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# Centralized Prosecution: Cross-Designated Prosecutors and an Unconstitutional Concentration of Power

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## *I. Introduction*

Since the 1970s, the federal government's jurisdiction over crime has vastly increased.[1] Relying on an expansive interpretation of the Commerce Clause, Congress criminalized a variety of activities, broadening the scope of federal crime into areas historically left to the States.[2] Today, federal criminal laws act as a supplement to many state criminal laws. Consequently, a significant amount of criminal conduct is subject to federal as well as state prosecution, which increases the potential for successive or dual prosecutions.[3]

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1. *See* Greg Hollon, *After the Federalization Binge: A Civil Liberties Hangover*, 31 HARV. C.R.-C.L. L. REV. 499, 499 (1996) (explaining how Congress has relied on an expansive reading of the Commerce Clause to criminalize "a variety of activities traditionally considered to be purely state matters.").

2. *See* James M. Maloney, *Shooting for an Omnipotent Congress: The Constitutionality of Federal Regulation of Intrastate Firearms Possession*, 62 FORDHAM L. REV. 1795, 1796 (1994) ("The Commerce Clause has become, in recent years, the foundation for an expanding federal criminal jurisdiction over intrastate activities, on the theory that such activities 'affect interstate commerce.'").

3. *See* Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70

The federalization of crime has brought about significant changes in the way state and federal officials implement the criminal laws.[4] Historically, the federal government's involvement in crime was confined to enumerated areas of special federal concern.[5] Federal and state law enforcement operated in distinct fields and had little interaction with one another—a stark contrast to today's reality of concurrent federal and state jurisdiction over many crimes.[6] Concurrent criminal jurisdiction has resulted in extensive interaction between state and federal authorities within the criminal process.[7] This federal-state collaboration has been described as the "age of 'cooperative federalism', where the Federal and State governments are waging a united front against many types of criminal activity."[8] While cooperation between the two sovereigns can have many benefits, this Note will focus on an undesirable consequence of the federalization of crime and cooperative federalism—the cross-designation of prosecutors.[9]

A cross-designated prosecutor is usually a state prosecutor cross-designated as a Special Assistant United States Attorney ("SAUSA") to prosecute federal crimes.[10] The prosecutor retains his position as a state prosecutor while acting as a SAUSA, effectively placing the prosecutorial power of both sovereigns in a single government actor. [11] This

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S. CAL. L. REV. 643, 738 n.7 (1997) (noting that "federalization of criminal law increases opportunities for successive federal prosecutions . . . .").

4. *See* Daniel A. Braun, *Praying to False Sovereigns*, 20 AM. J. CRIM. L. 1, 7 (discussing the change in the criminal process brought about by the federalization of crime and noting that the relations between federal and state are cooperative rather than independent).

5. *See* Gerald G. Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. Rev. 789, 790 (1996) ("The United States Constitution granted relatively little criminal law enforcement authority to the newly created federal government . . . .").

6. *See* Braun, *supra* note 4, at 8 (explaining that the federalization of crime and the increasing cooperative interaction between federal and state law enforcement efforts are closely related).

7. *Id.*

8. Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55–56 (1964).

9. Bartkus v. Illinois, 359 U.S. 121, 168–69 (1959) (Brennan, J., dissenting) ("Of course, cooperation between federal and state authorities in law enforcement is to be desired and encouraged . . . .").

10. Federal prosecutors can also be cross-designated to conduct state prosecutions but this occurs less frequently.

11. Victoria L. Killion, *No Points for the Assist? A Closer Look at the Role of Special Assistant United States Attorneys in the Cooperative Model of Federal Prosecutions*, 82 TEMP. L. REV. 789, 791 (2009) ("Additionally, state prosecutors may be 'cross-designated'

centralization of power is the very danger that the Framers sought to protect against.[12] The concentration of power and authority possessed by a cross-designated prosecutor poses a substantial danger to the liberties and interests of criminal defendants. This danger has been often overlooked or disregarded in favor of more efficient crime control measures. The desire of politicians and law enforcement personnel to appear "tough on crime" has placed efficiency concerns at the forefront of the criminal process while pushing attention to the individual liberties of the accused into the background.

Many have argued that cross designation is just a part of a bigger problem in our criminal justice system: allowing dual and successive prosecutions during the age of cooperative federalism. However, courts have summarily rejected broad challenges to dual or successive prosecutions.[13] The purpose of this Note is to narrow the focus of the argument to issues arising when the same prosecutor is allowed to use the same evidence to prosecute a defendant in separate sovereigns. Addressing this problem and implementing measures to curtail its practice will afford criminal defendants protection from abuses of prosecutorial power and manipulation of the criminal process.

The cross-designated prosecutor has been described as a "double-edged sword."[14] The assurance of more efficient, enhanced attacks on crime is moderated by the acceptance of responsibility in preventing unfair and costly multiple prosecutions.[15] So long as the prosecution uses the resources, procedures, and investigative tools gained through the joint venture fairly and properly, there is no cause for concern. However, the very existence of this model of prosecution presents an invitation to manipulate the criminal process to gain an advantage over the accused. As one commentator observed, ". . . cross-designation—with its sharing of cooperative witnesses, mutual disclosure of grand jury testimony and general enhancement of prosecutive cases by cooperating sovereigns—the

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as SAUSAs, allowing them to retain their positions while trying cases in federal court.").

12. THE FEDERALIST No. 51 (James Madison) (Clinton Rossiter ed., 1961) (discussing the importance of maintaining proper checks and balances and separation of power within the government in order to avoid a concentration of power that would threaten the rights of the people).

13. *See infra* note 25.

14. Terry J. Knoepp & Edwin L. Miller, Jr., *Creation of the Cross Designated Prosecutor Concept*, 1 CRIM. JUST. J. 155, 174 (1976–78).

15. *Id.*

defendants can be placed in the unfortunate position of potentially defending two *successive* cases essentially produced by the same prosecutors, who are cross-designated and thus given two bites of the same apple."[16] Because of the great potential for abuse that accompanies this centralization of prosecutorial power, I argue that a cross-designated prosecutor should not be allowed to prosecute the same criminal defendant in separate jurisdictions.

Part I of this Note will focus on the present state of the criminal justice system, specifically the internal policies of the Department of Justice and State Attorneys General allowing individual prosecutors to represent both the Federal and State governments against a single defendant. Part II describes the various harms resulting from this system, specifically those undermining fundamental principles of federalism, those threatening the civil liberties of individual defendants, and those threatening the efficiency and legitimacy of the Court in the criminal justice system. Part III introduces proposed remedies to the system, with suggestions for Federal and State Executive Branches, Federal and State Legislatures, and individual defendants seeking judicial redress for those harms that can arise in criminal proceedings.

## *II. The Centralized Prosecution System*

### *A. Appointment of SAUSAs*

In response to federal budget cuts, the Department of Justice has been appointing an ever-increasing number of SAUSAs to assist with their caseload.[17] No federal or state statutory authority currently exists that authorizes the creation of a cross-designated prosecutor position.[18] Instead, a cross-designated prosecutor is created by the utilization of the Attorney General's appointment powers.[19] Federal law authorizes the appointment of SAUSAs to assist U.S. Attorneys in preparation and prosecution of

16. *See* Joel Cohen, *"Cross-Designation" of Prosecutors: They Shouldn't Have it Both Ways*, NAT'L L.J. 1, 36 (1987).

17. *See* Christie Thompson, *To Cope with Sequester, Justice Department Staffs Unpaid Attorneys*, PROPUBLICA (June 28, 2013, 8:00 AM), http://www.propublica.org/article/to-cope-with-sequester-justice-department-staffs-unpaid-attorneys (describing unpaid SAUSAs as a practical solution to growing budget pressure).

18. . *See* Knoepp & Miller, *supra* note 14, at 157.

19. *Id.*

federal criminal cases.[20] Once appointed, a SAUSA has the same power and authority as an Assistant United States Attorney.[21] A state or local prosecutor can be "cross-designated" as a SAUSA, thus allowing that person to retain his or her position as a state prosecutor while trying cases in federal court.[22] This practice allows for dual or successive prosecutions in state and federal jurisdictions by a single prosecutor.[23] Moreover, it allows for *simultaneous* federal and state prosecutions by a single prosecutor as that prosecutor has the ability to bring charges in both jurisdictions.[24]

### *B. Challenges to Cross-Designated Prosecutors Have Been Unsuccessful Due to the Dual Sovereignty Doctrine*

Dual and successive prosecutions have been frequently challenged as violative of a defendant's protection against double jeopardy.[25] These claims have been largely unsuccessful because of the dual sovereignty doctrine.[26] The doctrine stems from the common law notion that crime is an offense against the sovereign.[27] The premise of the dual sovereignty doctrine is that state and federal jurisdictions are two separate sovereignties

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20. *See* 28 U.S.C. § 543(a) (2012) ("The Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires . . . .").

21. *See* AM. PROSECUTORS RESEARCH INST., *Cross-Designation & Federal Firearms Laws: What Local Prosecutors Need to Know* 5 (2003) (explaining chain of command of SAUSAs).

22. *Id.*

23. *See* United States v. Bernhardt, 831 F.2d 181, 182–83 (noting the "troubling" circumstances present, including that the same state prosecutor was responsible for both state and federal prosecutions).

24. *See* United States v. DeMichael, 692 F.2d 1059, 1062 (explaining that under our federal system there can be simultaneous federal and State prosecutions against a defendant).

25. *See, e.g.*, Heath v. Alabama, 474 U.S. 82, 106 (1985); United States v. Wheeler, 435 U.S. 313, 315–16 (1978); Abbate v. United States, 359 U.S. 187, 189–90 (1959); Bartkus v. Illinois, 359 U.S. 121, 122 (1959); United States v. Jordan, 870 F.2d 1310, 1312 (7th Cir.), *cert. denied*, 493 U.S. 831 (1989); United States v. Jones, 808 F.2d 561, 564–65 (7th Cir. 1986), *cert. denied*, Humphrey v. United States, 481 U.S. 1006 (1987); United States v. Aleman, 609 F.2d 298, 309 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980).

26. *Id.*

27. Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 290 (1992).

that derive their power from different sources.[28] Thus, where a single act violates both state and federal criminal prohibitions, the act gives rise to two separate offenses: one against the state and one against the United States.[29] This doctrine justifies reprosecution by state authorities of defendants tried before federal courts, reprosecution of federal authorities of defendants tried before state courts, and reprosecution by state authorities of defendants tried before the courts of another state.[30] The doctrine also allows concurrent prosecution in state and federal court.[31] The dual sovereignty doctrine bars challenges to dual or successive prosecutions even when a cross-designated prosecutor conducts both prosecutions.

### *1. The Dual Sovereignty Doctrine*

The dual sovereignty doctrine has been long embraced by the Supreme Court, beginning with *United States v. Lanza*.[32] In *Lanza*, the Court relied on the dual sovereignty doctrine and held that, "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each."[33] The doctrine was further solidified in *Bartkus v. Illinois*[34] and *Abbate v. United States*.[35] In *Bartkus*, a federal jury acquitted Bartkus of robbing a federally insured bank.[36] Disappointed in their failure to obtain a conviction, the federal authorities instigated reprosecution of Bartkus by Illinois authorities under a state robbery statute.[37] The federal authorities prepared the state case, guided the state prosecution, and postponed the sentencing of Bartkus' alleged co-perpetrators until they testified against Bartkus at the state trial.[38] In

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28. *Id.*

29. *Id.*

30. *Id.* at 281–82.

31. *See* United States v. DeMichael, 692 F.2d 1059, 1062 (7th Cir. 1982) ("Likewise under our federal system there can be simultaneous federal and State prosecutions where similar or identical offenses under the two systems of law are committed as the result of particular conduct on the part of a defendant.").

32. 260 U.S. 377 (1922).

33. . *Id*. at 382.

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

35. Abbate v. United States, 359 U.S. 187 (1959).

36. *See Bartkus*, 359 U.S. 121, 164 (Brennan, J., dissenting).

37. *Id.* at 164–67.

38. *Id*.

January 1954, after being tried in state court on substantially the same facts, he was convicted and sentenced to life in prison.[39] The Supreme Court affirmed his conviction, relying on the dual sovereignty doctrine, and held that the Double Jeopardy Clause did not prohibit prosecution by state authorities of a person who had been previously subjected to federal prosecution for the same offense.[40] That same day, the Court heard *Abbate v. United States*, which challenged the propriety of allowing a federal prosecution for conspiracy to destroy federal property following a state prosecution for conspiracy to destroy the property of another.[41] The Court reasoned that because the state and federal governments are separate sovereigns, the Double Jeopardy Clause did not prohibit prosecution by federal authorities of a person who had been subjected previously to state prosecution for the same offense.[42]

### *2. An "Exception" to the Dual Sovereignty Doctrine*

In *Bartkus*, the Court suggested in dicta an exception to the dual sovereignty doctrine: the dual sovereignty doctrine would not bar successive prosecutions where "the state prosecution was a sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution," and vice versa.[43] The *Bartkus* Court did not specify the level of intergovernmental collusion or cooperation necessary to fall within the exception, nor has it done so since.[44] Indeed, as Justice Brennan's dissent points out, the facts of *Bartkus* itself suggest the difficulty of establishing the exception.[45] The exception has been described as "illusory" while many jurisdictions have questioned whether the exception exists at all.[46] Courts

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39. *Id*.

40. *Id*. at 138 (majority opinion).

41. Abbate v. United States, 359 U.S. 187, 188–89 (1959).

42. *Id.* at 194–95.

43. Bartkus v. Illinois, 359 U.S. 121, 123–24 (1959).

44. *See* Thomas White, *Limitations Imposed on the Dual Sovereignty Doctrine by Federal and State Governments*, 38 N. KY. L. REV. 173, 183 (2011).

45. *See Bartkus*, 359 U.S. at 168 (Brennan, J., dissenting) ("I cannot see how there can be more complete federal participation in a state prosecution than there was in this case . . . . If this state conviction is not overturned, then, as a practical matter, there will be no restraints on the use of state machinery by federal officers to bring what is in effect a second federal prosecution.").

46. *See* Dawson, *supra* note 27, at 296 ("The sham prosecution exception is more than

have made clear that mere "cooperation between prosecutorial sovereignties" is insufficient to meet the exception.[47] This is true even when the circumstances of the case strongly suggest a sham prosecution such as where: (1) state sovereigns requested federal prosecution, (2) the initial sovereign turned over all of its evidence to the second, and (3) cross designations of state officials as federal officials were made.[48]

Many have discussed the ineffectiveness of the exception and its utter failure to prevent unjust outcomes.[49] Around the time the dual sovereignty doctrine was established, the risk of successive federal-state prosecutions was not a substantial concern as the practice was very rare.[50] However, that changed with the dramatic expansion of federal criminal law. Before the federalization of criminal law, reality supported the dual sovereignty doctrine's portrayal of two independent sovereigns.[51] Today, cooperation between the federal and state governments is a regular and, in some areas—such as the execution of criminal firearms and narcotics laws—pervasive feature of the modern American criminal justice system.[52]

### *C. Cross-Designated Prosecutors Are a Result of the Transformation of Our Criminal Justice System*

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narrow, it is illusory."); *see also* United States v. Patterson, 809 F.2d 244, 247 n.2 (5th Cir. 1987) (noting that the *Bartkus* Court "did not squarely address the issue of whether, if substantiated by the record, a 'sham' situation would constitute an exception to the dual sovereignty doctrine.").

47. There was extensive cooperation in *Bartkus* but the Court declined to question whether it was a "sham prosecution." *Bartkus*, 359 U.S. at 168 (Brennan, J., dissenting); *see also* United States v. Tirrell, 120 F.3d 670, 677 (7th Cir. 1997); United States v. Bernhardt, 831 F.2d 181, 182–83 (9th Cir. 1987); United States v. Angelton, 314 F.3d 767, 773–74 (5th Cir. 2002).

48. *See* White, *supra* note 44, at 186.

49. *See, e.g.*, Robert Heller, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309 (1997); *see also* David L. Lane, *Twice Bitten: Denial of the Right to Counsel in Successive Prosecutions by Separate Sovereigns*, 45 HOUS. L. REV. 1869, 1882 (2009) (describing the "sham prosecution" exception as flawed or nonexistent).

50. *See* Braun, *supra* note 4, at 6 ("For Alphonse Bartkus and Louis Abbate, the danger was all too real, but the practice was still rare.").

51. *Id.* at 7 (explaining that before the federalization of crime, state and federal law enforcement officials operated in separate and distinct fields with little or no interaction).

52. *See Dawson*, *supra* note 27, at 297 (discussing the joint efforts of state and federal law enforcement in the "war on drugs").

### *1. The Federalization of Crime and the Resulting System of Cooperative Federalism*

The ever-popular political desire to appear tough on crime has "fueled an enormous growth in the scope of the federal government's jurisdiction over crime and in the resources allotted to federal law enforcement and prosecution."[53] Since the 1960s, Congress has passed sweeping crime control measures, resulting in concurrent federal-state jurisdiction over many crimes. Thus, the landscape of the criminal justice system transformed from two sovereigns enforcing their criminal laws separately and independently to increasing collaboration between federal-state officials acting together to enforce the criminal laws.[54] This practice of national, state, and local governments interacting cooperatively and collectively to solve common problems has been termed "cooperative federalism." [55] The tendency, particularly in large urban areas, was to formalize collaborative relationships between federal, state and local agencies through joint task forces and a variety of special programs.[56] The practice of cross-designating prosecutors began as a result of cooperative federalism.[57]

The federalization of crime and emergence of cooperative federalism has significantly weakened the justifications for allowing dual or successive prosecutions. Many have argued that the dual sovereignty doctrine has no place in the age of cooperative federalism because the rationale behind the dual sovereignty doctrine can only stand if the two sovereigns are actually separate and independent.[58] Indeed, in other areas of criminal law—such as

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53. Hollon, *supra* note 1, at 537.

54. *See* Braun, *supra* note 4, at 7 (explaining how the proliferation of federal criminal legislation has changed the way the criminal law is executed by state and federal officials).

55. *Id*. at 8.

56. *See* Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377, 397 (2006) (describing the collaborative relationships involved in joint task forces).

57. Nora V. Demleitner, *The Federalization of Crimes and Sentencing*, 11 FED. SENT'G REP. 123, 125 (1998) ("Frequently state and federal prosecutors . . . are cross-designated to allow them to work in both systems.").

58. *See* Dawson, *supra* note 27, at 296–97; Braun, *supra* note 4, at 71–72; *see also* Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538, 1540–50 (1967); Ray C. Stoner, *Double Jeopardy and Dual Sovereignty: A Critical Analysis*, 11 WM. & MARY L. REV. 946, 955–58 (1970); *see also* United States v. Grimes 641 F.2d 96, 101–104 (1981); *see also* United States v. All Assets G.P.S., 66 F.3d 483,496–99 (1995).

compelled testimony and sharing illegally obtained evidence—the courts have authorized a retreat from strict adherence to the dual sovereignty doctrine. [59]

Because there have been numerous works exploring the implications that cooperative federalism has on dual sovereignty, I will not be focusing on cooperative federalism and dual sovereignty as a whole. The focus of this Note is much narrower and more amenable to resolution: the harm that arises when the structural protections of sovereign independence become meaningless when federal and state power unite in one prosecutor.

## *III. Dangers Inherent in Centralized Prosecution*

### *A. Prosecutorial Power*

In our criminal justice system, the prosecutor possesses broad discretion and wide-ranging powers.[60] No public official has a greater direct impact on the individual citizen than the prosecutor in a criminal case.[61] As one scholar stated, "overreaching and the resulting miscarriages of justice are dangers built into the very structure of governmental power and prosecutions in criminal cases."[62] Another explained, "[c]oncurrent jurisdiction due to the federalization of criminal law introduces a potential for prosecutorial abuse that was not an area of concern when crime was primarily a locally regulated phenomenon."[63] The expansion of crimes and resulting increases in punishment has effectively transferred the power to make and adjudicate laws to prosecutors.[64] The overlap of federal and state

59. *See* Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 56 (1964) (noting an interaction of state and federal officials in a "united front against many types of criminal activity," the Court acknowledged that the institutional interests safeguarded by a system of dual sovereignties had been partially superseded by a structure of cooperative federalism); *see also* Elkins v. United States, 364 U.S. 206, 223–24 (1960) (outlining the silver-platter doctrine and finding that evidence that is illegally obtained by state law enforcement officers is no longer admissible in a federal prosecution).

60. *See* Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 887 (1998).

61. *Id.*

62. *Id.* at 957.

63. *See* Heller, *supra* note 49, at 1313.

64. *See* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004) ("The law-on-the-street—the law that determines who goes to prison and for how long—is chiefly written by prosecutors, not by

criminal laws and procedures creates even more opportunity for abuse of discretion on the part of the cross-designated prosecutor.[65] The practice of cross-designation affords the prosecutor unfettered authority to make charging decisions, strike plea deals, impose sentences, and manipulate otherwise independent sovereigns in securing a conviction.[66] Cross designation has been criticized as resulting in the manipulation of federal and state prosecutions, making one prosecution a "mere subterfuge" for the other.[67]

Most of the challenges involving cross-designated prosecutors have been double jeopardy claims premised on the *Bartkus* exception to the dual sovereignty doctrine.[68] Every circuit to consider the issue has held that the cross-designation of a state district attorney as a federal official to assist or even to conduct a federal prosecution does not by itself bring a case within the *Bartkus* exception.[69] Even when the facts suggest substantial control of one sovereign over the other by use of a cross-designated prosecutor, courts have declined to apply the exception.[70]

### *B. Centralized Prosecution Is Inconsistent with Principles of Federalism*

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legislators or judges.").

65. *See* Heller, *supra* note 49, at 1326.

66. *Id.*

67. Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 395 n.15 (1992).

68. *See* United States v. Figueroa-Soto, 938 F.2d 1015, 1019 (9th Cir. 1991); United States v. Paiz, 905 F.2d 1014, 1024 (7th Cir. 1990); United States v. Safari, 849 F.2d 891, 893 (4th Cir. 1988); United States v. Perchitti, 955 F.2d 674, 677 (11th Cir. 1992).

69. *Id.*

70. *See* United States v. Figueroa-Soto, 938 F.2d 1015, 1019 (9th Cir.1991) (noting that the state prosecuted at the request of federal authorities; federal agents testified and sat at the state prosecutor's table; federal evidence provided to the state; federal agent prepared key state witnesses; SAUSAs salary as federal prosecutor paid by the state); United States v. Paiz, 905 F.2d 1014, 1024 (7th Cir.1990) (noting that DEA was actively involved in the state investigation and arrest; state prosecutor was designated as SAUSA for federal prosecution); United States v. Perchitti, 955 F.2d 674, 677 (11th Cir. 1992) (noting that after the state court judge granted defendant's motion to suppress evidence, the state prosecutor, Dirks, filed a nolle prosse and federal authorities indicted defendant and appointed Dirks as a SAUSA for purposes of federal prosecution). *But cf.* United States v. Belcher, 762 F. Supp. 666 (W.D. Va. 1991) (finding that there was substantial control of one sovereign over the other by use of a cross-designated SAUSA).

The model of centralized prosecution that results from cross-designating prosecutors is inconsistent with the principles of federalism upon which our Nation was founded.[71] The Framers divided authority between the federal and state governments for the benefit of the American people.[72] This was to "prevent any distortion of the balance of power that in turn would subject the people to a tyrannous federal government."[73] In allocating power between the state and federal governments and placing sovereignty in the hands of the people, the Framers were not only motivated by a size-of-government concern, but also a concern with protecting individual liberty.[74] Government officials became representatives or agents of the people—the government's power derived from the sovereignty of the people.[75] The rationale for separating the government into independent federal and state spheres is explained in James Madison's *The Federalist* No. 51:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a *double security* arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.[76]

The Supreme Court echoed this in *Gregory v. Ashcroft*,[77] reasoning that in the same way that "separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of

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71. *See* Patrick M. Garry, *A One-Sided Federalism Revolution: The Unaddressed Constitutional Compromise on Federalism and Individual Rights*, 36 SETON HALL L. REV. 851, 854 (2006) (explaining that federalism refers to the sharing of power between two levels of government).

72. *See id.* at 856 ("This division of authority between the state and federal governments, with the latter enjoying only limited, enumerated powers, was not created for the benefit of the states but for the benefit of the American people.").

73. *Id.*

74. *See* Garry, *supra* note 71, at 852 (noting that the Framers believed that federalism would help ensure individual liberty by limiting and monitoring the power of the government).

75. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L. J. 1425, 1435–36 (1987).

76. THE FEDERALIST No. 51 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

77. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (finding that Congressional interference with the state's decision to establish qualifications for judges upsets the usual constitutional balance of federal and state powers).

excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[78] Hence, the Federalists consciously designed a dual-agency governance structure in which each set of government agents would have incentives to monitor and enforce the other's compliance with the Constitution's protections of individual rights and liberties.[79] Thus, federalism promotes limited government and limited government, in turn, inhibits oppression of the powerless by making it more difficult for the powerful to act.[80]

### *1. Centralized Prosecution Results in a Breakdown of Federalism and its Protections*

By diffusing power and limiting government in a manner analogous to the separation of powers, federalism is one of the Constitution's structural protections of liberty.[81] As one scholar explains:

> A diverse and decentralized governmental structure divided between the layers of state, local and nation, offers an array of benefits, the most compelling of which is the protection of individual liberty. The Constitution's embodiment of the structural principles of federalism is designed not just to create a workable government but to create one that protects individual rights. Federalism works with . . . the separation of powers to produce a system with two different levels of checks and balances: one existing between the national and state governments, and the other between the three branches of federal government. This system reflects what Madison called the Constitution's "double security" for individual rights.[82]

Federalism was intended to give the governments, state and national, incentives to win the sovereign people's affections by "monitoring and challenging the other's misdeeds."[83] However when the state and federal government unite to prosecute a single criminal defendant, there is no one

78. *Id.*

79. *See* Amar, *supra* note 75, at 1427.

80. *See id.*

81. *See* Printz v. United States, 521 U.S. 898, 921 (explaining that the separation of state and federal government into separate spheres is one of the Constitution's structural protections of liberty).

82. Garry, *supra* note 71, at 873–74.

83. Amar, *supra* note 75, at 1450.

to challenge the other's misdeeds. Thus, the lack of any meaningful check substantially increases the potential for abuse of power and unconstitutional infringement upon a defendant's rights.

"Far from seeking to create an indivisible central organ to wield all national power, the Federalists labored to divide power among distinct agencies."[84] By diluting the power of the centralized national government, federalism effectively limits opportunities for abuse. The breakdown of federalism occurring as a result of cooperative federalism and, more specifically, cross-designated prosecutors, has dire consequences for the criminally accused.

To the Framers, "the primary safeguards against government tyranny were architectural."[85] Infringements on liberty caused by a potentially tyrannical national government could best be prevented by state governments standing "ready to rally their citizens and lead them into opposition."[86] But overreaching by one government cannot be prevented by the other when the two are joined together. This concentration of power—concentration of both state and federal prosecutorial power in a single prosecutor—was exactly what the Framers intended to prevent. This is evidenced by James Madison's *The Federalist* No. 47 where he stated, "[t]he accumulation of all powers . . . in the same hands . . . may justly be pronounced the very definition of tyranny."[87] In separating and dividing power, either horizontally or vertically, the Federalists believed that individual liberties would be protected by vesting power in different sets of agents who will have personal incentives to observe and enforce limitations on each other's powers.[88]

Federalism and its constitutionally guaranteed protection of liberty is completely destroyed when federal and state prosecutorial powers are vested in an individual government actor. Absent federalism's protection from a centralized governmental authority, the individual criminal

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84. *Id.* at 1442.

85. Garry, *supra* note 71, at 875–76 (internal quotation marks omitted).

86. *Id.*

87. *See* Amar, *supra* note 75, at 1442 (quoting THE FEDERALIST No. 47) (this refers to the separation of powers, but the argument for federalism is analogous).

88. *Id.* at 1427 ("Guided by emerging principles of agency law and organization theory, the Federalists consciously designed a dual-agency governance structure in which each set of government agents would have incentives to monitor and enforce the other's compliance with the corporate charter established by the People of America.").

defendant is extremely vulnerable to a number of abuses and violation of rights.[89]

### *2. This Breakdown In Federalism Impermissibly Increases A Cross-Designated Prosecutor's Power and Discretion*

In many American jurisdictions, the prosecutor *is* the criminal justice system.[90] Prosecutors effectively make the law, enforce it against particular individuals, and adjudicate their guilt and resulting sentences.[91] Former U.S. Attorney General and Supreme Court Justice, Robert H. Jackson, explained the potential for abuse inherent in prosecutorial power:

> The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. . . . If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. . . . It is in this realm in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecutorial power lies. It is here that law enforcement becomes personal.[92]

The model of centralized prosecution that occurs by the utilization of cross-designated prosecutors lacks any meaningful checks that would prevent these abuses. Unlike the system envisioned by the Framers where the Constitution provides "double security" for individual rights, neither federalism nor the separation of powers principle provides any checks upon this power. When the State and Federal governments join forces, as they do in cross-designated prosecutors, the "two sovereigns in effect act as one sovereign; that they represent two governments becomes insignificant."[93]

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89. *See* Garry, *supra* note 71, at 855 (emphasizing federalism as a structural protection necessary for the preservation of democracy and individual rights).

90. *See* Erik Luna & Marianna Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1415 (2010).

91. *See id.*

92. Robert H. Jackson, Attorney General of United States, The Federal Prosecutor (Apr. 1, 1940), *available at* http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/the-federal-prosecutor/.

93. Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159, 1207 (1995) ("When two jurisdictions join forces in this way, the reasons for granting each sovereign the power to enforce its laws disappear. The two sovereignties in effect act as one sovereign; that they represent two governments becomes insignificant.").

The concentration of such power and authority in a single actor renders federalism's protective structure meaningless—a single government actor cannot serve as a check upon his or herself.

The separation of powers principle is an ineffective check on prosecutors as well.[94] As part of the executive branch of government, prosecutors have the power and the duty to enforce the laws.[95] In theory, the judiciary and legislative branches are to serve as checks on prosecutorial power, however, in practice, prosecutors have essentially been left to regulate themselves.[96] Depending solely on prosecutors to exercise self-restraint is problematic. Insulating a prosecutor's actions from judicial review can lead to violations of citizens' rights through the arbitrary, or worse, vindictive exercise of authority.[97] Nevertheless, courts have consistently deferred to the expertise of prosecutors in declining to question their motives for charging and other important prosecutorial decisions.[98] Likewise, in an effort to give prosecutors the freedom and independence to enforce the law, the legislative branch has also been wary to hamper the prosecutorial process.[99] In 1975, a proposal for federal legislation dealing with successive prosecutions in the federal system failed because it was thought that the Petite Policy (discussed below) adequately dealt with the problem.[100]

The underlying dangers that arise out of the practice of cross-designating prosecutors extend much further than the potential for dual or successive prosecutions. The sham exception to dual sovereignty was meant to address the breakdown of federalism that comes with the elimination of the "dual" aspect of dual sovereignty.[101] In upholding the dual sovereignty doctrine the Supreme Court explained, "*Bartkus* and *Abbate* rest on the basic structure of our federal system, in which States and the National

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94. *See* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 14–15 (1st ed. 2009).

95. *See id.* (citing U.S. CONST. art. II, § 3).

96. *See id.* (noting that self-regulation is either nonexistent or inadequate).

97. *See* Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U.L.Q. 713, 732–33 (1999).

98. *See id.*

99. *See id.*

100. *See* NORMAN ABRAMS & SARAH SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 772 (2d ed. 1993).

101. *See* United States v. Belcher, 762 F. Supp. 666, 670 (W.D. Va. 1991) (noting the emphasis the *Bartkus* court placed on federalism).

Governments are separate political communities. State and Federal Governments [derive] power from different sources, each from the organic law that established it."[102] In discussing dual sovereignty the Supreme Court stated that each independent sovereign is "exercising its own sovereignty, *not that of the other*."[103] To fit within the exception, the defendant must show that one sovereign was so dominated or controlled by the actions of the other that officials had little or no independent volition in their proceedings.[104] When a state prosecutor is cross-designated as a SAUSA and is involved in both federal and state prosecutions against a single defendant, it is difficult to conceive how that prosecutor, as a representative of both sovereigns, can act with independent volition. The cross-designated prosecutor is representative of both the state and federal governments. Thus, the interests of both sovereigns are unavoidably weighed when making decisions that can unjustly affect a criminal defendant.

The centralization of power that occurs with the breakdown of federalism to which *Bartkus* alluded has arisen with cross-designated prosecutors.[105] The dual sovereignty doctrine, which is nothing more than a legal fiction, cannot justify a cross-designated prosecutor instigating proceedings against the same defendant in separate sovereigns. When the two sovereigns are no longer acting as separate and distinct entities, the justifications for the dual sovereignty doctrine fall flat.[106] Although the courts to consider challenges involving cross-designated prosecutors have failed to find sufficient collusion, the facts of these cases (discussed below) strongly suggest the existence of such collusion. When the power of two

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102. United States v. Wheeler, 435 U.S. 313, 320 (1978).

103. *Id.* (emphasis added).

104. *See* In re Kunstler, 914 F.3d 505, 517 (4th Cir. 1990); *see also* United States v. Baptista-Rodriguez, 17 F.3d 1354, 1361 (11th Cir. 1994). However, federal courts have rejected applicability of the exception when prosecutions in which (1) state sovereigns requested federal prosecution, (2) the initial sovereign turned over all of its evidence to the second, and (3) cross designations of state officials as federal officials were made. *See* United States v. Angelton, 221 F. Supp.2d 696, 713–20 (S.D. Tex. 2002).

105. *See* Heller, *supra* note 49, at 1313 ("Concurrent jurisdiction due to the federalization of criminal law introduces a potential for prosecutorial abuse that was not an area of concern when crime was primarily a locally regulated phenomenon.").

106. *See* Bartkus v. Illinois, 359 U.S. 121, 155–56 (1959) (Black, J., dissenting) ("I have been shown nothing in the history of our Union, in the writings of its Founders, or elsewhere, to indicate that individual rights deemed essential by both State and Nation were to be lost through the combined operations of the two governments.").

governments becomes centralized in one cross-designated prosecutor, it results in harms to the accused and to our criminal justice system. [107]

### *a. Harms to the Individual Defendant*

Not only does the model of centralized prosecution fail to provide "double security" for the individual rights of the accused—it fails to provide any security or protection whatsoever. From the perspective of the accused, facing federal and state charges concurrently or consecutively is an enormous burden.[108] If those proceedings are strung out over a lengthy period of time the defendant is forced to live in a continuing state of uncertainty.[109] The "inherent inequality" between prosecutors and defendants has intensified with the federalization of crime and the use of cross-designated prosecutors.[110] The prosecutor's investigating, charging, convicting, and sentencing powers have expanded, giving the prosecutor an unfair advantage over the individual defendant.[111] This, along with the absence of any effective check on those powers lends itself to a strong potential for abuse during each phase of the criminal process.[112] This pertains to prosecutorial power in general but applies with exponentially more force when a single prosecutor has the resources of both governments at his or her disposal along with the unchecked authority to make decisions on behalf of both sovereigns.

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107. *See* Garry, *supra* note 71, at 874 ("The Constitution's embodiment of the structural principles of federalism is designed not just to create a workable government but to create one that protects individual rights.").

108. *See* Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 126 (1995) (observing that one of the risks of successive prosecutions is undue trauma and burdens from successive trials).

109. *See id*. (listing the risks of exposing a defendant to successive punishments and prosecutions).

110. *See* Gershman, *supra* note 67, at 395 ("More than thirty years later, as the prosecutor's investigating, charging, convicting, and sentencing powers have escalated, the 'inherent inequality' between the prosecutor and the defendant has intensified, making the adversary system almost obsolete.").

111. *See id.*

112. *See id.* at 408–09 ("Uncontrolled discretion in the hands of a powerful government official has the potential for abuse. In the hands of prosecutors, this potential is . . . a reality. Courts are unwilling to . . . rein in . . . prosecutors, resulting in a decline in the fairness of, and a loss of public confidence in, the system.").

*(1) Potential for Abuse In Making The Charging Decision*

The prosecutor holds the fate of the accused in his hands in making the charging decision.[113] The potential for harassment is substantial as irrational and even unconstitutional motivations are distinct possibilities.[114] Due to the federal-state concurrent jurisdiction, a cross-designated prosecutor can file charges in either federal or state court.[115] A number of considerations inform this decision, many of which can give rise to selective and vindictive prosecution claims.[116] For example, choosing what forum to prosecute particular offenders based on the availability of harsher penalties.[117] Or where a prosecutor brings more serious charges in another sovereign after a defendant exercises his right to a jury trial and declines a plea deal.[118] As one commentator explains, "[i]n theory, defendants can challenge dubious uses of prosecutorial discretion under the claims of selective prosecution as a violation of equal protection, or prosecutorial vindictiveness as a violation of due process."[119] However, such challenges succeed in only the most exceptional circumstances.[120]

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113. *See* Clymer, *supra* note 3, at 647–48. Clymer stated:

> Because of differences between federal and state criminal justice systems, an offender will often fare worse if prosecuted in federal court rather than state court. He may be detained pending trial when he would have been released if charged in state court, denied discovery allowable in state court, and confronted with evidence that would have been suppressed in state court. If convicted, a federally prosecuted defendant is likely to receive a longer sentence and to serve far more of that sentence than he would if sentenced in state court.

*Id.*

114. *See* Heller *supra* note 49, at 1313 (explaining that prosecutorial abuse can occur when a federal prosecutor decides to prosecute a case in federal court based on such "constitutionally impermissible motives such as the defendant's race, religion or ethnicity . . . . ").

115. *See* United States v. DeMichael, 692 F.2d 1059, 1062 (7th Cir. 1982) ("Likewise under our federal system there can be simultaneous federal and State prosecutions where similar or identical offenses under the two systems of law are committed as the result of particular conduct on the part of a defendant.").

116. *See supra* note 114 and accompanying text.

117. *See infra* notes 122–32 and accompanying text.

118. *See* Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 LAW & SOC. INQUIRY 239, 247 (2005) (explaining that local prosecutors have the ability to threaten to bring charges in federal court unless defendant pleads guilty).

119. Hollon, *supra* note 1, at 507.

120. *See id.* (citing United States v .Oakes, 11 F.3d 897 (9th Cir. 1993)).

### *(2) Selective Prosecution*

Serious concerns about a criminal defendant's civil rights and liberties arise when a prosecutor chooses a certain forum based upon the likelihood of a conviction.[121] A cross-designated prosecutor can engage in "prosecutorial forum shopping" to get the most favorable procedural and substantive rules.[122] Federal laws provide defendants with fewer procedural rights than the law in many states.[123] There is also a danger of manipulating the criminal process in order to bypass an unfavorable evidentiary ruling. For example, in *United States v. Perchitti*,[124] the state of Florida originally indicted the defendant for possession with intent to distribute cocaine. In the state proceeding, the judge granted the defendant's motion to suppress evidence. The state prosecutor, Darrell Dirks, then filed a *nolle prosse* on the state charges.[125] Federal authorities subsequently indicted the defendant and appointed Dirks as a SAUSA to conduct the federal prosecution.[126] Unlike the state court, the District Court denied the defendant's motion to suppress evidence.[127] The defendant appealed the ruling but the Eleventh

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121. *See* Clymer, *supra* note 3, at 676–77. Clymer stated:

> As a result of the disparity between state and federal procedural and sentencing regimes, much is at stake decisions are made more significant by the high conviction rate in federal court and the rigid determinative federal sentencing rules. Because of the relative certainty of conviction and harsher sentencing, from an offender's perspective, the federal prosecutor's decision to bring federal charges may be the single most important decision that any actor in the criminal justice system makes. Defendants chosen for federal prosecution bear the brunt of federalization, losing procedural protections and receiving and serving longer sentences.

*Id.*

122. *See* Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals to Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 769 (2005) (explaining that this gives prosecutors the ability to choose the forum where they are most likely to obtain a conviction, in part, because they are able to bypass state laws or policies favorable to the accused).

123. *See* Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn From the States*, 109 MICH. L. REV. 519, 531 (2011) ("Fewer restrictions on the government's use of informants, easier access to wiretaps and warrants, less generous discovery rights for defendants, and broader grand jury powers. Additionally, the federal jury pool may also differ from the state jury pool.").

124. *See generally* United States v. Perchitti, 955 F.2d 674 (11th Cir. 1992).

125. *Id.* at 675.

126. *Id.*

127. *Id.*

Circuit found no error in the District Court's decision to deny the motion to suppress, reasoning that there was no privity between the federal and state government.[128] Yet, to find that there was no privity when the same prosecutor represented both governments in the separate prosecutions seems to stretch the bounds of credulity.[129]

A selective prosecution concern arises when similarly situated defendants who commit identical crimes face grossly disparate sentences depending on whether the state or the federal government handles the prosecution.[130] Federal law generally provides for harsher punishments than its state law counterparts. [131] For example, when a prosecutor foregoes state prosecution in favor of federal prosecution of a drug offender charged with possession of 50 grams of crack cocaine, the applicable federal guidelines subject the defendant to a minimum sentence of ten years imprisonment.[132] The same defendant is only subject to a three-year minimum sentence if prosecuted in the state courts of California or Pennsylvania.[133]

Courts have rejected equal protection and due process challenges to disparate sentencing on the ground that a prosecutor's decision to prosecute a defendant federally is generally insulated from review.[134] This is true even

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128. *Id.*

129. The same set of facts were present in *United States v. Safari*, 849 F.2d 891, 893 (4th Cir. 1988) where the Fourth Circuit again found that there was no privity between the two governmental parties even though the same prosecutor conducted each prosecution.

130. *See* Hollon, *supra* note 1, at 503 ("Broad grants of federal criminal jurisdiction have created a situation in which defendants who commit identical crimes face grossly disparate sentences depending on whether they are prosecuted by the state or by the federal government.").

131. *See* George D. Brown, *Constitutionalizing the Federal Criminal Law Debate: Morrison, Jones, and the ABA*, 2001 U. ILL. L. REV. 983, 1024 (2001) (explaining that local prosecutors can use threat of federal prosecution, with its likely harsher punishments, as a threat in plea negotiations).

132. *See* 21 U.S.C. § 841(b)(1)(A)(viii) (2014). The sentencing guidelines are no longer mandatory but many federal courts do not allow a downward departure from the sentencing guidelines simply because a state statute proscribes a lower sentence for the same conduct. Heller, *supra* note 49 at 1358.

133. *See* CAL. HEALTH & SAFETY CODE § 113.51.5 (West 1991); *see also* 18 PA. CONST. STAT. ANN. § 7508(a)(2)(ii) (West Supp. 1996).

134. *See, e.g.*, United States v. Parson, 955 F.2d 858, 873 (3d Cir. 1992) (stating that the decision to prosecute drug-related charges in federal court while leaving arrest-related charges in state court pursuant to explicit referral policy and agreement between federal and state prosecutors is proper); *see also* United States v. McFarland, 264 F.3d 557, 559 (5th Cir. 2001) (stating that the decision to bring federal charges to maximize punishment for a crime that had historically been prosecuted under state system is proper); see also United States. v. Davis, 15 F.3d 526, 530 (6th Cir. 1994) (stating that the decision to prosecute in federal

where the prosecutor's decision to file in federal court "was not made pursuant to written policy, was motivated by a desire to impose a harsher sentence, and was inconsistent with the treatment given other defendants."[135] Thus, defendants are precluded from obtaining relief even where the cross-designated prosecutor was motivated solely by a desire to impose more stringent sentences.[136] Another example of the extreme sentencing disparities that can result based upon which sovereign prosecutes a defendant can be seen in *United States v. Willis*.[137] This case involved two brothers involved in the same cocaine transaction.[138] Federal prosecutors dismissed the charges against one brother, who was prosecuted in state court and sentenced only to probation plus time served while awaiting trial.[139] The other brother was tried in federal court and was subject to the federal sentencing guideline range of forty-one to fifty-one months.[140]

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rather than state court is insufficient to prove a constitutional violation though federal conviction yields a greater sentence); see also Reed v. United States, 985 F.2d 880, 882–83 (7th Cir. 1993) (stating that the decision to prosecute in federal rather than state court did not evidence an abuse of prosecutorial discretion though state law was more lenient); see also Bell v. United States, 48 F.3d 1042, 1044 (8th Cir. 1995) (stating that the decision to prosecute in federal rather than state court was insufficient to prove a constitutional violation, though federal conviction yields a greater sentence, because there was no proof decision based on impermissible factors); *see also* United States v. Williams, 282 F.3d 679, 682 (9th Cir. 2002) (stating that sentencing guidelines do not allow court to interfere with prosecutor's discretion to charge defendant in federal rather than state court absent evidence that prosecutor abused power); see also United States v. Curtis, 344 F.3d 1057, 1064 (10th Cir. 2003) (stating that the decision to prosecute a robbery case in federal court may properly be based on whether harsher penalties are available in federal or state court); see also United States v. Harden, 37 F.3d 595, 599 (11th Cir. 1994) (stating that the decision to prosecute in federal rather than state court does not constitute a due process violation, though defendant was subjected to harsher sentence because prosecutor can properly be influenced by available penalties); see also United States v. Clark, 8 F.3d 839, 842 (D.C. Cir. 1993) (stating that the decision to prosecute in federal rather than state court was insufficient to prove a constitutional violation though federal conviction would yield a greater sentence).

135. United States v. Oakes, 11 F. 3d 897, 898 (9th Cir. 1993).

136. *See Oakes*, 11 F.3d at 899 (noting that charging decisions not based on suspect characteristics are insulated from review "even where the prosecutor's decision to file in federal court was not made pursuant to written policy, was motivated by a desire to impose a harsher sentence, and was inconsistent with the treatment given other defendants").

137. United States v. Willis, 139 F.3d 811, 811 (11th Cir. 1998).

138. *See id.*

139. *See id.*

140. *See* Sun Beale, *supra* note 122, at 782 (outlining a situation where the sentencing judge reduced the sentence to thirteen months but the appeals court vacated the judgment and remanded for resentencing). However, this was before the Supreme Court mandated

Another example of circumstances giving rise to a selective prosecution claim can be seen in *United States v. Jones*.[141] In *Jones*, the defendant brought a selective prosecution claim based upon practices of the federal-state joint task force program Project Exile.[142] Project Exile was a joint undertaking of the cities of Richmond and Norfolk, Virginia and the U.S. Attorney for the Eastern District to address criminal narcotics and firearms offenses.[143] One Commonwealth attorney and one attorney from the state attorney general's office were cross-designated as SAUSAs to federally prosecute local offenders who committed firearm-related offenses.[144] The objective of Project Exile was to transfer offenders out of the state system and into the federal system because state court judges were perceived less likely to impose sentences "severe enough to serve as sufficient punishment for, or adequate deterrence of, narcotics related firearm offenses."[145] Not only were the sentencing structures in the federal and state systems different, but pre-trial release from custody was routine during state prosecutions and rare during federal prosecutions. Additionally, there were racial differences between the state and federal jury pools.[146] One of the stated goals of Project Exile was to avoid "Richmond juries."[147] The jury pool for the Circuit Court for the City of Richmond was approximately seventy-five percent African-American.[148] In contrast, the jury pool for the Richmond Division of the Eastern District of Virginia is

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that the sentencing guidelines are advisory only. Now, presumably a judge may depart downward in light of the existence of a lenient state sentence. Courts have taken various approaches on this matter. *Compare* United States v. Jaber, 362 F. Supp. 2d 365 (D. Mass. 2005) (finding that an out-of-guidelines adjustment was justified in order to bring defendant Jaber's sentence into line with the sentences imposed on other more culpable participants in scheme), *with* United States v. Wilson, 350 F. Supp. 2d 910 (D. Utah 2005) (concluding that except in most exceptional cases district courts should sentence within the guidelines in order to prevent disparity).

141. United States v. Jones, 36 F. Supp. 2d 304 (E.D. Va. 1999).

142. *Id.* at 311.

143. *Id.* at 307.

144. *Id.*

145. *See id.* at 309 (citing United States v. Nathan, No. 3:98cr116, Mem. Op. at 23–25 (E.D. Va., July 23, 1998)).

146. *Id.* at 313 (noting that seventy-five percent of Richmond juries are African-American while only ten percent of federal juries are African-American).

147. *Id.*

148. *Id.*

drawn from a broader area and was only about ten percent African American at that time.[149]

Project Exile had a disparate effect on Virginia's African-American population.[150] The court in *Jones* noted that Project Exile "would be vulnerable on selective prosecution grounds if African-Americans were routinely diverted from state to federal prosecution while prosecutors allowed similarly situated Caucasian defendants to remain in state court."[151] However, the claim was dismissed because the defendant produced no evidence to that effect.[152]

The judge in *Jones* also noted the substantial latitude afforded to prosecuting attorneys is undoubtedly accompanied by the potential for abuse. He stated that Project Exile "raises serious questions respecting basic principles of federalism."[153] And that where "the local authorities claim to have the capacity to address the problem, the invited federal incursion raises serious motivational concerns."[154] These examples are illustrative of the abuses of discretion that can occur when a single prosecutor possesses the ability to manipulate the investigative and prosecutorial resources of either sovereign to secure a conviction.

### *(3) Vindictive Prosecution*

A vindictive prosecution concern arises when a cross-designated prosecutor uses his or her authority to increase charges or to retry a defendant in another jurisdiction to obtain what he or she believes is a more just result.[155] Courts have consistently declined to find vindictive prosecution where the prosecutor increased charges before trial, reasoning

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149. As troubling as this may seem, the court nevertheless held that the defendant showed no evidence to suggest that the selection of federal juries was constitutionally infirm. It went on to explain that a defendant has no right to a jury of any particular racial composition so long as that jury is fairly selected from the jurisdiction it serves. *See Jones*, 36 F. Supp. 2d at 304.

150. *See Jones*, 36 F. Supp. 2d at 312 (noting that approximately ninety percent of the Project Exile defendants are African-American).

151. *Id.* at 311.

152. *Id.*

153. *Id.* at 313.

154. *Id.* at 316.

155. *See* Killion, *supra* note 11, at 800 (explaining that "allegiances can cause a SAUSA to skirt the line between zealous advocacy and vindictive prosecution.").

that a prosecutor has broad discretion to add charges in the pre-trial period.[156] The burden to establish vindictive prosecution is so high that even when the facts of the case strongly suggest vindictiveness on the part of the prosecutor, the courts decline to find such.[157] Allowing prosecutors this level of discretion effectively allows the prosecutor to impermissibly substitute his or her judgment for that of the judge or jury.

There is a substantial vindictive prosecution concern present when a prosecutor uses his or her ability to bring charges in another jurisdiction as leverage over the defendant to obtain a desired outcome. In the plea bargaining context, there is a significant risk of coercion, duress, and manipulation that forces individual defendants to accept an unfavorable plea deal in one jurisdiction to avoid facing prosecution in a less favorable forum.[158] As one defense attorney stated, "[c]riminal defendants and their lawyers often are faced with the potential for dual prosecutions . . . . They must always 'bargain in the shadow of the law.'"[159] An example of this can be seen in *United States v. Raymer*.[160] In *Raymer*, the defendant claimed that the following factors established a realistic likelihood of vindictiveness:

> (1) the federal prosecution was undertaken after defendant asserted rights incident to extradition, (2) a superseding indictment adding substantive counts was returned after the defendant obtained pretrial release, contrary to the government's wishes, (3) the federal government lacked substantial involvement in the investigation and prosecution of this case, and (4) the state and federal investigations and prosecutions were influenced by the discretion of a single state prosecutor.[161]

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156. *See generally* Bordenkircher v. Hayes, 434 U.S. 357 (1978) (holding that the Due Process Clause of the Fourteenth Amendment did not prohibit a prosecutor from carrying out a threat made during plea negotiations, to bring additional charges against an accused who refused to plead guilty to the offense with which he was originally charged).

157. *See* Killion, *supra* note 11, at 800 ("[T]he courts have required defendants to meet the difficult burden of proving the elements of selective and vindictive prosecution, even though evidence supporting these claims is unlikely to appear on the record.").

158. *See* Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 LAW & SOC. INQUIRY 239, 243 (2005) ("They can also use the threat of federal prosecution to leverage longer sentences in the plea-bargaining process . . . .").

159. *See id.* at 265.

160. *See* United States v. Raymer, 941 F.2d 1031 (10th Cir. 1991).

161. *Id.* at 1039.

The Tenth Circuit observed that it would be "naïve to think that the federal prosecution was not motivated in some part by the extradition difficulties." The court further noted "the prosecutor's obtaining a more serious federal indictment when the defendant asserted a right concerning extradition may appear to warrant an inference of vindictiveness."[162] Nevertheless, the Tenth Circuit found that this did not warrant a presumption of vindictiveness because the prosecutor's strategy was a product of failed plea negotiations which culminated in the defendant's insistence on formal extradition.[163] This is illustrative of the difficulty in trying to assert a vindictive prosecution claim based on pretrial events.[164]

A vindictive prosecution concern also arises when a defendant successfully obtains dismissal of state charges only to have the same prosecutor, in his capacity as a cross-designated SAUSA, indict the defendant federally for the same conduct. This troubling sequence of events is exactly what happened in *United States v. Bernhardt*.[165] In 1984, the state of Hawaii charged the Bernhardts with conspiracy and misapplication of bank funds.[166] The Bernhardts obtained a dismissal on statute of limitation grounds.[167] However, shortly before the state court dismissed the case, Stephen Mayo, the prosecutor in charge of the state case, contacted the United States Attorney for the District of Hawaii to express his concern over the pending dismissal.[168] Up until that point, there had been no federal involvement in the matter, nor had the federal government even considered the matter "one that justified exercise of federal sovereignty".[169] The U.S. Attorney agreed to undertake a federal prosecution under the condition that Mayo would become the lead attorney for the federal case and that the *state* would pay Mayo's salary.[170] The Bernhardts moved to dismiss the federal indictment on double jeopardy

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162. *Id.* at 1042.

163. *Id.*

164. While this abuse of power to gain leverage over a defendant most often occurs in the plea-bargaining context, it can also occur when the prosecutor needs the defendant to testify against a co-defendant. *See* Hollon, *supra* note 1, at 504.

165. United States v. Bernhardt, 831 F.2d 181 (9th Cir. 1987).

166. *Id.* at 181.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 181–82.

grounds, as well as vindictive prosecution and collateral estoppel.[171] The Ninth Circuit found that this was more than "mere cooperation," and described the circumstances as "troubling".[172] Nevertheless, the court rejected the Bernhardts claims, relying on the dual sovereignty doctrine and reasoning that the federal and state prosecutions, although for the same conduct, were prosecuting separate offenses.[173] This is illustrative of the enormous burden criminal defendants have in challenging the practice of cross-designated prosecutors. Because of the dual sovereignty doctrine, the designation of a SAUSA permits an attorney to proceed with what the courts would otherwise presume to be a vindictive prosecution.

A similar situation occurred in *United States v. Belcher*.[174] In *Belcher*, Commonwealth's Attorney McAfee indicted defendants on drug offenses in state circuit court.[175] The indictments were dismissed and McAfee secured another indictment.[176] The defendant then sought dismissal of that indictment.[177] While this motion was pending, McAfee, in his federal guise, drafted a three-count indictment against Belcher.[178] He then proceeded to write letters to an Assistant United States Attorney and a United States Attorney expressing his concern that the State court would dismiss the indictment.[179] In the letters he also indicated his willingness to handle the Belcher's federal prosecution.[180] After learning that the U.S. Attorney's office would submit his indictment to the federal grand jury, McAfee moved to nolle prosse the pending state indictment.[181] The defendants moved to dismiss the federal indictment based, in part, on theories of selective and vindictive prosecution.[182] The court found that there was a valid vindictive prosecution claim because the prosecutor filed new, and

171. *Id.*
172. *Id.* at 182–83.
173. *Id.* at 183.
174. United States v. Belcher, 762 F. Supp. 666 (W.D. Va. 1991).
175. *Id.* at 668.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* at 669.

more severe, federal charges based on the same transaction after the defendant successfully appealed his state conviction.[183]

That case was not the first where McAfee secured an indictment in a different sovereign after an unsuccessful prosecution.[184] The court noted that he appeared recently as a SAUSA to prosecute two defendants on drug charges.[185] The jury acquitted both defendants and McAfee proceeded to secure a state indictment on the same charges.[186] He gained a conviction of the defendant in State court even though she had been acquitted in federal court.[187] The court observed, "It is likely that somewhere in such a chain of events prosecution ends and persecution begins, that government power becomes so oppressive to the citizen that she no longer has the power or will to defend herself."[188] Unfortunately, the opinion in that case is an anomaly among the cases involving challenges to cross-designated prosecutors.[189] If defendants are to have any protection from abuses of power similar to those illustrated above, other courts must take note of the reasoning behind the decision and follow suit.

### *(4) Disproportionate Punishment*

A defendant's Eighth Amendment protection against cruel and unusual punishment is also implicated when a prosecutor uses his or her power to harass or punish the defendant by overcharging and thus, exposing the defendant to excessive or disproportionate punishment relative to the defendant's culpability.[190] Because of the overlap in offenses and penalties for the same conduct in state and federal criminal laws, a cross-designated prosecutor has the power to bring charges in both jurisdictions for the same act, and thus, punish a defendant more than once for that act.[191] The Eighth Amendment's prohibition on cruel and unusual punishment should serve as

183. *Id.* at 669–70.

184. *Id.* at 673.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. Although many courts have considered cases containing similar facts, those courts have declined to find any violation. *See supra* note 70 and accompanying text.

190. King, *supra* note 108, at 126.

191. *Id.*

a check on this type of disproportionate punishment. As one scholar noted, "[i]f double jeopardy permits legislatures to authorize successive penalties for the same conduct, then the more flexible commands of the Eighth Amendment and the Due Process Clauses must pick up the slack."[192] Likewise, Justice Frankfurter suggested in *United States ex rel. Marcus v. Hess*,[193] that the appropriate source of constraint on the ability to cumulate punishment is the limit on proportionality in the Eighth Amendment. He wrote:

> If it be suggested that a succession of separate trials for the enforcement of a great number of criminal sanctions, even though set forth in advance in a single statute, might be a form of cruelty or oppression, the answer is that the Constitution itself has guarded against such an attempt "to wear the accused out by a multitude of cases with accumulated trials . . . by prohibiting cruel and unusual punishments.[194]

An example of disproportionate punishment can be seen in *United States v. Grimes*.[195] Grimes was charged and convicted in state and federal court for the same bank robbery.[196] He made persistent attempts to have his state and federal sentences served concurrently or credited against each other.[197] However, his attempts were unsuccessful because "[t]he rule of presumptive concurrency of sentences . . . does not apply where one sentence is imposed by a federal court and the other by a state court."[198] The defendant's sentencing challenge was premised in a double jeopardy claim because the duplicative punishment was allowed pursuant to the dual sovereignty doctrine.[199] The court in *Grimes* urged a reexamination of *Bartkus* to determine whether the justifications of the dual sovereignty doctrine are still viable with the expansion of federal criminal law.[200] However, the court acknowledged that it was not the proper forum to overturn "a legal directive from the Supreme Court" and thus rejected the

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192. *Id.* at 125.

193. United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 556 (1943) (Frankfurter, J., concurring).

194. *Id.*

195. United States v. Grimes, 641 F.2d 96 (3d Cir. 1981).

196. *Id.* at 97.

197. *See id.* at 98 ("Persistent attempts have been made by Ali to have his state and federal sentences served concurrently or credited against each other.").

198. *Id.* at 100.

199. *Id.* at 97.

200. *Id.* at 101.

defendant's double jeopardy claim.[201] Although this case did not involve a cross-designated prosecutor, it is not difficult to imagine a situation where a cross-designated prosecutor uses his or her power to overcharge in order to disproportionately punish the defendant.

### *(5) Ineffective Assistance of Counsel*

This model of centralized prosecution also has a detrimental impact on defendants' Sixth Amendment rights.[202] Having to "fight in two arenas at once" invariably creates disadvantages for the defense counsel, and thus for the defendant.[203] The government is able to potentially exhaust the defendant's financial ability to adequately defend himself by "whipsawing him from one jurisdiction to another."[204] Additionally, many defense attorneys may be familiar with the laws, rules, and procedures in *only one* of the jurisdictions. This may necessitate hiring a second attorney. Unfortunately, as many criminal defendants are unable to afford their own attorney and must use an overworked and underpaid public defender. This presents another problem: the potential inability of an overburdened public defender to recognize and address the problems a defendant will face when subjected to concurrent prosecutions. The expansion of federal criminal jurisdiction over the years has resulted in increasing resources being devoted to enforcing federal criminal law.[205] In contrast, public defense services remain devastatingly underfunded.[206] There is a real danger of deficient performance on the part of the defense counsel when the public defense system is overburdened and underfunded.[207] A cross-designated prosecutor has the ability to take advantage of a defendant by overburdening his defense counsel to the point where any assistance received is virtually ineffective.

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201. *Id.* at 104.

202. *See* Hollon, *supra* note 1, at 501–02 (explaining that the resource disparity caused by Congress' systematic underfunding of defense services violates the defendant's right to counsel).

203. *See* David L. Lane, *Twice Bitten: Denial of the Right to Counsel in Successive Prosecutions by Separate Sovereigns*, 45 HOUS. L. REV. 1869, 1900 (2009).

204. *See* Knoepp & Miller, *supra* note 14, at 171.

205. *See* Hollon, *supra* note 1, at 501–02.

206. *Id.*

207. *Id.* (explaining that in the overburdened public defender services, ineffective assistance more often results from an attorney's errors of omission).

*(6) Defendant's Interest in Finality and Accuracy of the Verdict*

Beyond equal protection, due process, effective assistance, and proportionate punishment violations, centralized prosecutions also affect a defendant's interest in finality and accuracy of the verdict. As one commentator observes, "When the federal government seeks to prosecute a defendant following an acquittal in a state prosecution, the interests and rights of the defendant are often compromised . . . ."[208] Multiple prosecutions allow the government to hone its trial strategies through successive attempts at conviction. This is especially true when the same prosecutor conducts each proceeding. As Justice Souter explained in his dissent in *United States v. Dixon*, the government could ". . . bring a person to trial again and again for that same conduct, violating the principle of finality, subjecting him repeatedly to all the burdens of trial, rehearsing its prosecution, and increasing the risk of erroneous conviction . . . ."[209] Although *Dixon* concerned successive prosecutions as a double jeopardy violation, the dangers presented in Justice Souter's dissent apply with considerably more force when a single prosecutor is able to prosecute a defendant in separate sovereigns for the same conduct using the same evidence.[210] Both practices conflict with the prosecutor's well-known duty, not simply to convict but to seek justice.[211] In discussing the prosecutor's responsibilities, the Supreme Court stated:

> [I]s not that it shall win a case, but that justice shall be done. As such, he is in a particular and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.[212]

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208. 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, 375 (1997).

209. United States v. Dixon, 509 U.S. 688, 761 (1993) (Souter, J., dissenting).

210. *See* Knoepp & Miller, *supra* note 14, at 171 ("The Cross Designated-Prosecutor could utilize his position to refile in the second forum by his ability to use certain evidence barred in the first. New evidence could come to light which might increase the potential for a second, and perhaps successful prosecution. . . . A premature prosecution which was not successful could be re-filed in the second forum upon further development of the case.").

211. Alafair S. Bourke, *Prosecutorial Agnosticism*, 8 OHIO ST. J. CRIM. L. 79, 83 (2010).

212. *See* Berger v. United States, 295 U.S 78, 88 (1935); *see also* Donnelly v. DeChristoforo, 416 U.S. 637, 648–49 (Douglas, J., dissenting) ("The function of the

A prosecutor retrying a defendant after an unsuccessful prosecution—taking a second bite of the apple—is undoubtedly an impermissible prosecutorial practice. Yet, courts have allowed exactly that. There have been many cases involving subsequent indictments based on a prosecutorial sense that justice has not been served.[213] When this occurs, the prosecutor is improperly substituting his or her own judgment for that of the judge or jury.[214] An example of this can be seen in *United States v. Padilla* where the defendant pled guilty to state criminal charges only to be federally indicted by the same prosecutor utilizing the same evidence. In his concurrence, Judge Logan observed, "It appears to be the state prosecutor's frustration with the sentence given defendant by the state court which led him, in his new capacity as an Assistant United States Attorney, to seek the federal indictment.[215] In the previously discussed case of *United States v. Figueroa-Soto*,[216] the court failed to find sufficient collusion where the federal authorities: (1) requested state prosecution, (2) sat at the prosecutor's table, (3) testified as witnesses, (4) collected evidence for use by the state in the state prosecution, (5) postponed sentencing a prosecution witness until after he testified for the state, (6) delayed a forfeiture proceeding to avoid prejudicing the state prosecution, and lastly (7) cross-designated the state prosecutor as a SAUSA to conduct the federal prosecution while still on the

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prosecutor under the Federal Constitution is not to take as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial.").

213. *See* Lane, *supra* note 203, at n. 234; *see, e.g.*, Heath v. Alabama, 474 U.S. 82, 84–86 (1985) (defendant confessed to crime in one jurisdiction and was sentenced to life imprisonment, refused to testify to grand jury in separate jurisdiction, and was subsequently charged with and tried for capital murder in that jurisdiction despite widespread publicity); see also Bartkus v. Illinois, 359 U.S. 121, 121–22 (1959) (defendant acquitted of bank robbery in federal district court, then investigated and charged in state court using same evidence supplied by FBI agent who investigated federal case); see also United States v. Tirrell, 120 F.3d 670, 674 (7th Cir. 1997) (defendant granted probation on state charges and state then asked U.S Attorney to prosecute without success; only after defendant violated probation on the state charges and state renewed request for federal prosecution were federal charges brought); or perhaps the most famous of all, the "Rodney King Case," United States v. Koon, 34 F.3d 1416, 1425 (9th Cir. 1994) (four Los Angeles police officers acquitted in state court on charges of assault with a deadly weapon and excessive use of force by a police officer were later charged with multiple federal crimes, including violation of King's constitutional rights).

214. Lane, *supra* note 203, at 1908.

215. United States v. Padilla, 589 F.2d 481, 485–86 (10th Cir. 1978) (Logan, J., concurring).

216. United States v. Figueroa-Soto, 938 F.2d 1015 (9th Cir. 1991).

state's payroll.[217] Accepting that this level of collusion is permissible simply because the prosecutions were conducted in separate sovereigns stretches the bounds of belief. Criminal defendants are already in an inherently unequal position in comparison to prosecutors without the added burden of a prosecutor having the ability to manipulate the resources of two sovereigns.

The danger of convicting innocent defendants also occurs in the plea bargaining context. Prosecutors possess unchecked power to overcharge and generate easy pleas.[218] As one scholar noted, "[t]his excessive plea leverage reduces the prosecutors' incentive to separate innocent from guilty defendants at the charging stage, increasing the chance that innocent defendants will be convicted."[219] In this context, prosecutors become the sole judges of crime and punishment.[220] This potential for abuse of power is increased when a single prosecutor has the unrestrained ability to charge a defendant under both state and federal criminal statutes.

### *b. Harms to the Criminal Justice System*

In addition to the numerous risks and abuses defendants face with centralized prosecutions, when multiple sovereigns are "investigating the same crime and pursuing punishment of the same defendant . . . it is wasteful of police, prosecutorial and judicial resources."[221] In discussing the increased federalization of crime and its effect on federal courts, Chief Justice Rehnquist stated:

> The trend to federalize crimes that traditionally been handled in state courts not only is taxing the Judiciary's resources and affecting its budget needs, but it also threatens to change entirely the nature of our federal system . . . . Federal courts were not created to adjudicate local crimes, no matter how sensational or heinous the crimes may be. State courts do, can, and should handle such problems.[222]

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217. *See id*. at 1018–19.

218. Sara Sun Beale, *The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors*, 51 DUKE L.J. 1641, 1679–80 (2002).

219. *Id.*

220. *See* Luna & Wade, *supra* note 90, at 1423.

221. Lane, *supra* note 203, at 1900.

222. William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary*, THIRD

These concerns apply with full force when a cross-designated prosecutor is able to bypass state courts and circumvent a variety of protective state laws and thus, use federal prosecution as a tool to secure a more favorable outcome.[223] When cases that have been traditionally tried by state courts are pulled into the federal court system, the capacity of the relatively small federal court system is overwhelmed. [224] This hinders the ability of the federal judiciary to fulfill its other functions, such as the enforcement of federal constitutional and statutory rights.[225]

In addition to the increasing number of cases competing for the scarce attention of federal courts, the federal prison system is also affected by the higher rate of federal prosecutions that have followed the federalization of crime.[226] Following the implementation of joint task forces like Project Exile, the federal prison system has experienced a higher rate of inmate increase than state systems.[227]

Federal Courts are not meant to be courts of general jurisdiction; they are to resolve the defined set of matters that the Constitution envisions for them.[228] Extensive prosecutions of the overlapping federal and state offenses blur this unique role. The federal expansion of criminal laws and the increasing overlap and entanglement of state and federal laws and enforcement of those laws has transformed the historic state-federal judicial relationship into an increasingly dysfunctional judicial system.[229]

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BRANCH (1999).

223. *See* Beale, *supra* note 122, at 768–69 ("These include a more powerful federal grand jury system in which witnesses and potential defendants have fewer procedural rights, lower standards for the approval of search warrants, a lower burden of proof to justify a wire tap, and more restricted discovery of the government's case. Unlike state law, federal law also permits a conviction on the basis of an accomplice's uncorroborated testimony.").

224. *See* Brown, *supra* note 131, at 997 ("A large volume of prosecutions under the overlapping statutes may crowd out 'traditional federal criminal law prosecutions and many . . . increasingly complicated federal civil suits . . . .'").

225. *See* Beale, *supra* note 122, at 772–73.

226. *See* JAMES STRAZELLA ET AL., TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N CRIM. JUST. SEC., THE FEDERALIZATION OF CRIMINAL LAW 51 (1998) (including the higher rate of inmate increase in federal prisons as one of the drains on federal resources).

227. *See* Brown, *supra* note 131, at 997.

228. *Id.* at 998.

229. *See* Harry Litman & Mark Greenberg, *Dual Prosecutions: A Model for Concurrent Federal Jurisdiction*, 543 ANNALS AM. ACAD. POL & SOC. SCI. 72, 72 (1996).

Various scholars assert that a "vigorous federalism in the criminal law area operates to protect both state and national institutions."[230] However, the federalization of criminal law and the use of cross-designated prosecutors has resulted in a breakdown of the "vigorous federalism" necessary to protect the separate functions of these institutions.[231]

### *IV. Ineffective Protections*

There are several commonly proposed protections that ostensibly protect a criminal defendant from the various abuses and injustices inherent in a model of centralized prosecution. However, as will be explained, these protections are ineffective and do not provide defendants with any real redress.

#### *A. The Bartkus Exception*

Defendants have futilely tried to find recourse via judicial remedy, asserting the *Bartkus* exception as a defense to successive prosecutions.[232]

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230. *See* Brown, *supra* note 131, at 998.

231. *See* Litman & Greenberg, *supra* note 229, at 72–74. They explained:

> Critics of federalization foresee in the expansion of federal criminal legislation the potential for dire consequences for federalism and for the federal criminal justice system: a flood of local cases overwhelming the federal courts and impairing their ability to carry out their traditional functions; interference with state control over domains traditionally regulated by the states; harm to democracy as decision making is shifted away from the most directly accountable levels of government; preemption of valuable experimentation with local solutions to crime problems; inefficient duplication of resources; ineffective legislation enacted for short-term political benefits; and unfairly disparate treatment of defendants selected for federal prosecution.

*Id.*

232. *See, e.g.*, United States v. Baker, 88 F. App'x 96, 98 (7th Cir. 2004) ("[W]e have never formally recognized or applied such an exception . . . ."); United States v. Tirrell, 120 F.3d 670, 677 (7th Cir. 2004) ("At any rate, the exception, if it exists at all, is a very narrow one. Even significant cooperation between federal and state agencies is not enough to make the second prosecution a 'sham.'" (citations omitted)); United States v. McCloud, No. CR406-247, 2007 WL 1706353, at *8 (S.D. Ga. June 11, 2007) ("The Eleventh Circuit has 'repeatedly refused to decide whether such an exception actually exists.'" (quoting United States v. 817 N.E. 29th Drive, 175 F.3d 1304, 1311 n.13 (11th Cir. 1999))). *But see* United States v. Guzman, 85 F.3d 823, 827 (1st Cir. 1996) ("We emphasize that the *Bartkus* exception is narrow. It is limited to situations in which one sovereign so thoroughly dominates or manipulates the prosecutorial machinery of another that the latter retains little

Courts continuously resist attempts to reverse convictions of those defendants claiming the exception, even in cases presenting the strongest evidence of intergovernmental collusion—dual prosecutions led by cross-designated prosecutors. The context of the *Bartkus* opinion suggesting judicial recourse is inherently narrow and fails to serve as a reliable claim for threatened defendants.

The "sham prosecution" exception arising in the Supreme Court's dicta fails to offer defendants any real protection when facing simultaneous or successive prosecutions by a single cross-designated prosecutor. The courts have set the bar so high for the "sham prosecution" exception that sufficiently collusive conduct between state and federal officials is very seldom found, even when the same cross-designated prosecutor handles both prosecutions.[233] In *United States v. Angleton*,[234] the trial court responded that the facts of *Bartkus* and many other subsequent prosecution cases considered by the federal courts indicated there could be extensive involvement between governments without such cooperation rising to the level of a collusive prosecution.[235] "Among the examples cited by the trial court were prosecutions in which (1) state sovereigns requested federal prosecution, (2) the initial sovereign turned over all of its evidence to the

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or no volition in its own proceedings."); United States v. Koon, 34 F.3d 1416, 1438 (9th Cir. 1994) (noting that the Ninth Circuit has recognized a "narrow exception" to the doctrine of dual sovereignty); United States v. Knight, No. 05-81155, 2006 WL 1722199, at *3 (E.D. Mich. June 22, 2006) (finding that dual involvement of an officer in both federal and state prosecutions of the defendant invited abuse and constituted a "sham prosecution"). For a summary of case law concerning the *Bartkus* Exception, see *Guzman*, 85 F.3d at 826–27.

233. Courts have set the bar so high that the "exception" is effectively meaningless, thus encouraging further such collusion. *See, e.g.*, *Baker*, 88 F.App'x at 98 ("[W]e have never formally recognized or applied such an exception. . . ."); *Tirrell*, 120 F.3d at 677 ("At any rate, the exception, if it exists at all, is a very narrow one. Even significant cooperation between federal and state agencies is not enough to make the second prosecution a 'sham.'" (citations omitted)); *McCloud*, 2007 WL 1706353, at *8 ("The Eleventh Circuit has 'repeatedly refused to decide whether such an exception actually exists.'" (quoting United States v. 817 N.E. 29th Drive, 175 F.3d 1304, 1311 n.13 (11th Cir. 1999))). *But see Guzman*, 85 F.3d at 827 ("We emphasize that the Bartkus exception is narrow. It is limited to situations in which one sovereign so thoroughly dominates or manipulates the prosecutorial machinery of another that the latter retains little or no volition in its own proceedings."); *Koon*, 34 F.3d at 1438 (noting that the Ninth Circuit has recognized a "narrow exception" to the doctrine of dual sovereignty); *Knight*, 2006 WL 1722199, at *3 (finding that dual involvement of an officer in both federal and state prosecutions of the defendant invited abuse and constituted a "sham prosecution").

234. 221 F. Supp. 2d 696 (S.D. Tex. 2002).

235. *See id.* at 714–15.

second, and (3) cross designations of state officials as federal officials were made."[236]

The failure of courts to find sufficient collusion to invoke the exception does not mean that collusive conduct does not occur or that it is not harmful when it does occur.[237] Because of the narrowness of the *Bartkus* exception (coupled with judicial deference to prosecutorial decision-making), many improper practices escape scrutiny. Some of these practices include "enticing guilty pleas that are later used in another jurisdiction, rejuvenation or sharing of tainted evidence, or any other obvious attempt to strengthen charges against an individual beyond normal investigatory techniques."[238] The opportunity for the use of these improper tactics is increased greatly when a single prosecutor conducts both prosecutions.

Only one court has applied the principles of the *Bartkus* exception as a justification for denying a successive prosecution by a cross-designated prosecutor. In *United States v. Belcher*,[239] the judge observed that the prosecutor, by virtue of his cross-designation as a SAUSA, had the ability to function as a prosecutor at both the State and federal levels.[240] The judge reasoned that the kind of power possessed by the prosecutor in that case was inconsistent with the concepts of federalism implicit in the Constitution.[241] He explained that the fact that the "two sovereigns have essentially pooled their powers in one prosecutor strongly suggests to the court that in reality there are no longer two sovereigns at work . . . . the pooling of prosecutorial power effectively creates one 'super sovereign,' i.e., a unitary government."[242]

If the issues motivating the *Bartkus* Court's concern are to have meaningful redress, courts must explicitly define the scope of the "sham prosecution" to include instances of cross-designated prosecutors prosecuting defendants in different sovereigns. Whether the prosecutor is actually harassing the defendant or manipulating his role on behalf of either

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236. *See* White, *supra* note 44, at 186.

237. *See* Lane, *supra* note 203, at 1899.

238. *See id.* at 1907.

239. 762 F. Supp. 666 (W.D. Va.1991).

240. *See id.* at 673.

241. *See id.* at 671 ("[I]t seems to the court that if the same prosecutor simultaneously derives power from both a State and the federal government, then the whole underpinning of federalism is destroyed.").

242. *See id.* at 671.

sovereign is immaterial, as representation of dual sovereigns constructively serves as undue influence on both, constructively resulting in a "sham."

### *B. Petite Policy and State Legislation*

To ameliorate some of the unfairness inherent in multiple prosecutions by different sovereigns, the federal government and many states have established limitations, or even prohibitions, on subsequent prosecutions after an initial prosecution in which double jeopardy has attached.[243]

#### *1. Petite Policy*

Only one branch of the Federal government, the Executive, has presented an available protection for harms occurring in the cross-designation system. As a response to the concerns over the dual-sovereignty issues in *Bartkus* and *Abbate*, the Department of Justice instituted the Petite Policy,[244] which establishes a strong presumption against federal reprosecution of a defendant already prosecuted by a state for the same conduct.[245]

The Petite Policy has been formalized as Section 9-2.031 of the United States Attorneys' Manual, a publication of departmental policy statements.[246] The Petite Policy "precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same act(s) or transactions(s)."[247] These guidelines are to direct the Department of Justice in deciding whether the Government should prosecute a defendant following a state prosecution.[248] Under the Policy, prosecutors are to presume that any prior trial vindicated federal

243. *See* White, *supra* note 44, at 174.

244. Named after Petite v. United States, 361 U.S. 529 (1960) (vacating a judgment at the request of the Justice Department made in accordance with its new policy).

245. White, supra note 44, at 199.

246. *See* Litman & Greenberg, *supra* note 229, at 73.

247. *See* Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice,"* 13 CORNELL J.L. & PUB. POL'Y 167, 177–178 (2004).

248. *See id.*

interests.[249] However, the presumption can be overcome if there are factors suggesting an "un-vindicated federal interest."[250]

Even when the policy is followed to its full effect, it fails to address concerns raised by centralized prosecutions. Because the adhering to the Policy is not mandatory, various forms of coercive harassment in simultaneous prosecutions are not deterred, thus, it only dilutes those threats of subsequent federal proceedings without providing protections from or redress for any injustices faced.[251] Additionally, the Petite policy is susceptible to manipulation and political pressure.[252] Criminal defendants facing simultaneous or successive prosecutions should find no comfort in the existence of the Petite Policy, as it vests no rights in the accused.[253] There is no recourse for a prosecutor's failure to follow the guidelines set out in the Policy.[254] When prosecutors ignore the internal guidelines, courts

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249. *See id.* at 180.

250. *See* White, *supra* note 44, at 199.

> [1] a failure to convict resulting from incompetence, corruption, intimidation or undue influence;
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> [2] court or jury nullification in clear disregard of the evidence or the law;
>
> [3] the unavailability of significant evidence not timely discovered or known by the prosecution, or because it was kept from the trier of fact's consideration because of an erroneous interpretation of the law;
>
> [4] the failure in a prior state prosecution to prove an element of a state offense that is not an element of the contemplated federal offense; and
>
> [5] the exclusion of charges in a prior federal prosecution out of concern for fairness to other defendants, or for significant resource considerations that favored separate federal prosecutions.
>
> The presumption may also be overcome where the violation of federal law (1) involves a "compelling federal interest," (2) the offense involves "egregious conduct," or (3) where any prior prosecution is regarded as "manifestly inadequate" in light of the federal interest at issue.

*Id.*

251. *See infra* note 250 and accompanying text.

252. *See id.* at 201–02.

253. *See id.* at 202.

254. It has been clearly established that since the *Petite* policy is an internal rule, criminal defendants may not invoke it to bar prosecution by the federal government. *See, e.g.*, United States v. Schwartz, 787 F.2d 257, 267 (7th Cir. 1986) (finding that failure to abide by the Petite Policy by failing to obtain approval before bringing successive federal charges after a state prosecution does not authorize reversal of conviction); United States v. Thomas, 759 F.2d 659, 668 (8th Cir. 1985) (explaining that failure to follow the Petite Policy does not create a right defendants can invoke to bar federal prosecution); United States v. Catino, 735 F.2d 718, 725 (2d Cir. 1984) ("[The Petite Policy] is merely an internal guideline for exercise of prosecutorial discretion, not subject to judicial review.").; United

have consistently found the policy to be non-binding and unenforceable, thereby leaving criminal defendants without remedy.[255]

If the Department of Justice is to provide substantive protection to criminal defendants, Congress must follow the lead of the States and establish the underlying principles of Petite Policy as binding via appropriate legislation.[256] Many states have enacted legislation that precludes state prosecution of a defendant for harms properly addressed in federal proceedings.[257] However, even if all fifty states enacted this legislation, a defendant remains unprotected against a successive prosecution by the federal government.[258]

The following proposals serve as guidance for unilateral action by the Executive and Legislative branches, while presenting justiciable claims for litigants to secure the Court's protection from those constitutional violations presented by centralized prosecutions. Both the Petite Policy and its State parallels were derived from the illustration presented by the *Bartkus* exception to the dual sovereignty doctrine known as the "sham prosecution."

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States v. Nelligan, 573 F.2d 251, 255 (5th Cir. 1978) ("In any case, it is apparent that the Petite policy is intended to be no more than self-regulation on the part of the Department of Justice.").

255. *See, e.g.*, United States v. Hayes, 589 F.2d 811, 818 (5th Cir. 1979) ("[W]e are not prepared to hold that a letter, press release, or similar statement of the Attorney General, which is not promulgated as a regulation of the Justice Department, and published in the Federal Registrar, can serve to invalidate an otherwise valid indictment returned by the Grand Jury."); United States v. Jackson, 327 F.3d 273, 294–95 (4th Cir. N.C. 2003); United States v. Kriens, 270 F.3d 597, 603 (8th Cir. 2001). *See also* United States v. Thompson, 579 F.2d 1184, 1189 (10th Cir. 1978) ("[A] press release expressing a policy statement and not promulgated as a regulation of the Department of Justice and published in the Federal Register is simply a 'housekeeping provision of the Department."').

256. Several jurists argue that the Petite Policy should be binding and provide defendants with enforceable due process protections. *See* United States v. Thompson, 579 F.2d 1184, 1189–92 (10th Cir. 1978) (Seth, C.J., dissenting) (explaining that the policy was violated and the defendant should be able to receive the benefit of being protected from unfairness associated with needless prosecutions)

257. *See* Kenneth M. Murchison, The Dual Sovereignty Exception to Double Jeopardy, 14 N.Y.U. REV. L. & SOC. CHANGE 383, nn. 191–92 (1986). See COLO. REV. STAT. § 18-1-303 (1978); DEL. CODE ANN. tit. 11, § 209 (1979); GA. CODE ANN. § 16-1-8 (1984); HAW. REV. STAT. § 701-112 (1976); MICH. COMP. LAWS § 767.64 (1982); MINN. STAT. § 609.045 (1983); MONT. CODE ANN. § 46-11-504 (1983); N.J. STAT. ANN § 2C:1-11 (West 1982); N.Y. CODE CRIM. PROC. § 40.20 (1981 & 1984-85 Supp.); OKLA. STAT. ANN. tit. 22, § 130 (West 1968); 18 PA. CONS. STAT. ANN. § 111 (1983); *and* WISC. STAT. ANN. § 939.71 (West 1982).

258. *See* Lane, *supra* note 203, at 1884.

A majority of State legislatures have taken the Petite Policy one step further, making similar principles binding on State prosecutors in order to prevent successive prosecutions once State interests have been adjudicated in federal courts.[259] Both of these protections are "flawed or nonexistent."[260] Moreover, as current remedial schemes only address harms arising from successive convictions, neither the Petite Policy, nor state intervention, has sufficiently addressed harms arising in initial proceedings or occurring after an initial acquittal.

The following proposals serve as guidance for unilateral action by the Executive and Legislative branches, while presenting justiciable claims for litigants to secure the Court's protection from those constitutional violations presented by centralized prosecutions.

## *V. Remedies*

### *A. Potential Remedies from Executive Policy*

Though the Petite Policy has served as an internal check on successive prosecutions by the Federal Government, the Department of Justice can easily address issues arising from the use of a cross-designated SAUSA. First, the Petite Policy should be expanded to bar all successive prosecutions of a defendant for harms previously litigated in State courts, regardless of the outcome. The current policy bars prosecution of convicted defendants, but fails to apply to those State prosecutions that prove unsuccessful. By extending the Petite Policy, the Department of Justice can prevent cross-designated State prosecutors from having "two bites at the apple." The Policy can also be expanded to initiate Federal stays of all proceedings against defendants who have been simultaneously exposed to State proceedings.

Simultaneous prosecutions present an array of harms independent of those created by successive proceedings. Whether the conduct underlying federal indictments is the same or wholly irrelevant to those ongoing in State courts, simultaneous prosecution by a cross-designated prosecutor

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259. See Dawson, supra note 27, at 294 ("Thirteen states impose a similar limitation, limiting state prosecution of offenses arising out of the same conduct previously subject to federal prosecution.").

260. *See* Lane, *supra* note 203, at 1882 (listing protections normally suggested as effective for safeguarding defendants' rights in successive prosecutions).

threatens a defendant's ability to negotiate or prepare a material defense. Strains on defendant's resources, defendant's counsel, and the courts are too substantive in this context and further no legitimate governmental interest. A policy barring simultaneous prosecutions will afford fundamentally fair defense and grant judges comfort in knowing that their sovereign will not lose custody of the defendant in the process.

An expansive Petite Policy may be a substantive amendment to the current prosecutorial system, but the most effective Executive remedy comes from policies traditionally found in the private sector—the use of the "Chinese Firewall". In the private setting, these "firewalls" serve as internal veils preventing attorneys from accessing records of, or contributing to, cases against parties represented by the employee in previous employment.[261] The same severance of collaboration can be implemented in the Department of Justice, barring SAUSAs from representing States in criminal proceedings against the same defendant. By removing the SAUSA from his role on behalf of his respective State, the Department of Justice can implement a system preventing prosecutorial abuse of dual sovereignty. Though it may only be enforceable internally, the limited protection instills a policy that prioritizes sovereign independence. In the same way the Petite Policy has had influence on successive prosecution, a firewall can curtail centralization and put SAUSAs on notice that their appearance in federal proceedings will be strictly on behalf of the United States.

State Attorneys General may be able to establish similar firewall policies independently of the Department of Justice. Putting cross-designated State prosecutors on notice that appearance on behalf of the United States strips authorities to prosecute the defendant on behalf of the State can force SAUSAs to weigh State's interests in the case while prioritizing their relationship with the State.

### *B. Potential Remedies from Legislative Policy*

261. *See* Michael Davis & Josephine Johnston, *Conflict of Interest in Four Professions: A Comparative Analysis*, NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION, http://www.ncbi.nlm.nih.gov/books/NBK22946/ (noting that law firms have created methods for "screening" lawyers within firms as a way of managing conflicts of interest, often described as "firewalls").

State legislatures have acted proactively in codifying the underlying principles of the Petite Policy, but Congress has yet to do so.[262] Federal legislation barring simultaneous or successive prosecutions of defendants in State proceedings will provide judges with the authority to enforce procedural and substantive fairness. By implementing and expanding the Petite Policy via statute, Congress can provide a bevy of remedies typically unavailable to judges or defendants.[263] Legislative action extends enforcement to injunctive relief, possible grounds for dismissing a case, or an outright ban of SAUSAs appearance in particular cases.

State legislatures have already shown a willingness to implement policies rather than waiting for executive intervention.[264] By expanding current policies to bar simultaneous prosecutions, while implementing mandatory "firewall" protections, States can maintain independence, restrict agents from sacrificing State interests, and protect against the unnecessary expenditure of State resources.

### *C. Potential Claims for Judicial Intervention*

Absent affirmative intervention from the Executive or Legislative branches, the only remedy a defendant may seek in a centralized prosecution is via judicial intervention. Only one case, *United States v. Belcher*, has resulted in a dismissal of a successive prosecution by a cross-designated prosecutor on behalf of an alternate sovereign. The court limited the scope of the ruling by dismissing the subsequent case on collateral estoppel grounds, deeming the acquittal of the defendant in one case as a non-justiciable resolution of fact against the same party, the prosecutor. The unique context of the *Belcher* case, rather than the prosecutor's cross-designation, may have played a substantive role in the court's search for an equitable outcome. The sovereign, rather than the individual prosecutor, is typically considered the litigating party in criminal proceedings. Nevertheless, the fundamental principles underlying the outcome justified the remedy in *Belcher* and can be found in contexts giving rise to legitimate

262. *See* Murchison, *supra* note 257, at 413 (collecting statutes).

263. In 1975, a proposal for federal legislation dealing with successive prosecutions in the federal system failed because it was thought that the Petite Policy adequately dealt with the problem. *See* ABRAMS & BEALE, *supra* note 100, at 722.

264. *See* Murchison, *supra* note 257.

grounds for barring a simultaneous or successive prosecution by the same prosecutor.[265]

### *VI. Conclusion*

Our criminal justice system places an increasingly strong emphasis on crime control and prevention at the expense of the fundamental fairness that the Constitution affords criminal defendants. Uncontrolled discretion in the hands of a powerful government official has great potential for abuse. In the hands of cross-designated prosecutors, this potential often becomes a reality. Courts have been unwilling to systematically rein in the prosecutors, which has resulted in a decline in the fairness of the criminal justice system. Considering the justifications for cross-designated prosecutors—namely efficiency—in light of the extensive burden on the accused, one should question the continued propriety of this system of centralized prosecution. Addressing this problem and implementing measures to curtail its practice will afford criminal defendants protection from abuses of prosecutorial power and manipulation of the criminal process.

265. *See* Braun, *supra* note 4, at 73–74 (calling for an exception to the dual sovereignty doctrine where the federal and state governments cooperate at the investigative or prosecutorial stages of the criminal process).