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Not Twice for the Same: How the Dual Sovereignty Doctrine is Used to Circumvent "Non Bis In Idem"

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Not Twice for the Same: How the Dual Sovereignty Doctrine is Used to Circumvent *Non Bis In Idem*

ABSTRACT

Today, it is quite possible for a criminal defendant who has violated the laws of several countries with one criminal act to be subject to multiple prosecutions. In situations where two countries share concurrent criminal jurisdiction, it is unclear whether the defendant would be able to rely on some level of double jeopardy protection. International law currently does not obligate a sovereign state to recognize another state's penal judgments, thus allowing states to prosecute a defendant regardless of any legal action that may have been previously taken against the defendant. Several countries, however, have chosen to provide defendants with at least some level of double jeopardy protection. In the international realm, the prohibition against multiple prosecutions for the same offense is cited as the maxim non bis in idem.

Despite the fact that the Fifth Amendment of the Constitution of the United States provides for such protection against sequential prosecutions, the United States does not extend this protection to defendants who have been prosecuted in another sovereign state. Under the judicially-constructed dual sovereignty doctrine, U.S. courts allow separate sovereigns to seek redress for violations of their law independent of any action that may have been previously taken by another affected sovereign. It is this doctrine that the U.S. courts cite in choosing not to recognize non bis in idem *as a binding principle of international law, but rather as a protection that may be provided only by treaty in cases of extradition. Often times, however, defendants are left with little or no protection even with operative treaty provisions.*

This note considers the issues and implications presented by the United States' use of the dual sovereignty doctrine in permitting multiple prosecutions. It will further discuss how U.S. courts have counteracted non bis in idem *even in the presence of a treaty provision. Finally, this note will propose a standard that provides the United States with an avenue with which to vindicate its interests while at the same time subjecting the defendant to a single trial.*

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I. INTRODUCTION

As more and more crime begins to transcend national borders in the new millennium, nation-states will find themselves sharing concurrent criminal jurisdiction with other states over the same defendants. In such cases, the problem is that a defendant who has violated the laws of several states may be subject to multiple prosecution. The question then becomes: to what extent is that defendant protected against double jeopardy?[1]

The problem of concurrent jurisdiction is becoming more common as certain crimes such as drug trafficking, terrorism, and genocide have multinational effects.[2] Currently, the general

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1. MARTIN FRIEDLAND, DOUBLE JEOPARDY 358 (1969).

2. Under international law, a sovereign may prosecute an offense based on territorial, personal, or universal jurisdiction. INTERNATIONAL CASES AND MATERIALS 1046-86 (Louis Henkin et. al. eds., 3d ed. 1993).

rule in international law does not obligate a sovereign state to enforce another state's penal judgments.[3] Thus, under the current state of the law, defendants who engage in these activities would likely face individual and separate prosecution in each sovereign that chooses to exercise its jurisdiction over him.[4] Although this is within the discretion of local prosecuting authorities, the fact that sovereigns are free to prosecute those defendants that may have been previously convicted or acquitted by another court is troubling under the well-accepted tenets of both national and international law.

Nevertheless, the vast majority of legal systems have chosen to provide defendants some level of protection against multiple prosecutions for the same offense.[5] In the international realm, this prohibition is cited as the maxim *non bis in idem*[6] and is the international equivalent to the protection provided by the Double Jeopardy Clause of the Fifth Amendment.[7] Despite some differences in application, at the foundation of both double jeopardy and *non bis in idem* are similar considerations of fairness, just treatment, and respect for an individual's dignity.[8] Moreover, the rationale underlying both principles provides that a state possessing vast and powerful resources should not be allowed to continually subject a defendant to harassment, anxiety, and the great expense of defending himself.[9]

Even though domestically the idea prohibiting multiple prosecutions is one our most valued and cherished constitutional protections, the United States does not extend this protection to defendants who have previously been prosecuted by another sovereign state. Further adding to this apparent paradox, the U.S. Supreme Court has developed a doctrine that expressly allows for sequential prosecutions in cases where a defendant's

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3. Lara Ballard, *The Recognition and Enforcement of International Criminal Court Judgments in U.S. Courts*, 29 COLUM. HUM. RTS. L. REV. 143, 173 (1997).

4. *See id.*

5. FRIEDLAND, *supra* note 1, at 358 (stating that *non bis in idem* is widely accepted by individual states with respect to their interstate relations).

6. BLACK'S LAW DICTIONARY 1051 (6th ed. 1990) (defining *non bis in idem* as "not twice for the same").

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

8. *See* FRIEDLAND, *supra* note 1, at 358.

9. Green v. United States, 355 U.S. 184, 187-88 (1957).

> The underlying idea, . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id.

actions violate the laws of separate sovereigns.[10] Known as the dual sovereignty doctrine, this approach allows each sovereign to seek independent redress regardless of any legal action that may have been previously taken by other affected sovereigns.[11] This approach, which is unfaithful to the protection provided by double jeopardy, has not been universally adopted. Instead, some countries have attempted to remain committed to the principle of *non bis in idem* by giving legal effect to other countries' penal judgments, thereby preventing the injustice of placing a defendant in double jeopardy.[12]

This note considers and addresses the issues presented by this system which permits multiple prosecutions. Part II of this note introduces and discusses the origins of *non bis in idem.* Part III describes how U.S. courts have employed the dual sovereignty doctrine to counteract the *non bis in idem* doctrine in both the presence and absence of an extradition treaty. Part IV evaluates the reasons why the dual sovereignty doctrine is inequitable and ineffective at protecting the rights of criminal defendants. Finally, this note concludes that, despite the Supreme Court's continued reliance on the dual sovereignty doctrine, the doctrine should be abandoned in the international realm and substituted with a more flexible standard that allows sovereigns to cooperate and jointly prosecute defendants.

II. HISTORICAL DEVELOPMENT AND LEGAL BACKGROUND

A. *The Rule's Origin*

Although the idea that no man shall be twice prosecuted for the same conduct is a well accepted tenet of American Constitutional law as well as one of the oldest recognized legal norms in western civilization,[13] its origin remains a matter of speculation.[14] Tracing the evolution of this doctrine is difficult at best. The consensus among writers of antiquity is that the rule

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10. *See, e.g.*, Bartkus v. Illinois, 359 U.S. 121, 137 (1959).
11. *Id.* at 133-34.
12. FRIEDLAND, *supra* note 1, at 358-59.
13. *Bartkus*, 359 U.S. at 151 (Black, J., dissenting) (recognizing that "[fe]ar and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization").
14. Jill Hunter, *The Development of the Rule Against Double Jeopardy*, 5 J. LEGAL HIST. 3, 4 (1984) (delineating the different theories of the origin of double jeopardy).

finds its roots in Roman and Greek law.[15] According to the *Digest of Justinian*,[16] Roman law required that "the governor must not allow a man to be charged with the same offense of which he has already been acquitted."[17] This precept, which did not carry the same legal force among the Romans as it does in the U.S. Constitution, eventually developed into the oft-cited Roman law maxim, *nemo bis in idem debet vexari*,[18] or *non bis in idem*,[19] which has served as the fundamental principle behind the idea that no man should be tried twice for the same offense.[20] Whatever its origin, one court has observed that the protection against double jeopardy "seems to have been always embedded in the common law of England, as well as in the Roman law, and doubtless in every other system of jurisprudence, and instead of having a specific origin, it simply always existed."[21]

After the fall of the Roman Empire, the concept of double jeopardy survived through its solemnization in the canon law[22] as well as through the writings of early Christian authors.[23] The canon law's acceptance of the prohibition of multiple trials for the same conduct arose primarily in 391 A.D. from St. Jerome's reading of I Nahum 9 as commanding that "there shall not rise up a double affliction."[24] By 847 A.D., this interpretation supported the need for a prohibition against double jeopardy, as even the

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15. Hunter, *supra* note 14, at 4; *see also* Jay Siegler, *A History of Double Jeopardy*, 7 AM. J. LEGAL HIST. 283, 284 (1963).

16. Published in 533 A.D., the *Digest of Justinian* is a collection of Roman law drawn from the writings of classical jurists. ALAN WATSON, ROMAN LAW AND COMPARATIVE LAW 214 (1991). The *Digest of Justinian* was assembled in an effort to streamline Roman law by removing those laws that were obsolete, redundant, or contradictory. *Id.*

17. Francine Ward, *The Double Jeopardy Clause of the Fifth Amendment*, 26 AM. CRIM. L. REV. 1477 (1989) (citing Dig. 48.2.7 (Alan Watson ed. 1985)). In Roman law, criminal prosecutions were brought by citizens and not the state. *See* Ronald J. Allen & John P. Ratnaswamy, *Heath v. Alabama: A Case Study of Doctrine and Rationality in the Supreme Court*, 76 J. CRIM. L. & CRIMINOLOGY 801, 807 (1985). From its inception, the prohibition against double jeopardy was not formulated in terms of who brought the charges. Instead, it barred an individual from repeated accusations under any circumstances. *Id.*

18. "No one should be troubled twice for the same matter." *In re* Extradition of Montiel Garcia, 802 F.Supp. 773, 777 (E.D.N.Y. 1992).

19. BLACK'S LAW DICTIONARY, *supra* note 6, at 1054.

20. Hunter, *supra* note 14, at 4-5.

21. Stout v. State, 36 Okla. 744, 756 (Okla. 1913).

22. The canon law, which began its development at the close of the Roman Empire, is the body of laws and regulations for the government of the Christian organization made or adopted by the ecclesiastical authority and included regulations borrowed from Roman law. Catholic Encyclopedia: Canon Law, http://www.newadvent.org/cathen/09056a.html (last visited Jan. 19, 2000).

23. *Bartkus*, 359 U.S. at 152 (Black, J., dissenting).

24. Siegler, *supra* note 15, at 284 (citing Douay version); *see also Bartkus*, 359 U.S. at 152 (stating that the King James version of I Nahum 9 reads "affliction shall not rise up a second time").

church recognized that even God does not judge an individual twice for the same transgression.[25]

Even with such a strong expression of the principle against multiple prosecutions, it was not until the dispute between St. Thomas Becket and Henry II in the twelfth century that the concept of double jeopardy gained widespread approval.[26] The controversy surrounded the King's desire to further prosecute church clerics in civil tribunals who had already been tried and convicted in the ecclesiastical courts.[27] Relying on the canon law, Becket objected, arguing that to allow further prosecution would violate the maxim *nemo bis in idipsum*—"no man ought to be punished twice for the same offence."[28] In 1176, following Becket's martyrdom, Henry conceded that clerics convicted in the ecclesiastical courts were exempt from further prosecution in the King's courts.[29] This was a significant event because the King's court and the ecclesiastical court drew their power from different sovereigns, thus giving credence to the argument that the focus of prohibiting successive prosecutions is on the rights of the defendant and not of the prosecutor.[30]

By 1250, the evolving principle of double jeopardy had begun to emerge in the English common law.[31] According to one commentator, the concept was introduced into the common law through both the canon law traditions and the influence of Roman law scholars who had traveled to England.[32] These scholars influenced jurists and writers who sought to supplement the English common law with the doctrinal refinements of the Roman law.[33] As they were known in England, the prohibitions against multiple prosecutions began not as fundamental, substantive principles of English justice, but merely as a technical parts of criminal procedure.[34] Specifically, the principle was incorporated through the common law pleas of *autrefois acquit* (otherwise acquitted) and *autrefois convict* (otherwise

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25. *See* POLLOCK & MAITLAND, A HISTORY OF ENGLISH LAW 448-49 (2d ed., 1899); *see also* Z.N. BROOKE, THE ENGLISH CHURCH AND THE PAPACY: FROM THE CONQUEST TO THE REIGN OF JOHN 204-05 (1931).

26. *See* Ward, *supra* note 17, at 1477.

27. *Id.* at 1477-78.

28. *See* FRIEDLAND, *supra* note 1, at 5.

29. *Id.*

30. *See* Allen & Ratnaswamy, *supra* note 17, at 806-07.

31. *See* M. CHERIF BASSIOUNI, SUBSTANTIVE CRIMINAL LAW 499 (1978).

32. *See* Hunter, *supra* note 14, at 4. In the twelfth and thirteenth centuries, there was an influx of Roman law scholars who entered England. *Id.*

33. *Id.*

34. *Id.* at 4-5 (stating "up to the end of the sixteenth century . . . the protection remained a mere statement of procedure replete with exceptions and compromises which would deny it the status of being a fundamental right and a cornerstone of English justice").

convicted).[35] These pleas allowed the defendant to avoid a second prosecution by proving prior acquittal or conviction on the same charge.[36] Despite the existence of these procedural safeguards, no governing legal document or legal treatise of the time addressed the substantive principle of double jeopardy.[37] It was not until the late nineteenth century that Blackstone recognized that the plea of *autrefois acquit* stood as a "universal maxim of the common law of England" grounded in the idea that "no man is to be brought into the jeopardy of his life more than once for the same offence."[38]

These early writings by Blackstone and others acted to influence the development of the law in the United States.[39] The earliest conceptualization of double jeopardy in the United States began in the Massachusetts colony.[40] Although Massachusetts law was greatly influenced by the English common law, its approach to the principle of double jeopardy differed in that it extended protection to cover not only all criminal prosecutions, but civil trespasses as well.[41] Although it was the first to offer double jeopardy protection, Massachusetts inexplicably omitted this protection from its post-revolutionary constitution.[42] Despite this fact, however, its conceptualization of the protection influenced other colonies in shaping their own double jeopardy laws,[43] and although many post-revolutionary constitutions did

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35. *See* Ward, *supra* note 17, at 1478-79.

36. *Id.* at 1479. There were, however, instances where the King's Bench held that a retrial may be permitted where the first indictment was not complete. *Id.*

37. *Id.* at 1478. Although the Magna Carta and other legal documents do not address double jeopardy, works by Glanville and Bracton discuss the prohibition against multiple prosecutions as it relates to trials by ordeal. *Id.*

38. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 335 (1873).

39. Allen & Ratnaswamy, *supra* note 17, at 807-08. Sir Edmund Coke's Second Institutes also had a profound influence on the modern understanding of double jeopardy. *Id.*

40. Siegler, *supra* note 15, at 298.

41. *See* THE LAWS AND LIBERTIES OF MASSACHUSETTS 46 (Max Ferrand, ed., 1929). The Massachusetts double jeopardy clause was listed in the *Body of Liberties* of 1641 and read as follows: "No man shall be twice sentenced by civil justice for one and the same crime, offense, or trespass." Siegler, *supra* note 15, at 299.

42. Siegler, *supra* note 15, at 307.

43. Siegler, *supra* note 15, at 307-08. Several states addressed double jeopardy concerns through their constitutions, procedures, and courts. *See* Ward, *supra* note 17, at 1479-81. New Hampshire was the first colony to provide the protection in its constitution. *Id.* In the courts of Virginia, New York, and Connecticut the plea was recognized although it was not listed in their respective state constitutions. *Id.*

not recognize this protection, the plea was recognized by statute and through the common law.[44]

During the post-revolutionary period, the principle's growing acceptance by the colonies led to its inclusion in the Bill of Rights.[45] The procedural history of the Amendment, however, provides insight and clues as to the intended extent and operation of the principle. After the ratification of the Constitution, James Madison proposed various amendments to the Constitution including a provision stating: "No person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offense."[46] The House rejected this draft and several other amendments, including one that proposed inserting the phrase "by any law of the United States" after the words "same offense."[47] The rejection of this version may at minimum signify that double jeopardy at its inception was intended to bar federal courts from trying an individual of a crime for which that individual had already been prosecuted by another sovereign.[48] Indeed, at least one commentator has recognized that this rejection may allow "the speculation by negative inference that double jeopardy may have been intended to apply to the states and the federal government alike."[49]

Following several drafts and much discussion, Congress approved the final version of the Bill of Rights, which included the Double Jeopardy Clause of the Fifth Amendment.[50] As to the specific meaning of the final text of the Double Jeopardy Clause,[51] there was little debate on the floor of Congress.[52] From the debate that did occur, it may be inferred that the framers intended to incorporate into the Clause their understanding of the concept as it existed in the English common law and in the colonies.[53] At that time, the English common law's conception of

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44. Allen & Ratnaswamy, *supra* note 17, at 808.
45. Siegler, *supra* note 15, at 299-308.
46. *Id.* at 304.
47. *Id.* at 305.
48. This view is supported by two early Supreme Court cases. *See* United States v. Furlong, 18 U.S. (5 Wheat.) 184, 197 (1820) (stating that "there can be no doubt that the plea of autrefois acquit would be good in any civilized State, though resting on a prosecution instituted in the courts of any other civilized State"); *see also* Rose v. Himley, 8 U.S. (4 Cranch) 241, 276 (1808) (observing that "if the port of St. Domingo had jurisdiction of the case, its sentence is conclusive").
49. *Id.*
50. Allen & Ratnaswamy, *supra* note 17, at 809.
51. U.S. CONST. amend. V (providing "[n]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb").
52. Allen & Ratnaswamy, *supra* note 17, at 809-81 (citing 1 Annals of Cong. 753 (Joseph Gales ed., 1789)).
53. *Id.* at 810; *see also* Siegler, *supra* note 15, at 306 (stating that the clause was intended to be "declaratory of the law as it now stood" and was to follow the "universal practice in Great Britain and in this country").

double jeopardy had evolved and was understood to act as a bar even to successive prosecutions by different sovereigns.[54] More specifically, the English position held that a person who had been acquitted by a foreign court having competent jurisdiction could not be retried in an English court.[55]

From this historical perspective, it can be seen that *non bis in idem* evolved from its limited beginnings as a principle of justice to its present state as a recognized right that ensures individuals are protected from being repeatedly subjected to criminal prosecution for the same offense regardless of the prosecuting authority.

B. Non Bis In Idem *as an International Principle*

Today, the principle that no person should be subjected to more than one trial for the same offense is a well recognized tenet of American constitutional law that is widely accepted by nearly all civilized legal systems.[56] Although the manner in which this protection is interpreted and provided for varies,[57] at its core it is regarded as part of the "universal law of nations."[58] In the United States, the prohibition against multiple prosecutions is provided for by the Double Jeopardy clause of the Fifth Amendment.[59] Many other countries make similar guarantees, but among the civil law countries, this protection continues to be recognized as the maxim *non bis in idem*.[60]

Although both *non bis in idem* and double jeopardy generally protect one's freedom from multiple prosecutions for the same

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54. FRIEDLAND, *supra* note 1, at 360; *see also* JAY A. SIEGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 121 (1969) [hereinafter SIEGLER II].

55. Rex v. Roche, 1 Leach C.C. 134 (1775) (cited in SIEGLER II, *supra* note 54, at 126). In Rex v. Roche, the defendant was on trial in an English court on the charge of murder. *Id.* However, the defendant claimed that he had already been tried for the same murder in a Dutch court. *Id.* Although the court did not decide the case on this plea, it did state if the facts supported the plea, double jeopardy would bar the second prosecution. *Id.* For a list of similar English cases see *infra* note 68.

56. *See* FRIEDLAND, *supra* note 1, at 358; *see also* M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protection and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 289 (stating that the protection from double jeopardy and *non bis in idem* are found in over fifty national constitutions). For a complete list of these constitutions see *id.* at 289 n.264.

57. *See* M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 598 (1996).

58. SIEGLER II, *supra* note 54, at 120.

59. U.S. CONST. amend. V.

60. *See* Jennifer Costa, *Double Jeopardy and Non Bis In Idem: Principles of Fairness*, 4 U.C. DAVIS J. INT'L L. & POL'Y 181, 182 (1998).

offense, fine distinctions exist in the operation of the two concepts.[61] The primary difference between the two is that double jeopardy is usually held to apply to conflicts within a given legal system and not to disputes between separate sovereigns.[62] *Non bis in idem*, by contrast, protects an individual from multiple prosecutions irrespective of the prosecuting authority.[63] While both vary in their scope and application,[64] both *non bis in idem* and double jeopardy embody the same core values: fairness and respect for individual dignity.[65]

Although it is theoretically accepted that *non bis in idem* should bar prosecutions for a single offense by separate sovereigns, the functional reality instead reflects the opposite.[66] On this point, the primary question focuses on the extent to which a sovereign state is obligated to respect and enforce the criminal judgment of a foreign court. One view, adopted by several nations, finds that a previous judgment by a foreign court will act to bar a successive suit for the same offense in any other country's courts.[67] Early English and American cases reflect acceptance of this approach.[68]

In contrast, the opposing view holds that in the absence of a treaty expressly providing otherwise, sovereign states are not obligated to give legal effect to each other's penal judgments.[69] This position is based on the assumption that when an

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61. *Id.* at 183; *see also* FRIEDLAND, *supra* note 1, at 359 (observing that whereas American lawyers speak of double jeopardy and English lawyers refer to *autrefois acquit* and *autrefois convict*, international lawyers use the term *non bis in idem*).

62. *See* BASSIOUNI, *supra* note 57, at 288.

63. *Id.*

64. *Id.*

65. FRIEDLAND, *supra* note 1, at 358.

66. *See* BASSIOUNI, *supra* note 57, at 598 (observing that "there has always been a question as to its applicability between the different legal systems").

67. SIEGLER II, *supra* note 54, at 120.

68. *See* Rex v. Thomas, I Keble 677 (1664) (King's Bench held that the defendant's acquittal in Wales on a charge of murder barred a second prosecution in England); Rex v. Hutchinson, *cited in* 1 Leach 135 (1677) (holding that the defendant could not be tried in England for murder because he had already been acquitted of the charge in Portugal); Rex v. Roche, 1 Leach 134 (1775) (noting that if defendant had been acquitted of murder in a Dutch court it would act as a bar to subsequent English prosecution); Rex v. Aughet, 26 Cox C.C. 232 (1918) (respecting a foreign acquittal); United States v. Furlong, 18 U.S. (5 Wheat.) 184, 197 (1820); Rose v. Himley, 8 U.S. (4 Cranch) 241 (1808).

69. This is the dominant view followed by courts in the United States today. *See* United States v. Benitez, 28 F. Supp. 2d 1361, 1364 (S.D. Fla. 1998) (citing the rule that absent a treaty, sovereign nations are not obligated to respect or enforce the penal judgments of another sovereign). The Third Restatement on Foreign Relations Law of the United States further supports this view, stating that unless required by treaty, no state enforces the penal judgments of other states. RESTATEMENT (THIRD) OF FOREIGN REL. LAW OF THE UNITED STATES § 483 cmt. 3 (1987) [hereinafter RESTATEMENT].

individual's conduct violates the laws of two sovereign nations, that conduct may be deemed as constituting two separate and independent offenses for the purpose of punishment.[70] Each state, as a sovereign, may therefore seek redress for the violation committed.[71] This approach, known as the doctrine of separate sovereignties, allows each nation to consider simply whether a violation of its own law has occurred, and to enforce its laws regardless of whether another state has already prosecuted or punished the defendant for the same crime.[72]

From these competing viewpoints, there does not seem to be a general consensus among nations as to the legal effect that *non bis in idem* should have when considering existing foreign judgments.[73] For instance, some countries, such as Peru and the Netherlands, recognize the binding force of *non bis in idem* and afford foreign criminal judgments the same legal effect they do to domestic criminal judgments.[74] Others, like Sweden, will only apply the protection in those cases where the defendant was previously convicted, but disregard it when the defendant was previously acquitted.[75]

As a practical matter, it is quite uncommon for a situation to arise where more than one nation seeks to punish the same person for the same offense because of the lack of a common code of common international offenses.[76] In these rare instances when two sovereigns choose to pursue legal action resulting from the same conduct, the doctrine of *non bis in idem* arises not during substantive criminal proceedings, but is instead most often invoked during extradition proceedings.[77] Specifically, a criminal defendant usually invokes the doctrine as a procedural tool in an effort to avoid being extradited to face prosecution on a charge for which he has previously been acquitted or convicted in another

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70. BASSIOUNI, *supra* note 57, at 598.

71. *Id.* at 598-99.

72. *Id.* The requesting state may seek to try the person claimed because it believes itself to be in a better position than the other state with regard to the evidence, and because it believes that the other state did not fully appreciate the gravity of the offense. *Harvard Draft Convention on Extradition*, 29 AM. J. INT'L L. 144, 145 (Supp. 1935). For further discussion see *infra* Part II.C.

73. FRIEDLAND, *supra* note 1, at 359 (noting that there is "no general agreement amongst . . . nations as to the precise effect of a foreign criminal judgment").

74. *Id.*

75. *Id.* Other variations on the doctrine focus on such factors as the defendant's nationality and the nature of the crime. *Id.*

76. BASSIOUNI, *supra* note 57, at 601 (recognizing the few criminal acts that have multi-state effects which are simultaneously or concurrently pursued by more than one state).

77. Costa, *supra* note 60; *see also* SATYA DEVA BEDI, EXTRADITION IN INTERNATIONAL LAW AND PRACTICE 171-79 (1968).

country.[78] In recognizing the validity of such a use, as well as in an attempt to remain true to the premise underlying the protection against double jeopardy, many sovereign nations have addressed the problem of multiple prosecutions by adopting *non bis in idem* provisions in their extradition treaties.[79] In recent years, such provisions have become "common to most extradition treaties," reflecting an expanding acceptance of this principle in the international community.[80]

C. *The Dual Sovereignty Doctrine*

With respect to international double jeopardy, the United States adheres to the view that a sovereign state is not obligated to give legal effect to another sovereign's penal judgments.[81] Consistent with this view, U.S. courts have held that the Fifth Amendment's Double Jeopardy Clause does not preclude the United States from bringing criminal charges even after prosecution by a foreign state.[82] While this may appear to be in direct conflict with the Fifth Amendment, the Supreme Court has held that the principle against placing a man in double jeopardy is offset by the more significant principle of sovereignty.[83] Under this view, known as the dual sovereignty doctrine, two sovereigns, each deriving its power from different and independent sources, "may individually or both prosecute an offender for an infraction arising from the same conduct which violates the laws of each."[84] Essentially, each sovereign may vindicate its own interest and apply its own laws.

The principles underlying the dual sovereignty doctrine are not explicitly or implicitly expressed in the federal Constitution or in the constitution of any state, but are rather the product of judicial construction.[85] The doctrine arose primarily to

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78. BEDI, *supra* note 77.

79. 6 MARJORIE WHITEMAN, DIGEST OF INTERNATIONAL LAW 1054 (1968) (stating that such provisions have become common in extradition treaties).

80. *Id.*

81. *See* RESTATEMENT, *supra* note 69, § 483 note 3 (Enforcement or recognition of foreign penal judgments) (stating that the United States does not enforce or recognize foreign penal judgments, but ironically may recognize them for purposes of habitual criminal statutes or multiple offender sentencing laws).

82. *See* United States v. Richardson, 580 F.2d 946, 947 (9th Cir. 1978) (holding that Guatemalan convictions did not preclude the United States from bringing criminal charges); *see also* Chua Han Mow v. United States, 730 F.2d 1308, 1313 (9th Cir. 1983) (holding that Malaysian convictions did not bar the United States' prosecution of the defendant).

83. *See, e.g.*, Bartkus v. Illinois, 359 U.S. 121 (1959); Abbate v. United States, 359 U.S. 187 (1959); United States v. Lanza, 260 U.S. 377 (1922).

84. Robert Matz, *Dual Sovereignty and the Double Jeopardy Clause: If at First You Don't Convict, Try, Try Again*, 24 FORDHAM URB. L.J. 353, 359 (1997).

85. *Id.*

accommodate the demands of concurrent state-federal jurisdiction in our unique system of federalism.[86] Under a federalist system, governmental power is divided between two separate and independent entities: a central government responsible for national affairs and local governments responsible for local affairs.[87] The presumption which arises under such a system asserts that each entity derives its sovereign powers from different sources, thereby allowing for one act to equal a separate offense against each independent sovereign.[88] Thus, a federal prosecution does not preclude a subsequent state prosecution and vice versa even though both prosecutions arise from the same course of conduct.[89]

While the foundation for the dual sovereignty doctrine can be traced to a number of early Supreme Court cases,[90] the Court did not actually employ the doctrine in its reasoning until *United States v. Lanza* in 1922.[91] In *Lanza*, the defendants were prosecuted and convicted in the state of Washington for manufacturing, transporting, and possessing liquor in violation of the prohibition laws.[92] Subsequently, the federal government

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86. Heath v. Alabama, 474 U.S. 82, 92 (1985); *see also* United States v. Rashed, 83 F. Supp. 2d 96 (D.C. 1999).

87. Matz, *supra* note 84, at 360. Federalism has been defined as:

> A system of government wherein the power is divided by a constitution between a central government and local governments . . . . Since the United States is a federal "republic," considerations of federalism play a major role in the interpretation of the Constitution.

BARRON'S DICTIONARY OF LEGAL TERMS 181 (3d. ed. 1998).

88. Matz, *supra* note 84, at 360; *see also* United States v. Lanza, 260 U.S. 377 (1922).

89. United States v. Davis, 906 F.2d 829, 832 (2d Cir. 1990). Under the federalist system, each sovereign "has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses. When a single act violates the laws of two sovereigns, the wrongdoer has committed two distinct offenses." *Id.*

90. *See, e.g.*, Fox v. Ohio, 46 U.S. 410 (1847). The Court first articulated the doctrine in Moore v. Illinois, 55 U.S. 13, 19-20 (1852). In *Moore*, the Court stated:

> An offence, in its legal signification, means the transgression of a law. A man may be compelled to make reparation in damages to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act; and may be said, in common parlance, to be twice punished for the same offence. 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.

Id.

91. 260 U.S. 377 (1922).

92. *Id.* at 378.

sought to prosecute the defendants for violating the National Prohibition Act.[93]

The Supreme Court held that the Double Jeopardy Clause only applied to infra-federal prosecutions, and therefore did not bar a federal prosecution initiated after a previous state conviction.[94] The Court reasoned that because neither the state government nor the federal government could "exhaust its jurisdiction to the exclusion of the other," no jurisdictional conflict existed.[95] Furthermore, the Court justified the dual sovereignty exception as a means of preventing offenders from undermining a statute's deterrent effect by preemptively pleading guilty in those states that imposed only nominal penalties for an offense in an effort to secure immunity from subsequent federal prosecution.[96] As a result, each sovereign could proceed against the defendants without impediment.[97]

In 1959, the seminal cases of *Bartkus v. Illinois*[98] and *Abbate v. United States*[99] recognized the dual sovereignty doctrine as a constitutionally valid exception to the Double Jeopardy Clause. In *Bartkus*, the defendant was acquitted by a federal court for bank robbery, but was subsequently convicted and sentenced to

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93. *Id.* at 379.

94. *Id.* at 382. Since that time, the Double Jeopardy Clause of the 5th Amendment has been incorporated to apply to the states through the 14th Amendment. Benton v. Maryland, 395 U.S. 784 (1969). Because the constitutionality of the doctrine at the time seemed to be based upon the inapplicability of the 5th Amendment on the states, *Benton* appeared to be the death knell to the doctrine's validity. Matz, *supra* note 84, at 365-66. However, in the post-*Benton* period, the court has affirmed the dual sovereignty doctrine in two cases based on the weight of the authority established by Supreme Court precedents—United States v. Lanza, Bartkus v. Illinois, Abbate v. United States—and on the principles of federalism. United States v. Wheeler, 435 U.S. 313 (1978) (finding that Native American tribal nations are distinct sovereigns from the United States and that successive federal and tribal prosecutions are protected from double jeopardy by the dual sovereignty doctrine); Heath v. Alabama, 474 U.S. 82 (1985) (holding that the Double Jeopardy Clause does not bar successive prosecutions brought by different states).

95. *Lanza*, 260 U.S. at 385. The Court justifies the dual sovereignty doctrine by stating:

> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the Amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.

Id. at 382.

96. *Id.* at 385.

97. *Id.*

98. 359 U.S. 121 (1959).

99. 359 U.S. 187 (1959).

life imprisonment by an Illinois state court for the same offense.[100] The Supreme Court upheld the conviction, holding that the dual sovereignty doctrine allows states to enforce their own penal laws even after an acquittal in the federal courts.[101]

While the order of the prosecutions in *Abbate* was the reverse of those in *Bartkus*, the result was, nevertheless, the same. In that case, the Court affirmed a federal conviction that followed a state prosecution for the same crime.[102] Guiding its decision in *Abbate* was the Court's concern that a case would arise where a prosecution by one sovereign for a relatively minor offense might bar the other from prosecuting a much graver offense.[103] This, in the opinion of the court, would effectively deprive the latter sovereign of the right to enforce its own laws.[104] Moreover, the Court found that the application of the doctrine promoted the efficiency of federal law enforcement and noted the impracticability of requiring "federal authorities to attempt to keep informed of all state prosecutions which might bear on federal offenses."[105] The Court's opinion in this case is significant because it provides several policy-based arguments that were instrumental in not only upholding, but also extending, the doctrine's applicability in later cases.[106]

The Court did not, however, fully eliminate the double jeopardy prohibition from this context. The dual sovereignty doctrine continues to be limited by what is referred to as the "sham" exception, which was described by the *Bartkus* Court.[107] The sham exception provides that a prosecution by one sovereign cannot be used as a "sham and a cover" for another sovereign's

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100. *Bartkus*, 359 U.S. at 122.

101. *Id.* at 137. Mr. Justice Frankfurter in his opinion for the majority overlooks the significance of the early English Common Law cases that held that an acquittal in a foreign court would bar a subsequent English prosecution. *See supra* note 68. Frankfurter dismisses these cases as "dubious" because of (1) "the confused and inadequate reporting" of *Rex v. Hutchinson*, and (2) "because they reflect a power of discretion vested in English judges not relevant to the constitutional law of our federalism." *Bartkus*, 359 U.S. at 128 n.9. One commentator has noted that both these reasons are actually irrelevant to the reasoning of the opinion. The opinion rests on the presumed requirements of federalism dictating that there be an exception when two sovereignties are involved. Walter T. Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. CHI. L. REV. 591, 604 n.68 (1961).

102. *Abbate*, 359 U.S. at 188.

103. *Id.* at 195.

104. *Id.*

105. *Id.*

106. Matz, *supra* note 84, at 364-65. The reasoning in *Abbate* has served as the foundation for the dual sovereignty doctrine's continued validity in the jurisprudence following *Benton v. Maryland*. *Id.* at 365 n.68.

107. *Bartkus*, 359 U.S. at 123-24. For further discussion see *infra* Part III.C.

re-prosecution of the same defendant.[108] This doctrine would operate to prevent, on double jeopardy grounds, a prosecution brought by one sovereign with the encouragement and support of another sovereign that has already failed in its attempt to prosecute the same defendant.[109] The doctrine is founded on the rationale that the two sovereigns are acting as one.[110] Unfortunately, this exception has been construed so narrowly as to make it difficult to be utilized successfully.[111]

III. THE VARYING APPLICATION OF *NON BIS IN IDEM*

A. *No Right Without a Treaty*

In the opinion of some international law scholars, the principle of *non bis in idem* is so pervasive in bilateral treaties,[112] national laws, customary practice, and multilateral conventions[113] that it warrants recognition as a part of conventional and customary international law.[114] It has been written that "the principle is so obviously just, indeed, and so widely approved in the world's legal systems, that it hardly seems

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108. *Id.* at 124. In *Bartkus*, the Court rejected the defendant's argument that the State of Illinois in prosecuting him was acting as "merely a tool of the federal authorities, who thereby avoided the prohibition of the Fifth Amendment against a retrial of a federal prosecution after an acquittal." *Id.* at 123-24. Justice Brennan, in his dissent, argued that the Court's task was not to determine what extent the federal government had to participate before the conviction had to be set aside. *Id.* at 168 (Brennan, J., dissenting). According to him, the proper test should be "fashioned to secure the fundamental protection of the Fifth Amendment 'that the [Federal Government] with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity.'" *Id.*

109. United States v. Koon, 34 F.3d 1416, 1438 (9th Cir. 1994).

110. *Id.*

111. *See, e.g.*, United States v. Figueroa-Soto, 938 F.2d 1015, 1018-19 (9th Cir. 1991) (holding that the sham exception did not apply where the state prosecuted the defendant at the request of the federal authorities, and federal authorities sat at the prosecutor's table, testified as witnesses, collected evidence for use by the state in the state prosecution, prepared witnesses for the state, and the state attorney was appointed as a special assistant to the U.S. Attorney for the subsequent federal prosecution).

112. *See e.g.*, Convention on Extradition Between the Government of the United States of America and the Government of the State of Israel, Dec. 5, 1963, 14 U.S.T. 1707; Treaty on Extradition Between the United States of America and Spain, June 16, 1971, 22 U.S.T. 737; Treaty on Extradition Between the United States of America and Australia, May 8, 1976, 27 U.S.T. 957.

113. FRIEDLAND, *supra* note 1, at 358. For a list of some of these conventions see BASSIOUNI, *supra* note 57, at 603-05.

114. BASSIOUNI, *supra* note 57, at 605.

necessary to adduce reasons in its support."[115] In the United States, however, *non bis in idem* is not generally recognized as a binding principle of either procedural or substantive law, but rather has been confined to apply as a limited defense only in cases of extradition. Specifically, U.S. courts will consider *non bis in idem* as a bar to extradition only when a treaty is present which prohibits the grant of extradition when the defendant whose surrender is sought has already been tried and either convicted or acquitted in the requested state for the offense for which the extradition is requested.[116] Although a defendant has little if no legal ground with which to defend himself without such a provision, he may soon discover that even in the presence of one, the manner in which U.S. courts define the term "offense" has left *non bis in idem* provisions virtually powerless in providing defendants with any reasonable protection from being extradited. This assertion will be discussed more fully in the next section.

Nevertheless, from the available cases, the logical conclusion is that *non bis in idem* in the United States exists as a right only provided by treaty and applicable only in the context of extradition.[117] This proposition is bolstered by the fact that U.S. courts have held that the dual sovereignty doctrine extends to sequential foreign and U.S. federal prosecutions, thereby leaving defendants facing extradition without any Fifth Amendment Double Jeopardy protection.[118] As such, it is not surprising that the general rule followed by U.S. courts is that a sovereign nation is not obligated to give legal effect to those criminal judgments of another sovereign nation, and therefore no form of double jeopardy attaches unless provided for by an extradition treaty.[119]

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115. Harvard Research in International Law, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 603 (Supp. 1935).

116. *See, e.g.*, Sindona v. Grant, 619 F.2d 167, 177-78 (2d Cir. 1980); Galanis v. Pallanck, 568 F.2d 234 (2d Cir. 1977).

117. *Id.*

118. *See, e.g.*, United States v. Rashed, 83 F. Supp. 2d 96 (D.C. 1999) (holding that double jeopardy did not bar federal prosecution following Greek prosecution on related charges as Greece was a separate sovereign). It is important to note that the U.S. Supreme Court has yet to address whether the dual sovereignties exception applies in the international context.

119. United States v. Benitez, 28 F. Supp. 2d 1361, 1364 (S.D. Fla. 1998), *aff'd*, 208 F.3d 1282 (11th Cir. 2000) (noting that "a sovereign state is not obligated to respect or enforce the criminal judgment of another sovereign state"); United States v. Richardson, 580 F.2d 946, 947 (9th Cir. 1978) (holding that Guatemalan charges were no bar to U.S. charges); United States v. Martin, 574 F.2d 1359, 1360 (5th Cir. 1978) (stating that "the Constitution of the United States has not adopted the doctrine of international double jeopardy" and holding that U.S. prosecution was not barred by the Bahamian trial).

An excellent illustration of the application of this rule is the recent case of *United States v. Benitez.*[120] In *Benitez*, the defendants, charged with assaulting two agents of the U.S. Drug Enforcement Agency in Colombia, argued that a previous conviction by a Colombian court for the assault precluded the United States from seeking a second prosecution for the same offense.[121] The defendants relied primarily on the double jeopardy language of Article 14(7) of the International Covenant on Civil and Political Rights (ICCPR).[122] According to the defendants' reading, the ICCPR bans successive international prosecutions by different national governments for the same violation.[123] The district court disagreed with the defendants' interpretation of the ICCPR and found that Article 14(7) barred only successive internal prosecutions by the same government.[124] The court found that by its language, the ICCPR did not purport to regulate affairs between nations.[125] Moreover, the court further noted that the Humans Rights Committee established by Article 20 of the ICCPR had held that Article 14(7) applied to judicial decisions of a single state and not to those between different states.[126]

In the alternative, the defendants in *Benitez* argued that *non bis in idem*, as a principle of international law, should act as a bar

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120. 28 F. Supp. 2d 1361 (S.D. Fla. 1998), *aff'd*, 208 F.3d 1282 (11th Cir. 2000).

121. The United States sought to extradite the defendants, but the Colombian Supreme Court had annulled the extradition treaty in 1987. *See Benitez*, 28 F. Supp. 2d at 1363 n.2. Had there been an extradition treaty to prohibit a successive prosecution, it would have been immaterial because the defendants were brought to the U.S. through means other than extradition. *See id.* at 1363. The Court does not comment on exactly how the defendants were brought to the United States.

122. *Benitez*, 28 F. Supp. 2d at 1363-64. Article 14(7) of the ICCPR provides: No one shall be liable to be tried or punished again for an offence [*sic* British spelling] for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country." ICCPR (Dec. 16, 1966), 999 U.N.T.S. 171. The United States became a party to the ICCPR on September 8, 1992. *See Benitez*, 28 F. Supp. 2d at 1363. "The intent of the ICCPR is to provide international protection for the civil and political rights of the individual, as well as economic, social, and cultural rights." *See* ICCPR, preamble, 31 I.L.M. 648.

123. *Benitez*, 28 F. Supp. 2d at 1363.

124. *Id.* The ICCPR is a human rights treaty prescribing how each state should treat individuals within its own jurisdiction. *See id.*

125. *Id.*

126. *Id.* at 1364. The court examined the decision of the Human Rights Committee in *A.P. v. Italy*, Communication No. 204/1986 (decision adopted Nov. 2, 1987 at 31st Sess.). In that case, the committee held that Italy, as a signatory of the ICCPR, was not precluded from prosecuting an individual previously convicted and sentenced by Switzerland for the same offense. Report of the Human Rights Committee, 43d Sess., Supp. No. 40, at 242044, U.N. Doc. A/43.40 (1988), http://www1.umn.edu/humanrts/undocs/html/204-1986.htm.

to U.S. prosecution.[127] Their argument focused on the proposition that *non bis in idem* should apply as an international right even absent a treaty that also provided a scope of protections broad enough to nullify the dual sovereignties exception to the Double Jeopardy Clause.[128] The court chose to reject this seemingly well founded argument citing the general rule that, absent a treaty expressing otherwise, the United States would not be bound by the Colombian penal judgment imposed against the defendants.[129] The court did, however, concede that *non bis in idem* would provide broader protection only in respect to extradition cases where a treaty expressly provided for this protection.[130] For the court, *non bis in idem* represented nothing more than a term used to describe double jeopardy provisions in extradition treaties.[131] In characterizing the principle in this manner, however, the court implicitly rejected the defendant's argument that *non bis in idem* can stand alone as an overarching principle of international law independent of a treaty.

The position adopted by the court in *Benitez* is significant because it clearly demonstrates that American courts regard *non bis in idem* as only a treaty right and not a binding principle of international law. Only a few U.S. cases have discussed *non bis in idem* at any length, and in each case, with the exception of *Benitez*,[132] courts have examined whether a defendant could cite a *non bis in idem* provision in a treaty as a defense to being extradited to a country wishing to pursue further prosecution against him.[133] For the most part, these courts have reached the same conclusion as the *Benitez* court.

It is important to note that no court has yet to expressly and definitively state that *non bis in idem* is binding on the United States as only a treaty obligation.[134] One court has, however, gone as far as to say that the "Constitution of the United States

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127. *Benitez*, 28 F. Supp. 2d at 1364.

128. *Id.* at 1365.

129. *Id.*; *see also* Chua Han Mow v. United States, 730 F.2d 1308, 1313 (9th Cir. 1984) (holding that conviction in Malaysia does not preclude prosecution in the United States for same offense).

130. *Benitez*, 28 F. Supp. 2d at 1365.

131. *Id.* at 1364.

132. In *Benitez*, there was no treaty. Therefore the court applied the general rule. *Id.*

133. *See, e.g.*, Sindona v. Grant, 619 F.2d 167 (2d Cir. 1980); United States v. Jurado-Rodriguez, 907 F. Supp. 568 (E.D.N.Y. 1995). This situation arises most commonly when the defendant has been "prosecuted and convicted by the requested state and is sought by the requesting state for the identical or substantially similar criminal conduct." BASSIOUNI, *supra* note 57, at 601.

134. BASSIOUNI, *supra* note 57, at 607; *but see* Galanis v. Pallanck, 568 F.2d 234, 239 (2d Cir. 1977) which has often been cited for the proposition that *non bis in idem* is a treaty right as a matter public policy.

has not adopted the doctrine of international double jeopardy."[135] Therefore, from the relatively short list of available opinions, it is apparent that U.S. courts will continue to regard *non bis in idem* not as an independent principle of international law, but rather as a right supplied solely by treaty.

B. *The Same Offense*

In those cases where a treaty is present, the most common problem that U.S. courts have encountered is interpreting the language within *non bis in idem* provisions describing the identity of offenses.[136] The language employed may have a significant effect on the level of protection a defendant can expect because a singe criminal act may give rise to more than one offense. Specifically, the level of protection will depend on whether the provision bars extradition for the "same offense" or for the "same facts" for which the defendant may have already been tried, convicted, or acquitted.[137] Since these terms have been employed in the international realm without qualification, determining their meaning has indeed proven to be a difficult task.[138] The distinction between these terms is considerable and stems largely from the differences in application between the Common Law and Civil Law systems.[139]

In Common Law countries, such as the United States, prosecutors have a great deal of discretion in selecting which facts and crimes to prosecute.[140] After such determinations are made, the prosecutor "is barred from trying the same person for substantially the same crime based on substantially the same facts."[141] A narrower view, followed by U.S. courts, provides that the double jeopardy bar on successive prosecutions for the same offense applies only to offenses composed of the same elements of fact and law.[142] Thus, if each offense contains an element not

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135. United States v. Martin, 574 F.2d at 1360.

136. Harvard Research in International Law, *supra* note 115, at 613.

137. BASSIOUNI, *supra* note 57, at 600 (noting that most U.S. treaties refer to the "same offense" or substantially the same offense, whereas some, such as the treaty with France, use the "same facts").

138. Harvard Research in International Law, *supra* note 115, at 613.

139. *Id.*

140. *Id.*

141. *Id.* Moreover, in Common Law countries, the government may not appeal a judgment of acquittal even in situations where there may have been errors of law and continuing questions of fact. Costa, *supra* note 60, at 188 (observing that the prosecutor cannot seek an appeal even where the judge made a legal error).

142. BASSIOUNI, *supra* note 31, at 501.

contained by the other, then they are not the "same offense" and double jeopardy does not attach.[143]

In contrast, prosecutors in Civil Systems have considerably less discretion and are obligated to prosecute for all crimes that may arise from the facts known to the prosecutor at the time the defendant is charged.[144] Prosecutors are subsequently barred from retrying all uncharged crimes that may arise out of the same facts.[145] Unlike Common Law countries, however, prosecutors may appeal errors of law and questions of fact under *non bis in idem*.[146] By protecting an individual for all the facts arising from his criminal conduct, the Civil Law conceptualization of *non bis in idem* essentially provides a broader scope of protection than does the Common Law equivalent of double jeopardy.[147]

With such variances in interpretations, U.S. courts have faced some difficulty interpreting the meaning of the terms "same offense" and "same facts" as used in extradition treaties.[148] Often times, these treaties will specify which law should be applied in interpreting the terms, that of the requesting state or that of the requested state.[149] Absent such a provision, courts will inevitably interpret the terms of a *non bis in idem* provision in the context of their own domestic understanding of the law prohibiting dual prosecutions while simultaneously ignoring the possibility that the other affected sovereign may hold a differing interpretation of the same terms.[150] As discussed below, this approach is also problematic.

An analysis of the following cases will be illustrative of the problems U.S. courts have encountered in interpreting what constitutes the "same offense" or the "same facts" for *non bis in idem* purposes. Furthermore, these cases will further demonstrate the differences in the level of protection provided by each.

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143. United States v. Dixon, 509 U.S. 688, 696 (1993).

144. BASSIOUNI, *supra* note 57, at 600-01.

145. *Id.* (noting same facts may include "material propositions of fact").

146. Costa, *supra* note 60, at 190. In France, a Civil Law country, a party may appeal a conviction, an acquittal, a dismissal, and or a sentence in a criminal case. *Id.* Any party may appeal errors of law and questions of fact. *Id.*

147. BASSIOUNI, *supra* note 57, at 600.

148. *Id.* at 602.

149. *Id.* at 600; *see also* BEDI, *supra* note 77, at 171-79.

150. Matter of Extradition of Montiel Garcia, 802 F. Supp. 773, 777 (E.D.N.Y. 1993) (observing that "American courts do . . . have considerable experience interpreting the term 'same offense' in the context of domestic protection against dual prosecutions").

1. Sindona v. Grant (1980)

In *Sindona v. Grant*, the Second Circuit held that a *non bis in idem* provision did not bar the defendant's extradition to face charges in Italy where although the alleged Italian crime may have been the "but for" cause of the U.S. offense, it was not substantially the same offense for which the United States had prosecuted the defendant.[151] In this case, the defendant controlled a financial group of banks with locations both in the United States and Italy.[152] In 1974, two of the banks, the Franklin National Bank in the United States and the Banca Privata Italiana (BPI) in Italy, collapsed causing both to file for bankruptcy.[153] The Italian government sought the defendant's extradition from the United States in order to face charges relating to fraudulent bankruptcy.[154] While in the United States, however, a federal grand jury indicted the defendant on charges similar to those claimed by Italy but relating to the collapse of the U.S. bank.[155] The issue then became whether the defendant's U.S. indictment barred his extradition under the treaty between the United States and Italy.[156]

Pursuant to the language of the treaty, the court had to determine whether Italy's extradition request was based on the same "offense" for which the defendant had already been indicted in the United States.[157] The court quickly realized the difficulty in interpreting the *non bis in idem* provision because, although common in extradition treaties, there was "little in the way of reported decisions or helpful commentary with respect to their application."[158]

For guidance in interpreting the word "offense," the court turned to the work of one particular international law scholar, M.

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151. 619 F.2d at 179.
152. *Id.* at 169.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Sindona*, 619 F.2d at 169. Article VI(1) of the Treaty on Extradition between the United States of America and Italy, Jan. 18, 1973, 26 U.S.T. 493 [hereinafter Treaty] bars extradition "when the person whose surrender is sought is being proceeded against or had been tried and discharged or punished in the territory of the requested party for the offense for which his extradition is requested." *Id.*
157. *Sindona*, 619 F.2d at 177-78. The U.S. government argued that because some treaties provide a broader protection by using the term "acts" rather than "offense," the fact that this treaty uses "offense" is significant. *Id.*
158. *Id.* From the sparse commentary available, the court did conclude that such treaty restrictions derive form the norm of *non bis in idem*. *Id.*

Cherif Bassiouni.[159] According to Bassiouni, the terms "same offense" and "same conduct" are subject to broad interpretive leeway.[160] The "same conduct" may range from "identical acts" to "multiple acts committed in more than one place and at different times but related to the actor's initial design."[161] Similarly, the term "same offense" ranges from "identical charges" to related but not included offenses.[162] With such interpretive variances, Bassiouni asserts that the scope of any *non bis in idem* provision will depend in large measure on the interpretations given these terms that are borrowed from the domestic law and policies of the contracting parties.[163]

The U.S. Government, relying on both Bassiouni's position and Article X[164] of the Treaty, argued that the word "offense" should be interpreted in the context of U.S. law.[165] As such, the Government asserted that the proper test to be applied to determine whether a charge constitutes the same offense for double jeopardy purposes was the Supreme Court's *Blockburger* test, sometimes referred to as the "same elements" test.[166] The

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159. *Id.* M. Cherif Bassiouni is a professor of law at Depaul University in Chicago. He studied law at Dijon University in France and attended the graduate program in international law at the University of Geneva, Switzerland. In the United States, Prof. Bassiouni earned a J.D from Indiana University and a J.S.D. from George Washington University. He is considered a world-renowned scholar of international law and has served as the president of the International Institute of Higher Studies in Criminal Sciences at Siracusa, Italy. BASSIOUNI, *supra* note 57.

160. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 455-56 (1974).

161. *Id.*

162. *Id.*

163. *Id.* at 459; *see also* FRIEDLAND, *supra* note 1, at 391 (predicting that an English judge would apply English double jeopardy law to a treaty provision if asked to extradite a defendant who had already been tried in England by another state seeking to prosecute the defendant for an offense based on the same transaction); *see also* Matter of Extradition of Montiel Garcia, 802 F. Supp. at 773, 777.

164. Article X specifies that "[t]he determination that extradition should or should not be granted shall be made in accordance with the law of the requested Party." Treaty, *supra* note 156.

165. *Sindona*, 619 F.2d at 177-78.

166. Blockburger v. United States, 284 U.S. 299 (1932). According to the Supreme Court in *Blockburger*, "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." *Id.* at 304. The *Blockburger* test was the predominant test applied by the Court until 1990 when the Court decided Grady v. Corbin, 495 U.S. 508 (1990). The *Grady* test bars a subsequent prosecution in which the government, in order to establish an essential element of an offense charged in that prosecution, had to prove conduct that constituted an offense for which the defendant has already been prosecuted. *Id.* at 521. In 1993, *Grady* was overturned and the narrowly defined *Blockburger* test was reinstated in United States v. Dixon, 509 U.S. 688, 703-712 (1993). In *Dixon*, the court

court, however, rejected this position.[167] The court commented that under the *Blockburger* test, the *non bis in idem* provision would be inapplicable since the offense charged in Italy required proof of many facts and elements not charged in the United States and vice versa.[168] The court perceptively recognized that similar offenses may be defined differently by different countries, and therefore it would be impractical to apply the U.S. *Blockburger* test to foreign law.[169] In light of this observation, the court noted that "a court should not deem itself bound by a quiddity of the law of the requested party."[170]

In the court's view, the only way to not render the provision completely impotent would be to adopt a test similar to the one delineated by the district court, namely "a modified and more flexible test of whether the same conduct or transaction underlies the criminal charges in both transactions."[171] The court also identified the Department of Justice's Petite Policy as being a more appropriate standard in these cases.[172] The Petite Policy provides protection from a subsequent federal prosecution for the "same act" or "acts" except when there are "compelling federal interests for such a prosecution."[173] In the court's view, if the defendant's rights are not to be violated, the meaning attached to the word "offense" should provide a level of protection broader than that provided under the *Blockburger* test.[174]

Even under the broadest reading of the *non bis in idem* provision, however, the court held that the defendant's U.S. indictment did not bar his extradition to Italy.[175] According to the court, the Italian charges against the defendant encompassed

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observed that the "'same elements' test inquires whether each offense contains an element not contained in the other, if not, they are the 'same offense.'" *Id.* at 696.

167. *Sindona*, 619 F.2d at 178.

168. *Id.*

169. *Id.*

170. *Id.* at 178.

171. *Id.* The court recognizes the similarity between the test proposed by the district court and Justice Brennan's concurrence in Ashe v. Swenson, 397 U.S. 436, 453-54 (1970) (concurring opinion) that "the Double Jeopardy Clause requires the prosecution, except in most limited circumstances, to join at one time all the charges against a defendant which grow out of a single act, occurrence, episode or transaction." *Id.*

172. *Id.* In 1959, the Department of Justice instituted the Petite policy that allows federal reprosecutions only when there are compelling reasons and when the Assistant Attorney General gives his approval. *See* UNITED STATES ATTORNEYS' MANUAL § 9-2.142. The policy states in part: "No Federal case should be tried when there has been a state prosecution for substantially the same act or acts without a recommendation having been made to the Assistant Attorney General demonstrating compelling Federal interests for such prosecution." *Id.*

173. *Id.*

174. *Sindona*, 619 F.2d at 177-78.

175. *Id.* at 179.

a gigantic fraud on Italian banks.[176] Italy's concern was the harm done to Italian depositors in the collapse of BPI while the United States was focused on the harm to U.S. depositors and investors affected by the collapse of the Franklin National Bank.[177] The crimes charged in the U.S. indictment were, in the court's opinion, on the "periphery" of those sought by the Italian government.[178] The court observed that while the Italian fraud may have been the "but for" cause of the Franklin Bank collapse, it was not substantially the same offense for which the defendant was indicted in the United States.[179] As such, the defendant could be extradited to face charges in Italy.[180]

2. United States v. Jurado-Rodriguez (1995)

In *United States v. Jurado-Rodriguez*,[181] a U.S. district court examined the scope of protection provided by the *non bis in idem* provision of the United States-Luxembourg Extradition Treaty.[182] The court held that an indictment for crimes that are substantively different and have a sufficiently separate evidentiary base did not violate even the express limiting language of *non bis in idem* prohibitions in an extradition decree.[183]

In this case, the defendants were convicted and sentenced to jail in Luxembourg for having designed and carried out a money laundering operation involving $36 million stemming from cocaine trafficking.[184] In 1992, pursuant to the United States-Luxembourg Extradition Treaty, the United States sought the defendants' extradition to face charges of conspiracy to engage in

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176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* In its holding, the court reasoned that the *non bis in idem* provision could not have been intended to have substantial elements of the crime left unpunished. *Id.*
180. *Id.*
181. 907 F. Supp. 568 (E.D.N.Y. 1995).
182. Article III of the treaty reads:

> A person surrendered under this convention shall not be tried or punished in the country to which his extradition has been granted, nor given up to a third power for a crime or offence not provided for by the present convention and committed previously to his extradition . . . .

United States-Luxembourg Extradition Treaty, Oct 29, 1883, art. III U.S.-Lux., 23 Stat. 808, amended April 24, 1935, U.S.-Lux., 49 Stat. 3355.
183. *See Jurado-Rodriguez*, 907 F. Supp. at 580-81.
184. *Id.* at 571-72. Defendant Jurado was sentenced to fifty-four months in prison and fined five million Luxembourg francs (approx. $165,000); Defendant Garcia was sentenced to five years in prison and fined ten million Luxembourg francs (approx. $333,000). *Id.*

narcotics distribution and money laundering,[185] and in May 1994, Luxembourg granted the extradition request.[186]

The defendants moved to dismiss on the grounds that a U.S. prosecution would violate the express terms of the extradition decree in that it would constitute a second prosecution for the offense for which they had been previously tried, convicted, and sentenced in Luxembourg.[187] The extradition decree, which was issued at the time Luxembourg granted the U.S. extradition request, explicitly set out a limitation that the defendants "cannot be prosecuted or judged in the United States of America due to the 'faits' making up the subject of the extradition request for which [they] were prosecuted and judged in the Grand Duchy of Luxembourg."[188] The court, realizing it needed help in interpreting the treaty and the decree, enlisted the help of two international experts who testified as to Luxembourg law, *non bis in idem*, and the extent to which evidence used in the original trial may be used in a subsequent U.S. trial.[189]

In its discussion, the court acknowledged that because Luxembourg was the surrendering state, it had to interpret the specific protection contained in the extradition decree according to the laws of Luxembourg.[190] In doing so, the question then became: what meaning should be given to the term 'faits' for double jeopardy purposes?[191] The court determined that 'faits' as intended by the extradition decree referred to what U.S. courts recognize as "material propositions of fact." After making this determination, the court was careful to distinguish between conduct as it relates to the elements of an offense and evidence as it relates to the proofs of the offense before applying its meaning

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185. *Id.* at 573. The United States Drug Enforcement Agency (DEA) took an active role in helping to apprehend the defendants by providing the Luxembourg police with equipment to install wiretaps. *Id.* at 571-72.

186. *Id.* The Luxembourg extradition decree contained both charges asserted in the U.S. extradition request. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 574-75. Pursuant to Federal Rule of Civil Procedure 44.1, which allows a court to consider testimony explaining foreign law, the court heard testimony from Professor Christopher Blakesley, professor of law at Columbia, and Professor M. Cherif Bassiouni, professor of law at Depaul University.

190. *Id.* at 577-78. The court found that Luxembourg follows French civil law jurisprudence, which holds that the doctrine of *non bis in idem* incorporates related acts and the use of evidence supporting such similar acts. *Id.* The court observed that the that the civil law's formulation of *non bis in idem* conferred a broader protection for defendants than did the double jeopardy provision of the Constitution of the United States. *Id.*

191. *Id.* at 578. Faits could be either 'facts' or 'acts.' Either way, the court maintained that its definition was not dispositive in determining whether all the evidence admitted in the Luxembourg trial should be excluded. *Id.*

of 'faits' to the facts.[192] Applying its analysis, the court dismissed the money laundering charge noting the broad scope of *non bis in idem*, and that on this count, the U.S. government was relying on primarily the same 'faits' as had been relied upon in the Luxembourg trial: "that is to say on almost the identical material propositions of fact."[193]

The basis of the court's holding on the money laundering charge depended on the fact that the material elements of the charge were substantially the same.[194] The court, therefore, focused on the substantial similarity of the conduct, not on the evidence to be presented in the U.S. case.[195] Relying on this analysis, the court upheld the charge of drug trafficking as a sufficiently separate offense.[196] The defendants' prior conviction in Luxembourg was for laundering the proceeds stemming from the sale of narcotics.[197] The material propositions of fact on which the U.S. charge was predicated focused more on the drug trafficking itself and were therefore substantially different than those of the money laundering charge.[198] The court further reasoned that even though some of the evidence used to prove this charge was the same as that used in the Luxembourg trial, the conspiracy to engage in drug trafficking is distinctly different from that of money laundering.[199] The court's holding is therefore significant: where the material propositions of fact are substantially different, even though some evidence may be similar to that used in prior prosecution, neither *non bis in idem*, nor double jeopardy bars prosecution.

3. Elcock v. United States (2000)

In the most recent *non bis in idem* case, *Elcock v. United States*, Judge Trager encountered many of the same problems interpreting the double jeopardy provision of the extradition treaty between the United States and Germany as did Judge Friendly in *Sindona*.[200] In this case, the German government sought the extradition of the defendant in order to face larceny

192. *Jurado-Rodriguez*, 907 F. Supp. at 578. The court recognizes that a rule that would exclude evidence used in prior case would be unworkable. *Id.*

193. *Id.* at 580. The government relied on evidence similar, if not identical, to that relied upon in the Luxembourg trial on the money laundering charge. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 580-81.

197. *Id.*

198. *Id.*

199. *Id.*

200. 80 F. Supp. 2d 70 (E.D.N.Y. 2000).

charges arising from a bank robbery committed in Berlin.[201] In the United States, the defendant was charged with transporting currency stolen from the Berlin Bank in foreign commerce and smuggling currency into the United States.[202] In an attempt to block his extradition, the defendant argued that because of his U.S. prosecution, the *non bis in idem* provision of the treaty between the United States and Germany barred his extradition.[203] The primary issue before the court centered around what meaning to attach to the term "offense" for the purpose of applying the treaty.[204]

In this case, Judge Trager, relying primarily on Judge Friendly's recommendations in *Sindona*, made a significant attempt to articulate a workable standard for applying the principles of double jeopardy in the context of extradition in a manner that effectuated the intent of the parties involved.[205] In this attempt, the court focused primarily on the language of the treaty warning that domestic law should serve as a "second-best solution to the difficult problem of applying a transnational legal concept whose precise meaning is not fixed by international law."[206] Even though the court was hesitant to apply domestic law, it nevertheless engaged in a comparison of the parties' views of double jeopardy in an attempt to ascertain how each intended to interpret the term offense.[207]

On the one hand, the U.S. government argued that the term "offense" should be interpreted using the *Blockburger* or the "same elements" test, an argument that was consistent with the

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201. *Id.* at 73. The defendant was suspected of assisting his girlfriend, an employee of the bank, in stealing $419,720 in various national currencies. *Id.*

202. *Id.* at 73. After having committed the robbery, the defendant mailed the currency to his sister in the United States. Shortly thereafter, he flew to the United States in order to receive the package. *Id.* During a routine x-ray of the package, the U.S. Customs Service detected the currency and set up a sting operation to capture the recipient of the package. *Id.* After the package was delivered and accepted by the defendant, he was arrested. *Id.*

203. *Id.* at 75. Primarily, the defendant relied on Article 8 of the Treaty Between the United States of America and the Federal Republic of Germany Concerning Extradition, June 20, 1978, art. 8, U.S.-F.R.G., 32 U.S.T. 1485, which provides:

> Extradition shall not be granted when the person whose extradition is requested has been tried and discharged or punished with final and binding effect by the competent authorities of the Requested State for the offense for which his extradition is requested.

Id.

204. *Id.*

205. *Id.* at 76-77.

206. *Id.* at 77.

207. *Id.* at 80-81.

Department of State's position on the subject.[208] On the other hand, the court observed that Germany, as a Civil System, placed a broader interpretation on the principle of *non bis in idem* than did the United States on double jeopardy.[209] According to the court, German law, in contrast with U.S. law, prohibits multiple prosecutions not for the same offense, but rather for the broader same act or "tat."[210] As such, in making a *non bis in idem* determination, a German court would focus on the facts of the underlying prosecution, rather than on the elements of the offense committed.[211] The defendant would then be protected from re-prosecution for all offenses arising from the robbery itself because this view provides a broader level of protection.

From the evidence presented, the court keenly observed the possibility that the United States and Germany lacked a "shared understanding" of the meaning of the term "offense" when they executed the Treaty.[212] The court went on to note that under traditional contracts law, a court could find that, because each country ascribed a different meaning to the term, there was no meeting of the minds and therefore no contract had been formed.[213] Moreover, the court noted that because commentators had recognized the varying interpretations of *non bis in idem*, both the United States and Germany should have had "constructive knowledge" that the principle was interpreted differently in their respective legal systems.[214]

In the end, however, the court's attempt to apply a practical international standard that was not based solely on domestic law was futile. With no international consensus on the interpretation of "offense" and differing views by the parties' themselves, the court recognized that it was in no position to void a treaty properly signed by the President and ratified by the Senate even though the parties lacked a shared understanding of the treaty's

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208. *Id.* at 80. The Department of State has long held the position that the term "offense" encompasses only crimes whose elements are identical and crimes that constitute lesser included offenses. *Id.*

209. *Id.* at 81. In order to gain a better understanding of German law, the court sought the help of Professor Markus Dubber of the State University of New York at Buffalo, author of several comparative law articles, with an emphasis on German law. *Id.*

210. *Id.* A "tat" according to Professor Dubber is a "historical occurrence that, according to general life experience, counts as a single act." *Id.*

211. *Id.* The court also observed that "the Civilist concept of *non bis in idem* is not only broader than double jeopardy, but it is also based on the prohibition of prosecution for the same facts, and not only for the same or substantially the same crimes arising out of the same facts." *Id.* (quoting BASSIOUNI, *supra* note 57, at 600-01).

212. *Id.* at 82.

213. *Id.*

214. *Id.*

provisions.[215] As such, the court was left with no alternative but to defer to the Executive Branch's interpretations of the term in like provisions of other treaties and apply the *Blockburger* test.[216] In applying the *Blockburger* test to the facts, the court held that because the elements of the offense for which the defendant was prosecuted in the United States were not identical to those for which Germany sought to prosecute him, the *non bis in idem* provision did not bar his extradition.[217]

C. *The Sham Exception—United States v. Rashed*

In another recent case, *United States v. Rashed*, a federal court for the first time examined the applicability of the sham exception discussed in *Bartkus* in the international context.[218] In *Rashed*, the defendant claimed that a prior Greek prosecution for the same crime barred the U.S. trial on aircraft bombing charges.[219] In challenging the dual sovereignty doctrine, the defendant claimed that the sham exception applied and that the United States dominated and directed the Greek proceedings so completely that double jeopardy attached.[220]

The defendant wisely did not attack what the court described as the "uncontrovertible": that the United States and Greece were separate sovereigns.[221] The defendant argued, however, that because the United States provided assistance in the Greek prosecution, the two countries proceeded as one rather than two separate and independent sovereigns.[222] In addressing this argument, the court noted that because the exception is extremely narrow, it imposes a substantial burden on defendants.[223] In order for the defendant to satisfy his burden,

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215. *Id.* at 83.
216. *Id.*
217. *Id.* at 84-85.
218. 83 F.Supp. 2d 96, 101 (D.C. 1999).
219. *Id.* at 97. In this case, the defendant had served eight years in a Greek prison following his prosecution. *Id.* at 100. Shortly after his release, he was taken into custody by the FBI and taken to the U.S. for further prosecution. *Id.*
220. *Id.*
221. *Id.* at 101.
222. *Id.* at 102. In the process of investigating the charges against Rashed, the Greek Government not only requested U.S. assistance but also made an evidence-gathering visit to the United States. *Id.* at 98-99. The United States also provided both FBI agents to testify at the trial as well as prosecutors to provide further assistance during the prosecution. *Id.*
223. *Id.* at 101. The court lists those cases that have either described the exception as being narrow or that have questioned whether such an exception truly exists. *Id.* at 101-02.

the court required that he be able to show that the Greek officials "had little or no independent volition in the state proceedings."[224]

In the international context, the court further required that the defendant not only meet the "little or no independent volition" test, but that he show that the United States used the Greek prosecution to achieve an objective they could not otherwise achieve under the Constitution.[225] The court found that the defendant did not meet either requirement holding that Greece acted independent and contrary to the United States' express wishes.[226] Moreover, the court noted that the United States gained nothing from the Greek prosecution except a delay of its own opportunity to prosecute the defendant.[227] The fact that the United States cooperated with the Greek government did not merit a finding that the sham exception applied.[228]

IV. THE UNITED STATES SHOULD ABANDON THE DUAL SOVEREIGNTY DOCTRINE IN THE INTERNATIONAL REALM

Although the dual sovereignty doctrine is well established as a constitutional principle, it is the source of great criticism.[229] Commentators have almost uniformly attacked the doctrine's validity and have advocated for its elimination as it is applied in U.S. domestic law.[230] One of its primary criticisms is that it

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224. *Id.* at 102 (quoting United States v. Liddy, 542 F.2d 76, 79 (D.C. Cir. 1979)).

225. *Id.*

226. *Id.* The United States initially had requested that Rashed be extradited to the U.S. *Id.* at 98. Greece had agreed to do so, but later decided to prosecute him in Greece. *Id.*

227. *Id.* at 102.

228. *Id.* In reality, the U.S. cooperation was based on a treaty obligation. *Id.* As a signatory of the Montreal Convention, the U.S. was required to provide "the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences." *Id.* The court further noted that cooperation between separate sovereigns does not amount to a facially valid double jeopardy claim. *Id.*; *see also* United States v. All Assets of G.P.S. Auto. Group, 66 F.3d 483, 494 (2d Cir. 1995) (stating that "we have repeatedly held that even significant cooperation . . . does not provide a basis for applying the Bartkus exception").

229. The following is a list of law review articles criticizing the Supreme Court's construction of the dual sovereignty doctrine: Matz, *supra* note 84, at 359; Eric J. McDonald Guadalupe, *Double Jeopardy, Dual Sovereignty and Other Legal Fictions*, 28 REV. JUR. U.I.P.R. 201 (1994); Susan Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. REV. 609, 625 (1994); Kevin J. Hellmann, *The Fallacy of Dueling Sovereignties: Why the Supreme Court Refuses to Eliminate the Dual Sovereignty Doctrine*, 2 J.L. & POL'Y 149 (1994); Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1 (1992); Allen & Ratnaswamy, *supra* note 17, at 801.

230. *Id.*

provides prosecutors a second chance to prosecute acquitted defendants, and thus virtually guarantees a conviction on the second try.[231] Given a second bite of the apple, prosecutors may benefit from hindsight concerning prior mistakes. With a second chance, prosecutors can ensure a conviction by interviewing jurors, collecting further evidence, and selecting a more favorable jury for the second trial.[232]

Under such a system, the injustice is even greater for defendants, such as the ones in *Rashed* and *Elcock*, who had been previously convicted and had already served time in prison when sought for a second prosecution.[233] In securing a second conviction for the same offense, prosecutors have the advantage that the defendants have already been found guilty with the evidence available. In effect, a re-prosecution of a defendant after his release subjects him to another trial and perhaps a second punishment.

Despite the injustices suffered by defendants, the Court continues to uphold and expand the doctrine's applicability.[234] In response, however, approximately half the state legislatures and the Department of Justice have taken measures to limit, if not prevent, successive prosecutions. Several state legislatures have passed statutes barring state prosecutions in cases where defendants have previously been tried by an independent prosecuting authority such as the federal government or another state government.[235] Similarly, the Department of Justice instituted the Petite Policy which reflects the Department's intent to voluntarily abstain from bringing a federal action following a state prosecution unless compelling federal interests are present.[236]

On the international level, these safeguards have little if no effect. State statutes and the DOJ's internal policy provide no defense or protection for a defendant being prosecuted by the

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231. *See* Matz, *supra* note 84, at 372.

232. *Id.*

233. In *Rashed* the defendant served 8 years in prison. 83 F.Supp. 2d at 100. The defendant in *Elcock* served thirty months in prison. 80 F.Supp. 2d at 74.

234. *See e.g., Lanza*, 260 U.S. at 377.

235. *See, e.g.*, Ala. Code. § 12.20.010 (1984); Cal. Penal Code § 656 (West 1988); Ga. Code Ann. § 16-1-8 (Michie 1992); Ill. Ann. Stat. ch. 38, para. 3-4 (Smith-Hurd 1989); Kan. Stat. Ann. § 21- 31083(3) (1988); Miss. Code Ann. § 99-11-27 (1972); Utah Code Ann. § 76-1-404 (1990). For a complete list of statutes see Braun, *supra* note 229, at 5 n.15.

236. *See supra* note 168; *see also* Petite v. United States, 361 U.S. 529 (1960) (announcing the government's general policy that several offenses arising out of a single transaction should be alleged and tried together rather than being the basis of multiple prosecutions).

U.S. government in a federal court.[237] At best, they serve as evidence of the widespread contempt for the goals underlying the doctrine. At the present time, a defendant's only hope of avoiding being subjected to a second prosecution in the United States or being extradited to a country wishing to pursue further prosecution is either an extradition treaty expressly prohibiting such occurrences or the hope that U.S. courts abolish the dual sovereignty doctrine and recognize *non bis in idem* as having the legal effect of prohibiting a second prosecution. The interpretive problems associated with defining treaty provisions and the improbability that the Supreme Court will abolish the doctrine means that defendants are often left vulnerable to multiple prosecutions.

The following sections examine several arguments that undermine the doctrine's validity and reasons why U.S. courts should abandon the dual sovereignty doctrine in the international context, replacing it with a broader, more practical standard.

A. *As Applied in the International Context, the Dual Sovereignty Doctrine Lacks Basis in U.S. Historical and International Practice*

Quite noticeably, any discussion describing the historical foundation for the doctrine is missing from all the Supreme Court cases championing dual sovereignty.[238] For instance, Justice Taft's opinion in *United States v. Lanza* has served as a clear and often cited precedent for later cases affirming the doctrine, but the opinion itself provides little reasoning or support for the holding.[239] Without making any reference to the interests protected by the Double Jeopardy Clause or the framer's intent, Justice Taft simply announced that dual prosecutions were not precluded between two different sovereigns, even though on its face, the Fifth Amendment provides for no such exception.[240]

Had the Court ever engaged in an examination of history, it would have discovered that the framers of the Double Jeopardy Clause probably would not have accepted the dual sovereignty

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237. The Petite Policy's scope and effectiveness is actually subject to three limitations: "(1) since the petite policy is an internal administrative policy it is not subject to judicial review, (2) the Department's guidelines on applying the policy are vague, and (3) defendants cannot use the policy as a defense to successive prosecutions." Ophelia Camina, *Selective Preemption: A Preferential Solution to the Bartkus-Abbate rule in Successive Federal-State Prosecutions,"* 57 NOTRE DAME LAWYER 340, 348 (1981).

238. *See* Herman, *supra* note 229, at 625.

239. *Id.* at 622-23.

240. *Id.*

doctrine as it exists today.[241] While the Double Jeopardy Clause was adopted with little debate as to its meaning, the framers intended the Clause to conform to the "universal practice in Great Britain."[242] At the time of the Clause's adoption, the English common law position was clear on this point. Several English cases, all predating the adoption of the Constitution, have been relied on as establishing the rule that a person tried by a foreign court having competent jurisdiction may not be tried for the same offense in an English court.[243] Furthermore, it is logical to conclude that if the framers of Constitution had intended to allow for multiple prosecutions by separate sovereigns, they would have specified or provided an exception similar to the dual sovereignty doctrine.

Moreover, in the time period following the adoption of the Double Jeopardy Clause, the United States' international practice with respect to successive international prosecutions appears to be consistent with the English common law view.[244] Two early Supreme Court cases are significant in supporting this proposition. In *United State v. Furlong*, the Court recognized that for certain crimes, such as piracy, which fall within the criminal jurisdiction of all nations, "there can be no doubt that the plea of *autre fois acquit* would be good in any civilized state, though resting on a prosecution instituted in the Courts of any civilized state."[245] In *Rose v. Himley*, the Court rejected any effort to retry, collaterally, criminal issues determined in a foreign court.[246] Chief Justice Marshall plainly stated that "if the port of St. Domingo had jurisdiction of the case, its sentence is conclusive."[247]

More recently, the United States, by signing the NATO Status of Forces Agreement (SOFA), agreed to recognize the criminal judgments of other signatory states.[248] Part of the agreement provides for a situation where two or more sovereigns share concurrent criminal jurisdiction over military personnel stationed

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241. *Id.*

242. SIEGLER II, *supra* note 54, at 32.

243. *See supra* note 68; *see also* SIEGLER II, *supra* note 54, at 127; FRIEDLAND, *supra* note 1, at 360-361; 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN, ch. 35, § 10 (Thomas Leach ed., 6th ed. 1787) (stating "I take it to be settled this day, that an acquittal in any court whatsoever which has a jurisdiction of the cause, is a good bar of any subsequent prosecution for the same crime, as an acquittal in the highest court").

244. *See* Thomas Franck, *An International Lawyer Looks at the Bartkus Rule*, 34 N.Y.U. L. REV. 1096, 1099 (1959).

245. 18 U.S. 184, 197 (1820).

246. 8 U.S. 241 (1808).

247. *See id.* at 276.

248. *See* N.A.T.O. Status of Forces Agreement, June 19, 1951, 4 U.S.T. 1792.

abroad.[249] In fact, the agreement provides a double jeopardy clause that requires the sending state and the receiving state to respect criminal judgments of the other as final except as it regards breaches of military discipline.[250] While problems may still arise under this article, the intent is clear: "the exercise of jurisdiction by one party, either because it has primary jurisdiction or because the other party has waived its right to primary jurisdiction, bars a subsequent prosecution by the other."[251]

From this evidence, one could logically argue that on the international level, the dual sovereignty doctrine lacks any substantive foundation. The truth of the matter is that both U.S. history and international practice support the view that the United States, at least implicitly, recognized *non bis in idem* as a bar to multiple prosecutions in the international realm, and it should continue to do so today.

B. *The Same Conduct Test*

While the dual sovereignty doctrine rests on a shaky foundation, it will most likely continue to be upheld by U.S. courts. If so, *non bis in idem* continues to operate only as a treaty right subject to the interpretative pitfalls arising from the term "same offense," and in some cases "same facts." In order to avoid such problems, courts should not continue to rely on the *Blockburger* test as the measure of what constitutes the "same offense." To apply such a test would render such provisions impotent to protect a defendant's right not to be placed in jeopardy twice for the same offense.

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249. *See* Franck, *supra* note 244, at 1099. The United State has signed several SOFAs with Germany and countries that host U.S. troops for long periods of time. *See, e.g.*, Daniel Pagano, *Criminal Jurisdiction of United States Forces in Europe*, 4 PACE Y.B. INT'L L. 189 (1992).

250. Article VII, § 5 of the Agreement provides:

> Where an accused has been tried in accordance with the provisions of this Article by the authorities of one Contracting Party and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offence within the same territory by the authorities of another Contracting Party. However, nothing in this paragraph shall prevent the military authorities of the sending State from trying a member of its force for any violation of rules of discipline arising from an act or omission which constituted an offence for which he was tried by the authorities of another Contracting Party.

N.A.T.O. Status of Forces Agreement, June 19, 1951, 4 U.S.T. 1792.

251. FRIEDLAND, *supra* note 1, at 398. The ultimate interpretation of the double jeopardy clause in this agreement will most likely rest in the courts of the signatory nations. *Id.*

If *Blockburger's* "same elements" test remains the dominant standard applied, defendants could only benefit from an extradition treaty if they are able to prove that the elements of an offense prosecuted by a foreign court paralleled exactly those being pursued by a U.S court. The fact of the matter is that it would be impossible to find a foreign offense that required exactly the same elements as would its U.S. equivalent.[252] A foreign offense, at the very least, would logically differ in the elements required, the defense opened to the accused, the burden of proof, and generally the criminal process involved.[253] In essence, continued reliance on *Blockburger* would in no uncertain terms eliminate the defense of *non bis in idem* entirely in extradition cases.

It is at least inferable that the United States is attempting to provide defendants some level of protection from successive prosecutions on the international level, especially since *non bis in idem* provisions have become commonplace in U.S. treaties. If this is the case, it would be nonsensical for courts to weaken such provisions by construing them so narrowly as to provide a defendant no protection at all. In order to effectuate the purpose of providing for *non bis in idem* safeguards, courts should adopt an approach similar to the one taken by the *Sindona* court.

In *Sindona*, Judge Friendly recognized the problems associated with the use of the domestic law standard under *Blockburger*, and proposed the adoption of a more flexible test to be applied in the international law context that would protect defendants from being extradited for the same conduct or transaction underlying the criminal charges in both sovereigns.[254] Judge Friendly identified Justice Brennan's position in *Ashe v. Swenson* and the Petite Policy as examples of possible tests to be applied in the extradition context.[255] Irrespective of which one is adopted, both provide a broader level of protection because of their focus on the defendant's conduct, not the elements of the crime. A modified version of the Petite Policy may actually represent a better standard in that it provides an avenue for a sovereign to proceed with a second prosecution when it has significant interests at stake that were not met by the first prosecution. Nevertheless, under either, it is immaterial

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252. *Id.* at 383 (making this observation but in the context of English law).

253. *Id.*

254. *See Sindona*, 619 F.2d at 178. In *United States v. Rashed*, the defendants argued that in the international context, a conduct based test should apply because similar offenses may be defined differently in various countries. 1999 WL 1320187 *7 (D.C. 1999). The court, however, rejected this proposal and applied the *Blockburger* same elements test. *Id.*

255. *See supra* notes 168, 243.

what name an offense is identified by so long as the conduct is substantially the same. Therefore, while certain acts may constitute embezzlement in State X, larceny under the laws of State Y, and statutory theft in State Z, the defendant is protected from multiple prosecutions because the conduct at issue is substantially the same.[256]

By adopting a conduct based test, courts will better preserve not only the goals of providing *non bis in idem* provisions, but also a defendant's right not to be prosecuted twice for the same crime.

C. *Joint Prosecutions*

Several commentators have further criticized the dual sovereignty doctrine as being based on an antiquated view of federalism.[257] It is the Court's belief that without the dual sovereignty doctrine, federal and state prosecutors would compete for the exclusive right to prosecute defendants that have, through a single criminal act, violated the laws of both sovereigns.[258] In reality, federal and state prosecutors and law enforcement agencies have become increasingly cooperative with one another as a result of the fact that both state and federal laws prohibit much of the same behavior.[259] In this age of "cooperative federalism," cooperation is commonplace among prosecutors because their interests in prosecuting criminal acts frequently coincide.[260]

This spirit of cooperation has spread to the point where the activities of state and federal law enforcement agencies are so intertwined that they cannot be considered separate and independent agencies.[261] With advances in telecommunication technology and computer applications, cooperation and

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256. *See* Harvard Research in International Law, *supra* note 115, at 614.

257. *See* Matz, *supra* note 84, at 374; *see also* Hellmann, *supra* note 229, at 162.

258. *See* Matz, *supra* note 84, at 374

259. *See* Hellmann, *supra* note 229, at 165. While crime has traditionally been viewed as a local issue, Congress began federalizing certain kinds of crimes starting with a mail fraud statute passed in 1872. *See* Braun, *supra* note 229, at 4. This gradual convergence of federal and state jurisdictions has blurred the line dividing the state and federal prosecutorial authority that has served as the basis of traditional federalism to the point where each is undistinguishable from the other. *Id.* at 70-72.

260. "Cooperative federalism" is a term used by the Supreme Court to describe the united front waged by federal and state governments against several types of criminal activities. *See, e.g.*, Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 56 (1964). At least one commentator has expressed his concern that this type of cooperative federalism will eventually give rise to collusion between federal and state prosecutors against criminal defendants. *See* Braun, *supra* note 229, at 70-72.

261. *See* Matz, *supra* note 84, at 373.

coordination among law enforcement agencies has never been more feasible and desirable.[262] As cooperation increases between federal and state governments, the premise on which the dual sovereignty doctrine rests becomes weaker. This is so because sovereigns will no longer be working as separate, independent entities, but rather as single units driven by the common goal of prosecuting defendants.

Similarly, there has also been international movement towards a greater level of international cooperation among national police forces and criminal investigation organizations.[263] Today, modern crime transcends international borders. The United States, as arguably the sole world superpower, is actively involved in trying to curb crimes such as drug trafficking, money laundering, and terrorism on an international level.[264] As such, the United States has joined other countries in a collaborative effort extending to "information and evidence gathering, intelligence work, permission to conduct investigations in the respective national territories, and apprehension of criminals within foreign territories."[265]

Whether in the domestic or international realm, this increased level of cooperation will give rise to a greater level of collusion between sovereigns against criminal defendants.[266] This continued level of cooperation, however, is in direct conflict with the fundamental principles underlying the dual sovereignty doctrine. In order for the doctrine to retain any credibility as a Constitutional principle, the different sovereigns must maintain a

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262. *Id.*

263. *See* Jacqueline Klosek, *The Development of International Police Cooperation Within the EU and Between the EU and Third Party States: A Discussion of the Legal Bases of Such Cooperation and the Problems and Promises Resulting Thereof*, 14 AM. U. INT'L L. REV. 599, 656 (1999) (discussing the increase in international cooperation in criminal investigations); *see also* Abraham Abramovsky & Jonathan Edelstein, *The Sheinbein Case and the Israeli-American Extradition Experience: A Need to Compromise*, 32 VAND. J. TRANSNAT'L L. 305 (1999) (discussing cooperation between the United States and Israel in law enforcement); Barrett Atwood and Molly McConville, *Money Laundering*, 36 AM. CRIM. L. REV. 901 (1999) (examining the increased international cooperation in preventing money laundering); Jimmy Gurule, *The 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances—A Ten Year Perspective: Is International Cooperation Merely Illusory?*, 22 FORDHAM INT'L L.J. 74 (1998) (examining the increased cooperation in preventing drug trafficking).

264. Money laundering is a major concern because of its devastating social consequences. It provides an avenue for drug dealers and terrorists as well as other criminals to operate and expand their criminal networks. *See* Gurule, *supra* note 263, at 76-77. Furthermore, the United States is a party to several multilateral and bilateral treaties intended to foster international cooperation in narcotics enforcement, the most important being the U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. *Id.* at 77-78.

265. Klosek, *supra* note 263, at 602.

266. *See* Braun, *supra* note 229.

certain level of independence and separateness from one another in vindicating their own respective interests. Each must only seek to vindicate and pursue its own interests. As the world becomes increasingly smaller, however, countries will continue to work together to accomplish common interests. This means that defendants will be faced with defending themselves not against one government's resources and power, but multiple governments' resources and power working in conjunction.

One way to avoid inflicting a greater injustice upon defendants is for U.S. courts to adopt a broader version of the sham exception. The defendant in *Rashed* unsuccessfully argued that because the United States provided a high level of assistance to Greece during his trial, the sham exception should have barred his prosecution in the United States.[267] The court's rejection of this argument and acceptance of the "little or no independent volition test" signals that the sham exception, as it is understood today, is entirely too narrow to provide any protection on the international level.[268] The standard adopted should in some respects address some of the concerns raised by Justice Brennan in his dissent in *Bartkus*.[269] In essence, the premise on which barring a sequential prosecution using the broader sham exception rests is that the two sovereigns are not working as separate entities, but rather as one powerful sovereign with a great number of resources directed at prosecuting one sole defendant. As such, any significant amount of cooperation between sovereigns in prosecuting one defendant should provide a basis for a valid double jeopardy claim predicated upon the idea that when one sovereign enlists the help of a second sovereign sharing concurrent jurisdiction to prosecute an individual, that second sovereign waives its right to pursue prosecution at a later point.

There is, however, a better, more practical solution that bypasses the subjective need to ascertain how much cooperation is sufficient to satisfy the sham exception. Ultimately, the success of global law enforcement efforts depends on the increased level of international cooperation. This cooperation should, therefore, extend to the prosecution itself. The adoption of joint-prosecutions would enable the agencies of both sovereigns

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267. 83 F.Supp. 2d at 96.

268. *Id.* at 96.

269. Justice Brennan proposed that a test should be fashioned to "secure the fundamental protection of the Fifth Amendment 'that the Federal Government with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a state of anxiety and insecurity.'" *See Bartkus*, 359 U.S. at 168 (Brennan, J., dissenting) (quoting Green v. United States, 355 U.S. 184, 187 (1957)).

to contribute to the best presentation of evidence in a court mutually agreed upon by the sovereign states.[270] Furthermore, this scheme could be structured to allow all crimes arising out of the same conduct or criminal transaction to be joined together and prosecuted in a single criminal trial.[271]

In effect, this approach would serve as a more practical international practice in that it allows each violated sovereign to vindicate its own laws in a manner that would only subject the accused to a single trial. Such a concept is not foreign to the United States, as it has successfully executed this strategy with countries such as Israel.[272] Strategically, joint prosecutions may significantly increase the chance that a defendant is convicted because prosecutors from different nations will be able to determine which jurisdiction will enhance their probability of convicting and punishing the defendant.[273]

In the end, this approach is more practical in that it better balances the interests of the sovereign states with those of the individual defendant by preserving a defendant's right not to be twice placed in jeopardy. It also simultaneously promotes cooperation by encouraging prosecutors to work together in order to maximize their shared goal of further convicting defendants.[274]

V. CONCLUSION

As we enter a new millennium, the traditional concept of state sovereignty is in the process of being redefined.[275] Today, the focus is on individual rights and not on protecting a state's power to abuse those rights.[276] The United States therefore cannot continue to cling unto an antiquated view of sovereignty that from its inception was intended to places defendants in double jeopardy contrary not only to Constitutional prohibitions

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270. *Cf.* Franck, *supra* note 244, at 1103 (discussing the single trial proposal in the federal-state context).

271. *See* BASSIOUNI, *supra* note 57, at 505; *see also* Matz, *supra* note 84, at 174 (discussing this scheme in the federal-state context).

272. *See* Abramovsky & Edelstein, *supra* note 263, at 314-315. The United States has, on at least three occasions, assisted Israel in conducting joint-prosecutions of criminal defendants. *Id.* In conducting several of these joint prosecutions, the United States and Israel were able to establish several procedures that will facilitate subsequent prosecutions by minimizing delays. *Id.*

273. *Cf.* Hellmann, *supra* note 229, at 167 (discussing this prospect in the federal-state context).

274. *Id.*

275. *See* Kofi Annan, *Two Concepts of Sovereignty*, ECONOMIST, Sept. 18 1999, at 49.

276. *Id.*

against such an occurrence, but also to the internationally accepted maxim *non bis in idem*.[277]

In the end, it's a question of what is just. The multiple prosecutions of the same defendant for the same conduct, whether by the same or different sovereigns, is not only offensive, but also contrary to the basic notions of justice inherent in all people.[278] The Supreme Court of the United States has taken the position that a second trial is somehow less offensive if it is conducted by a second, independent sovereign. This approach, however, should finally be eliminated in the international arena. It has no foundation in history or practicality, and the basic outcome is unjust and reprehensible. It is time that the United States adopt a standard that continues to promote cooperation in international law enforcement by providing a mechanism by which to conduct international joint prosecutions. By adopting such a standard, the United States would be able to pursue its own penal interests while simultaneously preserving the rights of defendants. Ultimately, the United States would finally be practicing what it has always preached—that no man would twice be prosecuted for the same offense.

Dax Eric Lopez[*]

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277. The principle of *non bis in idem* is "so obviously just, . . . and so widely approved in the world's legal systems that it hardly seems necessary to adduce reasons in its support." Harvard Research in International Law, *supra* note 115, at 603.

278. Fisher, *supra* note 101, at 598 ("It is all the same to the accused. From his standpoint the situation is the same whether the successive prosecutions are by the same or by different sovereignties; one is as bad as the other").

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