state conviction that was preceded by a federal acquittal.[154] Justice Frankfurter's majority found this issue was "not a new question," having been "invoked and rejected in over twenty cases," and "not [having] been questioned by th[e] Court since the opinion in *Fox*."[155] The Court

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> fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable.

Id. at 20.

147 *Id.* at 21 (McLean, J., dissenting).

148 260 U.S. 377 (1922).

149 *Id.* at 382.

150 *Id.*

151 *Id.* at 381–82; *see also* Dawson, *supra* note 133, at 292–93 ("[T]he Tenth Amendment is the source for the dual sovereignty doctrine . . . .").

152 359 U.S. 121 (1959).

153 359 U.S. 187 (1959).

154 *Bartkus*, 359 U.S. at 121–22.

155 *Id.* at 128–29.

surveyed its prior precedents dating back to *Houston* through *Lanza* and beyond, as well as the decisions of both lower federal and state courts,[156] and determined that "disregard of a long, unbroken, unquestioned course of impressive adjudication" was not merely unwarranted, but "would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines."[157] Although the Court recognized it had "little sympathy" for the doctrine—given that the States were more competent to deal with the intricacies of criminal codes and proper prosecution thereunder—it was not the Court's place to interfere, especially where the doctrine was an incident of the federal system designed by the Founders.[158]

Justice Black's dissenting opinion, in which Chief Justice Warren and Justice Douglas joined, found successive prosecutions to be abhorrent from the standpoint of the individual thus prosecuted, notwithstanding the sovereignty of the prosecutors.[159] It was no answer to invoke "federalism" as a talisman to permit the loss of rights through "the combined operations of the two governments."[160] The "dangerous fiction" of dual sovereignty was also unnecessary in Justice Black's view, since Congress could merely preempt the states in matters under its power, while in purely local matters the states should have final authority.[161]

In a separate dissenting opinion, Justice Brennan, also joined by Justice Douglas and Chief Justice Warren, found that the "extent of participation of the federal authorities" should have barred the state trial.[162] While recognizing that "cooperation between federal and state authorities in criminal law enforcement is to be desired and encouraged," Justice Brennan believed that the price of such cooperative federalism was the requirement of "present[ing] the strongest case . . . at a single trial."[163]

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156 *Id.* at 128–37.

157 *Id.* at 136–37 ("It would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of prosecution . . . by federal authorities beyond the control of the States.").

158 *Id.* at 137–39.

159 *Id.* at 155 (Black, J., dissenting).

160 *Id.* at 156. Justice Black was of the opinion that the Court should "be suspicious of any supposed 'requirements' of 'federalism' which result in obliterating ancient safeguards." *Id.* at 155.

161 *Id.* at 157.

162 *Id.* at 165 (Brennan, J., dissenting).

163 *Id.* at 168–69. As Justice Brennan noted, this "sham" exception was "apparently acknowledge[d]" by the Court. *Id.* at 167. The Court, however, did not apply such an exception, instead finding:

The Court in *Abbate*, considering a state conviction followed by a federal prosecution, referred to many of the same concerns as it had in *Bartkus*, again citing substantial case law for the proposition that "the same act might . . . constitute an offense against both the State and Federal governments, and might draw to its commission the penalties denounced by either."[164] Justice Brennan, this time writing for the majority, quoted extensively from *Moore* and *Lanza* and expressly declined to overrule the latter given the "undesirable consequences [that] would follow."[165] In so holding, the Court pointed out the difficulties involved in abandoning the dual sovereignty doctrine: if state prosecutions barred federal prosecutions based upon the same actions, this would necessarily hamstring federal law enforcement personnel; conversely, if federal prosecutions barred state prosecutions, the distribution of crime-fighting power would be impermissibly shifted, given that "the States under our federal system have the principal responsibility for defining and prosecuting crimes."[166] As in *Bartkus*, Justice Black dissented with Justice Douglas and Chief Justice Warren, voicing essentially the same concerns he had previously and adding that he was "not convinced that a State and the Nation can be considered two wholly separate sovereignties for the purpose of allowing them to do together what, generally, neither can do separately."[167]

B. Post-Incorporation Retention

In the twentieth century, the Court retreated from its decision in *Barron v. Mayor of Baltimore*,[168] in which it had held the Bill of Rights inapplicable as a limitation on the states' power,[169] and began, bit by bit, to incorporate the various rights enshrined in the Constitution's

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> [The record] does not support the claim that the State of Illinois . . . was merely a tool of the federal authorities, who thereby avoided the prohibition of the Fifth Amendment . . . . It does not sustain a conclusion that the state prosecution was a sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution.

Id. at 123–24 (majority opinion).

164 Abbate v. United States, 359 U.S. 187, 191 (quoting United States v. Marigold, 50 U.S. (9 How.) 560, 569 (1850)). Indeed, in addition to discussions of *Houston v. Moore*, *Fox*, *Moore v. Illinois*, and *Lanza*, the Court's string citations reference no less than eighteen more of its own cases adhering to the dual sovereignty principle. *Id.* at 190–94.

165 *Id.* at 195.

166 *Id.*

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

168 32 U.S. (7 Pet.) 243 (1833).

169 *Id.* at 249.

inaugural amendments against the states.[170] The Court incorporated protection against double jeopardy in *Benton v. Maryland.*[171] Despite this incorporation, and although the Court abandoned dual sovereignty concepts in the self-incrimination[172] and unreasonable search and seizure[173] contexts following their incorporation, the Court rejected the invitation to abandon dual sovereignty in the double jeopardy context in *Heath v. Alabama.*[174]

Heath involved the unusual situation of successive *state* prosecutions, a situation which the Court had not before considered; notwithstanding this new factual wrinkle, Justice O'Connor's seven-Justice majority unflinchingly upheld the dual sovereignty doctrine.[175] The Court stated that the crucial issue in application of the dual sovereignty doctrine is "whether the two entities that seek successive[ ] . . . prosecut[ions] . . . draw their authority to punish the offender from distinct sources of power," and reiterated *Lanza*'s notion that the states' powers to prosecute criminal violations derive from the Tenth Amendment's preservation of state power that preexisted the Union.[176] The Court also rejected the notion that the doctrine is "simply a fiction," pointing to its "weighty support in the historical understanding and political realities of the States' role in the federal system."[177] Given these interests, a state could not be denied its inherent power to prosecute crimes simply because another sovereign had "won the race to the courthouse."[178]

Notably, *Heath*'s dissenters, Justices Marshall and Brennan, disagreed only with the dual sovereignty doctrine's extension to the context of successive state prosecutions.[179] Justice Marshall discussed at

170 *See, e.g.*, Malloy v. Hogan, 378 U.S. 1, 3 (1964) (Fifth Amendment self-incrimination clause); Mapp v. Ohio, 367 U.S. 643, 654–55 (1961) (Fourth Amendment unreasonable search and seizure).

171 395 U.S. 784, 787 (1969).

172 Murphy v. Waterfront Comm'n, 378 U.S. 52, 53 (1964).

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

174 474 U.S. 82, 92–93 (1985).

175 *Id.* at 89.

176 *Id.* at 88–89.

177 *Id.* at 92.

178 *Id.* at 93. The Court made clear that it was not sufficient that one prosecuting sovereign's interests aligned with the other's. Such a balancing approach, while "difficult and uncertain," would also be entirely inadequate: "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." *Id.* at 92–93.

179 *Id.* at 100–01 (Marshall, J., dissenting) ("Where two States seek to prosecute the same defendant for the same crime in two separate proceedings, the justifications found in the federal-state context for an exemption from double jeopardy constraints simply do not hold.").

length, and with approval, the doctrine's application where the federal government and a state are involved, echoing the federalism concerns and prevention of hindrances to law enforcement that the Court had noted in *Abbate*.[180]

The foregoing demonstrates the development of the dual sovereignty doctrine and its underlying rationales: (1) a sovereign's ability to protect the welfare of its citizenry through the definition and enforcement of criminal laws is a core component of the states' traditional powers, preserved thereto by the Tenth Amendment, as well as of the federal government's expansive powers; (2) conduct is made no less criminal by virtue of its violation of the criminal codes of more than one of these sovereign entities; and (3) to prohibit the enforcement of one of these sovereigns' laws because another of them won the race to the courthouse would ill serve the interests of either sovereign or the publics they protect. In short, as Justice Marshall stated, the possibility of multiple prosecutions is "the price of living in a federal system, the cost of dual citizenship."[181]

However, the Court has never addressed the implementation of the dual sovereignty doctrine in the Sixth Amendment right-to-counsel context, and few have considered the ramifications of such an extension. Indeed, the Court in *Cobb* left the lower courts to sort the question out for themselves. Although the circuits have not been in accord, I shall demonstrate in the following Part that the adoption of the dual sovereignty doctrine in the Sixth Amendment context not only follows inevitably from the Court's opinion in *Cobb*, but is also the correct choice, properly balancing the disparate interests of the defendant and the state.

III. INTEGRATING DUAL SOVEREIGNTY AND THE SIXTH AMENDMENT RIGHT TO COUNSEL

Since the Court handed down its decision in *Cobb*, the issue of whether the dual sovereignty doctrine was imported into the Sixth Amendment right-to-counsel jurisprudence has split those circuits considering it nearly evenly. On the one hand, the First, Fifth, and (most recently) Fourth Circuits have held that *Cobb* did incorporate the doctrine into the Sixth Amendment right to counsel, based on a plain reading of the opinion and the sovereignty concerns impli-

180 *Id.* at 99. Although Justice Marshall did not find any specific intent on the part of the Founders to implement a dual sovereignty exception to double jeopardy, he stated that this risk of successive prosecutions was "the cost of dual citizenship." *Id.* at 98–99.

181 *Id.* at 99.

cated.[182] On the other hand, the Second and Eighth Circuits, joined in dicta by the Seventh Circuit, have read *Cobb* to the contrary, finding the risk of collusion too high to hold otherwise.[183] Below I discuss their arguments, as well as other concerns implicated by the marriage of the Sixth Amendment right to counsel and dual sovereignty, and explain why such a marriage is the appropriate reading of *Cobb*.

The easiest and most straightforward reason for interpreting *Cobb* to have adopted the dual sovereignty doctrine is the decision's plain language. In importing the *Blockburger* test to define "offense" for Sixth Amendment right-to-counsel purposes, the Court clearly stated that it saw "no constitutional difference between the meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel."[184] This statement seems quite plainly to mean that, whatever "offense" might mean in the double jeopardy context, the same meaning obtains in the Sixth Amendment context.[185] As discussed previously, the Court has long held that an "offense" against the laws of one sovereign is not, under double jeopardy, an offense against the laws of another.[186] A clear-cut reading of *Cobb* would similarly lead directly to the conclusion that violations of the criminal laws of a state and of the federal government are separate "offenses" when considering attachment of the Sixth Amendment right to counsel. Indeed, this has been the cornerstone of the decisions adopting the dual sovereignty doctrine under *Cobb*,[187] and has even been conceded

182 *See* United States v. Alvarado, 440 F.3d 191, 196–97 (4th Cir. 2006), *cert. denied*, 127 S. Ct. 81 (2006); United States v. Coker, 433 F.3d 39, 44 (1st Cir. 2005); United States v. Avants, 278 F.3d 510, 517 (5th Cir. 2002).

183 *See* United States v. Krueger, 415 F.3d 766, 777 (7th Cir. 2005); United States v. Mills, 412 F.3d 325, 330 (2d Cir. 2005); United States v. Bird, 287 F.3d 709, 715 (8th Cir. 2002).

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

185 Indeed, one might say that *Cobb*, like *McNeil* before it, "meant what it said." *Id.* at 165.

186 *See supra* Part II.

187 The Fifth Circuit had the following to say on the matter:

> Particularly relevant to our analysis today, the Court [in *Cobb*] saw "no constitutional difference between the meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel."
>
> Thus, it seems rather clear that the Supreme Court would require us to apply double jeopardy principles in determining whether two offenses are the same in the Sixth Amendment context. . . . By concluding without limitation that the term "offense" has the same meaning under the Sixth Amendment as it does under the Double Jeopardy Clause, the Court effectively foreclosed any argument that the dual sovereignty doctrine does not inform the definition of "offense" under the Sixth Amendment.

as the most natural interpretation of *Cobb* by its critics.[188] It would follow, one supposes, that the lower courts should not depart from such an open and obvious statement of the Supreme Court, but should leave its reevaluation to that high body.[189]

Of course, such a literal, formalistic reading of the Court's language is not entirely satisfying, for it does not address the larger question of whether the right to counsel and dual sovereignty are compatible. The Courts of Appeals considering and rejecting the theory that *Cobb* adopted dual sovereignty in the Sixth Amendment context have expressed concern that this strict interpretation would open a loophole in the Sixth Amendment right-to-counsel jurisprudence that would effectively gut it, permitting collusion by sovereigns.[190] This echoes the doubts voiced by Justice Breyer in his *Cobb* dissent[191] as well as in academic criticism of the decision.[192] This criticism, how-

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Avants, 278 F.3d at 517 (citations omitted); *see also Alvarado*, 440 F.3d at 196 ("Because *Cobb* clearly indicates that the definition of offense is the same in the right to counsel and double jeopardy contexts, the dual sovereignty doctrine has equal application in both. Indeed, if dual sovereignty is a central feature of double jeopardy analysis, it cannot help but be a central feature of offense-specificity analysis since the two after *Cobb* are constitutionally one and the same." (citation omitted)); *Coker*, 433 F.3d at 44 ("If the Court intended to incorporate only the *Blockburger* test into its Sixth Amendment jurisprudence, then its statement in *Cobb* would make no sense, as there would be a difference in the meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel.").

188 *See Krueger*, 415 F.3d at 776 ("Because the Supreme Court has held that term [sic] 'offense' has the same meaning for purposes of the . . . Sixth Amendment analysis as it does for double jeopardy purposes, one might conclude that a defendant's invocation of his right to counsel as to a charge brought by a state government will not be treated as the invocation of his right as to the federal charge . . . ." (citation omitted)); David J. D'Addio, Comment, *Dual Sovereignty and the Sixth Amendment Right to Counsel*, 113 YALE L.J. 1991, 1993 (2004) (admitting that "[i]f there is truly 'no difference' between the meanings of offense in the double jeopardy and right-to-counsel contexts, then it follows that dual sovereignty . . . should be part of the right-to-counsel definition of offense as well").

189 *See, e.g.*, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) (stating that Courts of Appeals should "leav[e] to th[e] Court the prerogative of overruling its own decisions").

190 *See* United States v. Mills, 412 F.3d 325, 330 (2d Cir. 2005) (fearing that "a dual sovereignty exception would permit one sovereign to question a defendant whose right to counsel had attached, to do so in the absence of counsel and then to share the information with the other sovereign without fear of suppression"); *see also Krueger*, 415 F.3d at 777 (quoting the Second Circuit's opinion in *Mills*).

191 *See supra* notes 127–31 and accompanying text.

192 *See, e.g.*, D'Addio, *supra* note 188, at 1998 (opining that dual sovereignty would permit the noncharging sovereign to question the defendant outside of counsel's presence, and then hand off the information to the charging sovereign were the charging sovereign in a "be[tter] position to make use of the incriminating evi-

ever, falls short upon closer inspection. First, it fails to recognize the *Cobb* Court's admonition that a suspect must still be given her *Miranda* warnings, which inform her of her right against compulsory self-incrimination as well as her right to consult with a lawyer before being subjected to custodial interrogation.[193] Thus, just as a defendant who does not wish to speak to the charging sovereign's investigators except through counsel will have been informed of her right to do so, so will that defendant have been apprised of her right to do the same with respect to questioning at the hands of another sovereign.

The concern about collusion also ignores the *Bartkus* Court's apparent recognition of a "sham" exception to the dual sovereignty doctrine. As Justice Brennan noted in his *Bartkus* dissent, the Court "apparently acknowledge[d]" an exception to the traditional rule of dual sovereignty: where one body is "merely a tool" of the other or brings its prosecution as "a sham and a cover" for the other, the dual sovereignty doctrine will not apply.[194] This exception, designed to guard against the precise concerns regarding circumvention and collusion addressed by Justice Breyer and others, is no less applicable to dual sovereignty's employment in the context of the Sixth Amendment right to counsel.[195] Indeed, in today's world of widespread

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dence"); Andrew Hanawalt, Note, *Investigation of Represented Defendants After* Texas v. Cobb, 81 TEX. L. REV. 895, 913–14 (2003) (applauding the recognition of offense specificity as a means of promoting society's interest in investigation, but criticizing *Cobb* for permitting investigation of uncovered criminal transactions as tipping the scale too far against defendants); Melissa Minas, Note, *Blurring the Line: Impact of Offense-Specific Sixth Amendment Right to Counsel*, 93 J. CRIM. L. & CRIMINOLOGY 195, 222–24 (2002) (criticizing the *Cobb* majority for failing to consider the decision's potential for circumvention of the Sixth Amendment).

193 Texas v. Cobb, 532 U.S. 162, 171 & n.2 (2001) ("Even though the Sixth Amendment right to counsel has not attached to uncharged offenses, defendants retain the ability under *Miranda* to refuse any police questioning, and, indeed, charged defendants presumably have met with counsel and have had the opportunity to discuss whether it is advisable to invoke those Fifth Amendment rights."); *cf.* Patterson v. Illinois, 487 U.S. 285, 293–94 (1988) (noting the ameliorative effects of *Miranda* warnings even where the defendant has waived his Sixth Amendment right to counsel).

194 Bartkus v. Illinois, 359 U.S. 121, 167 (1959) (Brennan, J., dissenting); *id.* at 123–24 (majority opinion); *see also* Dawson, *supra* note 133, at 296 (recognizing that *Bartkus* suggested a sham exception, and criticizing its overly narrow application); Owsley, *supra* note 133, at 774–75 (noting that "[t]he *Bartkus* Court suggested an exception to the dual sovereign doctrine" for an "orchestrated . . . bypass" of double jeopardy).

195 *See* United States v. Coker, 433 F.3d 39, 45 (1st Cir. 2005) (recognizing a *Bartkus* exception to dual sovereignty "where 'one sovereign so thoroughly dominates or manipulates the prosecutorial machinery of another that the latter retains little or no volition in its own proceedings,'" and finding it to "appl[y] with equal force in the

cooperative law enforcement, this exception must form an important part of the application of any dual sovereignty doctrine.[196]

The *Bartkus* sham exception can also explain another criticism of dual sovereignty more generally, namely, its survival of the Bill of Rights' incorporation against the states. As noted earlier, the Court abandoned analogues of the dual sovereignty doctrine in the contexts of self-incrimination and unreasonable search and seizure following the application of these rights to the states.[197] The apparent rationale for discarding the doctrine in these circumstances appears to have been that evidence illegally obtained by one sovereign undergoes no ablution by being handed to another sovereign.[198] However, while this "silver platter doctrine" by definition involved collusion between state and federal officers, no collusion inheres in the dual sovereignty doctrine.[199] While collusion must no doubt be guarded against, the government's "legitimate interest in enforcing its own laws" must also be recognized.[200] The *Bartkus* exception, excluding information obtained in a complicit attempt to circumvent the Sixth Amendment's protections, provides a balanced response to fears of collusion while still permitting each sovereign to effectuate "society's interest in the ability of police to talk to witnesses and suspects,"[201] which is an "unmitigated good."[202]

Sixth Amendment context" (quoting United States v. Guzman, 85 F.3d 823, 827 (1st Cir. 1996))); *see also supra* note 85 and accompanying text (noting Chief Justice Burger's assertion that exclusion in cases where officials acted in bad faith in their interrogation or choice of indictments was the proper course, rather than a blanket rule against all questioning even for uncharged offenses).

196 *See Bartkus*, 359 U.S. at 168–69 (Brennan, J., dissenting) (encouraging cooperation between state and federal authorities, but criticizing the use of such cooperation to "harass the accused"); Owsley, *supra* note 133, at 789–90 (accepting a sham exception under *Bartkus*, but noting that the evidentiary burden must necessarily be high, so as not to inhibit intergovernmental cooperation or insert judicial scrutiny too detrimentally into law enforcement); *cf.* Braun, *supra* note 12, at 65–72 (discussing the broad range of "cooperative federalism" and the potential for "collusive federalism" under dual sovereignty); Dawson, *supra* note 133, at 296–97 (noting the extent of state-federal cooperation in criminal law enforcement, and criticizing the infrequent use of the sham exception as "illusory").

197 *See supra* notes 168–74 and accompanying text.

198 *See, e.g.*, Elkins v. United States, 364 U.S. 206, 223–24 (1960).

199 *See* Dawson, *supra* note 133, at 295–96 (noting the distinction between the necessity of cooperation under the "silver platter doctrine," as opposed to successive prosecutions, and citing *Bartkus* as recognizing a potential exception explaining dual sovereignty's persistence).

200 Owsley, *supra* note 133, at 789.

201 Texas v. Cobb, 532 U.S. 162, 172 (2001).

202 McNeil v. Wisconsin, 501 U.S. 171, 181 (1991).

Perhaps the most important reason for interpreting *Cobb* to have brought the Sixth Amendment right to counsel under the auspices of the dual sovereignty doctrine is the respect for federalism principles embodied by that doctrine, principles to which the Court has lately given heed. Dual sovereignty is founded on federalism concerns.[203] Those concerns are nowhere more noticeable than in the context of criminal law, which has always been an area of primarily state control.[204] This framework of divided authority is not accidental; it is a purposeful construct designed by the Framers to preserve basic liberties.[205] As the Court has noted, the Tenth Amendment reserves to the states a measure of sovereignty, indeed, it reserves to them all that sovereignty which was not relinquished to the federal government under the Constitution.[206] From the Tenth Amendment, the dual sovereignty doctrine naturally springs.[207]

The Tenth Amendment federalism foundation of the doctrine is crucial to understanding that dual sovereignty is not just a "fiction" that permits one to more easily conceptualize the federal system of government; it plays a vital role in protecting a fundamental area of state concern. The recent expansion of federal criminal law has drawn the attention of both the Court and academia.[208] Among the

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203 *See, e.g.*, Heath v. Alabama, 474 U.S. 82, 92 (1985) ("The Court's express rationale for the dual sovereignty doctrine . . . finds weighty support in the historical understanding and political realities of the States' role in the federal system . . . ."); *see also id.* at 99 (Marshall, J., dissenting) (calling dual sovereignty "the price of living in a federal system").

204 *See* United States v. Lopez, 514 U.S. 549, 561 n.3 (1995) ("Under our federal system, 'the States possess primary authority for defining and enforcing the criminal law.'" (quoting Brecht v. Abrahamson, 507 U.S. 619, 635 (1993))); *see also* Screws v. United States, 325 U.S. 91, 109 (1945) (plurality opinion) ("Under our federal system the administration of criminal justice rests with the States . . . .").

205 *See, e.g.*, Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 36 (2003).

206 *See, e.g.*, Printz v. United States, 521 U.S. 898, 918–19 (1997) (finding it to be "incontestible that the Constitution established a system of 'dual sovereignty,'" which was made express by the Tenth Amendment); New York v. United States, 505 U.S. 144, 188 (1992) ("The Constitution . . . 'leaves to the several States a residuary and inviolable sovereignty' reserved explicitly to the States by the Tenth Amendment." (citation omitted)).

207 *See supra* notes 151, 176 and accompanying text.

208 *See, e.g.*, United States v. Morrison, 529 U.S. 598, 617–18 (2000); *Lopez*, 514 U.S. at 561 n.3. *See generally* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995) (arguing that the expansion of federal criminal law is irreconcilable with principles of federalism); Garnett, *supra* note 205 (expressing concern that the expansion of federal criminal jurisdiction through use of the spending power may be inconsistent with the Constitution's structure and purpose); Adam H. Kurland, *First Principles of American Federalism and the*

major incidents of this expansion have been increased cooperation between federal and state governments in criminal investigations, a part of the phenomenon known as "cooperative federalism," as well as increasingly overlapping jurisdiction between the two governments as federal crimes proliferate.[209]

Given the growth of federal criminal law enforcement, it is essential to consider the enormity of a constitutional bar to interrogation by one sovereign where the other has had the good fortune of first apprehending a suspect, and such a bar's implications for criminal investigation and the interests of both federal and state governments. On the one hand, if the federal government could preclude state governments from investigating a crime based on having charged a defendant therewith, the federal government would effectively be preempting state law by defining the crime for the state.[210] This would no doubt be a "shocking and untoward deprivation" of the states' rights to define and punish crimes occurring within their borders,[211] and would violate the very fundamentals of federalism.[212] Conversely, if a state's charging of a defendant could block federal investigators from interrogating her, the result would be a veto power in the state, a result just as troubling as federal preemption.[213] Quite naturally, one sovereign cannot be counted on to protect the interests of another in its investigation and enforcement of its criminal laws, for

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Nature of Federal Criminal Jurisdiction, 45 EMORY L.J. 1 (1996) (arguing that broad federal criminal jurisdiction is consistent with the original understanding of federalism).

209 *See, e.g.*, NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 794–807 (4th ed. 2006) (discussing the consequences of jurisdictional overlap); *cf.* Braun, *supra* note 12, at 7–9 (criticizing dual sovereignty in the age of cooperative federalism). Indeed, the Court in its concern with the metastasizing of federal power, has recently attempted to place some limits on federal criminal law, albeit minor ones. *See* Garnett, *supra* note 205, at 36 ("[T]he creeping federalization of crime can, if left unchecked, threaten the 'sensitive relation between federal and state criminal jurisdiction.'" (quoting *Lopez*, 514 U.S. at 561 n.3)).

210 *See* Owsley, *supra* note 133, at 783. The Court long ago rejected the preemption argument in the dual sovereignty context. *See supra* notes 140–47 and accompanying text.

211 Heath v. Alabama, 474 U.S. 82, 93 (1985) (quoting Bartkus v. Illinois, 359 U.S. 121, 137 (1959)).

212 *See, e.g.*, Printz v. United States, 521 U.S. 898, 935 (1997) (holding that the federal government may not commandeer state officers to enforce a federal regulatory program, as such commandeering is "fundamentally incompatible with our constitutional system of dual sovereignty"); New York v. United States, 505 U.S. 144, 188 (1992) (holding that "States are not mere political subdivisions of the United States" and that the federal government "may not compel the States to enact or administer" federal regulatory programs).

213 *See* Amar & Marcus, *supra* note 135, at 17; Owsley, *supra* note 133, at 783–84.

different sovereigns serve different constituencies with differing views as to the proper level of criminalization of activities.[214] This is no less true in the area of the Sixth Amendment right to counsel than in the double jeopardy context, for, as the Court has noted, "the Constitution does not negate society's interest in the ability of police to [investigate crimes]."[215] Indeed, if the dual sovereignty doctrine's vitality in the double jeopardy context is based upon a vindication of the interests of each sovereign in effective enforcement of its criminal laws, its retention in the context of the Sixth Amendment right to counsel naturally follows, for enforcement can hardly be effective if investigation is precluded. And as noted before, the *Bartkus* sham exception prevents this otherwise slippery slope from being carried too far and providing an end run by which to impinge upon the defendant's interest in a fair trial.[216]

Nor is this concern for federalism inconsistent with the underlying rationale of the Sixth Amendment right to counsel, that of "fair administration of our adversary system of criminal justice."[217] While the constitutional underpinnings of the *Massiah* line of cases may not be the most sturdy,[218] they have consistently recognized that the defendant's interest in a fair trial must be balanced against the government's interest in combating crime.[219] In short, to permit either

214 *See Heath*, 474 U.S. at 93 ("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."); Owsley, *supra* note 133, at 785–87 (discussing a variety of ways in which national and local interests might diverge, including disparate penalties, differing values regarding controversial subjects, and various underlying theories of criminal punishment, and noting the difficulty in asking the judiciary to determine whether these various interests align sufficiently to permit one sovereign's activities to erect a bar to the other's enforcement action).

215 Texas v. Cobb, 532 U.S. 162, 171–72 (2001); *see also* McNeil v. Wisconsin, 501 U.S. 171, 181 (1991) ("Admissions of guilt . . . 'are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'" (quoting Moran v. Burbine, 475 U.S. 412, 426 (1986))); Maine v. Moulton, 474 U.S. 159, 179–80 (1985) ("The police have an interest in the thorough investigation of crimes for which formal charges have already been filed. They also have an interest in investigating new or additional crimes. . . . [T]o exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained . . . would unnecessarily frustrate the public's interest in the investigation of criminal activities.").

216 *See supra* notes 194–202 and accompanying text.

217 Brewer v. Williams, 430 U.S. 387, 398 (1977); *see also* Gardner, *supra* note 40, at 399–403 (citing fairness as the primary value protected by the Court's *Massiah* line of cases).

218 *See supra* note 40 and accompanying text.

219 *See, e.g.*, *McNeil*, 501 U.S. at 181 (noting that "the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good," and thus "society

sovereign to bar the other from questioning defendants regarding crimes for which the former has filed charges would allow the charging sovereign effectively to define the crime for the other, frustrating the federal system envisioned by the Framers and society's interest in crime prevention. The interest of a defendant in a fair trial, while no doubt of grave importance, is adequately protected by a carefully fashioned "sham" exception to the dual sovereignty doctrine and the *Miranda* warnings that she must in any event receive. To further extend this "fairness" rationale would be to impermissibly disrupt the federal system and ignore "the price of living in a federal system, the cost of dual citizenship."[220]

CONCLUSION

The Sixth Amendment provides a vital check on governmental power, permitting a defendant charged with a crime to rely upon her attorney as a medium through which to approach the vast acumen and resources of her sovereign adversary. Naturally, any circumscription of the defendant's protections must be carefully considered before adoption. But just as important as the defendant's interest in a fair trial is the interest of society in effective enforcement of its criminal laws and "maintain[ing] peace and order within [its] confines."[221] The Supreme Court clearly recognized these competing interests in *Cobb* and chose to import, without limitation, the *Blockburger* definition of "offense" in the Sixth Amendment right-to-counsel context. In equating the definition of "offense" in these two contexts, the Court implicitly acknowledged the viability of the dual sovereignty doctrine in both. The doctrine thus protects both the federalism interests inherent in a system of concurrent criminal jurisdiction and—when properly understood as including both an exception for collusion and as remaining subject to the protections of *Miranda* warnings—the defendant's interests in a fair adversarial proceeding and the con-

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would be a loser" in adopting a rule under which charged defendants were exempted from questioning); *Moulton*, 474 U.S. at 179 (recognizing the necessity of police investigation of crimes for which charges have been brought, as well as additional crimes); *Brewer*, 430 U.S. at 406 ("The crime of which [the defendant] was convicted . . . call[ed] for swift and energetic action by the police to apprehend the perpetrator and gather evidence with which he could be convicted. No mission of law enforcement officials is more important."); Massiah v. United States, 377 U.S. 201, 207 (1964) ("We do not question that . . . in many cases, it [is] entirely proper to continue an investigation of suspected criminal activities of the defendant . . . even though the defendant ha[s] already been indicted.").

220 Heath v. Alabama, 474 U.S. 82, 99 (1985) (Marshall, J., dissenting).

221 Bartkus v. Illinois, 359 U.S. 121, 137 (1959).

comitant protections afforded by the "Assistance of Counsel."[222] While the risks of collusion are undoubtedly greater as federalization of crime continues, so are the risks of "a shocking and untoward deprivation" of the states' "historic right and obligation" to enforce their criminal laws.[223] This is the "price of living in [the] federal system"[224] which our Founders deemed necessary "'to ensure protection of our fundamental liberties.'"[225] And these risks are appropriately balanced by adoption of a properly defined dual sovereignty doctrine in the context of the Sixth Amendment right to counsel.

222 U.S. CONST. amend. VI.

223 *Bartkus*, 359 U.S. at 137.

224 *Heath*, 474 U.S. at 99 (Marshall, J., dissenting).

225 United States v. Lopez, 514 U.S. 549, 552 (1995) (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).

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