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Ohio Revised Code Section 3113.31 and the Constitution: Ohio's Statutory Response to Domestic Violence and Its Double Jeopardy Infirmity

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LEGISLATIVE NOTE

OHIO REVISED CODE SECTION 3113.31 AND THE CONSTITUTION: OHIO'S STATUTORY RESPONSE TO DOMESTIC VIOLENCE AND ITS DOUBLE JEOPARDY INFIRMITY

I. INTRODUCTION

Domestic violence[1] impacts society broadly, affecting individuals, families, and communities.[2] Incidents of domestic violence, such as murder, rape, aggravated assault, and simple assault, occur in staggering numbers and account for much of the violence against women in America.[3] Domestic violence is a problem known to both traditional and modern society, however, both the law and society have dealt with domestic violence only reluctantly and recently.[4] In an attempt to halt domestic violence every state has enacted legislation allowing victims

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1. The Ohio Revised Code (O.R.C.) defines domestic violence as:
the occurrence of one or more of the following acts against a family or household member:
(a) Attempting to cause or recklessly causing bodily injury;
(b) Placing another person by the threat of force in fear of imminent serious physical harm or committing a violation of Section 2903.11 or 2911.21 of the Revised Code;
(c) Committing any act with respect to a child that would result in the child being an abused child as defined in Section 2151.031.
OHIO REV. CODE ANN. § 3113.31(A)(1) (Anderson 1992).

2. An estimated four to six million women experience violence at the hands of their husbands or partners each year. *Doctors Join Campaign Against Domestic Violence*, UPI, Oct. 21, 1992, *available in* LEXIS, Nexis Library, UPI File. Thus, domestic violence represents a "major health issue" and "is epidemic in nature." *Id.*

3. Sixteen percent of all sexual assaults and twenty percent of all aggravated assaults against women reported in 1991 were incidents of domestic violence. *One Million Women Suffered From Domestic Crime in 1991*, CHI. TRIB., Oct. 2, 1992, at C2. Additionally, more than thirteen-hundred women died at the hands of their partners in 1991. Nancy Gibbs, *Til Death Do Us Part*, TIME, Jan. 18, 1993, at 38. Although resort to violence is not reserved solely to men, women are six times more likely to suffer injury as a result of violent confrontations between partners. *Id.*

4. Bradley v. State, 1 Miss. (1 Walker) 156, 158 (1824) (a husband may chastise his wife without becoming subject to vexatious prosecution); State v. Rhodes, 61 N.C. (Phil. Law) 453, 456 (1868) (a husband may whip his wife subject only to the limitation that the whip be no wider than his thumb); State v. Black, 60 N.C. (Win) 162, 164 (1864) (a husband must "govern his

and potential victims of domestic violence to petition courts for injunctions or civil protection orders.[5] Implementation of domestic violence legislation, however, has faced numerous obstacles due to traditional societal attitudes towards family privacy.[6] Ohio's domestic violence legislation faces an additional problem because its implementation raises double jeopardy concerns.

Ohio meets the problem of domestic violence both criminally and civilly in separate provisions of the Ohio Revised Code (O.R.C).[7] Ohio's approach raises several important issues in terms of double jeopardy analysis.[8] By making violation of a court order a criminal offense

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household," and the law thus, allows him to use the degree of force necessary to make his wife "behave . . .; the law will not invade the domestic front or go behind the curtain").

5. *See* ALA. CODE § 30-5-7 (1989); ALASKA STAT. §§ 25.35.010, 25.35.020 (1991); ARIZ. REV. STAT. ANN. § 13-3602 (1989 & Supp. 1992); ARK. CODE ANN. § 9-15-206 (Michie 1991 & Supp. 1991); CAL. FAM. CODE §§ 5650, 5700 (West 1993) (operative Jan. 1, 1994); COLO. REV. STAT. ANN. §§ 14-4-102, 14-4-103 (West 1989 & Supp. 1992); CONN. GEN. STAT. ANN. § 46b-15-815a (West 1986 & Supp. 1992); DEL. CODE ANN. tit. 10, §§ 921(6), 925(15) (1975 & Supp. 1992); D.C. CODE ANN. §§ 16-1003 to 16-1005 (1989 & Supp. 1993); FLA. STAT. ANN. § 741.30 (West 1986 & Supp. 1993); GA. CODE ANN. § 19-13-4 (1991 & Supp. 1993); HAW. REV. STAT. § 586-3 (1985 & Supp. 1992); IDAHO CODE §§ 39-6304, 39-6306 (1993); ILL. ANN. STAT. ch. 725, para. 111-8 (Smith-Hurd 1993); IND. CODE ANN. § 34-4-5.1-2 (West 1983 & Supp. 1992); IOWA CODE ANN. § 236.4-6 (West 1985 & Supp. 1993); KAN. STAT. ANN. § 60-3107 (1983 & Supp. 1992); KY. REV. STAT. ANN. §§ 403.740, 403.745 (Baldwin 1990); LA. REV. STAT. ANN. §§ 46:2135, 46:2136 (West 1982 & Supp. 1993); ME. REV. STAT. ANN. tit. 19, § 766 (West 1981 & Supp. 1992); MD. FAM. LAW Code Ann §§ 4-505, 4-506 (1991 & Supp. 1992); MASS. GEN. LAWS ANN. ch. 209A, §§ 3-4 (West 1987 & Supp. 1993); MICH. COMP. LAWS ANN. § 600.2950 (West 1986), (Supp. 1992); MINN. STAT. ANN. § 518B.01 (West 1990 & Supp. 1993); MISS. CODE ANN. §§ 93-21-11 to 93-21-15 (Supp. 1989); MO. ANN. STAT. §§ 455.045, 455.050 (Vernon 1986 & Supp. 1993); MONT. CODE ANN. § 40-4-121 (1991); NEB. REV. STAT. § 42-924 (1988 & Supp. 1992); NEV. REV. STAT. ANN. § 33.020 (Michie 1986); N.H. REV. STAT. ANN. § 173-B:4 (1990 & Supp 1993); N.J. STAT. ANN. § 2C:25-29 (West 1982 & Supp. 1993); N.M. STAT. ANN. §§ 40-13-4, 40-13-5 (Michie 1978 & Supp. 1992); N.Y. JUD. LAW § 842 (McKinney 1983 & Supp. 1993); N.C. GEN. STAT. § 50B-3 (1989); N.D. CENT. CODE § 14-07.1-02 (1991); OHIO REV. CODE ANN. § 3113.31 (Anderson 1989 & Supp. 1992); OKLA. STAT. ANN. tit. 22, § 60.4 (West 1992); OR. REV. STAT. § 107.718 (1990 & Supp. 1992); PA. STAT. ANN. tit. 23, § 6108 (1991); R.I. GEN. LAWS § 15-15-4 (1988 & Supp. 1992); S.C. CODE ANN. § 20-4-60 (Law. Co-Op. 1985); S.D. CODIFIED LAWS ANN. § 25-10-5 (1992); TENN. CODE ANN. § 36-3-605 (1991); TEX. FAM. CODE ANN. § 3.581 (West 1993); UTAH CODE ANN. § 30-6-5 (1989 & Supp. 1993); VT. STAT. ANN. tit. 15, § 1104 (1989 & Supp. 1992); VA. CODE ANN. § 16.1-253.1 (Michie 1988 & Supp. 1992); WASH. REV. CODE ANN. § 10.99.040 (West 1990 & Supp. 1993); W. VA. CODE § 48-2A-6 (1992 & Supp. 1992); WIS. STAT. ANN. § 813.12 (Supp. 1992); WYO. STAT. §§ 35-21-104, 35-21-105 (1988).

6. Lauren L. McFarlane, Note, *Domestic Violence Victims v. Municipalities: Who Pays When the Police Will Not Respond,* 41 CASE W. RES. L. REV. 929, 931 (1991) (police generally show reluctance to respond assertively to incidents of domestic violence); Peter Finn, *Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Violence,* 23 FAM. L. Q. 43, 44 (1989) (women fear retaliation for and economic consequences of criminal prosecution of partners).

7. *See infra* notes 23-52 and accompanying text.

8. First, the civil provision, authorizing "punishment for contempt of court," fails to clearly state whether the contempt is civil or criminal. Second, although contempt under the civil provi-

when that same conduct is already punishable as contempt of court, Ohio's domestic violence legislation seeks to punish the same conduct in two different ways.[9] The immediate issue is whether punishment for contempt of court and criminal punishment, which is based on the same conduct, violates double jeopardy.[10] Although double jeopardy is implicated, contempt of court or domestic violence may, for reasons of public policy, warrant an exception to the protections of the United States Constitution.[11]

This Note addresses the double jeopardy problem created by Ohio's domestic violence legislation. In considering the double jeopardy issues, this Note outlines the statutory provisions and legal doctrines necessary to determine the constitutionality of Ohio's domestic violence legislation.[12] Section II discusses the applicable provisions of Chapter 2919 and Chapter 3113 of the O.R.C.[13] Section II also outlines the principles of double jeopardy and contempt of court.[14] Section II then discusses *State v. Vanselow*,[15] an Ohio case which considered the double jeopardy issues raised by Ohio's domestic violence legislation.[16] Section III analyzes the constitutionality of section 3113.31.[17] This Note concludes that Ohio's domestic violence legislation, allowing both multiple punishment and multiple prosecution, violates double jeopardy, and is thus unconstitutional.

II. BACKGROUND

The conclusion that Ohio's domestic violence legislation violates the double jeopardy provisions of the United States Constitution results from consideration of three distinct areas of law, as well as, pertinent Ohio case law.[18] First, the specific provisions of the O.R.C. addressing

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sion is clearly criminal, Ohio's domestic violence legislation may not survive a double jeopardy challenge. *See* OHIO REV. CODE ANN. § 3113.31(L)(1)(b); *see infra* notes 212-49 and accompanying text.

9. *See infra* notes 231-42 and accompanying text.

10. The United States Supreme Court recently considered this precise issue. In *United States v. Dixon*, the Court finally decided that the protections of the double jeopardy clause extend to criminal contempt proceedings. 113 S. Ct. 2849, 2856 (interim ed. 1993). "We have held that the Constitutional protections for criminal defendants other than the double jeopardy provision apply in nonsummary criminal contempt just as they do in other criminal prosecutions. We think it obvious, and today hold, that the protection of the Double Jeopardy Clause likewise attaches." *Id.*

11. *See infra* notes 250-65 and accompanying text.

12. *See infra* notes 23-211 and accompanying text.

13. *See infra* notes 29-52 and accompanying text.

14. *See infra* notes 53-172 and accompanying text.

15. 572 N.E.2d 269 (Ohio, Hamilton Cty. Mun. Ct. 1991).

16. *See infra* notes 173-206 and accompanying text.

17. *See infra* notes 207-65 and accompanying text.

18. *See infra* notes 23-206 and accompanying text.

domestic violence must be understood in terms of both their individual operation and their interaction.[19] Next, the operation of these provisions must be considered in light of the protections provided by the double jeopardy clauses of the United States and Ohio Constitutions.[20] Third, contempt of court, both in form and purpose, figures prominently in considering whether Ohio's domestic violence legislation violates double jeopardy.[21] Finally, a decision by an Ohio court concluding that O.R.C. section 3113.31 is unconstitutional warrants attention.[22]

A. Ohio's Domestic Violence Legislation

In light of the fact that Ohio's domestic violence legislation raises double jeopardy concerns, a detailed consideration of its provisions is warranted. Ohio confronts the problem of domestic violence broadly, using both criminal and civil provisions.[23] Through its criminal provisions, the O.R.C. seeks both to punish violent behavior between family members[24] and to deter unacceptable conduct.[25] Through its civil provisions, the O.R.C. seeks to coerce acceptable conduct[26] and to provide an effective remedy for victims and potential victims of domestic violence.[27] Further, each of these provisions makes reference to the other, clearly demonstrating that they are designed to work together to confront all aspects of domestic violence.[28]

1. Chapter 2919

The O.R.C. specifically addresses domestic violence by making violent behavior between family members a criminal offense.[29] Focusing on the violent or potentially violent family member, the O.R.C. punishes unacceptable conduct by proscribing the specific offense of domestic violence.[30] Section 2919.25 prohibits causing or attempting to cause

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19. *See infra* notes 23-52 and accompanying text.
20. *See infra* notes 53-131 and accompanying text.
21. *See infra* notes 132-72 and accompanying text.
22. *See infra* notes 173-206 and accompanying text.
23. OHIO REV. CODE ANN. §§ 2919.25-2919.27 (Anderson 1992), 3113.31 (Anderson 1989 & Supp. 1992).
24. *See infra* notes 29-36 and accompanying text.
25. *See infra* notes 37-39 and accompanying text.
26. *See infra* notes 40-46 and accompanying text.
27. *See infra* notes 47-48 and accompanying text.
28. *See infra* notes 49-52 and accompanying text.
29. OHIO REV. CODE ANN. § 2919.25 (Anderson 1992). In application, courts seek to both respect family privacy and to define socially unacceptable conduct. State v. Suchomski, 567 N.E.2d 1304, 1305 (Ohio 1991) (parents may subject children to proper and reasonable discipline); City of Bucyrus v. Fawley, 552 N.E.2d 676, 678 (Ohio Ct. App. 1988) (verbal harassment is not sufficient provocation to warrant a jury instruction on self defense when the defendant is charged with domestic violence).
30. OHIO REV. CODE ANN. § 2919.25 (Anderson 1992). This section provides:

physical harm[31] to a family or household member[32] or causing a family or household member to fear physical harm.[33] Additionally, the violation of a protection order, whether that order is issued pursuant to criminal or civil provisions, may also be punished criminally.[34] Conviction of a criminal offense pursuant to Chapter 2919 subjects a person to fine, imprisonment, or both.[35] The penalties available under Chapter 2919 vary with the offense and previous conviction.[36]

Focusing next on the victims and potential victims of domestic violence, Chapter 2919 provides a mechanism for relief. Seeking to deter unacceptable conduct,[37] Chapter 2919 allows potential victims to re-

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(A) No person shall knowingly cause or attempt to cause physical harm to a family or household member;

(B) No person shall recklessly cause serious physical harm to a family or household member.

(C) No person by threat of force shall knowingly cause a family or household member to believe that the offender will cause physical harm to a family or household member.

(D) Whoever violates this section is guilty of domestic violence.

Id.

31. "Physical harm to persons" means any injury, illness, or other physiological impairment, regardless of its gravity or duration. *Id.* § 2901.01(C).

32. *Id.* § 2919.25. This section further provides:

(1) Family or household member means any of the following, who is residing or has resided with the offender:

(a) A spouse, a person living as a spouse, or a former spouse of the offender;

(b) A parent or a child of the offender or another person related by consanguinity or affinity to the offender;

(c) A parent or a child of a spouse, person living as a spouse, or a former spouse of the offender, or another person related by consanguinity or affinity to a spouse, person living as a spouse or former spouse of the offender.

(2) Person living as a spouse means a person who is living or has lived with the offender in a common law marital relationship, who otherwise is cohabiting with the offender, who otherwise has cohabited with the offender within one year prior to the date of the alleged commission of the act in question, or who is the natural parent of the offender's child.

Id. § 2919.25(E); see also State v. Hadinger, 573 N.E.2d 1191, 1193 (Ohio Ct. App. 1991) (the domestic violence statute protects persons who are cohabiting regardless of their sex); State v. Allen, 536 N.E.2d 1195, 1196 (Ohio Ct. App. 1988) (proof of only a sexual relationship between the parties is not proof they lived together as spouses, thus invoking the protections of the domestic violence statute).

33. OHIO REV. CODE ANN. § 2919.25 (Anderson 1992).

34. *Id.* § 2919.27. This section provides: "(A) No person shall recklessly violate any terms of a protection order issued or consent agreement approved pursuant to section 2919.26 or 3113.31 of the Revised Code; (B) Whoever violates this section is guilty of violating a protection order or consent agreement." *Id.*

35. *Id.* §§ 2919.25(D), 2919.27(B).

36. *Id.* The fines range from $300 to $2500 and prison sentences range from sixty days to five years. *Id.* §§ 2929.13, .21, .22.

37. State v. Bolds, No. CA-9058, 1993 Ohio App. LEXIS 260, at *3 (Ohio Ct. App. Jan. 19, 1993). "[T]he domestic violence statute . . . recognizes that the nature of domestic violence is most often a sequence of offensive acts. Thus, the event triggering prosecution is generally a conclusion to a series of events and is not always the most serious conduct." *Id.*

quest that the court issue a protection order.[38] The person seeking the protection order need only show that a family or household member is charged with a violent crime.[39]

2. Chapter 3113

The O.R.C. also attempts to protect victims and potential victims of domestic violence and to provide for their needs through its civil provisions.[40] To prevent the onset of domestic violence and to prevent any subsequent escalation,[41] Chapter 3113 allows victims and potential victims of domestic violence to petition the court for relief in the form of civil protection orders.[42] The requirements for a petition for relief are minimal.[43] Upon receipt of a petition, the court may immediately hold an *ex parte* hearing and issue a temporary protection order to protect the family or household member from domestic violence.[44] Chapter 3113 requires only that the court find "good cause" before issuing such an order.[45] Following an *ex parte* hearing, or a full hear-

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38. OHIO REV. CODE ANN. § 2919.26(A) (Anderson 1992). This section provides:

> Upon a filing of a complaint that alleges a violation of section 2919.25 of the Revised Code or a violation of section 2903.11 [felonious assault], 2903.12 [aggravated assault] or 2903.13 [assault] of the Revised Code involving a person who was a family or household member at the time of the violation, the complainant may file . . . a motion that requests the issuance of a temporary protection order.

Id.

39. *Id.*

40. *See generally* Michael J. Voris, *The Domestic Violence Civil Protection Order and the Role of the Court*, 24 AKRON L. REV. 423 (1990) (the civil remedy offers protection to many victims of domestic violence).

41. *Id.* at 426. The civil protection order is the only remedy for behavior which is not yet criminal. *Id.* Examples include intimidation and harassment. *Id.* From the perspective of the victim, halting the abuse is the critical concern. *Id.* at 428.

42. OHIO REV. CODE ANN. § 3113.31(C) (Anderson 1989 & Supp. 1992). This section provides that: "[a] person may seek relief under this section for himself, or any parent or adult household member may seek relief under this section, on behalf of any other family member, by filing a petition with the court." *Id.*

43. *Id.* This section further provides:

> The petition shall contain or state: (1) An allegation that the respondent engaged in domestic violence against a family or household member of the respondent, including a description of the nature and extent of the domestic violence; (2) The relationship of the respondent to the petitioner, and to the victim if other than the petitioner; (3) A request for relief under this section.

Id.

44. *Id.* § 3113.31(D).

45. *Id.* This section further provides:

> Immediate and present danger of domestic violence to the family or household member constitutes good cause for the purpose of this section. Immediate and present danger includes, but is not limited to, situations in which the respondent has threatened the family or household member with bodily harm or in which the respondent has previously engaged in domestic violence against the family or household member.

Id.

ing, the court may issue "any protection orders or may approve consent agreements" designed to "bring about the cessation of domestic violence."[46] In addition to attempting to coerce acceptable conduct, protection orders issued pursuant to Chapter 3113 also seek to provide for the immediate needs of victims of domestic violence.[47]

Chapter 3113, in addition to authorizing the court to issue a civil protection order, provides courts with the means to enforce their orders. A person who violates a civil protection order or a consent agreement is subject to sanctions.[48] The sanctions available under Chapter 3113 include criminal prosecution for domestic violence as well as punishment for contempt of court.[49] This provision clearly contemplates the imposition of both sanctions in the case of violation of a civil protection order or consent agreement.[50] Perhaps recognizing a double jeopardy problem, the statute attempts to cure any constitutional infirmity by al-

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46. *Id.* § 3113.31(E)(1). This section provides that: "The order or agreement may, [among other things]: (a) Direct the respondent to refrain from abusing family or household members . . . ." *Id.*

47. *Id.* This section further provides that the order may:

(b) Grant possession of the residence or household to the petitioner or other family or household member, to the exclusion of the respondent . . . ;

(c) When the respondent has a duty to support the petitioner or other family or household member living in the residence or household and respondent is the sole owner or lessee of the residence or household, grant possession of the residence or household to the petitioner . . .;

(d) Award temporary custody of, or establish temporary visitation rights with regard to minor children, if no other court has determined, or is determining, custody or visitation rights;

(e) Require the respondent to maintain support, if the respondent customarily provides for or contributes to the support of the family or household member . . .;

(f) Require the respondent, petitioner, victim of domestic violence, or any combination of those persons, to seek counseling;

(g) Require the respondent to refrain from entering the residence, school, business, or place of employment of the petitioner or family or household member;

(h) Grant other relief that the court considers equitable and fair.

Id.

48. *Id.* § 3113.31(L)(1).

49. *Id.* This section provides:

A person who violates a protection order issued or a consent agreement approved under this section is subject to the following sanctions:

(a) Criminal prosecution for a violation of section 2919.27 of the Revised Code, if the violation of the protection order or consent agreement constitutes a violation of that section;

(b) Punishment for contempt of court.

Id.

50. *Id.* § 3113.31(L)(2). This section provides: "The punishment of a person for contempt of court for violation of a protection order issued or a consent agreement approved under this section does not bar criminal prosecution of the person for a violation of section 2919.27 of the Revised Code." *Id.*

lowing "credit" for previous punishments suffered.[51] Section 3113 also prohibits a finding of contempt following a criminal prosecution.[52]

B. *Double Jeopardy*

When Ohio's legislature enacted Ohio's domestic violence legislation, the legislature apparently perceived a double jeopardy problem. A thorough analysis of Ohio's domestic violence legislation requires an understanding of the principles of double jeopardy. Double jeopardy refers to a complex legal doctrine,[53] contained in both the United States Constitution[54] and the Ohio Constitution,[55] which protects criminal defendants in three distinct situations. To curb the sentencing discretion of courts,[56] the double jeopardy clause prohibits the imposition of multiple punishments for the same offense.[57] Serving as a restraint on government, the double jeopardy clause also prohibits multiple prosecutions,[58] barring both prosecution following acquittal[59] and prosecution following conviction.[60] Recognizing that the double jeopardy clause protects a fundamental right,[61] the United States Supreme Court allows only limited exceptions[62] to its protection.[63]

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51. *Id.* This section further provides: "However, a person punished for contempt of court is entitled to credit for the punishment imposed upon conviction [for violation of section 2919.27]." *Id.*

52. *Id.* This section further provides: "[A] person convicted of a violation of [section 2919.27] shall not subsequently be punished for contempt of court arising out of the same activity." *Id.*

53. Albernaz v. United States, 450 U.S. 333, 343 (1981). "While the clause itself simply states that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb,' the decisional law in the area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." *Id.*

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

55. "No person shall be twice put in jeopardy for the same offense." OHIO CONST. art. I, § 10(1).

56. Whalen v. United States, 445 U.S. 684, 689 (1980). "If a federal court exceeds its own authority by imposing multiple punishments . . . it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty." *Id.*

57. *See infra* notes 71-83 and accompanying text.

58. *See infra* notes 84-115 and accompanying text.

59. *See infra* notes 87-98 and accompanying text.

60. *See infra* notes 99-115 and accompanying text.

61. Green v. United States, 355 U.S. 184, 187-88 (1957) (the idea underlying the double jeopardy clause is "deeply ingrained" in the Anglo-American system of jurisprudence); *see also* Benton v. Maryland, 395 U.S. 784, 796 (1969) (the principles underlying the double jeopardy clause are fundamental); Kepner v. United States, 195 U.S. 100, 122 (1904) (double jeopardy is among the principles deemed "essential to the rule of law and the maintenance of individual freedom"); *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 171 (1873) (the prohibition against double jeopardy represents one of the most valuable principles of the common law, but the framers thought it worthy of special notice through constitutional provision).

62. *See infra* notes 93 & 99.

To determine the scope of protection afforded by the double jeopardy clause, the United States Supreme Court weighs individual interests against government interests.[64] Utilizing this approach and expanding the scope of double jeopardy protection, the Court in *Benton v. Maryland*[65] held that the double jeopardy clause in the Fifth Amendment to the United States Constitution applies to the states through the Fourteenth Amendment.[66] In *Benton,* the Court relied on the fact that the protection against double jeopardy represents a "guarantee . . . fundamental to the American scheme of justice."[67] To support its conclusion that the guarantee against double jeopardy was a fundamental right, the Court relied on the clause's ancient roots and widespread acceptance.[68] To further support its holding, the Court emphasized the many interests of the individual against being subjected to double jeopardy.[69] In doing so, the Court rejected the doctrine of "selective incorporation."[70]

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63. United States v. Wilson, 420 U.S. 332, 343 (1975) (the policy underlying the double jeopardy clause is regarded as so important that exceptions are only "grudgingly allowed"). When considering Ohio's domestic violence legislation, an important limitation to the protection of the double jeopardy clause lies in the distinction between civil and criminal proceedings and penalties. See *infra* notes 116-31 and accompanying text for a discussion of this distinction.

64. United States v. Tateo, 377 U.S. 463, 466 (1964). In *Tateo,* the Court reasoned that the "sound administration of justice" required balancing societal and individual interests. *Id.* From society's point of view, the double jeopardy clause imposes a "high price" if it prohibits punishing guilty parties simply as a result of deficient proceedings. *Id.* From an individual's point of view, the likelihood of retrial following reversal keeps appellate courts "zealous" in their protection of constitutional principles. *Id.*

65. 395 U.S. 784 (1969).

66. *Id.* at 794.

67. *Id.* at 795 (citing Duncan v. Louisiana, 391 U.S. 145, 149 (1968)).

68. *Id.*

> The fundamental nature of the guarantee can hardly be doubted. Its origins can be traced to Greek and Roman times and it became established in the common law of England long before this Nation's independence . . .. Today every state incorporates some form of the prohibition in its constitution or common law.

Id.

69. *Id.* at 795-96 (citing Green v. United States, 355 U.S. 184, 187-88 (1957)). These individual interests include one's interest in: not being subjected to continuing embarrassment, expense, anxiety, or insecurity; and not being subjected to the continuing risk of being found guilty even though innocent. *Id.*

70. *Id.* at 795. The doctrine of "selective incorporation," originally espoused in *Palko v. Connecticut*, made guarantees of the United States Constitution applicable to the states only if state standards subjected a defendant to "a hardship so acute and shocking that our polity will not endure it." 302 U.S. 319, 328 (1937), *rev'd*, 395 U.S. 784 (1969).

1. Multiple Punishment

A primary protection afforded by the double jeopardy clause is the prohibition against multiple punishment for the same offense.[71] The power to define a crime and prescribe a punishment rests with the legislature.[72] In order to effectively combat and deter criminal activity, the legislature may constitutionally punish each distinct act proscribed by the criminal law.[73] Furthermore, a single act or transaction may constitute multiple crimes and be subject to punishment under several different statutory provisions.[74] Cumulative penalties are permissible since they punish different crimes.[75] Multiple penalties that punish the same crime, however, are prohibited by the double jeopardy clause.[76] Whereas double jeopardy prohibits multiple punishment, it does not prohibit cumulative punishment because the legislature has determined that certain conduct produces separate and distinct harms.[77]

The government may not, however, use the distinction between multiple punishment and cumulative punishment to thwart the protections afforded individuals by the double jeopardy clause.[78] In *Block-*

71. Jeffers v. United States, 432 U.S. 137, 150 (1977) (the prohibition against multiple punishments stands at the heart of the double jeopardy clause); *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 168 (1873). "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense." *Id.*

72. Whalen v. United States, 445 U.S. 684, 689 (1980). "[T]he legislative power, including the power to define criminal offenses and to prescribe punishment . . . resides wholly with the Congress." *Id.*

73. Garrett v. United States, 471 U.S. 773, 781 (1985) (common sense shows that statutory offense of continuing criminal enterprise amounts to a "carefully crafted prohibition aimed at a special problem"); *Jeffers*, 432 U.S. at 157 (policy which justifies separate punishment of conspiracy and the underlying substantive offenses in cases of concerted activity is that the likelihood of successful criminal endeavor; Gore v. United States, 357 U.S. 386, 390 (1958) (congressional provisions involving narcotics traffic "constitute a network of provisions [which are] steadily tightened and enlarged [to] grappl[e] with a powerful, subtle and elusive enemy").

74. *Gore*, 357 U.S. at 389 (an individual may violate numerous statutory provisions with a single transaction); Albrecht v. United States, 273 U.S. 1, 11 (1927) (Congress retains power to punish each step leading to a criminal transaction as well as the ultimate transaction).

75. *Gore*, 357 U.S. at 389 (the fact that an individual violates several different statutory provisions with a single act does not make the offenses single and identical for purposes of double jeopardy analysis); *Albrecht*, 273 U.S. at 11 (the Constitution does not prohibit the punishment of each step taken toward a criminal act and the completed criminal act).

76. Ohio v. Johnson, 467 U.S. 493, 499 (1984) (double jeopardy clause protects against the imposition of multiple punishment, restraining the sentencing discretion of courts); Brown v. Ohio, 432 U.S. 161, 165 (1977) (the double jeopardy clause protects against multiple punishments for the same offense); One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 236 (1972) (the double jeopardy clause prohibits punishing twice for the same offense); *Ex Parte* Lange, 85 U.S. (18 Wall.) 163, 168 (1873) ("[i]f there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence").

77. Albernaz v. United States, 450 U.S. 333, 343 (1981) (the separate provisions of the criminal law address separate and diverse harms).

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

burger v. United States,[79] the United States Supreme Court developed the test to determine which acts may and may not be separately punished.[80] The first step in the *Blockburger* analysis requires determination of whether the legislature intended to impose cumulative punishment.[81] The focus then shifts to the elements of the offenses charged.[82] If each statutory "provision requires proof of a fact which the other [statutory provision] does not [require]," then the imposition of cumulative punishment survives constitutional challenge.[83]

2. Multiple Prosecutions

Equally as important as the prohibition against multiple punishment is the double jeopardy prohibition against multiple prosecutions.[84] The double jeopardy clause prohibits multiple prosecutions in two distinct situations. First, an individual who has been acquitted may not be prosecuted again for the same offense.[85] Second, an individual who has been convicted of a crime, may also not be prosecuted again for the same offense.[86]

a. Prosecution Following Acquittal

The double jeopardy clause prohibits prosecution of an individual following acquittal.[87] In fact, an acquittal carries considerable weight in double jeopardy analysis.[88] Thus, when balancing society's interest in

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79. 284 U.S. 299 (1932).

80. *Id.* at 304.

81. *Id.* at 305. "The plain meaning of the provision is that each offense is subject to the penalty prescribed; and if that be too harsh, the remedy must be afforded by act of Congress, not by judicial legislation under the guise of construction." *Id.*; *see also* Garrett v. United States, 471 U.S. 773, 778 (1985).

82. *Blockburger*, 284 U.S. at 304. "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.*; *see also* Albernaz v. United States, 450 U.S. 333, 337 (1981); Illinois v. Vitale, 447 U.S. 410, 416 (1980); Iannelli v. United States, 420 U.S. 770, 785 (1975); Gore v. United States, 357 U.S. 386, 388 (1958).

83. *Blockburger*, 284 U.S. at 304.

84. North Carolina v. Pearce, 395 U.S. 711, 718 (1969) ("the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it").

85. *See infra* notes 87-98 and accompanying notes.

86. *See infra* notes 99-115 and accompanying notes.

87. United States v. Ball, 163 U.S. 662, 669 (1896) (an acquittal following invalid indictment, not objected to, bars a second indictment for the same crime).

88. United States v. Scott, 437 U.S. 82, 91 (1978) (the law attaches special significance to an acquittal), *cert. denied*, 440 U.S. 929 (1979). So significant is a judgment of acquittal that historically the government possessed no right of appeal in criminal cases absent express statutory authority. *Id.*; *see also* United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977) (permitting multiple trials arms the state with a potent instrument of oppression); Peters v. Hobby, 349 U.S. 331, 345 (1955) (deeply rooted in the criminal law is the principle that a verdict

the prosecution of those guilty of violating its laws[89] against an individual's interest in the finality of judgments,[90] the individual's interest will prevail.[91]

Support for the rule barring prosecution following acquittal rests on an understanding of what constitutes jeopardy.[92] Jeopardy is not simply punishment, but also includes the risks involved in trial and conviction.[93] Given this understanding, jeopardy may attach prior to a verdict.[94] Once jeopardy attaches, an acquittal bars subsequent prosecu-

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of acquittal is not appealable); United States v. Sanges, 144 U.S. 310, 312 (1892) (the overwhelming weight of authority holds that the government may not sue out a writ of error in a criminal case, absent express statutory authority). Additionally, collateral estoppel precludes relitigation of factual issues determined in a general verdict of acquittal. Ashe v. Swenson, 397 U.S. 436, 444-45 (1969).

89. Ohio v. Johnson, 467 U.S. 493, 502 (1984) (acknowledging a state's right to "one full and fair opportunity" to try, convict, and punish individuals who have violated the criminal law).

90. Brown v. Ohio, 432 U.S. 161, 165 (1977) (the double jeopardy clause prohibits multiple prosecution, recognizing an individual's interest in finality).

91. Green v. United States, 355 U.S. 184, 191 (1957) (a verdict of acquittal, no matter how erroneous, is an absolute bar to later prosecution for the same offense); *Ball*, 163 U.S. at 671 ("[t]he verdict of acquittal was final and could not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy").

92. Serfass v. United States, 420 U.S. 377, 391 (1975) (the double jeopardy clause comes into play when jeopardy attaches); United States v. Sisson, 399 U.S. 267, 289 (1970). "An acquittal may not be reviewed for error or otherwise, without twice putting the defendant in jeopardy." *Id.*

93. Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 308 (1984); United States v. Ball, 162 U.S. 662, 669 (1896). "The accused whether convicted or acquitted is equally put in jeopardy at the first trial." *Id.*

Once placed in jeopardy, the Court recognizes limited exceptions to the rule barring retrial. For example, a defendant may be reprosecuted in the event of mistrial. Lee v. United States, 432 U.S. 23, 31 (1977) (dismissal for invalid indictment "functionally indistinguishable from declaration of mistrial"); United States v. Dinitz, 424 U.S. 600, 608 (1976) (mistrial declared at defendant's request amounts to consent to reprosecution), *cert. denied*, 429 U.S. 1104 (1979); Gori v. United States, 367 U.S. 364, 368 (1961) ("retrial following *sua sponte* declaration of mistrial consistent with double jeopardy clause because justice may require mistrial . . . decision left to the sound discretion of the trial judge"); United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824) (the law grants to courts power to dismiss jury when "there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated"). A defendant may also be subject to reprosecution by a different sovereign. Abbate v. United States, 359 U.S. 187, 189 (1959) (an act defined as criminal by both federal and state authorities is an offense against each and may be punished by each); Bartkus v. Illinois, 359 U.S. 121, 123 (1959) (federal and state authorities may cooperate in prosecution of individual and not violate double jeopardy so long as one is not the tool of the other). *But see* Waller v. Florida, 397 U.S. 387, 393 (1970) (individual may not be prosecuted by state and municipal authorities . . . judicial power of both springs from the same organic law).

94. Critz v. Bretz, 437 U.S. 28, 34-35 (1978). Jeopardy attaches when the issue of guilt or innocence is submitted to the trier of fact. United States v. Scott, 437 U.S. 82, 95 (1978), *cert. denied*, 440 U.S. 929 (1979). In the case of a jury trial, jeopardy attaches when the jury is empaneled and sworn. *Serfass*, 420 U.S. at 388. In the case of a bench trial, jeopardy attaches when the court begins to hear evidence. *Id.* The point at which jeopardy attaches reflects important double jeopardy concerns. *Bretz*, 437 U.S. at 37-38. The concerns include the finality of judg-

tion.[95] The rationale for this rule is that society placed the individual in jeopardy, submitted the issue of his guilt or innocence to the trier of fact, and returned a verdict of not guilty.[96] An acquittal terminates jeopardy in a defendant's favor.[97] A valid judgment of acquittal terminates a proceeding, ends jeopardy, and bars subsequent prosecution.[98]

b. Prosecution Following Conviction

The double jeopardy clause also protects an individual when a criminal proceeding ends with a conviction.[99] An individual may not be subject to later prosecution for the same offense.[100] Furthermore, an

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ments, minimizing the burdens of criminal trial, and the individual's interest in proceeding to judgment with his chosen jury. *Id.* Thus, the federal rules also apply to the states. *Id.*

95. Fong Foo v. United States, 369 U.S. 141, 143 (1962) (judgment of acquittal is final).

96. *Scott*, 437 U.S. at 95.

97. *Id.* at 94. *Lydon*, 466 U.S. at 308 (acquittals represent resolution of the factual elements of the offense charged). Given the significant weight carried by a judgment of acquittal and the purposes of double jeopardy protections, the Court emphasizes substance over form when considering whether further prosecution is barred. *Scott*, 437 U.S. at 95 (issue is whether proceeding terminated on grounds unrelated to factual guilt or innocence); *Serfass*, 420 U.S. at 392 (the word acquittal carries no "talismanic" quality and actions of court must be considered in procedural context).

98. Price v. Georgia, 398 U.S. 323, 329 (1970) (jeopardy for an offense ends with a judgment of acquittal, whether the acquittal is express or implied, rejecting argument for "continuing jeopardy" in cases of acquittal).

99. Brown v. Ohio, 432 U.S. 161, 165 (1977) (the double jeopardy clause serves to protect an individual's interest in finality, an end to the ordeal of trial).

The Court recognizes exceptions to this protection in limited circumstances. Diaz v. United States, 223 U.S. 442, 449 (1912). In *Diaz*, a death occurred as a result of an assault and battery following prosecution for the assault and battery. *Id.* at 444. The Court allowed a second prosecution, reasoning that assault and battery and homicide represented distinct offenses "in law and in fact." *Id.* at 449. Death, the principal element in the homicide, constituted no part of the assault and battery offense and had not occurred by the time of prosecution. *Id.* Thus, the defendant faced no jeopardy for the offense of homicide before the death occurred. *Id.*

Similarly, an individual may be reprosecuted following conviction if he appeals and obtains reversal on appeal. United States v. Jorn, 400 U.S. 470, 483-84 (1971); Bryan v. United States, 338 U.S. 552, 560 (1950); Stroud v. United States, 251 U.S. 15, 18 (1919). To justify retrial following reversal on appeal, the Court relies on the concept of "continuing jeopardy." Jeffers v. United States, 432 U.S. 137, 152 (1977). When the defendant himself invoked the action of the court, resulting in retrial, he is not in jeopardy a second time within the meaning of the Constitution. *Id.; see also Price*, 398 U.S. at 326, (all criminal proceedings against a defendant should be allowed to run their course). In *Jorn*, the Court reasoned that the double jeopardy clause does not require that the government be prepared in all instances to guarantee a single proceeding free of harmful error. 400 U.S. at 483-84. The double jeopardy clause prohibits a second trial when it is unnecessary and "unfairly aids the prosecution and harasses the defense." *Id.*

If, however, a defendant obtains reversal on appeal based on the insufficiency of the evidence, the double jeopardy clause bars retrial. Burks v. United States, 437 U.S. 1, 18 (1978). In *Burks*, the Court distinguished trial error from a finding that the evidence was insufficient to support a conviction. *Id.* at 15. When a reviewing court finds the evidence insufficient, it amounts to a determination that the government failed to prove its case. *Id.* The first proceeding gave the government one fair opportunity to present its case, barring a claim of prejudice. *Id.* at 16.

Id. at 17, 18.

individual may not be prosecuted for a lesser offense following conviction for a greater offense,[101] nor may an individual be prosecuted for a greater offense following conviction for a lesser offense.[102] The sequence of prosecution is immaterial.[103]

In *Brown v. Ohio*,[104] the United States Supreme Court adopted the *Blockburger* analysis[105] as a means of establishing the protections of the double jeopardy clause in cases of multiple prosecutions.[106]

> If two offenses are the same under [*Blockburger*] for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions. Where the judge is forbidden to impose cumulative punishment for two crimes at the end of a single proceeding, the prosecutor is forbidden to strive for the same result in successive proceedings. Unless each statute requires proof of an additional fact which the other does not, the Double Jeopardy Clause prohibits successive prosecution as well as cumulative punishment.[107]

Focusing on the elements of the offenses charged,[108] the Court con-

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101. Harris v. Oklahoma, 433 U.S. 682, 683 (1977) (an individual prosecuted for a crime involving multiple incidents may not be retried for any one of those single incidents); *In re* Nielson, 131 U.S. 176, 187 (1889) (individual convicted and suffering punishment may not be punished again for incidents included in the offense).

102. *Brown*, 432 U.S. at 165. In *Brown*, the Court relied on the fact that the double jeopardy clause acts primarily as a restraint on government. *Id.* Thus, legislatures may not punish an individual repeatedly for what amounts to a single offense. *Id.* Additionally, courts may not impose multiple punishment and prosecutors may not seek to impose multiple punishment in more than one trial. *Id.* As a result, for purposes of double jeopardy analysis, the greater offense becomes the same as any lesser offenses following conviction. *Id.* at 168.

103. *Id.* The Court, however, has never gone so far as to explicitly adopt the position advocated by Justice Brennan that the double jeopardy clause requires the government to prosecute an individual in one proceeding on all charges growing out of a course of conduct. *Harris*, 433 U.S. at 683 (Brennan, J., concurring).

104. 432 U.S. 161 (1977).

105. *See supra* notes 79-83 and accompanying text.

106. *Brown*, 432 U.S. at 166.

107. *Id.* (citations omitted).

108. *Brown* involved the statutory offenses of "joyriding" and autotheft. *Id.* at 162-63. In late November 1973 Nathaniel Brown stole a 1965 Chevrolet from a parking lot in Cleveland, Ohio. *Id.* at 162. Nine days later, police in Wickliffe, Ohio apprehended him and charged him with "joyriding." *Id.* Brown pleaded guilty to the charge, paid a $100 fine and served a thirty day jail sentence. *Id.* Following his release and return to Cleveland, Brown faced charges of autotheft and joyriding in Cuyahoga County. *Id.* at 162-63. The Cuyahoga County Court rejected Brown's claim of former jeopardy, imposed a sentence of six months, suspended the sentence and placed him on probation. *Id.* at 163.

On appeal, the Ohio Court of Appeals for Cuyahoga County affirmed the conviction. *Id.* The court of appeals held that joyriding and autotheft amounted to the same statutory offense for purposes of double jeopardy analysis. *Id.* at 164. The court of appeals, however, permitted the second prosecution reasoning that the two prosecutions involved separate acts. *Id.* (citations

cluded that the two offenses of joyriding and autotheft were the same[109] for purposes of double jeopardy analysis.[110] Additionally, the Court rejected the argument that Brown could be constitutionally prosecuted a second time because the offenses involved different acts at different times.[111]

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109. The Court found joyriding a lesser included offense of autotheft. *Id.* at 167. To prove the greater offense, autotheft, the prosecutor need only prove the additional element of intent. *Id.*

110. *Id.* at 168. "As is invariably true of a greater and lesser included offense, the lesser offense . . . requires no proof beyond that which is required for conviction of the greater. . . . The greater offense is therefore by definition the 'same' for purposes of double jeopardy as any lesser offense included in it." *Id.*

111. *Id.* at 169. "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a crime into a series of temporal or spatial units." *Id.* (citations omitted).

In a recent, short-lived decision, Grady v. Corbin, 110 S. Ct. 2084 (interim ed. 1990), *overruled by* United States v. Dixon, 113 S. Ct. 2849 (interim ed. 1993), the Court further refined this position. The *Grady* case involved an automobile accident which resulted in the death of one driver. *Id.* at 2087-88. Apparently as a result of miscommunication, the prosecuting attorneys failed to prevent the "responsible" driver, Thomas Corbin, from pleading guilty to traffic violations in justice court. *Id.* at 2088. The court accepted the guilty plea, but postponed sentencing. *Id.* Subsequently, a grand jury indicted Corbin, charging him in varying degrees with manslaughter, homicide, assault, and driving while intoxicated. *Id.* at 2089. Corbin pleaded former jeopardy. *Id.* The New York Court of Appeals eventually accepted this argument. *Id.*

Given these facts, the United States Supreme Court, when considering the case, first adhered to its position that the *Blockburger* analysis initially determines whether subsequent prosecution is barred on double jeopardy grounds. *Id.* at 2090. ("[i]f application of [*Blockburger*] reveals that the offenses have identical statutory elements or that one is a lesser included offense of the other, then the inquiry must cease and subsequent prosecution is barred"). The Court then went a step further, requiring consideration beyond *Blockburger*. *Id.* ("[t]he State argues that this should be the last step in the inquiry and that the Double Jeopardy Clause permits successive prosecutions whenever the offenses charged satisfy the *Blockburger* test; [w]e disagree"). Acknowledging the policies underlying the double jeopardy clause, including the burdens of trials and the fact that subsequent trials allow the prosecution to develop and refine its presentation, the Court found *Blockburger* insufficient to protect individuals. *Id.* at 2091-93. ("[i]f *Blockburger* constituted the entire double jeopardy inquiry in the context of successive prosecutions, the State could try Corbin in four consecutive trials . . . Corbin would be forced either to contest each of these trials or to plead guilty to avoid the harassment and expense"). Focusing on conduct rather than only the elements of the offenses, the Court held that the double jeopardy clause bars subsequent prosecution for an admittedly different offense if, to prove its case, the government will rely on conduct for which a defendant has been previously prosecuted. *Id.* ([t]he Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted). If that conduct constitutes an essential element of the offense charged in a subsequent prosecution, the double jeopardy clause bars the proceeding. *Id.* at 2094. In order to constitutionally proceed, the government must rely on conduct not previously prosecuted. *Id.* Giving substance to this rule, the Court further held that the government may not simply rely on different evidence to support different prosecutions resulting from the same conduct. *Id.* at 2093.

> This is not an "actual evidence" or "same evidence" test. The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct . . . . [A] State cannot avoid the dictates of the Double Jeopardy Clause merely by altering in successive prosecutions the evidence offered to prove the same conduct.

Id.

As in the case of a prosecution following an acquittal, substance rather than form determines the protections of the double jeopardy

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The decision in *Grady* sharply divided the court. *Id.* at 2087. Justice O'Connor dissented separately. *Id.* at 2095. Justices Rehnquist and Kennedy joined Justice Scalia in his vigorous dissent. *Id.* at 2096. Justice Scalia's dissent voiced concern that the Court's holding went beyond accepted principles of double jeopardy analysis. *Id.* at 2096. He stated: "The Court today . . . depart[s] from clear text and clear precedent . . . [and] in practice . . . will require prosecutors to observe a rule we have explicitly rejected in principle; that all charges arising out of a single occurrence must be joined in a single indictment." *Id.*

In spite of this division, the Court adhered to *Grady's* "same conduct" test two years later in United States v. Felix, 112 S. Ct. 1377, 1382 (interim ed. 1992). *Felix,* however, cautioned against an expansive reading of *Grady. Id.* at 1382. In *Felix*, as in *Grady,* the Court disclaimed any intention to adopt the "same evidence" test and reiterated that the mere overlap of proof does not conclusively establish a double jeopardy violation. *Id.* Additionally, the Court emphasized the context of *Grady* and recognized the problems which arose in its interpretation. *Id.* Nevertheless, after *Grady,* a number of courts interpreted the decision as "broaden[ing] the scope of double jeopardy protection." *See, e.g.*, State v. Kipi, 811 P.2d 815, 819 (Haw. 1991). Courts also interpreted *Grady* as barring later prosecutions when one of the earlier proceedings was for contempt proceeding. State v. Mojarro, 816 P.2d 260, 261 (Ariz. Ct. App. 1991); United States v. Dixon, 598 A.2d 724, 733 (D.C. 1991), *aff'd,* 113 S. Ct. 2849 (interim ed. 1993); State v. Vanselow, 572 N.E.2d 269, 274 (Ohio, Hamilton Cty. Mun. Ct. 1991); State v. Magazine, 393 S.E.2d 385, 387 (S.C. 1990). *But see* Commonwealth v. Manney, 617 A.2d 817, 818 (Pa. Super. Ct. 1992); Commonwealth v. Warrick, 609 A.2d 576, 578 (Pa. Super. Ct. 1992).

To survive double jeopardy challenge after *Grady*, courts emphasized the exceptions explicitly recognized. One exception allowed subsequent prosecution when a state was unable to prosecute in a single proceeding. *Grady,* 110 S. Ct. at 2090 n.7 ("[a]n exception may exist where the state is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence") (*citing* Brown v. Ohio, 432 U.S. 161, 169 n.7 (1977)). *Grady* also recognized an exception if the state did not rely on the same conduct to prove an offense subsequently prosecuted. *Id.* at 2094 (refusing to adopt the "same transaction" test); *see also* State v. Glaser, 613 A.2d 1011, 1013 (Md. 1992) (state may proceed in a later criminal prosecution when it follows the Court's guidance and limits its proof to conduct not previously prosecuted). Further, by recognizing exceptions in certain circumstances, one court interpreted *Grady* as allowing other exceptions. Commonwealth v. Warrick, 609 A.2d 576, 578 (Pa. Super. Ct. 1992) ("[t]he necessity of providing a court with the immediate means to protect its dignity and its ability to properly conduct judicial proceeding must be deemed at least as important as the administrative and procedural concerns recognized by *Grady*").

Based in part on this confusion in the lower courts as to the meaning of *Grady*, the Supreme Court overruled *Grady.* United States v. Dixon, 113 S.Ct. 2849, 2860 (interim ed. 1993). While formally extending the protections of the double jeopardy clause to reach contempt proceedings, the Court rejected the "same conduct" test announced in *Grady. Id.*

> [W]e think it time to acknowledge what is now, three years after *Grady*, compellingly clear: the case was a mistake. We do not lightly reconsider a precedent, but, because *Grady* contradicted an "unbroken line of decisions," contained "less than accurate" historical analysis and has produced "confusion" we do so here.

Id.

Thus, the Court, by overruling *Grady,* announced that the older *Blockburger* or "same elements" analysis will determine the protections of the double jeopardy clause. *Id.* "We have concluded, however, that *Grady* must be overruled. Unlike the *Blockburger* analysis, whose definition of what prevents two crimes from being the 'same offence,' has deep historical roots and has been accepted in numerous precedents of this Court, *Grady* lacks Constitutional roots." *Id.* (citations omitted).

clause in cases of prosecutions following conviction.[112] Again, the Court relies on an understanding of jeopardy to support this position.[113] Because a prosecution itself involves considerable physical, emotional, and financial strain, the double jeopardy clause bars the government from imposing this strain more than once.[114] When a proceeding imposes significant burdens and carries potentially severe consequences, the double jeopardy clause bars further prosecution.[115]

3. Double Jeopardy in Civil and Criminal Proceedings

An important limitation to the protections of the double jeopardy clause lies in the distinction between civil and criminal proceedings.[116] The protections of the double jeopardy clause apply only to criminal proceedings.[117] To determine whether a proceeding is civil or criminal in character, a court looks to the nature of the relief sought.[118] Initially, a court considers whether the legislature, expressly or implicitly, indicated that the relief provided is civil or criminal.[119] If the legislature labels the provision civil, a court then determines whether the statutory provision is so punitive in purpose or effect as to defeat that label.[120] The court, however, requires strong evidence to overcome the legislative label.[121]

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112. Breed v. Jones, 421 U.S. 519, 528 (1975) (proceedings and judgment involve stigma associated with criminal conviction and potentially lengthy imprisonment).

113. *Id.* Although the literal language "life and limb" suggests an especially serious proceeding, it is construed far more broadly. *Id.* Jeopardy means the risks embodied in the ordeal of trial. *Id.*

114. *Id.* at 530.

115. *Id.*

116. United States v. Ward, 448 U.S. 242, 248 (1980) (the distinction between civil and criminal proceedings is important because some constitutional protections apply only to criminal proceedings).

117. United States v. One Assortment of 89 Firearms, 465 U.S. 354, 359 (1984) (Congress may impose both criminal and civil sanctions arising from the same act or omission); Helvering v. Mitchell, 303 U.S. 391, 397 (1938) (acquittal in a criminal proceeding is not a bar to a later civil action by the government based on the same facts); United States v. Ryan, 810 F.2d 650, 653 (7th Cir. 1987) (civil and criminal sanctions for the same conduct does not violate the double jeopardy clause).

118. Hicks v. Feiock, 485 U.S. 624, 636 (1988); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911) (character and purpose of punishment and not the fact of punishment distinguishes civil and criminal cases).

119. *One Assortment of 89 Firearms*, 465 U.S. at 362; One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 236-37 (1972).

120. Allen v. Illinois, 478 U.S. 364, 369 (1986) (civil label is not dispositive); Flemming v. Nestor, 363 U.S. 603, 617-20 (1960); *see also* United States v. Halper, 109 S. Ct. 1892, 1901 (interim ed. 1989) (labels may not defeat the protections of the double jeopardy clause).

121. *Feiock*, 485 U.S. at 631 (state law provides "strong guidance" as to whether the state is exercising its power in a non-punitive or punitive fashion, the Court will not "psychoanalyze" the subjective intent of state legislatures and courts); *Flemming*, 363 U.S. at 617-20 (only the clearest proof suffices to establish the unconstitutionality of a statute).

One method of determining the character of relief sought focuses on the purposes served by a particular sanction.[122] The relief afforded in a civil proceeding is remedial in nature.[123] In contrast, the character of relief afforded in a criminal proceeding is punitive in nature.[124] When considering the character of the relief sought, the court does not consider the form of sanction determinative.[125]

In *United States v. Halper*,[126] the Court announced a "rule of reason."[127] The analysis under this rule focuses on the purposes served by the sanction.[128] While civil sanctions seek to remedy, criminal sanctions seek to punish and deter.[129] When a civil penalty bears no "rational relation" to the goal of compensation, the government has moved from seeking a remedy to imposing punishment.[130] Further, a court may properly determine when the government has ceased pursuing remedial goals and has begun to pursue retributive or deterrent goals.[131]

C. *Contempt of Court*

The distinction between civil and criminal penalties and proceedings becomes important when considering that contempt of court plays a central role in Ohio's domestic violence legislation. Contempt of court is disrespect for the authority of the court or disobedience of its orders.[132] The contempt power is essential to the preservation of order in

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122. *Feiock*, 485 U.S. at 631.

123. *Id.* at 635-36.

124. *Id.* To give further content to this distinction, the Court in *Kennedy v. Mendoza-Martinez*, listed a number of factors assessing the character of a statutory sanction by looking at both the sanction and the offense. 372 U.S. 144, 168-69 (1963).

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Id.

125. United States v. Halper, 109 S. Ct. 1892, 1901 (interim ed. 1989). While giving some deference to a legislative label, the Court will not allow that label to determine whether the protections of the double jeopardy clause apply. *Id.* at 1901. ("labels affixed either to proceeding or the relief imposed . . . are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law"). Id. (quoting *Feiock*, 485 U.S. 624).

126. *Id.*

127. *Id.* at 1902.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. Denovchek v. Board of Trumbull County Comm'rs, 520 N.E.2d 1362, 1363 (Ohio 1988); Petition of Green, 175 N.E.2d 59, 62 (Ohio 1961); Scherer v. Scherer, 594 N.E.2d 150,

judicial proceedings[133] and to the enforcement of judgments.[134] In addition, the contempt power serves to secure the dignity of the courts and the "uninterrupted and unimpeded" administration of justice.[135]

Contempt is a power inherent in all courts.[136] Although acts or omissions constituting contempt of court may be defined by statute, courts retain their inherent power to determine what constitutes contempt and when it has occurred.[137] The legislature may, however, procedurally regulate the exercise of the courts' inherent contempt power.[138]

1. Direct and Indirect Contempt

One method of regulating the exercise of the contempt power lies in the distinction between direct contempt[139] and indirect contempt.[140]

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151 (Ohio Ct. App. 1991); Ohio v. Tatman, 598 N.E.2d 91, 93 (Ohio Ct. App. 1991) (Grey, J., dissenting).

133. Zakany v. Zakany, 459 N.E.2d 870, 873 (Ohio 1984).

134. State v. Local Union 5760, United Steelworkers of Am., 173 N.E.2d 331, 337 (Ohio 1961). "A court's historic function is subverted and its purposes frustrated if persons to whom orders are directed successfully challenge the authority of the court by disregarding or refusing to obey such orders." *Id.*

135. McDaniel v. McDaniel, 599 N.E.2d 758, 759 (Ohio Ct. App. 1991).

136. State v. McGrath, 577 N.E.2d 1100, 1101 (Ohio 1991); State v. Christon, 589 N.E.2d 53, 55 (Ohio Ct. App. 1990); W.F. BAILEY, A TREATISE ON THE LAW OF HABEAS CORPUS AND SPECIAL REMEDIES, § 64 (1913).

137. State v. Treon, 188 N.E.2d 308, 313 (Ohio Ct. App. 1963) ("it is within the inherent power of the court to protect its processes against wrongdoing and to punish, as and for contempt, those guilty of such unlawful conduct"); Beach v. Beach, 74 N.E.2d 130, 134 (Ohio Ct. App. 1946) (possessing inherent power to punish contempt, courts additionally possess power to determine what conduct actually constitutes contempt).

138. *In re* Lands, 67 N.E.2d 433, 437 (Ohio 1946) (where the General Assembly has prescribed the procedure of the exercise of the contempt power, the courts are under a duty to follow those procedures).

139. Direct contempt is codified in Ohio at O.R.C. section 2705.01 which provides: "A court, or a judge at chambers may summarily punish a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice." OHIO REV. CODE ANN. § 2705.01 (Anderson 1992). For examples of direct contempt, see State v. Local Union 5760, United Steelworkers of Am., 173 N.E.2d 331, 337 (Ohio 1961) (union member and officials interfering with a sheriff's writ of replevin); *In re* McGinty, 507 N.E.2d 441, 445-56 (Ohio Ct. App. 1986) (in close proximity to court proceedings prosecutor interrupted private conversation between defense counsel and witness and intimidated defense counsel); State v. Flinn, 455 N.E.2d 691, 693 (Ohio Ct. App. 1982) (refusal, in open court, to execute a handwriting sample); *In re* Poth, 442 N.E.2d 105, 106 (Ohio Ct. App. 1981) (refusal to answer relevant and material questions asked in a trial court when witness had been granted transactional immunity); Fidelity Fin. Co. v. Harris, 126 N.E.2d 812, 815 (Ohio Ct. App. 1955) (attorney filing required documents with the court which bore signature of a fictitious person and acknowledging that signature with full knowledge that the person does not exist).

140. Indirect contempt is codified in Ohio at O.R.C. section 2705.02 which provides:

A person guilty of any of the following acts may be punished as for a contempt: (A) Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment or command of a court or an officer; (B) Misbehavior of an officer in the performance of his official duties, or

Although legislatures may initially classify certain acts as direct or indirect contempt, courts retain the power to determine whether specific acts constitute direct or indirect contempt.[141]

Direct contempt involves conduct in the presence of the court which obstructs the administration of justice.[142] "In the presence of the court," however, involves more than "physical propinquity."[143] Any act which directly affects the administration of justice is deemed to be done in the court's presence.[144] Thus, the court may be constructively present.[145] Direct contempt may be punished summarily, immediately following its occurrence and without a separate proceeding.[146] Misbehavior observed by the court requires no outside evidence.[147] A summary proceeding for direct contempt does not require the filing of charges or the issuance of process.[148] Immediate punishment prevents misbehavior from delaying, hindering, or influencing pending proceedings.[149] Thus, immediate punishment for direct contempt prevents the obstruction of

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in his official transactions; (C) A failure to obey a subpoena duly served, or a refusal to be sworn or to answer as a witness when lawfully required; (D) The rescue, or attempted rescue of a person or of property in the custody of an officer by virtue of an order or process of court held by him; (E) A failure upon the part of a person recognized to appear as a witness in a court to appear in compliance with the terms of his recognizance.

OHIO REV. CODE ANN. § 2705.02 (Anderson 1992). For examples of indirect contempt, see Midland Steel Prods. Co. v. United Auto. Workers of Am., Local 486, 573 N.E.2d 98, 100 (Ohio 1991) (violation of temporary restraining order); City of Shaker Heights v. Heffernan, 549 N.E.2d 1231, 1233 (Ohio Ct. App. 1989) (attorney's failure to notify the court of a fraud perpetrated upon it); Rice v. Rogers, 572 N.E.2d 213, 214 (Ohio Ct. App. 1989) (failure to comply with a court order to remove certain items from property); Adams v. Epperly, 499 N.E.2d 374, 375 (Ohio Ct. App. 1985) (failure to obey a domestic relations court order); *In re* Carroll, 510 N.E.2d 1204, 1208 (Ohio Ct. App. 1985) (providing letter of credit following bid at Sheriff's sale rather than cash or certified check as requested).

141. *Local Union 5760, United Steelworkers of Am.*, 173 N.E.2d at 336-37; State v. Sandlin, 463 N.E.2d 85, 88 (Ohio Ct. App. 1988).

142. McGill v. McGill, 445 N.E.2d 1163, 1165 (Ohio Ct. App. 1982); State v. Treon, 188 N.E.2d 308, 315 (Ohio Ct. App. 1963) (the elements of direct contempt are misconduct in open court or in the presence of a judge which disrupts the court's business).

143. Beach v. Beach, 74 N.E.2d 130, 134 (Ohio Ct. App. 1946); *see also* OHIO REV. CODE ANN. § 2705.01 (Anderson 1992).

144. *Beach*, 74 N.E.2d at 130. "If the act is of such character and is done under such circumstances that naturally its effect would be felt in the actual administration of justice, then the act is as much done in the court's presence as if the person doing the act were actually in the court's presence." *Id.* at 134-35.

145. *Local Union 5760, United Steelworkers of Am.*, 173 N.E.2d at 337 (a court is constructively present when its constituent parts are engaged in the administration of its business).

146. *In re* Carroll, 501 N.E.2d 1204, 1207 (Ohio Ct. App. 1985); *Treon*, 188 N.E.2d at 315.

147. *In re* Purola, 596 N.E.2d 1140, 1142 (Ohio Ct. App. 1991).

148. *Id.*

149. *Treon*, 188 N.E.2d at 315.

justice.[150] Further, immediate punishment vindicates the authority of the court in the eyes of the public.[151]

Contempt may also be indirect. Indirect contempt occurs outside the presence of the court.[152] Thus, indirect contempt involves conduct of which the court is not immediately aware.[153] Such conduct may, nevertheless, affect the administration of justice and thus it is punishable as contempt.[154] Because the court is not present to witness and immediately punish the conduct constituting contempt, indirect contempt generally requires a hearing.[155]

2. Civil and Criminal Contempt

Contempt of court is further distinguished as either criminal or civil.[156] Courts recognize, however, that the distinction between criminal and civil contempt is often very subtle.[157] In spite of the difficulty of determining whether a specific act constitutes criminal or civil contempt, the distinction is crucial because it directly and immediately determines the rights of the individual accused of contempt.[158] In *Gompers v. Bucks Stove & Range Co.*,[159] the United States Supreme

150. *Id.*

151. *Id.*

152. *In re* Carroll, 501 N.E.2d 1204, 1207 (Ohio Ct. App. 1985); *see also* OHIO REV. CODE ANN. § 2705.02 (Anderson 1992).

153. *In re Carroll*, 501 N.E.2d at 1207.

154. State v., Local Union 5760, United Steelworkers of Am., 173 N.E.2d 331, 337 (Ohio 1991) (a court's historic functions are subverted and its purposes frustrated if persons to whom orders are directed may successfully challenge the court's authority by disregarding or refusing to obey such orders).

155. OHIO REV. CODE ANN. § 2705.05 (Anderson 1992); *In re Carroll*, 501 N.E.2d at 1207 (when a court becomes aware of an act of indirect contempt, the contemptor is given notice and the court conducts a hearing); *In re* Lands, 67 N.E.2d 433, 437 (Ohio 1946) (when an individual is charged with an act of indirect contempt, he is entitled to an adversarial hearing, to be charged in writing and to an opportunity to be heard, by himself or counsel).

156. *In re* Purola, 596 N.E.2d 1140, 1143 (Ohio Ct. App. 1991) (contempt may be classified as either criminal or civil). For a detailed discussion of the distinction, see Robert J. Martineau, *Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt*, 50 U. CIN. L. REV. 677 (1981).

157. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911) (contempt is neither wholly civil nor wholly criminal, a particular act may contain characteristics of both); State v. Sandlin, 463 N.E.2d 85, 88 (Ohio Ct. App. 1983) (no line of demarcation exists between criminal and civil contempt).

158. *In re Purola*, 596 N.E.2d at 1143; *see also* Bloom v. Illinois, 91 U.S. 194, 201 (1968) (serious or criminal contempt is so nearly like other serious crimes that it is subject to the constitutional guarantee of a right to jury trial); Brown v. Executive 200, Inc., 416 N.E.2d 610, 612 (Ohio 1980) (explicitly adopting standard of proof beyond a reasonable doubt in cases of criminal contempt); State v. Kilbane, 400 N.E.2d 386, 390 (Ohio 1990) (classification of contempt as either criminal or civil becomes important as it determines when the constitutional safeguards involved in criminal trials are required).

159. 221 U.S. 418 (1911).

Court developed a test which characterizes contempt proceedings as either civil or criminal.[160] The Court stated that the distinction between civil and criminal contempt lies in the "character and purpose of the punishment."[161] Although the Court characterized sanctions for both civil and criminal contempt as "punishment," the Court, nonetheless, held that punishment in the case of civil contempt is remedial in character and serves to benefit the complainant.[162] In contrast, the purpose of punishment in the case of criminal contempt is punitive.[163] Punishment for criminal contempt also serves to vindicate the authority of the court.[164]

In the application of the *Gompers* test, several factors influence the determination of whether a contempt is civil or criminal. First, a particular type of punishment does not necessarily define the contempt as criminal or civil.[165] For example, imprisonment may be appropriate punishment in cases of both criminal and civil contempt.[166] Similarly, monetary penalties may be used as a sanction in either criminal or civil contempt.[167] Additionally, the unconditional or conditional nature of the sanction impacts on the determination of whether an act constitutes criminal or civil contempt.[168] When a sanction is unconditional, thus punitive in nature, it results from criminal contempt.[169] On the other hand, if the sanction is conditional, thus coercive in nature, it results

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160. *Id.* at 441.

161. *Id.*

162. *Id.*

163. *Id.; see also* State v. Christon, 589 N.E.2d 53, 57 (Ohio Ct. App. 1990) (in cases of criminal contempt, an individual faces punishment for past affronts to the court).

164. State *ex rel* Rice v. McGrath, 577 N.E.2d 1100, 1101 (Ohio 1991) (a court may punish disobedience of its orders with contempt proceedings); Zakany v. Zakany, 459 N.E.2d 870, 873 (Ohio 1984) (included in a court's inherent powers is the authority to punish disobedience to its orders with contempt); *Christon*, 589 N.E.2d at 57 (criminal contempt is punishment for affronts to the courts); State *ex rel* Slaby v. Summit City Council, 454 N.E.2d 1379, 1385 (Ohio Ct. App. 1983) (power to punish for contempt is a power necessary to a court's very identity).

165. *In re* Carroll, 501 N.E.2d 1204, 1208 (Ohio Ct. App. 1985) (fine or imprisonment or both available for civil or criminal contempt); McGill v. McGill, 445 N.E.2d 1163, 1166 (Ohio Ct. App. 1982) (imprisonment does not automatically establish criminal contempt).

166. Dayton Women's Health Ctr. v. Enix, 589 N.E.2d 121, 129 (Ohio Ct. App. 1991). Imprisonment may be punitive if the sentence is for a determinate period. *Id.* In contrast, imprisonment may be remedial if the person may terminate his incarceration by performing the act required by the court's order. *Id.*

167. *Id.* A fine may be remedial when paid to the complainant. *Id.* In other circumstances, however, a fine paid to the court may be punitive. *Id.*

168. Hicks v. Feiock, 485 U.S. 624, 633 (1988).

169. *Id.* The sanction cannot provide relief or undo what has been done. Id.; *see also* State v. Christon, 589 N.E.2d 53, 57 (Ohio Ct. App. 1990) (punishment for criminal contempt is unavoidable); Contex, Inc. v. Consolidated Tech., Inc., 531 N.E.2d 1353, 1356 (Ohio Ct. App. 1988) (penalties for criminal contempt are unconditional, such as an absolute fine or a determinate period of confinement).

from civil contempt.[170] Finally, the posture of the proceeding may influence the determination of whether a contempt is criminal or civil. Criminal contempt is a separate cause of action prosecuted by the state.[171] In contrast, civil contempt generally results from conduct within a proceeding which affects that proceeding.[172]

D. Ohio Case Law

Contempt of court figures prominently in Ohio's domestic violence legislation.[173] Individuals may face prosecution and punishment for both contempt of court and the criminal offense of violation of a court order.[174] Thus, a double jeopardy challenge is likely. *State v. Vanselow*[175] demonstrates this fact. In *Vanselow*, an individual raised a double jeopardy challenge, causing an Ohio court to consider the constitutionality of O.R.C. section 3113.31.[176]

In *Vanselow,* the Butler County Court of Common Pleas issued a protection order pursuant to section 3113.31.[177] Shortly after the court issued the order, Phillip Vanselow went to his wife's place of employment in Hamilton County, Ohio, an act which violated the terms of that order.[178] There, the police arrested him.[179] As a result, Vanselow faced criminal charges for violating a civil protection order pursuant to O.R.C. section 2919.27 in the Hamilton County Municipal Court.[180]

Prior to the criminal trial in the Hamilton County Municipal Court, the Butler County Court of Common Pleas, the court which issued the protection order, found Vanselow in contempt of court as authorized by section 3113.31.[181] The court of common pleas then sen-

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170. Denovcheck v. Board of Trumbull County Comm'rs., 520 N.E.2d 1362, 1364 (Ohio 1988) (sanctions for civil contempt are designed for the benefit of the complainant, by coercing contemnor to obey court orders, therefore, the contemnor "holds the keys" to his own release); *Christon,* 589 N.E.2d at 57 (purpose of civil contempt is to cause compliance with a court order, thus, sanction is completely avoidable since the individual may "purge" himself of contempt); *In re* Carroll, 501 N.E. 2d 1204, 1208 (Ohio Ct. App. 1985) (in cases of civil contempt, the contemnor is able to "purge" himself of the contempt; once he complies, the purpose of the sanction is realized and the sanction is discontinued).

171. BAILEY, *supra* note 136, § 67.

172. BAILEY, *supra* note 136, § 67.

173. *See supra* notes 48-52 and accompanying text.

174. *See supra* notes 48-52 and accompanying text.

175. 572 N.E.2d 269 (Ohio, Hamilton Cty. Mun. Ct. 1991). The Butler County Court of Common Pleas sits in the City of Hamilton, County of Butler, State of Ohio. The Hamilton County Municipal Court sits in the City of Cincinnati, County of Hamilton, State of Ohio.

176. *See infra* notes 177-206 and accompanying text.

177. *Vanselow*, 572 N.E.2d at 270.

178. *Id.*

179. *Id.*

180. *Id.* For a discussion of section 2919.27, see *supra* notes 29-39 and accompanying text.

181. *Vanselow*, 572 N.E.2d at 270.

tenced Vanselow to thirty days imprisonment.[182] Following this finding of contempt, Vanselow challenged the criminal charges, pending in the Hamilton County Municipal Court, on double jeopardy grounds.[183] The Hamilton County Municipal Court agreed with Vanselow that subjecting him to criminal prosecution pursuant to section 2919.27 following a finding of contempt pursuant to section 3113.31 subjected him to double jeopardy.[184] The Hamilton County Municipal Court then considered the broader question of the constitutionality of O.R.C. section 3113.31(L)(2) and declared O.R.C. section 3113.31(L)(2) unconstitutional.[185]

In reaching this conclusion, the *Vanselow* court acknowledged that *Blockburger* begins any double jeopardy analysis.[186] The court cited Ohio law applying the *Blockburger* analysis to cases involving contempt of court and criminal prosecution.[187] The court then implied that a finding of contempt and criminal prosecution in the context of Ohio's domestic violence legislation will not be barred by the double jeopardy clause under *Blockburger*.[188] The court, however, failed to analyze O.R.C. section 2919.27, violation of a court order, and contempt of court for violation of a court order under *Blockburger*.[189]

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182. *Id.* The domestic relations court, however, suspended the sentence. *Id.*

183. *Id.*

184. *Id.* at 275.

185. *Id.*

186. *Id.* at 271.

187. *Id.*

188. *Id.* at 271-72 (citing State v. Bowling, 520 N.E.2d 1387 (Ohio Ct. App. 1987) and State v. Kimbler, 509 N.E.2d 99 (Ohio Ct. App. 1986)). The court quoted language in *Kimbler* which stated:

> None of the elements of this offense need to be proved in connection with a charge of criminal contempt for violating a court order involving custody, such as herein involved. In a contempt proceeding, it is not necessary to prove that the person violating the custody order had the purpose to withhold the child from the legal custody of his parent. Rather, it is sufficient to prove that the court order was violated.

Id. at 272 (quoting *Kimbler*, 509 N.E.2d at 104.)

189. *Id.* The court also considered the issue of collateral estoppel, which is not immediately pertinent to the double jeopardy issues presently being considered. Id. The court accepted the rule of Ashe v. Swenson, 397 U.S. 436 (1969) which held that collateral estoppel and the double jeopardy clause preclude the relitigation of factual issues conclusively determined in an earlier proceeding between the same parties. *Vanselow*, 572 N.E.2d at 272 (collateral estoppel is a "constitutional component" of the double jeopardy clause). Interpreting *Ashe* in terms of Ohio case law, the *Vanselow* court held that courts must apply a two step analysis when considering a double jeopardy challenge from parties previously involved in litigation. *Id.* at 272 (citing State v. Tolbert, 1990 WL 37785 (Ohio Ct. App.), *rev'd*, 573 N.E.2d 617 (Ohio 1991), *cert. denied*, 112 S. Ct. 1215 (1992)). First, a court must determine whether an act violates two distinct statutory provisions. *Id.* If so, a court must then consider the collateral estoppel issue. *Id.* Applying this test, the *Vanselow* court held that the earlier litigation between the parties resolved the only factual issue. *Id.* "It is undisputed that the only issue to be decided in this case]s as follows: Did the

Turning next to *Grady v. Corbin*,[190] the *Vanselow* court focused on conduct.[191] The court accepted that the double jeopardy clause prohibits successive prosecutions for admittedly different statutory offenses, if the later prosecution amounts to prosecution based on the same conduct.[192] Applying this rule to the case before it, the court held that *Grady* barred further prosecution.[193]

The *Vanselow* court next considered the distinction between civil and criminal penalties.[194] Relying on *United States v. Halper*,[195] the court accepted that the double jeopardy clause precludes the imposition of a civil sanction and a criminal sanction, when the civil sanction serves deterrent or retributive, rather than remedial, purposes.[196] The court concluded that the thirty day sentence for violation of the protection order was "clearly" punishment.[197] The court found no other means by which to save the prosecution from a double jeopardy challenge, declining to characterize the previous prosecution as civil.[198] The court also declined to hold that the sequence of proceedings would permit subsequent prosecutions.[199]

Having concluded that double jeopardy barred the later prosecution, the court next considered the effect of the credit provision, as applied to Vanselow.[200] In its very brief consideration of this issue, the court emphasized that the double jeopardy clause protects against both multiple punishment and multiple prosecution.[201] While the court acknowledged that the credit provision might solve a problem of multiple punishment, the credit provision failed to "save an otherwise unconstitutional prosecution."[202]

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defendant violate the temporary protection order? This issue has already been decided, and the state can not relitigate the issue . . . ." *Id.*

190. 110 S. Ct. 2084 (interim ed. 1990), *overruled by* United States v. Dixon, 113 S. Ct. 2849 (interim ed. 1993); *see also supra* note 111.

191. *Vanselow*, 572 N.E.2d at 272-73.

192. *Id.* at 273.

193. *Id.* "There is absolutely no doubt that the exact same evidence would be used by the prosecution in this case as was used in the contempt proceeding . . . and the *conduct* of defendant would be the identical conduct. Therefore, the *Grady* test would prohibit prosecution of this case." *Id.*.

194. *Id.* "Entwined in the ultimate question before this court is the issue of whether and under what circumstances a civil penalty may constitute punishment for the purposes of the Double Jeopardy Clause." *Id.*

195. 490 U.S. 435 (1989).

196. *Vanselow*, 572 N.E.2d at 274.

197. *Id.*

198. *Id.* ("characterization as a 'civil matter' mistakes form for substance").

199. *Id.* "In a double jeopardy inquiry, which case came first is determined only to negate the subsequent prosecution." *Id.*

200. *Id.*

201. *Id.*

The court next turned to the larger issue of the constitutionality of the provision allowing both prosecutions.[203] The court acknowledged that the credit provision represented a legislative attempt to avoid a double jeopardy problem.[204] The court concluded that while the credit provision addressed the problem of multiple punishment, it failed to address the problem of multiple prosecution.[205] The court, therefore, held the provision unconstitutional in so far as it purported to allow subsequent prosecution.[206]

III. ANALYSIS

The Hamilton County Municipal Court in *Vanselow* arrived at the correct conclusion that O.R.C. section 3113.31(L)(2) is unconstitutional.[207] The lack of detailed analysis in the decision, however, prompts further consideration. The conclusion that O.R.C. section 3113.31(L)(2) is unconstitutional flows inevitably from the resolution of several issues. First, contempt of court pursuant to O.R.C. section 3113.31(L)(2) must be characterized as either criminal or civil to determine whether the double jeopardy clause applies.[208] Second, although such contempt is clearly criminal, under *Blockburger*, is it a different offense than violation of a court order?[209] Third, if section 3113.31(L)(2) fails *Blockburger*, does the credit provision remedy the double jeopardy problem?[210] Finally, does allowing both a finding of contempt and criminal prosecution for contempt survive constitutional challenge for reasons of public policy?[211]

A. Civil v. Criminal Contempt

Section 3113.31 fails to identify contempt of court pursuant to its provisions as either criminal or civil.[212] Contempt of court for violation of a civil protection order issued pursuant to O.R.C. section 3113.31

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203. *Id.* at 275.
204. *Id.*
205. *Id.*
206. *Id.*

The legislature has enacted a statute declaring that previous contempt holdings will not be a bar to subsequent prosecutions for violations of O.R.C. 2919.27. However, the legislature cannot, by mere statutory enactment, abrogate the United States or the Ohio constitutional provisions against double jeopardy. Therefore, O.R.C. 3113.31(I)(2) is unconstitutional on its face.

Id. at 275.

207. *Id.*
208. *See infra* notes 212-28 and accompanying text.
209. *See infra* notes 229-41 and accompanying text.
210. *See infra* notes 242-49 and accompanying text.
211. *See infra* notes 250-65 and accompanying text.
212. *See infra* note 212.

should be characterized as criminal rather than civil contempt. It is true that domestic violence proceedings pursuant to O.R.C. section 3113.31 originate between private parties[213] and that the state is not a party to the action.[214] The fact, however, that contempt of court subjects an individual to punishment[215] suggests that the double jeopardy clause protects the individual.[216] Further, given the Supreme Court's emphasis on substance over form, the identity of the parties represents a weak argument for the purposes of double jeopardy analysis.[217]

Aside from the identity of the parties, in both its language and operation, contempt of court pursuant to O.R.C. Chapter 3113 is certainly criminal in nature.[218] Focusing first on the language of the provi-

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213. *Ex parte* Williams, 799 S.W.2d 304, 308 (Tex. Crim. App. 1990) (contempt conviction sought by a private party); Baggett v. State, 690 S.W.2d 362, 364 (Ark. Ct. App. 1985) (civil contempt protects and enforces the rights of private parties); Pompano Horse Club v. State, 111 So. 801, 808 (Fla. 1927) (contempt punishes violations of court orders, criminal sanction punishes "offense[s] against the peace and dignity of the state").

214. United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977) (multiple trials constitute a "potent instrument of oppression"); Green v. United States, 355 U.S. 184, 187-88 (1957) (the state, with its significant "resources and power," should not be permitted to repeatedly proceed against individuals); *Williams,* 799 S.W.2d at 307 (purpose of the double jeopardy clause is to prevent repeated prosecutions by the same sovereign).

215. O.R.C. section 2705.01 provides that: "A court, or judge at chambers, may summarily *punish* a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice." OHIO REV. CODE ANN. § 2705.01 (Anderson 1992) (emphasis added). O.R.C. section 2705.02 provides that: "A person guilty of any of the following acts may be *punished* as for a contempt." *Id.* § 2705.02 (emphasis added). O.R.C. section 2705.05(A) provides that:

> If the accused is found guilty of contempt, the court may impose any of the following penalties: (1) For a first offense, a fine of not more than two hundred fifty dollars, a definite term of imprisonment of not more than thirty days in jail, or both; (2) For a second offense, a fine of not more than five hundred dollars, a definite term of imprisonment of not more than sixty days, or both; (3) For a third or subsequent offense, a fine of not more than one thousand dollars, a definite term of imprisonment of not more than ninety days in jail, or both.

Id. § 2705.05(A).

216. Jeffers v. United States, 432 U.S. 137, 150 (1977) (the prohibition against multiple punishment stands at the heart of the double jeopardy clause); *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 168 (1873). "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense." *Id.*

217. State v. Vanselow, 572 N.E.2d 269, 274 (Ohio, Hamilton Cty. Mun. Ct. 1990) (holding that characterization of contempt in a domestic proceedings as a " 'civil matter' mistakes form for substance"); State v. Kimbler, 509 N.E.2d 99, 103 (Ohio Ct. App. 1986) (punishment for contempt does not result from injury to individuals); State v. Thompson, 659 P.2d 383, 385 (Or. 1983) (holding that contempt is not civil because sought by a private party); Strunk v. Lewis Coal Co., 547 S.W.2d 252, 252 (Tenn. Crim. App. 1976) (contempt for violation of an injunction is criminal regardless of the fact that action is originally brought in a court of equity).

218. *See* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction,* 42 HASTINGS L.J. 1325, 1411 (1991) (a sanction for violation of a civil protection order is criminal contempt). A number of jurisdictions specifically addressing this issue agree. *See* State v. Hope, 449 So. 2d 633, 635 (La. Ct. App. 1984) (contempt for violation of a custody order is criminal);

sion allowing the contempt sanction, Chapter 3113 authorizes "punishment for contempt of court."[219] Thus, the sanction is labeled punitive.[220] Additionally, the language surrounding the authorization for a finding of contempt speaks in terms of punishment.[221] As these provisions further seek to allow credit for any sanction imposed following a finding of contempt, the logical inference is that the contempt is criminal. If the contempt were civil, the double jeopardy clause would not be implicated.[222] Thus, the issue of multiple punishment, addressed by the legislature, would not need to be considered or addressed.

Turning next to the operation of the statute as a whole, the logical inference is again that the sanction for contempt of court is criminal.[223] By empowering the court to issue an order[224] and requiring the notification of potentially violent individuals,[225] these provisions may be read as coercive. Chapter 3113 addresses domestic violence, first, by attempting to coerce acceptable behavior through the issuance of protection orders.[226] If this coercion fails, Chapter 3113 then punishes unacceptable behavior.[227] Chapter 3113 authorizes "punishment for contempt of court" after the individual "violates" a court order.[228] As contempt of court in this situation comes after the coercion fails, it is punishment. Such contempt is clearly criminal in nature.

In re Marriage of Nelson, 408 N.W.2d 618, 621 (Minn. Ct. App. 1987) (sanction for violation of a temporary restraining order is criminal when party is unable to effect his release); People v. Jhon, 570 N.Y.S.2d 427, 430 (N.Y. Crim. Ct. 1991) (statute specifically provides that violation of Family Court Order of Protection warrants a charge of criminal contempt); Vito v. Vito, 551 A.2d 573, 576 (Pa. Super. Ct. 1988) (contempt sanction for violation of protection order was unconditional and punitive and therefore, criminal in nature); State v. Magazine, 393 S.E.2d 385, 386 (S.C. 1990) (when the contemnor may not purge himself of contempt for violation of an order, the contempt is criminal).

219. OHIO REV. CODE ANN. § 3113.31(L)(1)(b) (Anderson 1989 & Supp. 1992).

220. *Nelson*, 408 N.W.2d at 621 (" 'by definition civil contempt power cannot be used to punish a person for past misconduct' ") (quoting Hopp v. Hopp, 156 N.W.2d 212, 217 (Minn. 1968)).

221. OHIO REV. CODE ANN. §§ 3113.31(L)(1)(a),(L)(2) (Anderson 1989 and Supp. 1992); *see also supra* notes 48-52.

222. United States v. One Assortment of 89 Firearms, 465 U.S. 354, 359 (1984) (Congress may impose both criminal and civil sanctions arising from the same act or omission); Helvering v. Mitchell, 303 U.S. 391, 397 (1933) (acquittal in a criminal proceeding is not a bar to a later civil action by the government based on the same facts); United States v. Ryan, 810 F.2d 650, 653 (7th Cir. 1987) (civil and criminal sanctions for the same conduct do not violate the double jeopardy clause).

223. OHIO REV. CODE ANN. §§ 3113.31(A)-(K) (Anderson 1989 & Supp. 1992); see also *supra* notes 40-52 and accompanying text for a detailed discussion of the operation of these sections.

224. OHIO REV. CODE ANN. § 3113.31(E)(1).

225. *Id.* § 3113.31(F).

226. *Id.* § 3113.31(C).

227. *Id.* § 3113.31(L)(1).

B. *Contempt Under Blockburger*

Under *Blockburger*, prosecution and punishment for physically assaultive or threatening criminal behavior may follow or proceed a finding of and punishment for contempt. In Ohio, for example, such behavior towards a family or household member may be punished as domestic violence.[229] The offense of domestic violence requires proof of both the requisite mental state and physical harm, or fear of such harm.[230] In contrast, contempt of court punishes disobedience of a court order.[231] Thus, contempt of court requires proof of both the existence of a court order and the intentional violation of that order.[232] As the two provisions have completely different elements, they survive the *Blockburger* analysis. Each statutory provision requires proof of a fact which the other does not.

When an individual is prosecuted criminally for violation of a court order, however, punishment for contempt of court does not survive the *Blockburger* analysis. Such is the case in Ohio's domestic violence legislation. The legislature clearly intended to create separate offenses.[233] The statutory elements of the criminal offense, however, do not differ from the elements of contempt of court.[234] The criminal offense of violation of a court order requires proof of a court order and its intentional or reckless violation.[235] Contempt also requires proof of a court order and its intentional violation.[236] Thus, although the criminal offense requires proof of a specific mental state, contempt of court does not require proof of a fact not required by the criminal offense.[237] Con-

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229. *Id.* § 2919.25 (Anderson 1992); For text of section 2919.25, see *supra* note 30.

230. *Id.*

231. *Id.* § 2705.02(A). This section provides: "A person guilty of the following acts may be punished as for a contempt: (A) Disobedience of, or resistance to, a lawful writ, process, order, rule, or command of a court or an officer . . . ." *Id.*

232. *Id.*; *see also* Midland Steel Prods. Co. v. United Auto. Workers of Am., Local 486, 573 N.E.2d 98, 103 (Ohio 1991) (holding that in cases of indirect criminal contempt, proceedings must establish that individual intended to defy the court); *In re* Carroll, 501 N.E.2d 1204, 1208 (Ohio Ct. App. 1985) (holding that intent to defy the court is an essential element of criminal contempt).

233. OHIO REV. CODE ANN. § 3113.31(G) (Anderson 1989 & Supp. 1992). This section provides: "The remedies and procedures provided in this section are in addition to, and not in lieu of, any other available civil or criminal remedies." *Id.*; *see also* § 3113.31(L)(2). This section provides: "The punishment of a person for contempt of court for violation of a protection order issued or a consent decree approved under this section does not bar criminal prosecution of the person for a violation of Section 2919.27 of the Revised Code." *Id.*

234. *Id.* § 2919.27. This section provides: "No person shall recklessly violate any terms of a protection order issued or a consent agreement approved pursuant to Section 2919.26 or 3113.31 of the Revised Code." *Id.*

235. *Id.* § 2919.27 (Anderson 1992).

236. *See supra* notes 230-32 and accompanying text.

237. *See infra* note 242.

tempt of court pursuant to section 3113.31 is the same offense as violation of a court order under section 2919.27. The two offenses, therefore, fail the *Blockburger* analysis.

Even if intent to violate a court order is not required for a finding of contempt,[238] a prior or subsequent criminal prosecution for the criminal offense of violation of a court order also fails the *Blockburger* test. The criminal offense of violation of a court order requires proof of a court order and its intentional violation.[239] Contempt of court requires proof of a court order and its violation.[240] Contempt only requires proof of facts already required for the criminal offense. Thus, contempt is a lesser included offense of the criminal offense. For purposes of double jeopardy analysis, they are the same offense under *Blockburger*.[241]

C. *The Credit Provision*

Since contempt of court is both criminal and the same offense as violation of a court order, the double jeopardy clause bars multiple punishment.[242] The legislature apparently recognized this problem and enacted the "credit provision" in an attempt to cure any double jeopardy infirmity.[243] This provision allows credit for punishment suffered when an individual is also punished pursuant to section 2919.27, violation of a court order, but not for punishment pursuant to section 2919.25, domestic violence.[244]

The *Blockburger* analysis also determines the protections of the double jeopardy clause when considering multiple prosecution.[245] The credit provision does not change the fact that an individual faces multiple prosecutions. A proceeding for criminal contempt for violation of a court order clearly constitutes a prosecution.[246] Although the individual accused of contempt is not automatically entitled to all of the proce-

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238. State *ex rel* Crenshaw v. Tatman, 598 N.E.2d 91, 93 (Ohio Ct. App. 1991) (proof of purposeful, willing or intentional violation of a court order is not necessary for a finding of contempt); Pedone v. Pedone, 463 N.E.2d 656, 658 (Ohio Ct. App. 1983) (a party's intent is irrelevant, if a court order is disobeyed, contempt will follow).

239. O.R.C. section 2919.27 provides that: "No person shall recklessly violate any terms of a protection order issued or a consent agreement approved pursuant to Section 2919.26 or 3113.31 of the Revised Code." OHIO REV. CODE ANN. § 2919.27 (Anderson 1992)

240. *See supra* note 231.

241. Brown v. Ohio, 432 U.S. 161, 168 (1977). "[T]he lesser offense . . . requires no proof beyond that which is required for conviction of the greater . . .. The greater offense is, therefore, by definition the 'same' for purposes of double jeopardy as any lesser offense included in it." *Id.*

242. Jeffers v. United States, 432 U.S. 137, 150 (1977); United States v. Blockburger, 284 U.S. 299, 304 (1932); *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 168 (1873).

243. OHIO REV. CODE ANN. § 3113.31(L)(2) (Anderson 1989 & Supp. 1992).

244. *Id.*

245. *See supra* notes 103-110 and accompanying text.

246. O.R.C. section 2705.05(A) provides that: "In all contempt proceedings, the court shall conduct a hearing. At the hearing, the court shall investigate the charge and hear any answer or

dural protections afforded to a defendant in a criminal trial,[247] he is entitled to certain protections afforded defendants when individual interests are at stake.[248]

Nor does the credit provision change the character of the punishment suffered for contempt. In effect, the provision seeks to eliminate the punishment imposed as a result of a finding of contempt. Thus, it seeks to impose only one punishment on the individual. But the state and not the individual possesses the ability to invoke the operation of the provision.[249] Although the statute provides for credit, the punishment does not become conditional or civil. If the state proceeds against the individual criminally, the provision grants credit to the individual for punishment suffered. The credit provision does not discontinue the contempt, it simply allows credit. As the individual does not possess the ability to end the sanction imposed and purge himself of contempt, the sanction is not conditional or civil.

D. Public Policy

Contempt of court pursuant to O.R.C. section 3113.31 is clearly criminal. Furthermore, prosecution and punishment for both contempt and the criminal offense of violation of a court order fails *Blockburger*. The constitutionality of section 3113.31, however, depends directly on whether punishment for contempt of court triggers the protections of the double jeopardy clause. Until recently, this issue remained unresolved by the United States Supreme Court.[250] The issue was, how-

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testimony that the accused makes or offers and shall determine whether the accused is guilty of the contempt charge." OHIO REV. CODE ANN. § 2705.05(A) (Anderson 1992).

247. *In re* Calhoun, 350 N.E.2d 665, 666-67 (Ohio 1976) (the right to counsel); State v. Weiner, 305 N.E.2d 794, 796 (Ohio 1974) (contempt is a petty offense carrying no right to trial by jury).

248. O.R.C. section 2705.03 provides that: "In cases under section 2705.02 of the Revised Code, a charge in writing shall be filed with the clerk of the court, an entry thereof made upon the journal, and an opportunity given to the accused to be heard, by himself or counsel." OHIO REV. CODE ANN. § 2705.03 (Anderson 1992); *see also* Pilliod v. Searles, 155 N.E. 230, 232 (Ohio 1927) (appointment of a master is acceptable in contempt proceedings when the party accused takes part in the examination of witnesses and has the questions of competency and the admissability of testimony reviewed by the court).

249. State v. Bolds, No. CA-9058, 1993 Ohio App. LEXIS 260 (Ohio Ct. App. Jan 19, 1993); State v. Vanselow, 572 N.E.2d 269 (Ohio, Hamilton Cty. Mun. Ct. 1991); *see also* Voris, *supra* note 40, at 426 (the *civil* protection order is the remedy available for behavior which is not yet criminal) (emphasis added).

250. *See* Commonwealth v. Manney, 617 A.2d 817, 818 (Pa. Super. Ct. 1992) (refusing to rule that a finding of criminal contempt triggers double jeopardy until the issue is answered definitively by either the Pennsylvania Supreme Court or the United States Supreme Court); *see also* Joan Meier & Naomi Cahn, *Double Jeopardy and the Enforcement of Civil Protection Orders*, 1 TEXAS J. OF WOMEN & THE LAW 269, 270 n.6 (1992) (United States Supreme Court has not held that criminal contempt triggers double jeopardy).

ever, resolved by the Court last term, in *United States v. Dixon.*[251] Prior to this definitive resolution, the Court's decisions were ambiguous.[252] As a result of this ambiguity, lower federal courts and state courts addressing the issue stood divided.[253] The courts allowing prosecution following a finding of contempt relied on *Blockburger*,[254] the differences between criminal contempt and criminal offenses,[255] and the inherent power of the court.[256]

Relying on their inherent powers, Ohio courts zealously protected their contempt powers.[257] Additionally, the legislature recognized these

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251. 113 S. Ct. 2849, 2856 (interim ed. 1993). "We have held that the Constitutional protections for criminal defendants other than the double jeopardy provision apply in non-summary criminal contempt prosecutions just as they do in other criminal prosecutions. We think it obvious, and today hold, that the protection of the double jeopardy clause likewise attaches." *Id.*

252. Menna v. New York, 423 U.S. 61, 62 (1975) ("declining to address the Double Jeopardy claim on the merits"); Bloom v. Illinois, 91 U.S. 194, 201 (1968) ("[c]riminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both"); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911) ("contempt is neither wholly civil nor [wholly] criminal," but has characteristics of both).

253. United States v. Rollerson, 449 F.2d 1000, 1004-05 (D.C. Cir. 1971) (contempt for assaulting prosecutor does not bar later assault prosecution); United States v. Haggerty, 528 F. Supp. 1286, 1295 (D. Colo. 1981) (contempt for violation of order prohibiting strike bars prosecution for striking in violation of federal law); People v. Lombardo, 123 Cal. Rptr. 755, 758 (Cal. Ct. App. 1975) (contempt for refusal to testify bars criminal prosecution for the same charge); People v. McCartney, 367 N.W.2d 865, 867 (Mich. Ct. App. 1985) (contempt for violation of a probate court order does not bar later prosecution for embezzlement); State v. Warren, 451 A.2d 197, 200 (N.J. Super. Ct. App. Div. 1982) (contempt for failure to testify does not bar criminal charge for hindering prosecution); People v. Columbo, 293 N.E.2d 247, 247-48 (N.Y. 1972) (contempt for refusal to testify bars criminal prosecution for refusal to obey court order); Maples v. State, 565 S.W.2d 202, 206 (Tenn. 1978) (contempt for false testimony does not bar later prosecution for perjury).

254. People v. Allen, 787 P.2d 174, 176 (Colo. Ct. App. 1989); People v. Totten, 514 N.E.2d 959, 965 (Ill. 1987); People v. Rodriguez, 514 N.E.2d 1033, 1037 (Ill. Ct. App. 1987); Williams v. State, 775 S.W.2d 812, 817 (Tex. Crim. App. 1989).

255. Baggett v. State, 690 S.W.2d 362, 363 (Ark. Ct. App. 1985) (the primary purpose of criminal contempt is to "maintain the dignity, integrity and authority of, and respect towards the court"); State v. Newell, 532 So. 2d 1114, 1115 (Fla. Dist. Ct. App. 1988) ("criminal prosecution . . . seeks to punish public offenses"); State v. Kimbler, 509 N.E.2d 99, 103 (Ohio Ct. App. 1986) (criminal sanction punishes "conduct which the legislature has declared to be so repugnant as to constitute a criminal offense"); *Allen*, 787 P.2d at 176 (although the same conduct may constitute both contemptuous and criminal behavior, the punishment for contempt focuses on the effects of the conduct while the criminal punishment focuses on the conduct itself).

256. *Newell*, 532 So. 2d at 1115 ("courts must be able to enforce obedience to and respect for their orders . . . this authority cannot be impaired").

257. Hale v. State, 45 N.E. 199, 200 (Ohio 1896).

> The difference between the jurisdiction of courts and their inherent powers is too important to be overlooked. In constitutional [courts], their jurisdiction is conferred by the provisions of the constitutions and of statutes enacted in the exercise of legislative authority. That, however, is not true with respect to such powers as are necessary to the orderly and efficient exercise of jurisdiction. Such powers, from both their nature and their ancient exercise, must be regarded as inherent. They do not depend upon express constitutional grant, nor in any sense upon the legislative will. The power to maintain order, to secure the at-

powers when promulgating the criminal code, which expressly states that it does not diminish a court's powers.[258] As a result, courts in Ohio regarded contempt as distinct from criminal offenses, and thus found that cases involving both contempt and criminal offenses did not implicate the double jeopardy clause.[259]

The ambiguity of the Supreme Court decisions concerning contempt and double jeopardy previously allowed the approach adopted by the Ohio courts. Initially, the Court accepted that contempt fails to trigger double jeopardy.[260] Gradually, the Court expanded the protections mandated in contempt proceedings.[261] Weighing the interests of both the individual and society, the Court began finding that the individual's interests should prevail.[262] These expanded protections imposed additional costs on courts and society.[263] A potential cost of holding

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tendance of witnesses to the end that the rights of parties may be ascertained, and to enforce process to the end that effect may be given to judgments, must inhere in every court or the purpose of its creation fails.

Id.; see also Beach v. Beach, 74 N.E.2d 130, 136 (Ohio Ct. App. 1946) (to the extent that statutes purport to confer power to punish acts within the purview of courts existing powers, they are "merely confirmatory of the common law").

258. OHIO REV. CODE ANN. § 2901.03 (Anderson 1992). This section provides:

(A) No conduct constitutes a criminal offense against the state unless it is defined as an offense in the Revised Code

(B) An offense is defined when one or more sections of the Revised Code state a positive prohibition or enjoin a specific duty, and provide a penalty for violation of such prohibition or failure to meet such duty;

(C) This section does not affect any power of the general assembly under section 8 of Article II, Ohio Constitution, nor does it affect the power of a court to punish for contempt or to employ any sanction authorized by law to enforce an order, civil judgment or decree.

Id.

259. Brown v. Executive 200, Inc., 416 N.E.2d 610, 612 (Ohio 1980) (contempt is *sui generis*, not wholly civil or wholly criminal); State v. Timson, 311 N.E.2d 16, 20 (Ohio 1974) ("since the foundation of our government, [contempt] . . . ha[s] been regarded as *sui generis* . . . of its own kind; peculiar to itself"); City of Cincinnati v. Cincinnati Dist. Council 51, 299 N.E.2d 686, 691 (Ohio 1973) (contempt proceedings are *sui generis* bearing resemblance to suits in equity, criminal proceedings and civil actions).

260. *In re* Chapman, 166 U.S. 661, 672 (1897) (with regard to contempt of Congress, contempt for refusal to answer a congressional committee does not bar punishment imposed by statute, "the two being *diverse intuitu* and capable of standing together"); *In re* Debs, 158 U.S. 564, 595 (1895) (sanction for violation of injunction does not bar criminal prosecution).

261. Bloom v. Illinois, 391 U.S. 194, 202 (1968) (right to jury trial); Offut v. United States, 348 U.S. 11, 18 (1954) (the right to trial before an impartial judge); *In re* Oliver, 333 U.S. 257, 278 (1948) (the right to be heard in open court); Cooke v. United States, 267 U.S. 517, 537 (1925) (alleged contemnor entitled to be advised of charges, the opportunity to meet the charges with assistance of counsel, and the calling of witnesses); Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 444 (1911) (alleged contemnor entitled to be presumed innocent until proven guilty and is not required to be a witness against himself); *In re* Debs, 158 U.S. at 595 (in cases of contempt for acts outside the courts' presence, alleged contemnor is entitled to normal adversarial procedures, including a hearing and the formal presentation of evidence).

262. *See supra* note 261.

263. *See supra* note 261.

that contempt triggers double jeopardy in cases involving Ohio's domestic violence legislation is a limitation on the exercise of the court's inherent powers. By making the violation of a court order a criminal offense, however, Ohio vindicates the authority of the court and addresses the problem of domestic violence assertively through the criminal code. If an individual is prosecuted criminally for the violation of a court order, he will suffer punishment as he would for contempt of court.

No public policy arguments justify denying an individual the protections of the double jeopardy clause. Although in other states contempt of court is the primary method of enforcing orders issued to prevent domestic violence,[264] the method of enforcement chosen by the Ohio legislature is criminal prosecution and punishment.[265] The nonavailability of contempt of court pursuant to O.R.C. section 3113.31 will not undermine the effectiveness of Ohio's domestic violence legislation.[266] The effective implementation of Ohio's domestic violence legislation requires only that individuals who violate a court order be immediately charged criminally or punished for contempt of court. But courts and prosecutors must recognize that prosecution and punishment for one bars prosecution and punishment for the other.

IV. CONCLUSION

Section 3113.31(L)(2) is a fundamentally flawed and unnecessary provision. It represents a misunderstanding of both double jeopardy and contempt of court. Currently in Ohio, contempt of court is the same offense as violation of a court order issued to protect victims of domestic violence. Thus, prosecution and punishment for one triggers the protections of the double jeopardy clause. Although the Ohio legislature attempted to solve a constitutional problem legislatively, this effort failed. Additionally, Ohio courts must recognize that the double jeopardy clause protects a fundamental individual right guaranteed by the United States Constitution, and yield their contempt powers in this specific situation.

Ohio courts must also recognize that the criminal offense of violation of a court order serves to protect the victims of domestic violence, while at the same time vindicating the courts' authority. To resolve the

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264. Finn, *supra* note 6, at 55 (violation of a civil protection order is civil contempt in thirty-one states, criminal contempt in twenty states and both in eleven states).

265. OHIO REV. CODE ANN. § 2919.27 (Anderson 1992).

266. Commonwealth v. Allen, 486 A.2d 363, 367 (Pa. 1984) (effectiveness of legislation depends on the victim's ability to seek enforcement of injunctions); Meier & Cahn, *supra* note 250, at 269; *see also* Finn, *supra* note 6, at 59 (chronic abusers will only be influenced by incarceration, not by a piece of paper).

confusion generated by Ohio's domestic violence legislation, section 3113.31(L)(2) should be repealed. Section 3113.31(L)(1) should then be amended to read:

> A person who violates a protection order issued or a consent agreement approved under this section is subject to criminal prosecution for a violation of section 2919.27 of the Revised Code.

This simple solution will facilitate the assertive and effective implementation of Ohio's domestic violence legislation.

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