Towards an Integrated Theory of Interjurisdictional Double Jeopardy an Alternative to Section 707 of the Proposed Federal Criminal Code

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NOTES

TOWARDS AN INTEGRATED THEORY OF INTERJURISDICTIONAL DOUBLE JEOPARDY: AN ALTERNATIVE TO SECTION 707 OF THE PROPOSED FEDERAL CRIMINAL CODE

The Final Report of the National Commission on Reform of Federal Criminal Laws\(^1\) has been completed and submitted to Congress.\(^2\) The Final Report includes a Proposed Federal Criminal Code,\(^3\) which is presently under consideration by the Senate Subcommittee on Criminal Laws and Procedures.\(^4\) Sections 707 and 708 of the Code deal with the issue of successive federal and state prosecutions for the same act in cases of concurrent jurisdiction.\(^5\) These sections attempt

\(^5\) \$ 707. FORMER PROSECUTION IN ANOTHER JURISDICTION: WHEN A BAR

When conduct constitutes a federal offense and an offense under the law of a local government or a foreign nation, a prosecution by the local government or foreign nation is a bar to a subsequent federal prosecution under either of the following circumstances:

(a) the first prosecution resulted in an acquittal or a conviction as defined in section 704(a) and (c) or was a barring termination under section 704(d) and the subsequent prosecution is based on the same conduct or arose from the same criminal episode, unless (i) the law defining the offense of which the defendant was formerly convicted or acquitted is intended to prevent a substantially different harm or evil from the law defining the offense for which he is subsequently prosecuted, or (ii) the second offense was not consummated when the first trial began; or

(b) the first prosecution was terminated by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed, or vacated and which necessarily required a determination inconsistent with a fact or a legal proposition which must be established for conviction of the offense of which the defendant is subsequently prosecuted;

unless the Attorney General of the United States certifies that the interests of the United States would be unduly harmed if the federal prosecution is barred. In this section, "local" means of or pertaining to any of the 50 states of the United States or any political unit within any of the 50 states.

\$ 708. SUBSEQUENT PROSECUTION BY A LOCAL GOVERNMENT WHEN BARRED

When conduct constitutes a federal offense and an offense under local law, a federal prosecution is a bar to subsequent prosecution by a local government under either of the following circumstances:

(a) the federal prosecution resulted in an acquittal or a conviction as
to rectify long-standing problems with judicial application of the
double jeopardy clause in the federal system.6

Because the Code is likely to be enacted in the near future, the
problems which inspired sections 707 and 708 and the difficulties which
may occur in the application of those sections should be examined.

I

THE STATUS OF THE LAW

In 1922, in United States v. Lanza,7 the Supreme Court ruled for
the first time that the Constitution's double jeopardy clause was in-
applicable to successive state and federal prosecutions.8 Lanza has been
severely criticized as unsupported by precedent or logic.9 Nevertheless,
three-seven years later, in Bartkus v. Illinois10 and Abbate v. United

7 260 U.S. 377 (1922).
8 Although this case arose out of unique circumstances under the eighteenth amend-
ment, the Court chose to base its decision on broad principles of dual sovereignty. Id.
at 382.
9 See, e.g., Grant, The Lanza Rule of Successive Prosecutions, 32 COLUM. L. Rev. 1309,
1316-29 (1932); Note, Successive Federal and State Trials Arising from the Same Acts, 45
CORNELL L.Q. 574, 576-77 (1960); Note, Double Prosecution by State and Federal Govern-
ments: Another Exercise in Federalism, 80 HARV. L. Rev. 1538, 1539-41 (1967); Note,
Double Jeopardy and Dual Sovereignty: The Impact of Benton v. Maryland on Successive
Prosecutions for the Same Offense by State and Federal Governments, 46 IND. L.J. 413, 415-
17 (1971); Note, Double Jeopardy and Dual Sovereignty: A Critical Analysis, 11 WM. &
10 359 U.S. 121 (1959). In Bartkus, the petitioner was acquitted following a federal
prosecution for the robbery of a federally insured bank, and was subsequently convicted
on a virtually identical state indictment for bank robbery. In the federal action it had been
stipulated that the bank was federally insured; therefore, the only issue in each trial was
the Supreme Court reaffirmed the Lanza principle. The rationale for these decisions was that because the federal and state governments are "separate sovereign entities," the judgments and law enforcement activities of one should not prejudice or hinder the activities of the other. In short, the principles of dual sovereignty and federalism were considered more significant than the protection afforded the individual by the double jeopardy clause. Despite continuing scholarly criticism, the dual sovereignty rationale of Bartkus and Abbate is still law.

A. Practical Ramifications of Bartkus and Abbate

Since Bartkus and Abbate, several hundred individuals have been forced to prove their innocence of a specific act twice. Many others whether Bartkus had in fact perpetrated the act. It was also admitted that federal agents turned over their evidence to state officials after the federal acquittal. Id. at 122.

In Abbate, petitioners were convicted in an Illinois state court for conspiring to destroy the property of another. The state prosecution arose out of an alleged conspiracy to bomb the telephone company. Subsequently, a federal indictment, alleging identical facts, was handed down. The telephone company was protected under 18 U.S.C. §§ 371, 1362 (1970), which make it a crime to conspire to destroy or to interfere with a federally operated or controlled communications system. The second prosecution resulted in a conviction for the identical conspiracy. This conviction was affirmed by the Supreme Court:

[Undesirable consequences would follow if Lanza were overruled... If the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered.

359 U.S. at 195.


See, e.g., Note, supra note 9, 45 CORNELL L.Q. at 580; Note, supra note 9, 80 HARV. L. REV. at 1539-41, 1564-65; Note, supra note 9, 46 IND. L.J. at 418-22; Note, supra note 9, 11 WM. & MARY L. REV. at 952-59. See also Fisher, Double Jeopardy and Federalism, 50 MINN. L. REV. 607 (1966); Schaefer, Unresolved Issues in the Law of Double Jeopardy: Waller and Ashe, 58 CALIF. L. REV. 391, 400-04 (1970). Each of these commentators seeks to refute the logic and validity of Bartkus and Abbate. Justice Black contributed to the criticism by writing a highly persuasive dissent in Bartkus. Black remarked:

The Court apparently takes the position that a second trial for the same act is somehow less offensive if one of the trials is conducted by the Federal Government and the other by a State. Looked at from the standpoint of the individual who is being prosecuted, this notion is too subtle for me to grasp. If double punishment is what is feared, it hurts no less for two "Sovereigns" to inflict it than for one. If danger to the innocent is emphasized, that danger is surely no less when the power of the State and Federal Governments is brought to bear on one man in two trials, than when one of these "Sovereigns" proceeds alone. In each case, inescapably, a man is forced to face danger twice for the same conduct.

359 U.S. at 155.

have either been punished twice for the same act, or have been convicted and punished after acquittal in another jurisdiction. Every year the Supreme Court denies several petitions for certiorari, relying upon Bartkus and Abbate;\textsuperscript{16} every year numerous state and federal court decisions are based on the rationale of Bartkus and Abbate.\textsuperscript{16} For example, the recent case of United States v. Mechanic\textsuperscript{17} involved the trial of a defendant arrested at a large protest demonstration.\textsuperscript{18} In a Washington state court the defendant unsuccessfully attempted to prove that he had not thrown a firecracker at a policeman. He was convicted of violating a temporary restraining order in effect at the time of the protest.\textsuperscript{19} Subsequently, the defendant was convicted in federal court for the same act on the theory that throwing the firecracker had also violated the anti-riot provisions of the Civil Rights Act of 1968.\textsuperscript{20} Citing Abbate, the appellate court allowed the second prosecution;\textsuperscript{21} the Supreme Court denied certiorari.\textsuperscript{22}

The abundance of this type of case is difficult to reconcile with the traditional Anglo-American abhorrence of double jeopardy.\textsuperscript{23} It is unfair, embarrassing, and financially onerous to force an individual to defend himself twice against the same accusation. The possibility of convicting an innocent man is multiplied when prosecutors are given a second chance, and thus allowed to remedy tactical errors and weaknesses in the first prosecution. Furthermore, successive prosecutions for the same criminal act are wasteful of already overburdened judicial resources. Yet, in Bartkus, Mr. Justice Frankfurter held these considerations less important than the principle of "federalism":

It would be in derogation of our federal system to displace the re-


\textsuperscript{16} See, e.g., United States v. Crossen, 462 F.2d 96, 103 (9th Cir. 1972); United States v. Mechanic, 454 F.2d 849, 856 (5th Cir. 1971); United States ex rel. Hill v. United States, 452 F.2d 664, 665 (5th Cir. 1971); Robinson v. Neil, 452 F.2d 370, 372 (6th Cir. 1971); Goldsmith v. Cheney, 447 F.2d 624, 628 n.3 (10th Cir. 1971); United States v. Smith, 446 F.2d 200, 202 (4th Cir. 1971); United States v. Synnes, 438 F.2d 764 (8th Cir. 1971); Commonwealth v. Mills, 286 A.2d 638, 639-42 (Pa. 1971); State ex rel. Cullen v. Cicil, 45 Wis. 2d 492, 457, 173 N.W.2d 174, 177 (1970).

\textsuperscript{17} 454 F.2d 849 (5th Cir. 1971), cert. denied 406 U.S. 929 (1972).

\textsuperscript{18} Id. at 850-51.

\textsuperscript{19} Id. at 855.


\textsuperscript{21} 454 F.2d at 855.

\textsuperscript{22} 406 U.S. 929 (1972).

served power of the States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States.

Some recent suggestions that the Constitution was in reality a deft device for establishing a centralized government are not only without factual justification but fly in the face of history.24

Although Frankfurter concluded that "[p]recedent, experience, and reason alike support[ed] the conclusion that Alfonse Bartkus [had] not been deprived of due process,"25 Mr. Justice Brennan disagreed, noting in dissent that the second trial had been dominated by the same federal officials who had been unable to convict Bartkus in their first attempt.26

Unfortunately, the problems presented by the Bartkus-Abbate rationale are becoming more pronounced. First, the federal government is steadily expanding its control in the area of criminal law.27 Many crimes traditionally regulated by the states are now subject to federal jurisdiction.28 Indeed, many criminal activities, although essentially local in nature, are controlled by the federal government.29 And yet, in most of these new areas of federal jurisdiction, the traditional power of the states has not been supplanted. For example, the states retain authority to prosecute individuals for such crimes as bank or train robbery, loan sharking, rioting, or conspiracy, even though the federal government may also prosecute them for these crimes. It

24 359 U.S. at 137.
25 Id. at 139.
26 Id. at 165-70 (Brennan, J., dissenting).
28 Title I of that Act created the Law Enforcement Assistance Administration, which operates cooperative planning efforts for federal and state law enforcement.
29 In Perez v. United States, 402 U.S. 146 (1971), the Supreme Court demonstrated the increasingly broad base for federal criminal jurisdiction. In that case, it was held that the federal government could prosecute loan-sharking activity, even though the activity was exclusively local and did not extend across state lines. The expressed rationale was that Congress had found that most loan sharks were under the control of organized crime, and that organized crime has an interstate impact. Id. at 147. The Perez case borrowed from Wickard v. Filburn, 317 U.S. 111 (1942), which had held that the commerce clause could apply to exclusively local activities—in that case, wheat production—if even a remote connection to interstate commerce were shown.
30 In response to increasing crime, Congress has taken hold of the constitutional opportunities afforded by Perez and Wickard. Federal criminal statutes increasingly overlap with crimes traditionally local in nature. See, e.g., 18 U.S.C. § 2101 (1970) (use of interstate facilities to incite riot); id. § 659 (embezzlement or larceny from carrier); id. § 2113 (bank robbery).
is obvious that as the federal government moves into areas of traditional state control without supplanting state authority, the problem of successive prosecutions will grow.

A second reason why the double jeopardy problems caused by *Barthkus* and *Abbate* are becoming more commonplace is that this is an age of "co-operative federalism,"\(^{30}\) characterized by extensive cooperation between state and federal law enforcement agencies.\(^{31}\) When this cooperation occurs in the context of successive prosecutions, however, the basic premises of the dual sovereignty rationale are shaken.\(^{32}\) The justification for allowing successive prosecutions is that the state and federal governments are separate sovereigns, each entitled to its day in court. But when such cooperation exists, each jurisdiction clearly does not enjoy a separate day in court. This is especially true when each government is using the same evidence to prove the same facts.\(^{33}\)

B. *Inconsistencies in the Bartkus-Abbate Rationale*

The dual sovereignty rationale, relied on in *Barthkus* and *Abbate*, has been steadily eroded in all other areas of constitutional law. In *Malloy v. Hogan*,\(^{34}\) the Supreme Court held that the self-incrimination clause of the fifth amendment was fundamental and therefore extended to the states by the fourteenth amendment.\(^{35}\) Prior to *Malloy*, the Su-

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\(^{30}\) Murphy v. Waterfront Comm’n, 378 U.S. 52, 56 (1964). In *Murphy*, it was held that because of cooperation between federal and state officials the dual sovereignty theory was outweighed by the self-incrimination clause of the fifth amendment. A state could not grant state immunity and coerce statements which would incriminate under federal law. *See* notes 37-39 and accompanying text *infra*.

*Murphy* is often contrasted to *Bartkus* and *Abbate*, in which the double jeopardy clause was outweighed by the dual sovereignty argument. *See* note 45 *infra*.


\(^{32}\) In *Bartkus*, Mr. Justice Brennan remarked:

*What happened here was simply that the federal effort which failed in the federal courthouse was renewed a second time in the state courthouse across the street. Not content with the federal jury’s resolution of conflicting testimony in Bartkus’ favor, the federal officers engineered this second prosecution and on the second try obtained the desired conviction.*

\(^{33}\) *Id.* at 169.

\(^{34}\) *Id.* at 166-68.

\(^{35}\) 378 U.S. 1 (1964).
The Supreme Court had ruled that the federal government could compel a witness to give testimony which would incriminate him under state law, that a state could compel testimony which would incriminate him under federal law, and that in either case such testimony was admissible in court. The dual sovereignty rationale provided the basis for all these earlier decisions. On the day that Malloy v. Hogan was decided, however, the Court, in Murphy v. Waterfront Commission, overruled these prior cases, reasoning that if the right against self-incrimination was fundamental, it necessarily applied between the state and federal governments. Dual sovereignty could not outweigh a fundamental right.

Elkins v. United States involved the illegal seizure of evidence by state law enforcement officials. Prior to Elkins, such evidence would have been admissible in federal court. Under the long accepted "silver platter" doctrine, evidence illegally seized by state officials could be used in federal court; the illegal evidence could be handed to federal prosecutors "on a silver platter." But in Elkins the Supreme Court rejected this doctrine, holding that the fundamental protection against unreasonable searches and seizures outweighed the dual sovereignty rationale.

In Benton v. Maryland, decided ten years after Bartkus and Abbate, the Supreme Court ruled that the double jeopardy clause extends a fundamental right. Since Benton, the Bartkus-Abbate rationale has come under increasing attack, but has been consistently sustained in state and federal decisions. Although there are distinctions

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39 378 U.S. 52 (1964) (absent immunity provision, one jurisdiction in federal system may not compel testimony which might incriminate the defendant in another jurisdiction).
40 Id. at 77-80.
42 The evidence would be admissible in the second jurisdiction because the officials of that jurisdiction had not themselves made the illegal seizure. See, e.g., Knapp v. Schweitzer, 357 U.S. 371 (1958); Feldman v. United States, 322 U.S. 487 (1944); United States v. Murdock, 284 U.S. 141 (1931). The rationale of the doctrine was that illegal acts by officials in one state should not be permitted to prejudice the law enforcement activities of another jurisdiction. Without the illegal seizure, however, the second jurisdiction probably would not have had the evidence anyway. This weakness was implicitly recognized in Elkins, where the doctrine was repudiated.

The rationale of Bartkus-Abbate is similar to that of the "silver platter" cases. Supporters of Bartkus-Abbate contend that a trial in one jurisdiction should not be permitted to prejudice the law enforcement activities of another jurisdiction.
44 See notes 13-16 and accompanying text supra.
between Elkins, Murphy, and Bartkus-Abbate, it is clear that the Supreme Court views fundamental rights as transcending technical distinctions of federalism. As Justice Black has pointed out, if a defendant must undergo successive prosecutions, it makes little difference to him whether the second prosecution is state, federal, local, or foreign.

Some have suggested that the problems presented by Bartkus and Abbate may be solved by the discretionary restraint of state and federal officials or by state legislation. The American system, however, does

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46 One basic distinction between a Murphy-Elkins situation and a Bartkus-Abbate situation is that, under Murphy and Elkins, the abandonment of dual sovereignty principles does not bar the state or federal government from prosecution—only from using illegal testimony or evidence. In contrast, if Bartkus and Abbate were overruled, there would be a complete preclusion of the second trial.

Another suggested distinction is that in the Elkins and Murphy situations, one jurisdiction was trying to use the fruits of another jurisdiction's illegal activity, while in Bartkus and Abbate, the second jurisdiction was attempting to do nothing more than vindicate its own interests.

The distinctions between Elkins and Murphy, and Bartkus and Abbate, as well as the important similarities are discussed in Note, supra note 9, 80 HARV. L. REV. at 1546-49.

48 Elkins and Murphy seem to establish the rule that fundamental constitutional principles cannot be overridden by dual sovereignty or federalism arguments. It would follow that in light of Benton, which held double jeopardy to be a fundamental right, Elkins and Murphy obliterate the rationale of Bartkus and Abbate. See Schaefer, supra note 13, at 400-02; Note, supra note 9, 11 WM. & MARY L. REV. at 955-58; 39 U. CIN. L. REV. 799, 802-04 (1970). See generally Note, supra note 9, 80 HARV. L. REV. at 1546-49.

47 Ironically, since 1820, criminal prosecution by another nation has barred prosecution in federal courts for the same act. See United States v. Furlong, 18 U.S. (5 Wheat.) 605, 612 (1820). The curious contradiction between this case and Abbate is discussed in J. SIGLER, supra note 23, at 56: "American Courts will not try him if he has been tried by courts of another nation. One may ask: 'If American courts can trust foreign courts, is it too much to expect them to trust each other?'" See also Franck, An International Lawyer Looks at the Bartkus Rule, 34 N.Y.U.L. REV. 1096, 1103 (1959).

49 About one-third of the states have enacted legislation barring their courts from prosecution subsequent to federal prosecution for the same act. Perhaps the most sophisticated example is Article 40 of the New York Criminal Procedure Law, which explicitly prohibits New York state courts from trying an individual subsequent to trial for the same act in another jurisdiction, unless the trial in the other jurisdiction is dismissed for insufficiency of evidence with respect to an element of the first crime which is not an element in the second crime. N.Y. CRIM. PROC. LAW §§ 40.10-40 (McKinney 1971). For a comparison of the New York rule and federal double jeopardy standards, see Note, Double Jeopardy Provisions of the New York Criminal Procedure Law: Variations on a Federal Theme, 38 BROOKLYN L. REV. 748 (1972).

Of course, the most basic argument offered by Mr. Justice Frankfurter in Bartkus was that states should be free to operate their own criminal justice system. 359 U.S. at 137. Nonetheless, it begs the question to say that this issue should be resolved individually by the states. The states have always been free to limit successive prosecutions, but most do not. And the problem of successive prosecutions is growing. Furthermore, if the protection
not normally make fundamental rights dependent upon the discretion of prosecutors and state legislators. Furthermore, inconsistencies can result in states with statutes protecting citizens against successive inter-jurisdictional prosecution. If, for example, an individual charged with robbing a New York bank is first prosecuted by the federal government, a provision of the New York Criminal Procedure Law bars a subsequent state prosecution for the same robbery. But if the defendant is unfortunate enough to be prosecuted first by New York, the federal government may initiate a second prosecution under Abbate. In many cases, the rights of the accused will thus hinge upon the fortuity of which jurisdiction prosecuted first.

Under Bartkus and Abbate a defendant has no reasonable way of knowing whether he will be forced to defend himself against the same charge twice. To prevent such oppression, the Founding Fathers included the double jeopardy clause in the Constitution.

Finally, it has been suggested that despite its apparent violation of the double jeopardy clause, the Bartkus-Abbate rationale retains validity because of the exigencies of civil rights prosecutions. In

against double jeopardy is a fundamental right, it can hardly be maintained that the states should be free to violate that right.

51 N.Y. CRIM. PROC. LAW § 40.20(2) (McKinney 1971).
52 The Attorney General of the United States will often refrain from a second prosecution in the interests of justice. Six days after Bartkus and Abbate, Attorney General Rogers issued a memorandum establishing a Justice Department policy of avoiding successive prosecutions unless such prosecution is important to the interests of the United States: "After a state prosecution there should be no federal trial for the same act or acts unless the reasons are compelling... [T]he mere existence of a power, of course, does not mean that it should necessarily be exercised." Quoted in N.Y. Times, April 6, 1959, at 1, col. 4-5. The great number of subsequent federal prosecutions reflects the lack of feasible standards in the memorandum. Indeed, it appears that the Justice Department has on a few occasions ignored the memorandum and initiated a second prosecution when no apparent interest of the United States was involved. See, e.g., United States v. Mechanic, 454 F.2d 849, 855 (5th Cir. 1971). But cf. 5 U.S. COMM'N ON CIVIL RIGHTS, 1961 REPORT: JUSTICE 58:

The Civil Rights Division follows an invariable policy of delaying prosecution in deference to State action. In certain respects this policy appears proper. It leaves the prime responsibility exactly where it belongs—with the States. But in most of these cases the Division does more than delay prosecution. It delays the investigation—provided it is convinced that the State is acting in good faith.

53 For a discussion of the history of the enactment of the double jeopardy clause and the considerations of the Founding Fathers, see J. SIGLER, supra note 23, at 27-34.
54 The Commission on Civil Rights makes it clear that the federal government believes that successive state and federal civil rights prosecutions may often be necessary for the effective vindication of civil rights policies. U.S. COMM'N ON CIVIL RIGHTS, supra note 52, at 208-10 & nn.121-22. It is argued, for example, that "if the State prosecution results in the imposition of what appear to be inadequate penalties, the Division may prosecute too." Id. at 209 n.121.

For brief discussions of the civil rights implications of Bartkus-Abbate, see Amster-
Screws v. United States,\textsuperscript{55} United States v. Guest,\textsuperscript{56} and United States v. Barnhart,\textsuperscript{57} state juries granted questionable acquittals for heinous crimes against black citizens and civil rights workers. In the absence of Abbate, subsequent federal civil rights prosecutions would have been barred.

This "civil rights" justification for Abbate is of doubtful validity.\textsuperscript{58} Dissenting in Screws, Justice Frankfurter remarked:

We are told local authorities cannot be relied upon for courageous and prompt action, that often they have personal or political reasons for refusing to prosecute. If it be significantly

\textsuperscript{55} 325 U.S. 91 (1944).

\textsuperscript{56} 383 U.S. 745 (1966). In Guest, the defendant murdered a black man but was acquitted by a local jury. It is widely believed that the acquittal resulted from local anti-Negro bias. Subsequently, the defendant was indicted and convicted under 18 U.S.C. § 241 (1970) for conspiring to deprive the victim of his constitutional rights. The conviction was affirmed. It is recognized that any assault on Bartkus-Abbate must propose a solution to this type of recurrent problem.

\textsuperscript{57} 22 F. 285, 289 (C.D. Ore. 1884). This was one of the earliest cases upholding successive prosecutions. The court was concerned with local prejudice against the victim of the crime—an Indian.

\textsuperscript{58} If the state trial is truly a sham, it might be argued that the defendant was never really in jeopardy. See Note, supra note 9, 80 HARV. L. REV. at 1551-52. Furthermore, some have argued that if the state and federal laws have widely variant policies behind them, double prosecution is permissible. Id. at 1559-64. To the extent clearly separate policies are involved, double jeopardy might not attach between the offenses involved in a single act, such as selling liquor to a minor on Sunday. N.Y. CRIM. PROC. LAW § 40.20(2)(f) (McKinney 1971) bars a state prosecution subsequent to federal prosecution for the same act, but § 40.20(2)(b) allows subsequent prosecution in cases where the statutes involved have at least one different element, and the statutes are designed to "prevent very different kinds of harm or evil."

This New York statute borrows from the Model Penal Code which bars successive prosecutions between jurisdictions unless the statutes are "intended to prevent a substantially different harm or evil." MODEL PENAL CODE § 1.10(1)(a) (1962).

In a case such as Guest, the federal government might argue that 18 U.S.C. § 241 (1970) is intended to protect civil rights, while the state murder statute is designed to prevent murder within the state. However, this argument can be made in almost any case in which a state and federal statute overlap. The weakness of such an argument is seen by comparing Guest with the "selling liquor to a minor on Sunday" hypothetical. In the liquor case, two trials would take place. In one, the only issue would be the age of the purchaser. The day of the week would be irrelevant. In the other, the age of the purchaser would be irrelevant. Clearly, both trials are permissible. In Guest, however, the only real issue in each trial was the murder of the victim. It is difficult to argue that, on the facts of the case, the interests involved are sufficiently different to require separate trials.

The problem of Guest cannot adequately be met by a different interest approach. Therefore, if Abbate is rejected and successive prosecutions barred, the problems of civil rights enforcement must be solved in another way.
true that crimes against local law cannot be locally prosecuted, it is an ominous sign indeed. In any event, the cure is a re-invigoration of State responsibility. It is not an undue incursion of remote federal authority into local duties with consequent debilitation of local responsibility.\textsuperscript{59}

Naturally, some federal "incursion" will be necessary to effectuate the policies of civil rights legislation, but this is no justification for vitiating the double jeopardy clause. Rather, a system must be developed which prohibits violations of the double jeopardy clause and at the same time permits the vindication of civil rights violations.\textsuperscript{60}

II

THE IMPACT OF SECTIONS 707 AND 708 OF THE PROPOSED FEDERAL CRIMINAL CODE

Although several scholars have articulated proposals to alleviate the problems caused by the Bartkus-Abbate rationale,\textsuperscript{61} none have yet been implemented by either the federal legislature or the judiciary.\textsuperscript{62} The most detailed and intensive approach to the problem of inter-jurisdictional double jeopardy has been offered by the drafters of the Proposed Code.\textsuperscript{63} Section 707 of the Code provides that a federal prosecution is barred subsequent to prosecution for the same criminal act or transaction in another jurisdiction unless the Attorney

\begin{itemize}
\item \textsuperscript{59} 325 U.S. at 160-61 (Frankfurter, J., dissenting).
\item \textsuperscript{60} For a proposal which hopefully accomplishes this goal, see Appendix and notes 109-13 and accompanying text infra.
\item \textsuperscript{61} The most widely discussed proposal was suggested by Walter T. Fisher, appointed counsel for Bartkus. In his article, \textit{Double Jeopardy and Federalism}, 50 Minn. L. Rev. 607 (1966), Fisher proffered a unique and interesting proposal. He began by arguing that a defendant should be permitted to choose his own forum—state or federal—and that the resulting prosecution should constitute a bar to action by other jurisdictions. \textit{Id.} at 610-11. This proposal alone would be inadequate because it would allow defendants such as Screws and Guest to select a prejudiced local forum and to evade punishment. But Fisher also noted that under his plan the federal government would have the option to preempt the state proceeding. \textit{Id.} at 610-12.
\item Fisher's argument appears to break down, however, when he argues that a state prosecution would not constitute a bar to a subsequent federal prosecution on "federal issues." \textit{Id.} at 611. In other words, Fisher would reject Bartkus, barring subsequent state trials, but not Abbatte, barring subsequent federal trials. Such a result is unsatisfactory. As Justice Black reasoned in Bartkus, if an individual is forced to defend himself twice for the same act, the burden is no less great merely because different sovereigns bring the prosecutions. 359 U.S. at 155.
\item Several states have established limitations on their own ability to prosecute subsequent to a federal prosecution for the same act or criminal transaction. See note 49 \textit{supra}.
\item See notes 2-6 and accompanying text \textit{supra}.
\end{itemize}
General of the United States "certifies that the interests of the United States would be unduly harmed if the federal prosecution [were] barred." Section 708 of the Code provides that a state or local government is barred from prosecution subsequent to a federal prosecution for the same act or transaction. The Code does not, however, provide or suggest any mechanism for choice of forum in cases of concurrent criminal jurisdiction. An examination of sections 707 and 708 reveals that the problems created by Bartkus-Abbate cannot be solved without such a mechanism.

A. Section 708: Bar to Subsequent State Prosecution

The drafting of section 708 of the Code, which acts as a bar to state prosecution subsequent to federal prosecution for the same act, was not accomplished without some difficulty. The official comment to section 708 notes:

A substantial body of opinion in the Commission, while not in disagreement with the end to be achieved, favors deletion of this section, both because of strong doubts as to its constitutionality and because of the view that, even if constitutional, it would be preferable, as a matter of comity within the federal system to permit the states to deal with the problem themselves rather than to force this result by Congressional action.

The Study Draft of the Proposed Federal Criminal Code, issued a year before the Final Report, provided that the state would be barred from subsequent action unless the Attorney General of the United States certified "that the interests of the state would be unduly harmed if the state prosecution is barred." The Working Papers, released before section 708 was made absolute against the states, reveal that Bartkus and Abbate were responsible for much of the controversy and confusion surrounding section 708:

A . . . difficult question is presented as to whether all State prosecutions should be barred or whether, as is the case with successive Federal prosecutions, there should be provision for successive prosecutions in limited circumstances. If the Abbate and Bartkus decisions are not accurate statements of the constitutional

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64 For the entire text of § 707, see note 5 supra.
65 For the entire text of § 708, see note 5 supra. It should be noted that under certain exceptional circumstances the effect of § 708 may be avoided. See, e.g., PROPOSED CODE § 709. Such exceptions are outside the scope of this Note.
66 PROPOSED CODE § 708, Official Comment at 64.
68 Id. § 707. This section became PROPOSED CODE § 708.
69 The Working Papers, consisting of materials used by the Commission, were issued on July 1, 1970.
doctrine of double jeopardy, then, of course, there can be no successive prosecutions in any circumstances. While the draft takes the position that those decisions are unsound, it accepts their doctrinal validity . . . .

Even if Barthus and Abbate are conceded doctrinal validity, they delineate only the minimum limitations placed on government by the double jeopardy clause. There is no apparent reason why Congress cannot go beyond Barthus and Abbate and expand double jeopardy protections. Fortunately, equivocation ceased and an absolute bar was placed on the states by section 708 in the Final Report.

The history of section 708 reveals a broad controversy surrounding its constitutionality. Both commentators and legislators feared that section 708 would infringe upon the traditional areas of police power reserved to the states by the tenth amendment. This argument was articulated by Justice Frankfurter in Barthus. But while the Barthus opinion tended to preserve the police powers of the states, it did not insulate the states from valid federal legislation. Normally, when the federal government desires to exercise its powers under the supremacy clause and to exclude the states from an area, it will simply preempt the entire area. But no one would seriously suggest that the federal

70 WORKING PAPERS 349.
71 See Hearings, supra note 4, at 991-34 (statement of A. Miller, Attorney General of Virginia); id. at 1024-25 (statement of R. Shevin, Attorney General of Florida); id. at 1168-76 (statement of R. Israel, Attorney General of Rhode Island).
73 Under the supremacy clause, when Congress has authority to legislate in a specific area, it has correlative power to prevent the states from interfering with its legislation. The propriety of excluding states from interference in areas of federal authority was established in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). Chief Justice Marshall remarked that "the acts of New York must yield to the law of congress." Id. at 210. Therefore, assuming the validity of most federal criminal laws, it would appear that § 708 is a fortiori valid under the supremacy clause.

In California v. Zook, 336 U.S. 725 (1949), the Supreme Court stated:
"There is no longer any question that Congress can redefine the areas of local and national predominance, . . . despite theoretical inconsistency with the rationale of the Commerce Clause as a limitation in its own right. . . . When Congress enters the field by legislation, we try to discover to what extent it intended to exercise its power of redefinition."
Id. at 728 (emphasis added).

Other cases have reaffirmed the principle that state police power may be preempted by the federal government. In Head v. New Mexico Bd., 374 U.S. 424 (1963), the Court stated:
"In areas of the law not inherently requiring national uniformity, our decisions are clear in requiring that state statutes, otherwise valid, must be upheld unless there is found 'such actual conflict between the two schemes of regulation that both cannot stand in the same area, [or] evidence of a congressional design to preempt the field.'"
Id. at 430 (emphasis added), quoting Florida Avocado Growers v. Paul, 373 U.S. 182, 141
government should preempt states from criminal prosecution in all areas which involve the federal government. State criminal jurisdiction is too ingrained in our federal system. Therefore, federal criminal preemption must be selective and the state should be preempted only if the federal government prosecuted first.\(^7\) \textit{Pennsylvania v. Nelson},\(^7\) cited by the drafters of the Code,\(^7\) held the Pennsylvania Sedition Act\(^7\) unconstitutional on the ground that federal sedition laws "occupied the field."\(^7\) The Court pointed out that it was "not unmindful of the risk of compounding punishments which would be created by finding concurrent state power. . . . Without compelling indication to the contrary, we will not assume that Congress intended to permit the possibility of double punishment."\(^7\) Under section 708 there would be no doubt about congressional intent; there is a specific manifestation of intent that double punishment should not be permitted. In \textit{Murphy v. Waterfront Commission},\(^8\) the Court specifically stated that the supremacy clause allowed the federal government to grant immunity from state prosecution.\(^8\) It is a contradiction in terms to maintain that immunity can be granted but that prosecution may not be barred.

The fourteenth amendment provides an additional constitutional basis for section 708. In \textit{Benton v. Maryland},\(^8\) the due process clause of the fourteenth amendment was held to incorporate the double jeop-

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\(^7\) Such selective preemption is not without precedent. In \textit{Murphy v. Waterfront Comm'n}, 378 U.S. 52, 71 (1964), the Supreme Court remarked that "the Federal Government could, under the Supremacy Clause, grant immunity from state prosecution." Several federal statutes, all of which have been held constitutional, demonstrate that selective preemption of state power to prosecute is permissible. \textit{See, e.g.}, 18 U.S.C. § 659 (1970) (carrier embezzlement statute): "[N]or shall any provision of this section be construed as invalidating any provision of State Law unless such provision is inconsistent with any of the purposes of this section or any provision thereof." Several of these statutes also include provisions which bar federal prosecution subsequent to state prosecution for the same act. \textit{See, e.g.}, id.

\(^8\) 550 U.S. 497 (1956).

\(^8\) The drafters cited the case as support for the constitutionality of § 708. \textit{Working Papers} 349. Critics have contended that the case was misconstrued. \textit{See Hearings, supra} note 4, at 1168-68, 1175 (statement of R. Israel, Attorney General of Rhode Island).

\(^7\) PA. STAT. ANN. tit. 18, § 4207 (1963).

\(^8\) 350 U.S. at 500. The relevant federal statute was the Smith Act of 1940, 18 U.S.C. § 2385 (1970).

\(^7\) 350 U.S. at 509-10.

\(^8\) 378 U.S. 52 (1964).

\(^8\) Id. at 71.

ardy clause. Section 5 of the fourteenth amendment empowers Congress to enforce the provisions of the fourteenth amendment. In light of Benton, section 5 gives Congress the power to prohibit any action which it reasonably considers violative of the double jeopardy clause. For Congress to decide that successive federal and state prosecutions violate the double jeopardy clause would not seem to be an unreasonable exercise of this authority.

Concern over the constitutionality of section 708 thus would appear unfounded. The remaining question is whether section 708 is workable. In recent Senate hearings on the Code, several critics of section 708 complained that enactment of the section would cause "races to the courthouse." As they now stand, sections 707 and 708 perhaps may cause such races, but the underlying cause of this behavior would not be the bar in section 708. The real problem is that the Code fails to provide a means for determining whether a defendant should be tried by the state or the federal government. It makes little sense to assert that in order to prevent races to the courthouse we should

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83 In Katzenbach v. Morgan, 384 U.S. 641 (1966), the Supreme Court ruled that § 5 of the fourteenth amendment afforded Congress broad power to enforce the substantive provisions of the fourteenth amendment. The Court noted:

A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment.

Id. at 648 (emphasis added). The Court continued: "By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause . . . ." Id. at 650 (emphasis added).

84 This is especially true in light of Ashe v. Swenson, 397 U.S. 436 (1970), which held that basic notions of collateral estoppel are implicit in the double jeopardy clause. Although Ashe v. Swenson did not arise in an interjurisdictional context, the crux of the case is that it is unconstitutional to force an individual to defend himself twice against the same factual allegation. If a defendant's alibi is that he was in Paris on the day of the crime, he should only be forced to prove once that he was in Paris. The burdens remedied by Ashe are no less severe when the separate trials occur in separate forums.

Although collateral estoppel has been suggested as a possible solution to the Barthus-Abbate problem, such a theory creates new problems. First, it is basic to collateral estoppel that a party not privy to the first action cannot be estopped by the results of that action. Of course, in cases where there is extensive state and federal cooperation, it can reasonably be argued that privity exists. Second, it is also basic to collateral estoppel that only those issues which were specifically decided can work an estoppel. In most criminal cases, a general verdict is rendered. It is usually impossible to delineate exactly what the jury decided on particular issues.

85 Hearings, supra note 4, at 931 (statement of A. Miller, Attorney General of Virginia).

86 See notes 105-07 and accompanying text infra.
abandon the fundamental right against being placed in double jeopardy. Races to the courthouses may be eliminated in other ways.  

Criticism of section 708 has also dealt with the potential hostility which it might engender between federal and state prosecutors. It has been pointed out that

Sections 201 and 207 would not have the impact on Federal-State relations which they do were it not for Section 708 which is revolutionary criminal law. . . .

The practical effect of Section 708 would be to make the State a non-appearing party, bound by adjudications which it has no opportunity to argue or oppose . . . .

There are major weaknesses in this argument. The states would have an opportunity to vindicate their interests by cooperating with federal authorities, participating in the investigation, and generally assisting at all levels. Furthermore, in cases where the state interest is clearly superior, the state could prevail upon the federal prosecutor to decline jurisdiction and to allow state prosecution. Undoubtedly, prosecutors could adapt to section 708, realizing that in cases of concurrent jurisdiction they must cooperate and present their case against the defendant in a single trial.

State prosecutors would not relish being deprived of their power to prosecute certain cases; however, the Bill of Rights was not designed to optimize prosecutorial efficiency. Therefore, even if it does cause some abrasion between state and federal prosecutors, section 708 is justifiable insofar as it prevents double jeopardy. Although there is a tension here between basic concepts of federalism and basic concepts of double jeopardy, the protection against double jeopardy must not be vitiated for the sake of federalism. Rather, productive federal-state cooperation must be encouraged in order to vindicate all interests in one trial.

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87 See notes 108-13 and accompanying text infra.
88 See Hearings, supra note 4, at 1168-76 (statement of R. Israel, Attorney General of Rhode Island).
89 Id. at 1175.
90 It has been suggested that if subsequent state prosecutions are barred, a defendant might go free if his federal prosecution resulted in acquittal or dismissal because of an exclusively federal element of the crime. For example, if an individual were charged with the federal crime of crossing state lines to commit a riot, and the federal government were unable to prove that he crossed state lines, would the state be barred from prosecution for the simple state crime of rioting? Section 708(b) of the Code resolves this dilemma. Under this section a state prosecution is barred only if the federal action was terminated by an acquittal or dismissal which "necessarily required a determination inconsistent with a fact or a legal proposition which must be established for conviction of the offense of which the defendant is subsequently prosecuted." The fact that a defendant
Section 708 should be adopted. As the Code recognizes, the time has come to effectuate the most meaningful interpretation of the double jeopardy clause—no person should be compelled to prove twice that he did not do "X," regardless of how many jurisdictions happen to designate "X" a crime.

B. **Section 707: Limited Bar to Federal Prosecution**

Section 707 of the Code bars a federal prosecution subsequent to a state prosecution unless the Attorney General of the United States certifies that the bar would unduly harm the interests of the United States. This policy is not new—it merely codifies Justice Department procedure which has been informally followed since 1959. Nevertheless, the problems of multiple interjurisdictional prosecution continue to increase. Section 707 is inadequate in its present form for three basic reasons.

First, even if the *Bartkus-Abbate* rationale is accepted, section 707 offers the Attorney General no meaningful standard by which to deter-
mine when a second prosecution is appropriate. A subsequent federal prosecution is authorized whenever a bar would "unduly harm" the United States. This is a hopelessly vague index.

Section 207 of the Code does provide for discretionary restraint in the exercise of concurrent federal jurisdiction, listing several factors which may influence the Attorney General to decline federal jurisdiction. Arguably, this section sets adequate standards for when to re-prosecute under section 707. However, even if the section 207 standards are extended to section 707, no justifiable basis exists for section 707's allowance of successive prosecutions for the same act.

Moreover, by clothing inadequately guided discretion with approval, Congress would in effect sanction violation of the double jeopardy clause. At least today, the Attorney General tends to be cautious in deciding whether to initiate second prosecutions for the same act. But under the Code, the issue of fairness in reprosecution is nonexistent. Section 707 alludes only to the interests of the United States; the rights of the accused are not mentioned. Thus, even the status quo is preferable to section 707. Both leave much to be desired.

Second, significant constitutional questions are raised by the discretionary clause of section 707. The Supreme Court has left little doubt that only a "compelling governmental interest" can justify the

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93 Although § 207 authorizes federal law enforcement officials to decline jurisdiction over crimes when concurrent jurisdiction exists between the federal government and a state, federal officials may exercise this option only in the absence of a "substantial Federal interest." Section 207 defines "substantial Federal interest" to include cases in which

(a) the offense is serious and state or local law enforcement is impeded by interstate aspects of the case; (b) federal enforcement is believed to be necessary to vindicate federally-protected civil rights; (c) if federal jurisdiction exists under section 201(b), the offense is closely related to the underlying offense, as to which there is a substantial federal interest; (d) an offense apparently limited in its impact is believed to be associated with organized criminal activities extending beyond state lines; (e) state or local law enforcement has been so corrupted as to undermine its effectiveness substantially.

Although § 207 says nothing about a bar to state prosecution (indeed, § 206 says that the existence of federal jurisdiction does not bar the state), it might be argued that the list of federal interests in § 207 is also useful for exercising retrial discretion under § 707. Even if this interpretation is accepted, however, § 707 remains unacceptable for reasons discussed in notes 94-103 and accompanying text infra.

94 In the memorandum of April 6, 1959, the Attorney General remarked:

After a state prosecution there should be no federal trial for the same act or acts unless the reasons are compelling. . . . [T]hose of us charged with law enforcement responsibilities have a particular duty to act wisely and with self-restraint in this area.

*Quoted in* United States v. Mechanic, 454 F.2d 849, 856 n.5 (5th Cir. 1971).

95 Even § 207, in its list of important considerations, never mentions the factor of fairness to the defendant. See note 93 *supra*. 
infringement of a fundamental right.\textsuperscript{96} Section 707 allows successive prosecutions without any showing of compelling interests. Furthermore, if federal interests in a particular case were truly compelling, the federal government could preempt the state proceedings,\textsuperscript{97} allowing vindication of federal interests without violation of the double jeopardy clause. Section 707 cannot meet the compelling interest test because it relies on a discretionary determination by the federal prosecutor that federal interests may be "unduly harmed" by a bar—surely an inadequate standard for determining compelling interests.

If section 707 is enacted into law and the Attorney General initiates second prosecutions only rarely, the de facto result is clearly unconstitutional. Under such circumstances, defendants will generally not expect a second trial. They would be unfairly surprised when the second trial was initiated. In \textit{Furman v. Georgia},\textsuperscript{98} the majority of Justices seemed to agree on only one thing: when a law or policy strikes "like lightning,"\textsuperscript{99} because it is discretionary and erratically applied, it is unconstitutional.\textsuperscript{100} It is hardly an exceptional proposition that discretionary and unpredictable laws or policies do not meet due process standards.\textsuperscript{101} Therefore, even if successive prosecutions under section 707 occur only rarely, the result is unconstitutional under both the double jeopardy and the due process clauses. If the Attorney General frequently initiates second prosecutions, the incidence of double jeopardy violations increases. Regardless of how the Attorney General interprets his rights under section 707, the problems of \textit{Bartkus} and \textit{Abbate} remain.

Third, inconsistencies would result from the difference between sections 707 and 708. If a defendant were tried first in federal court,\textsuperscript{96} Shapiro v. Thompson, 394 U.S. 618, 634 (1969).\textsuperscript{97} The constitutionality of such preemption has already been established. See notes 72-84 and accompanying text \textit{supra}. Preemption is also at the crux of the proposal made herein. See Appendix.\textsuperscript{98} 408 U.S. 238 (1972).\textsuperscript{99} Id. at 309 (Stewart, J., concurring).\textsuperscript{100} It is recognized that \textit{Furman} is of limited precedential value because of the nature of the case and the diversity of opinions. Nevertheless, to the extent that anything is agreed upon by the majority, it is that a law or policy is unconstitutional if there is no rational or discernible standard of application. Justice Douglas noted that legislatures must "write penal laws that are evenhanded, nonselective, and nonarbitrary, and . . . require judges to see to it that general laws are not applied sparsely, selectively, and spottedly to unpopular groups." \textit{Id.} at 256.\textsuperscript{101} See generally \textit{id}.
DOUBLE JEOPARDY

subsequent state prosecution would be barred by section 708. But if he were tried first in state court, the defendant could fall victim to double prosecution under section 707.102

These problems could be eliminated by deleting the discretionary clause from section 707, thus making a state prosecution a bar to a subsequent federal prosecution. The most troubling argument against such a deletion is that it would hamper the federal government in its efforts to vindicate important federal interests, such as enforcing civil rights legislation.103 To the extent that federal interests would be harmed by a bar to successive prosecutions, a system should be developed which not only allows federal prosecution, but also protects the double jeopardy rights of the accused, and yet does not preempt the police power of the states unless federal interests demand it.

C. The Need for an Integrated System for Choice of Forum Under the Code in Cases of Concurrent State and Federal Criminal Jurisdiction

If double jeopardy violations are to be avoided in cases of overlapping federal and state criminal jurisdiction, a mechanism must be developed for choice of forum. The Code fails to provide any method of determining which forum should prosecute the defendant. In part, of course, this failure results from the Code's willingness to allow successive prosecutions, at least in a state-federal chronology.

The choice of forum issue is indirectly considered in the Code:

[F]ederal law enforcement agencies are authorized to decline or discontinue federal enforcement efforts whenever the offense can effectively be prosecuted by nonfederal agencies and it appears that there is no substantial Federal interest in further prosecution or that the offense primarily affects state, local or foreign interests.104

In short, in all cases where jurisdiction is concurrent, federal authorities may decline jurisdiction. When federal jurisdiction is declined, the state will proceed and there will be no choice of forum problem. However, nothing in the Code provides that the federal government's decision to take jurisdiction bars a state prosecution. Section 708 bars state prosecution only when there has been a full attachment of jeopardy in federal court.105 Section 207 gives federal authorities discre-

102 Cf. notes 50-52 and accompanying text supra.
103 See notes 54-60 and accompanying text supra.
104 PROPOSED CODE § 207.
105 Section 704 of the Code, entitled "When Prosecution Barred by Former Prosecu-
section to decline jurisdiction, but it does not give them discretion to bar or preempt state prosecution. No matter what decision federal authorities make under section 207, the state is completely free to proceed, subject only to section 708 limitations. Therefore, it is clear that section 207 does not afford an adequate mechanism for choice of forum in cases of concurrent federal and state jurisdiction. If a state government initiates prosecution against a defendant, the federal government may either decline jurisdiction under section 207, or it may initiate its own second prosecution. Even if jeopardy has attached in state court, the discretionary clause of section 707 would allow a subsequent federal prosecution. But the federal government is given no method of preventing the state prosecution.

Modification of the Code is necessary to integrate sections 207, 707, and 708 and to provide a mechanism for assumption of jurisdiction by the forum which could most appropriately dispose of the case.

The proposal advocated herein—selective preemption—provides

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106 The exercise of discretion is vested with finality by section 207, which states that "[t]he presence or absence of a federal interest and any other question relating to the exercise of the discretion referred to in this section are for the prosecuting authorities alone and are not litigable." The door is finally bolted shut to state authorities by section 708 which bars in most instances state prosecution "based on the same conduct or [arising] from the same criminal episode" after federal prosecution. In short, once the federal prosecutor decides to step in, the state authorities are, in effect, out of the ball game.

Dobbyn, A Proposal for Changing the Jurisdictional Provisions of the New Federal Criminal Code, 57 CORNELL L. REV. 198, 202-03 (1972) (emphasis added). It is difficult to perceive how such a conclusion can be reached. Nowhere in the Code is it even implied that the mere assumption of jurisdiction by the federal prosecutor is a bar to state prosecution. Indeed, § 206 unequivocally contradicts Dobbyn: "The existence of federal jurisdiction over an offense shall not, in itself, prevent any state or local government from exercising jurisdiction . . . ." The assumption of federal jurisdiction is not a bar to the states. The only bar to the states found in the Code is § 708, which takes effect not when federal jurisdiction is assumed pursuant to § 207 but rather when full jeopardy attaches pursuant to § 708. The distinction is crucial, because if the mere assumption of jurisdiction were a bar to the states, the result would be a full-fledged preemption statute. See notes 109-13 and accompanying text infra. Section 207 is not such a statute. It provides no basis for federal preemption. Rather, it merely affords the federal prosecutor an option to decline federal jurisdiction.

107 See note 106 supra.

108 One possibility would be to allow the defendant to choose his own forum. This would be inadequate, however, since it would allow the beneficiary of local prejudice to choose a local forum and to thwart important federal policies. Certainly, the defendants in Screws v. United States, 325 U.S. 91 (1943), and United States v. Guest, 383 U.S. 745 (1966), would have chosen trials in the local community.

109 See Appendix.
that the ultimate decision as to proper forum must be made by the federal government. The only alternatives are to leave choice of forum to the states, to the individual, or to chance. Each alternative presents serious difficulties, and, in balance, federal choice is clearly superior.\footnote{The difficulties in leaving choice of forum to \textit{coincidence} have been explored. \textit{See} notes 98-101 and accompanying text \textit{supra}. So, too, serious difficulties arise if we leave choice of forum to the states, particularly in the field of civil rights. \textit{See} notes 54-60 and accompanying text \textit{supra}.}

In cases in which the state initiates its prosecution first, but in which the federal government desires to vindicate important federal interests, the Attorney General could preempt the state action by certifying that federal interests so require. The Attorney General could be guided in his decision to preempt by the standards set out in section 207.\footnote{The only practical alternative, in fact, is to leave the choice to the federal government. This is consistent with the supremacy clause. Also, it assures that national civil rights policies are vindicated without subjecting the defendant to two trials for the same act.} Although these standards are admittedly inadequate for the purpose of granting a second prosecution in violation of the double jeopardy clause, they are not inappropriate for determining which forum should dispose of the case.

If the federal government decides to prosecute, the only recourse open to the state is cooperation in the federal prosecution. Through this cooperation, the state can ensure that the one trial vindicates not only federal but also state interests. In many cases, the state might sincerely believe that its own interests require exercise of the state police power. Certainly, state officials may attempt to persuade federal officials that the case is more appropriate for state action and that under section 207 federal jurisdiction should be declined. Indeed, because of the congestion of federal courts, federal officials should be predisposed to permit the states to bring their own action in the absence of compelling federal interests. There will be cases in which the state will feel that its interests have been derogated by federal preemption. In such cases, however, federal preemption will have resulted from the Attorney General's belief that important national interests outweigh the state's interest. Either the federal government or the state must be barred from action; the alternative is to sacrifice the rights of the individual under the double jeopardy clause. The selective preemption formulation recognizes the concepts of federalism but also protects the individual's fifth amendment rights.

Under both selective preemption and section 707, the Attorney General has discretion to prosecute in cases of concurrent jurisdiction. But under selective preemption, he must decide to prosecute before...
jeopardy attaches in the state court. Failure to do so will result in a bar. The goal of both section 707 and selective preemption is to allow the Attorney General to prosecute whenever important national interests are at stake. Section 707 attains this goal at the expense of the defendant’s rights under the double jeopardy clause. Selective preemption would not require such a sacrifice: when national interests so require, the Attorney General preempts; when they do not, the state may proceed.

CONCLUSION

The Proposed Federal Criminal Code consciously attempts to deal with the problems created by Bartkus and Abbate. It fails, not only because of the discretionary nature of section 707, but also because of the corresponding absence of guidelines and mechanisms for forum choice in cases of concurrent criminal jurisdiction. Selective preemption offers a viable alternative to the haphazard Code provisions relating to interjurisdictional double jeopardy.

112 Jeopardy usually attaches in state proceedings either when the jury is sworn in, or when the first witness is sworn in. See, e.g., Newman v. United States, 410 F.2d 259 (D.C. Cir. 1969); Fonesca v. Judges, 59 Misc. 2d 492, 299 N.Y.S.2d 493 (Sup. Ct. 1965). Generally, jeopardy does not attach until several months after the accusatory instrument is filed. The time delay results from clogged calendars, grand jury hearings, pretrial motions and hearings, and jury selection. Therefore, the federal government will usually have a reasonable time to decide if federal jurisdiction would be more appropriate.

Of course, in cases where the defendant colludes with friendly local officials to procure a speedy and secret acquittal in order to avoid federal jurisdiction, § 709 of the Code would permit federal prosecution. This exception to the general bar of § 707 is available only in clear cases of collusion to avoid federal prosecution.

113 A possible flaw in the preemption plan might become evident when local prejudice exists but the federal crime carries a significantly less severe penalty than the state crime. The state would argue that it could give a fair trial, and that its interest in prosecution would be greater than the federal interest, as evidenced by the more stringent penalty. Such an argument should be seriously considered by federal authorities. However, if the federal government believes that a federal trial would be more appropriate in the case, preemption would not be unreasonable. Again, the alternative is to subject the defendant to double jeopardy. Furthermore, this type of problem would be uncommon because most overlapping federal and state statutes are supplementary in nature—passed by the federal government to assist the states with interstate problems. The penalties are generally similar. See, e.g., 18 U.S.C. § 2113 (1970) (federal bank robbery statute); id. § 241 (if death results from infringement of civil rights, life sentence may be imposed).

In the few cases of overlapping state and federal statutes with widely divergent penalties, the statutes involved usually focus on different policies. In such cases, it is arguable that no bar would exist between the prosecutions because of such policy differences. N.Y. CRIM. PROC. LAW § 40.20(3)(b) (McKinney 1971), MODEL PENAL CODE § 1.10(1)(a) (1962), and PROPOSED CODE §§ 707(a)(3), 708(a)(i) allow dual prosecution in cases where the statutes involved are intended to prevent substantially different kinds of harm.
The Appendix to this note contains a statutory draft offered as an alternative to section 707 of the Code. Two important changes are made in the Code. First, the discretionary clause is removed from Section 707. Thus, upon attachment of jeopardy in state court, the federal prosecution is barred. Second, a new section is added which allows federal preemption of state prosecution before jeopardy attaches. In essence, this new section is a substitute for the old discretionary clause, but the result of the exchange is that rather than trying the defendant twice, a decision must be made by the federal government as to where the prosecution can most appropriately be brought. Naturally, if the federal government decides to yield to the state, section 207 would operate to restrain federal jurisdiction.

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APPENDIX

The following statutory provisions should replace section 707 of the Proposed Federal Criminal Code:

§ 707. Former Prosecution in Another Jurisdiction: When a Bar

When conduct constitutes a federal offense and an offense under the law of a local government or foreign nation, a prosecution by the local government or foreign nation is a bar to a subsequent federal prosecution under either of the following circumstances:

(a) the first prosecution resulted in an acquittal or a conviction as defined in section 704(a) and (c) or was a barring termination under section 704(d) and the subsequent prosecution is based on the same conduct or arose from the same criminal episode, unless (i) the law defining the offense of which the defendant was formerly convicted or acquitted is intended to prevent a substantially different harm or evil from the law defining the offense for which he is subsequently prosecuted, or (ii) the second offense was not consummated when the first trial began; or

(b) the first prosecution was terminated by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed, or vacated and which necessarily required a determination inconsistent with a fact or a legal proposition which must be established for conviction of the offense of which the defendant is subsequently prosecuted.

§ 707A. Federal Preemption in Cases of Concurrent Jurisdiction

When conduct constitutes a federal offense and an offense under the law of a local government, a prosecution by the local government may be barred by the federal government at any time prior to the swearing in of the first witness in the local trial, provided that the
Attorney General of the United States certifies that the interests of the United States would be unduly harmed if the federal prosecution is barred. In this section, "local" means of or pertaining to any of the 50 states of the United States or any political unit within any of the 50 states.

§ 708. Unchanged.