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Lissa Griffin

Elisabeth Haub School of Law at Pace University

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TWO SIDES OF A "SARGASSO SEA": SUCCESSIVE PROSECUTION FOR THE "SAME OFFENCE" IN THE UNITED STATES AND THE UNITED KINGDOM

Lissa Griffin *

I. INTRODUCTION

The Fifth Amendment to the United States Constitution commands that "no person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb"¹ The origin of this clause dates back to Roman times.² Nevertheless, the double jeopardy protection is "one of the least understood and, in recent years, one of the most frequently litigated provisions of the Bill of Rights."³ Indeed, despite the straightforward language of the clause itself, Chief Justice Rehnquist has characterized the Supreme Court of the United States's double jeopardy jurisprudence as "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator."⁴

In fact, that is so. The Supreme Court's double jeopardy cases are doctrinally inconsistent and analytically confusing, and the results are often unprincipled. Indeed, in no other area of consti-

* Professor of Law, Pace University School of Law. B.A., University of Michigan, Ann Arbor, Michigan, 1972; Law Clerkship pursuant to Rule 520.5 of the Rules of the New York State Court of Appeals, 1973-1977. The author wishes to thank Professor Bennett L. Gershman for his critique of this article. The author also wishes to thank the Pace University School of Law Faculty Research Fund and the Pace London Program for their financial support during the preparation of this article.

1. U.S. CONST. amend. V.

2. See George C. Thomas III, *An Elegant Theory of Double Jeopardy*, 1988 U. ILL. L. REV. 827, 836-37 (1988). For a more thorough treatment of the history of double jeopardy see JAY A. SIGLER, *DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY* 1-37 (1969).

3. *Whalen v. United States*, 445 U.S. 684, 699 (1980) (Rehnquist, J., dissenting).

4. *Albernaz v. United States*, 450 U.S. 333, 343 (1981). "Sargasso" is defined as "a mass of floating vegetation." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1043 (1988).

tutional jurisprudence has the Court so frequently overruled or substantially modified recently created doctrine.

The principal confusion centers on the concept of "same offence." The Court has used three different approaches to interpreting the meaning of this term: a "same-elements" test,⁵ a "same-conduct" test,⁶ and a "same transaction" test.⁷ The selection of a particular test is important because each test either expands or contracts the protection against prosecutorial manipulation in the charging process, and thereby affords a defendant protection against repeated prosecution for alleged criminal conduct.

The narrowest approach adopted by the Court is the so-called "same-elements" test.⁸ Under this test, a court examines the statutory definition of the crimes at issue to determine if they have the same elements.⁹ If all of the elements of one crime are contained within the elements of another crime, the crimes constitute the same offense.¹⁰ For example, armed robbery and robbery would be the same offense, because robbery has no element that is not contained in armed robbery. By the same analysis, armed robbery and bank robbery are not the same offense because each one has an element that the other does not have: one requires the defendant to be armed, and the other requires that the defendant rob a bank. The "same-elements" test offers a defendant the narrowest protection against repeated prosecutions, because it permits a prosecutor to prosecute a defendant following an initial prosecution so long as the crimes have different elements, even though they are based on exactly the same facts.¹¹ Piecemeal litigation is still permitted.

The Court has also adopted a much broader approach to the definition of "same offence" by applying the so-called "same-conduct" test.¹² This test does not examine statutory elements,

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

6. *Id.* at 697.

7. *See Ashe v. Swenson*, 397 U.S. 436, 453-54 (1970) (Brennan, J., concurring); *see also Thompson v. Oklahoma*, 429 U.S. 1053 (1977) (Brennan, J., dissenting) (objecting to denial of certiorari).

8. *Dixon*, 509 U.S. at 696-97.

9. *Id.*

10. *Id.*

11. *See id.*

12. *Id.*

but rather examines the conduct underlying charges alleged in two proceedings.¹³ Under this test, even if the two charges have different elements, a second prosecution is barred if, in order to prove the defendant's guilt at a second proceeding, the prosecution would be required to prove a crime for which the defendant has already been convicted or acquitted.¹⁴ For example, if a defendant has been convicted of armed robbery and is later charged with bank robbery based on the same criminal transaction, the second prosecution would be barred if the prosecution had to prove the same robbery twice. The "same-conduct" test is a broader protection against reprosecution because it focuses on the defendant's actual conduct and what will be proven at each prosecution, rather than on the statutory elements of crimes.¹⁵ Piecemeal litigation is thus more effectively prevented.

Finally, at least two Supreme Court justices have interpreted "same offence" to mean "same transaction."¹⁶ Under this test, which was endorsed by Justices Brennan and Marshall but has never been adopted by the Court, all crimes arising out of a single criminal transaction are deemed to be the same.¹⁷ Thus, for example, if a defendant enters a bank, displays a gun, steals money, and assaults a guard in the process, the armed robbery, bank robbery, larceny, and assault violations he could be charged with all would be considered the same offense and would be required to be charged and tried together. This test is the broadest double jeopardy protection against piecemeal litigation.

The Court's difficulty in defining "same offence" consistently is not entirely surprising. There is very little historical evidence of the Framers' intention in using that term.¹⁸ Existing at that time were the common law English doctrines of *autrefois acquit* and *autrefois convict*, which clearly were intended to be included in the constitutional double jeopardy protection.¹⁹ However, the

13. *Id.*

14. *Id.*

15. *See id.*

16. *See Ashe v. Swenson*, 397 U.S. 436, 453-54 (Brennan, J., concurring).

17. *Id.*

18. Susan R. Klein, *Double Jeopardy's Demise*, 88 CAL. L. REV. 1001, 1002 (2000) (reviewing GEORGE C. THOMAS III, *DOUBLE JEOPARDY: THE HISTORY, THE LAW* (1998)).

19. *Brown v. Ohio*, 432 U.S. 161, 165 (1977). Under these common law pleas, discussed at length *infra* Part II.A.2 and accompanying text, a second prosecution was barred for any offense of which the defendant had previously been convicted or acquitted, with "offense" being defined as the same offense in law and fact.

problems faced by the modern Court in defining the scope of this protection were not present when the Constitution was ratified, because at that time there were very few statutory crimes.²⁰ So, because criminal conduct was defined by only a small number of statutory crimes, the “same-elements” test, the “same-conduct” test, and the common law pleas were virtually synonymous. For example, if a defendant hit someone over the head with a gun and stole his money, he would be charged with robbery; there was no option to charge him with robbery, possession of a weapon, and larceny. In this circumstance, the term “same offence” was probably intended to “[prevent] the government from recharging a defendant with a particular theft because it was dissatisfied with an acquittal on that theft.”²¹

However, over the last two hundred years this simple system of criminal charging has undergone drastic changes. The number of crimes has increased, many crimes overlap, and there has been a huge proliferation of government agencies with the power to prosecute. These developments have seriously increased the risk that a defendant could be subjected to multiple prosecutions for the same act and have complicated the search for a definition of “same offence” that would protect the interests underlying the double jeopardy clause.

It is against this background that the Court has struggled to define the term “same offence.” Initially the Court adopted the “same-elements” test,²² then moved gradually toward articulating a “same-conduct” test, which it ultimately adopted.²³ However, the Court quickly overruled itself, disavowed this new test, and returned to the “same-elements” test.²⁴ Having re-settled on this narrow test, the Court is still divided about how to apply it, creating substantial confusion in the lower federal courts.²⁵

20. *See id.*

21. Klein, *supra* note 18, at 1002.

22. Blockburger v. United States, 284 U.S. 299, 304 (1932).

23. Grady v. Corbin, 495 U.S. 508, 510, 521 (1990).

24. United States v. Dixon, 509 U.S. 688, 704–05, 711 (1993).

25. Compare United States v. Delgado, 256 F.3d 264, 270 (5th Cir. 2001) (requiring examination of indictments), and Sharpton v. Turner, 264 F.2d 1284, 1288 (2d Cir. 1992) (applying a similar test), with United States v. Arlt, 252 F.3d 1032, 1034 (9th Cir. 2001) (examining statutory definition of the relevant changes rather than allegations of the indictment), and United States v. Liller, 999 F.2d 61, 63 (2d Cir. 1993) (applying the “same-elements” test to allegations of the indictment).

Part of the Supreme Court's difficulty may arise from its exclusive focus on the Double Jeopardy Clause as the sole constitutional protection against successive prosecution.²⁶ The availability of other constitutional protections has largely been ignored. However, the Due Process Clause appears to offer protection against arbitrary or unfair prosecutorial manipulation of the charging process.²⁷ Indeed, the Supreme Court has recognized due process protection against one type of improperly motivated re prosecution—cases in which the prosecution retaliates against a defendant for invoking his or her constitutionally guaranteed procedural rights.²⁸ The Court has not applied this protection where the prosecutor's motivation is to harass, oppress, or get a second chance at conviction.²⁹ On the other hand, several state courts have recognized and invoked an inherent judicial power to bar vexatious or unfair re prosecution.³⁰

The approach by the United Kingdom to successive prosecution for the same offense offers an important contrast. The United Kingdom's definition of "same offence" is analytically consistent and doctrinally sound. English courts apply the same narrow legal protection against double jeopardy under the doctrines of *autrefois acquit* and *autrefois convict*, as does the U.S. Supreme Court.³¹ However, this core "same-elements" rule is supplemented by a broad judicial discretion to bar criminal proceedings when a successive prosecution would constitute an "abuse of process."³² Indeed, prosecution of a defendant in the United Kingdom for different offenses based on the same conduct as in a prior prosecution is presumptively improper as vexatious and harassing, and, in the absence of special circumstances, usually will be forbidden.³³ A second prosecution for a different offense based on sepa-

26. See e.g., *Dixon*, 509 U.S. at 711; *Grady*, 495 U.S. at 516–23; *Blockburger*, 284 U.S. at 304.

27. For a concise, complete, and articulate discussion of a supplemental due process protection against successive prosecution, see Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807 (1997).

28. See *Blackledge v. Perry*, 417 U.S. 21 (1974); *North Carolina v. Pearce*, 395 U.S. 711 (1969).

29. See *infra* notes 241–47 and accompanying text.

30. See, e.g., *Commonwealth v. Smith*, 615 A.2d 321 (Pa. 1992).

31. See, e.g., *Connelly v. Dir. of Pub. Prosecutions*, [1964] A.C. 1254 (1963), discussed *infra* Part III.B.1.

32. *Id.*

33. *R. v. Beedie*, [1998] Q.B. 356 (Eng. C.A. 1997). Moreover, there is an even stronger presumption against a second prosecution where the later offense is an aggravated form of

rate facts may also be prohibited under the abuse of process doctrine, but the burden of proof to demonstrate unfairness in this circumstance remains on the defendant.³⁴

Part II of this article analyzes the U. S. constitutional law interpreting the concept of "same offence." Included is a survey of the Supreme Court's attempts to interpret constitutional text in order to provide adequate protection for the underlying double jeopardy interest against vexatious reprosecutions, which have frequently produced inconsistent and illogical results. Part III of this article analyzes U.K. law relating to the concept of "same offence," where the same narrow double jeopardy protection adopted by the U.S. Supreme Court is supplemented with a broad discretion to prevent unfair successive prosecution that constitutes an abuse of process. Part IV draws lessons from a comparison of U.S. and U.K. law that might serve to rationalize and clarify the U.S. Supreme Court's jurisprudence by supplementing the narrow same-elements interpretation of the Double Jeopardy Clause with a due process or supervisory-power protection against oppressive multiple prosecutions.

II. UNITED STATES

A. *The "Same-Elements" Test*

1. *Blockburger v. United States*

In *Blockburger v. United States*,³⁵ the Supreme Court addressed for the first time the double jeopardy standard for determining whether two offenses are the "same offence." In *Blockburger*, the defendant was convicted of two separate offenses: (1)

a lesser charge that previously resulted in acquittal or conviction. *See R. v. Elrington* [1861] 1 B. & S. 688, 696 ("[W]hether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form."); *see also R. v. Forest of Dean Justices*, [1990] R.T.R. 228, 239 (referring to the "almost invariable [] rule that where a person is tried on a lesser offence he is not to be tried again on the same facts for a more serious offence").

34. *Hui Chi-Ming v. R.*, [1992] 1 A.C. 34, 57 (P.C. 1991) (appeal taken from Hong Kong).

35. 284 U.S. 299 (1932).

selling drugs without a written order;³⁶ and (2) selling drugs not in the original stamped package.³⁷ The issue for the Court was whether the defendant could be given consecutive jail sentences for these two crimes.³⁸ The Court held that when the same conduct or transaction establishes a violation of two statutory provisions, the offenses are not the same offense if “each statute requires proof of an additional fact which the other does not”³⁹

In *Blockburger*, each statutory offense had an element that the other did not.⁴⁰ The first offense included the element of the sale of drugs “not in pursuance of a written order,” and the second offense included as an element the sale of drugs “not in or from the original stamped package.”⁴¹ Accordingly, the Court held that the imposition of consecutive sentences did not violate the Fifth Amendment.⁴² In short, *Blockburger* limited the concept of “same offence” in the Double Jeopardy Clause to the statutory definition of the crime as enacted by the legislature.⁴³

2. Lesser Included Offenses

In *Brown v. Ohio*,⁴⁴ the Court expanded the *Blockburger* defini-

36. *Id.* at 301; see also Harrison Narcotic Act, Pub. L. No. 63-223, ch. 1, 38 Stat. 785, 786 (1914), amended by Pub. L. No. 65-254, ch. 18, 40 Stat. 1057, 1131 (1919).

37. *Blockburger*, 284 U.S. at 301.

38. *Id.* at 304.

39. *Id.*

40. *Id.*

41. *Id.* at 301.

42. See *id.* at 304–05.

43. Contradicting the lesser included offense rule, a defendant may be charged with homicide where he or she has previously been acquitted or convicted of any lesser included offenses of assault or attempted murder where the victim dies after the first conviction or acquittal. *Diaz v. United States*, 223 U.S. 442 (1912). Technically, of course, this violates the *Blockburger* “same-elements” test. The same definition of “same offence,” and thus the same double jeopardy protection, applies in each case. *Brown v. Ohio*, 432 U.S. 161, 166 (1977). Parenthetically, under the *Blockburger* test, it does not matter which charge is tried first and which is tried second; nor does it matter whether the defendant has been acquitted or convicted in the first proceeding. See *Blockburger*, 284 U.S. at 304. This makes no logical sense for two reasons. Although it could be argued that under the Double Jeopardy Clause, the acquitted defendant is entitled to greater protection against re-prosecution because of the risk of a wrongful conviction, the *Blockburger* test is neutral on this question. See *id.* Moreover, it is permissible to try a defendant first for the greater offense, and, if he is acquitted, prohibit successive prosecution of a lesser offense, even though an acquittal could have been based on the absence of the aggravating element.

44. 432 U.S. 161 (1977).

tion of "same offence" to encompass lesser included offenses.⁴⁵ In *Brown*, the defendant was first charged with joyriding, and later charged with stealing an automobile.⁴⁶ The existing Ohio statute defined "joyriding" as "tak[ing], operat[ing], or keep[ing] any motor vehicle without the consent of its owner."⁴⁷ The Ohio Court of Appeals distinguished this joyriding offense from the separate charge of stealing an automobile, which it defined as "operating a motor vehicle without the consent of the owner . . . [with] intent . . . to *permanently* deprive the owner of possession."⁴⁸ In *Brown*, joyriding was a lesser included offense of the stealing charge because it contained no additional elements; for the same reason, the two were the "same offence" under *Blockburger*.⁴⁹ Accordingly, the Court held that the successive prosecution of the two crimes violated the Double Jeopardy Clause.⁵⁰

In support of its extension of "same offence" to offenses that clearly differ in form, the Court distinguished the role of the double jeopardy guarantee in *Blockburger's* multiple punishment context from its role in the *Brown* context of preventing successive prosecutions.⁵¹ The Court explained that in *Blockburger*, its role was to determine legislative intent, while in *Brown* its goal was to provide finality.⁵² Thus, the Court held:

The *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be

45. *Id.* at 168–69.

46. *Id.* at 162–63.

47. *Id.* at 162 n.1 (quoting OHIO REV. CODE ANN. § 4549.04(D) (West 1973) (repealed 1974)).

48. *Id.* at 163 (quoting Ohio Court of Appeals).

49. *Id.* at 167.

50. *Id.* at 170.

51. *Id.* at 166.

52. *Id.* at 165.

Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense. Where successive prosecutions are at stake, the guarantee serves a "constitutional policy of finality for the defendant's benefit." That policy protects the accused from attempts to relitigate the facts underlying a prior acquittal, and from attempts to secure additional punishment after a prior conviction and sentence.

Id. at 165–66 (citations omitted).

barred in some circumstances where the second prosecution requires relitigation of factual issues already resolved by the first.⁵³

The Court cited *Ashe v. Swenson*⁵⁴ and *In re Nielsen*⁵⁵ as authority for the proposition that offenses can be the “same” for successive prosecution purposes even though they would be separate offenses under *Blockburger*.⁵⁶ In *Ashe*, the Court held that the doctrine of collateral estoppel was included within the Fifth Amendment double jeopardy guarantee, thus barring relitigation of an issue of ultimate fact determined in a prior proceeding.⁵⁷ In *Nielsen*, the Court sustained a plea of *autrefois convict*, holding that a conviction of cohabiting with two wives barred a subsequent prosecution for adultery with one of them.⁵⁸ The second charge of cohabitation would not have been barred under *Blockburger*, because each offense contained an element that the other did not.⁵⁹ Nevertheless, the Court construed the goal of the cohabitation statute to prohibit polygamy, so that the adultery was an “incident and part of the unlawful cohabitation” for which the defendant had already been convicted.⁶⁰ Accordingly, the Court held that the two charges were the “same” and sustained the plea of *autrefois convict*.⁶¹

B. The “Same-Conduct” Test

1. Origins of the Test

In *Harris v. Oklahoma*,⁶² the Court broadened the concept of “same offence,” this time beyond the inclusion of lesser offenses.⁶³

53. *Id.* at 166–167 n.6.

54. 397 U.S. 436 (1970).

55. 131 U.S. 176 (1889).

56. *Brown*, 432 U.S. at 167 n.6.

57. *Ashe*, 397 U.S. at 442–46.

58. 131 U.S. at 190–91. Cohabitation is committed if there is a “living or dwelling together as husband and wife.” *Id.* at 186 (quoting *In re Snow*, 120 U.S. 274 (1887)).

59. *Id.* at 180, 185–86. Conviction for adultery required proof that the defendant was married to another, while conviction for cohabitation did not. *Id.* at 180. Conversely, conviction for cohabitation required proof that the defendant lived with more than one woman at the same time, while conviction for adultery did not. *Id.* at 185–86.

60. *Id.* at 187.

61. *Id.*

62. 433 U.S. 682 (1977).

63. See *In re Nielsen*, 131 U.S. at 188.

The defendant was convicted of felony murder based on robbery with firearms and was then indicted and convicted for robbery with firearms based on the same conduct.⁶⁴ The two charges were not the same under *Brown* because, by statutory definition, felony murder does not necessarily include the element of robbery with firearms.⁶⁵ Felony murder merely requires the commission of any one of several enumerated felonies; moreover, robbery with a firearm does not require a death.⁶⁶ Thus, each crime contained an element the other did not, and could be successively prosecuted.⁶⁷ However, the Court held that, “[w]hen . . . conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one.”⁶⁸

The Court explained that the second prosecution was barred because the State conceded that the defendant’s robbery with firearms must be proved at the trial for felony murder in order to obtain a conviction.⁶⁹ Thus, the Court looked not at the statutory definitions of the two crimes, which would have permitted successive prosecution for essentially the same conduct, but at the facts that would be proved at the two proceedings.⁷⁰

Three years later in *Illinois v. Vitale*,⁷¹ the Court took another step toward the adoption of a broad “same-conduct” test. In *Vitale*, a police officer issued a traffic citation to the defendant for failure to reduce speed after the defendant caused a fatal car accident.⁷² He was later convicted and fined on this charge. Subsequently, he was charged with involuntary manslaughter based on his failure to reduce speed.⁷³ On appeal, the Court held that the second prosecution was not barred under the “same-elements” test because the charge of involuntary manslaughter included an

64. *Harris*, 433 U.S. at 682.

65. *Id.*

66. *See Harris v. State*, 555 P.2d 76, 80–81 (Okla. Crim. App. 1976).

67. *Harris*, 433 U.S. at 683.

68. *Id.* at 682–83.

69. *Id.* at 683 (quoting *Nielsen’s* language that a prosecution for a crime that includes various incidents bars a second prosecution for “one of those incidents.”).

70. *See id.*

71. 447 U.S. 410 (1980).

72. *Id.* at 411.

73. *Id.* at 412–13, 412 n.2.

element—causing death—which the failure to reduce speed offense did not.⁷⁴ Conversely, the failure to reduce speed offense included an element—failure to slow a vehicle—that was not encompassed within an involuntary manslaughter charge.⁷⁵ However, consistent with the *Harris* Court's focus on the facts to be proven at the second trial, the Court remanded the case and suggested that the second prosecution would be barred if the prosecution was going to prove manslaughter by proving a failure to slow the vehicle.⁷⁶

[I]t may be that to sustain its manslaughter case the State may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede as much prior to trial. In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under *Brown [v. Ohio]* and our later decision in *Harris v. Oklahoma*.⁷⁷

2. Disavowal of the "Same-Elements" Test

The case envisioned in *Vitale* was presented in *Grady v. Corbin*.⁷⁸ In *Grady*, the defendant drove his car across a double yellow line, injuring one person and killing another.⁷⁹ The defendant was served with two traffic tickets charging him with driving while intoxicated⁸⁰ and failing to keep right of the median.⁸¹ The defendant pleaded guilty to the two offenses, was sentenced to pay a \$350 fine, and had his license revoked for six months.⁸² *Grady* was thereafter indicted for "reckless manslaughter, second-degree vehicular manslaughter, and criminally negligent homicide . . ."⁸³ When the prosecution conceded that to prove the charges it would rely on "(1) operating a motor vehicle on a public

74. *See id.* at 416–17.

75. *Id.*

76. *Id.* at 420–21.

77. *Id.* at 420.

78. 495 U.S. 508 (1990).

79. *Id.* at 511.

80. *Id.*; *see also* N.Y. VEH. & TRAF. LAW § 1192(3) (Consol. 1992).

81. *Grady*, 495 U.S. at 511; *see also* N.Y. VEH. & TRAF. LAW § 1120(a) (Consol. 1992).

82. *Grady*, 495 U.S. at 512–13.

83. *Id.* at 513. These charges were for causing the death. *Id.* He was also indicted for third degree reckless assault for injuring the other passenger, as well as driving while intoxicated. *Id.*

highway in an intoxicated condition, (2) failing to keep right of the median, and (3) driving approximately 45 to 50 miles per hour in heavy rain," the defendant moved to dismiss on double jeopardy grounds.⁸⁴ This motion was denied.⁸⁵

The New York Court of Appeals reversed the lower court's decision,⁸⁶ and the Supreme Court affirmed.⁸⁷ In a five-to-four decision, the Court adopted the suggestion in *Vitale* and created a broad "same-conduct" test: "[T]he Double Jeopardy Clause bars any subsequent prosecution [if,] to establish an essential element of an offense charged in that prosecution, [the government] will prove conduct that constitutes an offense for which the defendant has already been prosecuted."⁸⁸

The Court noted that the narrower "same-elements" test of *Blockburger* "was developed 'in the context of multiple punishments imposed in a single prosecution'"⁸⁹ and was a "rule of statutory construction," a guide to determining whether the legislature intended multiple punishments.⁹⁰ Quoting its decision in *Green v. United States*,⁹¹ the Court explained that successive prosecutions raise additional finality concerns that require a broader protection.⁹²

"The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby sub-

84. *Id.* at 514.

85. *Id.*

86. *Id.*

87. *Id.* at 515.

88. *Id.* at 521.

89. *Id.* at 516 (quoting *Garrett v. United States*, 471 U.S. 773, 778 (1985)).

90. *Id.* at 517 (quoting in part *Missouri v. Hunter*, 459 U.S. 359, 366 (1983)). The majority disagreed with Justice Scalia's contention in dissent that "we have applied the [*Blockburger*] formulation in virtually every case defining the 'same offense' decided since *Blockburger*." *Id.* at 517 n.8 (citing *id.* at 535-36 (Scalia, J., dissenting)). The Court noted that every one of the eight cases cited by Justice Scalia determined the permissibility of cumulative punishment and not the permissibility of successive prosecution. *See id.* at 517 n.8. According to the majority, "[n]one of the cases even suggests that *Blockburger* is the exclusive definition of 'same offence' in the context of successive prosecutions." *Id.*

91. 355 U.S. 184 (1957).

92. *Grady*, 495 U.S. at 518.

jecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity. . . ."⁹³

In adopting a "same-conduct" test, the Court recognized that successive prosecutions give the state an "opportunity to rehearse its presentation of proof, thus increasing the risk of an erroneous conviction for one or more of the offenses charged."⁹⁴ Accordingly, the Court concluded that "[e]ven when a State can bring multiple charges against an individual under *Blockburger*, a tremendous additional burden is placed on that defendant if he must face each of the charges in a separate proceeding."⁹⁵

C. The "Same-Elements" Test Redux

Three terms after *Grady* in *United States v. Dixon*,⁹⁶ the Supreme Court overruled *Grady* in another five-to-four decision and returned to *Blockburger*'s "same-elements" test as the sole definition of "same offence."⁹⁷

In *Dixon*, two defendants, Dixon and Foster, were tried for criminal contempt based on orders prohibiting them from engag-

93. *Id.* (quoting *Green*, 355 U.S. at 187).

94. *Id.* at 518. In support of this connection, the Court cited *Tibbs v. Florida*, 457 U.S. 31 (1982), which states that the Double Jeopardy Clause "prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction." *Grady*, 495 U.S. at 518 (citing *Tibbs*, 457 U.S. at 41). The Court also cited *Ashe v. Swenson*, 397 U.S. 436 (1970), which notes the State's concession that after the defendant's acquittal the prosecution did "what every good attorney would do—he refined his presentation in light of the turn of events at the first trial." *Grady*, 495 U.S. at 518 (citing *Ashe*, 397 U.S. at 447). The Court included *Hoag v. New Jersey*, 356 U.S. 464 (1958) for support as well. *Grady*, 495 U.S. at 518–19. In *Hoag*, after an acquittal, the State called only the witness who had testified most favorably at the first trial and the defendant was convicted. *Grady*, 495 U.S. at 518–19 (citing *Hoag*, 356 U.S. at 471–72).

95. *Id.* at 519. Not surprisingly, the Court in *Grady* analyzed its own precedent and determined that it had not relied exclusively on the *Blockburger* test in the context of multiple prosecutions since 1889. *See id.* at 519–20. The Court interpreted its precedents instead as creating a direct path to the conclusion that "a technical comparison of the elements of the two offenses as required by *Blockburger* does not protect defendants sufficiently from the burdens of multiple trials." *Id.* at 520.

96. 509 U.S. 688 (1993).

97. Later, in *Dixon*, the Court interpreted the same precedents from *Grady* as indicating that it had consistently relied upon *Blockburger* as the only test. *See id.* at 703–04. It is noteworthy that between *Grady* and *Dixon*, the membership of the Court changed. Justices Brennan and Marshall left the Court and Justices Souter and Thomas joined it. In *Dixon*, the *Grady* dissenters became the majority and the *Grady* majority became the dissenters. Significant as well, the parties did not raise the issue of overruling *Grady* with the Court in *Dixon*. Thus, this break with *Grady* occurred *sua sponte*. *See id.*

ing in criminal conduct—the same conduct for which they were later prosecuted.⁹⁸ The trial court released Dixon on bail in an order that required him not to commit “any criminal offense.”⁹⁹ Thereafter, he was arrested and charged with possession of cocaine with intent to distribute and held in contempt.¹⁰⁰ His later motion to dismiss the indictment on double jeopardy grounds was granted, and this ruling was upheld by the District of Columbia Court of Appeals.¹⁰¹

The Supreme Court upheld the dismissal of the possession charges against Dixon, reasoning that the release order incorporated the entire criminal code.¹⁰² Thus, possession of cocaine with intent to distribute became a lesser included offense of the contempt charge, and the prosecution was therefore barred.¹⁰³

Foster was the subject of a civil protection order that arose out of attacks on his estranged wife.¹⁰⁴ The order provided that he not “molest, assault, or in any manner threaten or physically abuse” her.¹⁰⁵ He was acquitted of some counts and convicted of others.¹⁰⁶ When he was later indicted for the same course of conduct, he moved to dismiss the charges on double jeopardy grounds.¹⁰⁷ The motion was denied.¹⁰⁸ The court of appeals reversed and held that the prosecution was barred.¹⁰⁹

The Court upheld the dismissal of the assault charge against Foster because it was incorporated in the Court’s order providing *inter alia* that he not “assault” his wife.¹¹⁰ However, the other four counts—assault with intent to kill and threats to injure or kidnap—were not barred because they required proof of a specific in-

98. *Id.* at 691.

99. *Id.*

100. *Id.* at 691–92.

101. *Id.* at 691–94.

102. *Id.* at 698–700.

103. *See id.* Moreover, because contempt requires both knowledge of the order and the commission of any crime, and because possession is a crime, each offense did not contain an element the other did not. *See id.* at 700. Therefore, under *Blockburger* they were the same offense. *See id.*

104. *Id.* at 692.

105. *Id.*

106. *Id.* at 693.

107. *Id.*

108. *Id.*

109. *See id.* at 693–94.

110. *Id.*

tent that the contempt charge (based on simple assault and threatening “in any manner”) did not.¹¹¹ The prosecution would have been barred under *Grady*, because the government would have relied on the same assault and threats to establish the contempt charge at the later proceeding.¹¹² The Court overruled *Grady*, however, holding that it was “wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy,” lacked “constitutional roots,” and was too difficult to apply.¹¹³ In this case, Justice Scalia, a *Grady* dissenter, wrote the majority opinion.¹¹⁴

111. *Id.* at 700, 702–03. It is important to realize the effect of this holding. For Dixon, the charge of possession of narcotics with intent to sell (which carries a possible fifteen-year sentence) was found to be a lesser included offense of the charge of contempt (which carries a six-month sentence). *Id.* at 700. This is not consistent with any definition of lesser included offense. Moreover, the effect is that the conviction for contempt barred any future prosecution for the drug offense. *See id.* The situation was not as problematic for Foster because, although a prosecution for simple assault was barred, he could still be prosecuted for assault with intent to injure. *See id.* As to both, however, the fact that one crime was intended to vindicate the power of the court and the other was designed to protect the public has no place in the “same-elements” test. *See id.* at 699–700.

112. *See id.* at 703–04.

113. *Id.* at 704. According to Justice Scalia, the adoption of the *Grady* “same-conduct” standard required the creation of several large exceptions, one of which concerned whether conspiracy and the crime that is the object of the conspiracy are the “same offence” for double jeopardy purposes. *Id.* Indeed, there is long-standing Supreme Court authority that “the agreement to do the act is distinct from the act itself.” *United States v. Bayer*, 331 U.S. 532, 542 (1947). Likewise, conspiracy has “ingredients as well as implications, distinct from the completion of the unlawful project,” such that the “commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses.” *Pinkerton v. United States*, 328 U.S. 640, 643–44 (1946); *accord*, *Garrett v. United States*, 471 U.S. 773, 778 (1985); *Iannelli v. United States*, 420 U.S. 770, 777–79 (1975). In *United States v. Felix*, 503 U.S. 378 (1992), the Court relied upon the *Bayer-Pinkerton* precedent and held that a defendant could be successively prosecuted for conspiracy and for a substantive crime that was one of the overt acts alleged to have occurred in furtherance of that conspiracy. *Id.* at 389–90. The *Felix* court reasoned that the lesser included offense exception to “same offence” applies only to a “single course of conduct” and not to the “multilayered conduct” involved in conspiracies and overt acts. *Id.* at 390.

114. *See Dixon*, 509 U.S. at 688. Justice Scalia’s reliance upon *Blockburger* and *Nielsen* to establish the historical pedigree of the “same-elements” test has been described as “awkward.” *See, e.g., Akhil Reed Amar & Jonathan L. Marcus, Double Jeopardy After Rodney King*, 95 COLUM. L. REV. 1, 41 (1995); *see also supra* notes 58–61 and accompanying text. In *Nielsen*, the court stated that “where . . . a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence.” *Nielsen*, 131 U.S. at 188.

Interestingly, as the Court noted later in the *Brown v. Ohio* decision, “strict application of the *Blockburger* test [in *Nielson*] would have permitted imposition of consecutive sentences had the charges been consolidated in a single proceeding.” 432 U.S. 161, 166 n.6. (1977). That is, unlawful cohabitation contains an element (living with more than one

Justice Scalia's opinion in *Dixon* relied largely upon his dissent in *Grady*, in which he had made two textual arguments.¹¹⁵ First, he had defined "offense" as "transgression" or "the [v]iolation or [b]reaking of a [l]aw" and had concluded that the statutory definitions of the crimes were the appropriate basis of comparison.¹¹⁶ Second, Justice Scalia explained that because the clause protects individuals against being "twice put in jeopardy," it presupposes that "sameness" can be determined before jeopardy attaches, i.e., before the second trial.¹¹⁷ Because that was always true under the *Blockburger* test, but was not always true under the *Grady* test, the *Grady* test was not the proper vehicle by which to determine double jeopardy.¹¹⁸

In *Grady*, Justice Scalia had also relied on the historical and practical record of *autrefois acquit* and *autrefois convict* to support his arguments in dissent.¹¹⁹ In England and the colonies, these common law pleas prohibited a second prosecution only if the offenses charged were the same in fact and law.¹²⁰ These principles, according to Justice Scalia, could be equated with the "same-elements" test in *Blockburger*.¹²¹ In addition, Justice Scalia agreed with the basis for Justice O'Connor's dissent in *Grady*, in which she argued that the Court's prior opinion in *Dowling v. United States*¹²² foreclosed the majority's conclusions.¹²³

woman) that adultery does not and adultery contains an element (marriage) that unlawful cohabitation does not. *See id.* Nevertheless, the *Nielsen* court held they were the same offense by concluding that the cohabitation statute required evidence of marriage and sexual intercourse such that adultery became a lesser included offense of unlawful cohabitation. *See id.*; *see also In re Nielsen*, 131 U.S. 176, 188 (1889).

Justice Souter contended in his *Dixon* dissent that this parsing of the statutory language represented a focus on the conduct with which the defendant was being charged and provided no support for Justice Scalia's reliance on the "same-elements" test. *See Dixon*, 509 U.S. at 749-53, 761-63 (Souter, J., dissenting). Whichever view is correct, it does appear that the focus of the *Nielsen* Court was not on a technical reading of the "same-elements" test, but rather on the fairness of successive prosecutions in this context.

115. *See Dixon*, 509 U.S. at 704; *see also Grady v. Corbin*, 495 U.S. 508, 528-29 (1990) (Scalia, J., dissenting).

116. *Grady*, 495 U.S. at 529 (Scalia, J., dissenting).

117. *Id.* (Scalia, J., dissenting).

118. *See Dixon*, 509 U.S. at 704; *Grady*, 495 U.S. at 529-30 (Scalia, J., dissenting).

119. *See Grady*, 495 U.S. at 530 (Scalia, J., dissenting).

120. *Id.* at 530-35 (Scalia, J., dissenting); *see also Illinois v. Vitale*, 447 U.S. 410 (1980); *Harris v. Oklahoma*, 433 U.S. 682 (1977); *Brown v. Ohio*, 432 U.S. 161 (1977); *In re Nielsen*, 131 U.S. 176 (1889).

121. *See Grady*, 495 U.S. at 535-36 (Scalia, J., dissenting).

122. 493 U.S. 342 (1990).

In addition to his textual arguments, Justice Scalia distinguished *Nielsen*, *Brown*, *Harris*, and *Vitale*.¹²⁴ Justice Scalia interpreted *Nielsen's* use of the term "incidents" to refer to "elements," as opposed to conduct,¹²⁵ and discounted as dicta the language from *Brown* and *Harris* stating that there was a test beyond the "same-elements" test.¹²⁶ He claimed that the *Vitale* Court had simply deferred the question of whether a double jeopardy claim based on proof of the same conduct at the second trial could later succeed, and that the answer to that question should now be "no."¹²⁷

Justice Scalia also rejected the *Vitale* Court's reliance on *Brown*, describing the *Brown* decision as "nothing more than a straightforward application of *Blockburger*."¹²⁸ He rejected *Vitale's* reliance on *Harris*, noting that the *Harris* decision was based on the proposition that "conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms."¹²⁹ In *Dixon*, Justice Scalia chose to rely on *Gavieres v. United States*¹³⁰ and *Burton v. United States*,¹³¹

123. See *Grady*, 495 U.S. 524–26 (O'Connor, J., dissenting); see also *id.* at 538–39 (Scalia, J., dissenting). In *Dowling*, a prosecution for bank robbery, evidence that the defendant had committed a prior, similar robbery was admitted under Fed. R. Evid. 404(b). *Dowling*, 493 U.S. at 345. This evidence was admitted on the question of identity and to tie the defendant to the person who had allegedly lent him the getaway car in the second robbery. *Id.* The individual was co-defendant in the first robbery trial, which resulted in an acquittal. *Id.* at 345–46. The *Dowling* Court held that the evidence was not barred by the Double Jeopardy Clause because it did not determine an issue of ultimate fact in the second trial, and because the government was not required to prove the defendant's identity as the first robber beyond a reasonable doubt at the second trial. See *id.* at 347–48. *Grady* only prohibited such proof if it was necessary to prove an essential element of the second charge. See *Grady*, 495 U.S. at 521–22.

124. *Dixon*, 509 U.S. at 705–07.

125. *Id.* at 705 n.10.

126. *Id.* at 706. See *supra* notes 53, 69 and accompanying text.

127. *Grady*, 495 U.S. at 537 (Scalia, J., dissenting).

128. *Dixon*, 509 U.S. at 706.

129. *Id.* at 538 (quoting *Harris*, 433 U.S. at 682). Of course, that is not entirely true; conviction of felony murder can be based on proof of other felonies and does not require proof of armed robbery. See, e.g., MODEL PENAL CODE § 210.2(b) (1962).

130. 220 U.S. 338 (1911). In *Gavieres*, the defendant had been convicted of being drunk in a public place in violation of a city ordinance in Manila. *Id.* at 341. He was then convicted based on the same incident, of threatening or insulting a public official in violation of a provision of the Penal Code of the Philippine Islands. *Id.* The Court held that his double jeopardy rights had not been denied because the two charges were different, even though they involved the same conduct. *Id.* at 345.

131. 202 U.S. 344 (1906). In *Burton*, the defendant, a U.S. Senator, had been convicted of taking money from a corporation, but acquitted of taking money from an individual who

both pre-*Blockburger* cases, to conclude that “the *Blockburger* test (and *only* the *Blockburger* test)” defined “same offence” for double jeopardy purposes.¹³² Finally, responding to Justice Souter’s contention that reliance solely on *Blockburger* violates underlying double jeopardy principles, Justice Scalia suggested that prosecutors “have little to gain and much to lose” from bringing separate prosecutions to perfect their cases.¹³³

Concurring and dissenting in *Dixon*, Chief Justice Rehnquist, joined by Justices O’Connor and Thomas, pointed out that most courts had held that double jeopardy did not prevent conviction for contempt and for the underlying substantive offense,¹³⁴ and that this view “dates back to the English common law.”¹³⁵ Chief Justice Rehnquist thus rejected the notion that the substantive criminal offenses at issue in *Dixon* were lesser included offenses of the crime of contempt.¹³⁶

In a concurring and dissenting opinion, Justice White, joined by Justice Stevens, concluded that the subsequent prosecutions were barred because “the offense at issue in the contempt proceedings were either identical to, or lesser included offenses of, those charged in the subsequent prosecutions.”¹³⁷ Justice White criticized the majority for ignoring the principles underlying the Double Jeopardy Clause, the “central purpose [of which was] to

was an officer of that corporation. *Id.* at 360–65. When the convictions were reversed, the prosecutor brought a new indictment alleging receipt of funds from the corporation. *Id.* The defendant’s argument that his prior acquittal barred the second prosecution was rejected. *Id.* Plainly, the charges were the same in law, but were not the same in fact. Accordingly, the Court stated, “jeopardy is not the same when the two indictments are so diverse as to preclude the same evidence from sustaining both.” *Id.* at 381 (citations omitted).

132. *Dixon*, 509 U.S. at 707–08. Neither *Gavieres* nor *Burton* refer to the *Blockburger* test; both simply reject double jeopardy claims that arise out of the same criminal transaction. See *Gavieres*, 220 U.S. at 338; *Burton*, 202 U.S. at 344. Justice Scalia also asserted that *Grady* had “already prove[n] unstable in application.” *Dixon*, 509 U.S. at 709. He pointed to *United States v. Felix*, 503 U.S. 378 (1992), where the Court held that “a subsequent prosecution for conspiracy to manufacture, possess and distribute methamphetamine” was permissible after “a previous conviction for attempt to manufacture the same substance.” *Id.* According to Justice Scalia, *Felix* required the Court to create a major exception to *Grady*. *Id.* at 709–10. He referred as well to lower court decisions expressing confusion about *Grady* and to two commentators who had concluded that *Grady* had “contributed confusion.” *Id.* at 711, 712 n.16.

133. *Id.* at 710 n.15.

134. *Id.* at 714–15 (Rehnquist, C.J., concurring in part and dissenting in part).

135. *Id.* at 715 (Rehnquist, C.J., concurring in part and dissenting in part) (citations omitted).

136. *Id.* at 714 (Rehnquist, C.J., concurring in part and dissenting in part).

137. *Id.* at 731 (White, J., concurring in the judgment in part and dissenting in part).

protect against vexatious multiple prosecutions.”¹³⁸ Like Justice Blackmun, Justice White dissented from the decision overruling *Grady*.¹³⁹ Justice White argued that it was “injudicious” to overrule *Grady* when that issue had not been raised or considered by the court of appeals or in the petition for certiorari.¹⁴⁰

Justice Blackmun, also concurring and dissenting in part, argued that the prosecutions were not barred, because contempt and the substantive criminal law serve different interests: contempt punishes disobedience to a court order, while the criminal law punishes for an act against the community.¹⁴¹ Justice Blackmun expressed concern that the majority’s holding would handicap trial court’s efforts to protect their own authority.¹⁴² He also dissented from the judgment overruling *Grady*, and criticized the majority for “so cavalierly [overruling] a precedent that [was] barely three years old and that [had] proved neither unworkable nor unsound.”¹⁴³

Justice Souter, joined by Justice Stevens, concurred in the judgment in part and dissented in part.¹⁴⁴ Like Justices Blackmun and White, Justice Souter believed the majority had “read our precedents so narrowly as to leave them bereft of the principles animating [the double jeopardy] protection.”¹⁴⁵ Justice Souter argued that *Grady* “amount[ed] merely to an expression of just those animating principles”¹⁴⁶ and should not have been overruled.¹⁴⁷ Moreover, according to Justice Souter, the “same-elements” test is merely a method of statutory construction and is not the only test for preventing successive prosecutions.¹⁴⁸ The

138. *Id.* at 735 (White, J., concurring in the judgment in part and dissenting in part).

139. *Id.* at 740 (White, J., concurring in the judgment in part and dissenting in part).

140. *Id.* (White, J., concurring in the judgment in part and dissenting in part).

141. *Id.* at 742 (Blackmun, J., concurring in the judgment in part and dissenting in part).

142. *Id.* at 742–43 (Blackmun, J., concurring in the judgment in part and dissenting in part).

143. *Id.* at 741 (Blackmun, J., concurring in the judgment in part and dissenting in part).

144. *Id.* at 743 (Souter, J., concurring in the judgment in part and dissenting in part).

145. *Id.* at 744 (Souter, J., concurring in the judgment in part and dissenting in part).

146. *Id.* (Souter, J., concurring in the judgment in part and dissenting in part).

147. *Id.* (Souter, J., concurring in the judgment in part and dissenting in part). Justice Souter also joined in Part I of Justice White’s opinion, and would have held, as did Justice White, that the prosecution of Dixon and of Foster were barred in the entirety. *Id.* (Souter, J., concurring in the judgment in part and dissenting in part).

148. *Id.* at 745 (Souter, J., concurring in the judgment in part and dissenting in part).

Double Jeopardy Clause requires that the government also meet the “same-conduct” test established in *Grady*.¹⁴⁹

In addition to the Court’s division concerning the return to the “same-elements” test, the Court was sharply divided about how to apply it. Justices Scalia and Kennedy would have applied the test to the terms of the court’s order and not to the statutory definition of the crime of contempt.¹⁵⁰ Under the statutory definition, each offense would have an element the other does not, and, thus, would not be the same offense for double jeopardy purposes.¹⁵¹ Chief Justice Rehnquist, joined by Justices O’Connor and Thomas, would have applied the test to the statutory elements of contempt, which would have permitted successive prosecutions.¹⁵² Finally, Justices White, Stevens, and Souter would have disregarded the court’s contempt orders and the statutory definition of contempt and compared the substantive offenses alleged in both prosecutions.¹⁵³

III. UNITED KINGDOM

Protection against successive prosecution under United Kingdom law is afforded in two different ways: first, there is a core “same-elements” protection that is based on the pleas of *autrefois acquit* and *autrefois convict*; second, this narrow protection is supplemented by a broad judicial discretion to stay successive prosecutions under the doctrine of “abuse of process.”¹⁵⁴

149. *Id.* at 745–50 (Souter, J., concurring in the judgment in part and dissenting in part).

150. *Id.* at 697.

151. *Id.* These Justices, relying on *Harris*, likened contempt to felony murder, where various felonies are incorporated into the felony murder statute and are thus a kind of lesser included offense. *Id.* at 698.

152. *Id.* at 714–15 (Rehnquist, C.J., concurring in part and dissenting in part).

153. *Id.* at 734 (White, J., concurring in the judgment in part and dissenting in part).

154. In England, a recent Law Commission Consultation Paper has recommended (1) an exception to the rule against retrial after an acquittal to permit retrial where significant new evidence of guilt emerges after the acquittal; and (2) broadening of the rule permitting retrial after a tainted acquittal. THE LAW COMMISSION, CONSULTATION PAPER NO. 156: DOUBLE JEOPARDY ¶¶ 5.17, 6.2 (1999). For a thorough discussion of the government’s proposals see Ian Dennis, *Rethinking Double Jeopardy: Justice and Finality in Criminal Process*, 2000 CRIM. L. REV. 933. The Law Commission has also recommended enlarging the circumstances upon which the prosecution may appeal from an acquittal. THE LAW COMMISSION NO. 267, DOUBLE JEOPARDY AND PROSECUTION APPEALS, ¶ 1.19 (Lord High

A. Autrefois Convict *and* Autrefois Acquit

As in the United States, in the United Kingdom the common law pleas of *autrefois convict* and *autrefois acquit*, the same pleas that the U.S. Supreme Court held to be synonymous with the *Blockburger* test,¹⁵⁵ bar retrial only of offenses that are the same in fact and in law.¹⁵⁶

Application of the pleas focuses on the statutory definition of the crimes and bars successive prosecution after acquittal or conviction for (1) the same statutory offense; and (2) any offense of which the defendant could have been convicted, i.e., one for which he necessarily was “in peril” at the first trial.¹⁵⁷ It thus would bar prosecution of a lesser included offense following conviction for a more serious charge,¹⁵⁸ but it would not bar prosecution of a

Chancellor 2001). These recommendations were largely in response to an acquittal in the Stephen Lawrence case, a racially-motivated homicide case that was widely condemned. *Id.* ¶ 1.5.

For additional sources on the English protection against successive prosecution see ANDREW L.-T. CHOO, *ABUSE OF PROCESS AND JUDICIAL STAYS OF CRIMINAL PROCEEDINGS* (Clarendon Press 1993); MARTIN. L. FRIEDLAND, *DOUBLE JEOPARDY* (1969); ROSEMARY PATTENDEN, *ENGLISH CRIMINAL APPEALS 1844-1994* (Clarendon Press 1996); ROSEMARY PATTENDEN, *JUDICIAL DISCRETION AND CRIMINAL LITIGATION* (Clarendon Press 1990).

155. See *United States v. Dixon*, 509 U.S. 688, 704 (1993).

156. *Connelly v. Dir. of Pub. Prosecutions*, [1964] A.C. 1254, 1358 (1963)

157. Criminal Law Act, 1967, c. 58 § 6(3) (Eng.) defines the concept of “in peril” as follows:

Where, on a person’s trial on indictment for any offence except treason or murder, the jury find him not guilty of the offence specifically charged in the indictment, but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence.

Id. It is difficult to determine whether a charge is necessarily included in a prior charge. The rule would not bar a second prosecution for assault after a conviction for robbery, because robbery can be committed in England through blackmail and other non-assaultive conduct. However, it would bar a prosecution for larceny after a conviction for robbery, because theft is necessarily included in robbery. Similarly, it would not bar a prosecution for burglary with intent to commit theft after a prosecution for burglary and theft, because burglary with intent is not necessarily included in burglary and theft (the defendant need not have had a requisite intent at the time of entering the premises). Thus, like the *Blockburger* test, this test can be circumvented by a prosecutor choosing to allege only part of the criminal event in the first indictment or by carefully selecting the charges to bring based on a single criminal incident. This affords a defendant a very narrow protection.

158. The common law pleas would not bar retrial of a greater offense after a lesser included offense, because the defendant could not have been in peril of the greater offense at trial. To prevent this, the English courts have developed the rule that “whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the

greater offense where a defendant is convicted of a nonfatal charge and the victim subsequently dies.¹⁵⁹ Some courts have barred prosecution for an offense that is substantially the same as a prior offense.¹⁶⁰ This is an inexact, *sui generis* test that provides little guidance for future cases.

B. *Abuse of Process*—*Connelly v. Director of Public Prosecutions*

The English House of Lords has recognized that the common law pleas are too narrow to provide sufficient protection against successive prosecution. Rather than use the approach taken by the U.S. Supreme Court and broaden the construction of these pleas, the House of Lords has recognized a broad judicial discretion to prevent successive prosecution that is deemed to constitute an abuse of process.¹⁶¹

As noted above, the common law pleas bar reprosecution for crimes that are the same in law and fact or any lesser included offenses. In *Connelly*, the House of Lords analyzed the courts' power to bar successive prosecution for crimes that are not the same in law but that arise out of the same facts.¹⁶²

In *Connelly*, the defendant and others were charged in two indictments with murder and robbery with aggravation, arising out of an office robbery in which an employee was killed.¹⁶³ According to English practice, which is intended to protect the accused, the

same facts in a more aggravated form." *R. v. Elrington*, [1861] 1 B. & S. 688, 696. But see *R. v. Barron*, [1914] 2 K.B. 570 (Eng. C.A.), where a defendant acquitted of sodomy was convicted of gross indecency with another male. *Id.* at 570. The graver charge of sodomy involved gross indecency and other elements, and thus acquittal of sodomy did not involve acquittal of every part of it. *Id.* at 576.

159. *R. v. Thomas*, [1950] 1 K.B. 26, 29 (Eng. C.A. 1949).

160. See, e.g., *Dir. of Pub. Prosecutions v. Humphrys*, [1977] A.C. 1 (1976).

161. *Id.* Since *Connelly*, an abuse of process has been defined as "something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceeding." *Hui Chi-Ming v. R.*, [1992] 1 A.C. 34, 57 (P.C. 1991) (appeal taken from Hong Kong). It may be an abuse of process if "the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality," *R. v. Derby Crown Court ex parte Brooks*, 148 J.P. 609 (1984), or if the defendant will be prejudiced by delay. Abuse of process is not limited to cases in which the defendant cannot obtain a fair trial, but applies also where it would be unfair to try the defendant.

162. *Connelly* [1964] A.C. at 1295.

163. *Id.* at 1257.

murder charge was tried alone.¹⁶⁴ The defense presented an alibi and also argued that if the defendant had been present, he had no intent to murder; however, the defendant was convicted.¹⁶⁵ Thereafter, the judge directed that the indictment for robbery be stayed.¹⁶⁶ Connelly appealed, and the Court of Criminal Appeal held that the judge's instruction on the question of whether or not he had been present was in error.¹⁶⁷ As required by English law, the court of appeal entered a judgment of acquittal.¹⁶⁸ However, the court also granted leave for the prosecution to proceed on the robbery indictment.¹⁶⁹

When the robbery indictment came before the court, the defendant entered a plea of *autrefois acquit*.¹⁷⁰ In accordance with English practice, that plea was presented to the jury and rejected.¹⁷¹ The judge was then asked to exercise his discretion to bar the re prosecution as abuse of process, but he held that he had no such discretion.¹⁷² He expressed the opinion that it would be wrong for the Crown to prosecute, but the Crown proceeded nonetheless, and the defendant was convicted.¹⁷³ In the House of Lords, Lord Devlin wrote the majority opinion.¹⁷⁴ He held that the doctrines of *autrefois acquit* and *autrefois convict* are narrow and only prevent successive prosecution for offenses that are the same in fact and law.¹⁷⁵ This is the "same-elements" test of *United States v.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 1257–58.

168. *Id.* at 1259.

169. *See id.* at 1338.

170. *Id.* at 1339.

171. *Id.*

172. *Id.*

173. *Id.*

174. Reflecting a *Dixon*-like split of opinion, the decision of the five Lords contains four opinions. *See id.* at 1254–1368. Thereafter, the English courts misunderstood *Connelly* and for many years interpreted Lord Morris's opinion as the majority opinion, which would have held that the common law pleas were the only bar to successive prosecution on the same facts. *See, e.g., R. v. Moxon-Tritsch*, [1988] Crim. L.R. 46, 47 (holding that "Lord Morris's principles set out in *Connelly v. D.P.P.* correctly represented the law"). Indeed, a leading commentator had reached the same erroneous conclusion. *See* ARCHBOLD'S CRIMINAL EVIDENCE, PLEADING & PRACTICE, ¶ 4-117 (1997), *discussed in R. v. Beedie*, [1998] Q.B. 356, 361 (Eng. C.A. 1997).

175. *Connelly* [1964] A.C. at 1339–40.

The word "offence" embraces both the facts which constitute the crime and the legal characteristics which make it an offence. For the doctrine to apply it must be the same offence both in fact and in law. Robbery is not in law the

Dixon.¹⁷⁶ In addition, however, Lord Devlin recognized an inherent judicial power to prevent abuse of process through re-prosecution stating:

[T]he judges of the High Court have in their inherent jurisdiction, both in civil and in criminal matters, power (subject of course to any statutory rules) to make and enforce rules of practice in order to ensure that the court's process is used fairly and conveniently by both sides. I consider it to be within this power for the court to declare that the prosecution must as a general rule join in the same indictment charges that "are founded on the same facts, or form or are a part of a series of offences of the same or a similar character" (I quote from the Indictments Act, 1915, Schedule I, rule 3 . . .); and power to enforce such a direction . . . by staying a second indictment if it is satisfied that its subject-matter ought to have been included in the first.¹⁷⁷

Accordingly, the Lords adopted the following rule:

[A] judge should stay an indictment . . . when he is satisfied that the charges therein are founded on the same facts as the charges in a previous indictment on which the accused has been tried, or form or are a part of a series of offences of the same or a similar character as the offences charged in the previous indictment. He will do this because as a general rule it is oppressive to an accused for the prosecution not to use rule 3 [England's joinder statute] where it can properly be used. But a second trial on the same or similar facts is not always and necessarily oppressive, and there may in a particular case be special circumstances which make it just and convenient in that case. The judge must then, in all the circumstances of the particular case, exercise his discretion as to whether or not he applies the general rule.¹⁷⁸

In *Connelly*, of course, the prosecution had followed an established practice of trying murder charges separately from any other charges—the House of Lords disapproved of that practice and held that it should be discontinued.¹⁷⁹ But since the prosecu-

same offence as murder (or as manslaughter, of which the accused could also have been convicted on the first indictment) and so the doctrine does not apply in the present case.

Id.

176. 509 U.S. 688 (1993).

177. *Connelly* [1964] A.C. at 1347.

178. *Id.* at 1359–60. The House of Lords gave as examples of general circumstances cases in which a judge would have severed charges if they had been joined and where the accused has obtained an order of severance. *Id.* at 1360.

179. *Id.* at 1360–61.

tion had relied upon a well-established practice, there was no abuse of process.¹⁸⁰

In so holding, Lord Devlin made clear that the judicial discretion to bar reprosecution is founded on a general power “to prevent unfairness to the accused . . . [particularly with] reference to the framing of indictments.”¹⁸¹ Also, in language similar to that of the U.S. Supreme Court in *United States v. Green*,¹⁸² Lord Devlin noted, “if the power of the prosecutor to spread his case over any number of indictments was unrestrained there could be grave injustice to defendants.”¹⁸³ Lord Devlin also relied upon “the courts’ duty to conduct their proceedings so as to command the respect and confidence of the public,”¹⁸⁴ in language quite similar to that used by the U.S. courts in describing their inherent power.

180. *Id.*

181. *Id.* at 1347. The House of Lords cited the requirements of disclosure of exculpatory evidence as another example of this discretion. *Id.* at 1361. This is the English equivalent of *Brady v. Maryland*, 373 U.S. 83 (1963), which was based on due process principles.

182. 355 U.S. 184 (1957). In *Green*, the Supreme Court stated:

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

Id. at 187–88.

183. *Connelly* [1964] A.C. at 1347. Lord Devlin stated that “even the simplest set of facts almost invariably gives rise to more than one offence. . . .” *Id.* at 1353. He continued, stating that:

[I]f the Crown were to be allowed to prosecute as many times as it wanted to do on the same facts, so long as for each prosecution it could find a different offence in law, there would be a grave danger of abuse and of injustice to defendants. The Crown might, for example, begin with a minor accusation so as to have a trial run and test the strength of the defence . . . [or] the Crown might keep a count up its sleeve. Or a private prosecutor might seek to harass a defendant by multiplicity of process in the different courts.

Id.

184. *Id.* The House of Lords stated:

Suppose that in the present case the appellant had first been acquitted of robbery and then convicted of murder. Inevitably doubts would be felt about the soundness of the conviction. That is why every system of justice is bound to insist upon the finality of the judgment arrived at by a due process of law. It is quite inconsistent with that principle that the Crown should be entitled to re-open again and again what is in effect the same matter.

Id.

Lord Devlin rejected the suggestion that, instead of recognizing a broad abuse of process protection, the Lords should expand the scope of the common law pleas.¹⁸⁵ He stated:

If I had felt that the doctrine of *autrefois* was the only form of relief available to an accused who has been prosecuted on substantially the same facts, I should be tempted to stretch the doctrine as far as it would go. But, as that is not my view, I am inclined to favour keeping it within limits that are precise.¹⁸⁶

Finally, in contrast to Justice Scalia's sentiment in *Dixon* that there was little danger of prosecutorial rehearsing because there was little incentive to do so,¹⁸⁷ Lord Devlin rejected the contention that the Crown could be trusted to use its resources fairly by the sheer press of business, stating that:

The fact that the Crown has . . . generally behaved with great propriety in the conduct of prosecutions, has up till now avoided the need for any consideration of this point. Now that it emerges, it is seen to be one of great constitutional importance. Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused.¹⁸⁸

In a separate opinion, Lord Pearce agreed that there was an inherent power to prevent vexatious successive prosecution and that there was "no reason" why the pleas of *autrefois* should exhaust the inherent power of the courts.¹⁸⁹ He traced English precedent upholding the courts' powers to prevent successive prosecutions upon the same facts in order to avoid "abuse and injustice."¹⁹⁰ Lord Pearce also noted that "[i]nstead of attempting to

185. *See id.* at 1340.

186. *Id.* It could be said, of course, that the failure to recognize any supplemental protection against successive prosecution beyond the common law pleas has forced the United States Supreme Court to wrestle with the scope of the pleas, pushing and prodding them and yielding inconsistent and sometimes unprincipled and illogical results.

187. *United States v. Dixon*, 509 U.S. 688, 710 n.15 (1993).

188. *Connelly* [1964] A.C. at 1354.

189. *Id.* at 1361-62.

190. *Id.*; *see, e.g.*, *Wemyss v. Hopkins*, [1875] L.R.-Q.B. 378. In *Wemyss*, the defendant was tried for and convicted of driving a carriage so that he struck a horse causing "hurt and damage" and was later convicted of unlawfully assaulting, striking, and otherwise abusing the same injured party. *Id.* at 378-79. The second conviction was quashed, not on the basis of *autrefois convict*, but because one could not be convicted twice for the same

enlarge the pleas beyond their proper scope, it is better that the courts should apply to such cases an avowed judicial discretion based on the broader principles which underlie the pleas."¹⁹¹

In contrast to Lords Reid, Devlin, and Pearce, Lord Morris of Borth-y-Gest, joined by Lord Hodson, would have limited the protection against successive prosecution to the narrow common law pleas.¹⁹² These Lords found no additional judicial power to order an indictment to be stayed on the ground of abuse of process.¹⁹³

Connelly was misinterpreted for many years.¹⁹⁴ Thirty-three years after the decision, in *Regina v. Beedie*,¹⁹⁵ the Court of Appeal clarified *Connelly*.¹⁹⁶ In *Beedie*, a young female tenant died of carbon monoxide poisoning due to her landlord's failure to maintain a gas heater.¹⁹⁷ The landlord was prosecuted by the Health and Safety Executive.¹⁹⁸ The landlord pled guilty, was granted a conditional discharge, and was ordered to pay costs.¹⁹⁹ He was then charged by the Crown Prosecution Service with manslaughter based on the same facts.²⁰⁰

The court ultimately quashed the conviction.²⁰¹ The court based its decision on *Connelly* and held that the prosecution was not barred by the plea of *autrefois convict* because the charges were different in law.²⁰² However, because *Connelly* established a presumption against the retrial of different charges on the same facts absent special circumstances, and because the court found no such special circumstances existed, it quashed the conviction.

matter. *Id.* at 380–81. See also *R. v. Miles*, [1890] 24 Q.B.D. 423 (finding that a person convicted of an assault and discharged on promise of good behavior cannot be convicted a second time for the same assault); *R. v. King*, [1897] 1 Q.B. 214 (1896) (holding that a person convicted for obtaining goods under false pretenses cannot afterwards be convicted for larceny of the same goods).

191. *Connelly* [1964] A.C. at 1364.

192. *Id.* at 1305–06. On this analysis, the crimes of robbery with aggravation and murder are two distinct crimes since there could be robbery without killing and killing without robbery.

193. *Id.* at 1305.

194. See *supra* note 173.

195. [1998] Q.B. 356 (Eng. C.A. 1997).

196. *Id.* at 358.

197. *Id.* at 359.

198. *Id.*

199. *Id.*

200. See *id.* at 360.

201. *Id.* at 367.

202. *Id.* at 360–61.

tion.²⁰³ The fact that two different prosecutorial authorities were involved was found not to be a special circumstance allowing for retrial.²⁰⁴

There is very little authority on what would constitute "special circumstances" sufficient to rebut the strong presumption against successive prosecution. The three examples cited in *Connelly* were: (1) acquiescence by the defendant in separate trials of two indictments; (2) instances in which a further event occurs after the first trial (e.g., the death of a victim of an assault for which the defendant has previously been convicted would allow for a subsequent homicide prosecution);²⁰⁵ and (3) cases in which new evidence of guilt of a different offense based on the same facts is discovered after the first trial.²⁰⁶ As noted above, in *Beedie*, the

203. *Id.* at 366. In fact, the court held that the lower court had erred in employing a "balancing test" between the public interest in establishing liability for this death and the defendant's interests, rather than looking for "special circumstances" to justify a second prosecution. *Id.*

204. *Id.*

The Health and Safety Executive were well aware of the risk of double jeopardy, and a conscious decision was made about the nature of the charges to be pursued in the light of this principle. The only purpose to be achieved by a manslaughter prosecution was the imposition of a further penalty and the heaping of condemnation on the defendant.

Id. at 364. The court went on to say:

We see no reason why, prior to institution of the summary proceedings, the Crown Protection Service should not have been alerted by the police, the Health and Safety Executive or the local authority to the enquiry which was being undertaken into the circumstances leading to the death of this unfortunate young woman. Had this been done, it should have been sensible for a possible joint decision to be reached as to what charges could, and should, have been properly brought against the defendant, and no doubt manslaughter would have been among them.

Id. at 366. In addition, the court reaffirmed the principle established in *R. v. Elrington*, that "whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form." *Id.* at 362 (quoting *R. v. Elrington*, [1861] 1 B. & S. 688, 696); see also *R. v. Dir. of Pub. Prosecutions ex parte Stacey*, Q.B., CO/714/99 (1999) (finding that it was proper for the CPS to refuse to prosecute a corporation for manslaughter after guilty pleas to charges brought by the Health and Safety Executive and a heavy fine, since such a prosecution would have been an abuse of process).

205. *Connelly* [1964] A.C. at 1305; see *R. v. De Salvi* (1867) 10 Cox. C.C. 481, 481; *R. v. Morris* [1867] K.B. 480, 480.

206. *Connelly* [1964] A.C. at 1306. This is broader than, but similar to, the exception recognized by the United States Supreme Court in *United States v. Diaz*, 223 U.S. 442 (1912). In *Diaz*, however, the Court's analysis concluded that the two prosecutions were not for the same offense. *Id.* at 448.

involvement of separate prosecutorial agencies did not constitute special circumstances.²⁰⁷

C. Application

Several rules emerge from the case law that guide the abuse of process discretion.

1. Lesser and Greater Offenses

First, as set forth above, crimes may not be prosecuted in ascending order of severity. The English courts have repeatedly applied this rule in the context of road fatalities like that in *Grady v. Corbin*.²⁰⁸ In *Regina v. Cwmbran Justices, ex parte Pope*,²⁰⁹ after the defendant had been acquitted of driving with excess alcohol he was charged with driving without due care and attention.²¹⁰ The court held the proceedings should be stayed.²¹¹ In

207. *Beedie* [1998] Q.B. at 366. An example of special circumstances was presented in *In re Solicitor*. Q.B. CO/2504/2000, 2000 WL 1791470 (Q.B. Div'l Ct. Nov. 20, 2000). However, the case appears to be *sui generis*. There, a solicitor was suspended from practice based on his failure to keep accounts and his personal use of client funds. *Id.* at *1. Thereafter, he was charged and convicted of theft based on the same facts and sentenced to a year of imprisonment. *Id.* The Solicitors Disciplinary Tribunal then heard a second application based not on the misconduct but on the existence of the theft conviction. *Id.* The tribunal held that the second application was an abuse of process, but the appellate court disagreed because of the "special circumstance" that the case involved the conduct of a solicitor. *Id.* at *1, *5-6. In addition, of course, the case falls squarely within the exception that permits successive prosecution of two charges that each have different elements and/or based on changed circumstances: the criminal conviction did not exist at the time the first proceeding was brought and was a legitimate, separate basis for discipline. In any event, the court directed the tribunal not to impose any additional punishment if the charges at the second proceeding were sustained. *Id.* at *6.

208. 495 U.S. 508 (1990).

209. [1979] 143 J.P.R. 638.

210. *Id.* at 640.

211. *Id.* The court explained that this holding was

not because that last charge gives rise to the same issue as that which was canvassed before the jury at the Crown Court but because it would be a little, at least, unfair to require him to stand his trial before the justices upon what does involve the self-same issue, and because it would not be entirely in the interests of public policy that one tribunal might be in a situation in which it feels itself driven to a decision directly in conflict with what was the finding of a jury, who after all form the basis of our administration of common law justice.

Id.

Regina v. Forest of Dean Justices, ex parte Farley,²¹² the court held that it was an abuse of process to pursue a charge of reckless driving based on the allegation of excessive alcohol use after a prosecution for driving with excess alcohol.²¹³ The court reached the same result in *Regina v. Moxon-Tritsch*,²¹⁴ where a private prosecution for causing death by reckless driving was stayed following a prosecution for careless driving and use of excess alcohol, explaining that:

The proposed prosecution arose from the same facts as those upon which she had been convicted at the magistrates' court. It would be oppressive to let her face a second trial for a more aggravated form of the same offence to which she had already pleaded guilty The learned judge said he could well understand the private prosecutors' desire that the defendant should face the more serious charge before a jury. But the learned judge considered that her ordeal must be brought to an end.²¹⁵

2. Contempt

Second, it is not an abuse of process to prosecute contempt and the underlying criminal conduct successively—the situation pre-

212. [1990] R.T.R. 228 (Q.B.).

213. *Id.* at 233.

214. [1988] Crim. L.R. 46, 47.

215. *Id.* Significantly, however, the court noted that if the defendant had pleaded guilty only to the alcohol offense and not to driving without due care, the subsequent prosecution could only be stayed as a matter of abuse of process and not under the plea of *autrefois convict* because the issue of her driving had not been previously determined; i.e., she was not in effect being charged with an aggravated form of the prior charges. *See id.* at 48, cmt.

Because the English do not recognize the doctrine of collateral estoppel, *Dir. of Pub. Prosecutions v. Humphrys*, [1977] A.C. 1 (1976), several courts have invoked the concept of abuse of process to prevent reprosecution where all of the charges arise as part of the same transaction for which the defendant has already been tried. For example, in *R. v. Roberts*, [1979] Crim. L.R. 44, the defendant was charged with stealing an outboard motor from his landlord. *Id.* at 44. A year earlier he had been charged with stealing hydraulic jacks during the same time period. *Id.* His earlier defense was that the items had been abandoned and he was acquitted. *Id.* at 45. The court stayed the second trial on the ground that the matter was stale and that any conviction would be illogical and inconsistent. *Id.* Similarly, in *Dewhurst v. Foster & Foster*, [1982] Crim. L.R. 582, the defendants were charged with theft and their defense was that they had paid for the item in question. *Id.* at 582. The defendants were acquitted, but their employers brought a private prosecution against them. *Id.* at 583. This prosecution was stayed because the same issues were to be tried again. *Id.*

sented in *Dixon*.²¹⁶ In *Director of Public Prosecutions v. Tweddell*,²¹⁷ the defendant violated a court order and was held in contempt based on his assault upon his wife.²¹⁸ After the defendant was sentenced to three months of imprisonment, a prosecution was brought for the assault, and the defendant argued that it constituted an abuse of process because it would be punishing him twice for the same offense.²¹⁹ The trial court agreed with the defendant, but the appellate court reversed.²²⁰ Although both charges were based on the same facts, the court relied upon the different purposes of criminal prosecution: to protect public order, rehabilitation, deterrence, and contempt—vindication of the court's powers—to find no abuse in these successive prosecutions.²²¹ The court did note, however, that if the defendant were found guilty, it would be appropriate to consider whether the sentence previously imposed for contempt might be sufficient to serve the public interest.²²²

3. Conspiracy

Finally, it is not an abuse of process to prosecute a defendant successively for conspiracy and its object offense. In the combined cases of *Regina v. Payne* and *Regina v. Marshall*,²²³ the Court of Appeal (Criminal Division) held that it was permissible to proceed first on a conspiracy charge and, after an acquittal, to prosecute for the substantive crime underlying the conspiracy.²²⁴ In *Payne* the defendants were charged with conspiracy to burgle and twenty counts of burglary and handling stolen goods.²²⁵ The prosecution proceeded on the conspiracy count only, and the court acquitted the defendants.²²⁶ After the decision, the court granted leave to proceed on the substantive counts before a new jury.²²⁷

216. See *Dixon*, 509 U.S. at 691.

217. [2001] EWHC Admin 188 (Q.B. Div'l Ct.) (LEXIS).

218. *Id.* at ¶ 1.

219. *Id.* at ¶¶ 1, 2.

220. *Id.* at ¶¶ 3, 24.

221. *Id.* at ¶¶ 14, 15, 16.

222. *Id.* at ¶ 19.

223. [1982] Crim. L.R. 684.

224. *Id.* at 685.

225. *Id.* at 684.

226. *Id.*

227. *Id.*

The Court of Appeal held that the judge had been correct to grant leave.²²⁸

IV. LESSONS FOR THE UNITED STATES

Whether the *Grady* majority or the *Dixon* majority is correct, the Supreme Court's analysis of its own precedent is wildly inconsistent, more so than in any other area of its constitutional jurisprudence. As a result, the decision about the scope of the Double Jeopardy Clause seems to be based not on text, history, or legal precedent, but on the shifting membership of the Court.

As noted above, the English House of Lords has avoided this problem by refusing to limit the protection against successive prosecution to the limited scope of the common law pleas.²²⁹ Instead, it has interpreted those pleas narrowly and then recognized a broad, discretionary abuse of process protection against unfair reprosecution.²³⁰

A. A Narrow Double Jeopardy Protection

The U.S. Supreme Court should follow the analysis of the House of Lords. Rather than massage the Double Jeopardy Clause into a broader protection than it can logically or doctrinally sustain, the Court should, as it has done, define the double jeopardy protection narrowly by the "same-elements" test.²³¹

228. *Id.* at 685. On the other hand, in *Regina v. Riebold*, [1965] 1 All E.R. 653 (Birmingham Assizes 1964), the defendant had been indicted for two counts of conspiracy and twenty-seven overt acts which were used to establish one or the other of the conspiracy counts. *Id.* at 654. The prosecution proceeded on the second count of conspiracy. *Id.* The defendant was convicted, but the conviction was reversed and the indictment dismissed. *Id.* An application for leave to proceed on the remaining counts was refused. *Id.* at 656. The court held that "retrial . . . would become a complete reproduction of the [previous] trial." *Id.* Even though "the prosecution [did] not desire to be oppressive," the court made clear that it had to look to the effect of the prosecution's decision. *Id.* The court held that it would be "bad and oppressive" to allow a retrial. *Id.*

229. *See supra* Part III.

230. *See supra* Part III.

231. One commentator has succinctly made the case for such a protection:

In many cases, the state may have no particularly good reason for splitting a single criminal transaction or episode into two separate trials. And in some cases, perhaps the state may have particularly bad—illegitimate—reasons.

B. A Supplemental Due Process Protection

With that being said, what is to be made of the Supreme Court's clear statement in *Green v. United States*²³² of the fairness interests imbedded in the double jeopardy protection that are not protected by the "same-elements" test? The Court's articulation in *Green* of the finality concerns of harassment, stress, expense, and of the potential for wrongful conviction are not protected by the "same-elements" test.²³³ Furthermore, what is to be made of the explicit language of *Brown v. Ohio*,²³⁴ the apparent meaning of *In re Nielsen's* "incidents" language,²³⁵ and the suggestion in *Illinois v. Vitale*,²³⁶ in which the Court identified a protection beyond the "same-elements" test in the successive prosecution context? While the "same-elements" test may provide adequate protection against multiple punishments—the context in which it was decided—it provides minimal protection against the interests recognized by the Court in *Green*. To return to the example set forth in the introduction, the "same-elements" test would permit successive prosecution of armed robbery and bank robbery even though they are based on the same conduct. In addition, it would permit successive prosecution even where the defendant has been acquitted of the first charge, thus providing no protection against the prosecution's practicing, learning the defense, improving its case, and convicting an innocent person. Moreover, it would permit successive prosecution if the defendant had been convicted of

Perhaps bifurcation reflects a systematic attempt to vex or harass a defendant, by wearing her down in successive proceedings, draining her financial resources, and forcing her witnesses to appear twice on her behalf. Such vexation can create a real risk that a defendant, though innocent of the greater offense, will be erroneously convicted in the second trial. Or perhaps the prosecutor is trying to evade statutory limits on prosecutorial discovery by forcing a defendant to tip her hand in the first trial—a preliminary round—so that the state, with the benefit of this 'cheat peek,' has an edge in the second trial, the main event. Or perhaps the prosecutor is angry and vindictive after the first trial because, although the state won a conviction, the defendant largely prevailed in the sentencing, and the prosecutor seeks to punish this success—and send a message to future defendants—via a new round of charges.

Amar, *supra* note 27, at 1821–22 (footnotes omitted).

232. 355 U.S. 184 (1957).

233. *See id.* at 187.

234. 432 U.S. 161, 166 n.6 (1977).

235. 131 U.S. 176, 187 (1889).

236. 447 U.S. 410, 420 (1980).

the first crime, permitting the imposition of two full sentences for one criminal act. As the Eleventh Circuit has pointed out, “[a]s the test now stands, it is difficult to see many circumstances under which the double jeopardy clause will place any check on a prosecutor who displays a minimum degree of care in crafting indictments.”²³⁷

On the other hand, traditional, case-by-case due process analysis fits quite well as a protection for these interests and would rationalize the U.S. Supreme Court’s precedent under a consistent theory. Prosecutorial motive, fairness, and potential conviction of the innocent are issues that have traditionally been subjected to a case-by-case due process analysis. In fact, the Due Process Clause has already been relied on to prevent an improperly motivated second prosecution. In *Blackledge v. Perry*,²³⁸ the Court held that the Due Process Clause prohibits the government from bringing more serious charges on retrial after the defendant invokes his or her right to a trial de novo.²³⁹ The Court recognized a presumption of vindictiveness in this context that could only be rebutted by objective evidence showing the charges could not have been brought before the defendant exercised his rights.²⁴⁰ As with all presumptions, this presumption was based on the likelihood that such a reprosecution was improperly motivated and was intended to spare courts the “unseemly task” of probing the actual motives of the prosecutor.²⁴¹

237. *United States v. Sanchez*, 3 F.3d 366, 367 (11th Cir. 1993).

238. 417 U.S. 21 (1974).

239. *Id.* at 28–29.

240. *Id.* at 28–29 & n.7.

241. *See id.* at 28. In *United States v. Goodwin*, 457 U.S. 368 (1982), however, the Supreme Court refused to find a presumption of vindictiveness where misdemeanor charges were replaced by felony charges after the defendant invoked his right to a jury trial, but before any trial had taken place. *Id.* at 381–82, 384. The Court held that because the greater charges were brought pretrial, there was no presumption of vindictiveness because at that time—before the case has been finally prepared for trial—retaliation was unlikely to be the reason for the change in charges. *Id.* at 384. This does not apply in the context of preventing a successive prosecution because, by its very nature, the prosecutor’s decision takes place at the same time as in *Blackledge*—after a fully completed prior prosecution.

More recently, the presumption of vindictiveness was found in *Thigpen v. Roberts*, 468 U.S. 27 (1984). In *Thigpen*, the defendant had been convicted of reckless driving, driving with a revoked license, driving on the wrong side of the road, and driving while intoxicated. *Id.* at 28. He successfully appealed, and while the appeal was pending a grand jury indicted him for the greater charge of manslaughter based on the same incident. *Id.* at 28–29. The United States Supreme Court held that the institution of felony charges in this case “suggested ‘a realistic likelihood of ‘vindictiveness.’” *Id.* at 30 (quoting *Blackledge*,

No court has yet applied these due process principles to prevent a successive prosecution motivated by non-vindictive but equally unconstitutional reasons—the desire to harass, practice, or seek additional punishment.²⁴² Yet the analysis and the presumption against reprosecution are fully applicable here. In the successive prosecution context, as in the vindictiveness context, the case has already proceeded to trial. The prosecution has already chosen its charges and prepared and presented its best case. Thus, as in the vindictiveness context, there is unlikely to be any legitimate reason for litigating the same facts again. As Justice Scalia recognized in *Dixon*, prosecutors have nothing legitimate to gain by doing so—the motivation is presumptively illegitimate, i.e., to seek additional punishment, to harass a defendant, or to undo an acquittal.²⁴³ Of course, if the prosecution can demonstrate legitimate motives, such as different jurisdictional requirements,²⁴⁴ different procedural rules,²⁴⁵ subsequent facts that made initial prosecution impossible,²⁴⁶ or subsequent facts that provide “objective information concerning identifiable conduct . . . occurring after . . . the original sentencing proceeding,” this could rebut the presumption.²⁴⁷

417 U.S. at 27). On that basis, the Court recognized a presumption of vindictiveness, even though a different prosecutor had been added to the prosecutorial team following the indictment. *Id.* at 31.

242. *Dowling v. United States*, 493 U.S. 342, 354 (1990), seems to contain the Court’s only reference to the possibility of a due process protection against successive prosecution, although it is an ill fit. *Id.* at 354. In *Dowling*, successive prosecutions were not really involved; evidence of a robbery for which the defendant had been acquitted was admitted at the defendant’s trial for a second robbery on the question of identity. *Id.* at 344–45. The Court rejected the defendant’s double jeopardy claim. *Id.* at 348. It also rejected the defendant’s claim that the introduction of such evidence “contravenes a tradition that the government may not force a person acquitted in one trial to defend against the same accusation in a subsequent proceeding.” *Id.* at 354. The Court held: “We acknowledge the tradition, but find it amply protected by the Double Jeopardy Clause. We decline to use the Due Process Clause as a device for extending the double jeopardy protection to cases where it otherwise would not extend.” *Id.*; cf. *United States v. Esposito*, 912 F.2d 60 (3d Cir. 1990). In *Esposito*, the court held that acquittal on a RICO charge does not bar subsequent prosecution for predicate acts because they are not the “same offenses,” but “[left] open without comment whether this scenario may present a situation of prosecutorial vindictiveness or overreaching so severe that it violates the Due Process Clause.” *Id.* at 67.

243. See *United States v. Dixon*, 509 U.S. 688, 701 n.15 (1993).

244. *Grady v. Corbin*, 495 U.S. 508, 530 (1990).

245. *Dixon*, 509 U.S. at 688.

246. *Blackledge v. Perry*, 417 U.S. 21, 29 n.7 (1974) (citing *Diaz v. United States*, 223 U.S. 442, 449 (1912)).

247. *North Carolina v. Pearce*, 395 U.S. 711, 726 (1969).

Recognizing that “same offence” means what it says, the same offense in law and fact, and allowing the courts to engage in traditional case-by-case fairness analysis, would protect *all* of the interests identified as at stake in the circumstance of successive prosecution and would rationalize the Court’s confusing jurisprudence. Several factors could be taken into account in the analysis. First, the courts could distinguish between post-acquittal and post-conviction reprosecutions, allowing for greater protection for an acquitted defendant, for whom the risk of wrongful conviction is greater. Second, the claimed reason or need for reprosecution could be taken into account. Good reasons, such as different jurisdictional limitations or different required proof, might permit reprosecution. However, bad reasons, such as trying to overcome an acquittal, to drain the defendant’s resources, or to impose additional punishment, would not be acceptable. Under the “same-elements” test, none of these reasons are considered. In England, of course, this is precisely how the courts deal with successive prosecutions that are not barred by the common law pleas.

C. *A Supplemental Inherent Power Protection*

Alternatively, the United States courts should rely on their inherent power to prevent abuse, as do the English courts, by restricting unfair or manipulative successive prosecutions. In the United States, several state supreme courts have taken this route.²⁴⁸ Although no federal court has relied on its supervisory power to prohibit a reprosecution, the courts’ supervisory power jurisprudence indicates that such reliance is appropriate.²⁴⁹

In *McNabb v. United States*,²⁵⁰ Justice Frankfurter observed that the federal courts have “the duty of establishing and maintaining civilized standards of procedure and evidence” that are broader in scope than protections afforded by the Constitution or statutes.²⁵¹ In the more than fifty years since *McNabb*, the Su-

248. See, e.g., *Commonwealth v. Smith*, 615 A.2d 321, 325 (Pa. 1992).

249. See *United States v. Hasting*, 461 U.S. 499, 505 (1983); *McNabb v. United States*, 318 U.S. 332, 341 (1943).

250. 318 U.S. 332 (1943).

251. *Id.* at 340. In *McNabb* and its companion case, *Anderson v. United States*, 318 U.S. 350 (1943), incriminating statements were obtained by the police from suspects who were held incommunicado and interrogated for several days until some of them confessed. *McNabb*, 318 U.S. at 334–38; *Anderson*, 318 U.S. at 352–55. Although there was no proof

preme Court and the lower federal courts have used their supervisory power to create a variety of rules of procedure and evidence to prevent government overreaching and to maintain the integrity of the federal criminal justice process.²⁵² Although the source of this power is not clear, its underlying rationale traditionally has been understood to be to create a subconstitutional “fairness” remedy to (1) cure the violation of recognized rights; (2) deter government misconduct; and (3) preserve judicial integrity.²⁵³ Cases in which supervisory power has been exercised draw their authority and inspiration from constitutional values but are not limited by actual constitutional text. For example, in *United States v. Perez*,²⁵⁴ the United States Court of Appeals for the Second Circuit held that its rule prohibiting an increased sentence after a successful appeal, which had been articulated as an exercise of supervisory power, was not affected by various limitations the Supreme Court had placed on its similar but due-process-based holding in *North Carolina v. Pearce*.²⁵⁵ The *Perez* court explained:

In announcing the *Pearce* due process protection, and in modifying *Pearce* thereafter, the Supreme Court has neither precluded a circuit court from relying on its supervisory power to invalidate enhanced sentences under certain circumstances, nor even suggested that constitutional constraints are the only possible limits on a district court’s discretion when resentencing a defendant following a second trial after a successful appeal. Indeed, in other contexts, the Supreme Court has affirmed the legitimacy of a federal court’s supervisory power, and its role in securing rights not guaranteed by the Constitution.²⁵⁶

of coercion, nor any suggestion that the defendants’ constitutional rights were otherwise violated, the Court held that prolonged detention that resulted in the defendants’ confessions was in “flagrant disregard” of statutory requirements mandating that a person taken into custody be promptly arraigned before a judicial officer. *McNabb*, 318 U.S. at 345. To allow a conviction to stand based on unlawfully secured evidence would make “the courts themselves accomplices in willful disobedience of law.” *Id.*

252. See *Burton v. United States*, 483 F.2d 1182, 1187–88 (9th Cir. 1973), *aff’d on reh’g*, 483 F.2d 1190 (citing thirty such cases); see also Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1455–56 (1984) (stating that the exercise of such power has “become commonplace in every circuit . . .”).

253. *United States v. Payner*, 447 U.S. 727, 736 n.8 (1980).

254. 904 F.2d 142 (2d Cir. 1990).

255. 395 U.S. 711 (1969); see also *Perez*, 904 F.2d at 148 (distinguishing the due process based holding in *Pearce*).

256. 904 F.2d at 148 (citations omitted). This theory easily explains the decision in *Jencks v. United States*, 353 U.S. 657 (1957). As the Supreme Court suggested, access to a

Although the Supreme Court has narrowed the permissible scope of supervisory power over the years, none of the prohibitions relate to double jeopardy protection. Moreover, the Court has continuously reaffirmed the power of the federal courts to control their own proceedings.²⁵⁷ First, the Court has refused to allow the lower courts to exercise supervisory power over grand jury proceedings.²⁵⁸ Second, reliance on supervisory power has been disallowed where it conflicts with statutory rules or provisions.²⁵⁹

The greatest limitation in this context has been the holding that supervisory power is subservient to the harmless error rule contained in the Federal Rules of Criminal Procedure.²⁶⁰ However, a double jeopardy violation is a structural error that is not subject to harmless error analysis.²⁶¹ Similarly, Rule 8 permits joinder of offenses if they are, inter alia, "based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."²⁶² This is entirely consistent with, and indeed would warrant, a prohibition against successive prosecution of such crimes. Finally, the exercise of supervisory power has been disallowed if it conflicts with or is broader than the Supreme Court's exclusionary rule jurisprudence, a limitation that is not applicable here.²⁶³

witness's prior statements for impeachment purposes is more than a rule of procedure; it is a quasi-constitutional rule to protect the defendant's confrontation and due process rights. *See id.* at 667-68. To the extent that criminal discovery protects values that inhere in the right to confrontation, the right to effective representation, and the due process right to a fair trial, the court's use of its supervisory authority to formulate rules to protect these rights, although not explicitly required by the Constitution, is necessary to protect these rights. *See id.* at 667-70.

257. *See, e.g.,* *United States v. Williams*, 504 U.S. 36, 50 (1992) (finding that federal courts have less power to fashion rules in grand jury proceedings); *Young v. United States ex rel. Vuitton et Fils S. A.*, 481 U.S. 787, 793 (1987) (stating that there is inherent authority to begin contempt proceedings).

258. *See, e.g., Williams*, 504 U.S. 793 at 46-47 (1992) (arguing that because of the separation of powers, supervisory power may not be used to dismiss an indictment based on prosecutor's failure to disclose exculpatory evidence in the grand jury).

259. *United States v. Gatto*, 763 F.2d 1040, 1046 (9th Cir. 1985).

260. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-56 (1988); *United States v. Hasting*, 461 U.S. 499, 510-12 (1983); *see also* FED. R. CRIM. P. 52.

261. *See Price v. Georgia*, 398 U.S. 323, 331 (1970).

262. FED. R. CRIM. P. 8.

263. This limitation is based on the fact that the issue of deterrence and the balancing of values necessary to determine the appropriateness of exclusion have been decided by the Supreme Court, so that the lower courts may not substitute their own deterrence

State courts have recognized an inherent judicial power to administer justice that includes prohibiting successive prosecution of a defendant.²⁶⁴ For example, in *State v. Kyles*, the Louisiana Court of Appeal recognized this power in deciding whether to prevent a fifth trial of the defendant.²⁶⁵ The court held that:

Trial judges have the inherent authority to terminate a prosecution in the exercise of a sound judicial discretion, where, as here, repeated trials, free of prejudicial error, have resulted in genuinely deadlocked juries and where it appears that at future trials substantially the same evidence will be presented and the probability of continued hung juries is great . . . requiring defendants to face additional juries with the continuing prospect of no verdict offends traditional notions of fair play and substantial justice.²⁶⁶

analysis. *United States v. Payner*, 447 U.S. 727, 736–37 (1980).

264. See, e.g., *State v. Moriwake*, 647 P.2d 705, 712 (Haw. 1982) (finding inherent power to dismiss for deadlocked juries after one or more mistrials occurs); *State v. Kyles*, 706 So. 2d 611, 614 (La. App. 1998) (explaining the inherent authority possessed in the factual context of a deadlocked jury); *Commonwealth v. Smith*, 615 A.2d 321, 325 (Pa. 1992) (barring a retrial because of prosecutorial misconduct); *State v. Witt*, 572 S.W.2d 913, 917 (Tenn. 1978) (holding that there is inherent authority to prevent retrials when deadlocked juries cannot agree and it appears that at later trials very similar evidence will be presented).

265. 706 So. 2d at 613.

266. *Id.* (quoting *Witt*, 572 S.W.2d at 916). The Court of Appeals of Louisiana based its finding of inherent power on the Louisiana Code of Criminal Procedure which states:

A court possesses inherently all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders, including the authority to issue such writs and orders as may be necessary or proper in aid of its jurisdiction. It has the duty to require that criminal proceedings shall be conducted with dignity and in an orderly and expeditious manner and to so control the proceedings that justice is done. A court has the power to punish for contempt.

LA. CODE CRIM. PROC. ANN. art. 17 (West 1991). The court articulated several factors that had been adopted in other jurisdictions to be considered by the trial courts:

- 1) the number of prior mistrials and reasons for them;
- 2) the character of the prior trials and similarity of evidence presented;
- 3) the likelihood of any substantially different result at a new trial;
- 4) the trial court's own evaluation of the strength of the parties' cases;
- 5) the conduct and diligence of counsels;
- 6) the seriousness of the offense;
- 7) the public's concern for the effective and definitive conclusion of criminal prosecutions;
- 8) the status of the defendant; and
- 9) the impact of retrial upon the defendant in terms of untoward hardship and unfairness.

Kyles, 706 So. 2d at 614 (citing *State v. Sauve*, 666 A.2d 1164, 1168 (1995)).

Ultimately, the court upheld the decisions of two lower courts not to bar the proceedings, citing in particular the existence of new evidence of a confession by the defendant

V. CONCLUSION

The characterization of the Supreme Court of the United States's double jeopardy jurisprudence as "a veritable Sargasso Sea"²⁶⁷ could not be more fitting. The Court has itself interpreted the same precedents to yield two contrary results, depending on its membership.

The Court's jurisprudence has attempted to define when two offenses are sufficiently similar to trigger double jeopardy protection and to lay the boundaries for the balance of power between the legislature that defines the crimes and the judicial branch. The Court's sole reliance on a strict *Blockburger* analysis does not fulfill that intent. Piecemeal litigation is not prevented by the *Blockburger* test.

The intellectual inconsistency and inadequacy of protection that stems from reliance only on the "same-elements" test could be cured by recognizing that in some circumstances, due process requires that factually related crimes be tried together. The Supreme Court of the United States could maintain its narrow view of the double jeopardy clause—a "clear brightline rule enforced by a special plea in bar before the second trial has even begun"²⁶⁸—while supplementing that protection with a due process and/or inherent power protection against successive punishment that would protect the interests underlying the ban on successive prosecution.

This is the route chosen by the English House of Lords. Perhaps the Supreme Court of the United States could untangle itself by considering this straightforward and sensible approach.

that had not been available to the prosecution at prior trials. *Id.* at 614–15. For additional sources on the English protection against successive prosecution, see CHOO, *supra* note 154, FRIEDLAND, *supra* note 154, and PATTENDEN, *supra* note 154.

267. *Albernaz v. United States*, 450 U.S. 333, 343 (1981) (Rehnquist, J.).

268. Amar, *supra* note 27, at 1816.