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THE LESSER INCLUDED OFFENSE DOCTRINE AND THE CONSTITUTION: THE DEVELOPMENT OF DUE PROCESS AND DOUBLE JEOPARDY REMEDIES

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I. INTRODUCTION

The lesser included offense doctrine is important and pervasive. Its involvement in criminal cases is incalculable because of its potential to play some role in the vast majority of both state and federal prosecutions. Constitutional developments of uncertain reach have accentuated the doctrine's importance.

From its emergence at common law, the lesser included offense (LIO) principle developed as a doctrine codified by statutes and rules for the benefit of both prosecution and defense. Increasingly, the doctrine has raised federal constitutional questions under the Due Process and Double Jeopardy Clauses, as well as under the Cruel and Unusual Punishment Clause. These constitutional developments have important procedural ramifications, and remedies constructed to effectuate the constitutional provisions have important pragmatic consequences. In turn, these pragmatic consequences may play a large part in inhibiting how far the courts will go in constitutionalizing aspects of the LIO doctrine.

The general notion that the LIO concept can breed double jeopardy implications is a longstanding one. The double jeopardy proscription traces back to common law and was broadly asserted in early constitutional cases as a given principle. What followed was the tortuous development of the concept's application, in particular, the development of exceptions to the broadly stated double jeopardy principles. By contrast, case law suggesting

that the LIO doctrine may also raise general due process issues is a relatively current development. Recent holdings that the failure to give an LIO instruction was constitutional error were delivered explicitly in the narrow context of capital cases, but the rationale underlying these holdings conceivably has a much wider application. As a result, the courts are struggling to discern how far to extend the Supreme Court's constitutional LIO holdings.

The ubiquitous nature and importance of the LIO doctrine calls for an exploration of its increasing federal constitutional overtones. The development of these overtones is the subject of this Article.[1] It also discusses the evolving remedies used to effectuate these rights, the implications of those remedies, and ways in which underlying problems can be avoided. Overall, this Article examines a number of related constitutional issues through the unique prism of the LIO doctrine. In doing so, the authors have attempted to explore the juxtaposition of related issues not extensively dealt with elsewhere in the literature.

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1. Analysis of a particular state's law may yield a different result compared with the federal clauses. The state provision may be deemed to afford the same, greater, or lesser protection than does the Federal Constitution. Ultimately, of course, the defendant must be accorded at least the minimum protection given by the federal clause, but a state provision may extend more protection as a matter of state law. *See, e.g.*, California v. Ramos, 463 U.S. 992, 1013-14 (1983) (recognizing that states are free to provide greater protections to defendants than U.S. Constitution). *See generally* Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 354 n.2 (1984) (collecting authorities).

Regarding state law and due process LIO issues, *see, e.g.*, People v. Geiger, 674 P.2d 1303, 1307 (Cal. 1984) (en banc) (collecting cases for proposition that California due process provision requires appropriately requested lesser included offense instructions whether or not required by federal due process, and extending principle to cover "related" lesser offenses, even if not necessarily included offenses); cases cited *infra* notes 125-31 (affording defendants greater protection under state law than required by federal due process). Regarding state law and double jeopardy protection, *see, e.g.*, State v. Lessary, 865 P.2d 150, 157 (Haw. 1994) (finding double jeopardy violation under state, but not federal, constitution); Stephens v. State, 806 S.W.2d 812, 815 (Tex. Crim. App. 1990) (en banc), *cert. denied*, 502 U.S. 929 (1991) (noting that federal and Texas double jeopardy provisions are conceptually identical); Bennett v. State, 182 A.2d 815, 817 (Md. 1962) (noting that former jeopardy defense, although not provided for in state constitution, is firmly established as part of state common law except as altered by statute); cases cited *infra* note 555 (affording defendant greater protection than required by federal Double Jeopardy Clause).

For various purposes, references to state law appear throughout the Article, but it does not deal directly with state constitutional provisions or state statutes, rules, or case law. *See, e.g.*, MODEL PENAL CODE § 1.08 (Official Draft 1985)(when prosecution barred by former prosecution for the same offense); 18 PA. CONS. STAT. § 109(1) (1983 & 1994 Supp.) (when prosecution statutorily barred by former prosecution for same offense). *See also* MODEL PENAL CODE § 1.09 (Official Draft 1985) (when prosecution barred by former prosecution for different offense).

Section II of this Article briefly discusses the background of the underlying LIO doctrine, as well as the varying tests and approaches employed. Section III deals with the development of due process requirements that have been grafted onto the LIO doctrine, at least in capital cases. It discusses the incipient Supreme Court LIO due process decisions and later Supreme Court opinions shedding light on those seminal decisions. Lower federal and state court cases are summarized. However, for those readers who will find a more detailed exposition useful, these lower court cases are also examined in some detail, providing a further opportunity to explore the rationale of the Supreme Court decisions and whether this rationale should extend to all cases, capital and noncapital. The authors also examine the pragmatic impact habeas corpus remedies have had on the federal courts' willingness to extend due process protections, because the LIO issue often reaches the federal courts on habeas corpus petitions by state prisoners. Finally, the authors discuss how the judicial treatment of this particular issue fits in with more general due process approaches to state criminal procedural matters, particularly given the current universal acceptance of the LIO doctrine and its historical development from early common law.

Section IV of this Article explores the development of double jeopardy implications concerning successive prosecutions. It then addresses some underlying double jeopardy concepts as they relate to LIOs and the various LIO situations in which double jeopardy issues can arise. Also discussed are reprosecutions after convictions—convictions for a greater encompassing offense followed by reprosecution for an LIO, and the reverse sequence of LIO convictions followed by prosecutions for the greater offense. The general doctrines concerning acquittals (and some uncertainties in the extent of those doctrines) are set forth, and we discuss the development of these doctrines as applied to greater offense acquittals followed by prosecutions for the LIOs, as well as the reverse situation. The Article then identifies the precise impact double jeopardy considerations have on the varied state LIO approaches and addresses how those varied approaches relate to double jeopardy's same offense bar. Procedural mechanisms to avoid double jeopardy problems are also examined. Finally, Section IV contains conclusions beyond those dispersed throughout the Article.

II. BACKGROUND OF THE LESSER INCLUDED OFFENSE DOCTRINE: DEFINITIONS, TESTS, AND APPROACHES

The LIO doctrine was developed at early common law and is now universally accepted in this country.[2] In brief, the doctrine provides that a criminal defendant may be convicted at trial of any crime supported by the evidence which is less than, but included within, the offense charged by the prosecution.[3] In a jury trial,[4] the trial judge instructing the jury on all possible verdicts under the charges must include all lesser included offenses warranted by the evidence.[5]

The LIO doctrine applies in two steps.[6] The first step (the "legal step") requires a legal determination about whether a crime constitutes an LIO of the charged crime or whether it is legally possible for the charged crime to include an LIO. This step provides the tests or approaches for determining generally what crimes are LIOs of other crimes. The second step in the doctrine (the "evidence step") requires trial evidence to warrant

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2. *See, e.g.*, Schmuck v. United States, 489 U.S. 705, 717 n.9 (1989); Beck v. Alabama, 447 U.S. 625, 633-37 (1980). The "historical pedigree" of the LIO doctrine is discussed extensively *infra* notes 333-72 and accompanying text.

3. Broadly used, the words "offense" and "crime" may both refer to a violation or infraction of law that makes the violator liable for punishment by that law. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 536, 1566 (3d ed. 1976). However, for purposes of the Federal Double Jeopardy Clause, the term "same offense" may encompass more than one violation of a criminal statute or law. Indeed, a greater crime and all the lesser crimes included within it—its "lesser included offenses"—are treated as one "offense" for double jeopardy purposes. For a discussion of double jeopardy concepts and their relationship to the LIO doctrine, see Section IV.

4. In a bench trial, the parties may ask the trial judge to consider returning an LIO verdict. Issues about whether LIOs exist and are supported by the evidence would arise during arguments to the judge.

5. Different jurisdictions follow different rules about whether the judge is required to instruct on LIOs only when requested by one of the parties, or whether the judge is required or allowed to instruct sua sponte on all LIOs warranted by the evidence. *See, e.g.*, 8A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 31.03, at 31-15 n.1 (1992); 2 CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 498, at 800 (1982). Sometimes, of course, one party—either the prosecution or the defense—may seek an LIO instruction over the objection of the other party. *See, e.g.*, State v. Keffer, 860 P.2d 1118 (Wyo. 1993) (holding that despite defendant's written waiver of LIO instruction, trial judge was required to give instruction because prosecution objected to waiver and requested instruction). Obviously, tactical considerations by the parties overlay this issue. *See* 3 ANTHONY G. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES §§ 437, 438 (5th ed. 1989).

6. *See, e.g.*, United States v. Browner, 889 F.2d 549, 550-51 (5th Cir. 1989) [hereinafter *Browner* I]; State v. Jeffries, 430 N.W.2d 728, 730 (Iowa 1988); State v. Keffer, 860 P.2d 1118, 1128 (Wyo. 1993); Janis L. Ettinger, *In Search of a Reasoned Approach to the Lesser Included Offense*, 50 BROOK. L. REV. 191, 209-11 (1984).

instruction on any legally possible LIO.[7] This is an aspect of the more general requirement that jury instructions are given only if supported by trial evidence, but the evidence step of the LIO doctrine is more precise. It requires "that the evidence at trial must be such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater."[8] Not only must the evidence support a conviction for the LIO, it must also support an acquittal of the greater offense. In other words, there must be a rational factual dispute about the element or elements that differentiate the greater and lesser offenses.[9] This rationally disputed evidence requirement is what is meant by stating that the trial evidence must warrant the LIO instruction.

Defining an LIO under the "legal step" is usually not difficult in the abstract; that is, an LIO is a crime included within, but less than, the crime charged.[10] Different jurisdictions use different approaches, however, to

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7. Courts and commentators sometimes mesh or mix the two steps. *See, e.g.*, Jerrold H. Barnett, *The Lesser-Included Offense Doctrine: A Present Day Analysis for Practitioners*, 5 CONN. L. REV. 255 (1972). For example, the "evidence approach" (discussed *infra* at notes 22-25) uses the trial evidence to help determine LIOs, and in so doing, tends to commingle the legal and the evidentiary steps. If a court using the evidence approach decides that the crime charged has an LIO based on the trial evidence, then it should follow automatically that the evidence step is satisfied. Regarding the evidence step, there is also a lack of clarity about the burden of proof, the standard of review, and other issues that are beyond the scope of this Article. For a discussion of some of these issues, see State v. Jeffries, 430 N.W.2d 728 (Iowa 1988); State v. Keffer, 860 P.2d 1118 (Wyo. 1993); Joseph E. Smith, *The Convergence of Plain Error and Lesser Included Offense Rules in* State v. Collins, 72 N.C. L. REV. 1721 (1994).

8. Schmuck v. United States, 489 U.S. 705, 716 n.8 (1989) (citing Keeble v. United States, 412 U.S. 205, 208 (1973)). *Schmuck* clarified the federal approach for defining LIOs under FED. R. CRIM. P. 31(c), and also referred to the evidence step as an "independent prerequisite." *Id.* This step was not at issue in *Schmuck*.

9. Where the contested factual issues are the same as to both the greater and the lesser offenses, an LIO instruction is not required or proper. The instruction should be given only when the trial evidence requires the jury to find a disputed element of the greater that is not required for conviction of the lesser. *See, e.g.*, Hopper v. Evans, 456 U.S. 605, 611-12 (1982); Sansone v. United States, 380 U.S. 343, 349-50 (1965); Berra v. United States, 351 U.S. 131, 134 (1956); Stevenson v. United States, 162 U.S. 313, 315 (1896); *Browner I*, 889 F.2d at 553.

10. A "lesser" offense clearly embraces the concept that the LIO contains fewer or lower elements than the greater offense. Traditionally, it also referred to the concept that the lesser crimes were graded lower and carried lesser penalties than the charged offense. These two concepts of lesser are not always the same, because the proliferation of statutory crimes has made it possible for a crime to have fewer or lesser elements but a greater penalty. *See, e.g.*, Commonwealth v. Anderson, 610 A.2d 1042, 1053 (Pa. Super. Ct. 1992) (aggravated assault not LIO of attempted murder because, inter alia, aggravated assault is a first degree felony carrying a maximum sentence of 20 years in prison, while attempted murder is only a second degree felony carrying a maximum of 15 years in prison). *See also* United States v. Dixon, 113 S. Ct. 2849, 2867 (1993), where Chief Justice Rehnquist, concurring, remarked: "The crimes at issue here, however, cannot be viewed as greater and lesser included offenses, either intuitively or logically. A crime such as possession with intent to distribute cocaine is

decide what crimes are included within other crimes. The main approaches are sometimes referred to by different names, but essentially they are the statutory elements test, the pleadings test, and the evidence test.[11] The difference between these tests is essentially a matter of what is examined in order to determine the existence of an LIO. Thus, in practice, the legal step actually involves two parts: first, a comparison of elements between the offense charged and other offenses claimed to be LIOs to determine if the LIO elements are included within the elements of a charged greater offense; and second, a consideration of varying databases or sources of information to discern precisely what is the greater offense involved in a particular case.[12]

Statutory elements approach. The statutory elements approach considers only the elements of the crimes as set forth in the criminal statutes. This is the federal approach as articulated by the Supreme Court in *Schmuck v. United States*.[13] *Schmuck* held that the elements approach

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a serious felony that cannot easily be conceived of as a lesser included offense of criminal contempt, a relatively petty offense as applied to the conduct in this case." *Id.*

11. *See, e.g.*, United States v. Browner, 937 F.2d 165, 167-68 (5th Cir. 1991) [hereinafter *Browner* II]; State v. Jeffries, 430 N.W.2d 728 (Iowa 1988); Keffer v. State, 860 P.2d 1118, 1128-29 (Wyo. 1993); Barnett, *supra* note 7, at 259 n.23; Comment, *The Lesser Included Offense Doctrine in Iowa: The Gordian Knot Untied*, 59 IOWA L. REV. 684, 684-86 (1974). Thoughtful analyses of the various approaches to defining LIOs are also contained in Christien R. Blair, *Constitutional Limitations on the Lesser Included Offense Doctrine*, 21 AM. CRIM. L. REV. 445 (1984), and Ettinger, *supra* note 6, at 198-209. Both of these articles also evaluate some of the interplay between the LIO doctrine and federal constitutional requirements.

Section 1.07(4) of the Model Penal Code states what some refer to as an additional and more liberal approach. *See, e.g.*, *Keffer*, 860 P.2d at 1129. As described in *Keffer*:

> [The Model Penal Code approach] allows the instruction when the lesser included offense is established by proof of the same or less than all of the facts required for the greater offense; or when the lesser offense consists of an attempt or solicitation; or when the difference between offenses is only in the respect that a less serious injury or risk of injury or a lesser culpability establishes a lesser offense. Model Penal Code § 1.07(4) (1985). This test has not been widely adopted, but it is partially incorporated in the "inherent relationship" standard.

860 P.2d at 1129. The Model Penal Code seems to combine aspects of the main approaches summarized in the text.

12. These two parts of the legal step for defining LIOs are discussed *infra* notes 607-18 and accompanying text in regard to the interaction between double jeopardy and state LIO law. Specifically, we there analyze whether the LIO approach chosen under state law affects the scope of double jeopardy protection and whether the double jeopardy same offense test mandates any particular state LIO approach.

13. 489 U.S. 705 (1989). In United States v. Dixon, 113 S. Ct. 2849, 2856 (1993), the Supreme Court held that the "same elements" test (the so-called "*Blockburger*" test) was required for determining whether crimes are the same offense under the Double Jeopardy Clause. The *Blockburger* test is discussed *infra* notes 419-27 and accompanying text. As is

was required in federal court under Federal Rule of Criminal Procedure 31(c).[14] It explained:

Under this test, one offense is not "necessarily included"[15] in

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also discussed *infra* notes 610-18, and accompanying text some courts and commentators opine that *Dixon* mandates that states adopt the statutory elements approach for determining LIOs under state law. *See, e.g., Keffer*, 860 P.2d at 1128 (citing Blair, *supra* note 11, at 447-48). However, the Supreme Court seems to have looked beyond the abstract statutory definitions even in *Dixon*. 113 S. Ct. at 2865 (Rehnquist, C.J., concurring).

14. FED. R. CRIM. P. 31(c) provides in pertinent part: "The defendant may be found guilty of an offense necessarily included in the offense charged . . . ." The rule was adopted in 1944 to carry into the Federal Rules of Criminal Procedure chapter 255, section 9 of the Act of June 1, 1872, ch. 255, § 9, 17 Stat. 198 (1872). That statute was enacted to codify the common law LIO doctrine and Rule 31(c) was intended as restatement of that law. *See, e.g., Schmuck*, 489 U.S. at 718-19; Keeble v. United States, 412 U.S. 205, 208 n.6 (1973). The rule, its predecessor statute, and information about the current and past federal LIO law are discussed further *infra* 377-84.

On its precise facts, *Schmuck* held under Rule 31(c) that the crime of odometer tampering was not "necessarily included" within the charge of mail fraud, because odometer tampering included an element (knowingly and willfully causing an odometer to be altered) that was not the same as, or a subset of, any element of mail fraud. *Schmuck*, 489 U.S. at 721. To reach this holding, the Court first resolved "a conflict among the [c]ircuits over which test to apply in determining what constitutes a lesser included offense for the purposes of Rule 31(c)." *Id.* at 710 (footnote omitted). The Court concluded that the "elements test" was the proper approach and rejected the "inherent relationship" test that had been used by the Seventh Circuit in *Schmuck* and other cases. *Id.* at 716. This rejected test is a form of the "evidence test," discussed *infra* notes 22-25.

Schmuck did not mention the pleadings approach. Nevertheless, lower federal courts have suggested that *Schmuck* rejected that approach by implication. *See, e.g., Browner II*, 937 F.2d at 170 (holding assault with deadly weapon was not an LIO of voluntary manslaughter under the elements test adopted by *Schmuck*; it might have been an LIO of manslaughter based on the pleading in the case, but *Schmuck* did not adopt the pleadings test). *Browner II* also asserted that at least two other circuits had implicitly rejected the pleadings approach following *Schmuck*. *Id.* at 170-71 (citing United States v. Mena, 933 F.2d 19, 29-30 (1st Cir. 1991), and United States v. Sneezer, 900 F.2d 177, 178-79 (9th Cir. 1990)). However, those opinions did not even mention the pleadings test.

Federal cases before *Schmuck* had discussed the pleadings approach and purported to apply it. In some of those cases the courts also examined the trial evidence. Therefore, they seem actually to be evidence approach cases, more like the inherent relationship cases discussed *infra* notes 22-25. *See, e.g.,* United States v. Cova, 755 F.2d 595 (7th Cir. 1985) (upheld conviction of conspiracy to possess cocaine on indictment for conspiracy to possess with intent to deliver; court said it was not limited to looking only at the statutory language but could also consider the allegations on the indictment and the evidence presented at trial); United States v. Kearney, 498 F.2d 61 (D.C. Cir. 1974) (whether unlawful entry is LIO of burglary depends not solely on comparison of statutory elements, but also on an analysis of the facts charged in the indictment and proved at trial); United States v. Coppola, 425 F.2d 660 (2d Cir. 1969).

15. Generally, "necessarily included" is read as meaning the same as "lesser included," although there are differences of view on the matter. *See, e.g.*, Olais-Castro v. United States, 416 F.2d 1155, 1157 (9th Cir. 1969); State v. Keffer, 860 P.2d 1118, 1124 (Wyo. 1993) (regarding Fed. R. Crim Pro. 31(c) and an identically worded state rule, court remarked: "The

> another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c).[16]

Under the elements approach, an offense cannot be an LIO "if the proof of one offense does not invariably require proof of the other."[17] As *Schmuck* reiterated: "To be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser."[18] With the elements approach, offenses are compared by laying the statutes defining the crimes side by side and comparing these statutory elements in the abstract, without regard to the allegations of the charging document or the evidence presented at trial.[19]

With the statutory elements approach, a lesser crime may or may not be an LIO depending on the crime charged and how the statute defines it, because the elements of the LIO must be included within the statutory definition of the crime charged. For example, discharging a dangerous weapon is an LIO if the charged crime is assault with a deadly weapon, because the statute defining that crime includes the elements of the weapons offense. If the crime charged is simple assault, however, the weapons offense is not an LIO, because the simple assault statute would not mention discharging a weapon.

Although the elements of the asserted LIO are not included in the greater offense statute, those elements might be mentioned elsewhere in the case. This possibility gives rise to the two other approaches for determining whether an LIO exists: the pleadings approach, when the LIO

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description of an offense necessarily included in the offense charged set forth in Rule 31(c) perhaps makes conventional reference to a 'lesser included offense' somewhat imprecise . . . .") Certainly, *Schmuck* treated "lesser included" and "necessarily included" as synonymous; it frequently referred to "lesser included offenses" despite the "necessarily included" language of Rule 31(c). *See, e.g.*, *Schmuck*, 489 U.S. at 710 (where the Court spoke of the need to resolve what was the appropriate test for determining "a lesser included offense for the purposes of Rule 31(c).").

16. *Schmuck*, 489 U.S. at 716. In applying this test, *Schmuck* also stated: "This element [willful and knowing alteration] is not a subset *of any element* of mail fraud." *Id.* at 721 (emphasis added). This suggests a slightly more expansive approach. The greater need not have elements in addition to those of the lesser; instead, an element of the greater could have greater and lesser parts and the element of the lesser could be the lesser part of the element of the greater. This would permit LIOs that had lesser included elements as well as those that had less elements. For example, certain mental states (such as purposely) include lesser states (such as knowingly); certain results (death) include other lesser results (serious bodily injury or simple bodily injury).

17. *Id.* at 717.

18. *Id.* at 719 (quoting House v. State, 117 N.E. 647, 648 (Ind. 1917)).

19. *Id.* at 716-17.

elements are mentioned in the pleadings, and the evidence approach, when the LIO elements are shown by the trial evidence.

Pleadings approach. The pleadings approach looks to the pleadings to supplement the abstract statutory definitions. That is, the examination of the greater offense charged is broadened to include consideration of the allegations of the charging document (indictment or information), not just the abstract statutory definitions.[20] Although the pleadings approach still compares elements and asks whether the lesser offense simply omits an element required for the greater offense, it allows examination of the pleadings to determine what crimes to compare. This approach expands the possible LIOs beyond those reflected only by consideration of the statutes in the abstract. The charged crime set forth in the pleadings may be more narrow or more specific than the general elements stated in the statute. LIOs may exist based on the prosecution's theory as alleged in the pleading, in addition to the LIOs included within the abstractly defined statutory crimes. Thus, the pleading may charge the greater offense more specifically than the statutory definition, and specify or imply additional

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20. Barnett, *supra* note 7, at 273, asserted that "most jurisdictions examine the language of the accusatory pleading rather than the statutory elements . . . to determine when a lesser offense is included in the charged crime." Barnett also observed that under the pleading test as then used in Connecticut, the court looked to the indictment or information to determine LIOs, and also allowed the pleadings to be supplemented by a bill of particulars. *Id.* at 261, 265, 273-74; *see, e.g.*, State v. Brown, 301 A.2d 547, 553 (Conn. 1972). Barnett also asserted that *Brown* eliminated the evidence step of the LIO doctrine. Barnett, *supra* note 7, at 263-64, 273-74. This latter assertion is open to question. *Brown* did not focus on the separate evidence step. Instead it held that where an information charging sale of narcotics did not allege the elements of possession of narcotics, possession was not an LIO of sale, and there was no need to look to the trial evidence to determine the existence of LIOs. *Brown* seemed to reject an earlier Connecticut approach of looking at the trial evidence in addition to the pleadings to help determine the existence of LIOs under the "legal" step. This earlier approach is represented by State v. Mele, 100 A.2d 570, 572 (Conn. 1953). In *Mele*, the court viewed an information for assault with intent to murder as alleging that the crime was committed by means of a dangerous weapon, making aggravated assault an LIO, where that was not stated in the information but was shown by the trial evidence. This combined pleading-evidence approach to the legal step of the LIO doctrine seems more like an evidence test than a pleadings test.

Comment, *supra* note 11, discusses the pleadings approach and also what it calls a "modern variation of the pleadings analysis": even if the indictment does not explicitly include an LIO, if the indictment does not exclude a method of committing the charged crime and the trial evidence supports that method, any lesser offense whose elements are included within that method is also considered to be an LIO. *Id.* at 694-95. This "modern variation" sounds more like the evidence approach, or at least a combination of pleadings and evidence. For additional discussion of this approach, see Blair, *supra* note 11, at 468-69; Ettinger, *supra* note 6, at 203-05.

lesser crimes whose elements are included within the greater offense as charged.[21]

In the weapons example stated above, under the statutory elements approach discharging a weapon is not an LIO of simple assault but it is an LIO of assault with a deadly weapon. Under the pleading approach, however, if the indictment or information charging simple assault alleges that the defendant used a weapon to commit the crime ("the defendant caused bodily injury to the victim by shooting her in the leg with a handgun"), then discharging a weapon would be an LIO of simple assault.

Evidence approach. Under the evidence approach, the examination expands still further to include the evidence actually presented at trial. Thus, the examination is not simply of abstract statutory elements or even crimes suggested by the pleadings, but the crimes that the trial evidence tends to prove.[22] As with the pleadings approach, the evidence approach allows greater flexibility in deciding which crimes to consider. It also has

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21. For federal cases applying or purporting to apply the pleadings approach, see cases cited *supra* note 14. For state cases, see, *e.g.*, State v. Marino, 462 A.2d 1021, 1029 (Conn. 1983) (citing State v. Brown, 301 A.2d 547 (Conn. 1972), discussed *supra* note 20, court stated the first principle of the LIO doctrine as "it is not possible to commit the greater offense, in the manner described in the charging documents without having first committed the lesser;" specifically holding that where murder as charged in the indictment and bill of particulars alleged intentional shooting with a pistol, manslaughter in the first degree with a firearm was an LIO); Brown v. State, 206 So. 2d 377, 380 (Fla. 1968); State v. Madrid, 702 P.2d 308, 309-10 (Idaho Ct. App. 1985) (incest not LIO of rape under statutory elements approach, because it requires familial relationship that is not element of rape, but may be LIO under pleadings approach if that relationship is alleged in the rape indictment); Dorsey v. State, 490 N.E.2d 260, 268 (Ind. 1986) (class C burglary not LIO of the class B burglary charged, where the information as drafted omitted the language that would include a building or structure other than a dwelling); Commonwealth v. Stots, 324 A.2d 480, 481 (Pa. Super. Ct. 1974) (where indictment alleged that defendant attempted to kill victim by discharging firearm at her, willfully and wantonly discharging firearm was LIO of attempt with intent to kill). One common application of the pleadings approach authorizes an LIO instruction where the pleading alleged the means or manner by which defendant committed the charged crime, or an element of it, and those means or manners constitute or include an LIO. *See, e.g.*, United States v. Browner, 937 F.2d 165, 169 (5th Cir. 1991) (court stated that test is whether asserted LIO is the manner in which charging instrument alleges defendant committed crime charged); Thomas v. State, 261 N.E.2d 588, 590 (Ind. 1970); Barnett, *supra* note 7, at 262-63. When a statute defines a crime generally, but that crime may be committed through a variety of means, and those means may themselves constitute or include lesser crimes, the statute in the abstract would not necessarily include those lessers, because it may be committed through any of several means. However, the pleading, by alleging more specifically the manner of committing the crime, could thereby allege particular LIOs. In the abstract, the crime charged would not necessarily include any one lesser crime, but the pleading would specify the means and, therefore, particular LIOs.

22. *See, e.g.*, State v. Keffer, 860 P.2d 1118, 1129 (Wyo. 1993); Blair, *supra* note 11, at 448-50; Ettinger, *supra* note 6, at 205-09.

the suggested benefit of being more closely related to the actual criminal conduct shown by the facts proven at trial.[23]

For example, if evidence presented at trial shows that the defendant shot the victim in the leg, then discharging a weapon would be an LIO of simple assault, even though the statute defining simple assault does not mention weapons and the charging instrument does not allege the precise means of committing the assault.

As with much of the law in this area, these terms and approaches are not always used with precision. Indeed, some courts and commentators seem to use lesser included offense colloquially as a general label that includes not only true LIOs, but also lesser related offenses. To be precise, lesser included offenses are only crimes that are included within the elements of another crime. Related or cognate offenses, on the other hand, are crimes that are in some way related or similar to each other, but are not necessarily included within each other. An LIO only has elements that are included within those of the greater, with no elements in addition to those of the greater. In contrast, related offenses could each have elements that the other does not have.[24] In some jurisdictions, the related offense doctrine is similar to the LIO doctrine in the sense that a jury may be authorized to convict not only on true LIOs, but also on all crimes related or cognate to the crime charged.[25]

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23. *See, e.g.*, Ettinger, *supra* note 6, at 205-09. The inherent relationship test is an evidence test for determining LIOs. It would seem more accurate, however, to say that this test determines "related" offenses, not true LIOs. See discussion *infra* at note 24-25. The inherent relationship test was probably stated best in United States v. Whitaker, 447 F.2d 314, 319 (D.C. Cir. 1971) (quoted in *Schmuck*, 489 U.S. at 715-16):

> [D]efendant is entitled to invoke Rule 31(c) when a lesser offense is established by the evidence adduced at trial in proof of the greater offense, with the caveat that there must also be an "inherent" relationship between the greater and lesser offenses, *i.e.*, they must relate to the protection of the same interests, and must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense.

24. *See, e.g.*, People v. Geiger, 674 P.2d 1303, 1306 (Cal. 1984) (defendant charged with burglary; held error not to instruct on vandalism, which the evidence showed was a related offense though not a lesser offense necessarily included within the charged crime).

25. Some courts and commentators use the pleadings and evidence approaches to determine related offenses, as well as to determine LIOs. Indeed, these discussions often fail to distinguish between the two categories of offenses. They refer to the approaches as "cognate pleading" and "cognate evidence." *See, e.g.*, State v. Keffer, 860 P.2d 1118, 1128-29 (Wyo. 1993) (also citing State v. Jeffries, 430 N.W.2d 728 (Iowa 1988)); Blair, *supra* note 11. "Cognate" approaches are not true LIO tests, but are instead approaches that look to the pleadings or the evidence for applying a "related offense" doctrine. For example, the "inherent relationship" test, followed by some federal circuit courts before *Schmuck*, sounded like a test for determining related offenses based on the trial evidence. *See, e.g.*, United

III. DUE PROCESS AND THE LIO DOCTRINE

The Due Process Clauses of the Fifth and Fourteenth Amendments generally require that criminal proceedings satisfy those "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[26] The Supreme Court has not established a general due process requirement or right to an LIO instruction. The Court has held narrowly that an appropriately warranted LIO instruction may not be precluded in a capital case, but it has explicitly reserved decision on whether the Constitution requires such an instruction in all cases. What the Court has said suggests that it is not likely to establish this general due process right and most lower federal courts that have addressed the question have refused to extend the Court's capital case rule to noncapital cases. These points and the related cases are discussed and analyzed in this section of the Article.

At the outset it might well be questioned whether there is any practical importance to creating a general federal constitutional LIO requirement. As is discussed below, appropriately warranted LIO

States v. Whitaker, 447 F.2d 314, 319 (D.C. Cir. 1971), as discussed in *Schmuck*, 489 U.S. at 708-09, and as applied by the circuit court panel in *Schmuck*. United States v. Schmuck, 776 F.2d 1368 (7th Cir. 1985), *rev'd*, 840 F.2d 384 (7th Cir. 1988) (en banc), *aff'd*, 489 U.S. 705 (1989). Viewed as a related offense test, it is obvious why *Schmuck* held "inherent relationship" was not a proper test for determining whether "an offense [is] necessarily included in the offense charged," under FED. R. CRIM. P. 31(c). *Id.* By definition, related offenses are not necessarily included or lesser included offenses. *Schmuck* recognized that the inherent relationship test, and also implicitly related offense approaches, raise due process notice issues if these approaches allow related offense instructions at the prosecution's request and over defense objection. *Id.*

26. Medina v. California, 505 U.S. 437, 445 (1992) (quoting Patterson v. New York, 432 U.S. 197, 201-02 (1977) (internal quotations omitted)). *Medina* concluded that *Patterson* stated the proper analysis for determining whether state criminal procedures satisfied due process under the Fourteenth Amendment. *Id.* This is discussed more extensively *infra* notes 295-308. The due process standard has been stated similarly by the Supreme Court in other contexts. *See, e.g.*, United States v. Salerno, 481 U.S. 739, 746 (1987) (dealing with preventive detention provisions of the federal bail statute; the Court remarked: "So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience'. . . or interferes with rights 'implicit in the concept of ordered liberty'. . . ." Government action must also be "implemented in a fair manner. This requirement has traditionally been referred to as 'procedural' due process." (citations omitted)); United States v. Lovasco, 431 U.S. 783, 790 (1977) (dealing with pre-charge delay; the Court reasoned: "We are to determine only whether the action complained of—here, compelling respondent to stand trial after the Government delayed indictment to investigate further—violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions'. . . and which define 'the community's sense of fair play and decency'. . . ." (citations omitted)).

instructions are required in all states as a matter of state law and in the federal courts under the Federal Rules of Criminal Procedure. Therefore, if there were a general federal constitutional LIO requirement, what would it add?

We can put to one side the unrealistic event of a state completely abolishing all LIO doctrine. But what of a *general* due process requirement, examining the appropriateness of LIO instruction in a particular case? A general federal due process requirement of an LIO instruction would, of course, apply to the states and would subject state court LIO decisions to federal court oversight by creating a federal issue cognizable in federal court on habeas corpus or on the direct review route to the Supreme Court. A federal due process requirement would also carry with it federal constitutional standards for defining LIOs (the legal step),[27] for determining whether the trial evidence warranted an LIO instruction (the evidence step),[28] for deciding whether instructions were required without request or over objection, and for analyzing other subsidiary issues. In short, the LIO doctrine would become federally constitutionalized. This consequence of recognizing a due process LIO requirement points out the practical implications that have inhibited and will continue to inhibit the federal courts from granting general due process recognition.[29] The pervasive nature of LIOs throughout state and federal criminal prosecutions means that a constitutional LIO doctrine would greatly involve the federal courts in everyday state criminal law and procedure far beyond their interest and the intent of the Due Process Clause.

A. The Supreme Court's LIO Due Process Decisions

On two occasions—in *Beck v. Alabama*[30] and *Keeble v. United States*[31]—the Supreme Court has reserved decision on the important question of whether there is a general federal constitutional requirement of a jury instruction on otherwise appropriately warranted LIOs. In each

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27. *See, e.g.*, Schad v. Arizona, 501 U.S. 624, 657-58 (1991) (dissenting opinion suggested that there are constitutional limits to the deference the Court must give to state law definition of crimes; in a compound crime like felony-murder, the underlying crime that must be proven to prove the other crime must be considered an LIO as a matter of federal constitutional law).

28. *See, e.g.*, Hopper v. Evans, 456 U.S. 605, 611-12 (1982) (in holding that the preclusion of an LIO instruction did not violate the Constitution because the evidence did not warrant the instruction, the Court set forth the LIO evidence standard under Alabama state law and stated that the "Alabama rule clearly does not offend federal constitutional standards, and no reason has been advanced why it should not apply in capital cases.").

29. This is discussed *infra* at notes 173-74 and in Section III.D.3.c.

30. 447 U.S. 625 (1980).

31. 412 U.S. 205 (1973).

of these cases, the Court explicitly reserved the question because the precise issue before it did not necessitate a broad constitutional decision. The Court has directly addressed the issue only in the narrow context of capital cases,[32] where it held that a trial court's refusal to instruct the jury to consider an available, noncapital LIO warranted by the evidence violated the Federal Constitution. The Court's most recent constitutional LIO decision was *Schad v. Arizona*,[33] decided in 1991, but the leading case is the 1980 decision in *Beck*, which held that in a capital case the lack of LIO instruction violated the Federal Constitution. The Court directly decided only two other constitutional LIO cases in the interim between these two decisions. (This is discussed extensively below.) The Court has also referred to the "*Beck* rule" in other opinions not involving the LIO doctrine.[34]

The most significant question is whether the "*Beck* rule" should extend to noncapital cases. The answer depends initially on how to read the Court's opinions in *Beck* and its progeny. As others have recognized, the answer "turns in part on which constitutional provision [the Supreme Court] rested the *Beck* decision."[35] The *Beck* Court's opinion did not

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32. In Trujillo v. Sullivan, 815 F.2d 597, 602 (10th Cir.), *cert. denied*, 484 U.S. 929 (1987), the Tenth Circuit stated that, "[i]n the six years since *Beck*, the Supreme Court has declined to consider whether *Beck* should be extended to noncapital cases," citing as support the Court's denial of certiorari in Holloway v. State, 362 So. 2d 333 (Fla. Dist. Ct. App. 1978), *cert. denied*, 449 U.S. 905 (1980). *Holloway* would support this statement, however, only if it was a noncapital case. *Holloway* can be considered noncapital only if one accepts the Tenth Circuit's distinction between "capital" and "noncapital" cases. According to that distinction, a case is deemed noncapital even though the state sought the death penalty throughout trial, if upon conviction the defendant was sentenced only to life imprisonment. The Supreme Court has given no indication, in *Holloway* or otherwise, that it would accept this distinction. The Tenth Circuit and other capital case definitions are analyzed *infra* notes 177-95 and accompanying text.

33. 501 U.S. 624 (1991).

34. These opinions are discussed *infra* notes 86-124 and accompanying text.

35. Trujillo v. Sullivan, 815 F.2d 597, 601 (10th Cir.), *cert denied*, 484 U.S. 929 (1987). *Trujillo* continued: "Unfortunately, the [*Beck*] Court's opinion is less than clear on this point." *Id.*

In *Trujillo*, the Tenth Circuit declined to choose which of the alternative *Beck* rationales the Tenth Circuit would accept. The court would admit only that under *Beck*, "there is clearly now a constitutional right to a lesser included offense instruction *when the death penalty is imposed* and the evidence warrants the instruction." *Id.* (emphasis added). This narrow reading of *Beck* allowed *Trujillo* to hold that *Beck* did not apply to the case before it, in which the jury imposed life imprisonment following conviction for an offense carrying the death penalty. *Trujillo* decided that it was bound by pre-*Beck* Tenth Circuit precedent, Poulson v. Turner, 359 F.2d 588 (10th Cir.), *cert. denied*, 385 U.S. 905 (1966), which it read as holding that generally the failure to give an LIO instruction was not a constitutional violation cognizable on federal habeas corpus review of a state conviction. 815 F.2d at 601-02.

clearly articulate the precise constitutional basis for its holding, a failing which, as will be shown, has produced considerable uncertainty about the reach of the decision. On one hand, *Beck* might simply be an Eighth Amendment case following the *Furman v. Georgia*[36] line of capital cases "delineating procedural safeguards to ensure that the death penalty is not imposed on the basis of caprice or emotions . . . ."[37] On the other hand, much of the *Beck* opinion discussed additional concerns about undermining the reasonable doubt standard, reducing the reliability of the factfinding process, and risking fundamental unfairness.[38] These broader-based due process concerns seem to apply equally to all cases; under this analysis, failure to give LIO instructions in noncapital cases would violate due process.[39]

Even for capital cases, the scope and implications of the *Beck* decision are unclear. It is not clear, for example, whether a capital defendant is constitutionally entitled to instructions for only one noncapital LIO, or for the most rational LIO in view of the defense theory, or for all LIOs warranted by the evidence.[40] Moreover, if the constitutional LIO rule is limited to capital cases, the Court has not defined "capital case" for this purpose. The term is open to differing interpretations and, as discussed below, is viewed differently among the federal circuit courts. Capital can mean potentially capital when the case goes to the jury, as well as actually capital because the jury imposes death and the case subsequently reaches the appellate court.

The *Trujillo* opinion and its view of what constitutes a capital case are discussed extensively *infra* notes 177-182 and accompanying text.

36. 408 U.S. 238 (1972). The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.

37. *Trujillo*, 815 F.2d at 601. As *Trujillo* explained, *Beck* emphasized the qualitative difference between capital and noncapital punishment and the need for additional, special procedural safeguards to avoid arbitrary imposition of the death penalty. *Id.*

38. *Id.* The Tenth Circuit in *Trujillo* mentioned *Beck's* concern about the fundamental right to a fair and impartial trial; concern about the reliability of the factfinding process free from extraneous influences; and concern for the increased risk of erroneous, unwarranted convictions or acquittals when the jury is given an all-or-nothing choice without an LIO option.

39. *Trujillo* concluded, "[t]he same concern for reliability of the factfinding process when no 'third option' is provided also arises in the case in which the death penalty is not imposed." *Id.* at 602. *Trujillo* cited Dianne Smith McGann, Note, Beck v. Alabama: *The Right to a Lesser Included Offense Instruction in Capital Cases*, 1981 WIS. L. REV. 560, as a "thoughtful note" arguing for the extension of *Beck* to noncapital cases. *Id.* This analysis also appears in, *e.g.*, Blair, *supra* note 11, at 462-72.

40. *See* Schad v. Arizona, 501 U.S. 624 (1991), discussed *infra* notes 77-85 and accompanying text.

Although *Beck* itself created the potential to extend a general constitutional requirement to all warranted LIOs in all cases, the Court's later decisions, particularly *Schad*, suggest a much more narrow constitutional LIO rule. Most state and lower federal courts have taken this narrow view, limiting *Beck* to capital cases. That view is also supported by the practical implications for the federal courts if a broader rule were adopted. Extending the *Beck* rule to apply in noncapital cases would create a basis for federal court review of all state convictions raising LIO issues. The pervasive nature of the LIO doctrine and the vast number of state criminal cases suggest that broadly constitutionalizing LIOs would overwhelm the federal courts and involve those courts in state criminal law issues to an unmanageable and undesirable extent.

Beck v. Alabama. In *Beck*, a state statute provided that in a trial for a capital crime, the judge was prohibited from giving the jury the option of convicting on a lesser, noncapital crime. "Instead, the jury [was] given the choice of either convicting the defendant of the capital crime, in which case it [was] required to impose the death penalty, or acquitting him, thus allowing him to escape all penalties . . . ."[41] Reviewing a conviction and death penalty imposed under this statute, *Beck* held precisely that "a sentence of death [may not] constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict." [42]

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41. Beck v. Alabama, 447 U.S. 625, 628-29 (1980). The Alabama statute precluded jury instruction on LIOs of capital murder, and the instructions required by the statute would cause the jury to believe the death penalty was mandatory. The jury was also instructed that if it found defendant guilty it must impose the death penalty; it was not told that the judge made the final sentencing decision after a separate hearing to consider aggravating and mitigating circumstances, and that the judge was not bound by the jury's "imposition." *Id.*

This statute gave the jury a very stark all-or-nothing choice. That the jury would think its guilty verdict meant an automatic mandatory death penalty greatly aggravated the nature of the choice it had to make and compromised the reliability of the verdict. As the Supreme Court noted, the closing jury arguments showed that under the Alabama statute, the jury issue really became whether the defendant deserved the death penalty, and not so much whether the state proved guilt beyond a reasonable doubt. *Id.* at 643 n.19. Indeed, *Beck* observed that the Alabama statute had many of the same flaws as mandatory death penalty provisions the court had invalidated previously. *Id.* at 638-40.

42. *Id.* at 627. The capital offense charged was an intentional killing in the course of a robbery. Under state law, this offense required a robbery murder with an intent to kill. An unintentional killing during a robbery was an LIO of noncapital murder. The state conceded the evidence would warrant an instruction on that LIO, but the statute precluded LIO instructions in capital cases. Defendant's trial testimony was that he participated in the robbery but neither killed nor intended the death of the victim. *Id.* at 627-30.

The defendant Beck argued that the LIO preclusion statute violated the Eighth Amendment Cruel and Unusual Punishment provision and the Fourteenth Amendment Due Process Clause "by substantially increasing the risk of error in the factfinding process" and creating a danger that the jury "will resolve any doubts in favor of conviction."[43] The Court accepted the essence of this argument. In the Court's view, precluding consideration of LIOs "interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime."[44] The unavailability of the LIO option would inevitably encourage the jury either to convict, because it believes the defendant is guilty of and should be punished for some crime, though not the one charged,[45] or to acquit, because it believes that the defendant does not deserve the severe punishment for the charged crime. Therefore, the Court reasoned that LIO instructions were of constitutional value because without them there was a substantial risk that the reliability of the jury's factfinding, guilt-determining process would be impaired or diminished, leading to a substantially increased risk of jury error, improper verdicts, and unwarranted convictions. LIO instructions warranted by evidence would ensure that the jury gives the defendant the full benefit of the reasonable doubt standard.[46]

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43. *Id.* at 632.

44. *Id.* at 642.

45. The Court recognized that juries abhor setting a defendant free when the evidence shows guilt of some serious crime just as much as they abhor punishing a defendant for a crime the evidence did not prove. *Beck*, 447 U.S. at 642; *see also, e.g.,* Baldwin v. Alabama, 472 U.S. 372, 394 n.2 (1985) (Stevens, J., dissenting).

46. *Beck*, 447 U.S. at 634 (quoting Keeble v. United States, 412 U.S. 205, 212-13 (1973)). The Court has also recognized that when LIO instructions are given, the presence of the greater crime may cause the jury to compromise and convict of the LIO, instead of carefully resolving the question of defendant's guilt or innocence at all. This is a different example of the diminishment of the reliability of the truth determining process in the LIO area. Thus, in Price v. Georgia, 398 U.S. 323 (1970), a defendant, charged with murder and found guilty of the LIO voluntary manslaughter, sought and obtained reversal of this initial conviction. The Supreme Court held that the Double Jeopardy Clause did not prevent retrial, but since the first verdict was limited to the LIO, the Court limited retrial to that lesser offense. The Court rejected the state's argument that the second trial for murder was harmless error because defendant was convicted of the same crime at both the first and second trials and suffered no greater punishment on the subsequent conviction. The Court reasoned, inter alia, that "we cannot determine whether or not the [impermissible] murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence. See United States ex rel. Hetenyi v. Wilkins, 348 F.2d 844 (2d Cir. 1965), *cert. denied*, [Mancusi v. Hetenyi,] 383 U.S. 913 (1966)." *See Price*, 398 U.S. at 331-32. Here, the availability of the LIO verdict allowed the jury to compromise its questions about whether the defendant was guilty or innocent at

Interpreted broadly or in the abstract, out of the precise context of the capital case, *Beck*'s reasoning sounds like a general due process analysis, which would apply regardless of the crime charged. Indeed, *Beck* reviewed the history of the LIO doctrine[47] and commented that "the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard."[48] The Court expressly recognized, however, that it need not decide whether due process required LIO instructions in noncapital cases. To resolve the dispute before it, *Beck* needed only to hold that the state was "constitutionally prohibited from withdrawing" the option of an LIO conviction in a capital case.[49]

In its more narrow reasoning, *Beck* stated that the enhanced risk of an unwarranted conviction "cannot be tolerated in a case in which the defendant's life is at stake. As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments."[50] The Court discussed its Eighth Amendment precedent, which invalidated rules that diminished the reliability of capital sentencing determinations, and concluded that "[t]he same reasoning must apply to rules that diminish the reliability of the guilt determination."[51] It earlier concluded that "in *every case* [preclusions of LIO instructions] introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a *capital case*."[52]

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all, while in *Beck* the absence of the LIO alternative was thought inevitably to influence the jury to convict or acquit inappropriately because of its feeling it had no choice.

47. *Beck*, 447 U.S. at 633-37. *Beck* recognized that, since early common law, juries could convict defendants of LIOs. It observed that this LIO doctrine originally developed to assist prosecutors where the evidence failed to prove an element of the charged offense, but that it has long been recognized as benefiting the defendant. *Beck* quoted at length from its statutorily based precedent Keeble v. United States, 412 U.S. 205 (1973) (discussed in the text *infra* at notes 53-57) and noted that defendant entitlement to LIO instructions had long been undisputed in the federal courts, citing and quoting *Keeble*, Stevenson v. United States, 162 U.S. 313 (1896), Berra v. United States, 351 U.S. 131 (1973), and FED. R. CRIM. P. 31(c). *Beck* noted that state courts had also "unanimously held that a defendant is entitled to a lesser included offense instruction where the evidence warrants it," citing decisions of virtually every state in the union. *Beck*, 447 U.S. at 636-37 n.12. The Court followed this discussion by suggesting that although it had never so held, there might be a due process right to LIO instructions. The general due process analysis as applied to the LIO doctrine, including the doctrine's history and current acceptance, are discussed extensively *infra* Section III.D.

48. *Beck*, 447 U.S. at 637.

49. *Id.* at 638.

50. *Id.* at 637.

51. *Id.* at 638.

52. *Id.* at 643 (emphasis added).

Certainly, *Beck*'s precise holding was directed only to capital cases. *Beck* may arguably be limited even more strictly only to cases in which the jury supposedly imposed the death penalty automatically with its finding of guilt of the capital offense, because that was the precise dispute before the Court. The question raised by the *Beck* opinion, however, is not what the Court held, but the implications of its reasoning and whether that reasoning appropriately extends to noncapital as well as capital cases. Though at times specifically limited to death cases and Eighth Amendment-type analysis, *Beck*'s reasoning intimates due process concerns. Can and should the reasoning be limited to the oft-articulated concern about the need for special caution in proceedings that lead to the imposition of the qualitatively different death penalty? Or does *Beck* truly reflect broader concerns about the reliability of the factfinding process and the need to ensure that conviction occurs only when the evidence establishes guilt beyond a reasonable doubt? This broader concern is certainly a significant part of *Beck*'s rationale, lending support to the extension of *Beck*'s constitutional LIO rule to noncapital cases.

Keeble v. United States. *Beck* relied heavily on the Court's earlier precedent, *Keeble v. United States*.[53] *Keeble* did not concern a constitutional issue. Instead, the case involved the federal prosecution of a Native American for a crime enumerated within the limited federal jurisdiction conferred by the Major Crimes Act of 1885. The Court nevertheless held that the defendant was entitled to instruction on an LIO warranted by the evidence even though the LIO was not an enumerated offense. *Keeble* discussed the history of the LIO doctrine, especially in federal court, and observed that "it is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense" if the evidence warrants,[54] and the limited offenses specified in the act did "not require that he be deprived of the protection afforded by an instruction on a lesser included offense."[55]

Explaining the federal LIO doctrine, *Keeble* reasoned that, theoretically, a jury given choices only of conviction and acquittal should acquit if the evidence fails to prove an element of the crime charged beyond a reasonable doubt, but in practice, a substantial risk exists that the jury will resolve its doubts in favor of conviction when the defendant seems guilty

53. 412 U.S. 205 (1973). *See supra* notes 46-47.
54. *Id.* at 208.
55. *Id.* at 214.

of some serious crime.[56] This reasoning, cited in *Beck*, has distinct due process overtones. Indeed, the *Keeble* court remarked that forbidding the LIO instruction "would raise difficult constitutional questions."[57] Those constitutional questions were avoided in *Keeble*, however, because the Court interpreted the Major Crimes Act as not eliminating the right to LIO instructions under federal cases and procedural statutes.

Beck's Progeny. Since *Beck*, the Court has directly addressed federal constitutional requirements regarding LIOs in only three cases: *Hopper v. Evans*,[58] *Spaziano v. Florida*,[59] and *Schad v. Arizona*.[60] Certainly, as the Court observed in *Beck*, the wholesale state law preclusion of LIO instructions in capital cases was "unique in American criminal law."[61]

Hopper v. Evans. Shortly after *Beck*, the Court held in *Hopper v. Evans*[62] that the Alabama preclusion statute invalidated by *Beck* did not entitle defendant Evans to relief from his conviction and death sentence. The defendant was not prejudiced by the preclusion statute. An LIO instruction was not warranted by the evidence, because the defendant's own evidence negated any possibility of the LIO, and the evidence also showed that the defendant could not have raised any other plausible argument had the preclusion provision not applied.[63] *Hopper* rejected the

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56. In *Schmuck v. United States*, the Court also noted that:

> [We] recognized in *Keeble v. United States, supra*, that where the jury suspects that the defendant is plainly guilty of *some* offense, but one of the elements of the charged offense remains in doubt, in the absence of a lesser offense instruction, the jury will likely fail to give full effect to the reasonable doubt standard, resolving its doubts in favor of conviction . . . . The availability of a lesser included offense instruction protects the defendant from such improper conviction.

489 U.S. 705, 717 n.9 (1989) (citation omitted). *Schmuck* clarified the approach that must be used in federal cases to determine what is a "necessarily included offense" under FED. R. CRIM. P. 31(c). *See supra* notes 13-19 and accompanying text.

57. *Keeble*, 412 U.S. at 213.

58. 456 U.S. 605 (1982).

59. 468 U.S. 447 (1984).

60. 501 U.S. 624 (1991).

61. Beck v. Alabama, 447 U.S. 625, 635 (1980).

62. 456 U.S. 605 (1982).

63. Defendant's own evidence affirmatively showed that he intended to kill the victim, which was required for the capital offense. Defendant also testified that he would kill again if released and asked the jury to impose the death penalty. This negated any noncapital LIO claim. Given defendant's testimony, the Court concluded that the defendant could not plausibly assert that he would have used a different tactic, or presented other evidence, or requested different instructions had it not been for the preclusion statute. 456 U.S. at 612-14. This reasoning in the *Hopper* opinion has given rise to the suggestion that *Hopper* decided that the failure to give the LIO instruction was constitutional error but harmless error. *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279, 306-07 (1991) (Rehnquist, C.J., dissenting in part, joined by O'Connor, Kennedy, & Souter, JJ.) (The Chief Justice observed that, "the Court

lower court's interpretation that *Beck* required LIO instructions regardless of evidentiary basis, noting that *Beck* clearly held that the jury must be permitted to consider an LIO verdict only if the evidence warranted that verdict. *Hopper* reasoned that the evidentiary requirement was consistent with the underlying *Beck* rationale that the guilt determining process be rational and reliable. The evidence requirement channeled the jury's discretion so that it could convict only of a crime fairly supported by the evidence.[64]

Hopper also concluded that in the case before it the state law evidentiary standard for LIOs satisfied federal constitutional requirements. The Court quoted the Alabama state law evidence standard for an LIO instruction in noncapital cases. It then quoted the evidence standard stated in *Keeble* as being the "federal rule."[65] Clearly, *Hopper* treated the *Keeble* language as stating an appropriate evidentiary standard for the federal constitutional LIO rule adopted in *Beck*. Comparing state and federal law, *Hopper* concluded that "[t]he Alabama rule clearly does not offend federal constitutional standards, and no reason has been advanced why it should not apply in capital cases."[66]

Hopper did not clarify whether the Supreme Court considered the LIO rule as protection limited to capital cases (Eighth Amendment) or a more general due process right. The opinion vacillated between the different

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has applied harmless error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless. *See, e.g.*, . . . *Hopper v. Evans*, 456 U.S. 605 (1982) (statute improperly forbidding trial court's jury instruction on a lesser-included offense in a capital case violates the Due Process Clause).").

64. *Hopper* reasoned that Roberts v. Louisiana, 428 U.S. 325 (1976), also supported the importance of the LIO evidentiary requirement. *Hopper*, 456 U.S. at 611. In *Roberts*, the statute made the death penalty mandatory for a narrowly defined first degree murder. The statute also required jury instructions on all LIOs, meaning all lesser grades of homicide, regardless of whether those instructions were warranted by the evidence. *Roberts* reaffirmed that mandatory death penalty statutes violated the Eighth Amendment. It also held that the LIO instruction requirement did not save the statute, but was itself unconstitutional. Because instructions were required without regard to evidence, the jury had no standards to guide it in finding first degree murder verdicts. The statute invited the jury to choose an unsupported lesser verdict whenever it felt the death penalty inappropriate. It gave the jury de facto standardless sentencing discretion.

In *Beck*, the Court noted that an earlier Alabama Supreme Court decision had justified the Alabama preclusion provision on the ground that it helped save the statute from the defects in *Roberts*. 447 U.S. at 632 n.7.

65. *Hopper* stated: "The federal rule is that a lesser included offense instruction should be given 'if the evidence would permit a jury rationally to find [a defendant] guilty of the lesser offense and acquit him of the greater.'" 456 U.S. at 612 (quoting Keeble v. United States, 412 U.S. 205, 208 (1973)).

66. *Id.* at 612.

constitutional provisions. It stated that on the facts in *Beck*, an LIO instruction was required "as a matter of due process."[67] *Hopper* then remarked that "[o]ur holding in *Beck*, like our other Eighth Amendment decisions in the past decade," was concerned with eliminating arbitrariness in capital sentencing discretion, citing other clear Eighth Amendment cases.[68] *Hopper* later repeated that *Beck* held "due process requires that a lesser included offense instruction be given."[69]

Spaziano v. Florida. Spaziano v. Florida[70] held that the trial judge did not err in refusing to instruct on noncapital LIOs of the charged capital offense where the statute of limitations had run on the LIOs and defendant refused to waive the statute.[71] The Supreme Court acknowledged first that *Beck* held an LIO instruction necessary for constitutionally fair trials in capital cases and, second, that ordinarily a defendant cannot be required to waive a substantive right in order to receive a fair trial. *Spaziano* noted that what was essential to a fair trial was, as *Beck* reasoned, "the enhanced rationality and reliability" that the LIO "instruction introduced into the jury's deliberations."[72] Where no LIO is legally available *Spaziano* reasoned that the instruction detracted from, rather than enhanced, a jury's reliability by presenting an option that legally does not exist.[73] The Court rejected defendant's argument that the demands of reliability in the jury's decision-making process and the concern about unwarranted convictions required the LIO instructions regardless of whether the statute of limitations prevents actual punishment for the LIO. Although the jury in *Spaziano* was presented with no options other than capital conviction or acquittal, the Court said *Beck*'s concerns did not require that the jury be

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67. *Id.* at 609.
68. *Id.* at 611.
69. *Id.*
70. 468 U.S. 447 (1984).
71. On a second issue, *Spaziano* held that it is constitutional for a judge to impose the death penalty despite a jury recommendation against death, as long as the judge makes an individualized determination based on all the relevant circumstances. The Court reasoned that the Sixth Amendment jury trial right did not apply to sentencing, and basically dealt with the issue under the Eighth Amendment. *Id.* at 457-65. Justice Stevens (joined by Justices Brennan and Marshall) dissented as to the Court's decision on this second issue and did not discuss the LIO issue.

Several state courts have rejected the *Spaziano* holding and reasoning, adopting alternative approaches to the issue of LIOs on which the statute of limitations has run. *See infra* notes 125, 127.
72. *Id.* at 455.
73. Of course, this approach assumes that if a defendant is constitutionally entitled to an LIO instruction, the court must also have authority to convict for that offense. *Id.* at 454 n.5.

tricked into believing there was a choice of crimes for which defendant could be convicted when that was legally not possible.[74] Instead, *Spaziano* thought the better solution was to give the defendant the choice of waiving the statute and obtaining the benefits of the LIO instructions.[75]

Spaziano's reasoning paralleled that of *Hopper*.[76] These two opinions clarify that the *Beck* rule requires LIO instruction only when the instruction is authorized as a matter of law, meaning the LIO is available under the statute of limitations (*Spaziano*), and is warranted by the evidence (*Hopper*). That is, the reasons and concerns underlying the *Beck* rule only exist when an LIO is rationally and reasonably available as a verdict, both as a matter of law and based upon the trial evidence. If the jury cannot convict for the LIO, the *Beck* concerns do not apply.

Spaziano did not identify the constitutional provision it applied. It referred repeatedly to the LIO as an element of a constitutionally fair trial, but the Court also spoke of capital trials, constitutionally fair capital trials,

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74. Although the *Spaziano* dissent did not discuss the LIO issue, Justices Brennan and Marshall had earlier rejected the majority's analysis in their dissent from the Court's denial of certiorari in Holloway v. Florida, 449 U.S. 905 (1980) (Marshall & Brennan, JJ., dissenting), *denying cert. to* 362 So. 2d. 333 (Fla. Dist. Ct. App. 1978), which reached the Court before *Spaziano*. In *Holloway*, defendant was indicted for capital first degree murder three and a half years after the crime. By then, the statute of limitations had run on lesser homicide offenses, and therefore, at trial, the judge refused to instruct on those crimes. Defendant was convicted of first degree murder and sentenced to life imprisonment. The Florida Court of Appeals held there was no federal (or state) constitutional right to instruction on LIOs where conviction of those crimes would be a nullity, and the Supreme Court denied certiorari. Justices Brennan and Marshall objected, however, asserting that the case involved "an important due process question requiring interpretation of our decisions in *Keeble* . . ., and *Beck* . . . ." 449 U.S. at 905 (citations omitted). They suggested that under these cases LIO instructions were necessary to preserve the reliability of the factfinding process and whether judgment could be entered if the jury convicted of an LIO was a separate question. Further, noting that the state's delay in bringing an indictment had caused the statute to run, the dissent remarked: "Serious due process concerns are raised if the state through prosecutorial inaction can avoid its own mandate to instruct on lesser degrees of an offense." *Id.* at 908.

75. The Court also considered whether defendant could be forced to waive the statute of limitations so that instruction on the LIOs would be meaningful. The Court decided that because a defendant might have tactical reasons for wanting to take its chances with the jury on capital murder alone, the defendant should have a choice whether to waive. Justice White (joined by Chief Justice Rehnquist) concurred in the majority opinion, except they disagreed with this "dictum," because they thought *Beck* did not require that the defendant be permitted to waive the statute of limitations and obtain LIO instructions on the barred offenses. *Spaziano*, 468 U.S. at 467.

76. Like *Beck* and *Hopper*, *Spaziano* involved a statute that effectively precluded LIOs. The preclusion statute was very different, however, because it was not a statute prohibiting instruction. Here, the noncapital LIOs (attempted first degree murder, second degree murder, third degree murder, and manslaughter) were barred by a two year statute of limitations, while there was no limitation on prosecuting for capital, first degree murder.

and the all-or-nothing choice between capital murder and acquittal. *Spaziano* also discussed reliability, rationality, and distortion of the factfinding process. Much of this is general discussion and seemingly applicable to all cases, but references to the death penalty are also included. Thus, the opinion's due process-type concerns seem narrowly focused on the capital nature of the case before the Court.

Schad v. Arizona. *Schad v. Arizona*[77] is the latest of the Supreme Court's *Beck* progeny. *Schad* held that *Beck* did not constitutionally require a jury instruction on robbery as an LIO of capital first degree robbery murder when the jury was instructed on second degree murder, yet it convicted the defendant of the capital charge and therefore rejected the second degree option between capital murder and acquittal.[78]

The *Schad* majority[79] first distinguished the precise holding of *Beck*. It reasoned that, unlike the state statute that precluded any LIO instruction in *Beck*, the *Schad* jury was not precluded from considering an LIO. The *Schad* jury was instructed on the option of convicting defendant of a lesser noncapital offense, second degree murder.

Schad also rejected defendant's argument that the due process principles underlying *Beck* required instructions on every noncapital LIO warranted by the evidence. The majority asserted that this view misapprehended the *Beck* rationale, because *Beck*'s goal was *only* "to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence."[80] *Schad* reasoned that *Beck*'s fundamental concern was with unreliability of the factfinding process when the only alternative to conviction of a capital offense was outright acquittal; this all-or-nothing choice created an unacceptable risk of erroneous conviction and imposition of the death penalty. When, as in *Schad*, the jury was not faced with an all-or-nothing

77. 501 U.S. 624 (1991).

78. A majority of the *Schad* Court also held constitutional a jury instruction that did not require the jury to agree unanimously on whether defendant was guilty of premeditated murder or of felony murder. The majority reasoned that this instruction simply reflected state law, which interpreted the first degree murder statute as defining only one crime, with premeditated and deliberate killing and felony murder as merely two means of committing the single crime, rather than as separate crimes or separate essential elements of the crime. 501 U.S. at 636-37. The Court then showed that this state law definition satisfied due process limits on defining a crime. *Id.* at 637-45.

79. Justice Souter authored the opinion of the Court, joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Scalia.

80. 501 U.S. at 646-47 (quoting Spaziano v. Florida, 468 U.S. 447, 455 (1984)). The *Schad* majority also cited *Hopper* for this point.

choice, but was given a third option of convicting the defendant of second degree murder, these underlying concerns were not present.

Thus, the *Schad* majority stated that the defendant could not prevail under the strict holding of *Beck* or under the principles underlying the *Beck* decision. The majority read the underlying principles of *Beck* so narrowly, however, that those principles encompassed only the precise holding of that case. The *Schad* majority seemed to equate *Beck*'s strict holding with its underlying reasoning; *Beck* was closely limited to its precise situation. Obviously, this narrow reading of *Beck* strongly suggests that the Court is not inclined to extend *Beck* to noncapital cases.

Schad's dissenting justices disputed the majority's analysis.[81] Rationally, the LIO instruction given did not avoid the all-or-nothing choice. The "third option" relied on by the majority (second degree murder) was simply not a choice between convicting defendant of first degree felony murder and acquittal. Based on the defense that defendant participated in robbing, but did not intend to kill the victim,[82] robbery was the only rational LIO. Indeed, the state conceded that second degree murder was an LIO of premeditated first degree murder, but not of first degree felony murder.[83] In accordance with this concession, a rational

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81. Justice White's dissenting opinion (joined by Justices Marshall, Blackmun, and Stevens), also disputed the Court's holding on the first issue. The dissent strongly asserted that the statutory categories of first degree murder—premeditated murder and felony murder—each required proof of different elements: "each contains separate elements of conduct and state of mind which cannot be mixed and matched at will." 501 U.S. at 654 (footnote omitted). Thus, the dissent asserted that these were two separate crimes, not simply one crime with one mens rea that could be shown in different ways.

82. According to defendant's brief, the only evidence against the defendant was his possession of the victim's property. Schad v. Arizona, 501 U.S. 624 (1991), Brief for the Defendant at 16. Defendant argued this evidence showed at most that defendant had stolen the property but not that he was involved in the killing.

83. The dissent also rejected the state's argument that capital felony (robbery) murder did not have any LIOs. The *Schad* majority did not rely on the state's argument on this point.

The dissent reasoned that to convict of felony (robbery) murder, the jury first needed to find defendant guilty of committing robbery or attempted robbery. The dissent noted that the elements of robbery and attempted robbery were a subset of the elements of felony (robbery) murder, and therefore were LIOs under the "elements test" adopted by the Supreme Court in Schmuck v. United States, 489 U.S. 705, 716 n.8 (1989), as the proper approach for determining LIOs in federal prosecutions under FED. R. CRIM. P. 31(c). The dissent also asserted that there are constitutional limits on the deference afforded state definitions of crimes, and in the case of a compound crime like felony murder, the underlying crime that must be proven to prove the other crime "must, as a matter of law, be a lesser included offense of the greater." *Schad*, 501 U.S. at 662.

Thus, the *Schad* dissent suggested that there are constitutional limits on how a state may define LIOs. This would seem to follow naturally from the decision in *Beck* that there is

jury conscientiously performing its duty and believing the evidence showed killing in the course of a felony, but did not show premeditation, could not convict defendant of second degree murder. Therefore, if the jury accepted the defense presented in *Schad*, second degree murder would be an inappropriate verdict. Because the jury was given only the second degree alternative and was precluded from considering robbery, it would effectively have an all-or-nothing choice. The dissent's point was that the reliability and rationality concerns of *Beck* required jury instructions matching the theory of the defense; the reliability of the conviction would be undermined if the jury was not allowed to consider the LIO consistent with the defense's case.

The majority responded that the verdict in *Schad* was true and reliable because the jury had a lesser option, but in fact convicted of first degree murder. It reasoned that a rational jury, which was given choices of capital first degree murder, second degree murder, and acquittal, and which believed defendant not guilty of the killing, but was loath to acquit because it also believed defendant was guilty of robbery, would not convict of capital murder, but would instead choose the lesser option of second degree murder. Unfortunately, this is essentially hindsight and approximates a harmless-error analysis. *Schad* reasoned that an additional or different LIO instruction was not required because the jury did not render its verdict on the LIO choice it was given. It merely looked at what the jury did and concluded that it likely would not have convicted the defendant of robbery had it been given that option. This approach ignores

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some constitutional right to an LIO. A federal constitutional right to LIO instructions would require a federal constitutional standard for determining what is an LIO and also when the evidence warrants an LIO instruction. At least the standards used by the courts would need to be consistent with the Federal Constitution. See discussion of *Hopper* regarding Federal Constitutional evidence standard, *supra* notes 65-66 and accompanying text.

A question of determining what is an LIO for *Beck* purposes was also discussed by the justices (Brennan and Marshall) who dissented from the Court's denial of certiorari in Hill v. Georgia, 451 U.S. 923 (1981). The defendant in *Hill* was convicted of first degree murder and forcible rape and sentenced to death. The trial judge had refused to instruct on statutory rape, although the victim was below the age for consent under state law. The state supreme court held that statutory rape was not an LIO of forcible rape. Justices Brennan and Marshall recognized that this was correct based on a comparison of the elements of the crimes (rape required intercourse by force, against the victim's will; statutory rape required intercourse with a girl under 14). They asserted, however, that these differences dissolved as a practical matter; the elements blend together; a girl under 14 is legally incapable of consent, so the "against the will" element is automatically shown by the victim's age; the victim's youth may support a finding of force; the abstract difference between the crimes may not exist under the evidence in the case; and therefore fairness would require allowing the jury to consider the possibility of statutory rape. *Hill*, 451 U.S. at 925.

whether robbery was an appropriate and rational LIO that the jury should have been instructed to consider.

Under the *Schad* Court's reading, *Beck*'s concern about the unreliability of jury verdicts is satisfied as long as the jury is allowed to consider convicting the defendant of one lesser included noncapital offense warranted by the evidence. In capital cases, the Constitution only requires that the jury not be given an all-or-nothing choice. *Schad* seems generally unconcerned about the true, overall reliability of jury determinations, concerning itself only with the unfairness of an all-or-nothing choice between capital murder on the one hand, and outright acquittal on the other. *Schad* clearly suggests that *Beck*'s constitutional rule does not require instruction on every legally and factually available LIO, as long as the jury is instructed on one LIO warranted by the evidence. *Beck* does not even require instruction on the most rational LIO under the defense's theory and evidence. Unfortunately, *Schad*'s hindsight analysis obscures the point.

Schad did not state what it considered the specific constitutional basis for the *Beck* LIO rule. The majority referred to defendant's contention "that the *due process principles* underlying *Beck* require that the jury in a capital case be instructed on every lesser included noncapital offense,"[84] but the Court did not itself characterize the principles. It did quote the due process concerns of the *Beck* and *Spaziano* opinions, but these were coupled closely with references to capital cases. One sentence referred to *Beck*'s concern about the "all-or-nothing choice between the offense of conviction (capital murder) and innocence,"[85] suggesting that capital murder was only an example, but this reference is far from definitive. The Court and the parties seemed to assume *Beck* only applied in capital cases, but this alone should not rule out a wider application of *Beck*.

Schad's restrictive reading of *Beck* supports a more narrow due process reasoning regarding LIOs and the Constitution. By confining *Beck* largely to its precise facts and by upholding the giving of very limited LIO options, *Schad* suggests that the Court is not inclined to extend *Beck* as a general due process rule applicable beyond capital cases.

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84. *Schad*, 501 U.S. at 646 (emphasis added).
85. *Id.* at 647.

B. *The Reach of the* Beck *Cases as Suggested by Other Supreme Court Opinions*

In other opinions, the Supreme Court has cited *Beck* and its progeny outside the LIO context, but only in capital cases. The Court does not seem to have referred to *Beck* in any noncapital cases. In addition to the Court's restrictive opinion in *Schad*, this treatment further suggests the unlikelihood of the Court extending the *Beck* rule to noncapital cases.

Moreover, the non-LIO Court opinions that cite *Beck* have not discussed whether *Beck* is a limited Eighth Amendment capital case rule or a broader due process right that might more easily extend to noncapital cases. In these non-LIO cases, *Beck* is sometimes called an Eighth Amendment case.[86] *Beck* is often cited in cases that involved only the Eighth Amendment[87] and cited with other cases that only dealt with the Eighth Amendment.[88] However, the Court has also referred to *Beck* explicitly as a due process case.[89] This confusion is not surprising. Often,

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86. Darden v. Wainwright, 477 U.S. 168, 196-97 n.3 (1986) (Blackmun, J., dissenting); Dobbert v. Wainwright, 468 U.S. 1231, 1237 (1984) (Brennan, J., dissenting).

87. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 994 (1991); Sawyer v. Smith, 497 U.S. 227, 252 (1990) (Marshall, J., dissenting); Boyde v. California, 494 U.S. 370, 395 (1990) (Marshall, J., dissenting); Schiro v. Indiana, 475 U.S. 1036, 1039 (1986) (Marshall, J., dissenting); Cabana v. Bullock, 474 U.S. 376, 400 (1986) (Brennan, J., dissenting); Baldwin v. Alabama, 472 U.S. 372, 383 (1985); Zant v. Stephens, 462 U.S. 862, 884 (1983); Eddings v. Oklahoma, 455 U.S. 104, 114 n.9 (1982).

88. Harmelin v. Michigan, 501 U.S. 957, 994 (1991); Sawyer v. Smith, 497 U.S. 227, 252 (1990); Murray v. Giarratano, 492 U.S. 1, 8 (1989); Darden v. Wainwright, 477 U.S. 168, 196-97 n.3 (1986) (Blackmun, J., dissenting); Cabana v. Bullock, 474 U.S. 376, 400 (1986) (Brennan, J., dissenting); Dobbert v. Wainwright, 468 U.S. 1231, 1237 (1984) (Brennan, J., dissenting); Strickland v. Washington, 466 U.S. 668, 705 (1984) (Marshall, J., dissenting); Zant v. Stephens, 462 U.S. 862, 884 (1983); Willis v. Balkcom, 451 U.S. 926, 929 (1981) (Marshall, J., dissenting).

89. Baldwin v. Alabama, 472 U.S. 372, 386-87 (1985). *Baldwin* involved the same statute as in *Beck*, under which the jury was required to return a "sentence" of death when it returned a verdict of guilt of first degree murder. *See supra* note 41. Although such a jury sentence would be an unconstitutional mandatory death sentence, *Baldwin* held that where the judge was not required to follow the jury verdict, but instead imposed the death sentence after holding a separate sentencing hearing and making an independent evaluation of the aggravating and mitigating circumstances, the death sentence was constitutional and not tainted by the jury's "sentence." 472 U.S. at 386-89. In the course of rejecting the defense argument that *Beck* required reversal, *Baldwin* explained that *Beck* "reasoned that the provision violated *due process*, because where the jury's only choices were to convict . . . of [a] capital offense and 'sentence' him to death, or to acquit him, but the evidence would have supported a [LIO] verdict, the factfinding process was tainted with irrelevant considerations" that created an intolerable risk of uncertainty and unreliability. *Id.* at 386-87 (emphasis added).

defendants assert Eighth Amendment and due process grounds together. In capital cases, Eighth Amendment and due process claims overlap or are identical. Thus, statements in capital cases that due process requires certain procedures may simply reflect the view that not only does the Eighth Amendment require special rules for death cases, but also that there are heightened due process safeguards in death cases beyond those applicable in noncapital cases. Referring to due process in a capital case does not necessarily suggest that the requirements are generally applicable to all cases.

The Court has cited *Beck* most often with other cases in an effort to exemplify its "death-is-different" rationale[90]—the proposition that the death penalty is so different from other punishments[91] that procedures are

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The conviction and sentence in *Baldwin* was also constitutional despite the lack of LIO instructions, as in *Beck*, because LIO instructions were not warranted by the evidence. *Baldwin*, 472 U.S. at 378 n.4 (citing Hopper v. Evans, 456 U.S. 605 (1982)).

90. *See, e.g.*, Herrera v. Collins, 113 S. Ct. 853, 860 (1993) (citing *Beck* and other cases for proposition that the nature of the death penalty has required additional protections in capital cases); *Darden*, 477 U.S. at 188-89 n.1 (*Beck* cited among many cases for the statement that the Eighth Amendment requires a heightened degree of reliability in death penalty cases); *Zant*, 462 U.S. at 885-86 (citing *Beck* together with Woodson v. North Carolina, 428 U.S. 280 (1976), for statement that the qualitative difference between death and other punishments required corresponding difference in the need for reliability of the determination that death is appropriate); *Harmelin*, 501 U.S. at 998-99 (citing *Beck* and other cases).

The strong "death is different" view is expressed repeatedly by Justices Brennan and Marshall, often in dissenting opinions. This view is joined with their more fundamental opinion that the death penalty is unconstitutional cruel and unusual punishment under all circumstances. *See, e.g.*, Williams v. Lynaugh, 484 U.S. 935, 938-39 (1987) (dissenting opinion from denial of certiorari, stating that Court has recognized since Gardner v. Florida, 430 U.S. 349 (1977), that death is different and therefore has invalidated many procedural rules that questioned the reliability of the sentencing determination, citing *Beck* and other cases); Craig v. North Carolina, 484 U.S. 887, 889 (1987) (dissenting opinion from denial of certiorari, also citing *Woodson* about the finality of death).

91. The important difference between death and other penalties is not a quantitative difference in the amount of punishment, but a qualitative difference. Thus, for example, in Woodson v. North Carolina, 428 U.S. 280 (1976), Justices Stewart, Powell, and Stevens remarked: "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Id.* at 305, *quoted in* Lankford v. Idaho, 500 U.S. 110, 125 n.21 (1991). Similarly, in his opinion in Spaziano v. Florida, 468 U.S. 447, 468 (1984), Justice Stevens (joined by Brennan & Marshall, JJ.), remarked: "In the 12 years since *Furman v. Georgia* . . . every Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense." (citations omitted.)

required in capital cases to ensure that a death penalty is appropriate.[92] These death-is-different, enhanced-reliability references are most common regarding capital sentencing proceedings,[93] but the Court applies the same

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The same point is shown clearly by the opinions in Harmelin v. Michigan, 501 U.S. 957 (1991), where the Court held that a mandatory life sentence without parole, imposed without considering any mitigating factors such as lack of prior felony convictions, did not constitute cruel and unusual punishment in violation of the Eighth Amendment. Although there were several opinions, a majority of the court joined in Justice Scalia's rejection of the claim that mitigating circumstances were required, which was urged as an extension of the individualized capital sentencing doctrine. The opinion emphasized the repeated reasoning in past cases that there is no comparable requirement outside capital cases because of the qualitative difference between death and other penalties. The opinion quoted *Furman* about the difference not in degree, but in kind because of the total irrevocability of the death penalty, its rejection of the rehabilitation purpose of criminal law, and its absolute rejection of the entire concept of humanity. The opinion then discusses the comparison of life without parole to death and to other sentences, concluding that there is simply no comparison with death. *Harmelin*, 501 U.S. at 994-96.

92. WELSH WHITE, THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT 7-8 (1991), states that during the 1976-81 period, the Court began to insist that stringent procedures be employed in capital cases. Professor White placed these cases in two categories: those that simply extended to the penalty stage constitutional rights that applied at the guilt stage, and those that established special procedures to enhance reliability in capital sentencing. This second group was based on the death-is-different rationale: "Because death is different, the Court deemed it appropriate to apply safeguards to make capital sentencing procedures more reliable." *Id.* at 8. Professor White put *Beck* in the second category; he characterized *Beck* as a case that dealt with "restraints that unduly restrict the jury's exercise of discretion" because of concern about the increased risk of unwarranted convictions, by pressuring a jury to convict of a capital offense. *Id.* Other cases included in the second group are Lockett v. Ohio, 438 U.S. 586 (1978) (requiring that jury be allowed to consider any mitigating evidence), and Godfrey v. Georgia, 446 U.S. 420 (1980) (requiring definition of aggravating circumstances narrow enough to restrain or direct jury discretion). See WHITE, *supra*, at 8.

Professor White asserts that during the early 1980's the Court's attitude changed. Although it still mentioned the importance of fair procedures, the Court was willing to allow imperfections because of its increased concern about expediting executions. White also remarks that the Court has even suggested that because death is different, a capital defendant may lose protections; the Court was concerned about implementing the death penalty without excessive delays that might result from too many procedural safeguards. *Id.* at 9-10.

93. *See, e.g.*, Sawyer v. Smith, 497 U.S. 227, 235 (citing *Beck* with Eighth Amendment cases for general proposition that capital sentencing must have guarantees of reliability); *Harmelin*, 501 U.S. at 995 (Eighth Amendment requirement of individualized determination of appropriateness of death penalty, citing Eighth Amendment cases); *Boyde*, 494 U.S. at 386 (Marshall, J., dissenting); *Cabana*, 474 U.S. at 295 (Blackmun, J., dissenting); *Baldwin*, 472 U.S. at 386; California v. Ramos, 463 U.S. 992, 1006 (1992); *Zant*, 462 U.S. at 884; Eddings v. Oklahoma, 455 U.S. 104 (1982); Willis v. Balkcom, 451 U.S. 926 (1981) (Marshall, J., dissenting); Buttrum v. Georgia, 293 S.E.2d 334 (Ga. 1983), *cert. denied*, 459 U.S. 1156 (1983) (Marshall, J., dissenting); Butler v. South Carolina, 290 S.E.2d 1 (S.C.), *cert. denied*, 459 U.S. 932 (1982) (Marshall, J., dissenting). *Cf.* Bullington v. Missouri, 451 U.S. 430 (1981) (Court applied double jeopardy implied acquittal rationale to jury imposition of life imprisonment at death penalty proceeding, another situation in which the Court may have been influenced

rationale to the guilt determination that leads to the sentencing decision. Indeed, the Court has not seemed to differentiate between the penalty and guilt determining phases.[94] For example, in *Murray v. Giarratano*,[95] a plurality opinion distinguished the trial stage, where the evidence is presented and questions of guilt and punishment are decided, from post-trial review proceedings: "[T]he Constitution places special constraints on the procedures used to convict an accused of a capital offense and sentence him to death."[96] These special procedural safeguards were sufficient to ensure the reliability of the death penalty and avoid the need for special post-trial review procedures.[97] The references to *Beck* as a death-is-different case again suggest that the Court does not consider *Beck* a broad due process rule or rationale, but rather an example of the Court's special treatment of death cases.[98]

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by the death-is-different rationale. *See infra* note 585.).

94. *See, e.g.*, Herrera v. Collins, 113 S. Ct. 853 (1993); Boyde v. California, 494 U.S. 370 (1990); California v. Ramos, 463 U.S. 992 (1983); Beck v. Alabama, 447 U.S. 625 (1980).

95. 492 U.S. 1 (1989).

96. *Id.* at 8-9 (citing *Beck* and Eighth Amendment sentencing proceeding cases).

97. *Id.*

98. The Court has not made the death-is-different distinction and required different rules in jury selection cases. These cases were not decided under the Eighth Amendment, however. Instead, they were based on the Sixth Amendment guarantee of impartial jurors who will conscientiously apply the law and find the facts.

In Witherspoon v. Illinois, 391 U.S. 510 (1968), the Court held that the same jury selection standards apply in capital and noncapital cases, even though death qualifying jurors occurred only in capital cases. Wainwright v. Witt, 469 U.S. 412 (1985), reiterated that the interests and objectives underlying death qualifying juries were not unique to capital cases, but were based on the same standard that governed noncapital cases: "[T]he proper standard for determining when a prospective juror may be excluded for cause . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Id.* at 424 (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). The Court continued its "death is not different" treatment of jury selection issues in Lockhart v. McCree, 476 U.S. 162 (1986) (holding the Sixth Amendment did not preclude removing prospective jurors for cause before the guilt stage of a bifurcated capital trial, when their opposition to the death penalty was so strong it would impair the performance of their duties at the sentencing phase, even if this might produce jurors who were more likely to convict).

Professor White writes that these jury selection decisions undermine rather than enhance reliability. Professor White contrasts these opinions with the "long line of decisions" in which the Court "articulated a concern for enhancing reliability in capital cases." WHITE, *supra* note 92, at 202. Recalling that the Court invalidated several procedural rules that "'diminish[ed] the reliability of the sentencing determination,'" and that *Beck* applied that same analysis to invalidate rules that "diminish[ed] the reliability of the guilt determination," *id.*, Professor White thinks it remarkable that the Court failed to consider whether death qualifying juries also diminished the reliability of the guilt determination. Observing that the Court in *Beck* had concluded LIO preclusion enhanced the risk of unwarranted capital conviction because the Court had "assumed" a jury would be more likely to convict a defendant without an LIO

Some other opinions provide more explicit support for the proposition that the Court considers *Beck* applicable only in capital cases. For example, in *Herrera v. Collins*,[99] the majority opinion stated that, "[t]o the extent *Beck* rests on Eighth Amendment grounds, it simply emphasizes the importance of ensuring the reliability of the guilt determination in capital cases in the first instance."[100] Still other opinions contain a similar focus on the capital aspect of *Beck*.[101]

These references to *Beck* seem to resist the argument that *Beck* should apply to noncapital cases, although there are some conflicting references. Thus, the Court has recognized that for jury instructions affecting the reliability of the decision-making process, a distinction may exist between guilt-determining proceedings (involved in *Beck*) and sentencing proceedings. In *California v. Ramos*,[102] the Court held constitutional an instruc-

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option, Professor White suggests that *Beck* "merely exercised its intuition to assume that" juries, who would convict of the LIO if presented that choice, would likely convict of capital offenses rather than acquit if not given the LIO choice. *Id.* at 202-03. Professor White contrasts this mere intuitive assumption with what he considers a much more firmly grounded basis for concluding that death qualification increases the likelihood of conviction. *Id.* at 203.

99. 113 S. Ct. 853 (1993) (state defendant's claim of actual innocence based on newly discovered evidence was not grounds for federal habeas relief, where 10 years of proceedings had occurred in the case and where defendant did not assert an independent constitutional challenge to his conviction and sentence).

100. The majority refused to extend this to support a federal habeas challenge on after-discovered evidence. 113 S. Ct. at 864 n.5. The Court concluded that due process does not require every possible procedure that might remove any possibility of convicting the innocent, because that would paralyze the criminal law enforcement system. *Id.* at 859-60. The Court also rejected defendant's argument that death is different as being irrelevant because the Court had in past cases refused to apply different standards on habeas corpus review of death penalty cases, citing several decisions. *Id.* at 863.

101. The dissenting opinion in *Herrera* explicitly rejected the government's assertion that the Eighth Amendment did not apply where a defendant challenged guilt but not punishment, reasoning that *Beck* made clear that the legitimacy of punishment is necessarily tied to the validity of the guilt determination, and *Beck* also established that the Eighth Amendment mandates reliability of the guilt determination. 113 S. Ct. at 877-78 (Blackmun, J., dissenting). In Harmelin v. Michigan, 501 U.S. 957, 994 (1991), Chief Justice Rehnquist and Justice Scalia stated that "proportionality review" was "one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides." (citing *Beck* with death penalty cases.). Justices Brennan and Marshall expressed this idea clearly in more than one dissenting opinion, stating: "Time and again, the Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case." Barefoot v. Estelle, 463 U.S. 880, 913 (1983). *See, e.g.*, Dobbert v. Wainwright, 468 U.S. 1231, 1237 (1984) (dissenting opinion cited *Beck* with a parenthetical, stating "normal procedural rules must give way in the capital cases where they 'diminish the reliability of the sentencing determination,'" quoting *Beck*, 447 U.S. at 638).

102. 463 U.S. 992 (1983). The Court in *Ramos* referred to the Eighth and the Fourteenth Amendments, but made no separate reference to the Due Process Clause. Thus, it seems that *Ramos* was an Eighth Amendment case, as applied to the states through the

tion that a capital sentencing jury could consider the governor's power to commute a life sentence without parole to life with parole. The majority opinion was not concerned that this instruction injected a factor too speculative for jury consideration, distracted the jury's attention from making an individualized sentencing decision, and impermissibly diminished the reliability of the sentencing determination. The *Ramos* dissent expressed these concerns, which sound like *Beck's* reasoning, and indeed cited *Beck.*[103] The *Ramos* majority distinguished *Beck,*[104] however, in part[105] because of the "fundamental difference between the nature of the guilt/innocence determination at issue in *Beck* and the nature of the life/death choice at the penalty phase" in *Ramos.*[106] The majority stated: "*Beck* identified the chief vice of . . . failure to provide a lesser included offense option as deflecting the jury's attention from the '*central issue* of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime.'"[107] In contrast, at the sentencing phase there is no such central issue; the jury considers myriad factors in making an individualized decision. "In short," *Ramos* concluded, "the concern of *Beck* regarding the risk of an unwarranted conviction is simply not directly translatable to the" capital sentencing process where there is no single determinative issue, only the general concern about individual treatment.[108]

Gilmore v. Taylor. The Supreme Court's decision in *Gilmore v. Taylor*[109] clearly shows the Court's current view that, generally, state court jury instruction errors will not constitute federal due process violations and, more precisely, that *Beck*'s federal constitutional LIO rule applies narrowly, only in capital cases. *Taylor* held that a federal circuit court decision—concluding that state law jury instructions regarding murder

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Fourteenth Amendment.

103. *Id.* at 1024 (Marshall, Brennan, & Blackmun, JJ., dissenting).

104. The *Ramos* majority stated that *Beck* held "the jury in a capital case must be permitted to consider a verdict of guilt of a noncapital offense where the evidence would support such a verdict." *Id.* at 1006-07.

105. *Ramos* also reasoned that the LIO preclusion created a risk of unwarranted conviction in *Beck* because it gave the jury only two artificial sentencing alternatives (capital offense or acquittal), neither of which might be appropriate, but the instruction in *Ramos* only added to the myriad of sentencing considerations for the jury. *Id.* at 1007.

106. *Id.*

107. *Id.* at 1007-08 (quoting *Beck*, 447 U.S. at 642).

108. *Id.* at 1009.

109. 113 S. Ct. 2112 (1993).

and manslaughter violated due process[110]—announced a new rule that only applied prospectively in federal habeas corpus proceedings under *Teague v. Lane*.[111] Although *Taylor* emphasized that the only issue before it was retroactivity under *Teague*, the majority opinion suggested strongly on the merits that instruction errors not affecting the state's burden of proving the elements of the crime[112] raise only state law issues, not federal constitutional violations.[113]

The most significant reflection of the *Taylor* view of *Beck* was in the Court's response to the circuit court's reasoning concerning *Boyde v. California*.[114] The circuit court in *Taylor* had reasoned that, under the *Teague* test, the Court's *Boyde* decision compelled and foreshadowed the circuit's rule.[115] The Supreme Court in *Taylor*, however, reasoned:

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110. In Falconer v. Lane, 905 F.2d 1129 (7th Cir. 1990), the Seventh Circuit found a constitutional defect because the structure of the murder-manslaughter instructions effectively eliminated manslaughter as a crime. The state law instructions specifically directed the jury that it could convict of murder regardless of and without even considering evidence that might clearly prove defendant was entitled to a manslaughter verdict. Though the jury might have found that the evidence proved only manslaughter, under the instructions the jury would never get to that point, because it would already have convicted of murder.

The Seventh Circuit recognized that manslaughter was an affirmative defense to a murder charge under state law. However, the court deemed irrelevant the cases holding that the Federal Constitution allowed states to place the burden on the defendant to prove an affirmative defense, reasoning that its decision did not turn on burden of proof issues regarding elements of the crime and affirmative defenses. *Id.*

111. Teague v. Lane, 489 U.S. 288 (1989). *Teague* dealt with retroactivity and cognizability on federal habeas corpus, holding that constitutional decisions not foreshadowed by earlier Supreme Court cases announced new rules that were not available on habeas challenges to state court judgments entered before the new constitutional decisions.

112. *Taylor* distinguished the challenged instructions in the case before it because they related only to affirmative defenses, and therefore, did not implicate the Court's burden of proof decisions following *In re* Winship, 397 U.S. 358 (1970). *Taylor*, 113 S. Ct. at 2116-17.

113. The Supreme Court in *Taylor* noted that the state conceded the instructions were unconstitutional under *Falconer*. *Id.* at 2116. Nevertheless, the state seemed to argue strongly that *Falconer* was poor constitutional law, and therefore, the instruction in *Taylor* was not unconstitutional. Although the Supreme Court did not need to decide that question, it seemed to accept the state's view. *Id.* at 2117.

The *Teague* analysis itself tends to suggest that a "new" rule devised by a court of appeals is wrong and will be rejected by the Court. The idea that a rule is not foreshadowed or compelled by the Court's precedent suggests that the rule is not supported by the precedent and is therefore inappropriate unless the Court is inclined to extend or overrule the precedent. Here, the text of the majority's opinion strongly suggests that it will not be inclined to do either.

114. 494 U.S. 370 (1990).

115. The *Taylor* majority first rejected the assertion that the standard articulated in Cupp v. Naugthen, 414 U.S. 141 (1973), compelled the Seventh Circuit's *Falconer* rule. *Taylor* reasoned that *Cupp* was in the line of cases following *In re Winship*, and other cases in that line made clear that the Constitution only requires the state to prove the elements of the

> *Boyde* was a capital case, with respect to which we have held that the Eighth Amendment requires a greater degree of accuracy and fact finding than would be true in a noncapital case. [See *Herrera v. Collins*; *Beck v. Alabama.*] Outside the capital context, we have never said that the possibility of a jury misapplying state law gives rise to federal constitutional error. To the contrary, we have held that instructions that contain errors of state law may not form the basis for federal habeas relief. [*Estelle v. McGuire*][116]

This view certainly reads the *Beck* LIO rule as applying only in capital cases,[117] based on the Eighth Amendment requirement of greater capital protections.[118] More generally, the reasoning suggests that a majority of

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crime beyond a reasonable doubt, not to disprove affirmative defenses like manslaughter in *Taylor*. The *Taylor* majority suggested that *Cupp* was limited to burden of proof issues and did not set forth a general due process standard regarding state court jury instructions. *Taylor*, 113 S. Ct. at 2117. This seems contrary to the widespread understanding of *Cupp*, discussed *infra* note 320-21 and accompanying text.

Taylor also rejected the view that Connecticut v. Johnson, 460 U.S. 73 (1983), foreshadowed the circuit court's decision. *Taylor* concluded that *Johnson* did not support a general proposition that instructions violate due process when they lead the jury to ignore exculpatory evidence, reasoning instead that *Johnson* (and other cases) could not be applied beyond the *Winship* principle that state law instructions are unconstitutional when they lessen the prosecution's burden of proving elements of the crime. Because this principle did not apply to instructions related to evidence on affirmative defenses, like the manslaughter defense in question, this entire line of cases could not support the circuit court's decision. *Taylor*, 113 S. Ct. at 2118.

116. *Taylor*, 113 S. Ct. at 2117-18 (citations omitted).

117. The state argued in *Taylor*, inter alia, that the erroneous instruction in *Falconer* was like the failure to instruct on LIOs warranted by the evidence. Because it asserted that *Beck* held that this failure to instruct was constitutional error only in capital cases and *Falconer* was not a capital case, the state argued that *Falconer* must be a new rule not foreshadowed by earlier Court decisions. *Id.* at 2128 (Blackmun, J., dissenting) (Stevens, J., joining). The *Taylor* majority did not respond directly to this *Beck*-based argument, but its opinion nevertheless clearly seems to reflect the majority's agreement with the view that *Beck* applies only in capital cases. *Id.* at 2116.

118. The *Taylor* majority also rejected defendant's alternative argument that the murder-manslaughter instructions in question prevented the jury from considering the defense and, therefore, the *Falconer* rule was supported and foreshadowed by the Court's decisions that the Constitution guarantees the defendant a meaningful opportunity to present a complete defense. The *Taylor* majority reasoned that this precedent was limited to the exclusion of defense testimony or evidence, and "none of them involved restrictions imposed on a defendant's ability to present an affirmative defense." *Taylor*, 113 S. Ct. at 2118. The majority concluded that these cases could not be read so broadly as to support the proposition that confusing instructions on state law that prevent the jury from even considering an affirmative defense would violate due process. The majority also reasoned that were it to hold otherwise, these cases would undermine the *Estelle* rule that state law instruction errors were not grounds for federal habeas corpus relief. *Id.* at 2118-19. The majority's reasoning here seems unacceptable in so broadly suggesting that the defendant's right to present a defense does not include the right to have the jury consider it. The continued reference to

the current Supreme Court thinks that in noncapital cases state law jury instruction errors (such as LIO errors) never constitute federal constitutional violations.[119]

Justices O'Connor and White concurred in the *Taylor* judgment on the prospectivity of the circuit court rule under *Teague*.[120] However, the concurring justices thought it unnecessary to decide the merits of the rule or to construe Supreme Court cases as narrowly as did the majority.[121] These justices did not mention *Beck*, but their opinion evinces a broader view of whether state court jury instructions may violate due process even when they do not directly lessen the state's burden of proof beyond a reasonable doubt, and thus might seem to show a broader view of the scope of the constitutional LIO rule. For example, the concurring opinion reasoned that *Boyde v. California* was intended to, and did apply to, noncapital as well as capital cases, and that *Estelle v. McGuire* did not hold that erroneous state court instructions can only violate the Federal Constitution in capital cases.[122] The dissenting opinion in *Taylor* (Justices Blackmun and Stevens) also agreed that *Boyde* and other jury instruction

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what seems to be an inaccurate reading of *Estelle* is discussed *infra* at notes 309-25 and accompanying text.

This portion of the *Taylor* opinion did not directly address *Beck*, but it is analogous where the theory of defense is that the lack of proof on the greater offense required an LIO verdict. Under this theory, lack of LIO instructions would impair defendant's opportunity to present the defense.

119. General due process analysis of state criminal procedures and the further implications of *Taylor's* suggested view are discussed in more detail *infra* notes 315-25 and accompanying text.

120. *Taylor*, 113 S. Ct. at 2120. The concurring justices agreed that the *Falconer* rule was "new" under *Teague*, being at least susceptible to debate among reasonable jurists.

121. *Id.*

122. *Id.* at 2121. The concurrence noted that *Estelle* was itself a noncapital case, yet the Court there carefully examined the challenged instruction under the *Boyde* standard before holding that it did not violate the Constitution. Clearly, the *Taylor* concurrence reasoned, *Estelle* thought state jury instructions could be so erroneous as to be unconstitutional. *Id.* *Taylor* and *Estelle* are discussed further *infra* at notes 309-25 and accompanying text.

The *Taylor* concurrence also disputed the majority's suggestions about the import of the *Winship* line of cases, reasoning that although states could require defendants to prove affirmative defenses, the Court had not held that due process could not be violated by instructions reasonably likely to lead the jury to ignore affirmative or hybrid defenses altogether. The concurrence also considered the manslaughter defense not purely an affirmative defense but a hybrid on which the defendant had only a burden of production, while the prosecution then had the burden of proving the absence of the defense beyond a reasonable doubt. *Taylor*, 113 S. Ct. at 2121-22.

rules were not limited to capital cases and that erroneous instructions in noncapital cases may violate the Federal Constitution.[123]

Thus, a narrow 5-4 *Taylor* Supreme Court majority has suggested in a non-LIO context that *Beck* and the constitutional LIO doctrine are limited to capital cases. This majority also suggested that state jury instructions can never create federal constitutional violations in noncapital cases. Although this more general suggestion seems erroneous, as we discuss later,[124] the overall reaction to *Taylor* is that, like *Schad*'s restrictive treatment of the *Beck* rule, a majority of the Supreme Court seems very unlikely to extend the capital case constitutional requirement of warranted LIO instruction to noncapital cases.

C. The LIO Due Process Question in the State and Federal Courts

Most state and federal courts have refused to find federal grounds for relief in noncapital cases when a state court fails to instruct on LIOs. Most have declined to find an underlying federal constitutional violation. Others have refused relief on other grounds. These cases are summarized in the next few pages; the circuit court cases are then analyzed in detail for readers who wish a more extensive discussion.

1. State Court Cases

Almost universally, state law requires LIO instructions. Therefore, most state court LIO decisions can rest on state law grounds, without the need to consider whether there might be a federal constitutional violation.[125] The state cases generally find a state law error in refusing to give

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123. *Id.* at 2123. The dissenting justices asserted that the instructions that prevented the jury from considering defendant's manslaughter defense did violate the Constitution by creating a form of ex post facto law, diminishing the likelihood of an accurate conviction, and depriving defendant of the right to a fair trial which includes the right to present and have the jury consider a legitimate defense. Without going into further details of the dissenting views, it is interesting to note that the dissent does address the state's argument that *Beck* does not apply in non-capital offenses. The dissent recognized that the *Falconer* rule, asserted in *Taylor*, and *Beck* both entitle defendants to have the jury consider less drastic alternatives to the crime charged. The dissent otherwise distinguished *Beck*, which concerned whether the jury would correctly follow the instructions about proof beyond a reasonable doubt, from *Falconer/Taylor*, which concerned whether the jury would accurately follow the instructions and ignore defendant's manslaughter defense. *Taylor*, 113 S. Ct. at 2126-28.

124. *Infra* notes 320-25 and accompanying text.

125. *See, e.g.*, State v. Jeffries, 430 N.W.2d 728, 735-39 (Iowa 1988); State v. Keffer, 860 P.2d 1118, 1129-32 (Wyo. 1993) (both thoroughly discussing several state law approaches to the different aspects of the LIO doctrine and the arguments for and against these approaches, as well as some of the constitutional issues raised).

LIO instructions, or they find no error at all. In most instances, this finding deprives a federal constitutional claim of its premise.

Nevertheless, some defendants challenge the state court's application of state law by arguing that the Federal Constitution requires LIO instructions in noncapital cases. This occurs most often when defendants argue that the trial judge should have instructed on LIOs *sua sponte*, despite the lack of request for the instruction and the failure to object to its absence.[126] Other situations in which defendants raise the federal constitutional argument in state courts are cases in which the state statute

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Some state courts have discussed *Beck* and its progeny and otherwise used reasoning similar to the Federal Constitutional analysis, but have relied on their state constitutions or other state law. Generally, states may provide greater protections to individuals as a matter of state law than that which is mandated by the Federal Constitution. In doing so, states may follow the reasoning of federal cases, not because they are bound by federal law, but because they find the federal cases persuasive. *See, e.g.*, Hook v. State, 553 A.2d 233, 239-42 (Md. 1989) (court accepted that *Beck* rule was restricted to capital cases; discussed *Beck*, *Hopper*, and *Spaziano* at length and concluded that the core of *Beck's* due process rationale, that an LIO is required because of defendant's right to fundamental fairness, had long been protected by state common law; based on that common law tradition and the *Beck* rationale, the court applied a *Beck*-type rule in noncapital cases as matter of state law); State v. Short, 618 A.2d 316, 321-24 (N.J. 1993) (court applied right to LIO instructions to noncapital cases as matter of state law, because that right implicated the very core of guarantees of a fair trial; the court's reasoning included the considerations discussed in *Beck*, *Keeble*, and state cases, but it rejected those federal cases, particularly *Spaziano*, that require defendant to waive statute of limitations on LIOs in order to obtain instructions on them); State v. Collins, 431 S.E.2d 188, 190 (N.C. 1993) (discussed *infra* note 130); State v. Vanzant, No. CA-8036, 1990 Ohio App. LEXIS 5580, at *10-12 (Ohio Ct. App. Dec. 10, 1990) (court said Ohio law was the same as Sixth Circuit decisions that had extended *Beck* to noncapital cases, citing Ferrazza v. Mintzes, 735 F.2d 967 (6th Cir. 1984) (discussed *infra* note 138)); State v. Muentner, 138 Wis. 2d 374, 388-92, 406 N.W.2d 415, 417-23 & n.9 (1987) (like *Short*, discussed above, LIOs here were beyond statute of limitations; court distinguished *Spaziano* and held under state law that jury must be instructed on LIOs even if statute had run; court was careful to point out that, relying on state law, it did not reach federal constitutional issues).

126. *See, e.g.*, State v. Whittle, 752 P.2d 494, 496 (Ariz. 1988) (en banc) (court stated that defendant did not have a "constitutional right pursuant to the due process clause to a *sua sponte* instruction on all lesser offenses included in noncapital cases"); State v. Lucas, 708 P.2d 81, 87-88 (Ariz. 1985) (stating the same proposition as *Whittle*); Jones v. State, 484 So. 2d 577, 578-80 (Fla. 1986) (in noncapital case counsel may, by failing to request instruction, waive state law right to LIO on defendant's behalf; in capital case defendant must waive personally, knowingly and intelligently, because the LIO right is fundamental); State v. Wallace, 475 N.W.2d 197, 200-01 (Iowa 1991) (in noncapital case, LIO may be waived by counsel on defendant's behalf; counsel's waiver presumed to show knowing, intelligent, and voluntary waiver by defendant); State v. Sheppard, 832 P.2d 370, 374-75 (Mont. 1992) (failure to instruct on LIOs *sua sponte* did not violate Fourteenth Amendment rights). *See also* Chao v. State, 604 A.2d 1351, 1357-60 (Del. 1992) (in capital case, court held *sua sponte* instructions on LIOs not required by Federal Constitution or by state law; extensive discussion of *Beck* and *Schad*).

of limitations ran on the LIO,[127] the prosecution *nol prossed* a separately charged LIO,[128] or the defendant sought to raise the LIO claim on state collateral attack after a direct appeal in which the claim was either decided or not raised.[129] Those state courts that have addressed the federal constitutional issue in these contexts have almost all held that *Beck* does not extend to noncapital cases and that the failure to give LIO instructions is not otherwise a federal constitutional violation.[130] Very few state

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127. State v. Short, 618 A.2d 316, 322-23 (N.J. 1993); State v. Muentner, 138 Wis. 2d 374, 388-92, 406 N.W.2d 415, 421-23 (1987).

128. *See, e.g.*, Hook v. State, 553 A.2d 233, 242 (Md. 1989) (although state has broad authority to terminate prosecution, it cannot exercise that authority to circumvent *Beck* rule, therefore where evidence supports an LIO, prosecution cannot *nolle prosequi* it; *nolle prosequi* would deprive defendant of right to LIO instructions, denying fundamental fairness, exactly like the preclusion statute held unconstitutional in *Beck*; same analysis as to noncapital cases under state common law). *See also* Dean v. State, 600 A.2d 409, 412 (Md. 1992) (refusing to extend *Hook* to lesser related offenses that are not LIOs); Kinder v. State, 567 A.2d 172, 176 (Md. Ct. Spec. App. 1989) (*Hook* applies to all noncapital cases, not only to homicides.).

129. People v. Mitchell, 582 N.E.2d 1193, 1200 (Ill. App. Ct. 1991) (state collateral relief available if conviction resulted from substantial denial of federal or state constitutional right; here LIO issue was decided on direct appeal, therefore, res judicata barred relitigation); State v. Nicholson, 148 Wis. 2d 353, 435 N.W.2d 298 (Ct. App. 1988) (Failure to instruct on LIO was error but not constitutional error, and therefore, defendant's failure to raise it on direct appeal precluded raising it on collateral challenge.).

130. *See, e.g.*, State v. Whittle, 752 P.2d 494, 496 (Ariz. 1988); State v. Lucas, 708 P.2d 81, 87-88 (Ariz. 1985); Jones v. State, 484 So. 2d 577, 579-80 (Fla. 1986); Tucker v. State, 459 So. 2d 306 (Fla. 1984); State v. Wallace, 475 N.W. 2d 197, 201 (Iowa 1991); State v. Sheppard, 832 P.2d 370, 374-75 (Mont. 1992) (*Beck* was based not on Due Process Clause of Fourteenth Amendment, but on "a due process concept rooted in the Eighth Amendment . . . which requires a higher degree of procedural exactitude in capital cases . . . ."; court notes that a majority of federal circuit courts hold this never raises a federal constitutional question.); State v. Collins, 431 S.E.2d 188, 191 (N.C. 1993); Thompson v. State, 748 P.2d 526, 529 (Okla. Crim. App. 1988); State v. Nicholson, 148 Wis. 2d 353, 365-66 (Ct. App. 1988) (*Beck*, an Eighth Amendment death penalty rule, has no application in a state that has no death penalty). Other state courts in capital cases commented that *Beck* was an Eighth Amendment, not a Due Process case, *see, e.g.*, State v. Lawrence, 1988 Ohio App. LEXIS 1482, at *15-16 (Ohio Ct. App. Apr. 21, 1988), or distinguished *Beck* on the facts. *See, e.g.*, State v. Guynn, 1986 WL 10131, at *2 (Tenn. Crim. App. Sept. 18, 1986); Adanandus v. State, 866 S.W.2d 210, 232 (Tex. Crim. App. 1993), *cert. denied*, 114 S. Ct. 1338 (1994).

Some of these cases holding that *Beck* does not extend to noncapital cases also used a plain or fundamental error analysis to hold that, under state law, the defendant could challenge a jury instruction on appeal though she did not object at trial. This analysis sounds like the "fundamental defect" analysis some federal courts use to determine habeas corpus cognizability of state court LIO claims, based on Hill v. United States, 368 U.S. 424 (1962). *See* discussion *infra* notes 231-94 and accompanying text. For example, in *Collins*, the Supreme Court of North Carolina refused to decide whether *Beck's* due process rule extended to noncapital cases, because a state statute required LIO instructions warranted by the evidence. *Collins*, 431 S.E.2d at 190. Applying this state law, the North Carolina court found that substantial evidence supported the LIO conviction. *Id.* at 192. Although the defendant

courts have found federal constitutional error in noncapital cases.[131]

2. Federal Circuit Court View of The Reach of *Beck's* Rationale

Whether *Beck*'s LIO requirement should extend to noncapital cases—a question reserved in the *Beck* line—depends initially on how to read the Court's opinions in *Beck* and its progeny. The federal courts of appeals have engaged in such readings.

The Tenth Circuit recognized, in *Trujillo v. Sullivan*,[132] that the

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did not request the instruction or object to its omission, the court reviewed the failure to instruct on the grounds that it was a "plain error" at trial. *Id.* at 193. The court defined "plain error" as error "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *Id.* (quoting State v. Bagley, 362 S.E.2d 244, 251 (N.C. 1987), *cert. denied*, 485 U.S. 1036 (1988)) (internal quotations and citations omitted). Also *see, e.g.*, State v. Odom, 300 S.E.2d 375, 378 (N.C. 1983) (relying on federal circuit court interpretation of the plain error rule in FED. R. CRIM. P. 52(b) in holding that failure to give an LIO instruction was not plain error). The North Carolina court's plain error definition is almost identical to the *Hill* standard. Moreover, the *Collins* case reasons for finding plain error mirrors *Beck*: the failure to give LIO instructions caused the jury an impermissible dilemma of convicting defendant of the greater crime or acquitting him, despite evidence on which the court thought the jury would have preferred to convict of the LIO. As a Note on this case observed, "*Collins* suggests that the North Carolina Supreme Court is ready to use both rules [the LIO rule and the plain error rule] to aid criminal defendants." Joseph E. Smith, Note, *The Convergence of Plain Error and Lesser Included Offense Rules in* State v. Collins, 72 N.C. L. REV. 1721 (1994). For other state court cases that apply a fundamental error analysis to unobjected failures to give LIO instructions, *see, e.g.*, *Whittle*, 752 P.2d at 496; *Lucas*, 708 P.2d at 87-88; *Sheppard*, 832 P.2d at 374-75.

131. *See, e.g.*, People v. Mitchell, 582 N.E.2d 1193, 1196-97 (Ill. App. Ct. 1991) (not altogether clear whether court based decision on state law or extension of *Beck*; although court relies heavily on state court cases discussing constitutional rights, it also relies on *Beck* and mentions that the earlier state court cases relied on "the due process discussion in Beck." State v. Carrington, 134 Wis. 2d 260, 263, 397 N.W.2d 484, 486 (1986) (court noted that LIO doctrine "may implicate the due process and double jeopardy provisions of the federal and state constitutions").

In capital cases, the state cases tend to follow the analysis of the *Schad* opinion. *See, e.g.*, Chao v. State, 604 A.2d 1351, 1359 (Del. 1992); Parker v. Dugger, 537 So. 2d 969, 971-72 (Fla. 1988); State v. Greer, No. 12258, 1987 WL 7769 (Ohio Ct. App. Mar. 4, 1987).

132. 815 F.2d 597 (10th Cir.), *cert. denied*, 484 U.S. 929 (1987). In *Trujillo*, the Tenth Circuit declined to choose which of the alternative *Beck* rationales the circuit would accept. The court would admit only that under *Beck*, "there is clearly now a constitutional right to a lesser included offense instruction *when the death penalty is imposed* and the evidence warrants the instruction." *Id.* at 601 (emphasis added). This narrow reading of *Beck* allowed *Trujillo* to hold that *Beck* did not apply to the case before it, in which the jury chose life imprisonment rather than death following conviction of an offense for which the death penalty was authorized. *Trujillo*, 815 F.2d at 602. *Trujillo* decided that it was bound by pre-*Beck* Tenth Circuit precedent, Poulson v. Turner, 359 F.2d 588 (10th Cir.), *cert. denied*, 385 U.S. 905 (1966), which it read as holding that generally the failure to give an LIO instruction was not a constitutional violation cognizable on federal habeas corpus review of a state conviction.

answer "turns in part on which constitutional provision [the Supreme Court] rested the *Beck* decision. Unfortunately, the Court's opinion is less than clear on this point."[133] As *Trujillo* observed, *Beck* might simply be an Eighth Amendment case "delineating procedural safeguards to ensure that the death penalty is not imposed on the basis of caprice or emotion,"[134] but *Beck* also discussed broader-based concerns[135] that would support holding that the failure to give LIO instructions in noncapital cases violates due process.[136]

a. Federal Circuit Court Cases Summarized

Most federal courts now refuse to grant relief for state LIO errors in noncapital cases.[137] At one time, several federal circuit courts suggested that *Beck* supported a constitutional requirement of LIO instructions in noncapital cases, but most of these decisions have been superseded.[138] At

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Trujillo, 815 F.2d at 603-04. The *Trujillo* opinion is discussed more extensively *infra* at notes 177-82, 245-59.

133. *Trujillo*, 815 F.2d at 601.

134. *Id.* at 601. As *Trujillo* explained, *Beck* emphasized the qualitative difference between capital and noncapital punishment and the need for additional, special procedural safeguards to avoid arbitrary imposition of the death penalty. *Id.*

135. *Id.* at 601-02. The Tenth Circuit mentioned several *Beck* concerns: the fundamental right to a fair and impartial trial; the reliability of the fact-finding process free from extraneous influences; and the increased risk of erroneous, unwarranted convictions or acquittals when the jury is given an all-or-nothing choice without an LIO option. *Id.*

136. *Id.* at 602. As *Trujillo* concluded, "[t]he same concern for reliability of the factfinding process when no 'third option' is provided also arises in the case in which the death penalty is not imposed." *Id.* *Trujillo* also cited Dianne Smith McGann, Note, Beck v. Alabama: *The Right to a Lesser Included Offense Instruction in Capital Cases*, 1981 WIS. L. REV. 560, which argued for the extension of *Beck* to noncapital cases. For other articles asserting that *Beck* should be extended, see, e.g., Blair, *supra* note 11, at 466-70.

137. *See* discussion *infra* notes at 147-95.

138. Before its more recent opinions in Bagby v. Sowders, 894 F.2d 792 (6th Cir.), *cert. denied*, 496 U.S. 929 (1990), discussed *infra* notes 150-58 and accompanying text, several Sixth Circuit opinions suggested this in dicta and without substantial analysis. For example, in Ferrazza v. Mintzes, 735 F.2d 967, 968 (6th Cir. 1984), the Sixth Circuit quoted Hopper v. Evans, 456 U.S. 605, 611 (1982), for the proposition that due process required an LIO instruction when warranted by the evidence. It then stated that "the principle is not limited to capital cases and should be applied [in a non-capital case] as well." Ferrazzo, 735 F.2d at 968 (citing without further discussion Pilon v. Bordenkircher, 593 F.2d 264 (6th Cir.), *vacated and remanded on other grounds*, 444 U.S. 1 (1979); *Pilon* is discussed below). On its facts, however, *Ferrazza* did not hold due process violated, finding instead that the evidence did not warrant an LIO instruction. The Tenth Circuit later cited *Ferrazza* as a case that extended *Beck* to noncapital cases. *Trujillo*, 815 F.2d at 602. The Tenth Circuit recognized, however, that "the [*Ferrazza*] court failed to articulate the analysis underlying its substantive decision to extend the constitutional reach of *Beck*." *Id.* at 603.

In Brewer v. Overberg, 624 F.2d 51, 52 (6th Cir. 1980), *cert. denied*, 449 U.S. 1085 (1981) (citing *Pilon*, 593 F.2d 264), the Sixth Circuit stated that "failure of a state court to instruct

present, only the Third Circuit extends the *Beck* rule to noncapital cases.[139] At least one circuit, the Second, has not conclusively ruled on the issue, although district courts within the circuit have confronted it.[140]

The constitutional LIO issue reaches the federal circuit courts in cases involving petitions for writs of habeas corpus. Federal habeas relief is authorized for convicted state defendants held in custody in "violation of the Constitution or laws or treaties of the United States."[141] This remedial mechanism and its associated consequences have complicated the courts' reasoning. The issue on habeas is often not treated simply as whether *Beck*'s constitutional requirement should apply in noncapital cases, but rather as a more general question of whether there is any cognizable

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the jury on lesser included offenses raises a question cognizable on habeas review. In some circumstances, the failure . . . could deprive the defendant of the fundamental right to a fair trial as secured by the Fourteenth Amendment." (citations omitted). The Sixth Circuit later cited *Brewer* in Allen v. Morris, 845 F.2d 610, 617 (6th Cir. 1988), *cert. denied*, 488 U.S. 1011 (1989). *Allen* was a noncapital case that did not find a due process violation because the evidence did not warrant the LIO instruction. *Id.*

Like *Ferrazza*, the *Brewer* and *Allen* opinions are conclusory, relying ultimately on Pilon v. Bordenkircher, 593 F.2d 264 (6th Cir.), *vacated and remanded on other grounds*, 444 U.S. 1 (1979). *Pilon* was a pre-*Beck* Sixth Circuit decision, which did not support the proposition for which the Sixth Circuit later cited it. Indeed, *Pilon* stated almost the opposite point; it stated that federal habeas review is generally *not* available for state court LIO issues, particularly when the state's highest court found no LIO error under state law. See *Bagby*, 894 F.2d at 795, 799 (different opinions noted that *Pilon* stated: "[F]ailure to give a requested lesser-included offense instruction . . . clearly does not rise to the level of constitutional error when the failure was correct as a matter of state law." (quoting *Pilon*, 593 F.2d at 267)).

Other circuit court opinions could be read as recognizing a constitutional right in noncapital cases, but these implications have been superseded by later decisions. In United States *ex rel.* Barnard v. Lane, 819 F.2d 798, 804-05 (7th Cir. 1987), the Seventh Circuit held the Sixth Amendment right to effective assistance of counsel was denied by counsel's failure to request LIO instructions in a noncapital case and strongly suggested that due process might require the instructions. *But see* Nichols v. Gagnon, 710 F.2d 1267 (7th Cir. 1983), *cert. denied*, 466 U.S. 940 (1984), discussed *infra* notes 159-76 and accompanying text. The Eighth and Tenth Circuits have also discussed a defendant's right to LIO instructions, citing *Beck*, but these cases did not reach constitutional proportions. They clearly seem to be predicated upon the federal statutory-like right to LIO instructions under FED. R. CRIM. P. 31(c). *See, e.g.*, United States v. Campbell, 625 F.2d 760 (8th Cir. 1981); United States v. Horn, 946 F.2d 738, (10th Cir. 1991); United States v. Joe, 831 F.2d 218 (10th Cir. 1987); United States v. Swingler, 758 F.2d 477 (10th Cir. 1985).

139. The Third Circuit's treatment of the issue is discussed *infra* notes 197-213 and accompanying text.

140. Discussed *infra* note 196.

141. 28 U.S.C. § 2254(a) (1988) provides, in pertinent part, that a state prisoner may obtain federal habeas corpus relief "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." *See also* 28 U.S.C. § 2241 (1988) (setting forth the federal power to issue the writ). For further discussion of these statutes, see *infra* notes 220-32, 237-44 and accompanying text.

basis for federal habeas relief, as if the failure to give LIO instructions in state court could violate federal law other than the Constitution.[142]

These federal habeas corpus issues have led federal courts to use different lines of reasoning to refuse relief for LIO claims in noncapital cases. The two main lines of analysis focus on the *Beck* decision and also on the Court's decision in *Hill v. United States*.[143] The treatment of these analyses by the various circuit courts is explored extensively below,[144] but summarized here.[145]

Taken as a whole, the federal cases reach differing conclusions. First, many cases conclude that the federal constitutional requirement recognized in *Beck* applies only in capital cases—that *Beck* was a capital case and does not extend to noncapital cases. Second, several cases suggest, incorrectly, that the failure of a state court to instruct on LIOs in noncapital cases may be cognizable on federal habeas even if not a constitutional violation, but then ultimately deny federal relief. The federal circuits in these cases have used an analysis based on the standard articulated in *Hill*—whether failure to instruct "amount[ed] to so fundamental a defect as to cause 'a complete miscarriage of justice []or an omission inconsistent with the rudimentary demands of fair procedure.'"[146]

The circuit courts applying *Hill* also take two further different paths. Some use the *Hill* analysis to conclude that the failure to give an LIO instruction is never reviewable on habeas corpus. (This may be referred to as automatic nonreviewability or a per se *Hill* analysis.) Other cases conclude that the *Hill* analysis does not require automatic nonreviewability, but decide, based upon the particular facts of each case, that the failure to instruct does not satisfy the *Hill* standard. (This analysis may be referred to as an ad hoc or fact-specific *Hill* analysis.) It is also important to realize that federal courts use the *Hill* analysis independent of, or at least in addition to, the *Beck* analysis.

Beyond the different methods of using *Hill*, either per se or ad hoc, the various circuit opinions also seem to see this analysis in substantively different ways. That is, some circuits seem to use *Hill* as a constitutional

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142. Of course, LIO issues in federal trials can be decided as a matter of federal statutory or rule law, as well as under the Constitution. *See* FED. R. CRIM. P. 31(c), discussed *supra* notes 14-19, *infra* notes 377-84 and accompanying text.

143. 368 U.S. 424 (1962), discussed *infra* notes 236-44 and accompanying text.

144. *Infra* notes 245-79 and accompanying text.

145. The First Circuit's 1990 opinion in Tata v. Carver, 917 F.2d 670 (1st Cir. 1990), also contains a useful summary. For more extensive discussion of *Tata*, see *infra* notes 273-79 and accompanying text.

146. *Tata*, 917 F.2d at 671 (quoting Hill v. United States, 368 U.S. 424, 428 (1962)).

standard for determining whether the lack of LIO instructions violates due process. Others seem to use *Hill* to determine whether the lack of LIO instructions in state court could somehow violate a federal law other than the Constitution.

These different substantive approaches underscore an important point: It is not appropriate to use *Hill* regarding state court LIO issues. As is discussed below, the *Hill* standard is a prudential limit on cognizability of federal statutory claims and other nonconstitutional, federal issues; it is not a constitutional or jurisdictional standard. State court LIO claims, however, do not raise federal statutory issues. They are either federal due process issues or simply matters of state law, which are never cognizable on federal habeas. Thus, in the context of state LIO issues, *Hill v. United States* seems quite irrelevant.

In addition to these substantive differences in the reasoning of the federal circuit court cases, the opinions also differ in how the reasoning is expressed. Some opinions are fairly extensive in their analysis, while others are very conclusory on critical points. Courts use some or all of the lines of reasoning summarized above, alone and in combination; sometimes they use these various lines of reasoning inconsistently.

As a result, the law is unsettled on an important point that arises frequently at the intersection of substantive criminal law, criminal procedure, and constitutional law. It is therefore useful to attempt to categorize and evaluate in more detail the varied treatment of the underlying issue in the circuits. Those treatments provide an intriguing case study of the attempts by strong courts, fostered by Supreme Court cases, to deal with a difficult and developing issue that could dramatically expand federal constitutional review of state cases, with all the concomitant implications of such an expansion.

b. Circuit Court Decisions Refusing to Extend Beck

Several decisions reject extension of *Beck* in a conclusory fashion. These opinions simply state that in noncapital cases a state court's failure to instruct on LIOs raises no federal constitutional issue and is not cognizable on federal habeas. The opinions offer little reasoning beyond citing conclusory precedent that antedates *Beck*. Some fail even to mention the *Beck* decision. The effect of these decisions is to leave an authoritative line of precedent without the essential renewed analysis that would seem to be required by a major Supreme Court decision recognizing

a new constitutional right. The Fifth[147] and Ninth[148] Circuits have

147. Fifth Circuit opinions did no more than cite their own pre-*Beck* precedent to support the conclusion that failure to give LIO instructions in noncapital cases did not violate the Federal Constitution and, therefore, were not grounds for federal habeas corpus relief. The most recent Fifth Circuit decision, Valles v. Lynaugh, 835 F.2d 126 (5th Cir. 1988), stated simply that the failure to give an LIO did not raise a constitutional issue in noncapital cases. *Id.* at 127 (citing Alexander v. McCotter, 775 F.2d 595 (5th Cir. 1985)). In *Alexander*, the Fifth Circuit noted that a line of its cases dating back to 1970 had consistently held that a state trial judge's failure to give LIO instruction was not a federal constitutional matter. *Alexander*, 775 F.2d at 601 (citing Easter v. Estelle, 609 F.2d 756 (5th Cir. 1980), and Higgins v. Wainwright, 424 F.2d 177 (5th Cir.), *cert. denied*, 400 U.S. 905 (1970)). These cases simply cited earlier Fifth Circuit precedent, with little or no other reasoning.

Some brief reasoning was expressed in *Higgins*. The Fifth Circuit there stated the often-repeated general proposition that "[h]abeas corpus does not lie to set aside a conviction on the basis of improper jury instructions unless the impropriety is a clear denial of due process so as to render the trial fundamentally unfair," citing several earlier non-LIO cases. *Higgins*, 424 F.2d at 178. In *Higgins*, the failure to instruct did not deny a fair trial because defendant did not request the instruction. Similarly, in Flagler v. Wainwright, 423 F.2d 1359, 1360 (5th Cir.), *cert. denied*, 398 U.S. 943 (1970), the Fifth Circuit quoted general language (due process requires that state action "shall be consistent with fundamental principles of liberty and justice"), but concluded that without an evidentiary basis or a request for an LIO instruction, the right to the instruction "is simply not one which has achieved the status of a 'fundamental principle of liberty and justice.'" *Id.* In cases after *Higgins* and *Flagler*, the Fifth Circuit stated no reasons why the failure to instruct was not a federal constitutional matter.

In these cases the Fifth Circuit discussed *Beck* only by implication. Instead, the circuit court mentioned its own post-*Beck* capital case precedent, Bell v. Watkins, 692 F.2d 999 (5th Cir.), *cert. denied*, 464 U.S. 843 (1983), which in turn cited *Beck* and progeny. *Bell* affirmed the denial of habeas relief, because the evidence did not warrant an LIO instruction. In the *Bell* opinion, the Fifth Circuit cited *Beck* and *Hopper* for the broad proposition that "[t]he due process clause of the fourteenth amendment requires a trial judge to give a lesser included offense instruction to the jury 'if the evidence would permit a jury rationally to find [the defendant] guilty of the lesser offense and acquit him of the greater.'" *Id.* at 1004 (quoting *Beck*, 447 U.S. 625, 635 (1980), which in turn quoted Keeble v. United States, 412 U.S. 205, 208 (1973)). Although *Bell* was itself a capital case, the Fifth Circuit did not limit its expression of the due process right to capital cases; it only said the right was especially important in capital cases.

In *Alexander v. McCotter*, the Fifth Circuit quoted *Bell's* broad language, but doubted *Bell* intended this language to apply beyond its own precise facts to noncapital cases. *Alexander*, 775 F.2d at 601. *Alexander* asserted that the earlier line of precedent against a right to LIO instruction in noncapital cases survived *Bell*. *Id.* No reasoning was offered for these conclusions; the Fifth Circuit did not discuss arguments for or against extending *Beck* to noncapital cases in either *Bell* or *Alexander*.

148. In a pre-*Beck* case, James v. Reese, 546 F.2d 325 (9th Cir. 1976), the Ninth Circuit affirmed the denial of habeas corpus on the ground that defendant had not exhausted state remedies, but the court stated in dicta and without further reasoning that the "[f]ailure of a state court to instruct on a lesser offense fails to present a federal constitutional question and will not be considered in a federal habeas corpus proceeding." *Id.* at 327. The court cited a Fifth Circuit precedent, Grech v. Wainwright, 492 F.2d 747, 748 (5th Cir. 1974), for this statement. *See* discussion of Fifth Circuit, *supra* note 147. The *James* opinion is quoted and cited in several other circuit court opinions. *See infra* note 269.

treated the issue in this conclusory fashion.[149]

There are circuit courts that directly address and more extensively analyze whether *Beck* extends to noncapital cases. For example, the Sixth and Seventh Circuits generally reason that *Beck* was based upon a limited Eighth Amendment analysis, rather than a general due process analysis. The opinions emphasize the death-is-different aspects of *Beck*. In this regard, they are consistent with most references to *Beck* found in post-*Beck* Supreme Court opinions.

The remainder of this subsection (subsection 2) presents a detailed analysis of these circuit court cases, for readers who would find that exposition useful. Following that detailed analysis is subsection 3, which discusses the significant impact that the federal habeas corpus remedy has had on the LIO question, because state LIO issues reach the federal court on habeas petitions.

In cases decided after *Beck*, the Ninth Circuit acknowledged the Supreme Court's holding that due process required LIO instructions in capital cases. On the question whether *Beck* should extend to noncapital cases, however, the circuit court has accepted without discussion the continued viability of *James v. Reese*, its earlier, pre-*Beck* precedent holding no constitutional LIO right in noncapital cases. *See, e.g.*, Angulo v. Bunnell, 1991 U.S. App. LEXIS 32365 (9th Cir., Dec. 17, 1991); Woratzeck v. Ricketts, 820 F.2d 1450, 1452-58 (9th Cir. 1987) (*Woratzeck* was a capital case holding that: (1) the failure to charge on second degree murder did not violate due process, because it was not an LIO of capital felony murder under state law, and (2) the failure to charge on theft, as an LIO of robbery murder, was at most harmless error, because the jury convicted the defendant of burglary murder as well as robbery murder; discussion of noncapital cases was dicta).

149. The Eleventh Circuit, formerly a part of the Fifth Circuit, follows the decisions of the former Fifth Circuit decided before October 1991. Bonner v. City of Pritchard, 661 F.2d 1206, 1207 (11th Cir. 1981). In accordance with this practice, the Eleventh Circuit has accepted the Fifth Circuit precedent discussed above, adding little analysis. In Perry v. Smith, 810 F.2d 1078 (11th Cir. 1987), the Eleventh Circuit stated that these Fifth Circuit cases were not affected by the *Beck* cases because the Supreme Court's cases were capital cases, explicitly reserved the due process issue in noncapital cases, and the issue is still undecided by the Supreme Court. *Id.* at 1080 (citing *Alexander*, 775 F.2d at 601; reaffirming Easter v. Estelle, 609 F.2d 756 (5th Cir. 1980)). The Eleventh Circuit discussed the *Beck* rationale in Rembert v. Dugger, 842 F.2d 301 (11th Cir. 1988), *cert. denied*, 488 U.S. 969 (1988). *Rembert* did not discuss whether *Beck* should extend to noncapital cases. Instead, it discussed *Beck* to support its holding that where the death penalty is sought but not imposed, the case is nevertheless capital under *Beck*, but the constitutional error in failing to instruct was rendered harmless when the defendant received a life sentence. *Id.* at 303. The Eleventh Circuit opinions also did not mention or use the analysis based on United States v. Hill, 368 U.S. 424 (1962).

Sixth Circuit. An example of reasoning against extending *Beck* is the opinion of Sixth Circuit Judge Norris in *Bagby v. Sowders*.[150] In *Bagby*, the Sixth Circuit *en banc* decided that a state court's refusal to instruct on an LIO was not grounds for federal habeas corpus relief, but split its reasoning among several opinions.[151]

Judge Norris' *Bagby* opinion concluded that in noncapital cases the failure to give an LIO instruction did not violate due process *and* was not otherwise cognizable on federal habeas.[152] The due process conclusion was based on constitutional analysis, but the opinion is unclear whether the additional conclusion about federal habeas jurisdiction was a matter of constitutional scope or some other analysis.

The crux of Judge Norris' due process analysis was his statement, "[i]t appears to us that the Supreme Court's opinion in *Beck* is grounded upon Eighth Amendment concerns, rather than those arising from the Due Process Clause . . . . [Thus,] we are not required to extend *Beck* to noncapital cases."[153] The opinion emphasized the several references in *Beck* to the capital nature of that case, including the carefully framed issue

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150. 894 F.2d 792, 795-97 (6th Cir.), *cert. denied*, 496 U.S. 929 (1990). *Bagby* is cited by other circuits for the lead opinion's analysis of the matter. These other cases fail to mention that the opinion reflects neither a majority or even a plurality of the Sixth Circuit en banc.

151. Five opinions were issued, none joined by a majority or even a plurality of the court. Five judges of the fifteen judge en banc court signed Judge Norris' opinion, discussed in the text. *Id.* at 793. Five judges joined in a concurring opinion that did not reach the issue whether LIO instructions were constitutionally required, concluding instead that the evidence simply did not warrant an LIO instruction. *Id.* Another judge concurred, asserting as did the lead opinion, that "*Beck* and *Hopper*, considered in context, may [not] properly be read to hold" that due process mandates LIO instructions in noncapital cases, and also that the evidence did not warrant the requested instruction. *Id.* at 799-800. Four judges joined two separate dissenting opinions. These dissents offer a concrete articulation of the analysis that there is a general due process right to LIO instructions, even in noncapital cases. *Id.* at 800-04. The dissents are discussed *infra* notes 214-19 and accompanying text.

152. *Id.* at 797. Bagby was indicted for first-degree rape. He asserted that the state court's refusal to instruct the jury on the LIO of first-degree sexual abuse violated due process and, therefore, was cognizable on federal habeas corpus review. *Id.* at 793-94. Judge Norris' *Bagby* opinion addressed two theories that might support this assertion: (1) due process requires an LIO instruction whenever warranted by the evidence, in capital and noncapital cases; and (2) even if the instruction is itself not required by due process, the due process protection against arbitrary and unfair procedures was violated because the state court "so manifestly and flagrantly violated their own clearly stated law in refusing [the] requested instruction." *Id.* at 794. Judge Norris reasoned that this second theory would be valid only "under the most unusual circumstances," which were not the facts of the *Bagby* case. The theory would require a federal court to find that the state court improperly applied its own otherwise valid state law, which is not ordinarily the federal court's function. For a case that accepted this theory, see United States *ex rel.* Matthews v. Johnson, 503 F.2d 339 (3d Cir. 1974), *cert. denied*, 420 U.S. 952 (1975), discussed *infra* notes 208, 213, 343.

153. *Bagby*, 894 F.2d at 796-97.

in *Beck* and *Beck*'s explicit holding.[154] Judge Norris' opinion minimized the more general *Beck* concerns about the unreliability of the trial process and the enhanced risk of unwarranted verdicts, remarking, "[a]pparently, it was the risk of an unwarranted conviction where the death penalty is imposed that the Court found intolerable."[155] The opinion also discussed the Supreme Court's opinions in *Hopper* and *Spaziano*. However, it referred only to the portions of the Court's opinions that sound like Eighth Amendment reasoning and left unexplored the other portions that articulate more general due process concerns.

After concluding that *Beck* was an Eighth Amendment rather than a due process case, and that *Beck's* extension to noncapital cases was therefore not required, the *Bagby* opinion stated, "[i]nstead, we must determine whether the error asserted . . . is of the character or magnitude which should be cognizable on collateral attack."[156] The opinion answered this question by concluding, with minimal analysis, that the standard articulated by the Supreme Court in *Hill v. United States* was not met.[157]

Although this opinion's characterization of Supreme Court opinions in *Beck* and its progeny is not precisely accurate,[158] the opinion was essen-

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154. *Beck* had framed the issue in terms that asked, "May a sentence of death constitutionally be imposed," and stated its holding in this way: "We now hold that the death penalty may not be imposed under these circumstances." *Beck*, 447 U.S. at 627.

155. *Bagby*, 894 F.2d at 796.

156. *Id.* at 797.

157. The opinion cited *Hill*, 368 U.S. 424, 428 (1962), as presenting the inquiry, "Is the failure to instruct on lesser included offenses in noncapital cases such a fundamental defect as inherently results in a miscarriage of justice . . . ?" *Bagby*, 894 F.2d at 797. The *Bagby* opinion answered this inquiry simply, "Experience tells us that it is not," with little other reasoning. *Id.* The opinion's *Hill* analysis is discussed further *infra* note 234.

158. The opinion emphasized *Beck's* "death-is-different" rationale to the point of recasting *Beck's* reasoning to sound even more like the *Furman v. Georgia*, 408 U.S. 238 (1972), line of cases. For example, the *Bagby* opinion stated "[a]ccording to the [*Beck*] Court, failing to give the jury a 'third option' when it is warranted by the evidence, enhances the risk that a capital defendant will be sentenced to death because of caprice or emotion, and not on the basis of reason." *Bagby*, 894 F.2d at 796. The *Beck* opinion itself, however, did not quite phrase its ruling in that way. The *Bagby* opinion also seemed to misstate the *Hopper* Court's reference to the limited question presented in *Beck*. The opinion stated that in *Hopper* "the Court noted that its holding in *Beck* was limited to the question submitted on certiorari." *Id.* (citing Hopper v. Evans, 456 U.S. 605, 610 (1982)). The *Bagby* opinion suggested that this limitation referred to the portion of the *Beck* issue it had quoted earlier—"[m]ay a sentence of death . . . be imposed"—and thus that *Hopper* relied on *Beck* being limited to death penalty cases. *Id.* What *Hopper* actually emphasized, however, was that *Beck's* question was limited to cases in which the evidence warranted an LIO instruction. *Hopper*, 456 U.S. at 609. Thus, *Hopper's* comment about the limited *Beck* holding referred to the part of the *Beck* issue that read, "when the evidence would have supported" an LIO verdict. *Id.* at 610 (quoting

tially correct in that *Beck* narrowly held only that LIO instruction was constitutionally required in capital cases. That, of course, was the only issue before the *Beck* Court. Nevertheless, the decision and opinion in one case, like *Beck*, resolves one precise question but usually raises other questions about the extent of its coverage and reasoning. Thus, the narrow holdings of *Beck* and its progeny are only the beginning of the analysis. Reliance on these precise holdings without attention to the possible scope of the Court's rationale misses the real question: should *Beck* be limited to its facts or should *Beck*'s holding and its rationale be generalized to find a broader due process right to an LIO instruction in noncapital cases? That appropriate question was not expressly addressed by Judge Norris and the other judges who joined his opinion in *Bagby*.

This opinion's use of *Hill v. United States* is also unclear. The opinion may have incorrectly treated *Hill* as a general due process analysis. The opinion may have been premised on a belief that its *Beck* discussion exhausted the constitutional analysis and that the *Hill* analysis should be applied to decide whether there was a nonconstitutional basis for habeas review. In any event, Judge Norris' *Bagby* opinion unfortunately bypassed the intermediate step of whether the *Beck* rationale could and should be extended as a basis for a due process right to an LIO instruction in noncapital cases. This step is worthy of more detailed exploration.

Seventh Circuit. In *Nichols v. Gagnon*,[159] the Seventh Circuit also refused to extend *Beck* to noncapital cases. Instead, the court continued to follow in its own pre-*Beck* precedent, which focused on whether the failure to instruct "amount[ed] to a fundamental miscarriage of justice."[160]

Beck, 447 U.S. at 627). *Hopper* emphasized that *Beck* was limited to this question because the lower court misread *Beck* as requiring an LIO instruction in every case regardless of the evidence. *Id.* *Hopper* did not say, as Judge Norris' *Bagby* opinion suggested, that it would only apply *Beck* when the death penalty was imposed. Its point was that LIO instructions are required by *Beck* only when warranted by the evidence. The noncapital question was explicitly left open.

159. 710 F.2d 1267 (7th Cir. 1983), *cert. denied*, 466 U.S. 940 (1984).

160. *Id.* at 1269. *Nichols* reaffirmed the continued viability of United States *ex rel.* Peery v. Sielaff, 615 F.2d 402 (7th Cir. 1979), *cert. denied*, 446 U.S. 940 (1980). *Nichols* held that the state trial court's ruling that the evidence did not warrant an instruction on attempted rape as an LIO of rape was error under Wisconsin state law, but it was not an error of constitutional magnitude and did not warrant federal habeas relief, because the failure to instruct did not amount to a "fundamental miscarriage of justice" under the *Peery* standard. *Nichols*, 710 F.2d at 1269 (quoting *Peery*, 615 F.2d at 404). The *Peery* standard followed in *Nichols* is an "ad hoc, fact-specific *Hill* analysis," as discussed *infra* notes 260-72 and accompanying text. *Nichols* did not mention *Hill* itself, however, relying on *Peery*.

The defendant in *Nichols* did not assert that the Wisconsin LIO rule or standard was unconstitutional, only that the trial court violated due process in its application of that

Nichols considered whether this earlier precedent survived *Beck*,[161] but the Seventh Circuit was not inclined to extend *Beck* until the Supreme Court itself did so. The refusal to extend *Beck* was based on distinctions drawn between *Beck*, *Nichols*, and noncapital cases generally. It also reflected the Seventh Circuit's significant concern about the nature of the *Beck* right.[162]

In addition to generally limiting *Beck* only to capital cases,[163] the Seventh Circuit also saw an important distinction in the extent of the evidence for acquittal in *Nichols* as compared to *Beck*. *Nichols* observed that in the case before it, because there was substantial evidence for acquittal, "the choice was not loaded against the defendant, as it was in

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standard to the facts of his case.

161. The Seventh Circuit noted that it had followed *Peery* after *Beck* in Davis v. Greer, 675 F.2d 141 (7th Cir.), *cert. denied*, 459 U.S. 975 (1982), but that *Davis* had not mentioned *Beck*. *Davis* is discussed further *infra* at note 261.

162. The concurring opinion in *Nichols* reasoned that it was not necessary to decide whether *Beck* extended to noncapital cases because even assuming it did, state law as applied in *Nichols* would conform with the constitutional standard for determining when LIO instructions are required. *Nichols*, 710 F.2d at 1272 (Coffey, J., concurring). This opinion noted that in *Hopper*, the Supreme Court clarified that under *Beck* due process requires an LIO instruction only when warranted by the evidence. *Id.* at 1273. It then recited the state law there and concluded "[t]he Alabama rule clearly does not offend federal constitutional standards." *Id.* (quoting *Hopper*, 456 U.S. at 612). The concurrence continued that state law on the evidentiary requirement for LIOs in the case before it was like that in *Hopper*, that the state court's application of the standard was supported by the record and, therefore, the LIO standard as applied would not violate federal constitutional standards. *Id.* Thus, the *Nichols* concurring opinion reasoned that even if there was federal habeas jurisdiction, based on a constitutional LIO rule, on the merits of the claim that constitutional rule would not be violated, therefore habeas relief would be denied on the merits. *Id.* at 1274. This opinion clearly realized that a federal constitutional LIO right would also require a federal constitutional standard for applying that right. Traditional state law LIO issues would be federally constitutionalized. *See supra* notes 27-29, 65-66, and *infra* note 385, and accompanying text.

163. Like other circuits, *Nichols* relied on the Supreme Court's emphasis on the capital nature of *Beck* and the Court's express reservation of applicability to noncapital cases. *Id.* at 1271. With only brief discussion, *Nichols* was influenced by the kinds of considerations discussed in Judge Norris' opinion in *Bagby*. *Id.* at 1270. *See* discussion of *Bagby supra* notes 150-58 and accompanying text.

In Tata v. Carver, 917 F.2d 670 (1st Cir. 1990), the First Circuit's reasoning was similar to *Nichols* and *Bagby*. *Tata* agreed with *Bagby* and *Nichols* that *Beck* "is founded in Eighth Amendment jurisprudence, rather than on due process concerns." *Id.* at 672 (citing *Bagby*, 894 F.2d at 796; *Nichols*, 710 F.2d at 1270). It also agreed with *Nichols* that extension of *Beck* to noncapital cases would overextend federal habeas jurisdiction to encompass all cases questioning "the accuracy of state court determinations of guilt . . . ." *Id.* (quoting *Nichols*, 710 F.2d at 1272). *See infra* notes 173-74 and accompanying text. Like *Nichols*, *Tata* decided to apply an ad hoc analysis based on *Hill v. United States*. *Id.* at 672-73. *See infra* notes 273-79 and accompanying text.

Beck where there was no reasonable probability of the defendant's innocence," because there was certain evidence of guilt of some serious crime.[164] Based on this evidentiary comparison, the Seventh Circuit reasoned that defendant Nichols might not have been as harmed by the omitted instruction as was defendant Beck. Thus, in *Nichols,* the Seventh Circuit thought an LIO instruction could actually reduce the probability of acquittal, despite substantial evidence of innocence.[165]

This distinction from *Beck* was fact-specific and limited to the particular facts of *Nichols.* It is not a general basis for treating all noncapital cases differently from capital cases. The distinction was also based on the Seventh Circuit's apparent misconstruction of the *Beck* holding and reasoning. Its premise was that *Beck* held, "'*if* the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, [the state] is constitutionally prohibited from withdrawing that option from the jury in a capital case.'"[166] Actually, *Beck* reasoned that preclusion of LIO instructions was unconstitutional *because,* not *if,* the risk of erroneous conviction was *inevitably* enhanced.[167] Moreover, *Beck* was concerned not simply about the enhanced risk of unwarranted conviction, but also about the enhanced impairment of the reliability of the guilt-determining process generally, and with it, the increased probability of erroneous acquittals *and* erroneous convictions.[168] In *Nichols,* the

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164. *Nichols,* 710 F.2d at 1270. *Nichols* said that in *Beck* the defendant's own testimony showed he was guilty of the LIO felony murder, while defendant Nichols's testimony was that the victim consented, which if believed would support an acquittal of rape and of the LIO attempted rape. *Id.* This analysis raises a question about the court's earlier conclusion that the state court erred in ruling that the evidence did not warrant the LIO instruction. As the trial court reasoned, the evidence reasonably showed defendant guilty of rape or nothing—his defense was consent; the victim testified that he forced her and managed brief penetration. *Id.* at 1268.

165. Judge Posner, who wrote the *Nichols* opinion, used his "law and economics" theories, and some admittedly conjectural probability calculations, to illustrate why it was less clear than in *Beck* that defendant was hurt by the lack of LIO. Judge Posner assumed probabilities in *Beck* as: conviction of capital murder 90% vs. outright acquittal 10% without an LIO instruction, and conviction of capital murder 50% vs. conviction of felony murder 45% vs. acquittal 5% with the instruction. The probabilities in the case before him Judge Posner assumed to be: without instruction, 60% conviction of rape vs. 40% acquittal and with the instruction, 40% conviction of rape vs. 50% conviction of attempted rape vs. 10% acquittal. *Id.* at 1270.

166. *Id.* at 1269-70 (quoting *Beck,* 447 U.S. at 638) (emphasis added).

167. *Beck,* 447 U.S. at 637 ("[F]ailure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.")

168. *Id.,* at 642-43 ("may encourage the jury to convict for an impermissible reason . . . may encourage it to acquit for an equally impermissible reason . . . . But in every case they introduce a level of uncertainty and unreliability into the factfinding process . . . .").

Seventh Circuit seems to have misread *Beck*'s holding and selectively recounted *Beck*'s reasoning to narrow the potential scope of the *Beck* rule.

Perhaps the most significant point in the *Nichols* opinion, however, was its perception of the nature of the constitutional right established in *Beck*:

> *Beck* vindicated no specific right found in the Bill of Rights and applied to the states through the due process clause .... The only right asserted was the right not to be erroneously convicted because the instructions might have induced the jury to find guilt even if one element of the crime had not been proved beyond a reasonable doubt.[169]

Nichols viewed *Beck* as a case similar to *Jackson v. Virginia*.[170] It suggested that both *Beck* and *Jackson* were based on the Supreme Court's general concern about protecting against convicting the innocent, rather than some specific constitutional right.[171] Although it thought *Beck* was "an understandable extension of the *Jackson* principle," the *Nichols* court did not want to extend it further.[172] Its concern seems to be one of line-drawing: "if we must decide whether in any such case a lesser-included-offense instruction was correctly refused—how shall we avoid having to determine every other issue of state procedure that might have a bearing on the accuracy of the state court's determination of guilt?"[173] *Nichols* continued that this would "transform the federal courts in the exercise of their habeas corpus jurisdiction from enforcers of specific constitutional rights to guarantors of the accuracy of state court determinations of guilt

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This point is reinforced by the Supreme Court's opinion in Baldwin v. Alabama, 472 U.S. 372 (1985). In *Baldwin*, the Court held a death penalty valid although the jury determined guilt and automatically "fixed" the punishment at death, as required by the same state statute as in *Beck*. The trial judge was required to and did independently determine the sentence based on evidence of aggravating and mitigating circumstances and was not influenced by the jury's "sentence." *Baldwin* rejected the defendant's argument that *Beck's* reasoning required reversal of the death penalty. It reiterated *Beck's* rationale that the lack of LIO instruction tainted the factfinding process with irrelevant considerations, creating an unacceptable risk of unreliability, a risk that, absent another option, the jury might convict the innocent *and* it might acquit the guilty. *Id.* at 386-87.

169. *Nichols*, 710 F.2d at 1271.

170. 443 U.S. 307 (1979). In *Jackson*, the Supreme Court held that on habeas corpus review of state convictions, due process required the federal courts to consider whether there was sufficient evidence to justify a rational fact finder to find guilt beyond a reasonable doubt. *Id.*

171. *Nichols*, 710 F.2d at 1271.

172. *Id.*

173. *Id.*

[and] would enmesh the federal judiciary in almost every detail of state criminal procedure and every trial ruling . . . ."[174]

There seem to be flaws in this analysis, but also some validity in the court's ultimate concerns. For example, underlying *Nichols* is an acceptance of the reasoning of the *Jackson v. Virginia* concurrence, which was expressly rejected by the *Jackson* majority.[175] The circuit court in *Nichols* would seem to be precluded from ignoring the basic rationale of the *Jackson* majority. Moreover, *Beck* did not say the lack of LIO instruction induces a jury to convict although an element was not proven beyond a reasonable doubt; *Beck* reasoned that this unconstitutional result was inevitable when the jury was not given the LIO option. That distinguishes LIO errors from other details of state court procedure and trial rulings.

At first blush, the concern about the impact on federal habeas jurisdiction of extending *Beck* to noncapital cases might seem more prudential than jurisdictional. The concern is significant, however, because of what it suggests about the fundamental nature of the LIO claim. Recall that recognizing a general federal constitutional right to LIO instructions would also constitutionalize the many sub-issues and rules surrounding the LIO doctrine. Issues such as the standard used to define an LIO, the evidentiary standard for deciding when an instruction is warranted, and other procedural issues triggering the instruction on LIOs are all matters on which there has been substantial litigation and differences of opinion in the state courts and literature. Indeed, these differences extend even into federal court prosecutions. Recognizing a general right to LIO instructions

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174. *Id.* at 1272. *Nichols* was also concerned about the standard of review that federal habeas courts would apply to LIO issues: specifically, how much deference would the federal courts give to the state court determinations.

Judge Norris' opinion in Bagby v. Sowders, 894 F.2d 792 (6th Cir.), *cert. denied*, 496 U.S. 929 (1990) (discussed *supra* notes 150-58 and accompanying text), noted that if due process requires an LIO instruction when warranted by the evidence in state court, then defendant would be entitled to federal habeas relief if the state standard for giving instructions failed to meet constitutional standards and, even if it did, relief could be granted on the ground that the state court incorrectly applied the proper standard in the particular case. *Id.* at 794. Thus, the standard for giving LIO instructions and the application of that standard would be matters of federal constitutional law. The *Bagby* opinion also suggested that the federal habeas court would owe no deference to the state court when reviewing application of the LIO standard. *Id.* The opinion said this was required by the constitutional requirement of proving guilt beyond a reasonable doubt, *In re* Winship, 397 U.S. 358 (1970), and by the standard for reviewing sufficiency of the evidence to convict, as in Jackson v. Virginia, 443 U.S. 307, 319 (1979). *Id.*

175. *Jackson*, 443 U.S. at 319 n.12, 321-22 (majority opinion), 443 U.S. at 337-38 (opinion of Stevens, J., concurring in the judgment).

would mean applying constitutional standards to decide these sub-issues as well. These are pervasive matters that arise frequently and routinely in a large number of cases. This raises a significant question about whether they can be considered part of due process. Federal due process includes a limited number of fundamental concepts, and most criminal procedure is ordinarily entrusted to state law.[176] The large number of LIO issues and cases raise a question about how fundamental the LIO doctrine could be in a constitutional sense. The restriction to capital cases makes sense, in this context, not simply because of the conceptual differences between the concerns that underlie *Beck* in capital and noncapital cases, but because capital cases are exceptional. They are exceptional not because the *Beck* rationale logically applies only in those cases, but because of the nature of the death penalty. Limiting the *Beck* rule to capital cases not only recognizes that the LIO doctrine itself is not exceptionally fundamental in a due process sense, but also that it becomes fundamental only when considered in the context of the irrevocable death penalty.

c. Circuit Courts' Further Limitation of Beck *by Limiting the Definition of "Capital" Case*

If the *Beck* rule is limited to capital cases, an important additional question arises: What is a "capital" case for these purposes? The Supreme Court has not addressed this question. On its face, the answer might seem clear. When the death penalty is statutorily authorized for the offense charged, the case is capital.

However, some circuit courts have narrowly defined capital case to mean only a case in which the death penalty was actually imposed. Using this definition, refusal to give LIO instructions would not violate the Constitution even though the defendant was tried for and convicted of an offense carrying the death penalty, if after conviction the sentencing authority decided not to impose the death penalty. This is a significant, additional limitation on *Beck*, reducing further the number of cases to which *Beck*, narrowly read, would apply. The circuits that use this definition, in effect, doubly limit *Beck*, applying the rule only to capital cases and then severely confining what qualifies as capital. Other circuits seem to define capital more appropriately, as including all cases in which the death penalty was sought regardless of the sentence ultimately

176. For a discussion of the current analysis for determining the existence of a due process violation and its application to the LIO doctrine, see Section III.D.

imposed. However, others then find harmless error if death is not imposed.

These restrictions call for further reflection on the concerns highlighted in *Beck*: is the critical point of time for considering the case capital the point at which the case is submitted to the jury, or is it the point when it is possible, retrospectively, to discern whether the death sentence was actually imposed? The *Beck* rationale would seem to compel the view that a case is capital for *Beck* purposes if the death penalty is available at the time of verdict consideration, even if it is not in fact imposed after a conviction. *Beck's* rationale would also mean that the failure to give warranted LIO instructions in such a case is reversible constitutional error. The *Beck* Court reasoned that the reliability of the guilt determining process and accuracy of jury verdicts were inevitably undermined when the jury at trial was given an all-or-nothing choice between conviction of the greater offense or outright acquittal. These concerns exist at trial, when the LIO instructions would be given. The sentence imposed after the guilt determining process is completed can have no possible relationship to these concerns. At the time of sentencing, the concerns and reasons that required the *Beck* rule have already had their impact on the jury and the defendant. Whether the defendant actually receives death or life is unrelated to those concerns because sentencing occurs after the crucial procedural moment.

These opinions that restrict the *Beck* rule by not applying it when death is not imposed are further examples of the courts' confusing the theory underlying the *Beck* rule. These opinions might well be based implicitly on the courts' practical concerns about the impact on federal jurisdiction of a broad constitutional LIO rule.

Capital Case Only If Death Penalty is Actually Imposed. The Tenth Circuit used the narrower definition of capital case in *Trujillo v. Sullivan*.[177] *Trujillo* held that failure to give LIO instructions was not a federal constitutional violation under *Beck* where, although the state sought the death penalty throughout defendant's trial for two counts of murder, the jury ultimately imposed two consecutive life sentences at the sentencing hearing after defendant's convictions.[178]

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177. 815 F.2d 597 (10th Cir.), *cert. denied*, 484 U.S. 929 (1987). The Eighth Circuit cited this portion of the *Trujillo* opinion with approval, but without further discussion. Pitts v. Lockhart, 911 F.2d 109, 112 (8th Cir. 1990), *cert. denied*, 501 U.S. 1253 (1991). Other aspects of the *Trujillo* opinion are discussed *infra* notes 245-59 and accompanying text.

178. *Trujillo*, 815 F.2d at 604. Defendant Trujillo was charged with and convicted of two counts of first degree murder for killing a fellow inmate and a prison guard while he was already serving a life sentence. Although the state sought the death penalty, after conviction

Trujillo accurately recounted that the *Beck* opinion narrowly, precisely stated its holding, "that the death penalty could not be constitutionally imposed . . . ."[179] Therefore, *Trujillo* stated that under *Beck*, "there is clearly now a constitutional right to a lesser included offense instruction when the death penalty is imposed and the evidence warrants the instruction."[180] Beyond that, *Trujillo* suggested, the import of *Beck* was not clear: *Beck* spoke loosely of capital and noncapital cases, without explicitly discussing cases in which the death penalty was sought but not imposed, and *Beck* did not clearly state the constitutional basis for its decision. The Tenth Circuit considered itself bound by its own precedent to read *Beck* as resting on the Eighth Amendment, and stated:

> Analytically, the capital case in which the death penalty is not ultimately imposed appears to be more like the noncapital case than the death sentence case in which eighth amendment [sic] values are clearly implicated; unless the defendant is actually sentenced to death, the eighth amendment is not directly implicated. This case, therefore, belongs with noncapital cases merely because of the fortuity that the death penalty was not in fact imposed.[181]

This analysis does not satisfy the concerns of *Beck*. The Tenth Circuit failed to address how the mere "fortuity that the death penalty was not . . . imposed"[182] diminished the substantial constitutional concerns that were the basis for *Beck*. *Trujillo's* narrow reading of *Beck* comports with the peculiar facts of that case, but it is doubtful the Supreme Court intended

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the jury imposed two life sentences, consecutive to each other and consecutive to the life sentence defendant was already serving. *Id.* at 600. Perhaps the *Trujillo* court's narrow definition of capital case and its refusal to extend the *Beck* right, even though the defendant faced the death penalty at trial, was influenced by the character of the defendant and the nature of his crimes.

The three consecutive life sentences imposed on defendant Trujillo might seem to highlight the incongruity of not requiring LIO instructions simply because a death sentence was not imposed. The Eighth Amendment "death is different" type reason for additional safeguards might seem less meaningful in a case with actual punishment like *Trujillo*. Three life sentences might seem to some very similar to a death penalty; indeed, some might consider Trujillo's sentence worse. However, the Supreme Court's view is not just that death is different from other penalties in degree, but that it is different in kind. Death requires greater safeguards because it is irrevocable and therefore, extreme care and caution is required to avoid a mistaken determination that might not be remedied before it is too late.

179. *Trujillo*, 815 F.2d at 601.

180. *Id.*

181. *Id.* at 602.

182. *Id.* The decision of a jury or judge not to impose the death penalty after a sentencing hearing in which both sides present evidence of aggravating and mitigating circumstances is hardly a "fortuity."

so limited a view of capital cases. Under the unique state statute in *Beck*, the jury was instructed only that it should acquit or that it should convict and impose the death penalty; it was not given an LIO option nor was it told that the judge could impose a life sentence regardless of the jury's verdict. In contrast, under the state law in *Trujillo*, which is now universally followed, the trial jury was instructed only to decide guilt or innocence and that the penalty of death or life imprisonment would be determined at a separate hearing. Thus, except under the unique and no longer existing statute involved in *Beck*, at the time when giving an LIO instruction is an issue, the death penalty is not being considered by the jury. Therefore, to limit capital cases to cases in which the death penalty is actually imposed, on the basis that the trial jury in *Beck* imposed that penalty, is to ignore the current reality of state death penalty law and procedure.

Trujillo characterized *Beck* as speaking loosely of capital and noncapital cases. To the contrary, it seems to have been obvious to the *Beck* Court what a capital case was for its purposes. In view of *Beck*'s reasoning, it is doubtful that *Beck* would have adopted the strained definition and analysis of *Trujillo*.

The Tenth Circuit's *Trujillo* rationale reads like harmless error analysis based on hindsight. It seems totally inappropriate for determining whether error occurred in the first instance. Under *Beck*, the relevant time frame occurs when the jury considers guilt or innocence; the question is what impact the lack of an LIO instruction likely had on the jury in its decision on guilt or innocence. Even if the death penalty is ultimately not imposed, at the relevant time there existed a risk of conviction of a capital offense without the jury being allowed to consider a noncapital alternative.

Capital Case If Death Penalty Sought; Failure to Give LIO Deemed Harmless Constitutional Error if Death Penalty Not Imposed. The Eleventh Circuit's treatment of the question of what qualifies as a capital case represents a stronger approach than the Tenth Circuit's, but it also has flaws. Eleventh Circuit opinions define capital cases as those in which the death penalty is authorized by law for the crime charged and sought by the prosecution throughout the trial. These opinions consider the imposition of life imprisonment in a death penalty case as an issue of harmless error.

Eleventh Circuit cases have held that due process did not require state courts to give LIO instructions in noncapital cases.[183] Nevertheless, in

183. In Perry v. Smith, 810 F.2d 1079 (11th Cir. 1987), a case in which the death penalty was not authorized, the Eleventh Circuit concluded that *Beck* and its progeny did not affect earlier, binding precedent, which had held that due process did not require state courts to give

Rembert v. Dugger,[184] a murder case in which the state sought the death penalty throughout trial but the judge imposed a life sentence based upon the jury's recommendation after conviction, the court held that *Beck* applied because "[e]ach time Rembert attempted to have the jury receive the [LIO] instructions, Rembert faced capital conviction and sentencing."[185] The Eleventh Circuit reasoned, "*Beck* is unequivocal . . . that as long as there is a possibility of a death sentence, a defendant has a constitutional right to the relevant lesser included instructions."[186]

Rembert also decided, however, that the constitutional error was rendered harmless by the judge's imposition of life imprisonment. Despite its view that *Beck* should apply whenever the death penalty was possible, *Rembert* reasoned that "the Supreme Court's concern was singularly with the need to safeguard against the arbitrary and capricious imposition of death sentences," a concern about the "danger of an unwarranted death sentence" that was eliminated when the defendant received a life sentence.[187]

Although the Eleventh Circuit seems to have adopted the correct definition of capital case for *Beck* purposes, the court's harmless error reasoning seems to misinterpret *Beck*'s concern about upholding the reliability of the guilt determining process and about the inevitable risk of unwarranted convictions and acquittals, concerns considered intolerable when the death penalty could follow a conviction. Because these concerns exist at trial, and end with the jury's conviction of the capital offense, it is questionable how the later imposition of a life sentence can cure the constitutional error or render it immaterial at the earlier moment of jury

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LIO instructions in noncapital cases. *Perry* held, therefore, that even if the state court erred in refusing LIO instructions, this did not violate due process. *Id.* at 1080. The court relied on the Fifth Circuit's decisions in Estelle v. Easter, 609 F.2d 756 (5th Cir. 1980), and Alexander v. McCotter, 775 F.2d 595 (5th Cir. 1985), discussed *supra* note 147.

184. 842 F.2d 301 (11th Cir.), *cert. denied*, 488 U.S. 969 (1988). *Rembert* reaffirmed the early holding in *Perry* (*supra* note 183) and contrasted it with the *Beck* holding.

185. *Id.* at 303. In *Rembert*, charges of the LIO robbery had been dismissed as barred by the statute of limitations. At trial, however, the defendant repeatedly waived the statute. The trial judge refused to accept the waiver and, therefore, did not instruct on the LIO. Although noting that the effectiveness of the waiver was a matter of state law, the Eleventh Circuit concluded that this issue was inextricably linked to the LIO issue. Because *Beck* made the LIO issue a matter of federal constitutional law in capital cases, the court concluded that the statute of limitations waiver issue was also subject to federal review. Basically, in a capital case the acceptability of a waiver of the statute of limitations on an LIO must also be a federal constitutional issue. *See* Spaziano v. Florida, 468 U.S. 447 (1984), discussed *supra* notes 70-76 and accompanying text.

186. *Rembert*, 842 F.2d at 303.

187. *Id.*

conviction. The issue deals with the pressure on the jury in choosing options. There is no relationship between the *Beck* rationale as of that moment and the ultimate imposition of sentence.[188]

In *Wiggerfall v. Jones*,[189] a different panel of the Eleventh Circuit followed *Rembert* in holding that the case was capital, and that therefore *Beck* applied, even though the defendant was ultimately sentenced to life imprisonment.[190] *Wiggerfall* first reasoned that *Beck* rendered unconstitutional the determination of guilt, not the imposition of sentence. The court quoted *Spaziano*: "'[t]he goal of the *Beck* rule . . . is to eliminate the distortion of the factfinding process'"[191] and noted that "[t]he fact that a lesser sentence was later imposed does not change the nature of the case at the time the guilt determination occurred," the time the *Beck* concerns exist.[192] The *Wiggerfall* panel thus corrected the inappropriate reasoning of the *Rembert* panel.

Wiggerfall also appropriately refused to find that the life sentence rendered harmless the constitutional *Beck* error. It is unclear, however, why this panel chose to distinguish *Rembert* based on the nature of its sentencing procedures, rather than basing its decision on its accurate assessment of *Beck*'s rationale.[193] The *Wiggerfall* jury operated under the

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188. *Rembert's* analysis also seems internally inconsistent.

189. 918 F.2d 1544 (11th Cir. 1990).

190. *Id.* at 1549-50. The Ninth Circuit recently cited *Wiggerfall* as an example of a case in which procedural requirements were imposed in a death penalty case regardless of the sentence actually imposed. Beam v. Paskett, 3 F.3d 1301, 1304 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1631 (1994). *Beam* held that use of a dual jury procedure for two codefendants tried together was not grounds for federal habeas relief. The court first concluded that it need not use the exacting constitutional scrutiny required when the defendant will be executed because Beam's death sentence had been vacated. The court recognized that dual jury procedures generally impair defendants' ability to conduct a defense and, therefore, raise concerns about the reliability of the verdict. However, it distinguished the *Beck* cases, because, unlike *Beck*, whether the trial was capital did not cause the unreliability of dual jury procedure. The court suggested that *Beck* was based on the "additional uncertainty created by the fact that the trial is capital in nature." *Id.* at 1304. This limits the *Beck* rationale to the concern that the jury in capital LIO cases is unduly influenced by the capital nature of the case, and ignores the broader rationale that *Beck* seemed to follow; that failing to give LIO instructions warranted by the evidence inevitably endangers the reliability of the guilt determining process.

191. *Wiggerfall*, 918 F.2d at 1548 (quoting Spaziano v. Florida, 468 U.S. 447, 455 (1984)).

192. *Id.* at 1549 n.4.

193. In its attempt to be consistent with the earlier panel opinion in *Rembert*, the *Wiggerfall* panel seems to misread *Rembert's* reasoning. Thus, the district court in *Wiggerfall* had relied on *Rembert* to support its conclusion that the imposition of life imprisonment eliminated the concerns that gave rise to the constitutional right. *Id.* at 1548. That is exactly what *Rembert* said, 842 F.2d at 303, yet the Eleventh Circuit panel in *Wiggerfall* rejected the district court's analysis.

same statute as that in *Beck*, a statute which not only forbid LIO instructions but also called for instructions that the jury was required to impose the death penalty if it convicted, without knowing that the judge was actually required to hold a sentencing hearing and make the death or life decision. In contrast, state law in *Rembert* mandated that after the jury's guilty verdict a separate hearing was to be conducted before the jury, which would recommend a life or death sentence. *Wiggerfall* suggested that under this scheme the guilt determining process in *Rembert* was not distorted, and the risk of unwarranted conviction was eliminated, because a jury with reservations about the sufficiency of the evidence to prove guilt could nonetheless convict but later recommend a life sentence.[194] *Wiggerfall* conceived this scheme as giving the jury in *Rembert* "overall authority that served at least some of the interests of the 'third option,' the absence of which was critical in *Beck*."[195]

Although *Wiggerfall* more appropriately defined a capital case and appropriately refused to find the LIO error harmless, its reasoning in distinguishing *Rembert* shows the continued confusion of the circuit courts dealing with *Beck* issues. The court stated that the true concern was the risk of distorting the guilt determining process, but it failed to clearly address this concern, focusing instead on and limiting *Beck* to its very narrow facts, particularly the very unique statute there. Consequently, where the jury determines or recommends the sentence after hearing aggravating and mitigating evidence, the case is capital because of the risk of an unwarranted conviction. However, strangely, failing to give an LIO

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194. *Wiggerfall* suggests that under the scheme in the case before it, as in *Beck*, the trial judge could "correct" an erroneous guilty verdict only if the judge decided death was inappropriate based on the judge's finding that the evidence was insufficient to prove guilt beyond a reasonable doubt. 918 F.2d at 1548 (citing Baldwin v. Alabama, 472 U.S. 372, 387 (1985)). *Compare* 918 F.2d at 1550.

195. *Id.* at 1550. *Wiggerfall* continued that this power to recommend life in *Rembert* "brought within constitutional limits an otherwise unconstitutional process." *Id. Wiggerfall* reasoned, "[t]he jury that convicted Rembert operated under constraints that were significantly less restrictive than the ones pressuring the jury in *Beck*," and in *Wiggerfall*. *Id.* This gave the *Wiggerfall* panel "greater confidence in the reliability of the jury's determination of guilt in *Rembert*." *Id.* at 1549.

The real point of the *Wiggerfall* analysis is somewhat obscured in its opinion. It was not simply that the *Rembert* jury had the power to recommend life or death after a separate hearing, but, apparently, that the jury was instructed at trial on this procedure. Thus, unlike *Beck* and *Wiggerfall*, where the jury was instructed that if it convicted it must impose the death penalty even though the judge actually determined sentence, in *Rembert* the jury was not told it must impose death if it convicted and apparently was instructed on the sentencing procedure that would follow if it rendered a guilty verdict. For a description of the scheme and the required jury instruction, see *id.* at 1546-48.

instruction at trial is harmless constitutional error because the jury's power to make a meaningful sentencing decision after-the-fact somehow removes the risk of an unwarranted conviction. This analysis overlooks that the trial (the guilt determining proceeding) and the sentencing (the death penalty proceeding) are different proceedings involving different issues and determinations. *Beck*'s rationale was based on concerns about jury dynamics at the guilt determining stage and the inevitable impact the lack of LIO instructions would have on the jury's guilt or innocence decision. What sentence the jury might impose after a separate hearing following conviction does not give any clear indication about the jury dynamics at the trial's guilt-determination stage. That a jury could not agree to impose the death penalty based on additional evidence in a separate proceeding does not establish beyond a reasonable doubt that the jury was unaffected by the lack of LIO instructions in its earlier guilt determination.

d. The View that Beck *Extends to Noncapital Cases*

While some circuits have yet to rule on the issue,[196] the Third Circuit

196. The Second Circuit has recognized the split among the other circuits and found merit in extending *Beck*. It has avoided deciding the question whether due process requires LIO instructions in noncapital cases, however, because in the cases before it the evidence did not warrant LIO instructions. *See, e.g.,* Campaneria v. Reid, 891 F.2d 1014 (2d Cir.), *cert. denied*, 499 U.S. 949 (1991); Rice v. Hoke, 846 F.2d 160 (2d Cir. 1988); Harris v. Scully, 779 F.2d 875 (2d Cir. 1985). *Rice* asserted that the Third, Sixth, and Seventh Circuits held LIO instruction refusals denied due process and, therefore, were cognizable on federal habeas. *Rice*, 846 F.2d at 164-65. As discussed *supra* note 138, the Sixth and Seventh Circuit cases cited by *Rice* have been superseded. Thus, those circuits no longer apply a constitutional LIO rule in noncapital cases.

Recognizing the Second Circuit's indecision and the other circuit splits, district courts within the Second Circuit have also avoided the question on evidentiary grounds. Some district courts suggested in dicta that failure to give LIO instructions was not a constitutional violation because it was not a fundamental defect causing a complete miscarriage of justice under the *Hill* standard. Jones v. Speckard, 827 F.Supp. 139 (W.D.N.Y.), *aff'd*, 14 F.3d 592 (2d Cir. 1993); Green v. Kuhlman, No. 89 C 4323, 1990 WL 264771 (E.D.N.Y. Dec. 13, 1990); Rosado v. Kelly, No. 88 Civ. 1759 (RWS), 1988 WL 80226 (S.D.N.Y. July 27, 1988); Walker v. Jones, No. 86 Civ. 5301 (JFK), 1988 WL 34823 (S.D.N.Y. April 1, 1988), *aff'd*, 872 F.2d 1022 (2d Cir. 1989), *cert. denied*, 493 U.S. 1060 (1990). Other district court cases distinguished *Beck* based on the nature of the crime and the defendant, reasoning that *Beck's* concern, that the unacceptable risk of coercing an erroneous conviction where the evidence clearly showed defendant committed some violent crime, was inapplicable when the crime charged was not violent and where the evidence did not show violence by defendant. Dawkins v. Keane, No. 91 Civ. 7630 (MGC), 1992 WL 196757 (S.D.N.Y. Aug. 6, 1992) (involving first degree robbery charge); Perez v. Herbert, No. 90 Civ. 3936, 1991 US Dist. LEXIS 15509 (E.D.N.Y. Oct. 2, 1991) (possession of a controlled substance). One case distinguished *Beck* because the trial judge did instruct on one LIO, though not the LIOs sought by the defendant. Green v. Kuhlman, No. 89 C 4323, 1990 WL 264771 (E.D.N.Y. Dec. 13, 1990). This reasoning is like the Supreme Court's reasoning in Schad v. Arizona, 501 U.S. 624 (1991), discussed *supra*

is the only federal circuit court that currently holds there is a federal due process right to an LIO instructions in noncapital cases. However, an opinion in the Sixth Circuit states more extensively the reasoning in support of extending *Beck*, even though a majority of that court has not applied the constitutional LIO rule in noncapital cases. The leading Third Circuit decision and this Sixth Circuit opinion are discussed below.

Third Circuit. The leading Third Circuit decision is *Vujosevic v. Rafferty*.[197] In *Vujosevic*, the state trial judge instructed the jury on the offense charged (noncapital murder) and on lesser homicide offenses. The trial judge refused, however, to instruct on aggravated assault, which defendant had requested "on the theory that his testimony admitted criminal conduct but could support a finding that [decedent's] death was not caused by [defendant]."[198] The Third Circuit held this refusal was prejudicial constitutional error, entitling the defendant to federal habeas relief.[199] *Vujosevic* concluded:

> [T]he failure to instruct on [the LIO of] aggravated assault unfairly deprived [the defendant] of his primary defense theory; having gone forward with a theory that he committed a crime but did not cause the victim's death, [the defendant] was unable to have the jury decide whether his version of the facts was correct.[200]

The Third Circuit cited the *Beck* LIO rule for capital cases, then referred to its own precedent to reason: "This court applies that requirement to non-capital cases as well. This requirement is based on the risk that a defendant might otherwise be convicted of a crime more serious than that which the jury believes he committed simply because the jury wishes to avoid setting him free."[201] The Third Circuit recognized that, ordinarily, an erroneous state court jury instruction justified federal relief only when it "so infected the entire trial that the resulting conviction

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notes 77-85 and accompanying text.

197. 844 F.2d 1023 (3d Cir. 1988).

198. *Id.* at 1026.

199. The state appellate court and the federal district court had agreed that the failure to instruct was constitutional error but was harmless. Therefore, the Third Circuit said the real issue was whether the error was harmless, and it only briefly discussed why the failure was a constitutional error. *Id.* at 1027.

200. *Id.* at 1026-27.

201. *Id.* at 1027 (citing Bishop v. Mazurkiewicz, 634 F.2d 724 (3d Cir. 1980), *cert. denied*, 452 U.S. 917 (1981); Keeble v. United States, 412 U.S. 205 (1973)) (citations omitted). Because Vujosevic requested an aggravated assault instruction and presented evidence to support it, the state trial court's refusal to instruct violated the Constitution. *Bishop v. Mazurkiewicz* was argued and decided soon after *Beck*, but the Third Circuit's *Bishop* opinion did not refer to the Supreme Court's *Beck* decision.

violated due process."[202] However, the court decided not to apply that standard, because "[b]oth *Beck* and *Bishop* have already determined that the failure to instruct on a lesser included offense which is supported by the evidence constitutes a violation of due process."[203] *Vujosevic* did not further explain its reasoning.[204] Because *Beck* did not explicate a constitutional LIO rule for noncapital cases, the Third Circuit needed to extend *Beck* to reach the result in *Vujosevic*. That court, however, did not articulate reasons for extending *Beck*, nor did it address the reasons against extension articulated by other circuits.[205] It also did not address the view of other circuits that the general standard for federal review of state court jury instructions required analysis of *Hill v. United States* to determine

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202. *Vujosevic*, 844 F.2d at 1028 n.1. This is the general standard for assessing whether state court jury instruction errors violate due process, as most recently articulated by the Supreme Court in Estelle v. McGuire, 502 U.S. 62, 72, 75 (1991), and earlier articulated in, *e.g.*, Cupp v. Naughten, 414 U.S. 141, 147 (1973). *Vujosevic* did not cite the Supreme Court precedent for this proposition, but it could have. Instead, it cited an earlier Third Circuit decision, United States *ex rel.* Dorey v. New Jersey, 560 F.2d 584 (3d Cir. 1977), which in turn cited, *inter alia*, Splawn v. California, 431 U.S. 595, 599 (1977) (noting that Supreme Court has limited power to upset state convictions based on jury instructions and can do so only when the instruction rendered the conviction violative of the Federal Constitution); Henderson v. Kibbe, 431 U.S. 145 (1977); and Cupp v. Naughten, 414 U.S. 141 (1973). *Dorey*, 560 F.2d at 587. For a discussion of the general due process standard articulated in *Henderson, Cupp,* and *Estelle v. McGuire*, see *infra* notes 309-14 and accompanying text. In Dukette v. Perrin, 564 F. Supp. 1530 (D.N.H. 1983) (aggravated sexual assault (rape) charge and evidence warranted instruction on LIO of simple assault), the district court did apply this general due process standard. The court concluded that *Beck's* reasoning satisfied this general standard, because the risk of erroneous conviction found unacceptable in *Beck* was equally unacceptable in noncapital cases, and the failure to give the instruction seriously undermined the integrity of the factfinding process and prevented the defendant from having his testimony considered by the jury. The court also reasoned that the additional constitutional protections in death penalty cases did not diminish the importance of fundamental constitutional rights in nondeath cases. *Dukette*, 564 F. Supp. at 1538-40. *Accord* Sands v. Cunningham, 617 F. Supp. 1551 (D.N.H. 1985). Presumably, these district court decisions were overruled by the First Circuit's decision in Tata v. Carver, 917 F.2d 670 (1st Cir. 1990), discussed *infra* notes 273-79 and accompanying text, but *Tata* did not attempt to counter the reasoning reflected in the district court opinions.

203. *Vujosevic*, 844 F.2d at 1028 n.1. *See also* United States *ex rel.* Powell v. Pennsylvania, 294 F. Supp. 849, 851-52 (E.D. Pa. 1968) (federal habeas corpus relief is generally available to correct state trial errors, including jury instruction errors, only when the error so violated fundamental fairness as to result in deprivation of due process; specifically here, failure to charge on LIO of voluntary manslaughter constituted fundamental error requiring federal habeas relief).

204. In Hollander v. Lewis, Civ. A. No. 92-2106, 1992 WL 396320 (D.N.J. Dec. 29, 1992), a district court within the Third Circuit more completely reasoned that the Federal Constitution required an LIO instruction in a noncapital murder case, citing *Beck* and *Keeble*, as well as *Vujosevic*. Ultimately, however, *Hollander* denied relief on the ground that the evidence did not warrant the requested instruction.

205. *See* discussion *supra* notes 147-78 and accompanying text.

whether the LIO issue warrants federal relief.[206] *Vujosevic* quoted the general standard for federal review, but relied on *Beck* and its own precedent instead of analyzing that standard. Reliance on this pre-*Beck* precedent was questionable as a general matter,[207] and also because the particular precedent (*Bishop*) did not support the proposition for which *Vujosevic* cited it.[208]

The Third Circuit's failure to extensively discuss the reasons for finding constitutional error may be attributed to the fact that the state appellate court and the federal district court agreed that the failure to instruct was constitutional error, and had focused instead on whether that error was harmless. The lower courts' harmless error analysis was similar to the Supreme Court's reasoning later in *Schad v. Arizona*, although it is interesting to recall that *Schad* did not purport to find harmless error, instead using the reasoning to hold no *Beck* error occurred at all.[209] The lower courts in *Vujosevic* reasoned: The defendant was charged with murder; the jury was instructed on LIOs of aggravated manslaughter and simple manslaughter yet convicted the defendant of aggravated manslaughter; if the jury doubted defendant's guilt of the greater offense, murder, but was reluctant to acquit, it would have convicted of the lowest option provided it, manslaughter, not aggravated manslaughter; therefore the failure to instruct on assault was harmless.[210]

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206. *See* discussion of "*Hill* analysis" *infra* notes 233-35, 245-79 and accompanying text.

207. As discussed earlier, reliance on older pre-*Beck* precedent without discussion of the effect of *Beck* neglects the renewed analysis that would seem to be required by a major Supreme Court decision creating a constitutional requirement.

208. *Bishop*, like *Beck*, was a capital case, and therefore, unlike *Vujosevic*, a noncapital case. The *Bishop* opinion did not discuss or seem to consider it relevant that the case was capital. In addition, the due process violation in *Bishop* was not like that in *Beck* or *Vujosevic*. Instead, *Bishop* held due process was violated because LIO instructions were given in Pennsylvania homicide prosecutions inconsistently and arbitrarily, at the discretion of the trial judge without evidentiary support or any governing standards. Bishop v. Mazurkiewicz, 634 F.2d 724 (3d Cir. 1980). Thus, *Bishop* resembled an even earlier Third Circuit opinion, United States *ex rel.* Matthews v. Johnson, 503 F.2d 339 (3d Cir. 1974), *cert denied*, 420 U.S. 952 (1975), and the alternative theory discussed in Bagby v. Sowders, 894 F.2d 792, 794 (6th Cir.), *cert. denied*, 496 U.S. 929 (1990), discussed *supra* note 152 and *infra* notes 213, 343.

Moreover, *Bishop* supports the proposition for which *Vujosevic* is cited only by negative implication. *Bishop* stated that the Constitution did not require LIO instructions that were not supported by the evidence, citing *Keeble*. 634 F.2d at 725. *Vujosevic* assumed this meant the Constitution did require LIO instructions that were supported by the evidence. Of course, *Keeble* did not hold that; instead, it held that failure to give LIO instructions was error under FED. R. CRIM. P. 31(c) and simply noted that failure to give LIO instructions supported by the evidence raised significant constitutional concerns. Keeble v. United States, 412 U.S. 205 (1973). *See* discussion of *Keeble supra* notes 53-57 and accompanying text.

209. *See* discussion *supra* notes 77-85 and accompanying text.

210. *Vujosevic*, 844 F.2d at 1027.

The Third Circuit rejected this analysis based on reasoning similar to that of the dissenting justices in *Schad*. *Vujosevic* saw that the failure to instruct on aggravated assault created "precisely the danger *Beck* intended to address,"[211] namely, the substantial risk that a jury instructed only on the greater offense will convict rather than allow the defendant to go free, even though it may doubt defendant's guilt of that crime. In *Vujosevic*, the defendant did not contest the level of culpability of his conduct—that is, whether it established simple or aggravated manslaughter—but instead challenged the cause of death, asserting that his crime was not any level of homicide. Under this theory, the option of simple manslaughter did not give the jury a rational alternative between murder and acquittal. The jury's rejection of simple manslaughter did not undermine the reasons for requiring an LIO instruction.[212]

The Third Circuit's harmless error analysis is an appropriate application of the *Beck* rationale. In contrast, the Supreme Court's later reasoning in *Schad* seems contrived and artificial. Nevertheless, the durability of the Third Circuit's *Vujosevic* opinion is far from clear.[213]

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211. *Id.*

212. More precisely, *Vujosevic* reasoned:

> Given the level of culpability required for aggravated assault, and the fact that Vujosevic's defense theory was that he committed aggravated assault but did not cause Baron's death, the instruction on simple manslaughter was not a constitutionally adequate substitute for an instruction on aggravated assault. The factual question placed in issue by Vujosevic's defense was not the level of culpability, but rather the causation of Baron's death. Even a rational juror who thought Vujosevic did not cause the death, but who did not want to set Vujosevic free, might not vote for conviction on simple manslaughter, because Vujosevic's culpability was clearly not mere recklessness or heat of passion. The manslaughter instruction did not necessarily offer the jury a rational compromise between aggravated manslaughter and acquittal; only an aggravated assault charge could do that.

Id. at 1028.

213. The government argued in Gilmore v. Taylor, 113 S. Ct. 2112 (1993), that the Third Circuit recently suggested that *Vujosevic* might no longer be good law, citing Geschwendt v. Ryan, 967 F.2d 877, 884 n.13 (3d Cir.) (en banc), *cert. denied*, 113 S. Ct. 472 (1992). Gilmore v. Taylor, Government Brief at 15 n.7. Similarly, the government argued in Kontakis v. Beyer, 19 F.3d 110, 119 n.14 (3d Cir. 1994), that the viability of *Vujosevic's* extension of *Beck* was doubtful in view of Schad v. Arizona, 501 U.S. 624 (1991), and *Geschwendt*, 967 F.2d at 884 n.13. The Third Circuit did not address this argument in *Kontakis*, holding instead that the evidence did not warrant an LIO instruction. Although *Geschwendt* could not overrule *Vujosevic*, the court there did question whether its earlier decision withstood *Schad*.

In *Geschwendt*, a state prisoner sought federal habeas relief because his trial court had failed explicitly to instruct the jury on a special verdict of not guilty by reason of insanity. The Third Circuit rejected that claim on alternative grounds. The court first reasoned that the instructions as a whole had clearly conveyed to the jury that a not guilty verdict would be not guilty by reason of insanity. Alternatively, if the instructions were incomplete, the Third Circuit concluded that the error would only be one of state law, that due process did

Sixth Circuit. The Third Circuit extended *Beck* to noncapital cases without fully articulating the reasons underlying that decision. The Sixth Circuit dissenting judges in *Bagby v. Sowders* more completely explained[214] the view that in noncapital cases the due process requirement of a fair trial included LIO instructions warranted by the evidence.[215] Although acknowledging that *Beck* and its progeny expressed the need for greater protections because of the death penalty, the *Bagby* dissenters thought the view that *Beck* was only an Eighth Amendment capital case rule was a convenient but superficial and incorrect analysis.[216] The

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not require a special verdict on insanity. It opined further that even if the error was constitutional, it was harmless: the trial court's instructions had clearly provided the jury a rational option to acquit by reason of insanity (conviction for third degree murder), yet the jury not only convicted the defendant of six counts of first degree murder, but also imposed the death penalty on each count. For its harmless error rationale, *Geschwendt* relied on *Schad*, asserting that the Supreme Court in that case had held the refusal to instruct on an LIO robbery was error but harmless. In this respect, the Third Circuit misread the holding of *Schad*. *See Schad*, 967 F.2d at 883-88.

Geschwendt could not overrule *Vujosevic's* application of the *Beck* LIO rule to noncapital cases. *Geschwendt* was itself a capital case, it did not involve an LIO issue, and it did not discuss the extension of *Beck*. The Third Circuit majority in *Geschwendt* did suggest that *Schad* might overrule its harmless error analysis in *Vujosevic*, but it explicitly chose not to face that issue either.

The *Geschwendt* majority also suggested that *Schad* overruled another Third Circuit LIO decision, United States *ex rel.* Matthews v. Johnson, 503 F.2d 339 (3d Cir. 1973), *cert. denied*, 420 U.S. 952 (1975), discussed *supra* note 152, *infra* note 343. *Matthews* was not a *Beck* case. *Matthews* held that due process was violated because under Pennsylvania law trial judges had discretion whether to instruct on voluntary manslaughter in murder cases, without the need for evidence warranting that instruction and without any standards to guide trial judges' discretion.

214. Similar, well-articulated reasons for extending the *Beck* rule to noncapital cases also appear in federal district court opinions. *See, e.g.*, Nadworny v. Fair, 744 F. Supp. 1194 (D. Mass. 1990), *aff'd*, 976 F.2d 724 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 1392 (1993) (discussed *infra* note 218); Dukette v. Perrin, 564 F. Supp. 1530 (D.N.H. 1983) (discussed *supra* note 202); United States *ex rel.* Bacon v. DeRobertis, 551 F. Supp. 269 (N.D. Ill. 1982), *aff'd*, 728 F.2d 874 (7th Cir.), *cert. denied*, 469 U.S. 840 (1984) (discussed *infra* note 216).

215. *Bagby*, 894 F.2d at 800-04 (dissenting opinion). The dissenters also disagreed with the concurring opinions, finding the evidence sufficient in *Bagby* to warrant a lesser included offense instruction. *Id.*

216. *Id.* at 801. The dissent suggested that the case before it presented high stakes for the defendant. The disparity in the possible incarceration sentences there, although not the same as the consequences in a death penalty case, showed that the capital case distinction was superficial and an oversimplification of the basic fair trial issue.

In United States *ex rel.* Bacon v. DeRobertis, 551 F. Supp. 269 (N.D. Ill. 1982), *aff'd*, 728 F.2d 874 (7th Cir.), *cert. denied*, 469 U.S. 840 (1984), a federal district court in Illinois suggested similar reasoning, observing that the intolerable costs of the erroneous conviction were not insignificant in that case, where the difference between the charged offense and the LIO was 25 to 65 years in prison. The district court also suggested that Beck's concerns might exist even more in noncapital cases, because the jury might be more inclined to convict to

dissenters pointed to language in *Beck* and *Hopper* that explicitly discussed "due process" requirements of LIO instructions.[217] These judges reiterated the motivating concerns of *Beck* and noncapital LIO opinions, such as *Schmuck* and *Keeble*, and asserted that the need for appropriate LIO instructions to protect against improper convictions and to effectuate the reasonable doubt standard was a need equally present in noncapital cases.[218]

The *Bagby* dissent also rejected the concern expressed in *Nichols v. Gagnon*, that the federal courts would be swamped with habeas petitions if state LIO claims were cognizable. This prudential type argument was thought insufficient to justify refusing to hear issues implicating fundamental fairness.[219]

3. The Impact Of Federal Habeas Corpus On The LIO Question

The fact that *Beck*-type issues arise in the federal courts via habeas corpus distorts the way in which the courts deal with the issue. Several federal circuits refuse federal habeas relief for state court failure to give LIO instructions based upon an analysis from the Supreme Court's decision

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incarcerate a defendant when it was not faced with the risk of wrongly sentencing defendant to death. However, this court is within the Seventh Circuit, which decided it had to follow an analysis based on *Hill v. United States*, discussed *infra* at notes 260-72 and accompanying text.

217. *Bagby*, 894 F.2d at 800 (dissenting opinion). For example, the dissent quoted the Supreme Court's opinion in *Hopper*: "On the facts shown in *Beck*, we held that the defendant was entitled to a lesser-included offense instruction as a matter of *due process*." *Id.* (quoting *Hopper*, 456 U.S. at 609) (emphasis added).

218. The persuasiveness of this reasoning was also recognized in Trujillo v. Sullivan, 815 F.2d 597 (10th Cir.), *cert. denied*, 484 U.S. 929 (1987), but the Seventh Circuit there did not decide the question. See discussion *supra* notes at 133-36.

See also Nadworny v. Fair, 744 F. Supp. 1194 (D. Mass. 1990), *aff'd*, 976 F.2d 724 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 1392 (1993) (where defendant charged with noncapital murder and evidence warranted instruction on LIO of involuntary manslaughter, failure to instruct was constitutional error, but due process LIO requirement in noncapital cases was deemed a new rule under *Teague* and thus not applied retroactively on habeas corpus). In *Nadworny*, the district court reasoned that requiring LIO instructions warranted by the evidence in noncapital cases ensures that the jury will afford all defendants the full benefit of the constitutionally mandated reasonable doubt standard. To warrant an LIO instruction, the evidence must support acquittal of the greater crime and conviction of the lesser; thus, the evidence must support the existence of a reasonable doubt about guilt of the crime charged. Accordingly, instructing the jury on warranted LIOs is part of the due process reasonable doubt requirement. *Id.*

219. *Bagby*, 894 F.2d at 802 (dissenting opinion). The dissent also endorsed the Third Circuit's *Vujosevic* reasoning, *id.* at 801, and noted that earlier Sixth Circuit precedent consistently applied the rationale of *Beck* and *Hopper* to noncapital cases. *Id.* at 802-03. *See* discussion of earlier Sixth Circuit cases, *supra* note 138.

in *Hill v. United States*.[220] As more elaborately described below, *Hill* generally held that noncompliance with a federal rule of procedure was not cognizable on habeas, because it was not "a fundamental defect which inherently result[ed] in a complete miscarriage of justice, [or] an omission inconsistent with the rudimentary demands of fair procedure."[221]

A significant and recurring issue in collateral attack law involves the question of what claims are cognizable; what type of claims can provide a basis for relief? This recurring issue is particularly apparent with regard to federal habeas corpus following conviction in state court. On their faces, the pertinent federal statutes provide for relief if the state prisoner is detained in "violation of the Constitution or laws or treaties of the United States."[222] Illegal detentions based upon state conviction in violation of a treaty or of a federal statute are exceedingly rare, because application of treaties or federal law (federal statutes) to state criminal proceedings are correspondingly rare.[223] As a result, nearly all contemporary federal habeas relief is based on constitutional claims. In turn, the type of constitutional claim that would support habeas relief has undergone substantial debate and development.[224] While at one time only a lack of jurisdiction would support habeas relief from imprisonment based on a trial court judgment,[225] this basis was transfigured into a recognition of claims of fundamental violations conceived to have caused the trial court to lose jurisdiction. It ultimately gave way in the Supreme Court to a much wider view that any properly preserved, presented, and harmful constitutional error would be cognizable on habeas. This broad view has largely endured, although not without persistent debate and not without some limitation.[226] Nevertheless, that wide view was combined with the almost simultaneous Supreme Court recognition of expanded constitutional rights

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220. 368 U.S. 424 (1962).

221. *Id.* at 428.

222. 28 U.S.C. § 2241(c) (1988); 28 U.S.C. § 2254(a) (1988); 28 U.S.C. § 2255 (1988). *See infra* note 243.

223. *See, e.g.*, Reed v. Farley, 114 S. Ct. 2291 (1994), discussed *infra* notes 280-94 and accompanying text.

224. *See generally* Anthony G. Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 379 n.8, 382-83 (1964); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Fay v. Noia, 372 U.S. 391 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938); Waley v. Johnston, 316 U.S. 101 (1942); cases collected in various opinions in Wright v. West, 505 U.S. 277, 285-86, 291-93, 298-99 (1992).

225. *See, e.g.*, the jurisdictional formulation underlying habeas relief in *In re* Nielsen, 131 U.S. 176, 190 (1889), discussed *infra* note 443.

226. *See, e.g.*, Teague v. Lane, 489 U.S. 288 (1989) (dealing with retroactivity of claims and cognizability of new claims on habeas).

for state defendants. The product of these two developments has been an increased number of constitutional claims now cognizable on federal habeas.[227] While the Supreme Court carved out an exception for most Fourth Amendment claims in *Stone v. Powell*,[228] attempts to expand that exception have proved largely unsuccessful.[229] Indeed, some older and seemingly established law refusing certain claims has been discarded and cognizable issues expanded to that extent.[230]

A feature of this cognizability development has been an intermittent struggle with what issues can be raised on direct appeal but are nevertheless not basic enough to survive for collateral attack, such as habeas corpus. The question takes its clearest expression when a convicted prisoner files a "collateral" attack in the same jurisdiction as that which convicted the prisoner (*i.e.*, a state prisoner filing a state collateral attack, or a federal prisoner filing a collateral-like attack in federal court). Two Supreme Court cases, *Hill v. United States*[231] and *Sunal v. Large*,[232] both discussed below, were way-stations in that debate.

Given the ambiguity about the reach of *Beck*, and in light of the question about how fundamental is a right to LIOs, elements of the cognizability debate have resurfaced in the circuit courts' attempts to cope

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227. *See generally* James A. Strazzella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 ARIZ. L. REV. 443, 445 (1977), and authorities cited therein.

228. 428 U.S. 465 (1976) (holding Fourth Amendment claims not cognizable if there has been a full and fair opportunity for litigation of claims in state proceeding).

229. *See, e.g.*, Withrow v. Williams, 113 S. Ct. 1745 (1993) (rejecting attempt to extend non-cognizability to *Miranda* claims); Kimmelman v. Morrison, 477 U.S. 365 (1986) (refusing to apply *Stone* to claims of ineffective assistance of counsel relating to Fourth Amendment issue); Rose v. Mitchell, 443 U.S. 545 (1979) (holding claim of racial bias on part of grand jury foreperson cognizable). *See also* Jackson v. Virginia, 443 U.S. 307 (1979) (rejecting restrictions on federal courts hearing of due process claims relating to the integrity of the truth-determining process in state courts).

230. Jackson v. Virginia, 443 U.S. 307 (1979) (forsaking old standard followed by lower courts on reviewing evidence sufficiency only to extent of examining whether there was no evidence on elements and replacing it with test to determine whether evidence met the reasonable doubt standard as used on review).

231. 368 U.S. 424, 428 (1962) (federal conviction) (holding the asserted claim not cognizable, but implying that relevant inquiries, in addition to whether the claim is constitutional or jurisdictional, include: whether claimed error of law is "a fundamental defect which inherently results in a complete miscarriage of justice"; whether the claim involves "an omission inconsistent with the rudimentary demands of fair procedure"; or whether the claim "present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.").

232. 332 U.S. 174, 178 (1947) (federal conviction) (holding an asserted nonconstitutional claim not cognizable—"the writ of habeas corpus will not be allowed to do service for an appeal"—but suggesting that in certain circumstances a nonconstitutional claim that challenged jurisdiction might be considered on collateral attack). *Id.* at 178-79.

with habeas claims involving LIOs in noncapital cases. In particular, in resolving these claims a number of cases have resurrected *Hill*.[233]

The circuits differ in how they use the *Hill* analysis. These differences are matters of both substance and method. Some courts apply the *Hill* standard to determine whether the failure to give LIO instructions was a federal constitutional violation; others seem to use it only to determine federal habeas jurisdiction without regard to whether there is a constitutional issue; still others are unclear about the substantive focus of the *Hill* analysis they use. Some opinions turn to the *Hill* standard to determine whether there is another basis for habeas relief only after concluding that *Beck* did not extend to noncapital cases, reasoning that because *Beck* did not support a general due process right, then a *Hill* analysis is appropriate.[234] Some courts use *Hill* analysis to preclude habeas relief per se; they decide that, measured against the *Hill* standard, the failure to give LIO instructions is never a constitutional violation or grounds for federal habeas review. (This is an "automatic nonreview, per se *Hill* analysis.") Other circuits purport to evaluate each case and to decide whether the *Hill* standard is satisfied on the facts of that particular case. (This is an "ad hoc,

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233. The use of *Hill* analysis has gone beyond the question of cognizability of LIO claims. For example, in Brouillette v. Wood, 636 F.2d 215 (8th Cir. 1980), *cert. denied*, 450 U.S. 1044 (1981), the Eighth Circuit concluded that, although instructions about defense counsel's obligations to present evidence and make objections were improper, they were not a basis for federal habeas relief because they did not constitute a "fundamental defect." *Id.* at 218. *Brouillette* quoted DeBerry v. Wolff, 513 F.2d 1336, 1338-39 (8th Cir. 1975), which was itself an LIO case that had quoted *Hill*, 368 U.S. at 428. *See infra* note 252.

234. For example, the Sixth Circuit opinion in *Bagby v. Sowders* first concluded that it was not required to extend *Beck* to noncapital cases, because *Beck* was an Eighth Amendment case, not a due process case. 894 F.2d 792, 795-97 (6th Cir. 1990), discussed *supra* notes 150-58 and accompanying text. The opinion then stated, "Instead, we must determine whether the error asserted . . . is of the character or magnitude which should be cognizable on collateral attack." *Id.* at 797. The *Bagby* opinion posed the inquiry for this determination as: "Is the failure to instruct on lesser included offenses in noncapital cases such a fundamental defect as inherently results in a miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure?" *Id.* (citing *Hill*, 368 U.S. at 428). It answered this question by concluding simply, "Experience tells us that it is not." *Id.* The opinion gave no further reasoning, except to say that its view that failure to give LIO instructions "is not an error of such character and magnitude to be cognizable in federal habeas corpus review, is shared by a majority of the circuits." *Bagby*, 894 F.2d at 797 (citing Chavez v. Kerby, 848 F.2d 1101 (10th Cir. 1988); Perry v. Smith, 810 F.2d 1078 (11th Cir. 1987); Alexander v. McCotter, 775 F.2d 595 (5th Cir. 1985); Nichols v. Gagnon, 710 F.2d 1267 (7th Cir. 1983), *cert. denied*, 466 U.S. 940 (1984); James v. Reese, 546 F.2d 325 (9th Cir. 1976); DeBerry v. Wolff, 513 F.2d 1336 (8th Cir. 1975)). This conclusory opinion seems to adopt, with little explanation, the "automatic nonreview, per se *Hill* analysis." It also seems to consider this not a constitutional analysis, but simply a basis for determining federal habeas cognizability. *See* discussion *infra* notes 251-59.

fact-specific *Hill* analysis.") None of these fact-specific decisions seem to find *Hill* satisfied in a particular case, and underneath these consistent results, therefore, there lies the possibility that these circuits are also of the view that *Hill* generally precludes habeas relief.

The cases that use the fact-specific *Hill* analysis seem to focus on how strongly the evidence supports the LIO. Thus, they review the trial record to see if the evidence warranting the instruction was such that the failure to give it could be classified a fundamental defect. This analysis uses the evidentiary prong of the LIO doctrine to determine whether the lack of instruction violates due process or is otherwise cognizable on federal habeas. In effect, the courts using this approach must consider the merits of the claim that the failure to instruct was error in order to decide whether the claim was even reviewable on habeas. That is, the merits must, in effect, be decided in order to determine whether the court can decide the merits. The opinions seem to be confusing or mixing issues of the merits with cognizability questions.

Use of *Hill* in this context seems misdirected for several reasons that are discussed below. More light has been shed on this point by a new Supreme Court decision, *Reed v. Farley*,[235] which confirms that reliance on *Hill* to analyze the LIO federal habeas issue is misplaced.

a. Hill v. United States

In the 1962 case of *Hill v. United States*,[236] a federal trial court did not follow the formal requirements of Federal Rule of Criminal Procedure 32(a) when it failed to give the defendant an opportunity to speak and to present evidence at sentencing. The Supreme Court held that this error was only a failure to comply with the formal requirements of the rule; it was not of itself an error that could be raised on collateral attack.[237] Defendant Hill had moved to vacate sentence under 28 U.S.C. § 2255, which provides for relief if there is a violation of the Constitution or laws of the United States, lack of jurisdiction, an excessive sentence, or the

235. 114 S. Ct. 2291 (1994), discussed *infra* notes 280-94 and accompanying text.

236. 368 U.S. 424 (1962).

237. *Id.* at 429. Four justices (Justice Black, joined by Chief Justice Warren, Justices Douglas and Brennan) dissented, but did not reach the § 2255 issue. Instead, they asserted that the majority erred in refusing to grant relief under FED. R. CRIM. P. 35 (Motion to Vacate Sentence). *Id.* at 431-32 (dissenting opinion). Although the attack on the sentence was originally brought under § 2255, the dissenters additionally thought "petitioner is plainly entitled to relief under [Rule 35]." *Id.* at 431 n.1 (dissenting opinion). Accordingly, the dissent found "it unnecessary to consider the question discussed by the Court as to whether petitioner is also entitled to relief under § 2255." *Id.*

conviction is "otherwise subject to collateral attack."[238] *Hill* first concluded that section 2255 was enacted to provide a remedy "exactly commensurate with" that available by way of habeas corpus.[239] Regarding the formal violation of Rule 32(a) in the case before it,[240] the Supreme Court reasoned:

> [The error] is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus. It is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure. It does not present "exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent."[241]

A significant concern underlying *Hill* was expressed in a lengthy quotation from the Court's earlier benchmark opinion in *Sunal v. Large*.[242] *Sunal* concluded that ordinary errors of law in federal prosecutions should be raised and corrected through the direct appeal process;

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238. At the time of *Hill* (and now), § 2255 provided in pertinent part:

> A prisoner in custody under sentence of a [federal] court . . . claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255 (1988).

239. *Hill*, 368 U.S. at 427 (footnote omitted).

240. *Hill* made clear it was deciding only whether § 2255 relief was available for failure to follow "formal" requirements of the federal rules. It noted that defendant was not affirmatively denied the opportunity to speak, that there was no indication defendant even had anything to say, and that no suggestion was made that the sentencing judge was misinformed or uninformed. The Court stated, "[w]hether § 2255 relief would be available if a violation of Rule 32(a) occurred in the context of other aggravating circumstances is a question we therefore do not consider." 368 U.S. at 429.

241. *Id.* at 428. The Court cited several of its earlier § 2255 decisions in support of this analysis. Those decisions had upheld collateral review of jurisdictional, statutory, and constitutional issues. *Hill* quoted the "exceptional circumstances" language from Bowen v. Johnston, 306 U.S. 19, 27 (1939), which had reviewed a jurisdictional issue. The *Hill* Court also cited Waley v. Johnston, 316 U.S. 101 (1942) (holding reviewable a due process challenge to guilty plea coerced by threats); Walker v. Johnston, 312 U.S. 275 (1941) (holding reviewable, as a constitutional violation, the claim that the Sixth Amendment right to counsel was denied at trial); Johnson v. Zerbst, 304 U.S. 458 (1938) (holding reviewable, as both a constitutional violation and a jurisdiction requirement, the claim that the Sixth Amendment right of counsel was denied at trial); Escoe v. Zerbst, 295 U.S. 490 (1935) (the claim of denial of a statutory right to revocation of probation hearing held reviewable; a challenge to the decision at such a hearing would not be reviewable).

242. 332 U.S. 174 (1947).

collateral attack through the writ of habeas corpus should not be available simply as a substitute for direct appeal or a delayed motion for new trial. Indeed, to some, *Hill* is simply an example of the traditional view that habeas corpus is not intended to do the work of the direct appeal process.

Hill was a section 2255 challenge to a federal sentence based on an alleged violation of federal law, not the Constitution. With the exception of the federal circuit court cases that have used the *Hill* analysis for state court LIO issues, *Hill* has been used rarely in the context of section 2254 federal habeas challenges to custody imposed by a state court judgment. Although sections 2254 and 2255 generally provide for federal review of the same types of federal legal issues,[243] the use of *Hill* in state LIO cases seems peculiar. The *Hill* standard was articulated as a basis for determining when violations of federal law (in *Hill*, the federal rules of procedure) were cognizable on federal habeas-like review. On the facts of the case and under the language of the opinion, *Hill* did not deal with constitutional violations. The decision did not articulate a standard for determining when the Federal Constitution was violated nor did it state a standard for deciding which, if not all, federal constitutional violations were cognizable on federal habeas. Accordingly, the *Hill* analysis would seem totally ill-fitted for federal habeas challenges to state convictions raising LIO issues. In essence, those issues could only be reviewable on habeas if they were constitutional. Clearly, no federal law relevant to LIO instructions could apply in state court unless it simply restated a constitutional principle.

Thus, use of the *Hill* analysis seems completely inappropriate in deciding whether a state court's failure to give LIO instructions in a noncapital case violated the Federal Constitution or was otherwise cognizable on federal habeas. This conclusion is confirmed by recent Supreme Court case law, discussed shortly.[244] Nevertheless, several circuits use the *Hill* analysis to decide those state cases.

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243. The statutory basis for federal habeas jurisdiction for state prisoners is set forth in 28 U.S.C. § 2241(c) (1988): "(c) The writ of habeas corpus shall not extend to a prisoner unless . . . (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . ." Similarly, 28 U.S.C. § 2254(a) (1988) provides that federal judges may entertain habeas applications on behalf of those in custody pursuant to a state court judgment only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. The issues available on § 2255 challenges are set forth *supra* note 238.

244. Reed v. Farley, 114 S. Ct. 2291 (1994), discussed *infra* notes 280-94 and accompanying text.

b. Hill *Analysis to Determine Availability of LIO on Federal Habeas under Section 2254*

Several federal appellate courts use *Hill*-type analysis to support holding that state court failure to give LIO instructions does not violate due process or is not cognizable on federal habeas corpus.

Outline of Per se and Fact-Specific "Hill *Analysis*". In *Trujillo v. Sullivan*,[245] a panel of the Tenth Circuit accurately described the different *Hill* analyses used by the federal circuits. *Trujillo* followed earlier Tenth Circuit precedent, *Poulson v. Turner*,[246] in dismissing a habeas petition. *Poulson* had held generally that state court failure to give LIO instructions did not present a claim cognizable on federal habeas review.[247] *Trujillo* recognized that *Poulson* was itself a capital case and, therefore, was superseded by *Beck* as to cases in which the death penalty was imposed.[248] However, the *Trujillo* panel thought its *Poulson* "rule was broadly stated and appears to automatically foreclose habeas review of the failure to instruct on a lesser offense in all [death and] non-death sentence cases."[249] Without the Supreme Court extending *Beck* to noncapital cases and absent en banc consideration of the status of Tenth Circuit law, the *Trujillo* panel refused to find a general or particular constitutional violation in the failure to give LIO instructions.[250]

Trujillo viewed the circuit's *Poulson* rule as in accord with the "widely held view" among other federal circuits, that failure to give an LIO

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245. 815 F.2d 597 (10th Cir.), *cert. denied*, 484 U.S. 929 (1987).

246. 359 F.2d 588 (10th Cir.), *cert. denied*, 385 U.S. 905 (1966).

247. In *Poulson,* the Tenth Circuit affirmed denial of federal habeas relief following defendant's death sentence upon his state court conviction of first degree murder. The defendant raised several issues, including the failure to instruct on LIOs. The Tenth Circuit concluded that these were at most "only trial errors of the state court and are not such as to deprive the accused of his constitutional rights." 359 F.2d at 591. *Poulson* discussed general principles of due process and federal habeas corpus as related to state criminal prosecutions, most particularly that "habeas corpus is available to review state court errors in criminal cases only when they relate to and deprive an accused of fundamental rights guaranteed by the Constitution." *Id.* Thus, the *Poulson* court's conclusion that the lack of LIO instructions did not warrant habeas relief, which was quoted in *Trujillo,* was clearly based on the court's reasoning that this failure did not violate defendant's federal constitutional rights. The court did not explain this reasoning, beyond its general statements about federal habeas relief being limited to constitutional violations.

248. 815 F.2d at 600-01.

249. *Id.* at 602.

250. *Trujillo's* discussion of the *Beck* rationale and its conclusion that *Beck* only applied to cases in which the death penalty is actually imposed were discussed *supra* notes 132-36, 177-82 and accompanying text. Because the *Trujillo* panel considered itself bound by Tenth Circuit precedent, its discussion of the *Hill* analysis is dictum, but it is instructive.

instruction simply does not present a federal constitutional question and thus is not cognizable on federal habeas corpus review.[251] The *Trujillo* panel said that these circuits automatically precluded habeas review of LIO claims from state courts, positing as the widely held view the automatic nonreview, per se *Hill* analysis, but *Trujillo* considered that the reasoning behind this view was not well articulated. Thus, the *Trujillo* panel concluded that "the majority of post-*Hill* circuit cases, including our own Tenth Circuit *Poulson* precedent, seems to have implicitly applied *Hill* and concluded that the failure to instruct on a lesser included offense . . . *never* constitutes a 'fundamental defect' of the type described in *Hill*."[252]

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251. 815 F.2d at 602.

252. *Id.* at 603. The *Trujillo* panel stated that, in addition to its own Tenth Circuit rule, the Fifth, Eighth, and Ninth Circuits adopt the "automatic nonreview" view. *Id.* at 602. The Fifth and Ninth Circuits do indeed hold that lack of LIO instructions is not a constitutional violation in noncapital cases. There is no indication, however, that these circuits used a general *Hill* analysis as *Trujillo* states. For discussion of these circuits, see *supra* notes 147-48.

The Eighth Circuit uses the *Hill* analysis, but it is unclear whether it is the per se automatic nonreview rule or the ad hoc fact-specific analysis. A pre-*Beck* case, DeBerry v. Wolff, 513 F.2d 1336 (8th Cir. 1975), stated the general proposition that only constitutional issues are cognizable on federal habeas and then quoted the *Hill* test as determining whether a claim may be considered. It noted that erroneous jury instructions "generally" do not constitute constitutional error and particularly that the courts hold that failure to instruct on LIOs "is not *normally* such a constitutional error or 'fundamental defect' as to allow collateral review under habeas corpus." *Id.* at 1338-39 (emphasis added). The reference to constitutional error *or* fundamental defect suggests that the Eighth Circuit thought these were different. That is consistent with *Hill* itself, in which the Supreme Court used the fundamental defect analysis to determine cognizability of non-constitutional claims. In other parts of the *DeBerry* opinion, however, the Eighth Circuit treats constitutional error and habeas availability as the same point and uses the *Hill* analysis for both. *DeBerry's* use of the words "generally" and "normally" seems to suggest a fact-specific, case-by-case analysis, not a general, automatic rejection of the claim. Indeed, *DeBerry* held (without any further explanation) that the failure to instruct in that case was not a constitutional claim cognizable on habeas because "[u]nder the general rules stated above we are satisfied that *in the context of this case* it is not a defect which inherently results in a miscarriage of justice . . . ." *Id.* (emphasis added). *Accord* Cooper v. Campbell, 597 F.2d 628 (8th Cir.), *cert. denied*, 444 U.S. 852 (1979). The *DeBerry* opinion is very much like the Seventh Circuit's pre-*Beck* opinion in United States *ex rel.* Peery v. Sielaff, 615 F.2d 402 (7th Cir. 1979), *cert. denied*, 446 U.S. 940 (1980). *Peery* even cited *DeBerry*. *Id.* at 404. See discussion *infra* notes 260-72.

In a later post-*Beck* case, the Eighth Circuit first held that where the death penalty was sought throughout the trial but ultimately was not imposed, the case was not capital. Pitts v. Lockhart, 911 F.2d 109, 112 (8th Cir. 1990), *cert. denied*, 501 U.S. 1253 (1991), following Rembert v. Dugger, 842 F.2d 301 (11th Cir.), *cert. denied*, 488 U.S. 969 (1988), and *Trujillo*, discussed *supra* notes 177-95. (*Pitts'* reliance on *Rembert* is inaccurate, because *Rembert* held the case was capital and the error was constitutional but harmless because life sentence was imposed.) *Pitts* also held that the failure to instruct on LIOs might have been error, but it was not constitutional error. *Pitts* stated that most circuits have held failure to give LIOs "never raises a federal constitutional question." *Pitts*, 911 F.2d at 112 (citing cases from Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits). The court agreed with these cases that lack of

Trujillo, however, considered this rule of automatic nonreview to be inconsistent with Supreme Court precedent if *Hill* and *Beck* were read together. According to *Trujillo,* by explicitly leaving open whether the lack of LIO instructions violates due process in noncapital cases, *Beck* suggested that state LIO claims could not always be unreviewable on federal habeas. If application of the Supreme Court's *Hill* standard automatically precluded habeas review of all LIO claims, that view would have answered the question and the Supreme Court would not have left it open in *Beck.*[253]

Trujillo also stated, "*Hill* appears to say that a 'due process like' analysis of the facts of a case is required to determine whether a claimed error can be addressed under a writ."[254] *Hill*, the panel continued, "seems to require a due-process look at the facts of each case so as to determine whether the failure to instruct is sufficiently egregious to warrant habeas relief."[255] The panel seems to correctly assess the nature of the *Hill* standard as similar to a due process analysis and as one focused on the specific facts of each case. Concerns about fundamental defects, complete miscarriages of justice, and rudimentary demands of fair procedure sound like due process concerns; they are "due process like." Indeed, this similarity is probably why the *Hill* Court created that standard for determining whether to review errors of federal law. Ordinary, less substantial errors of federal law can be relegated solely to the direct appeal process and do not warrant extraordinary relief via habeas. Only when there are aggravating circumstances that approach the nature and magnitude of a constitutional violation should the federal court review a federal statutory claim on habeas corpus.

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an LIO instruction in a noncapital case "*rarely, if ever*, presents a constitutional question." *Id.* (emphasis added) (quoting *DeBerry*, 513 F.2d at 1339, language discussed earlier). *Pitts* is itself cited as representing the Eighth Circuit's view that LIO errors never raise federal constitutional issues. *See, e.g.*, Perez v. McKune, No. 92-3430-DES, 1993 WL 455596, at *2 (D. Kan. Oct. 28, 1993). This analysis of the Eighth Circuit seems to be overstated.

253. 815 F.2d at 603. The panel's reasoning is logical, of course. Why would the Court explicitly leave open a question it had already decided, not even mentioning its own precedent that decided the issue? However, *Trujillo* suggests that the Supreme Court was thinking about the relationship between *Hill* and *Beck* when it wrote the *Beck* opinion. However, it is quite unlikely that the *Beck* Court ever considered the *Hill* analysis relevant to the question before it because, quite simply, *Hill* was totally inapposite to *Beck*. *Beck* went to the Supreme Court on direct appeal, not on federal habeas which was the procedural context and focus of *Hill*. Moreover, it was undoubtedly apparent to the Supreme Court at the time of *Beck*, as recently reaffirmed in Reed v. Farley, 114 S. Ct. 2291 (1994), that *Hill* set forth the standard for cognizability of a federal statutory claim, while *Beck* considered federal constitutionality of refusing LIO instructions.

254. *Trujillo*, 815 F.2d at 603.

255. *Id.*

Trujillo is incorrect, however, in its suggestion that *Hill* represents a constitutional, due process standard. Due process was not the issue in *Hill* and, as the Court has recently clarified in *Reed v. Farley*,[256] the *Hill* analysis only applies to nonconstitutional, federal error.

The Tenth Circuit panel in *Trujillo* suggested that the ad hoc, fact-specific *Hill* analysis used by the Seventh Circuit was the proper approach to federal review of state court LIO issues. The panel explained that the Seventh Circuit "examine[s] the specific facts of a case under the very *Hill* test that seems to have prompted the Fifth, Eighth, Ninth, and Tenth Circuit rule of automatic nonreviewability in *all* cases."[257] It continued:

> Unlike the automatic nonreviewability rule, the Seventh Circuit approach contemplates that there may be times when the evidence so overwhelmingly supports a lesser included offense instruction that refusing to instruct on the lesser offense constitutionally taints, under *Hill*, the process by which the defendant is found guilty of the greater offense, whether or not *Beck* is extended to recognize an automatic right to a warranted lesser offense instruction.[258]

Again, *Trujillo* seems correct that the fact-specific approach is what the Supreme Court had in mind in *Hill*. It is incorrect, however, that this is an analysis for determining whether the lack of instruction is a constitutional violation.[259]

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256. 114 S. Ct. 2291 (1994).

257. *Trujillo*, 815 F.2d at 603.

258. *Id.* As already noted, *Trujillo's* discussion of *Hill* analysis was dicta. The panel held itself bound by *Poulson* to deny habeas review, absent Tenth Circuit en banc consideration. The panel did not consider it necessary to request en banc consideration, however, because the record before it did not show a fundamental defect under *Hill*. *Trujillo* noted that, as in *Peery*, the *Hill* standard was not met "[b]ecause the evidence supporting these lesser included offense instructions is not 'unequivocally strong.'" *Id.* at 604 n.2 (citing *Peery*, 615 F.2d at 404). Thus, *Trujillo's* discussion of *Hill* was in explanation not of its holding, but of why it would not request en banc consideration.

259. Another panel of the Tenth Circuit followed *Trujillo's* analysis that the Tenth Circuit's rule under *Poulson* was that in noncapital cases LIO claims are automatically nonreviewable on federal habeas, but that in capital cases *Beck* supersedes *Poulson*. *See* Chavez v. Kerby, 848 F.2d 1101, 1103 (10th Cir. 1988). *Chavez* also noted, although clearly dicta in view of the *Poulson* rule, that the evidence did not warrant an LIO and therefore the failure to give it was not fundamental unfairness, citing Nichols v. Gagnon, 710 F.2d 1267 (7th Cir. 1983), *cert. denied*, 466 U.S. 940 (1984) (*supra* notes 159-76 and accompanying text), and United States *ex rel.* Peery v. Sielaff, 615 F.2d 402 (7th Cir. 1979), *cert. denied*, 446 U.S. 940 (1980) (*supra* note 160 and *infra* notes 260-72 and accompanying text). 848 F.2d at 1103 n.*. Although the *Chavez* opinion is cursory and basically relies on the earlier analysis in *Trujillo*, *Chavez* is often cited as the "leading" Tenth Circuit case. *See, e.g.*, Perez v. McKune, No. 92-3430-DES, 1993 WL 455596 (D. Kan. Oct. 28, 1993); Wauqua v. Cowley, 1993 WL 279768 (10th Cir., July 22, 1993) (citing *Chavez* and *Poulson* but not *Trujillo*).

Seventh Circuit Opinions. In *United States ex rel. Peery v. Sielaff*,[260] the Seventh Circuit adopted an ad hoc, fact-specific *Hill* analysis. This adoption occurred before the Supreme Court's *Beck* decision, but the circuit court reaffirmed its *Peery* approach after *Beck*, in *Nichols v. Gagnon*.[261] This same analysis was also cited with approval by the Tenth Circuit panel in *Trujillo*.[262] The Seventh Circuit uses the fact-specific *Hill* analysis to determine whether state court failure to give LIO instructions violates federal constitutional due process. *Hill* is used, inappropriately, as a constitutional standard.

In *Nichols*, the Seventh Circuit concluded that the state trial court's refusal to give an LIO instruction (based on the view that the evidence did not warrant it) was error under state law but "was [not] an error of constitutional magnitude" that would warrant federal habeas relief under *Peery*.[263] *Nichols* reasoned:

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260. 615 F.2d 402 (7th Cir. 1979), *cert. denied*, 446 U.S. 940 (1980).

261. 710 F.2d 1267 (7th Cir. 1983), *cert. denied*, 466 U.S. 940 (1984). As discussed in an earlier section, the Seventh Circuit in *Nichols* considered whether *Peery* survived *Beck*. The court was not inclined to extend *Beck* to noncapital cases unless the Supreme Court did; instead, it reaffirmed that it would continue to follow *Peery* for noncapital cases. *See* discussion *supra* notes 159-61 and accompanying text.

In *Nichols*, the Seventh Circuit also discussed its use of the *Peery* analysis in Davis v. Greer, 675 F.2d 141 (7th Cir. 1982), *cert. denied*, 466 U.S. 940 (1984). 710 F.2d at 1270. *Davis* was decided after *Beck*, but did not mention *Beck*. *Davis* first discussed "whether federal courts *have jurisdiction to review* a state court's refusal to give a tendered lesser included offense instruction." 675 F.2d at 143 (emphasis added). The opinion stated that several circuits held that "'[f]ailure of a state court to instruct on a lesser offense fails to present a federal constitutional question and will not be considered in a federal habeas corpus proceeding.'" *Id.* (quoting James v. Reese, 546 F.2d 325, 327 (9th Cir. 1976)) (citing DeBerry v. Wolff, 513 F.2d 1336 (8th Cir. 1975), and other cases). The *Davis* court also noted that the Third and Sixth circuits allow habeas review of state court LIO claims. *Id.* It then set forth general principles of habeas jurisdiction (mere violation of state law would not state a federal claim; federal habeas jurisdiction exists if a state court deprived defendant of due process; when the issue is failure to give a jury instruction, "the relevant inquiry is 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process,'" *Davis*, 675 F.2d at 144 (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973), *quoted with approval in* Henderson v. Kibbe, 431 U.S. 145, 154 (1977)), and then found it had jurisdiction to decide the merits simply because defendant had claimed denial of due process. On the merits, *Davis* held the evidence insufficient to warrant an LIO verdict and concluded, therefore, that the state trial court did not err in refusing the instruction and that "the evidence . . . was [not] so unequivocally strong that [the] failure to give the instruction . . . amounted to a fundamental miscarriage of justice." 675 F.2d at 145 (quoting United States *ex rel.* Peery v. Sielaff, 615 F.2d 402, 404 (7th Cir. 1979), *cert. denied*, 446 U.S. 940 (1980)). Although the Seventh Circuit did not mention due process at this point in its opinion, that was the only basis that had been asserted for its jurisdiction. The *Davis* court quoted *Peery's* application of the *Hill* standard, but did not mention *Hill* itself.

262. *See supra* notes 257-59 and accompanying text.

263. 710 F.2d at 1268.

> In *United States ex rel. Peery v. Sielaff* . . . we joined several other circuits in holding that failure to instruct on a lesser included offense, even if incorrect under state law, does not warrant setting aside a state conviction unless "failure to give the instruction could be said to have amounted to a fundamental miscarriage of justice." It could not here. . . . [W]e cannot say that the Wisconsin Supreme Court was unreasonable to resolve [the evidentiary question] against [the defendant], or that the denial of the instruction in the circumstances of this case was likely to have resulted in the conviction of an innocent man.[264]

Nichols was unwilling either to recognize or to reject a general due process right to LIOs in noncapital cases, because the Supreme Court continued to leave open whether to extend *Beck*.[265] However, the Seventh Circuit continued to follow *Peery's* ad hoc, fact-specific, constitutional analysis, ultimately predicated on *Hill*,[266] because "one of the rights of criminal defendants under the due process clause . . . is to be tried according to the fundamental contemporary norms of civilized procedure."[267] The *Peery-Hill* analysis was deemed an appropriate standard for applying this due process right in specific cases involving state court failures to give LIO instructions.

The Seventh Circuit's *Peery* opinion reflects how the circuit courts began to use the nonconstitutional *Hill* analysis as the basis for determining whether the failure to give LIO instructions violated due process. *Peery* affirmed the dismissal of a habeas petition, rejecting defendant's claim that the state court's refusal to give LIO instructions violated due process.[268] *Peery* acknowledged that cases from other circuits indicated that, in general, "'[f]ailure of the state court to instruct on a lesser offense fails to present a federal constitutional question and will not be considered in a federal habeas corpus proceeding,'"[269] but it did not follow this per se

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264. *Id.* at 1269 (citation omitted). The court did not cite any cases for the "several other circuits" it joined.

265. For discussion of the Seventh Circuit's reasoning regarding *Beck*, see *supra* notes 159-76 and accompanying text.

266. The *Nichols* opinion did not mention *Hill* itself, but relied on it by implication through its reaffirmation of *Peery*, which was based on *Hill*.

267. 710 F.2d at 1272 (citing Palko v. Connecticut, 302 U.S. 319 (1937)).

268. The court had recognized that both due process and the Sixth Amendment right to a jury trial might be at issue, because a defendant is entitled to instruction on any defense that has some basis in the evidence and a trial judge dilutes the right to a jury trial when the judge inappropriately screens the evidence supporting a defense. *Peery*, 615 F.2d at 403-04 (quoting Strauss v. United States, 376 F.2d 416 (5th Cir. 1967)).

269. *Peery*, 615 F.2d at 404 (quoting James v. Reese, 546 F.2d 325, 327 (9th Cir. 1976), discussed *supra* note 148, and citing DeBerry v. Wolff, 513 F.2d 1336, 1339 (8th Cir. 1975),

approach. Instead, the Seventh Circuit stated, in back-to-back sentences: (1) "In a habeas action the question is whether the petitioner alleges a 'fundamental defect which inherently results in a complete miscarriage of justice [or] an omission inconsistent with the rudimentary demands of fair procedure,'" quoting *Hill*;[270] and (2) "The question before us is whether the 'ailing instruction by itself so infected the entire trial that the resulting conviction violates due process,'" quoting *Cupp v. Naughten*.[271] As to the specific habeas corpus petition before it, the Seventh Circuit rejected *Peery's* claim that the state court's refusal to give LIO instructions violated due process, because "the evidence [at trial] of serious provocation was not so unequivocally strong that failure to give the instruction [on voluntary manslaughter] could be said to have amounted to a fundamental miscarriage of justice."[272]

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and other cases). As suggested *supra* note 252, *DeBerry* is often cited for the automatic nonreview, per se *Hill* analysis, but it may well have used the fact-specific approach. Indeed, the *DeBerry* opinion is like *Peery* in its juxtaposition of general federal constitutional standards and the *Hill* standard for nonconstitutional issues on federal habeas. Like *Peery, DeBerry* shows the genesis of the misconceived *Hill* analysis. The opinions seem to treat the standards for determining due process violations and that for federal habeas jurisdiction as if they are interchangeable. Both opinions were decided before *Beck*, when the focus on the LIO issue was less clear than after *Beck*. Both opinions are regularly cited with approval by post-*Beck* cases for their use of the *Hill* analysis.

270. 615 F.2d at 404 (quoting Hill v. United States, 368 U.S. 424, 428 (1962)).

271. *Id.* (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)). The opinion also quoted language describing petitioner's heavy burden on this issue from Henderson v. Kibbe, 431 U.S. 145, 155 (1977).

272. 615 F.2d at 404 (footnote omitted). The *Peery* court noted a state appeals court had reversed defendant's original conviction on unrelated grounds, but had also said there was sufficient evidence to raise an issue of voluntary manslaughter based on serious provocation and passion. At defendant's retrial, the judge nevertheless refused to instruct on this form of manslaughter. The second state appellate court and the district court on habeas concluded, however, that the lack of instruction was not prejudicial, because the jury's rejection of unreasonable belief voluntary manslaughter meant that the jury also necessarily disbelieved the evidence of serious provocation or passion. The Seventh Circuit disputed this "harmless error" type reasoning, but doubted anyway that the evidence was sufficient to support serious provocation or to require an instruction. *Id.* at 404 n.2.

To answer the question before it, however, the *Peery* court did not need to decide whether the evidence warranted the instruction. Instead, the question under the fact-specific *Hill* analysis was whether the evidence was so strong that not only was an instruction warranted, but also that the lack of instruction was a fundamental miscarriage. After extensive review of the evidence in light of state law on passion or provocation voluntary manslaughter, *Peery* concluded that the various possible incidents shown "do not even cumulatively amount to such evidence as would require instruction in Illinois on voluntary manslaughter based on serious provocation. . . . Failure to give the requested instruction can in no sense, therefore, be said to have resulted in a complete miscarriage of justice." *Id.* at 407.

By *Peery's* juxtaposition of sentences and quotes, and its own fact-specific analysis and holding, the Seventh Circuit seems to treat the *Hill* standard for determining whether a claim is available on federal habeas as interchangeable with *Cupp's* general standard for whether an erroneous state court instruction violates due process. *Peery* did not articulate this reasoning or explicitly connect the different sentences in its opinion, but the opinion's structure and language, its factual analysis, and its conclusion imply that the Seventh Circuit substituted *Hill* in place of a due process analysis regarding LIO instructions in state court. Later circuit court opinions do not discuss this process, simply stating that *Peery* applies a fact-specific *Hill* approach.

First Circuit. In *Tata v. Carver*,[273] the First Circuit also applied the fact-specific *Hill* analysis to hold that a state court's failure to instruct on LIOs in a noncapital case did not violate federal due process and, therefore, was not a basis for federal habeas review.[274] The opinion followed closely the reasoning of other circuit courts discussed above in refusing to extend the *Beck* constitutional rule to noncapital cases and also rejecting an automatic nonreview rule that would hold the absence of LIO instructions "raises no federal due process issue"[275] in any case. Instead, it found more persuasive the view that:

> On the strength of the reasoning in *Hill v. United States* . . . a due process violation occurs only when [looking to the facts of the particular case] the failure to give such an instruction in a noncapital case amounts to so fundamental a defect as to cause "a complete miscarriage of justice []or an omission inconsistent with the rudimentary demands of fair procedure."[276]

Tata thus adopted the ad hoc, fact-specific *Hill* analysis as a basis for determining the existence of a due process violation in a noncapital case. This may be a logical conclusion from the other opinions on which *Tata*

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273. 917 F.2d 670 (1st Cir. 1990).

274. 917 F.2d at 672. The *Tata* court precisely held that the state court's refusal to instruct on the crime of trafficking in less than 100 grams of cocaine where defendant was charged with trafficking in over 100 grams did not result in a fundamental miscarriage of justice. *Id.*

275. *Id.* at 671. The First Circuit reviewed the treatment of the issue in the other circuits. It relied heavily on the Tenth Circuit panel opinion in Trujillo v. Sullivan, 815 F.2d 597 (10th Cir.), *cert. denied*, 484 U.S. 929 (1987), on the Sixth Circuit opinion in Bagby v. Sowders, 894 F.2d 792 (6th Cir.), *cert. denied*, 496 U.S. 929 (1990) (opinion of Norris, J.), on the Seventh Circuit's opinion in Nichols v. Gagnon, 710 F.2d 1267 (7th Cir. 1983), *cert. denied*, 466 U.S. 940 (1984), and also on the Eighth Circuit's pre-*Beck* opinion in DeBerry v. Wolff, 513 F.2d 1336 (8th Cir. 1975).

276. *Tata*, 917 F.2d at 671 (citation omitted).

relied,[277] but the premise is wrong. The conclusions of these opinions are themselves inaccurate in treating *Hill* as a constitutional due process analysis. In addition to overreading *Hill*, the First Circuit also seemed unclear about the import of its own reasoning. Thus, the *Tata* opinion cryptically remarked: "A *prudential restriction* on federal habeas review in noncapital cases to instances where the failure to give a lesser included offense instruction threatens a fundamental miscarriage of justice *accords with general due process standards* . . . ."[278] It is difficult to understand this conclusion. *Tata* correctly suggests that the *Hill* standard was developed to determine prudential limits on habeas jurisdiction over federal statutory law issues; it was not a jurisdictional constitutional standard. Also, *Hill's* prudential standard is certainly consistent with general due process standards.[279] Indeed, the similarity between the *Hill* standard and general due process standards is what seems to cause the circuits to transform *Hill* into a due process analysis. However, if, as *Tata* clearly held, the ad hoc *Hill* analysis is used to determine whether due process is violated, it is a jurisdictional analysis (not a prudential analysis). The First Circuit's decision to follow the *Hill* approach in deciding whether due process is violated, in reality, represents a jurisdictional analysis.

The ad hoc, fact-specific *Hill* analysis perhaps provides a rational intermediate position. If *Beck* were extended to noncapital cases, then there would be a broad due process right to LIO instructions that are warranted by the evidence in all capital and noncapital cases. If *Beck* is not extended, one view is that the state court failure to give LIO

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277. Like *Peery* and *DeBerry*, the *Tata* opinion noted that the ad hoc *Hill* approach it adopted was consistent with the general principle that erroneous state court jury instructions are reviewable on federal habeas only when they so infect the trial as to violate due process. 917 F.2d at 672. This is the same principle that *Peery* and *DeBerry* combined with the *Hill* standard to devise the ad hoc *Hill* analysis as a constitutional due process standard. *See supra* notes 268-72 and accompanying text.

278. *Id.* at 672 (emphasis added) (citing Lisenba v. California, 314 U.S. 219, 236 (1941), for proposition that due process is violated when lack of fundamental fairness prevents a fair trial).

Tata also stated that the *Hill* approach recognized that the absence of an LIO instruction in noncapital cases rarely, if ever, raises a constitutional issue. 917 F.2d at 672 (citing Pitts v. Lockhart, 911 F.2d 109 (8th Cir. 1990), *cert. denied*, 501 U.S. 1253 (1991)). This seems to beg the question, determining the approach to analyzing the question by first answering the question in the negative and then creating a standard that will ordinarily produce that negative answer.

279. The *Hill* standard is so consistent with due process standards that Justice Scalia has questioned whether there were any nonconstitutional errors that would satisfy the *Hill* standard for habeas review. Reed v. Farley, 114 S. Ct. 2291, 2301 (1994) (Scalia, J., concurring), discussed *infra* notes 287-89 and accompanying text.

instructions in noncapital cases is never a federal constitutional violation reviewable under federal habeas. Between those positions, however, lies the ad hoc, fact-specific analysis: if *Beck* is not extended to provide a general due process right, on the facts of a particular noncapital case the failure to give the instruction might violate due process. Under this view, there would be general due process violations in capital cases (under *Beck*) and particular violations (under *Hill*).

Hill is not directly applicable in the state court LIO situation at all, as discussed above. *Hill* can fairly be labeled a due process-like analysis, as the Tenth Circuit observed in *Trujillo*. Thus, an analysis concentrating on concerns paralleling those in *Hill*—a "fundamental defect" standard or an analysis like that mistakenly premised on *Hill* by several circuits—could be used as a measure for due process violations provided, however, this analysis is not confused with reliance on *Hill* itself.

c. *Further Reflections on the "*Hill *Analysis"*; Reed v. Farley

In the recent case of *Reed v. Farley*,[280] the Supreme Court clarified generally the applicability of the *Hill* standard. *Reed* is not an LIO case but it made clear that *Hill* applies only to claims of federal statutory violations, not to federal constitutional issues raised on federal habeas corpus.

Reed involved the Interstate Agreement on Detainers (IAD) and federal habeas corpus. It held "that a state court's failure to observe the 120-day rule of [the IAD] is not cognizable under § 2254[(a)] when the defendant registered no objection to the trial date at the time it was set, and suffered no prejudice attributable to the delayed commencement."[281] The Court first concluded that the IAD was both state law and the "'law of the United States' within the meaning of § 2254(a)."[282] Quoting *Hill* and other precedent, the *Reed* majority reasoned that "habeas review is available to check violations of federal laws when the error qualifies as 'a fundamental defect which inherently results in a complete miscarriage of justice, [or] an omission inconsistent with the rudimentary demands of fair procedure.'"[283] *Reed* recognized that the Court had developed this

280. 114 S. Ct. 2291 (1994).

281. *Id.* at 2294.

282. *Id.* at 2295 (citing Reed v. Clark, 984 F.2d 209 (7th Cir. 1993)).

283. *Id.* at 2297 (quoting Hill v. United States, 368 U.S. 424, 428 (1962)); *accord* United States v. Timmreck, 441 U.S. 780, 783 (1979); Davis v. United States, 417 U.S. 333, 346 (1974).

The Seventh Circuit in *Reed* had affirmed denial of the habeas petition using an analysis based on the Supreme Court's decision in Stone v. Powell, 428 U.S. 465 (1976). *Stone* held that a claim that evidence should have been excluded from a state trial, because it was

standard in cases involving federal prisoners seeking relief under section 2255.[284] However, the majority rejected the argument that these decisions only established a standard for section 2255, perceiving that "at least where mere statutory violations are at issue, '§ 2255 was intended to mirror § 2254 in operative effect,'"[285] and that "our decisions assume that *Hill* controls collateral review—under both §§ 2254 and 2255—when a federal statute, but not the Constitution, is the basis for the postconviction attack."[286]

The view that the *Hill* standard is limited to nonconstitutional, federal statutory violations is also reflected quite clearly in Justice Scalia's concurring opinion.[287] That concurrence explicitly stated the difference between constitutional violations and the *Hill* standard by remarking, "violation of that technicality [the IAD time limits], intentional or unintentional, neither produces nor is analogous to (1) lack of jurisdiction . . . , (2) constitutional violation, or (3) miscarriage of justice or denial of rudimentary procedures."[288] More generally, Justice Scalia remarked:

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obtained from an alleged Fourth Amendment violation, would not be heard in federal court under § 2254 if the state courts gave the petitioner an opportunity for full and fair litigation of the claim. The Supreme Court in *Reed* rejected the Seventh Circuit's application of the *Stone* analysis, because it said it had repeatedly declined to apply the *Stone* rule beyond Fourth Amendment exclusionary rule issues and because other existing precedent (the cases cited above) was sufficient to resolve *Reed*. 114 S. Ct. at 2296-97.

284. *See, e.g.*, Hill v. United States, 368 U.S. 424 (1962) (see discussion *supra*); United States v. Addonizio, 442 U.S. 178 (1979); United States v. Timmreck, 441 U.S. 780 (1979); Davis v. United States, 417 U.S. 333 (1974).

285. 114 S. Ct. at 2299 (quoting Davis v. United States, 417 U.S. 333, 344 (1974)).

286. *Id.* at 2299-300. The *Reed* majority quoted *Stone v. Powell* by way of example: "[I]n *Stone v. Powell*, a § 2254 case, we recalled 'the established rule with respect to nonconstitutional claims' as follows: '[N]onconstitutional claims . . . can be raised on collateral review only if the alleged error constituted a fundamental defect which inherently results in a complete miscarriage of justice.'" *Id.* at 2300 (quoting *Stone*, 428 U.S. at 477 n.10, in turn quoting *Davis*, 417 U.S. at 346, quoting *Hill*, 368 U.S. at 428) (internal quotation marks omitted). *See also Reed*, 114 S. Ct. at 2300 n.13 (quoting United States v. Addonizio, 442 U.S. 178, 185 (1979)).

The majority also rejected defendant's argument that the fundamental defect standard was used in *Hill* and *Timmreck* only because these were § 2255 cases following the reasoning of Sunal v. Large, 332 U.S. 174, 178 (1947), that habeas is not a substitute for direct appeal. The majority reasoned that *Sunal's* "general rule" applied equally to § 2255 and to § 2254. 114 S. Ct. at 2300.

287. 114 S. Ct. at 2301-02 (Scalia, J., concurring in part and concurring in the judgment, joined by Thomas, J.).

288. *Id.* at 2302. Justice Scalia's opinion agreed "that the 'fundamental defect' test of *Hill* . . . is the appropriate standard for evaluating alleged statutory violations under both §§ 2254 and 2255 . . . ." *Id.* at 2301. Justice Scalia asserted, however, that the majority used "too parsimonious an application of that standard." *Id.* Instead, the majority should have "state[d] the obvious;" no violation of the IAD time limits could be cognizable on habeas.

> The class of procedural rights that are *not* guaranteed by the Constitution (which includes the Due Process Clauses), but that nonetheless *are* inherently necessary to avoid "a complete miscarriage of justice," or [are] numbered among "the rudimentary demands of fair procedure," is no doubt a small one, if it is indeed not a null set.[289]

Again, the distinction between constitutional due process rights and those tested by the *Hill* standard is made explicit. Although not stated as such by the *Reed* majority, the concurring and dissenting opinions also make explicit what seems obvious from the face of the federal postconviction statutes. The *Hill* standard is a discretionary, prudential restriction on the claims that are available for federal habeas relief, not a jurisdictional one.[290] Both sections 2254 and 2255 provide that those in custody may challenge convictions based on an alleged "violation of the Constitution or

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The majority relied on the defendant's failure to object to the IAD time problem until after the time had run as the basis for holding that the violation did not satisfy the *Hill* standard. The majority characterized the failure to comply with the IAD time limits as an "unwitting judicial slip." *Id.* at 2297. Comparing the error to those in *Hill* and *Timmreck*, the majority concluded that this error "ranks with the nonconstitutional lapses we have held not cognizable." *Id.* The unobjected-to violation of the IAD was not a "fundamental defect" and "lacks 'aggravating circumstances'" rendering "the need for the remedy afforded by the writ of *habeas corpus* . . . ." *Id.* at 2298 (quoting *Hill*, 368 U.S. at 428, which in turn quoted Bowen v. Johnston, 306 U.S. 19, 27 (1939)).

Although it relied on defendant's failure to timely object in the state trial court, the *Reed* majority did not hold this was a procedural default precluding habeas relief. *See Reed*, 114 S. Ct. at 2302 (Scalia, J., concurring in part and concurring in the judgment). To the majority, the failure to object meant that the IAD violation could not be a fundamental defect under *Hill*. The *Reed* majority acknowledged valid reasons might exist to allow some federal review of state court application of the IAD, but it did not decide whether a properly objected to violation might satisfy the *Hill* standard. *Reed*, 114 S. Ct. at 2297. The concurring opinion addressed this broader issue.

289. *Id.* at 2301 (emphasis in original).

290. *Id.* at 2302 (Scalia, J., concurring in part and concurring in the judgment), 2304-05 (Blackmun, J., dissenting).

That the *Hill* analysis is prudential not jurisdictional is the basis for Justice Blackmun's dissent in *Reed*. Justice Blackmun (joined by Justices Stevens, Kennedy, and Souter) observed that the *Hill* precedents all concerned collateral attacks on federal convictions and sentences under § 2255. He asserted that there were sound "prudential" or policy reasons for not applying those precedents as a basis for barring review of violations of federal statutory law in state cases. Justice Blackmun asserted that §§ 2254 and 2255 proceedings had significant differences in purpose and scope. In § 2254 cases, he argued, federal statutory violations should be treated the same as constitutional violations, but they could be treated differently under § 2255. Therefore, the dissent suggested that the federal courts had jurisdiction to hear all federal statutory and constitutional violations, and in § 2254 cases they should do so, even though in § 2255 cases the courts should restrict those statutory violations it would hear based on the *Hill* standard. *Id.* at 2304-09.

laws . . . of the United States."[291] On the face of this statutory language, sections 2254 and 2255 afford federal courts jurisdiction to hear collateral-like challenges based on *all* alleged violations of the Federal Constitution and federal laws. The *Hill* standard cannot limit this statutory grant of federal court jurisdiction. It only imposes discretionary or prudential restrictions that define which violations of federal law may be heard. As Justice Scalia explained, equitable considerations guide the federal courts' exercise of discretion whether to hear claims, even though they have jurisdiction to do so.[292] In *Hill* and *Reed*, the alleged violations were of a "law of the United States." Therefore, the federal courts had jurisdiction to hear the section 2255 and section 2254 challenges. The Court used the *Hill* standard to decide whether it should exercise its discretion to hear claims about these particular federal law violations.

Hill is similar to *Stone v. Powell*[293] in that both cases state prudential limits on habeas jurisdiction, based on equitable and prudential considerations. The *Hill* standard is used to determine when the federal habeas court under sections 2254 and 2255 will review claims of federal statutory violations. *Stone v. Powell's* limitation on when federal habeas courts may hear claims of Fourth Amendment violations in state court, which is in large part a function of limitations on the exclusionary rule remedy, is only a prudential restriction on federal habeas jurisdiction over federal constitutional claims. The Court has thus far refused to apply the *Stone* analysis to other federal constitutional claims.[294]

As clarified by the Supreme Court in *Reed*, the *Hill* standard is not itself appropriate in LIO cases arising on habeas corpus. When custody based on a state court conviction is challenged because of the failure to give LIO instructions, no statutory law of the United States is even arguably involved. Unlike the IAD involved in *Reed*, the federal LIO law, Federal Rule of Criminal Procedure 31, does not apply to the states. In state LIO cases, the alleged violation is either purely a matter of state law or the Federal Constitution. The question in these cases is not whether the federal habeas court should accept jurisdiction over an existing claim, but whether there exists a federal claim based on a constitutional violation that would give rise to habeas jurisdiction. If the failure to give LIO instruc-

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291. 28 U.S.C. §§ 2254, 2255 (1988), quoted *supra* notes 238, 243.

292. Justice Scalia cited his opinion in *Withrow v. Williams* for the proposition that "[t]his Court has long applied equitable limitations to narrow the broad sweep of federal habeas jurisdiction." *Reed*, 114 S. Ct. at 2301 (Scalia, J., concurring in part and concurring in the judgment) (citing Withrow v. Williams, 113 S. Ct. 1745, 1765-70 (1993)).

293. 428 U.S. 465 (1976).

294. *See supra* notes 228-30 and accompanying text.

tions in state court is a violation of federal due process, the federal court has jurisdiction to hear the claim; if it is not a federal constitutional violation, the error is merely one of state law over which federal courts have no jurisdiction.

D. Due Process Analysis Generally

As discussed, the *Beck* Court did not clearly identify the constitutional basis for its holding. Although *Beck* is generally viewed as requiring greater safeguards only for capital cases, the Court's opinion also expressed concerns about the reliability of the trial process that sound like broader, due process concerns.

The Court recently clarified the approach to determining procedural due process requirements for state criminal procedures. *Beck's* reasoning is quite consistent with this current approach, and it might support extending *Beck* to noncapital cases.

1. The Current Due Process Approach: *Medina* and *Patterson*

In *Medina v. California*,[295] a majority of the Court concluded that the three-factor balancing test it had applied in *Mathews v. Eldridge*[296] to determine the constitutionality of federal administrative procedures[297] was not the appropriate analytical framework for determining whether state criminal procedures[298] satisfied due process.[299] *Medina* concluded

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295. 505 U.S. 437 (1992) (majority opinion by Kennedy, J., joined by Rehnquist, C.J., and Scalia, Thomas, and White, JJ.). In *Medina*, the Court held that although due process prohibits the criminal prosecution of a person who is not competent to stand trial, due process is not violated when a state places on the defendant the burden of proving incompetence by a preponderance of the evidence. *Id.* at 446.

296. 424 U.S. 319 (1976).

297. *Medina* stated:

> In *Mathews*, we articulated a three-factor test for evaluating procedural due process claims which requires a court to consider "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

505 U.S. at 443 (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)). *Medina* did not overrule the *Mathews* test; it limited that test to non-criminal procedures, like the administrative procedures at issue in *Mathews* itself. *Id.* at 445.

298. *Medina* precisely addressed "the appropriate framework for assessing the validity of state procedural rules which . . . are part of the criminal process," and "'the category of infractions that violate "fundamental fairness."'" *Id.* at 443 (quoting Dowling v. United States, 493 U.S. 342, 352 (1990)). This may seem to be a somewhat different question than the one we are addressing. Our question is not whether a state criminal procedure violates

instead that the "narrower inquiry" set forth in *Patterson v. New York*[300] was "the proper analytical approach" for evaluating state criminal procedures under due process. As described in *Medina, Patterson* stated that a state procedure is "not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[301]

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due process, but whether due process requires an LIO procedure. That question could be brought within the precise language of *Medina*, however, if it were rephrased as asking whether due process is violated by a state rule precluding or limiting warranted LIO instructions.

299. One commentator used the *Mathews* test as a significant part of his reasoning in support of the assertion that the LIO doctrine must be part of procedural due process requirements. Identifying the three factors set forth in *Mathews* (above) to determine minimum due process requirements, the author concluded: (1) the defendant has a clear and substantial liberty interest in a criminal prosecution; (2) the lesser included offense doctrine reinforces the presumption of innocence and the reasonable doubt standard; it reduces the risk of erroneous conviction by eliminating the danger that the jury will convict though not convinced of guilt of the charged offense beyond a reasonable doubt yet reluctant to acquit because convinced defendant is guilty of some other serious though uncharged offense (citing *Keeble* and *Beck*); and (3) the government has no legitimate interest in denying the lesser included offense instruction, particularly because its interest is not only in obtaining convictions but in seeing justice done. Edward G. Mascolo, *Procedural Due Process and the Lesser Included Offense Doctrine*, 50 ALB. L. REV. 263, 287-88, 292-94 (1986). In view of *Medina's* rejection of the *Mathews* test in criminal cases, this analysis is no longer a valid basis alone for concluding that due process requires the LIO doctrine. However, some of the ideas expressed in the author's discussion here and elsewhere in his commentary are relevant under the "fundamental fairness" analysis of *Medina*. *See Medina*, 505 U.S. at 445-49 (opinion of the Court), 453-55 (O'Connor, J., concurring).

300. 432 U.S. 197 (1977).

301. *Medina*, 505 U.S. at 445 (quoting *Patterson*, 432 U.S. at 201-02). At the end of the opinion the *Medina* Court again quoted *Patterson* to the effect that "'[t]raditionally, due process has required that only the most basic procedural safeguards to be observed . . . .'" *Id.* at 453 (quoting *Patterson*, 432 U.S. at 210).

Although *Medina* clarified the proper framework for analysis, the due process standard is still vague and defies simple analysis. As one commentator remarked in the context of due process and the LIO doctrine:

> [D]ue process remains a concept that defies precise definition. Nevertheless, it can be stated with reasonable accuracy that procedural due process has come to embody fundamental concepts of fairness traditional to Anglo-American law regulating interactions between the individual and the state. . . . Due process constitutes an intractable barrier to any deprivation of these rights by governmental methods which deny an individual the rudimentary elements of fair play.

Mascolo, *supra* note 299, at 287 (footnotes omitted). Justice O'Connor's recent concurring opinion in Herrera v. Collins, 113 S. Ct. 853, 870 (1993), seems to reiterate this vagueness, stating that executing an innocent person is unconstitutional, "[r]egardless of the verbal formula employed—'contrary to contemporary standards of decency,'. . . 'shocking to the conscience'. . . [the standard used by the dissent] or offensive to a 'principle of justice . . . ranked as fundamental.'" (citations omitted).

Medina reasoned that the *Patterson* standard was far less intrusive than *Mathews*, and therefore, was more appropriate for criminal matters, which are largely the concern of the states. *Patterson* was more consistent with *Medina's* acknowledgement that, "because the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition, it is appropriate to exercise substantial deference to legislative judgments in this area."[302] *Medina* reiterated that the Federal Due Process Clause does not empower the Court to create a code of criminal procedure for state courts; broad expansion of federal constitutional guarantees under the "open-ended rubric of the Due Process Clause"[303] would unduly interfere with state legislative judgments and the careful balance between liberty and order. Thus, the Court has "'defined the category of infractions that violate "fundamental fairness" very narrowly' based on the recognition that '[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.'"[304]

The *Medina* Court also identified several considerations relevant to the *Patterson* due process analysis.[305] The Court said "[h]istorical practice is probative of whether a procedural rule can be characterized as fundamental."[306] Contemporary practice, or the procedures adopted by the federal government and all the states, was considered of some, but "limited relevance to the due process inquiry."[307] *Medina* also deemed important

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302. *Medina*, 505 U.S. at 445-46.
303. *Id.* at 443.
304. *Id.* (quoting Dowling v. United States, 493 U.S. 342, 352 (1990)).
305. *Id.* at 445-46.
306. *Id.* at 446.
307. *Id.* at 447.

The *Medina* concurring opinion expressed the view that "[t]he balancing of equities that *Mathews v. Eldridge* outlines remains a useful guide in due process cases" for evaluating state criminal procedures. *Medina*, 505 U.S. at 453 (O'Connor, J., concurring). The concurrence agreed with the majority that "historical pedigree" was relevant, although it provided only a rebuttable presumption of constitutionality. *Id.* The concurrence suggested that the majority's consideration of "recognized principle[s] of 'fundamental fairness' in operation" allowed "some weight to be given countervailing considerations of fairness in operation, considerations much like those we evaluated in *Mathews*." These countervailing considerations could rebut the presumption provided by history. *Id.* at 454 (O'Connor, J., concurring). On the merits, the concurring opinion agreed that the balance of equities did not rebut the presumption of constitutionality based on history. *Id.* at 454-55.

The *Medina* dissent also stated that the Court's *Patterson* analysis included "the basic balancing of the government's interests against the individual's interest that is germane to any due process inquiry," *id.* at 460 (Blackmun, J., dissenting), and that "the Court ends up engaging in a balancing inquiry not meaningfully distinguishable from that of the Mathews v. Eldridge test . . . ." *Id.* at 462.

analogous Supreme Court precedent and "whether the rule transgresses any recognized principle of 'fundamental fairness' in operation."[308]

2. Supreme Court Decisions on State Court Jury Instructions and Due Process

Most Supreme Court decisions about the constitutionality of erroneous state court jury instructions are entirely consistent with the *Medina-Patterson* analysis. On the other hand, a 1993 Supreme Court majority opinion, if read literally, might raise doubts about whether state court instructions not related directly to the prosecution's burden of proof can ever violate the Federal Constitution in noncapital cases. However, as discussed below, that broad reading would seem inappropriate.

Cases on the constitutionality generally of state court jury instructions deserve brief discussion, as they impact on the more precise question of the constitutionality of state LIO instructions.

Estelle v. McGuire. In *Estelle v. McGuire*,[309] the Supreme Court held that state court jury instructions on prior injury evidence did not violate

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308. *Id. Medina* analyzed these factors to support its holding: (1) There was no "settled tradition" on the burden of proof on competence at common law before the Constitution was adopted nor a consistent view on the matter in nineteenth century English cases; (2) there was no uniformity among the states on the allocation of the burden of proof. In Herrera v. Collins, 113 S. Ct. 853 (1993), the Supreme Court followed the *Medina-Patterson* analysis in holding that, absent an independent constitutional violation, a state defendant's assertion of actual innocence based on newly discovered evidence was not grounds for federal habeas relief ten years after his conviction, during which time the defendant had challenged the conviction several times in state and federal court. The state court's refusal to hear a newly discovered evidence claim long after conviction did not violate "a principle of fundamental fairness 'rooted in the traditions and conscience of our people.'" *Id.* at 866 (quoting *Patterson*, 432 U.S. at 202). *Herrera* also concluded that "'[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.'" *Id.* at 860 (quoting *Patterson*, 432 U.S. at 208). "To conclude otherwise would all but paralyze our system for enforcement of the criminal law." *Id.*

Based on all the *Herrera* opinions, it does seem that a majority of the Court agrees that executing a factually innocent person would violate substantive due process. (A majority of the Court also thought the evidence clearly showed that the defendant Herrera was not innocent.) *See* Chief Justice Rehnquist's majority opinion at 869-70; Justice O'Connor's opinion at 871-74; Justice White's opinion at 875. As Justice O'Connor noted, however, executing an innocent person was not the issue before the court; instead it was: "whether a fairly convicted and therefore legally guilty person is constitutionally entitled to yet another judicial proceeding in which to adjudicate his guilt anew, 10 years after conviction, notwithstanding his failure to demonstrate that constitutional error infected his trial." *Id.* at 870 (O'Connor, J., concurring) (citing majority opinion at 860 and 864 n.6).

309. 502 U.S. 62 (1991). The federal appeals court had concluded that the introduction of prior injury evidence and the related jury instructions allowed the jury to convict based on a judgment that the defendant had committed prior acts of violence against the victim. The appeals court held this constituted constitutional error reviewable on federal habeas.

due process and, therefore, were not cognizable on federal habeas review. The Court quoted earlier cases as stating the standards for state jury instructions: "[I]t must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some [constitutional] right."[310] More precisely, the *Estelle* Court felt that "[t]he only question for us is 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process,'"[311] or "'so infused the trial with unfairness as to deny due process of law.'"[312] The Court also recalled "our previous admonition that we 'have defined the category of infractions that violate "fundamental fairness" very narrowly'" and that "[t]he Due Process Clause has limited operation."[313]

This *Estelle* reasoning is similar to *Medina* and *Patterson.* In addition, cases quoted in *Estelle* were also cited in *Medina.*[314] Indeed, *Estelle* was decided the same term as *Medina* and was itself cited by *Medina* to support using the *Patterson* due process analysis. This collection of opinions shows the Court understood and intended that state court jury instruction cases, like *Estelle*, should use the due process analysis articulated more generally in *Medina* and *Patterson.* Likewise, this due process analysis should be used for the state court LIO instruction issue.

Gilmore v. Taylor. More recently than *Estelle v. McGuire*, however, the Supreme Court's opinion in *Gilmore v. Taylor*[315] may suggest an even more restrictive due process analysis for state court jury instructions. If broad language in *Taylor's* majority opinion is read literally, it might be taken to suggest that those instructions can never violate due process in noncapital cases. This would certainly mean that state LIO instructions would not raise due process issues in noncapital cases. However, such a broad reading is inconsistent with other Court opinions, indicating that the

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310. *Id.* at 72 (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974) (internal quotation marks omitted)). *See also* Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983), cited in *Estelle*, 502 U.S. at 72.

311. *Id.* (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973); also citing Henderson v. Kibbe, 431 U.S. 145, 154 (1977)).

312. *Estelle*, 502 U.S. at 75 (quoting Lisenba v. California, 314 U.S. 219, 228 (1941)). As the Court emphasized later in *Medina* and *Patterson*, *Lisenba* stated, "[a]s applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." 314 U.S. at 236.

313. *Estelle*, 502 U.S. at 73 (quoting Dowling v. United States, 493 U.S. 342, 352 (1990)).

314. Like *Estelle*, *Medina* relied on Dowling v. United States, 493 U.S. 342, 352 (1990), and Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983), among other cases. 505 U.S. at 443.

315. 113 S. Ct. 2112 (1993). *See* discussion of *Taylor*, *supra* notes 109-24 and accompanying text.

Court's language in *Taylor* must be read cautiously and in context. In addition, the situation in *Taylor* may be distinguished from the LIO cases.

Taylor held that a federal appeals court decision (which had concluded that state law instructions regarding murder and manslaughter violated due process[316]) announced a new rule, which was not foreshadowed by earlier Supreme Court cases and, therefore, would not apply on federal habeas review under *Teague v. Lane*.[317] The main aspect of *Taylor's* rationale was that the state court's manslaughter instructions were consistent with the Court's burden of proof decisions following *In re Winship*,[318] because under state law the manslaughter passion-provocation concepts involved in the instructions were matters of affirmative defense and were unrelated to the elements of the crime of murder. Because of this consistency with *Winship*, *Taylor* reasoned that the federal decision invalidating the instructions was not foreshadowed by the Court's earlier decisions.

This reasoning shows an important distinction between *Taylor* and LIO cases. Unlike the manslaughter provocation-passion concepts in *Taylor*, the differences between charged crimes and LIOs *relate directly to the elements* of the state crimes. Therefore, LIO instructions *do* relate to essential elements of the crimes and affect the prosecution's burden of persuasion under *Winship*. It should be recalled that a significant concern of *Beck* and the earlier *Keeble* case was that the lack of LIO instructions would threaten to undermine the due process requirement that the jury find the elements of the charged offense beyond a reasonable doubt.[319] Because of this distinction from LIO cases, *Taylor*, narrowly read, would not support a conclusion that state LIO instructions fail to raise constitutional issues in noncapital cases.

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316. In Falconer v. Lane, 905 F.2d 1129 (7th Cir. 1990), the Seventh Circuit held that the instructions violated due process, because they allowed the jury to convict of murder without even considering evidence that might have clearly shown defendant was instead entitled to a manslaughter verdict. *Falconer* reasoned that although manslaughter was an affirmative defense to a murder charge under state law, the case did not turn on the question of burden of proof. Therefore, the circuit court deemed irrelevant cases holding that the Constitution allowed states to place the burden on the defendant to prove an affirmative defense. Instead, the constitutional defect seen in *Falconer* was that the order and structure of the murder-manslaughter instructions effectively eliminated manslaughter as a crime. Under the instructions, even if the jury might have found that the evidence proved only manslaughter, the jury would never get to that point because it would already have convicted of murder. *Id.*

317. 489 U.S. 288 (1989).

318. 397 U.S. 358 (1970). *See also* Martin v. Ohio, 480 U.S. 228 (1987); Patterson v. New York, 432 U.S. 197 (1977).

319. *See supra* notes 43-46, 53-57 and accompanying text.

Some of the *Taylor* majority's broad language, however, suggests that state court jury instructions never raise federal constitutional issues. For example, *Taylor* suggested that the Court's *Cupp v. Naughten*[320] standard only applied to instructions related to the prosecution's burden of proof under *Winship*. Although *Cupp* was itself a "*Winship*-type" case, the standard it articulated applies generally to whether erroneous jury instructions violate due process. The general applicability of *Cupp's* due process analysis is also supported by the wide variety of jury instruction cases in which the Supreme Court and lower federal courts have cited *Cupp*, most recently, *Estelle v. McGuire*.[321]

Other seemingly overbroad language in the *Taylor* majority opinion appears in as its response to the argument that the appeals court decision was foreshadowed by *Boyde v. California*.[322] There *Taylor* stated:

> Nevertheless, *Boyde* was a capital case .... Outside of the capital context, *we have never said that the possibility of a jury misapplying state law gives rise to federal constitutional error.* To the contrary, [in *Estelle v. McGuire*] we have held that instructions that contain errors of state law may not form the basis for federal habeas relief.[323]

Later, in rejecting an argument that cases recognizing a constitutional right to a meaningful opportunity to present a complete defense foreshadowed the court of appeals decision, the *Taylor* majority stated: "[S]uch an expansive reading of our cases would make a nullity of the rule reaffirmed in *Estelle v. McGuire* ... that instructional errors of state law generally may not form the basis for federal habeas relief."[324]

These statements are overbroad if read as absolute. They emphasize the majority's point and its rejection of the appellate court's reasoning, but do not take into account the broader implications or the possible application of these comments if taken literally. Justice O'Connor appropriately challenged the majority in her concurring *Taylor* opinion:

> Although the Court's opinion today might be read as implying that erroneous jury instructions may never give rise to constitutional error outside of capital cases ... such an implication would misconstrue our precedent. When the Court states that "instructions that contain errors of state law may not form the basis for federal habeas relief" ... (citing *Estelle v. McGuire, supra*), it must

320. 414 U.S. 141, 147 (1973).
321. 502 U.S. 62, 72 (1991), discussed *supra* notes 309-14 and accompanying text.
322. 494 U.S. 370 (1990).
323. Gilmore v. Taylor, 113 S. Ct. 2112, 2117-18 (emphasis added) (citations omitted).
324. *Id.* at 2118-19.

> mean that a mere error of state law, one that does not rise to the level of a constitutional violation may not be corrected on federal habeas. Some erroneous state-law instructions, however, may violate due process and hence form the basis for relief, even in a noncapital case.[325]

This view seems persuasive. The Court's decisions in cases such as *Estelle v. McGuire* and *Cupp v. Naughten* show that state court jury instructions may violate due process even when they do not involve *Winship*-type issues. Thus, in the end, *Taylor* would not itself afford an appropriate basis for refusing to extend the *Beck* LIO rule into noncapital cases under a general due process analysis. The *Medina-Patterson* due process analysis is the appropriate means to determine this issue.

3. *Beck v. Alabama* and Noncapital Cases under the *Medina-Patterson* Analysis

As noted above, *Beck* followed the same type of due process analysis as *Medina*[326] without delineating clearly whether it relied broadly on due process or, more narrowly, on the Eighth Amendment.[327] *Beck* did not

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325. *Id.* at 2121 (O'Connor, J., concurring). The dissenting opinion stated similarly: "The Court implies . . . that the *Boyde* standard might be confined to capital cases. The Court's citation of *Estelle v. McGuire*, however, belies that implication . . . ." *Id.* at 2125 n.2 (Blackmun, J., dissenting) (citations omitted). *See also* Victor v. Nebraska, 114 S. Ct. 1239, 1241, 1243 (1994) (citing *Estelle* in a noncapital case in which the Court upheld state court instructions defining reasonable doubt).

326. In Schad v. Arizona, 501 U.S. 624 (1991), the Supreme Court also used this due process analysis, but not to resolve the LIO issue presented in that case. Instead, the *Schad* majority used the analysis on the first issue in that case, which was whether instructions that did not require the jury to agree on alternate theories of premeditated murder and felony-murder violated due process. The majority concluded: "Such historical and contemporary acceptance . . . is a strong indication that they do not offen[d] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 642 (quoting *Patterson*, 432 U.S. at 202 (internal quotation marks omitted)). Justice Scalia, concurring in *Schad*, asserted even more strongly the significance of history: "It is precisely the historical practices that *define* what is 'due.'. . . [I]t is impossible that a practice as old as the common law and still in existence in the vast majority of States does not provide that process which is 'due.'" *Schad*, 501 U.S. at 650-51 (Scalia, J., concurring). He suggested that fundamental fairness analysis might appropriately be applied only to determine the validity of departures from traditional process and procedure. *Id.* at 650.

With regard to the LIO issue, *Schad* simply discussed application of the *Beck* rule, without undertaking a general due process analysis, because *Schad* was itself a capital case. The Court did not need to consider whether to extend *Beck* and apply a broad due process LIO rule in noncapital cases. For a detailed discussion of *Schad*, see *supra* notes 77-85 and accompanying text.

327. That *Beck* is unclear about the constitutional basis for its decision is understandable, because the Supreme Court's Eighth Amendment cruel and unusual punishment analysis (used in death penalty cases) is similar to the due process analysis discussed in the text. For

state that preclusion of an LIO instruction offended fundamental principles of justice rooted in our traditions and conscience, but it did discuss the considerations deemed relevant in *Medina*: historical and contemporary practice, recognized principles of fundamental fairness in operation, and the Court's own precedent.

Beck first discussed the acceptance of the LIO doctrine at common law, initially as an aid to the prosecution, but also as a benefit to the defendant.[328] It acknowledged the long acceptance of the doctrine in federal court, by statute, court rule, and under the Court's precedent.[329] *Beck* recognized that all state courts that had addressed the issue held that defendants were entitled to LIO instructions warranted by the evidence.[330] Although it reserved the question whether due process generally entitled defendants to LIO instructions, *Beck* did remark that the "the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard."[331] *Beck* then discussed why LIO instructions were necessary to prevent uncertainty and unreliability in the factfinding process, to prevent erroneous verdicts, and to ensure the benefits of the reasonable doubt standard. All of these concerns reflect recognized principles of importance in assessing fundamental fairness.[332]

a. Historical Pedigree of the LIO Doctrine

In *Medina*, the Court identified "[h]istorical practice" as "probative of whether a procedural rule can be considered as fundamental" under the

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example, in Woodson v. North Carolina, 428 U.S. 280, 288 (1976), the plurality opinion stated that the Eighth Amendment limits the state's power to punish only within civilized standards, which entails determining contemporary societal standards regarding infliction of punishment. Like the factors under the *Medina-Patterson* due process analysis, indicia of societal standards or values under cruel and unusual punishment include history and traditional usage, legislative enactments, and jury determinations. Also, the fairness, reliability, rationality, and avoidance of arbitrariness concerns that underlie the death penalty cases are due process-like concerns.

328. Beck v. Alabama, 447 U.S. 625, 633 (1980). *But see* Bagby v. Sowders, 894 F.2d 792, 799 (6th Cir.), *cert. denied*, 496 U.S. 929 (1990) (concurring opinion commented that *Beck's* reference to the universal acceptance of the LIO doctrine was simply recognizing "a settled principle of common law not of constitutional significance").

329. *Beck*, 447 U.S. at 634-35. The Court quoted from Keeble v. United States, 412 U.S. 205, 212-13 (1973), but noted that the principle was first announced in Stevenson v. United States, 162 U.S. 313, 323 (1896), and also quoted Berra v. United States, 351 U.S. 131, 134 (1956). Regarding current federal statutory law, the Court noted that FED. R. CRIM. P. 31(c) granted the defendant a right to an LIO instruction when warranted by the evidence.

330. In support of this recognition of contemporary acceptance of the doctrine, *Beck* cited cases from 46 states. 447 U.S. at 636 n.12.

331. *Id.* at 637.

332. *Id.* at 638-46.

Patterson due process standard.[333] The historical pedigree of the LIO doctrine is well-recognized. Thus, the *Beck* Court observed, "[a]t common law the jury was permitted to find the defendant guilty of any lesser offense necessarily included in the offense charged."[334] The truth of this statement is clear from the common law treatises cited by the *Beck* Court, as well as from other writings and from the common law cases in England and America.[335] Although at early common law felonies generally were punishable by death, common law sources did not suggest that the jury's authority or the defendant's entitlement to LIO verdicts was somehow limited to capital cases or was based on a death-is-different need for special procedures to ensure reliable capital verdicts. On the other hand, these authorities at most only hint at the rationale underlying *Beck* and *Keeble*, the "modern" LIO cases discussing the possibility of a general due process right to LIO instructions.

As early as 1724, Hawkins' *Treatise of the Pleas of the Crown* recognized that on an indictment charging murder courts upheld jury findings that defendants were not guilty of murder, but guilty of manslaughter, or other lesser homicides, if the evidence warranted.[336] This concept was expanded in later editions of Hawkins' treatise to recognize

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333. Medina v. California, 505 U.S. 437, 445 (1992).

334. 447 U.S. at 633.

335. *Beck* cited 2 M. HALE, PLEAS OF THE CROWN 301-02 (1736); 2 W. HAWKINS, PLEAS OF THE CROWN 623 (6th ed. 1787); 1 J. CHITTY, CRIMINAL LAW 250 (5th Am. ed. 1847); 1 T. STARKIE, TREATISE ON CRIMINAL PLEADING 351-352 (2d ed. 1822). 447 U.S. at 633 n.9. This historical pedigree is also discussed in recent state court decisions. For example, in Brown v. State, 206 So. 2d 377, 380 (Fla. 1968), the Supreme Court of Florida discussed old English cases "as illustrative of the common law decisional bases for the Florida statutory provisions" that were at issue there. *Brown* began this historical discussion by remarking that LIO situations have "challenged the effective administration of criminal justice for centuries. It is as old as the common law. Indeed, Blackstone tells us that there were recognized degrees of guilt which distinguished the seriousness of offenses . . . even among the Gothic and Roman predecessors of the common law. BLACKSTONE'S COMMENTARIES, Lewis ed. Vol 2, p. 1587 (1898)." *Id. See also, e.g.*, Commonwealth v. Jones, 319 A.2d 142, 144-48 (Pa.), *cert. denied*, 419 U.S. 1000 (1974). *Jones* discussed the history of homicide offenses, including: the division of felonious homicides in England into murder and manslaughter; the English rule that a defendant could be convicted of manslaughter on an indictment charging murder (citing the cases and commentators discussed herein); and comparable American LIO authorities. The court also discussed the 1794 Pennsylvania statute, which divided murder into two degrees without abrogating the jury's authority to convict of only the lesser crime. *Id.*

336. 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 439-40 (2d ed. 1724). Hawkins also stated that the jury could not simply find the defendant guilty of manslaughter without any express statement as to the murder, because then the verdict would only be for part and therefore would be void. *Id.* at 440. He recognized, however, that others had not said anything about the need for an express verdict as to murder. *Id.*

verdicts for lesser offenses in several other situations.[337] Likewise, at least by 1736, Hale's *Pleas of the Crown* reflected basically the same list of permissible lesser offense verdicts as did Hawkins.[338] Joseph Chitty's *Practical Treatise on the Criminal Law* stated that "without the addition of several counts, the jury may frequently find the prisoner guilty only of a minor offence included in the charge . . . "[339] and, "where the accusation includes an offence of inferior degree, the jury may discharge the defendant of the higher crime, and convict him of the less atrocious."[340] Among the examples given were manslaughter on a murder indictment, theft on a robbery indictment, and others like those mentioned by Hawkins and Hale.[341]

These early treatises impliedly lend support to the statement in *Beck* that the LIO rule was originally intended to benefit the prosecution when its evidence failed to prove some element of the offense charged, but nonetheless proved a lesser offense.[342] The treatises speak of the jury having the authority to convict of a lesser offense, without mentioning that the defendant had a right to insist that the jury be told it could consider the alternative of acquitting on the greater and convicting on the lesser

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337. Among the situations in which Hawkins recognized the validity of lesser verdicts were conviction of stealing goods of a certain value on an indictment for stealing a higher value, conviction "of the felony" on an indictment for robbery by putting in fear, conviction of common law manslaughter on an indictment for statutory offense of stabbing, and conviction of murder or manslaughter on an indictment for treason. 2 WILLIAM HAWKINS, PLEAS OF THE CROWN 623-24 (6th ed. 1787), *cited in Beck* 447 U.S. at 633 n.9.

338. 2 MATTHEW HALE, PLEAS OF THE CROWN 301-02 (1736), *cited in Beck*, 447 U.S. at 633 n.9. The same discussion appears in the first American edition of Hale's treatise, 2 M. HALE, PLEAS OF THE CROWN 301-02 (1st Am. ed. 1847).

339. 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 250 (3d Am ed. from 2d & last London ed. 1836). The earlier editions of Chitty's treatise (the first American edition was published in 1819) would seem to be the same. A somewhat later edition, 1 J. CHITTY, CRIMINAL LAW 250 (5th Am. ed. 1847), was cited in *Beck*, 447 U.S. at 633 n.9.

In addition to the sources cited here, *Beck* cited THOMAS STARKIE, A TREATISE ON CRIMINAL PLEADING 351-52 (2d ed. 1824), for the same propositions. Other early treatises are comparable. *See, e.g.*, JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW 476-91 (7th ed. 1882); WILLIAM L. CLARK, JR., HANDBOOK ON CRIMINAL LAW 45-46 (3d ed. 1915); HALSBURY'S LAWS OF ENGLAND 175-77 (2d Hailsham ed. 1933), *cited in* Brown v. State, 206 So. 2d 377, 380 (Fla. 1968).

340. 1 CHITTY, *supra* note 339, at 637-38.

341. *Id.* at 250, 637-38. Hawkins and Chitty also recognized a limitation on the jury's power to convict of a lesser offense; that on a felony indictment the jury could not return a conviction of "trespass" (a misdemeanor). 2 HAWKINS (2d ed. 1724), *supra* note 336, at 440; 1 CHITTY (3d Am. ed 1836), *supra* note 339, at 638. This limitation on the early English LIO rule was not followed in America. *See infra* notes 354-72 and accompanying text.

342. *Beck*, 447 U.S. at 633.

only.[343] Hawkins' 1724 edition is the most explicit on this point, stating that when the jury finds a defendant not guilty of murder, "they are not bound to make any Inquiry, whether he be guilty of Manslaughter, But that if they will they may, according to the Nature of the Evidence, find him guilty of Manslaughter . . . ."[344] The reasons given for the propriety of the lesser offense verdicts also suggest a prosecution-oriented rule. The lesser verdict rule seems to have been an application of more general concepts about the nature of criminal charges and about nonfatal, nonmaterial variances between indictment and the prosecution's evidence. If a lesser crime is included in the crime charged in the indictment, proof of that lesser crime does prove some of what was charged and the unproved residue (the elements of the greater not part of the lesser) are considered nonmaterial.[345] A lesser crime within the greater crime

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343. *But see* Commonwealth v. Jones, 319 A.2d 142 (Pa.), *cert. denied*, 419 U.S. 1000 (1974), where the Pennsylvania Supreme Court stated that the purpose of the common law rule authorizing a manslaughter conviction on a murder indictment was two-fold:

> First, it was intended to prevent the prosecution from failing where some element of the crime of murder was not made. Second, it was designed to redound to the benefit of the defendant, since its effect is actually to empower the jury to extend mercy to an accused by finding a lesser degree of crime than is established by the evidence.

Id. at 146 (footnotes omitted). Emphasizing the jury's mercy dispensing power, the Pennsylvania court held that in a murder case the trial judge must instruct on voluntary manslaughter regardless of whether the evidence would warrant that verdict. The court recognized that this rule was not strictly required by the LIO doctrine, because that doctrine required an evidentiary basis for the LIO instruction. *Id.* at 147-48.

Before *Jones*, the Pennsylvania Supreme Court had upheld unguided trial court discretion whether to give the manslaughter instruction without evidence. That practice was limited on due process grounds by the result of United States *ex rel.* Matthews v. Johnson, 503 F.2d 339 (3d Cir. 1974), *cert. denied*, 420 U.S. 952 (1975), discussed *supra* notes 152, 208, 213. The current status of Pennsylvania law on the manslaughter instruction is unsettled. *See, e.g.*, Lesko v. Lehman, 925 F.2d 1527, 1552 & n.24 (3d Cir.), *cert. denied*, 502 U.S. 898 (1991); Commonwealth v. Zettlemoyer, 454 A.2d 937, 966-67 (Pa. 1982), *cert. denied*, 461 U.S. 970 (1983).

344. 2 HAWKINS (2d ed. 1724), *supra* note 336, at 439.

345. Regarding the manslaughter verdict on a murder indictment, Hawkins stated, "the Killing is the Substance, and the Malice but a Circumstance, a Variance as to which hurts not the Verdict." 2 HAWKINS (2d ed. 1724), *supra* note 336, at 439-40. Hale stated generally that "[t]he jury . . . may find the defendant guilty of part, and not guilty of the rest, or may find the defendant guilty of the fact, but vary in the manner." 2 HALE (1st Am. ed. 1847), *supra* note 338, at 301-02. Chitty remarked as to the jury's ability to convict of a lesser crime:

> [I]t is the general rule which runs through the whole criminal law, that it is sufficient to prove so much of the indictment as shews that the defendant has committed a substantive crime therein specified; and in the case of redundant allegations it is sufficient to prove part of what is alleged according to its legal effect, provided that which is alleged, but not proved, be neither essential to the charge, nor describe or limit that which is essential.

explicitly charged in the indictment is also charged. This is shown most clearly when the indictment actually referred to the lesser in describing the greater (*e.g.*, assault with intent to murder or kill or ravish refer to assault); both the greater and the lesser are stated in the charge and either or both can be found by the jury.[346] As the Supreme Court of Florida stated in referring to the early treatise writers and English cases, "it is sufficient simply to prove so much of the charge as constitutes an offense punishable at law."[347]

Although this view of the LIO doctrine emphasizes the benefit to the prosecution, the effect of or reason for the benefit was that the jury's lesser offense verdict was a more accurate assessment of the defendant's guilt as shown by the evidence. The LIO rule benefited the prosecution, but the underlying interest or value served by it was the reliability of the guilt determining process. This was the very interest on which *Beck* based its holding of constitutional entitlement to LIO instructions.

The common law treatises discussed above collected numerous cases to support the propositions stated.[348] Without purporting to be exhaustive in describing the cases, the pattern of this case law is instructive. For example, in *The King v. Withal & Overend*,[349] a 1772 English case in which the defendant objected to the lesser verdict, the court upheld a conviction of stealing a box of money on an indictment charging burglary of a dwelling and stealing the box, where the evidence was strong on the

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1 CHITTY, *supra* note 339, at 250. Later in the same work, Chitty remarked similarly that "[t]he jury may acquit the defendant of a part, and find him guilty of the residue. . . . [W]here from the evidence it appears that the defendant has not been guilty to the extent of the charge specified, he may be found guilty as far as the evidence warrants, and be acquitted as to the residue . . . . And where the accusation includes an offense of inferior degree, the jury may discharge the defendant of the higher crime, and convict him of the less atrocious." 2 CHITTY, *supra* note 339, at 637-38. It may also be instructive that the discussions in Chitty appear under headings "When a part of a count may be found" and "Partial verdict." This treatise was cited often by the early American cases discussed hereafter.

346. *See also* Hunter v. Commonwealth, 79 Pa. 503, 507 (1875). In addition, the English common law rule against conviction of trespass on a felony indictment was based on concern that by charging the felony and proving the misdemeanor, the prosecution would deprive the defendant of procedural rights and protections attached to the lesser charges. *See infra* notes 360-66 and accompanying text. That is, the exception to the ancient lesser verdict rule was for the benefit of the defendant, while the rule itself benefited the prosecution.

347. Brown v. State, 206 So. 2d 377, 380 (Fla. 1968).

348. *See, e.g.*, *Brown*, 206 So. 2d at 380, stating that "[t]he English cases support the text-writers." In support of this statement, *Brown* cited and discussed several cases, including: Mackalley's Case, 77 Eng. Rep. 824, 828, 832 (K.B. 1611); Regina v. Greenwood, 7 Cox C.C. 404 (Assizes 1857); Regina v. French, 14 Cox C.C. 328 (Assizes 1879); Rex v. Hunt, 170 Eng. Rep. 1260 (K.B. 1811); Rex v. Hollingsberry, 107 Eng. Rep. 1081 (K.B. 1825).

349. 168 Eng. Rep. 146 (K.B. 1772).

stealing, but defective as to the breaking required for burglary. The court rejected defendant's argument that the conviction was invalid because there was no count in the indictment charging stealing, reasoning that the burglary indictment, as written, alleged all the elements of stealing. Similarly, in the 1811 English case of *Rex v. Hunt*,[350] over the defendant's objection the court upheld a lesser conviction of publishing a libel where the information charged the more aggravated offense of composing, printing, and publishing the libel. In *Salisbury Case*,[351] an English court in 1816 upheld a conviction of manslaughter on an indictment charging murder, over the defendant's objection. Basically, the court considered malice prepense simply as the element that aggravated a killing to murder, so that if the jury found defendant guilty of the substance, the killing, but not this additional element, a manslaughter verdict was proper.[352] Although *Salisbury Case* is from the early nineteenth century, it relied on an even earlier, seventeenth century decision.[353]

American courts stated and applied the common law LIO rule dating back to the early 1800s, and perhaps earlier.[354] Some jurisdictions had

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350. 170 Eng. Rep. 1260 (K.B. 1811). The opinion contains language like that in the treatises discussed above. *See also Brown*, 206 So. 2d at 380, discussing *Hunt* and other similar cases.

351. Matters of the Crown Happening at Salop (Salisbury Case), 75 Eng. Rep. 152 (K.B. 1816).

352. Similar to the reasoning articulated by the treatise writers discussed above, the court reasoned:

> [T]he substance of the matter was, whether he killed him or not, and the malice prepense is but matter of form or the circumstance of killing. And although the malice prepense makes the fact more odious, . . . yet it is nothing more than the manner of the fact, and not the substance of the fact, . . . if the jurors find the substance and not the manner, yet judgment shall be given according to the substance.

Salisbury Case, 75 Eng. Rep. at 160.

353. Mackalley's Case, 77 Eng. Rep. 824, 828, 832 (K.B. 1611). This case did not involve a lesser offense verdict, but its dictum is relevant. In the course of discussing material and nonmaterial variances between the indictment and the evidence, the court stated:

> So if one is indicted of the murder of another upon malice prepense, and he is found guilty of manslaughter, he shall have judgment upon this verdict, for the killing is the substance, and the malice prepense the manner of it; and when the matter is found, judgment shall be given thereupon, although the manner is not precisely pursued . . . .

Id. at 832-33. This situation was considered akin to one in which the indictment alleged killing with one type of weapon and the evidence proved another type. Basically, the issue was treated simply as a species of the variance cases, involving the issue of whether the variance between the indictment and the evidence was fatal or material.

354. *See, e.g.*, Hunter v. Commonwealth, 79 Pa. 503 (1875) (upholding conviction of simple assault on indictment charging assault with intent to murder and discussing the history of the LIO doctrine in America and particularly in Pennsylvania); Harman v. Commonwealth,

LIO statutes, but the statutes simply codified the traditional common law rule.[355] Many American cases cited as authority the treatises and English cases discussed above.[356] This shows a continuity of acceptance of the LIO doctrine dating from before the adoption of the Constitution and the Bill of Rights, including the original Fifth Amendment Due Process Clause.

The early American cases did not clearly discuss the rationale underlying the LIO doctrine. Although conclusorily written, the underlying

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12 Serg. & Rawle 69 (Pa. 1824) (discussing the history of the LIO rule in Pennsylvania, including cases dating back to 1772; upholding assault with intent to rape conviction on rape indictment); State v. Coy, 2 Aik. 180 (Vt. 1827) (discussing LIO history in opinion upholding simple assault on charge of assault with intent to commit murder); Watson v. State, 43 S.E. 32 (Ga. 1902) (discussing the history of the "American rule" on LIOs). *Watson* affirmed a conviction of a statutory offense, "shooting at another," where the defendant was indicted for murder. It rejected defendant's argument that this verdict was not legally permissible on a murder indictment. The court recognized that the English common law rule, allowing the jury to acquit of the offense charged and convict of a lesser offense included within it, was also the "American rule," except that American courts had rejected the English qualification with respect to misdemeanors. *Id.* at 33-34. *Watson* also recognized that many states had statutes codifying the LIO rule, but "these statutes were only declaratory of the common-law rule, and the rule stated in the statutes was just as much of force in those states as if there had been no statutes . . . ." *Id.* at 34.

For examples of early American cases applying the LIO doctrine, see State v. Shepard, 7 Conn. 54 (1828) (involving assault with intent to rape as LIO of rape); Johnson v. State, 14 Ga. 55 (1853) (dealing with rape and assault with intent to rape); Benham v. State, 1 Iowa (Clarke) 542 (1855) (upholding assault conviction on indictment for disfiguring; concluding that defendant may be found guilty of offense necessarily included in the one charged though no words in indictment specifically designate the included offense); State v. Gordon, 3 Iowa (Clark) 409 (1857) (noting that common law rule that manslaughter could be found on murder indictment was not changed by state statute); State v. Waters, 39 Me. 54 (1854) (upholding conviction of assault with intent to kill on indictment for assault with intent to murder); State v. Flannigan, 6 Md. 167 (1854) (upholding manslaughter conviction on indictment for murder, although jury did not explicitly acquit of murder, because conviction of manslaughter necessarily implies not guilty finding on higher offense); Commonwealth v. Griffin, 38 Mass. (21 Pick.) 523 (1839) (involving conviction of possession of less than 10 counterfeit coins on charge of possession of more than 10); Commonwealth v. Drum, 36 Mass. (19 Pick.) 479 (1837) (upholding an indictment for rape and conviction of assault and battery); Commonwealth v. Cooper, 15 Mass. 187 (1818) (same); King v. State, 4 Miss. (5 Howard) 727 (1841) (statute dividing murder into degrees did not abolish common law rule that on murder indictment defendant could be acquitted of murder and convicted of manslaughter); Watson v. State, 5 Mo. 283 (1838) (same); State v. Taylor, 3 Or. 10 (1868) (upholding jury instruction and conviction of simple larceny on indictment charging larceny from the person); State v. Mueller, 85 Wis. 203, 55 N.W. 165 (1893) (holding rape charge necessarily included assault with intent to commit rape so that conviction of lesser upheld on indictment of greater).

355. *See supra* note 354; *infra* note 365.

356. Some of the English common law treatises were reprinted in this country in "American editions." *See, e.g.*, JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW (1st Am. ed. 1819; 2d Am. ed. 1832; 3d Am. ed. 1836, reprinted from 2d and last London ed.); MATTHEW HALE, PLEAS OF THE CROWN (1st Am. ed. 1847). Chitty's treatise seems to have been especially influential in the American state courts.

reasons appear to be those exhibited in the English authorities.[357] Most of these earlier American cases applied the rule to the benefit of the prosecution, without expressly stating that as the purpose of the doctrine. The reported decisions upheld lesser offense verdicts over defense objections and otherwise furthered prosecutorial interests similar to those discussed above.[358] A few cases suggested a need to allow lesser offense convictions to protect the prosecution from later double jeopardy arguments that would inappropriately free guilty defendants. Acquittal of the greater would bar later prosecution for the lesser, because the greater offense included the lesser and the lesser offense was seen to merge into the greater. Therefore, the jury needed the authority to convict of the lesser in a prosecution for the greater, otherwise the defendant could avoid a justified conviction.[359]

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357. *See, e.g.,* Benham v. State, 1 Iowa (Clarke) 542, 545 (1855); Commonwealth v. Griffin, 38 Mass. (21 Pick.) 523, 525 (1839) (it is sufficient to prove so much of the charge as constitutes an offense); State v. Taylor, 3 Or. 10, 12 (1868) (indictment charging larceny from the person also charged all the facts that constitute lesser offense of simple larceny); Hunter v. Commonwealth, 79 Pa. 503, 507 (1875) (where lesser is included within greater crime charged in indictment, the jury may convict the defendant of the lesser); State v. Coy, 2 Aik. 180, 183 (Vt. 1827) (where a lesser offense is included in the greater offense charged in the indictment, "no good reason can be assigned, why the government or the prisoner should be subjected to the additional expense and trouble of a second indictment.").

358. *See, e.g.,* cases cited *supra* note 354. Since these cases arose because defendants were objecting to LIO verdicts, rather than seeking the LIO verdicts, it would seem that these defendants did not think the doctrine was for their benefit. At least these defendants seem to have preferred the all-or-nothing choice of conviction of the greater offense or outright acquittal. Indeed, at least one early case suggested that a defendant would benefit and the prosecution would be harmed by the all-or-nothing approach that did *not* give an LIO instruction, because then the jury would acquit if it concluded that the evidence failed to prove the greater. State v. Stedman, 7 Port. 495 (Ala. 1838) (court noted that trial judge misstated the law when it instructed jury that defendant indicted for assault with intent to murder could not be guilty of the LIO of simple assault and battery; however, the court found no prejudice because the jury would acquit, whereas if properly instructed the jury might convict of simple assault and battery). Clearly, this court was not adopting a *Beck*-like rationale. Years later, the same court recognized that failure to give an LIO instruction would be wrong, because that would preclude the jury from convicting of the lesser crime. Richardson v. State, 54 Ala. 158 (1875) (under indictment for rape, defendant could also be convicted of assault with intent to rape and simple assault and battery). However, in *Richardson*, rather than requesting the LIO instruction, the defendant had objected to it.

359. *See, e.g.,* Givens v. State, 6 Tex. 344 (1851) (court recognized as well-settled the rule that an accusation of an offense—there assault with intent to murder—included lesser crimes—there assault and assault and battery—so that jury could acquit of the charged crime and convict of the lesser, because otherwise acquittal or conviction of the greater would bar later prosecution for the lesser). *See also* State v. Shepard, 7 Conn. 54 (1828) (merger argument barring trial on the LIO made in the trial court, but abandoned in appellate court; on indictment charging assault with intent to commit rape, defendant challenged conviction because evidence showed completed rape, asserting he would now be subject to indictment

A few early nineteenth century state court cases[360] and a larger number from later in that century explicitly support the notion that the LIO doctrine was accepted historically not only for the prosecution's benefit, but also as a right of the defendant.[361] These cases recognized that the defendant was entitled to LIO instructions warranted by the evidence.[362] Some held reversible error where the trial court failed to

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for rape because assault with intent was not LIO of rape and acquittal or conviction would not therefore bar later prosecution); Hunter v. Commonwealth, 79 Pa. 503 (1875) (similar); Thomas v. State, 40 Tex. 36 (1874) (recognizing that greater and LIO were "same offenses" for state double jeopardy purposes, but rejecting defendant's argument that unlawfully carrying a pistol was an LIO of assault with intent to murder). *See* discussion of LIOs and double jeopardy *infra* Part IV.

360. One of the earliest cases of this type is Stewart v. State, 5 Ohio 241 (1831). There the Supreme Court of Ohio held that the trial court erred in refusing to instruct that on an indictment for assault with intent to kill, the jury could find the defendant guilty of simple assault and battery. The court's reasoning simply recited the rule stated in the earliest cases and treatises: "[W]here an accusation for a crime of a higher nature includes an offense of a lower degree, the jury may acquit him for the graver offense, and return him guilty of the least atrocious." *Id.* at 242 (citing CHITTY (1st Am. ed. 1819), *supra* note 339, and the cases cited therein). The court made no mention of any distinction between applying this rule to benefit the defendant rather than the prosecution. The court also noted that the English distinction between felonies and misdemeanors was not well-founded in America. *Id.*

361. Relying on North Carolina cases and earlier cases from other states, State v. Williams, 116 S.E. 736 (N.C. 1923), summarized the history of the LIO rule in North Carolina. The case suggested that the traditional LIO rule, said to have been for the prosecution's benefit, also benefited the defendant. *Williams* held that the trial court erred in refusing to instruct the jury that a defendant charged with rape could be found not guilty of rape, but guilty of assault with intent to ravish or other assault crimes, or not guilty of any crime, where the evidence warranted that instruction. *Williams* stated that state statutes, which generally authorized LIO verdicts and specifically permitted assault with intent convictions on rape indictments, simply reflected existing common law. The court reasoned that it was "familiar learning that . . . the greater includes the lesser, so that where one offense is alleged in the indictment, and the jury acquits as to that one, it may convict of the lesser offense when the charge is inclusive of both offenses." *Id.* at 737. *Williams* continued that a defendant was entitled to have all "material phases of the case submitted to the jury." *Id.* at 738. More particularly, the court said it was "a well-recognized principle" that where the crime charged includes an LIO and the evidence supports the lesser verdict, the defendant "is entitled to" an instruction on the LIO and failure to instruct is not cured by a guilty verdict on the greater crime. The defendant was entitled to these instructions "for the ascertainment of the truth." *Id.*

362. *See, e.g.*, Hall v. People, 11 N.W. 414 (Mich. 1882) (on charge of rape, court considered it error not to instruct on felonious assault in addition to simple assault); People v. Watson, 57 P. 1071 (Cal. 1899) (where defendant charged with assault with intent to commit murder, cases found it to be reversible error not to instruct on lesser offense of assault with intent to cause serious bodily injury). Also, many nineteenth century Iowa Supreme Court cases found error in the failure to instruct on LIOs warranted by the evidence. *See, e.g.*, State v. Desmond, 80 N.W. 214 (Iowa 1899) (right to instruction on assault and battery and assault where defendant indicted for assault with intent to ravish); State v. Porter, 11 N.W. 644 (Iowa 1882) (indictment for rape, error not to instruct on simple assault); State v. Pennell, 8 N.W.

give LIO instructions. In other cases, the court found no error because the evidence did not warrant LIO instructions,[363] or the defendant failed to object to the instructions given.[364] These decisions were predicated on the assumption that defendants generally are entitled to LIO instructions. Basically, they relied on the common law rule (stated in the earlier cases and treatises noted above), which concluded generally that a jury may find the defendant guilty of a lesser offense included within the one charged.[365]

The English authorities discussed above often stated a limitation on the jury's power to convict of an LIO. The early common law prohibited conviction of a lesser included trespass (or misdemeanor) where the indictment was for a felony.[366] This English common-law rule existed

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686, 687 (Iowa 1881) (same); State v. Clemons, 1 N.W. 546 (Iowa 1879) (error not to instruct on manslaughter where indictment for second degree murder); State v. Vinsant, 49 Iowa 241, 244 (1878) (error not to instruct on simple assault where indictment for rape, stating "Whoever is charged with rape is charged with all that constitutes it, and one of the elements of rape is an assault." (citing Commonwealth v. Drum, 19 Pick. 480 (Mass. 1837) (where the court also upheld a conviction of assault and battery on a rape indictment)); State v. Walters, 45 Iowa 389 (1877) (failure to instruct on simple assault where indictment for assault with intent to rape). These Iowa decisions holding for the defendant purport to follow the earlier Iowa cases that upheld convictions of LIOs over defendants' objections. *See, e.g.,* State v. Gordon, 3 Iowa (Clarke) 410 (1857); State v. Dixon, 3 Iowa (Clarke) 416 (1857). Thus, this state supreme court seemed to have equated the LIO rule "for the benefit of the prosecution" with holdings that benefited the defendant, thereby suggesting that the transition to a defendant-favored rule was not thought to be a change in the original common law rule.

363. *See, e.g.,* Jones v. State, 12 S.W. 704 (Ark. 1889); People v. McNutt, 29 P. 243 (Cal. 1892); People v. Barry, 27 P. 62 (Cal. 1891); Robinson v. State, 11 S.E. 544 (Ga. 1890); State v. Casford, 41 N.W. 32 (Iowa 1888); State v. Cole, 17 N.W. 183 (Iowa 1883); State v. Estep, 24 P. 986 (Kan. 1890); State v. Musick, 14 S.W. 212 (Mo. 1890); Johnson v. State, 27 Tex. 758, 766 (1865). *Compare* Commonwealth v. Jones, 319 A.2d 142, 146 (Pa. 1974), *cert. denied*, 419 U.S. 1000 (1974), where the Pennsylvania Supreme Court stated that one purpose of the common law rule authorizing a manslaughter conviction on a murder indictment was to benefit the defendant, because the rule empowered the jury to dispense mercy by finding a lesser crime than that shown by the evidence. Emphasizing this mercy-dispensing power of the jury, *Jones* required manslaughter instruction in murder cases even when the evidence does not warrant a manslaughter verdict. Pennsylvania law on this point is currently unsettled. See *supra* note 343.

364. *See, e.g.,* State v. Wright, 28 So. 909 (La. 1900).

365. Other cases early in this century reasoned that the defendant was entitled to LIO instructions because of state statutes that essentially codified the general common law LIO rule. *See, e.g.,* People v. Allie, 184 N.W. 423 (Mich. 1921); State v. Brinkman, 175 N.W. 1006 (Minn. 1920); State v. McPhail, 81 P. 683 (Wash. 1905).

366. As Chitty stated:

> The only exception to this rule seems to be, where the prisoner, by being originally indicted for a different offence, would be deprived of any advantage which he would otherwise be entitled to claim; in which case the prosecutor is not permitted to oppress the defendant, by altering the mode of the proceedings. A defendant,

because at that time a defendant received greater procedural protections when charged with a misdemeanor than when indicted for a felony. As a result, the courts were concerned that a defendant indicted for a felony, but convicted of a misdemeanor, would be deprived of those additional protections. The American courts rejected this limitation, some expressly reasoning that it was unnecessary in this country because greater protections were not recognized in misdemeanor prosecutions.[367]

The "Common Law Merger Doctrine." The different procedural protections for misdemeanor charges were also the underpinnings of a confused series of cases in which the English common law courts grappled with the question of whether a lesser misdemeanor crime disappeared into a greater felony in situations in which the same facts made out both. These cases gave rise to what is sometimes viewed as "the common law merger doctrine." It is difficult to generalize accurately about the common law merger doctrine because of its changing nature, the cases upon which this doctrine might be premised, and the varying linguistic uses of the term "merge." The question central to this line of cases did not relate to the results of a conviction for the encompassing felony. Rather, it was whether a misdemeanor prosecution could be initiated or maintained when the facts made out a greater felony, even if there was no prior felony prosecution.

This issue initially developed in England around the fifteenth century,[368] when the then extant procedural consequences varied for misdemeanors and felonies. At some early point the question was judicially resolved in favor of permitting the prosecutor to elect to charge the accused with a misdemeanor rather than a felony. The principle then went through a number of somewhat convoluted and misguided changes. As a result, in a later incarnation the initial doctrine was corrupted by some cases to produce a different and undesirable result: it was read as a *bar* to the conviction for a misdemeanor when it appeared that the facts made out

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> therefore, cannot be found guilty of a misdemeanor on an indictment for felony, because he would by that means lose the benefit of having a copy of the indictment, a special jury, and of making his full defence by counsel.

1 CHITTY (3d Am. ed 1836), *supra* note 339, at 639. *See also, e.g.*, 2 HAWKINS (2d ed. 1724), *supra* note 336, at 440. It is interesting that at early English common law the defendant had greater rights when charged with a misdemeanor than when charged with a felony. The concern about allowing conviction of a misdemeanor on a felony indictment was that the defendant would, because of the felony indictment, be deprived of the greater rights he was entitled to if charged with a misdemeanor.

367. *See, e.g.*, Watson v. State, 43 S.E. 32 (Ga. 1902) (examining earlier American cases). *See* discussion *supra* note 354.

368. P.R. Glazebrook, *The Merging of Misdemeanors*, 78 LAW Q. REV. 560, 564 (1962).

a felony even without an earlier felony prosecution.[369] This latter and discredited form of the merger doctrine was eventually repudiated by English law, both judicial and statutory.[370]

Nonetheless, some modern American cases still refer to the common law merger doctrine, despite the absence of a modern need for a separate doctrine allowing prosecutorial election of lesser charges and despite the abandonment of the doctrine's irrational forms.[371] References to the doctrine usually occur in the context of double jeopardy discussions.[372]

Despite some lack of clarity and completeness in the reasoning of the cases, the LIO doctrine, for the benefit of both the prosecution and the defense, was well-established in early English and American common law, even before the drafting of the Constitution and the Due Process Clause. Under the *Medina-Patterson* analysis, this historical practice tends to favor finding that the LIO doctrine is a fundamental principle of justice, and therefore part of due process.

b. Contemporary State and Federal LIO Practice

Medina reasoned that current federal and state practice is of some, though "limited relevance to the due process inquiry."[373] The universal

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369. *See* Glazebrook, *supra* note 368 (tracing in detail the development of the original cases and various errant forms of a merger doctrine as represented by the English cases and commentators); 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW 133 (15th ed. 1993) (further qualifying merger doctrine by noting that at common law a felony did not merge into another felony and a misdemeanor did not merge into another misdemeanor); Walker v. United States, 514 F. Supp. 294, 307 n.5, 308 (E.D. La. 1981) (discussing the various supposed justifications for the common law rule and the doctrine's "rather unusual historical development" in England).

370. *See* FRANCIS WHARTON, A TREATISE ON CRIMINAL PLEADING AND PRACTICE § 464, at 326 (9th ed. 1889) (stating that the merger doctrine was judicially abolished in England by a 1848 decision); the Criminal Procedure Act, 1851, 14 & 15 Vict., ch. 100, § 12, (generally abolishing prohibition on conviction for misdemeanor), *repealed by* the Criminal Law Act, 1967, ch. 58, sched. 3, Part III (Eng.); *see also* Glazebrook, *supra* note 368, at 571-72 (describing the drafting of the statute). Glazebrook concludes that "the doctrine of the merger of misdemeanours in felonies is no ancient principle of the common law, but an unhappy aberration with a short and fitful history . . . ." *Id.* at 573.

371. American courts rejected the early English limitation on the LIO doctrine (that conviction of lesser misdemeanor was not allowed on felony indictment), some expressly noting that in this country greater protections were not recognized in misdemeanor prosecutions. *See, e.g.*, Watson v. State, 43 S.E. 32 (Ga. 1902).

It is probably misleading to refer to any one doctrine as *the* merger doctrine since, as Glazebrook's history demonstrates, there were distinctly different common law doctrines referred to as "the doctrine of merger." *See* Glazebrook, *supra* note 368, at 652.

372. *See infra* notes 452-55 and accompanying text.

373. Medina v. California, 505 U.S. 437, 447 (1992).

acceptance of the LIO doctrine under state and federal law tends to favor concluding that the LIO doctrine is fundamental for due process purposes.

The modern practice in the states was recognized in *Beck*: "the state courts that have addressed the issue have unanimously held that a defendant is entitled to a lesser included offense instruction where the evidence warrants it."[374] The Court cited then-current cases from virtually every state in support of this proposition.[375] Review of current state law shows that this universal acceptance of the LIO doctrine has not changed since *Beck*.[376] The value of the basic doctrine makes substantial change in the future unlikely.

For federal proceedings, the LIO doctrine is codified in Federal Rule of Criminal Procedure 31(c).[377] As characterized in *Beck*, "[a]lthough the Rule is permissively phrased, it has been universally interpreted as granting a defendant a right to a requested lesser included offense instruction if the evidence warrants it."[378] In *United States v. Schmuck*,[379] the Court recently resolved a split among the federal circuit courts about the proper approach for defining LIOs under Rule 31(c). As discussed earlier, *Schmuck* held that the statutory elements approach was required in federal court under the rule. The *Schmuck* opinion observed that Rule 31(c) was adopted in 1944 to replace an 1872 statute that had codified, for federal criminal cases, the common law discussed above.[380]

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374. Beck v. Alabama, 447 U.S. 625, 635-36 (1980).

375. *Id.* at 636-37 n.12.

376. We have reviewed the law in each jurisdiction cited in the *Beck* footnote. Without citing the cases from every state, this research confirms that the statement in *Beck* about the unanimous holdings of the state courts also reflects the status of state law as of the time this Article was written.

377. FED. R. CRIM. P. 31(c) provides in pertinent part: "(c) Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

378. 447 U.S. at 636 n.11.

379. 489 U.S. 705, 719 (1989) (holding that the elements test must be utilized to determine whether an offense is "necessarily included" in the offense charged, under Rule 31(c)). *See* discussion of elements test *supra* notes 13-19 and accompanying text.

380. The statute replaced by Rule 31(c) was the Act of June 1, 1872, ch. 255, § 9, 17 Stat. 198 (1872). *See, e.g.*, LESTER B. ORFIELD, 5 ORFIELD'S CRIMINAL PROCEDURE UNDER THE FEDERAL RULES 101-04 (2d ed. 1987). As to the reasons for the rule, Orfield notes that it and the statute that preceded it "proceed on the premise that the overall interest of justice lies in permitting an instruction as to a lesser included offense . . . and permitting the prosecution to seek a verdict on that offense even though it has failed to convince the jury of some element of the greater offense named in the indictment." *Id.* at 117 n.3. JAMES W. MOORE ET AL., 8A MOORE'S FEDERAL PRACTICE ¶¶ 31-15 to -16 (1992), remarks that, "[t]he primary purpose of the statutory predecessors of Rule 31(c) was to aid the prosecution where its proof failed to make out all of the elements of the offense charged . . . .

Nothing in the recorded history of the rule or its predecessor statute expressly indicates whether the rule was originally intended for the benefit of the prosecution or also for the defense. It may be instructive, however, that the rule and statute were both written in terms of the authority to find the defendant guilty of a necessarily included offense, rather than in terms of a right or a need to instruct the jury on that lesser verdict. This wording suggests, perhaps weakly, a focus on benefiting the prosecution, rather than the defendant.

The Supreme Court explicitly recognized a defendant's entitlement to LIO instructions in federal trials as early as the 1890s. *Beck* noted: "In the federal courts, it has long been 'beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.'"[381] *Beck* noted further that the Supreme Court first announced this principle in *Stevenson v. United States* in 1896.[382] A year before *Stevenson*, however, the Court in *Sparf v. United States*[383] recognized that the LIO rule existed for the defendant's benefit, and discussed several earlier cases on this point.[384] On the facts of the case, however, *Sparf* held that the trial judge did not err in failing to instruct on LIOs, because the evidence did not support conviction of any lesser crimes.

Thus, for many years the LIO doctrine has been universally accepted in the federal system and in all the states. Although differences exist regarding the details of applying the doctrine, there is wide agreement with the general proposition that defendants are entitled to jury instructions on LIOs warranted by the evidence. This general agreement favors finding that the doctrine is sufficiently fundamental to be part of due process under the *Medina-Patterson* analysis.

Nevertheless the included-offense doctrine may also be availed of by the defense, and in fact is invoked more often by the defense since it provides the jury with an alternative which may permit mitigation of punishment for the greater offense." (Footnotes omitted.)

381. *Beck*, 447 U.S. at 635 (quoting Keeble v. United States, 412 U.S. 205, 208 (1973)).

382. Stevenson v. United States, 162 U.S. 313 (1896). *Stevenson* accepted the LIO doctrine with little discussion, holding that the trial court had erred in refusing LIO instructions. The Court reasoned that when evidence of LIOs was presented, the defendant's crime was a question of fact for the jury; it was not a question of law for the judge to decide in formulating the jury instructions. Thus, the *Stevenson* decision seems to be based on the proper roles of the judge and jury in a criminal case. *See also, e.g.*, Sansone v. United States, 380 U.S. 343 (1965); Berra v. United States, 351 U.S. 131 (1956) (both recognizing the defendant's entitlement to LIO instructions, but holding that the evidence presented did not warrant those instructions).

383. 156 U.S. 51 (1895).

384. *Id.* at 99-107. The Court seems to have alluded to the LIO doctrine earlier in Hopt v. Utah, 110 U.S. 574, 582 (1884).

c. Summary of Due Process LIO Doctrine Under Medina-Patterson *Analysis*

Viewing only the factors mentioned in *Medina* for considering whether the LIO doctrine is a "principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental"[385] under *Patterson*, it is arguable that the general LIO doctrine is encompassed within due process. The strong historical pedigree and the universal contemporary acceptance of the doctrine strongly support due process recognition. These considerations are coupled with the principles of fundamental fairness that *Beck* and other cases articulated in support of requiring LIO instructions—that LIO instructions warranted by the evidence were necessary to prevent uncertainty and unreliability in the fact-finding, guilt determining process, to prevent erroneous verdicts, and to ensure that the jury only convicts when persuaded of the defendant's guilt of a particular offense beyond a reasonable doubt. Those factors that tend to support recognition of the LIO rule under the *Medina-Patterson* due process analysis are outweighed, however, by more pragmatic considerations.

A due process right to an LIO instruction would open up significant federal court interference in state court proceedings. As noted previously, the LIO doctrine is pervasive, potentially raising issues in a vast majority of state criminal cases. A due process LIO doctrine would necessarily subject the various aspects of the doctrine to federal constitutional standards and review, including: the proper approach for defining LIOs, the evidentiary standards for warranting an instruction, whether a request for instruction is required, the standard for determining whether the failure to instruct is harmless error, and other issues. This would transform nearly every LIO decision by a state trial judge, made in the heat of trial litigation and often a close decision, into a federal constitutional issue that becomes relitigable in federal courts on habeas. This obviously raises concerns about federal-state relationships. It would not only involve federal courts in state criminal procedures, but would also cause the federal courts to intrude on substantive criminal law decisions regarding the elements of state law crimes, evidence sufficiency, and similar questions.

These potential consequences recall the *Medina-Patterson* reasoning for a less intrusive due process analysis in criminal matters. *Medina* emphasized that criminal procedure is largely a state law concern and that broad

385. Patterson v. New York, 432 U.S. 197, 202 (1977).

expansion of federal due process guarantees would unduly interfere with appropriate state judgments. Thus, beyond the specific Bill of Rights protections, due process should be interpreted narrowly with only limited application. Despite some substantial arguments in favor of recognition, a general due process right to LIO instructions would be inconsistent with the narrow, deferential standard and rationale of *Medina-Patterson.*

By contrast, the explicit holding of *Beck*—that the refusal to give warranted LIO instructions violated the Constitution in capital cases—is consistent with the *Medina-Patterson* analysis of fundamentality for due process protection. The conceptual arguments in favor of a due process LIO doctrine still exist, and the limited volume of capital cases alleviates the pragmatic concerns about undue federal encroachment on the states. In addition, of course, the uniquely severe, final, and irrevocable nature of the death penalty further substantiates the conclusion that greater procedural protections are indeed fundamental in capital cases. A combination of the nature of protections, the quality of capital punishment, and the less frequent opportunities for federal-state interference support constitutional recognition of the LIO doctrine as a fundamental, constitutional requirement in capital cases. These factors distinguish noncapital cases.

Ironically, the strong historical common law recognition of the LIO doctrine works in both directions. Not only might it favor recognizing a due process right under *Medina-Patterson*, but it also supports the argument against holding LIOs part of federal due process. If a well-known and longstanding doctrine like LIO were truly considered fundamental, one would expect that the Supreme Court would have explicated that proposition long ago, instead of simply suggesting within the last twenty years that it might be constitutionally required. Again, recall that *Medina* emphasized state expertise in criminal matters, derived from centuries of common law tradition, as a reason for narrowly reading the extent of federal due process requirements.[386] The long recognition and universal acceptance of the LIO doctrine might seem to be exactly the type of situation that the Court had in mind.

E. Due Process Summary

Currently, there is no general due process right to LIO instructions warranted by the evidence. The Supreme Court has held that in a capital

386. Medina v. California, 505 U.S. 437, 445-46 (1992), discussed *supra* note 302-04 and accompanying text.

case the Federal Constitution ordinarily requires warranted LIO instructions. In noncapital cases, as recently as 1980, the Court suggested the possibility of a due process right, but expressly reserved decision on the issue. More recent Supreme Court decisions seem to cast considerable doubt that the Court will now resolve that issue in favor of a broad constitutional LIO doctrine. In addition, most states and all but one federal circuit court have refused to extend the capital case LIO rule to noncapital cases.

The reasoning of some Supreme Court and several federal circuit court decisions is often unsatisfying. For example, the Supreme Court's recent suggestion that state court jury instructions not involving the prosecution's burden of proof never raise federal constitutional issues seems to be clearly exaggerated dictum that must be read with caution. Also, considerations related to habeas corpus jurisdiction, through which most state LIO issues reach the federal courts, have added confusion to the reasoning of several federal circuit decisions that appear to mix the question of constitutionality with that of habeas cognizability. The Supreme Court recently clarified that point in another context. The LIO cases need to take account of that clarification.

In addition to the lack of conceptual satisfaction with federal opinions refusing to adopt a general due process LIO doctrine, several considerations relevant to the current approach for determining whether due process is violated by state criminal procedures seem to favor finding a due process LIO right. Ultimately, however, that right would cause such pervasive federal interference in state criminal cases that it is unlikely that particular LIO instructions would be held so fundamental as to be required under due process, except in capital cases.

The Due Process Clause and the Eighth Amendment protection against cruel and unusual punishment do not exhaust the interplay of the Constitution and the LIO doctrine. Although there may not be a broad due process LIO doctrine encompassing a constitutional right to LIO instructions, the LIO doctrine does raise numerous and complicated constitutional issues under the Double Jeopardy Clause. We now turn to those issues.

IV. DOUBLE JEOPARDY AND THE LIO DOCTRINE

The LIO doctrine often works in conjunction with federal double jeopardy protections to prohibit second prosecutions.[387]

The Constitution's Double Jeopardy Clause, applicable in both federal and state prosecutions, provides: "[n]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."[388] The "same offence" protection and the purposes of the Clause become directly embroiled in LIO reprosecution situations. This section of the Article examines such successive prosecution situations.

The Double Jeopardy Clause can be implicated in situations which need not literally involve the same offense, as in collateral estoppel situations, and therefore do not involve LIOs.[389] The same offense provision itself has importance in many situations not extensively discussed in this Article, because the same offense category is broader than LIOs. Not all "same offenses" are LIOs; many issues related to "same offense" do not involve LIOs and are thus not dealt with in this Article. Moreover, LIO problems can also arise outside the context of successive prosecutions. For example, a single trial may produce several guilty verdicts involving

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387. Similar results may flow as a matter of state law, based upon a state constitutional double jeopardy provision or protective statute. *See supra* note 1.

388. U.S. CONST. amend. V, made applicable to the states in Benton v. Maryland, 395 U.S. 784 (1969).

389. The constitutional collateral estoppel doctrine is represented by Ashe v. Swenson, 397 U.S. 436 (1970). *Swenson* incorporated the federal collateral estoppel doctrine into the double jeopardy protection accorded state defendants. Generally put, *Swenson* held that even if a subsequent prosecution does not actually involve the same offense under the Double Jeopardy Clause language, in a prosecution for a different offense the collateral estoppel doctrine constitutionally bars relitigation of an issue of ultimate fact that has been determined adversely to the prosecution in a prior trial.

The net effect of the constitutionally incorporated collateral estoppel doctrine is to bar some subsequent prosecutions even if the second prosecution does not involve a crime that meets the same elements test for determining whether it is the same offense. For example, *Swenson* involved successive prosecutions for robberies of different victims. Although growing out of the same "incident" or "transaction," the second trial did not involve an LIO or an offense otherwise falling under the *Blockburger* same elements standard for determining what constitutes a same offense for double jeopardy purposes. (*See* text *infra* note 419.) Nevertheless, the subsequent prosecution was held effectively barred by collateral estoppel because an essential element determined adversely to the prosecution could not be relitigated. On collateral estoppel, *see generally* James A. Shellenberger, *Perjury Prosecutions After Acquittals: The Evils of False Testimony Balanced Against the Sanctity of Determinations of Innocence*, 71 MARQ. L. REV. 703 (1988).

offenses that are arguably greater offenses and LIOs, thereby possibly raising same offense issues in a purely multiple punishment context.[390]

A. Procedural Variations on LIO Problems

Double jeopardy reprosecution issues arise in a variety of LIO factual settings involving significantly different sequences of prosecution and different procedural postures. Each of these procedural junctions signals prosecutors, defense counsel, and trial judges, alerting them to the presence of potential double jeopardy consequences. They also alert prosecutors and judges to possible remedial actions that may minimize later double jeopardy claims.

Broadly put, successive prosecutions involving LIO double jeopardy problems can arise from two prosecution sequences. One sequence involves a first prosecution for the greater encompassing offense followed

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390. Multiple punishment problems implicating LIOs and greater offenses are apt to arise in the context of a single prosecution in which separate punishments are imposed on different counts and where defendant asserts they are counts involving the same offense for constitutional purposes. Constitutional protection from multiple punishment for the same offense is one of the protections afforded by the Double Jeopardy Clause. *See infra* note 413 and accompanying text. That is, the LIO-greater principles discussed here will also bar separate punishments if the jury returns guilty verdicts on both the greater and LIO. Multiple punishment following different trials for the same offense would also be prohibited, but the issue is generally short-circuited by the separately stated and recast bar to successive *prosecutions* for the same offense. See *infra* note 413 and accompanying text. This resulted in a line of cases discussing reprosecution issues separately (the focus of this Article), and another set of cases which seem to discuss separately multiple punishment issues as they arise in a single trial for several charges (not explored separately in this Article).

In a now disapproved view, some of the cases consider that the Double Jeopardy Clause should be interpreted differently in the two procedural settings. *See, e.g.*, Grady v. Corbin, 495 U.S. 508, 517 n.8 (1990); cases cited *infra* note 467. The argument is that the definition of same offense is different for determining reprosecution questions than for determining multiple punishment issues in a single trial (*i.e.*, a single jeopardy). *See generally* George C. Thomas III, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 IOWA L. REV. 323, 342, *passim* (1986) (discussing the relevant cases to that point and containing an extensive discussion of same offense definition cases). For differing views on interests involved in the multiple punishment issue, as distinguished from the successive prosecution issue, *see generally* Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 158 n.331; Thomas, *supra*, at 395.

The view that the successive prosecution branch of the Double Jeopardy Clause has a different meaning from that which is applied to multiple punishment situations in a single trial was rejected by a five justice majority of the Court in United States v. Dixon, 113 S. Ct. 2849, 2860 (1993) (Part IV of opinion by Scalia, J., concurred in by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas), overruling *Grady*. *Accord* Witte v. United States, 115 S. Ct. 2199, 2204 (1995) (six justice majority opinion relying on *Dixon's* conclusion that the same inquiry generally applies in both multiple punishment and multiple prosecution contexts).

by a prosecution for an LIO. This sequence can emanate from a rich variety of procedural patterns occurring at the trial of an offense for which there are LIOs:

(1) The case may go to the jury or trier of fact[391] for consideration of the greater offense and for consideration of one or more LIOs as well. In this situation, the jury may:

(a) *acquit* on *all* charges, greater and lesser[392]; or

(b) *convict* of a lesser offense only[393]; or

(c) announce a verdict *convicting* of the greater offense only.[394]

An important variation of this last pattern (c) occurs when the judge gives an LIO instruction, the jury convicts of the greater offense, and the greater offense conviction is then overturned on appeal due to insufficient evidence.[395]

(2) The case may go to the jury only on the greater offense without instructions on possible LIOs. This situation itself presents a significant number of variations, such as:

(a) the failure to give LIOs may conceivably be the result of a legal prohibition against giving LIO options to the jury;[396] or

(b) the failure to give the LIO instructions may result from a failure of the parties to ask for the instructions; or

(c) the judge may erroneously refuse to give LIO instructions even though properly requested by a party, perhaps because of an objection by the other party.

As will be seen, the jury's opportunity to consider an offense plays an important role in the Supreme Court's decisions concerning the effect of the jury verdict.[397]

The second sequence involving successive prosecutions is the reverse of that just described: a trial for a lesser offense, followed by an attempted prosecution for a greater encompassing offense.[398]

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391. The double jeopardy principles discussed in this Article apply generally to both jury and judge trials. In view of this and for convenience, we have usually referred to the trier of fact as the jury. Where differing issues are raised if the case is tried to a judge rather than a jury, we have tried to take explicit note of those differences in the formulation of resulting principles.

392. *See infra* note 571 and accompanying text.

393. *See infra* Section IV.C.2.

394. *See infra* Section IV.C.1.a.

395. *See infra* Section IV.C.1.b.

396. Such prohibitions, rare in the first place, are particularly unlikely to be found after the Supreme Court decisions discussed *supra* Section III.A.

397. *See, e.g., infra* notes 583-604 and accompanying text and Section IV.E.

398. *See infra* Sections IV.C.2. & IV.D.2.

The Supreme Court's sometimes expansive language concerning subsequent prosecutions that involve LIO situations needs to be viewed cautiously in light of the Court's development of exceptions. Each of the reprosecution sequences involving LIOs may raise different problems. In fact, the development of double jeopardy case law has been conceptually uneven and the product of that development is complex. This increasing complexity makes more difficult the reasonable effectuation of defendants' rights, prosecutorial decisions, and judicial attempts to apply Supreme Court decisions accurately. The growth of double jeopardy protections in cases involving LIOs accordingly merits close scrutiny, given its obvious importance to the parties and to the judicial system.

B. The Background of Double Jeopardy As It Relates to LIOs

1. The Original Meaning and the Increasing Complexity of Double Jeopardy Law

As the Supreme Court itself has acknowledged, the Double Jeopardy Clause's "deceptively plain language has given rise to problems both subtle and complex."[399] On the one hand, court decisions reveal that the Clause sometimes does not apply even when its language literally appears to cover the situation (because the Court has read exceptions into the Clause).[400] On the other hand, the Clause sometimes does apply when its language literally does not cover the situation (in collateral estoppel situations).[401] Moreover, Supreme Court justices have exhibited strongly divergent views about the nature and extent of the protections offered by the language of the Clause.[402] These differences sometimes obscure not only the rule being applied, but also the rationale underlying a particular protection and the extent of that protection.

The search for consistent judicial theories is further complicated

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399. Crist v. Bretz, 437 U.S. 28, 32 (1978). Justice Blackmun has taken note of a "continuing struggle to create order and understanding out of the confusion of the lengthening list of [Supreme Court] decisions on the Double Jeopardy Clause." Sanabria v. United States, 437 U.S. 54, 80 (1978) (Blackmun, J., dissenting). *See also* Albernaz v. United States, 450 U.S. 333, 343 (1981) (describing the decisional law in the area as "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator"); Whalen v. United States, 445 U.S. 684, 699 (1980) (Rehnquist, J., dissenting).

400. *See* the *Ball* principle *infra* note 475 (generally allowing a defendant to be twice put in jeopardy following defense-initiated reversal of judgment), and the "manifest necessity" doctrine *infra* note 546 (generally allowing a second jeopardy following mistrials).

401. Collateral estoppel situations can come into play when there are several prosecutions for crimes which are not the same offense. *See supra* note 389.

402. *See, e.g., infra* note 444.

because double jeopardy law has been extended well beyond its early historical function. The doctrine was originally designed to embody only the protection of the common law pleas of *autrefois acquit* and *autrefois convict*—pleas of former acquittal and former conviction that arose after a trial to final judgment, usually a trial by jury.[403] The uprooting of the doctrine from its early history has sometimes deprived attempts to interpret the Clause of commonly used interpretive guides—history and original purpose—and it has exacerbated the conceptual unevenness of the development of double jeopardy law. That uneven development is also partially due to the increasing complexity of double jeopardy situations. Modern legislative expansion of substantive crimes presents not only more double jeopardy issues, but also more complicated issues, than did the small number of offenses that originally existed. The earlier crimes had a simpler structure: elements were not so easily shared by other crimes and therefore crimes did not overlap as frequently. In these more straightforward and traditional crimes, issues were therefore more clearly presented and the values of the Double Jeopardy Clause more readily accessible and easier to apply.

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403. *See* JAY SIGLER, DOUBLE JEOPARDY 1-37 (1969) (tracing the protections against double jeopardy from ancient times through England and colonial America); Brown v. Ohio, 432 U.S. 161, 165 (1977) ("Because it was designed originally to embody the protection of the common-law pleas of former jeopardy, the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors.") (citation omitted); United States v. Scott, 437 U.S. 82, 92 (1978) (noting that "the primary purpose of the Double Jeopardy Clause was to protect the integrity of a final judgment," although law has developed protections even when there is no final judgment); United States v. DiFrancesco, 449 U.S. 117, 133 (1980) (noting that the "common-law writs of *autrefois acquit* and *autrefois convict* were protections against retrial." (citing United States v. Wilson, 420 U.S. 332, 340 (1975)). Benton v. Maryland, 395 U.S. 784, 795 (1969) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *335), stated:

> As with many other elements of the common law [the guarantee against double jeopardy] was carried into the jurisprudence of this Country through the medium of Blackstone, who codified the doctrine in his Commentaries. "[T]he plea of *autrefoits acquit*, or a former acquittal," he wrote, "is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence."

For additional relevant history of the double jeopardy protection, see *infra* note 457. *See generally* MARTIN FRIEDLAND, DOUBLE JEOPARDY 5-15 (1969) (discussing history of double jeopardy in English law); Charles L. Cantrell, *Double Jeopardy and Multiple Punishment: An Historical and Constitutional Analysis*, 24 S. TEX. L.J. 735 (1983); Bernard J. Gilday, Jr. & Stephen E. Gillen, *Jeopardy - Meandering Through Mandates and Maneuvers*, 6 N. KY. L. REV. 245 (1979); George C. Thomas III, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 IOWA L. REV. 323, 325 n.8 (1986) (tracing the historical development of the double jeopardy protection as far back as ancient Greek and Roman law).

The increase in the number and complexity of statutory crimes has particular significance in the area of LIOs. At the most basic level, there are quantitatively more LIOs. Furthermore, the Supreme Court's refusal, however correct, to adopt a test broader than the same elements test for what constitutes a same offense[404] has meant that a greater number of successive prosecution issues arise involving LIOs.[405] A more encompassing basic test would simply preclude a larger number of successive prosecutions.

Finally, despite the long historical root of the basic double jeopardy concept, much of the federal constitutional law has bloomed only in relatively recent times, fed particularly by two developments within the last few decades. These two developments have occasioned more judicial interpretations of the Double Jeopardy Clause and, therefore, have significantly contributed to the growing number of complex and litigable issues implicating LIOs.

The first of these critical developments was the Supreme Court's 1969 decision to extend the Double Jeopardy Clause to state prosecutions.[406] Since state cases cover the largest number of criminal trials, this extension has forced the courts to consider a dramatically increased pool of federal double jeopardy issues. A second driving force has been a 1970 statute expanding federal prosecution appeal rights. By its express language, this statute makes appealability contingent on a proviso that double jeopardy not prohibit further prosecution.[407] As a result, the statute has forced the

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404. For example, a same transaction test. *See, e.g.*, Ashe v. Swenson, 397 U.S. 436, 453-54 (1970) (Brennan, J., concurring, proposing a general rule mandating that all offenses growing out of the same transaction be tried together). The Court majority has refused to adopt this test or other alternate tests for defining same offenses, repeatedly relying on a same elements test under the *Blockburger* standard *infra* note 419. *See* United States v. Dixon, 113 S. Ct. 2849, 2863-64 n.15 (1993) (majority opinion of Scalia, J., as to part IV) (citing as examples Garrett v. United States, 471 U.S. 773, 790 (1985), and United States v. Felix, 503 U.S. 378 (1992)).

405. Although the test for determining what constitutionally is the same offense for federal double jeopardy purposes is not precisely the same as the standard for identifying LIOs, it can be noted that the Supreme Court has also adopted an elements tests for purposes of federal prosecutions under FED. R. CRIM. P. 31(c). *See supra* note 13 and accompanying text.

406. *See* Benton v. Maryland, 395 U.S. 784 (1969) (incorporating the Double Jeopardy Clause through Due Process and overruling Palko v. Connecticut, 302 U.S. 319 (1937)).

407. In pertinent part, 18 U.S.C. § 3731 (1988) provides:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

Supreme Court only recently to confront some of the important issues concerning the reach of the Double Jeopardy Clause.[408]

2. The Purposes of the Double Jeopardy Protection

A long series of Supreme Court cases attempting to distill the meaning and application of the Double Jeopardy Clause has now arrived at the view that the Clause provides several different types of protection. This view has cut double jeopardy loose from its early mooring in the finality of judgments and, therefore, from the history that confined the doctrine.[409] In this floating posture, and in view of the multitude of varying important interests, the Court has found it particularly difficult to reach much common ground on the application of the doctrine.

The Court has come to view the Double Jeopardy Clause as affording two separate guarantees directly relevant to subsequent prosecutions relating to LIOs, in addition to a related third guarantee prohibiting multiple punishment for the same offense.[410] One relevant guarantee is the protection against reprosecution following a conviction.[411] Another is protection against reprosecution following an acquittal.[412] A relatively recent and now frequently cited articulation of these various double jeopardy protections is stated in *North Carolina v. Pearce*: "[The] guarantee has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."[413]

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408. *See, e.g.*, United States v. Scott, 437 U.S. 82 (1978); United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); United States v. Jenkins, 420 U.S. 358 (1975); United States v. Wilson, 420 U.S. 332, 337 (1975). The Court has read the statute broadly, as legislatively intended to allow government appeals whenever double jeopardy does not bar further proceedings. *See Wilson*, 420 U.S. at 337; *Jenkins*, 420 U.S. at 363-64; *Martin Linen*, 430 U.S. at 568. This conclusion has stretched even further the need to determine the limits of double jeopardy. For a discussion of some other issues growing out of this statute, *see infra* note 549 and accompanying text.

An extensive collection of previously decided Supreme Court double jeopardy cases appears in United States v. DiFrancesco, 449 U.S. 117, 126-27 (1980).

409. *See supra* note 403 and accompanying text.

410. With regard to multiple punishment issues, see *supra* note 390.

411. *See infra* Section IV.C.

412. *See infra* Section IV.D.

413. 395 U.S. 711, 717 (1969) (majority opinion by Stewart, J.). For the general proposition that the "guarantee has been said to consist of three separate constitutional protections," the Court relied on the influential Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 265-66 (1965). *Id.*

The Clause is therefore clearly seen as creating a third bar, namely, a bar against multiple punishment. The protection is also treated as arising earlier than the time of punishment, that is, it erects a barrier against a prohibited successive prosecution (or, more precisely, the imposition of unpermitted second jeopardy).[414] Viewed as a procedural matter, this means that a defendant can move to dismiss the indictment pre-trial and, if successful, can terminate the vexatious burdens of an impermissible second prosecution, not just avoid unpermitted punishment following trial.

3. The "Same Offense" Limitation

As one Supreme Court justice has observed, "the scope of each of these three protections turns upon the meaning of the words 'same offense,' a phrase deceptively simple in appearance but virtually kaleidoscopic in application."[415] Obviously, a successive prosecution alleging that the same act violates the identical statutory provision constitutes a prosecution for the same offense and will be precluded absent an exception. However, the continuum extends beyond this clear situation. For example, a second prosecution may involve different statutory

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Supreme Court opinions in the double jeopardy area seem particularly prone to recite and restate broad areas of double jeopardy law ranging well beyond the particular issue involved. An example is United States v. DiFrancesco, 449 U.S. 117 (1980). The *Pearce* language itself fits this pattern. The broad and highly influential double jeopardy statement in *Pearce* was written in the context of a narrower set of questions. *Pearce* actually involved issues concerning whether pre-trial jail time had to be credited against the ultimate sentence and whether a harsher sentence was prohibited upon retrial following a defendant's successful appeal.

414. A defendant is protected from being put twice in "jeopardy"—the point at which a jury is sworn, or, in a bench trial, the point at which the judge begins to hear evidence. *See, e.g.*, Crist v. Bretz, 437 U.S. 28, 37-38 (1978) (jury case defining point at which jeopardy attaches in jury trial for purposes of state as well as federal trial; also stating in dictum when jeopardy attaches in non-jury trial); United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977) (similar). With regard to the attachment of jeopardy in a non-jury trial, *see* Goolsby v. Hutto, 691 F.2d 199, 200 (4th Cir. 1982) (citing *Crist* to support holding that jeopardy attaches in non-jury trial at the swearing of the first witness, even if that witness does not testify). *See also* Lee v. United States, 432 U.S. 23, 27 n.3 (1977) (citing Serfass v. United States, 420 U.S. 377, 388 (1975), in which the Court stated, "In a nonjury trial, jeopardy attaches when the court begins to hear evidence."); Joseph T. Bockrath, Annotation, *When Does Jeopardy Attach in a Non-Jury Trial?*, 49 A.L.R.3d 1039 (1973 & 1994 Supp.). With regard to the attachment of jeopardy in guilty plea cases, *see* Ricketts v. Adamson, 483 U.S. 1, 8 (1987) ("We may assume that jeopardy attached at least when respondent was sentenced . . . on his plea of guilty to second-degree murder.").

For a discussion of several different ways to analyze the point at which jeopardy attaches, see Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 97-99.

415. Whalen v. United States, 445 U.S. 684, 700 (1980) (Rehnquist, J., dissenting).

provisions, yet the second offense may be an LIO of the first. The reverse can also be true in that the first prosecution may involve an LIO offense of the second offense. Beyond this, there exist situations in which the same act gives rise to violations of separate statutory provisions that do not encompass the same elements and which would be treated as the same offense only if the Court were to adopt a wider test than currently used for defining that key concept (such as a same transaction or conduct test).[416]

The Blockburger *"same elements" test.* For purposes of double jeopardy law, separate statutory crimes need not consist of identical elements in order to be considered the same offense within the meaning of the double jeopardy prohibition.[417] The test for determining whether such crimes are the same offense is the *Blockburger* test, a longstanding test that has withstood a variety of attacks and has so far been consistently reaffirmed as the exclusive definition of same offense.[418] The *Blockburger* test emphasizes a comparison of the elements: "The applicable rule is that where the same act or transaction constitutes a violation of two

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416. *See supra* note 404.

417. Brown v. Ohio, 432 U.S. 161, 164 (1977) (citing 1 J. BISHOP, NEW CRIMINAL LAW § 1051 (8th ed. 1892)); Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 268-69 (1965)). Any number of cases discussed in this section of the Article stand as additional testimony to this basic proposition. *See, e.g., Nielsen, infra* notes 432-49 and accompanying text.

At the same time, it should be remembered that under the dual sovereignty doctrine, even when elements otherwise appear to be the same, the offenses will not be treated as the same offense when the conduct violates the laws of different sovereigns. Under this principle, for example, successive federal and state prosecutions are constitutionally allowed (*e.g.*, for state embezzlement and for federal embezzlement from certain transporters). State law, federal statutory law (*e.g.*, 18 U.S.C. § 659 (1988)), or federal administrative practice may, on other grounds, preclude such dual federal-state prosecutions, but the federal Double Jeopardy Clause does not. *See generally* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1171 n.189 (1995); DEPARTMENT OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-2.142 (as amended Dec. 14, 1994) (describing the departmental policy, generally known as "the *Petite* policy," used to administratively limit federal prosecutions following state prosecutions); Harry Litman and Mark D. Greenberg, *Dual Prosecutions: A Model for Concurrent Federal Jurisdiction*, in THE FEDERAL ROLE IN CRIMINAL LAW, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 72 (1996) (discussing the implications of the *Petite* policy).

418. *See, e.g.*, Garrett v. United States, 471 U.S. 773, 790 (1985) (noting that Court has steadfastly refused to adopt single transaction test). In his dissent from the now-overruled *Grady* decision, Justice Scalia has characterized the *Blockburger* test as a reflection of an early understanding: "[T]he *Blockburger* definition of 'same offence' was not invented in 1932, but reflected a venerable understanding." Grady v. Corbin, 495 U.S. 508, 535 (1990) (Scalia, J., dissenting). *See also* Marshall, J., (dissenting) in Missouri v. Hunter, 459 U.S. 359, 373-74 (1983) (referring to *Blockburger* and asserting that "same offense" phrase has content independent of legislative intent). For an early case using a *Blockburger*-like test, see Morey v. Commonwealth, 108 Mass. 28, 29 (1871). *Morey* is cited in early Supreme Court double jeopardy law.

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."[419]

In fixing on the statutory language, the test also emphasizes a search for the legislative intent in defining crimes.[420] As a consequence, the *Blockburger* test represents an unusual constitutional test, or at least one that appears unusual on the surface: a constitutional protection (the "same offense" language) is controlled by legislative intent (whether the legislature intended to set up different offenses), rather than by a test independent of the legislative intent. This result is premised on a general judicial acknowledgement that legislatures have the sole responsibility for

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419. Blockburger v. United States, 284 U.S. 299, 304 (1932) (citing Gavieres v. United States, 220 U.S. 338, 342 (1911), and authorities cited). "This test emphasizes the elements of the two crimes. 'If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. . . .'" Brown v. Ohio, 432 U.S. 161, 166 (1977) (quoting Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975)). The test is sometimes referred to as a "same evidence" test, but this erroneous label (*see generally* Anne Bowen Poulin, *Double Jeopardy Protection Against Successive Prosecutions in Complex Criminal Cases: A Model*, 25 CONN. L. REV. 95, 100 n.13 (1992); Grady v. Corbin, 495 U.S. 508, 521 n.12 (1990) (discussed *infra* note 444)) is misleading and shifts attention from the abstract element comparison actually required by the test.

420. *See, e.g.*, Ohio v. Johnson, 467 U.S. 493, 499 (1984) (stating that "the question under the Double Jeopardy Clause whether punishments are multiple is essentially one of legislative intent"); Whalen v. United States, 445 U.S. 684, 688 (1980) (multiple punishment case stating that the "question whether punishments imposed . . . are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized.").

Because *Blockburger* is considered a rule of statutory construction to *help* courts discern whether the legislature intended just one punishment or the possibility of separate punishments (and possibly successive trials), the rule has been held to have exceptions. *See, e.g,* Garrett v. United States, 471 U.S. 773, 779 (1985) (noting that Court has "indicated that the *Blockburger* rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history"). *See also infra* note 425 and accompanying text. Indeed, the status of *Blockburger* as a presumptive rule may be more complex in state cases. Writing about multiple punishments for the Court in Ohio v. Johnson, 467 U.S. 493 (1984), then-Justice Rehnquist, who has questioned whether *Blockburger* is a constitutional test (*see infra* note 424), stated "the *Blockburger* test does not necessarily control the inquiry into the intent of a state legislature. Even if the crimes are the same under *Blockburger*, if it is evident that a state legislature intended to authorize cumulative punishments, a court's inquiry is at an end." *Id.* at 499 n.8.

For discussion of the ways in which "same offense" can be defined, *see generally* Peter Westen & Richard Druble, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 111-22. For a discussion of the statutory "element test" under FED. R. CRIM. P. 31(c), *see supra* notes 13-19, 377-80 and accompanying text.

defining criminal offenses.[421] Given the sway allowed for legislative intent, the same offense protection (including LIOs), as it applies to successive prosecutions, essentially becomes a protection against prosecutorial action, not legislative action.[422]

The pivotal role that legislative intent plays in the test should not be confused with the fact that the Court has, rightly or wrongly, afforded constitutional significance to the test and its inherent deference to legislative judgments.[423] It has become clear that the *Blockburger* test is treated as a constitutional measure of same offense, despite occasional differences in the cases about the meaning of the test's legislative deference and its relation to defining a constitutional right.[424] Perhaps the confu-

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421. Garrett v. United States, 471 U.S. 773, 779 (1985) (there are no constitutional constraints on the legislature's power to define offenses) (citing Albrecht v. United States, 273 U.S. 1, 11 (1927)); Brown v. Ohio, 432 U.S. 161, 165 (1977) ("The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial.") (citation omitted).

In light of the *Blockburger* test's judicial deference to legislative intent, it is no surprise that the Supreme Court has never invalidated a congressional statute on double jeopardy grounds. *See* United States v. DiFrancesco, 449 U.S. 117, 126 (1980).

For a thoughtful discussion of the interplay of legislative intent in this matter, *see* MICHAEL S. MOORE, ACT AND CRIME 336-37 (1993). Professor Moore argues for an approach that would examine "morally salient act-types" to which the legislation refers in order to discern whether the "same offense" is involved. *Id.* at 337-46. *Cf.* United States v. Woodward, 469 U.S. 105, 109 (1985) (evaluating statutes as ones aimed at separate evils).

422. *See, e.g.*, *Brown*, quoted *supra* note 403; Ohio v. Johnson, 467 U.S. 493, 499 (1984) ("the question under the Double Jeopardy Clause whether punishments are 'multiple' is essentially one of legislative intent.").

The Court has not had a case in which a legislature has tried to expressly authorize successive prosecutions for the same offense. The language above arises in multiple punishment, single trial scenarios. It is difficult to believe that the Court would allow successive prosecution for conduct meeting the *Blockburger* test on the basis of clear legislative intent.

423. It is also something of an irony that the constitutional test for same offense has been affixed to the *Blockburger* decision. *Blockburger* itself was decided in the context of multiple punishments imposed in a single prosecution in which Blockburger's single drug sale led to conviction under several statutory provisions. The Double Jeopardy Clause is neither discussed nor cited in the *Blockburger* opinion itself, but the authorities cited by *Blockburger* did seem to involve double jeopardy questions. The case involved two federal statutes and the Court concluded that Congress had intended to authorize the multiple punishments imposed on the different counts. *Blockburger* cited Gavieres v. United States, 220 U.S. 338 (1911), which involved a statutorily extended double jeopardy protection, found to be carried to the Philippines with the same meaning as the constitutional double jeopardy protection. *Blockburger*, 284 U.S. at 304.

424. *See, e.g.*, Swafford v. State, 810 P.2d 1223, 1229 (N.M. 1991) ("The necessary corollary to the focus on legislative intent is that the *Blockburger* test is not a constitutional rule, but merely a canon of construction used to guide courts in deciphering legislative intent.

sion in these cases derives from Supreme Court language stating that the *Blockburger* test involves statutory construction and is "not a constitutional rule requiring courts to negate clearly expressed legislative intent."[425] When read in full, however, such language merely restates the interrelationship of legislative intent to the constitutional test being applied. The *Blockburger* test cannot be treated as entirely separate from the Constitution.[426]

The *Blockburger* test has important application to reprosecutions where LIOs are involved. Where LIOs are concerned, if two offenses are the same under *Blockburger*, then:

> 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 prosecutions as well as cumulative punishment.[427]

Whalen [*v. United States*, 445 U.S. 684, 691 (1980)] (*Blockburger* is a rule of statutory construction).").

In an oral argument before the Court, now-Chief Justice Rehnquist indicated a belief that "*Blockburger* did not rest on the Double Jeopardy Clause." Oral argument in Jeffers v. United States, 432 U.S. 137 (1977), as recounted in 20 CRIM. L. RPTR. 4203, 4205 (March 30, 1977) (excerpt). In response, defense counsel reportedly urged the Court to elevate the *Blockburger* rule to constitutional dimension if it had not already done so. *Id.*

425. Missouri v. Hunter, 459 U.S. 359, 368 (1983) (relying on Whalen v. United States, 445 U.S. 684 (1980), and Albernaz v. United States, 450 U.S. 333 (1981), stating that *Blockburger* test is rule of statutory construction). Following *Hunter*, other courts have applied the *Blockburger* test as a rule of statutory construction with little variation. *See, e.g.*, United States v. Mohammed, 27 F.3d 815, 819 (2d Cir. 1994); United States v. Sanchez, 992 F.2d 1143, 1153 n.14 (11th Cir. 1993); United States v. York, 888 F.2d 1050, 1058 (5th Cir. 1989). *See also supra* note 421.

426. *See, e.g.*, United States v. Dixon, 113 S. Ct. 2849, 2860 (1993) ("Unlike *Blockburger* analysis, whose definition of what prevents two crimes from being the 'same offence', U.S. Const. Amdt. 5, has deep historical roots and has been accepted in numerous precedents of this Court, *Grady* lacks constitutional roots."); Grady v. Corbin, 495 U.S. 508, 530 (1990) (Scalia, J., dissenting) ("Relying on text alone, therefore, one would conclude that the Double Jeopardy Clause meant what *Blockburger* said."); Missouri v. Hunter, 459 U.S. 359, 373-74 (1983) (Marshall, J., dissenting) (*Blockburger* test is a rule of constitutional stature for both multiple prosecutions and multiple punishments). *See also* George C. Thomas III, *A Unified Theory of Multiple Punishment*, 47 U. PITT. L. REV. 1, 56 n.269 (1985) (for successive prosecution cases, "the *Blockburger* test is the minimum constitutional standard for determining whether the second prosecution is for the same offense as the first.").

427. Brown v. Ohio, 432 U.S. 161, 166 (1977) (citations omitted) (quoting Morey v. Commonwealth, 108 Mass. 433, 434 (1871), and citing *In re* Nielsen, 131 U.S. 176, 187-88

Under *Blockburger*, for the offenses to be different, each offense must require a different element. Accordingly, when the *Blockburger* test is applied, an LIO and a greater offense will be considered the same offense because although one of the offenses (the greater) requires proof of at least one element different from the elements of the other offense (the LIO), the other offense (LIO) does not require a different element from the elements of the greater offense. For example, while assault with a dangerous weapon requires an element different from simple assault, simple assault requires no element not encompassed in assault with a dangerous weapon.

C. Convictions Followed by Successive Prosecutions

1. The Greater Offense-LIO Sequence

a. Conviction of the Greater Offense Charged and Its Implications for Subsequent LIO Prosecutions

The Double Jeopardy Clause's express prohibition against second jeopardy for the same offense works directly in cases where a conviction is followed by an attempted second prosecution for an LIO. Generally, "[w]hatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense."[428] Beneath its broad veneer, this prohibition means that a conviction for a greater offense—when undisturbed by reversal on defendant's appeal or otherwise appropriately vacated (as on defense motion for new trial)—usually encompasses a conviction for an LIO. These LIOs will be treated as included in a prior conviction for a same offense and, therefore, a second prosecution for the encompassed lesser crimes generally will be barred. "As is invariably true of a greater and [LIO], 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."[429] This rule is actually a corollary of the *Block-*

(1889), and *cf.* Gavieres v. United States, 220 U.S. 338 (1911)).

428. Brown v. Ohio, 432 U.S. 161, 169 (1977). The generality of the rule is conditioned on several exceptions. *Brown* noted one, *id.* at 169 n.7, and there are other exceptions, as the text discussion shows. *See infra* notes 528-37 and accompanying text.

429. *Brown*, 432 U.S. at 168. (conviction for stealing automobile held to preclude successive prosecution for operating auto without owner's consent where state interprets offenses as single offense). *Brown* is discussed further *infra* in note 485-90 and accompanying text and in Section IV.E.

burger test,[430] described above. LIOs and greater offenses are the same offense under the *Blockburger* test because, although one of the offenses requires proof of (at least) one element different from the other, each of the offenses does not require a different element, a point critical under *Blockburger*.[431]

This bar to successive prosecution for an LIO following conviction for a greater offense is a long standing proposition, developed in a continuing line of cases. The most notable of these deserve attention.

Nielsen, *"Merger," and Post-*Nielsen *State Cases*

The parent Supreme Court case determining that a conviction for a greater offense erects double jeopardy barriers for LIOs is *In re Nielsen*,[432] an 1889 case involving successive prosecutions. There the Court considered it "familiar learning that there are many cases in which a conviction . . . of a greater crime is a bar to a subsequent prosecution for a lesser one."[433] Although *Nielsen* can be read in different ways, the *Nielsen* Court appears to have treated the second prosecution in that case as one involving an LIO of the offense for which the defendant had earlier been convicted.

Nielsen arose as a polygamy case in the Utah territory where the defendant was indicted separately for violating two congressional prohibitions, one against cohabitation with more than one woman and another against adultery. He was first convicted of the cohabitation charge upon his guilty plea and sentenced. The adultery charge involved the same person with whom he had been found guilty of cohabitating.[434] The

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430. United States v. Dixon, 113 S. Ct. 2849, 2886-87 (1993) (Souter, J., dissenting in part and concurring in part).

431. *See, e.g.*, Illinois v. Vitale, 447 U.S. 410, 417 (1980).

432. 131 U.S. 176 (1889).

433. *Id.* at 189. *See also id.* at 190: "[A] conviction of the greater crime would involve the lesser also, and would be a bar . . . ."

434. The second indictment alleged that the adultery crime was committed on the day following the period covered by the first indictment. The differing time periods were given some attention in the case, but are ultimately inconsequential in reading the Court's broader holding regarding LIOs since the Court ultimately treated the time periods as the same for purposes of the case.

The government argued that the differing time periods prima facie showed that defendant could not have been placed in double jeopardy. 131 U.S. at 180. It went on, however, to argue that even if the activity had covered the same time, this did not mean that defendant had been placed in double jeopardy. *Id.* at 181. The Court treated cohabitation as a continuous offense not involving an isolated act. It also noted that the defendant had averred in his habeas corpus petition that the time of the unlawful cohabitation and the adultery were the same, proved by the same evidence covering the same entire time span. This averment

defendant filed a plea of *autrefois convict* in answer to the second indictment.[435] His claimed bar to the second prosecution was upheld by the Supreme Court, which examined whether the second crime, adultery, "was included in the crime of unlawful cohabitation for which he was [previously] convicted and punished . . . ."[436]

The Court recognized that the expressly stated elements of the first crime did not appear to contain the second as an LIO. Nevertheless, it seemed to treat the second crime as an LIO of the first, in light of the way the first crime had been construed by earlier case law. The prisoner's sentence for cohabitation "was for that entire, continuous crime. It included the adultery charged."[437] The Court acknowledged that "cohabitation did not necessarily imply sexual intercourse . . . ."[438] "But be that as it may," the Court continued,

> it seems to us very clear that where, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence.[439]

The Court took note of the possible contention that adultery is not an incident of unlawful cohabitation because adultery strictly involves proof of an additional element, namely marriage. The Court answered this potential argument by saying that while it was true that the element need not be strictly proved, the Court in fact had nevertheless construed the marriage element into the cohabitation statute. This construction had been imposed upon the statute in light of the statutory aim directed toward polygamy, therefore requiring that the parties live together as husband and wife. This aim implied that marriage be proved for cohabitation, with the result that cohabitation encompassed the lesser crime of adultery.[440]

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was demurred to by the prosecution and was therefore taken as true. *Id.* at 185-86.

435. *Id.* at 183.

436. *Id.* at 185.

437. *Id.* at 187.

438. *Id.* at 188.

439. *Id.* at 188. The use of the word "incidents" gives rise to a debate about whether the Court was adopting a same offense test broader than the same elements test, for example, a same conduct test. *See infra* note 444.

440. In response to the potential argument, the Court stated:

> To this it may be answered, that whilst this is true, the other ingredient (which is an incident of unlawful cohabitation) is an essential and principal ingredient of adultery; and, though marriage need not be strictly proved on a charge of unlawful cohabitation, yet it is well known that the statute of 1882 was aimed against polygamy, or, having of two or more wives; and it is construed by this court as requiring, in order to obtain a conviction under it, that the parties should live

This reading of *Nielsen*—that the Court treated the second prosecuted crime, adultery, as an LIO of the first—is buttressed by the authorities used for the Court's conclusion. Following the discussion recounted above, the Court immediately turned to the principle that a conviction (or acquittal) of a greater crime is a bar to a subsequent prosecution for a lesser one, concluding that the first cohabitation conviction barred the subsequent adultery prosecution. The Court's discussion included an approving citation of a case that treated a particular earlier conviction as one which "must, in a certain sense, be considered as a *merger* of all the distinct acts" leading to that offense.[441] The Court noted, with words paralleling the Double Jeopardy Clause, that the defendant "cannot be punished but for one offence."[442] It concluded that the first conviction was "a bar" to the second prosecution, depriving the convicting court of jurisdiction and thereby entitling the prisoner to habeas corpus relief.[443]

Because the crimes involved in *Nielsen* did not on their face appear to involve an LIO situation, the case has been part of the more general debates about what test should be used to discern whether a subsequent prosecution is for the same offense as the first and therefore prohibited.[444] These debates go beyond the LIO question to deal with a much

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together as husband and wives.

131 U.S. at 189. The elements of the crimes are set out in the statutory offenses involved, quoted in the statement of the case. *See id.* at 177.

441. *Id.* at 190 (quoting State v. Nutt, 28 Vt. 598, 603 (1856) (conviction for being seller of intoxicating liquors)).

442. *Id.* at 190, quoting State v. Nutt, 28 Vt. 598 (1856) (described *supra* note 441). As other examples of LIOs, the *Nielsen* Court referred to a conviction for robbery (which necessarily includes common law larceny), or seduction or adultery (both encompassing the LIO of fornication).

443. 131 U.S. at 190. The narrow issue in the case, of which the double jeopardy issue was an essential basis, was whether the prisoner was entitled to habeas corpus relief if "he had been convicted twice for the same offence . . . ." *Id.* at 182.

444. In Brown v. Ohio, 432 U.S. 161 (1977) (conviction for stealing automobile held to preclude successive prosecution for operating auto without owner's consent), Justice White's majority opinion took notice of *Nielsen* in a footnote which declared:

> The *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first.

432 U.S. at 166-67 n.6. For this proposition, the Court cited a collateral estoppel case, Ashe v. Swenson, 397 U.S. 436 (1970), and *Nielsen*, 131 U.S. 176 (1889). The *Brown* footnote read *Nielsen* (as it likewise read *Swenson*) as a case in which:

> [S]trict application of the *Blockburger* test would have permitted imposition of consecutive sentences had the charges been consolidated in a single proceeding. . . . In *Nielsen*, conviction for adultery required proof that the defendant had sexual

broader issue concerning the appropriate constitutional definition of same offense when there are successive prosecutions. None of these debates, however, casts doubt on the narrower proposition that if a crime is considered an LIO it will be treated as the same offense for purposes of double jeopardy protection from reprosecutions following conviction for the greater offense.[445] Conviction of the greater offense would act to bar

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intercourse with one woman while married to another; conviction for cohabitation required proof that the defendant lived with more than one woman at the same time. Nonetheless, the Court in both cases held the separate offenses to be the "same" for purposes of protecting the accused from having to "'run the gantlet' a second time." *Ashe, supra*, [397 U.S.,] at 446, quoting from Green v. United States, 355 U.S. 184, 190 (1957).

Because we conclude today that a lesser included and a greater offense are the same under *Blockburger*, we need not decide whether the repetition of proof required by the successive prosecutions against Brown would otherwise entitle him to the additional protection offered by *Ashe* and *Nielsen*.

Id. at 167 n.6. This reading of *Nielsen* and the proposition drawn from it (and from *Ashe*)—that the *Blockburger*-recited test may not be the only standard for determining whether a successive prosecution impermissibly involves the same offense—is rejected by a majority of the Supreme Court in United States v. Dixon, 113 S. Ct. 2849 (1993). Justice Scalia's majority opinion on this point in *Dixon* described the above *Brown* footnote as the "purest dictum" flatly contradicted by the text of the *Brown* opinion. 113 S. Ct. at 2861 (part IV, five justices). In the course of this discussion, Justice Scalia (for five justices) and Justice Souter (for two justices) wrote opinions debating the reach of *Nielsen*.

In *Dixon*, the Court overruled Grady v. Corbin, 495 U.S. 508 (1990), which had added a supplemental test beyond *Blockburger's*: that, in addition to passing the *Blockburger* test, a second prosecution still violates double jeopardy if the prosecution relies on proof of *conduct* that constituted an offense for which the defendant has already been prosecuted. *Dixon* rejected *Grady's* adoption of this test. 113 S. Ct. at 2860 (part IV; majority opinion by Scalia, J., for five justices). To reach this conclusion, the majority debated and rejected Justice Souter's dissenting view that *Nielsen* represented more than an LIO situation.

Justice Souter (joined by Justice Stevens) would have concluded in *Dixon* that prosecution for any charge comprising *an act* that has been the subject of prior conviction was barred. As a partial basis for this conclusion, Justice Souter viewed *Nielsen* as finding that the *Blockburger*-type test was inapplicable to the *Nielsen* facts; the case, he therefore believed, went beyond an LIO analysis. 113 S. Ct. at 2885. He concluded that *Nielsen* was a "same conduct" case, a conclusion rejected by a majority of the Court. The majority, through Justice Scalia, viewed *Nielsen* as involving an LIO, as the definitions of the involved offenses were in fact construed. *Id.* at 2860-61 (part IV, five justices). The opinions also discuss *Gavieres*, *Harris*, and *Vitale*.

For an extensive discussion of the view that *Nielsen* is more than a lesser included offense case, *see* George C. Thomas III, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 IOWA L. REV. 323 (1986).

445. The approving language in *Nielsen* indicates as much: "[A] conviction . . . of the greater crime is a bar to a subsequent prosection for a lesser one." 131 U.S. at 189. More precisely, if *Nielsen* is an LIO case (as it appears to be) the case is a holding on that point since conviction on the greater crime would have been held to have precluded a subsequent prosecution for a lesser included offense. Even if the case were read to go beyond the LIO doctrine and to have adopted a "same conduct" test, that principle would *a fortiori* cover

subsequent prosecution for the LIOs.[446]

In deciding the question before it, *Nielsen* treated the constitutional double jeopardy issue as one almost indistinguishable from a common law question, relying on English law, contemporaneous legal treatises,[447] and several state cases.[448] In effect, the concept that an LIO "merged" into the prior conviction for the greater crime was broadly moved onto a constitutional plateau in *Nielsen*.[449] The case represents a constitutional adoption of the general proposition that conviction of the greater offense constitutionally bars subsequent prosecution for the LIO. *Nielsen's* reference to the term "merger" seems to have been a conceptual and colloquial characterization of the consequence of conviction: the absorption of the lesser into the conviction for the greater offense, with the resulting bar to the second prosecution.[450] As such, it should not be mistaken as

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LIOs.

446. 131 U.S. at 190. For these propositions, the Court approvingly cited 1 WHARTON, CRIMINAL LAW § 560. (The language, as edited and relied upon by the Court, appears in both the 1874 7th edition and 1868 6th edition of WHARTON.) The Court noted that Wharton gave these propositions as examples of *acquittals* which would bar reprosecution and that some acquittal situations were a more open question than were conviction situations. Whatever might be the situation with regard to some acquittals, the Court treated *conviction* as a clear question: conviction for the greater offense would be a clear bar to reprosecution for the lesser offenses.

447. WHARTON, *supra* note 446 (citing an English statute). *See also* 1 BISHOP, CRIMINAL LAW § 1054 (5th ed. 1872); *Nielsen*, 131 U.S. at 190.

448. The Court's use of common law is consistent with its statement years later, in another context, that "The common law is important . . ., for our Double Jeopardy Clause was drafted with the common-law protections in mind." United States v. DiFrancesco, 449 U.S. 117, 134 (1980) (citing United States v. Wilson, 420 U.S. 332, 340-42 (1975), and Green v. United States, 355 U.S. 184, 200-01 (1957) (Frankfurter, J., dissenting)). *See also* Benton v. Maryland, 395 U.S. 784, 795 (1969).

449. *See Nielsen*, 131 U.S. at 187-90. *Nielsen* referred approvingly to an influential state court opinion which had observed that upon conviction of a greater offense "'the lesser offence . . . is *merged* in the greater offence . . . .'" *Id.* at 187-88 (emphasis added) (quoting Morey v. Commonwealth, 108 Mass. 433, 435 (1871), and noting also that the proposition accorded with the Court's own views). The Court also quoted another case using the term "*merger*" "in a certain sense." State v. Nutt, 28 Vt. 598 (1856), described *supra* at note 441. The reports of the cases presented in *Morey* and *Nutt* indicate that both cases presented issues of whether the second prosecution was for the same offense, but both cases seem to have been decided under common law; at the time, the federal constitutional protection was not applicable to the states and neither case refers any state constitutional principle.

450. That an LIO generally merges into a greater one in a certain sense appears to be a conceptually understandable idea. In this sense, the meaning is that the lesser becomes part of the conviction for the whole; a conviction for all the elements of the greater is automatically a conviction of the crime comprised entirely of elements necessarily included in the greater. Importantly, the punishment for the sum of the elements will generally have been intended as encompassing the lesser components of the greater. *See, e.g.*, Whalen v. United States, 445 U.S. 684, 692-94 (1980).

an adoption of "the common law merger doctrine," inasmuch as different consequences may flow from that outmoded doctrine.

Because the Federal Double Jeopardy Clause was not incorporated against the states for many years,[451] the states applied their own versions of the common law or their state constitutional double jeopardy protections for many years following *Nielsen*. In discussing protections against reprosecution, state courts sometimes referred to the "common law merger doctrine."[452] As described above, however, that particular doctrine did not deal with successive prosecutions, but rather barred initial prosecution or conviction.[453] Even if it were thought to involve a protection against reprosecution,[454] the common law doctrine is no longer needed.[455] The

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451. See *supra* note 388.

452. Some of these cases assume that the doctrine contained a protective facet for the benefit of the defendant, barring multiple prosecution or punishment for lesser and greater offenses but eventually treat the doctrine as having been subsumed by double jeopardy concepts. *See, e.g.*, Swafford v. State, 810 P.2d 1223, 1232-33 (N.M. 1991) (concluding that the doctrine of common law merger adds nothing to the multiple punishment analysis beyond that which is provided by double jeopardy); Bennett v. State, 182 A.2d 815, 817 (Md. 1962) (concluding old common law doctrine of merger no longer exists but the modern protection against punishment for LIOs remains as part of the state's common law prohibition against double jeopardy).

453. *See supra* notes 368-72 and accompanying text. However, at other points in history and in certain formulations, the merger doctrine really went far beyond the effect of merely barring reprosecution for an LIO. As such, the common law merger doctrine was not a doctrine which had the intended primary aim of prohibiting successive prosecutions.

454. At least in some of its formulations, the "common law merger doctrine" may have had the discernable consequence of precluding retrial after conviction. *See* United States v. Walker, 514 F. Supp. 294, 307 n.5, 308 (E.D. La. 1981) (discussing the various supposed justifications for the common law rule, and noting the contention by one commentator that the doctrine prevented harassment of a defendant by reprosecution for the same conduct).

455. Most jurisdictions now have discarded the "common law merger doctrine" as repudiated or no longer necessary. *See generally* CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 24 (15th ed. 1993) (stating merger doctrine has generally been repudiated); MODEL PENAL CODE § 1.08 cmt. (4)(a) (Tentative Draft No. 5 1956) (the merger doctrine has largely been abandoned). *See also* Iannelli v. United States, 420 U.S. 770, 777 n.11 (1975) (noting that as the procedural distinctions between felonies and misdemeanors disappeared, the merger doctrine lost its force and eventually disappeared; referring, however, to merger as "concept" in this context); United States v. Teters, 37 M.J. 370, 375-76 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 919 (1994) (subsuming merger notions under double jeopardy tests).

Some states nevertheless still continue to devise doctrines which they refer to as merger doctrines and which are employed for very particular uses. New York, for example, has used a merger doctrine to preclude a conviction for kidnapping when that conduct comes about exclusively as a part of another substantive crime for which the defendant has been convicted. *See, e.g.*, People v. Cassidy, 358 N.E.2d 870, 872 (N.Y. 1976). Pennsylvania has at times employed a merger of punishments doctrine as a supplement to double jeopardy, *see generally* RICHARD S. WASSERBLY & BETSY MOORE, 2 PA. CRIM. PRAC. § 31.19 (1981 and Cum. Supp. 1995); Jim Walden, Recent Decision, *Pennsylvania Purports to Abolish the Common Law Merger Doctrine*, 63 TEMP. L. REV. 385 (1990); Commonwealth v. Williams, 496 A.2d. 31 (Pa.

interpretation of the Double Jeopardy Clause, now applied to the states, provides protection without misleading reference to the common law merger doctrine. Use and misuse of the term common law merger doctrine, however, should not be confused with the courts' more frequent use of the general, colloquial concept that an LIO merges into the greater.[456] Indeed, *Nielsen* itself drew on that core concept in deciding a constitutional point of double jeopardy law.

The common law proposition that a conviction for a greater offense bars subsequent prosecution for LIOs, adopted as a constitutional principle in *Nielsen*, accords with the deep-seated common-law history of that protection and with a basic purpose of double jeopardy protection.[457]

Super. Ct. 1985) (en banc), but the limits of the doctrine are debatable. For examples of the struggle to define the Pennsylvania doctrine, *see, e.g.*, Commonwealth v. Williams, 559 A.2d 25 (Pa. 1989) (majority opinion asserts that, except for LIOs, merger doctrine is abolished); Commonwealth v. Burkhardt, 586 A.2d 375 (Pa. 1991) (punishment issue discussing merger relationship to double jeopardy; first opinion purports to hold courts may sentence separately for simultaneous convictions of multiple offenses absent express legislative intent to contrary; no opinion carries majority of justices, despite opinion labels); Commonwealth v. Anderson, 650 A.2d 20 (Pa. 1994) (modifying earlier cases and discussing doctrine as no different from double jeopardy analysis). *See also* Swafford v. State, 810 P.2d 1223, 1231 n.6 (N.M. 1991) ("While merger and double jeopardy are in many ways related, many jurisdictions treat the doctrines distinctly."); Mark E. Nolan, *Diverging Views on the Merger of Criminal Offenses: Colorado Has Veered Off Course*, 66 U. COLO. L. REV. 523 (1995) (discussing Colorado merger cases and statute).

456. *See supra* note 450 and accompanying text. *See also* Bennett v. State, 182 A.2d 815, 817 (Md. 1962) (pointing out that while the old doctrine of merger no longer exists in state, this does not mean the more modern concept of merger of offenses does not play an important role, whether that concept is considered under such terms as "double jeopardy," "merger," or "divisibility of offenses"; the principle is that if the lesser offense is a necessary ingredient of the other, a conviction of one will bar a prosecution for the other under double jeopardy rule); Tyree v. United States, 629 A.2d 20, 23 (D.C. 1993) (discussing defense contention that offenses for which defendant sentenced must merge). In this sense, the concept that the second prosecuted LIO "merged" into the greater crime for which the defendant had already been convicted merely states the double jeopardy conclusion.

The issue of whether some specific crimes "merge" into one another is also sometimes debated in conspiracy-and-substantive crimes situations. *See, e.g.*, Iannelli v. United States, 420 U.S. 770, 777 (1975) (noting that "Unlike some crimes that arise in a single transaction, . . . the conspiracy to commit an offense and the subsequent commission of that crime normally do not merge into a single punishable act."), and cases cited. For an additional conspiracy-LIO issue case, see *United States v. Rutledge*, described *infra* note 527.

457. Blackstone summarized the common law on former conviction in a passage underscoring that in order for the former conviction rule to apply, the plea "must be upon a prosecution for the same identical act and crime." Importantly, the passage also included an example of a greater homicide as barring a lesser homicide crime, "though the offences differ in colouring and in degree." The complete passage reads:

> [T]he plea, [sic] of *autrefoit convict*, or a former conviction for the same identical crime, though no judgment was ever given, or perhaps will be, (being

The principle protects against separate trials, implicating the antivexing aspects of the protection. It also precludes multiple punishment, since a logical assumption is that the legislature has included an enhanced punishment for the greater offense in order to cover the additional harm addressed by the punishment otherwise available only for the LIO. Thus, for good reason, the broadly stated prohibition against reprosecution for LIOs following conviction for the greater has stood unchallenged and has sometimes been repeated in Supreme Court cases.[458] However, the general prohibition has encountered situations which have blurred its application and led to qualifications.

Complex Crimes; Felony Murder

One of these situations involves "complex crimes," a situation that has reached the Supreme Court in the context of successive prosecutions following conviction for a possible LIO and for that reason is better deferred to a later point in this Article.[459] Another case that blurred application of the doctrine is *Harris v. Oklahoma*,[460] in which the Court

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> suspended by the benefit of clergy or other causes) is a good plea in bar to an indictment. And this depends upon the same principle as the former [*autrefoits acquit*], that no man ought to be twice brought in danger of his life for one and the same crime. [Citing 12 HAWK. P.C. 377]. Hereupon it has been held, that a conviction of manslaughter, on an appeal or an indictment, is a bar even in another appeal, and much more in an indictment, of murder; for the fact prosecuted is the same in both, though the offences differ in colouring and in degree. It is to be observed, that the pleas of *autrefoits acquit* and *autrefoits convict*, or a former acquittal, and former conviction, must be upon a prosecution for the same identical act and crime.

4 WILLIAM BLACKSTONE, COMMENTARIES *336. Blackstone was quoted in State v. Cooper, 13 N.J.L. 361, 375 (1833), which, in turn, was cited with approval in *Nielsen*.

As noted earlier (*supra* note 403), double jeopardy provisions had as their early object protection for one who had been formerly convicted or acquitted. *See* United States v. DiFrancesco, 449 U.S. 117, 128 (1980) (noting double jeopardy concept "has ancient roots centering in the common-law pleas of *autrefois acquit*, *autrefois convict*, and pardon, 4 W. Blackstone, Commentaries 329-30 (1st ed. 1769), and found expression in the legal tradition of colonial America."). The LIO protection is a descendent of this protection.

458. *See, e.g.*, Waller v. Florida, 397 U.S. 387, 390 (1970) (dealing with whether municipal and state prosecutions are different sovereignties for purposes of considering "same offense" issue) (Court assumes for purposes of decision that the first prosecution involved LIOs of second prosecution), *on remand*, 270 So. 2d 26 (Fla. Dist. Ct. App. 1972) (state court ruling that offenses involved were not in fact lesser and greater offenses and principle therefore did not apply), *cert. denied*, 414 U.S. 945 (1973) (Brennan, Douglas & Marshall, JJ., dissenting, based upon Justice Brennan's long-held premise that a "same transaction" test should replace the "same elements" test).

459. *See* Garrett v. United States, 471 U.S. 773, 777-78 (1985), discussed *infra* note 519 and accompanying text.

460. 433 U.S. 682 (1977) (per curiam).

appears to have given the doctrine a somewhat generous application in a felony murder case.

Harris v. Oklahoma. *Harris* involved a state conviction for felony-murder, followed by a prosecution for the felony (firearm robbery) which underlay the murder. The felony would not be a necessarily included offense under an abstract elements test because any number of felonies would qualify.[461] Therefore, the case would not seem to present a traditional greater-LIO problem. Nevertheless, in a short per curiam opinion, the Supreme Court granted certiorari and simultaneously reversed. In doing so, the Court took note of the state court's recognition that "proof" of the underlying felony was necessary in the first prosecution and also took note of the prosecution's concession that all the ingredients of the underlying felony had to be proved in the first prosecution. The Court then disposed of the case under the doctrine that when conviction for the greater crime could not have occurred without conviction for the lesser crime, the Double Jeopardy Clause bars later prosecution for the lesser. Principal reliance was placed on a citation to *Nielsen*.[462]

The posture and nature of the *Harris* decision has led to its characterization as a case in which the Court "did not consider the crime generally described as felony murder as a separate offense distinct from its various elements."[463] As a result, subsequent Supreme Court opinions have treated *Harris* as involving a "species of lesser-included offense" reprosecutions,[464] although there is debate about the full impact of this ambigu-

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461. See *supra* notes 13-19, 419 and accompanying text.

462. *Id.* at 682-83. A "*cf.*" citation to Brown v. Ohio (described *infra* at note 485) was added, and *Nielsen's* "same incidents" language was quoted. Additional citation reference was made to Waller v. Florida, described *supra* note 458 and accompanying text.

463. Illinois v. Vitale, 447 U.S. 410, 420 (1980).

464. *Id.* Five justices in United States v. Dixon, 113 S. Ct. 2849 (1993), read *Harris* as a type of LIO pattern. Speaking for two justices on that point, Justice Scalia concluded: "We have described our terse *per curiam* in *Harris* as standing for the proposition that, for double jeopardy purposes, 'the crime generally described as felony murder' is not 'a separate offense distinct from its various elements.'" *Id.* at 2867 (quoting Illinois v. Vitale, 447 U.S. 410, 420-21 (1980); *accord* Whalen v. United States, 445 U.S. 684, 694 (1980)). *Dixon* involved a contempt conviction followed by a prosecution for a substantive crime involving the contemptuous activity. "Here, as in *Harris*, the underlying substantive criminal offense is 'a species of lesser-included offense.'" *Id.* (speaking for two justices and quoting Illinois v. Vitale, 447 U.S. 410 (1980)). Although disagreeing about the extent of the *Harris* rule, Chief Justice Rehnquist and two other justices saw *Harris* as a case in which the two prosecutions were treated as "akin to greater and lesser included offenses." *Id.* at 2867 (Rehnquist, C. J., concurring and dissenting opinion).

Justice Scalia, dissenting in Grady v. Corbin, 495 U.S. 508, 528 (1990), viewed *Harris* as dealing with one of the cases in which the Court has departed from *Blockburger's* exclusive focus on the statutory elements of crime, *i.e.*, a situation in which "a statutory offense

ous opinion.[465] Given *Harris*' predicate reliance on the particular state court interpretation—that the state had, in effect, interpreted the felony as an LIO of the felony murder—it is possible that another state might not interpret an underlying felony as an LIO of felony murder.[466] Accordingly, such a different and critical state law interpretation might produce a different result in another case. Nevertheless, *Harris* seems destined to be generally treated by most courts as holding that a conviction for felony murder precludes a subsequent prosecution for the underlying felony, as an LIO.[467] As might be expected, a similar principle has been applied to

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expressly incorporates another statutory offense without specifying the latter's elements."

465. *Harris* has been part of the wider debate concerning the appropriate test for determining a "same offense." *See, e.g.*, *supra* note 404. A broader reading of *Harris*, as a "conduct test" and not an "elements test" case, lends fuel to that definitional debate. For an insight into this possible reading of *Harris* on this separate point, see the various opinions in *Dixon*, *supra* note 444.

466. *See, e.g.*, State v. Rhode, 503 N.W.2d 27, 41 (Iowa Ct. App. 1993) (holding the felony was not an LIO of felony murder under state law and that double jeopardy does not preclude conviction for both) (single prosecution) (*Harris* not cited). *But see* the dissenting opinion in *Schad*, discussed *supra* note 83 (characterizing robbery as "a necessarily lesser included offense of felony murder/robbery," citing Stevenson v. United States, 162 U.S. 313, 319-20 (1896) (federal prosecution), even though prosecution argued that felony-murder had no LIO); *but cf.* McIntyre v. Caspari, 35 F.3d 338, 343 (8th Cir. 1994) (concluding federal habeas corpus must analyze state statutes for LIO, and holding LIO was involved despite intermediate state court decision to the contrary), *cert. denied*, 115 S. Ct. 1724 (1995).

467. *See, e.g.*, State *ex rel.* Hall v. Strickler, 285 S.E.2d 143, 144 (W. Va. 1981) (conviction for felony murder bars subsequent prosecution on the predicate robbery felony, citing *Harris*); State v. Liberatore, 445 N.E.2d 1116, 1118 (Ohio 1983) (barring second trial for felony-murder charge following on predicate felony; characterizing ruling as a collateral estoppel holding and treating *Harris* as progeny of Ashe v. Swenson, 397 U.S. 436 (1970), *supra* note 389). *See also* Sekou v. Blackburn, 796 F.2d 108 (5th Cir. 1986) (acknowledging that felony is usually LIO of felony murder but holding that separate prosecution for felony-murder following conviction on armed robbery charges not barred by double jeopardy on record showing that state could have used either the robbery or kidnapping as predicate felony).

There is less consensus about the reach of double jeopardy when the prosecution for the felony-murder and the underlying felony occurs in the same proceeding, raising the multiple punishment issue rather than the successive prosecution issue. *See supra* at note 390. Numerous states consider that to be a double jeopardy violation as well. *See, e.g.*, Perry v. State, 853 P.2d 198, 200-01 (Okla. Crim. App. 1993) (holding conviction of felony murder and felony in same trial barred and ordering dismissal of felony, citing *Brown's* same "incidents" language, *see infra* note 488); People v. Allen, 505 N.W.2d 869, 873 (Mich. Ct. App. 1993) (stating both conviction and multiple punishment for felony murder and felony barred); State *ex rel.* Hall v. Strickler, 285 S.E.2d 143, 144 (W. Va. 1981) (multiple punishment for felony would be barred following conviction for felony murder). Other states, however, hold that so long as the prosecutions occur in a single trial, separate punishment is not barred by the protections of double jeopardy. *See, e.g.*, State v. Coody, 867 S.W.2d 661 (Mo. Ct. App. 1993) (holding punishment for felony murder and felony not barred when imposed in single trial); State v. Rhode, 503 N.W.2d 27 (Iowa Ct. App. 1993). *See generally* Thomas, *supra* note 390,

successive prosecutions under the misdemeanor-manslaughter rule.[468] Exceptions which appear elsewhere with regard to general LIO principles—such as the occurrence of new events—sometimes appear in the felony murder cases as well.[469]

b. Conviction of the Greater Offense Charged, Reversal on Appeal, and Attempted Retrial for LIO

The idea that conviction for a greater crime generally bars reprosecution for an LIO involves some possible variations and exceptions. One such important variation occurs when a jury convicts of an encompassing offense, but the guilty judgment on that verdict is upset on appeal because of insufficient evidence, and the prosecution then seeks to retry the defendant for an LIO. For example, a defendant may be convicted of common-law first degree murder and the appellate court may find insufficient evidence of premeditation-deliberation, the element that typically distinguishes common-law first degree murder from second degree.[470] Present law will preclude retrial for the crime on which insufficient evidence was found (*e.g.*, first degree murder).[471] Can the defendant nonetheless be subjected to a second prosecution for an LIO (*e.g.*, second degree murder)? This issue was left open by the Supreme Court in *Greene v. Massey*,[472] but there appears to be no persuasive double jeopardy reason to prohibit the prosecution from retrying the defendant for a lesser offense (*e.g.*, second degree murder). However, there may be another reasonable way (appellate modification) to address this problem short of second jeopardy, as will be discussed subsequently.

Greene v. Massey. In *Greene*,[473] the defendant's conviction for first degree murder was upset by the state appellate court. Subsequently, the

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at 348-50.

468. *Cf.* State v. Lonergan, 548 A.2d 718 (Conn. App. Ct. 1988) (acquittal case) (holding acquittal on vehicular manslaughter charge bars subsequent trial on underlying drunk-driving offense).

469. *See, e.g.*, People v. Harding, 506 N.W.2d 482 (Mich. 1993) (prosecution for felony-murder following conviction on predicate offense not prohibited by double jeopardy when victim's death did not occur until after the first trial); Potts v. State, 410 S.E.2d 89 (Ga. 1991) (double jeopardy does not bar separate prosecutions for felony-murder and predicate offense when proceedings occurred in different counties).

470. *See, e.g.*, People v. Anderson, 447 P.2d 942 (Cal. 1968).

471. *See infra* note 547. This issue would not have arisen prior to Burks v. United States, 437 U.S. 1 (1978), because pre-*Burks* law allowed for the retrial on even the greater offense. *Id.* at 6-10.

472. Greene v. Massey, 437 U.S. 19, 25 n.7 (1978).

473. 437 U.S. 19 (1978).

defendant again was tried for first degree murder and again convicted. The Supreme Court found that the state court opinions left doubt as to the basis for the original reversal. The reversal may have been based on insufficient evidence, in which instance Supreme Court cases decided subsequent to the state court reversal would bar retrial for that offense.[474] On the other hand, the reversal may have been based on trial errors, in which instance retrial for that upset offense would be permitted.[475] The Supreme Court remanded for reconsideration. It concluded that the state appeals court "conceivably did not see any need to consider whether, under the Federal Constitution, a retrial would be allowed *only* for some lesser included offense,"[476] because the Double Jeopardy Clause had not been held applicable to the states at the time of the state court reversal and because of the content of double jeopardy law at the time of the state court's original reversal. In this posture, the Court determined that it "need not reach the question of whether the State could, consistent with the Double Jeopardy Clause, try [the defendant] for a lesser included offense in the event that his first degree murder conviction is voided."[477]

While there is something to be said on both sides of the issue thus left open in *Greene*, the stronger argument seems to lie with the view that double jeopardy principles would not preclude retrial for the LIO.[478]

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474. *See* Benton v. Maryland, 395 U.S. 784 (1969) (applying the Double Jeopardy Clause to the states), and *Burks*, 437 U.S. 1 (1978), *infra* note 547 (decided the same day as *Greene* and concluding that reversal for insufficient evidence precludes retrial, unlike reversal for trial error on a defendant's appeal).

475. *See, e.g.*, United States v. Ball, 163 U.S. 662 (1896) (retrial allowed after successful defense appeal of a conviction; implying a "waiver" theory); United States v. Tateo, 377 U.S. 463 (1964) (retrial allowed following successful defense collateral attack; expressly pragmatic balancing of interests analysis). *See also* North Carolina v. Pearce, 395 U.S. 711, 720-21 (1969) (discussing theories underlying the *Ball* principle); Benton v. Maryland, 395 U.S. 784, 811-12 (1969) (Harlan, J., dissenting) (same).

476. *Greene*, 437 U.S. at 25 n.7 (italics in original).

477. *Id.* Following the Supreme Court's decision to remand this case to the Fifth Circuit to determine upon which grounds the original conviction in *Greene* was reversed, the federal circuit court certified questions to the Florida Supreme Court on several aspects of state law. These were answered in Greene v. Massey, 384 So. 2d 24 (Fla. 1980). Based upon the Florida court's answers, the circuit court concurred with the district court's interpretation that the state appellate reversal was based both on the weight of the evidence and "the interests of justice," and therefore determined that retrial for the upset (greater) offense was not barred by double jeopardy. Greene v. Massey, 706 F.2d 548, 557 (5th Cir. 1983).

478. It is true that the prosecution had the chance to have the LIO presented to the jury and that the defendant will have to undergo a second jeopardy. While this is of no small consequence, the cases reflect that these considerations are not necessarily determinative. The question is whether the case should be treated more like a conviction reversed on defendant's appeal (with a new trial ordered) or like those few issues in which the basis for the defendant's appeal precludes a new trial. The fact that a defendant successfully appeals

Several courts have confronted the issue and most have concluded double jeopardy does not preclude retrial in these circumstances.[479] Neverthe-

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following conviction does not normally preclude a retrial under the *Ball* principle. *See supra* note 475 (reversals based on trial errors). The exception to that principle is an appellate reversal on the basis of insufficient evidence, rather than trial errors. *See* Burks v. United States, 437 U.S. 1 (1978), described *infra* note 547. Based as they are on acquittals, the rationales for that exception do not cover LIOs for which the defendant was also impliedly convicted. This is unlike the implied acquittal situation. *See infra* notes 583-604 and accompanying text. Had the defendant been convicted only of the LIO and successfully appealed that conviction on a basis other than evidentiary insufficiency, retrial on the LIO would have been permitted. In the situation where the case goes to the jury on the greater offense, if the trial judge thought that the evidence was also sufficient to go to the jury on the LIO, as impliedly the trial judge must have thought, and if the appellate ruling does not find insufficient evidence for the LIO, precluding retrial would be a windfall for the defendant. A defendant who has been convicted of the greater offense has not been acquitted of the LIO. On the contrary, such a defendant has been necessarily convicted of the LIO. *See infra* note 642 and accompanying text. While it is true that the defendant will have to undergo a second trial as to the lesser crime, the defendant is in no worse position than a convicted defendant who wins retrial on an error unrelated to insufficiency on that charge. Retrial in the latter situation is clearly permitted. *See supra* note 475.

479. For the majority view permitting retrial on the LIO, *see, e.g.,* Beverly v. Jones, 854 F.2d 412 (11th Cir. 1988) (rejecting double jeopardy attack where Alabama state law ruling permitted retrial on an LIO supported by the evidence and when the conviction on the greater was reversed for insufficient evidence as to an aggravating element), *cert. denied,* 490 U.S. 1082 (1989); State v. O'Brien, 857 S.W.2d 212 (Mo. 1993) (en banc) (appellate court is not barred from remanding a case for new trial on the LIO when evidence would be sufficient to convict defendant on that charge and a modification of the verdict would not be appropriate); State v. Maupin, 859 S.W.2d 313 (Tenn. 1993) (Double Jeopardy Clause does not preclude new trial on LIO when conviction on greater offense was reversed for insufficient evidence). *See also* Gorham v. Commonwealth, 426 S.E.2d 493 (Va. Ct. App. 1993) (reasoning, somewhat problematically, that finding of insufficient evidence on greater offense means the trial judge erred in allowing that charge to go to the jury, and this "hybrid" of procedural error and insufficient evidence does not preclude a retrial on an LIO supported by the evidence). Several cases allow for reprosecution on the LIO but do not discuss the double jeopardy issue. *See, e.g.,* Rogers v. Commonwealth, 410 S.E.2d 621 (Va. 1991); Cheng v. Commonwealth, 393 S.E.2d 599 (Va. 1990); Stanley v. Commonwealth, 407 S.E.2d 13 (Va. Ct. App. 1991). In the face of a defense double jeopardy argument, Morris v. Mathews, 475 U.S. 237 (1986), seems to assume that a retrial in a parallel situation would be permissible. *See infra* note 655.

Rather than generally allowing a new trial, a number of jurisdictions imply that under these circumstances the better way to deal with the situation (or, perhaps, the necessary way) is for the appellate court to proceed by effectuating a modification of the judgment. *See, e.g.,* State v. Haynie, 867 P.2d 416 (N.M. 1994) (implying power to order new trial on LIO) (the usually appropriate remedy is remand and resentence and the power to order retrial on the LIO is limited to very specific factual settings where the interests of justice demand a new trial, *limiting* State v. Garcia, 837 P.2d 862 (N.M. 1992) (allowing second prosecution)); State v. Kingsley, 851 P.2d 370, 385 (Kan. 1993) ("Where a defendant has been convicted of the greater offense but evidence supports only a lesser included offense, the case must be remanded to resentence the defendant for conviction of the lesser included offense."); FLA. R. CRIM. P. 3.620 (in this situation, "the court shall not grant a new trial but shall find or

less, this double jeopardy question normally can be averted altogether by a judgment modification procedure, discussed more extensively below.[480]

2. The LIO-Greater Offense Sequence: Conviction of the LIO Followed by Prosecution for the Greater Offense

Nielsen and its progeny deal with a situation in which an attempted prosecution for an LIO follows a trial (and conviction) for the greater offense. The converse of this sequence sometimes arises: an attempt at a successive prosecution for an encompassing offense following a trial for an LIO. These situations sometimes surface, for example, because of new developments in a case or because different subdivisions of a jurisdiction may bring different charges. The precise question of whether the conviction for an LIO barred successive prosecution for the greater offense went unresolved in the Supreme Court for many years.[481]

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adjudge the defendant guilty of the lesser degree or lesser offense necessarily included in the charge . . .."). Under this view, conviction for an LIO is likewise permissible but the result is achieved without subjecting the defendant to a second jeopardy. The modification device is discussed later in the text.

The most extensive judicial attention to the issue of LIO retrial following reversal for evidentiary insufficiency can be found in the Texas cases. Current Texas law allows retrial on the LIO following a reversal for insufficient evidence on the greater offense, if the jury was instructed on the LIO at the original trial. Shute v. State, 877 S.W.2d 314 (Tex. Crim. App. 1994) (double jeopardy does not prevent retrial on attempted murder LIO after reversal of capital murder due to insufficient evidence); *Ex parte* Granger, 850 S.W.2d 513 (Tex. Crim. App. 1993) (en banc) (distinguishing Stephens v. State, 806 S.W.2d 812 (Tex. Crim. App.) (en banc), *cert. denied*, 502 U.S 929 (1991). *Stephens* ruled against retrial on the LIO in that particular case, on the grounds that the trial court there had refused to give LIO instructions to the jury). *Granger's* allowance of retrial has been applied to a bench trial verdict upset on appeal. Shute v. State, 877 S.W.2d 314 (Tex. Crim. App. 1994) (noting that the focus is on whether the first trier of fact was authorized to find guilt on LIO, court concluded that bench trial judge is considered to have LIOs available for consideration even if not expressly requested). For a case in accord with *Stephens*, *see Ex parte* Roberts, 662 So. 2d 229 (Ala. 1995) (since jury not instructed on LIOs, state is barred from retrying defendant for LIOs). For a comment on *Stephens*, see Scott R. Cordes, Note, 33 S. TEX. L. REV. 287 (1992).

480. *See infra* Section IV.F.3.

481. The unsettled state of discernable law on this point was reflected in views expressed in oral arguments in Jeffers v. United States, 432 U.S. 137 (1977) (discussed *infra* note 491). Justice Rehnquist asked: "Is there any decision of this Court to support your proposition that you can't try a defendant for the greater offense after conviction of the lesser-included offense?" Justice Stewart rhetorically asked: "The law is not clear that the trial for a greater offense after conviction of the lesser included violates double jeopardy, is it?" Oral argument, *Jeffers*, as reported in 20 CRIM. L. RPTR. 4203, 4204 (March 31, 1977) (excerpts).

The general principle

The Supreme Court encountered the LIO-greater sequence in a 1912 case, *Diaz v. United States*.[482] As will be discussed shortly, however, the facts gave rise to an exception not requiring a broad holding on the impermissibility of successive LIO-greater prosecutions.[483] Two cases involving an LIO conviction, followed by greater offense prosecution, were finally decided by the Supreme Court in 1977 and afforded a more definitive view of the picture. One of these cases was *Jeffers v. United States*.[484] The other was *Brown v. Ohio*,[485] in which the Court finally stated broadly that the sequence of trial for greater and LIOs did not matter. *Jeffers* is perhaps the more intriguing case, although *Brown* proved the more telling opinion. The prosecutorial background of each case suggests that neither was brought to deliberately test the reach of double jeopardy. As is the situation with many successive prosecution cases, *Brown*, for example, appears to be the product of successive prosecutions brought in an uncoordinated manner by different local authorities within the state.

Brown v. Ohio. Two different counties successively prosecuted Brown, who was first convicted of joyriding in an auto and then prosecuted for auto theft. The first crime (joyriding) was treated as an LIO of the second-charged crime (auto theft). In that context, the Supreme Court stated:

> As is invariably true of a greater and lesser included offense, the lesser offense—joyriding—requires no proof beyond that which is required for conviction of the greater auto theft. The greater offense is therefore by definition the "same" for purposes of double jeopardy as any lesser offense included in it.[486]

At another point in the opinion the Court reiterated its conclusion this way: "a lesser included and a greater offense are the same under *Blockburger* . . . ."[487] That rule, the *Brown* Court asserted, "merely restates what has been this Court's understanding of the Double Jeopardy Clause at least since *In re Nielsen* was decided in 1889."[488] Acknowledg-

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482. 223 U.S. 442 (1912) (initial prosecution for assault and battery followed by second prosecution for homicide when the victim eventually died).

483. *See infra* note 533 and accompanying text.

484. 432 U.S. 137 (1977).

485. 432 U.S. 161 (1977).

486. *Id.* at 168.

487. *Id.* at 167 n.6. For a discussion of this language in the context of varying state methods for discerning LIOs, *see* Section IV.E.

488. *Id.* at 168. The *Brown* Court noted that in *Nielsen*, "the Court endorsed the rule that 'where . . . a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice

ing that the *Nielsen* formulation had involved a conviction for the greater offense followed by conviction for the lesser offense, *Brown* nevertheless concluded: "Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense."[489] In a separate opinion, three justices in *Brown* professed no quarrel with this general double jeopardy analysis, and viewed the Court majority as having taken advantage of the opportunity to pronounce "some acceptable but hitherto unenunciated (at this level) double jeopardy law."[490] They dissented, however, from the Court's application of the double jeopardy principle to the lower court treatment of the case.

The Court's desire in *Brown* to state clearly the lesser-followed-by-greater principle may have been prompted by the government's argument in the contemporaneous *Jeffers* case.

Jeffers v. United States. The government's skirmish with the LIO-double jeopardy doctrine in *Jeffers v. United States*[491] represents one of the few attempts to limit the general LIO-double jeopardy concept. It is

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put in jeopardy for the same offense.'" *Id.* (quoting *In re Nielsen*, 131 U.S. at 188). This view was echoed by the dissenters in Jeffers v. United States, 432 U.S. 137, 158 (1977).

489. In context, the *Brown* Court said:

> Although in this formulation the conviction of the greater precedes the conviction of the lesser, the [*Nielsen*] opinion makes it clear that the sequence is immaterial. Thus, the Court treated the formulation as just one application of the rule that two offenses are the same unless each requires proof that the other does not . . . . Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense.

Id. at 168-69 (footnote and citations omitted).

490. *Id.* at 171 (Blackmun, J., dissenting opinion, joined by Burger, C.J., and Rehnquist, J.). A serious issue in the *Brown* case was whether an LIO and a greater offense were really involved, an underlying issue being whether the offenses charged covered the same harm.

Although not central to this Article, it might be noted that there is some question about whether *Brown* accurately determined that these offenses involved an LIO situation. (See the various tests for deciding whether an offense is an LIO, discussed *supra* Section II.) The Supreme Court treated the offenses as being an LIO under elements defined by the state court. *See* 432 U.S. at 167. While it might well be that the two offenses committed at the same time would involve an LIO greater situation, the *Brown* situation involved different days. Despite the Court's treatment of the prosecution's attempt to subdivide the same offense into different time periods, *see id.* at 169-70, the time sequence may, in fact, have made the offenses not the "same offense" because the crimes might have been legitimately treated as different events involving similar (or the same) wrongs but ones committed at different times. Professor Moore refers to these latter wrongs as "token-identity" wrongs which might distinguish the same type offenses discussed in *Brown*. *See* MICHAEL S. MOORE, ACT AND CRIME 320-24 (1993).

491. 432 U.S. 137 (1977).

also one of the few equally rare concrete discussions to surface in the Supreme Court on the question.

Jeffers involved a conviction for a conspiracy, followed by trial for a related continuing criminal enterprise (CCE).[492] The second prosecution followed defendant's opposition to the government's initial motion to consolidate for trial the separately returned indictments for conspiracy and CCE. In claiming double jeopardy barred the second proceeding, the defendant argued that the conspiracy was an LIO of the offense prosecuted second. If this was so, the prosecutions would present the LIO-greater sequence. In the Supreme Court, the government first argued that an LIO was not actually involved in the charges.[493] Alternatively, the government treated the permissibility of prosecuting a greater offense after conviction for an LIO as a question previously left open by the Supreme Court. It also argued for broad rules on the LIO-greater offense issue presented in the case. These prosecution arguments are the most intriguing aspect of *Jeffers*, and they represent one of the few attempts in the case literature to particularize the underlying significance of the sequences.

The government argued that, even if the case involved the same offense, a prosecution for the LIO followed by a greater offense prosecution involved no multiple punishment issue because of the particular punishments imposed in this case.[494] In other cases, it was argued, sentences could be shaped, if necessary, to also avoid multiple punishments in successive prosecutions.[495] With regard to successive prosecutions, the government argued that "the Double Jeopardy Clause does not generally bar prosecution for a greater offense following conviction for a lesser included offense."[496] This argument was conditioned on several limiting premises, however: so long as this defendant had been convicted (not

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492. The case can, therefore, also be viewed in the context of the "complex crimes" issues. *See infra* notes 518-20.

493. Brief for the United States at 9-12, Jeffers v. United States (No. 75-1805).

494. Jeffers received a sentence of 15 years and a $25,000 fine on the first conviction; a sentence of life in prison (effectively without parole) and $100,000 fine was imposed on the second conviction, with the life sentence made consecutive to the 15 year sentence. The government asserted that there were no other practical consequences of the second sentence and the 15 year sentence was effectively without meaning. *Id.* at 16-18.

495. The government contended that if a future case arose in which practical consequences were present from different sentences, multiple punishments could be avoided by "fixing the sentence on the greater offense to take into account any sentence already imposed on the lesser (as, for example, by crediting any time already served for the lesser offense against the time to be served for the greater). *See* Note, *Twice in Jeopardy*, 75 YALE L. J. 262, 289 n.128 (1965)." *Id.* at 17.

496. Brief for the United States at 8, *Jeffers* (No. 75-1805).

acquitted) of the supposed LIO in the first trial and "so long as he was not in jeopardy on the greater offense at the first trial and is not placed in jeopardy again on the lesser included offense at the second trial."[497] The government argued that Jeffers was not in jeopardy for the greater offense during the first trial for the supposed LIO; nor was he in jeopardy on the supposed LIO during the second trial because the crime in the separate indictment was not treated as an LIO at the first trial.[498] The government's position was careful to distinguish the different possible sequences—greater-LIO and LIO-greater.[499]

Jeffers' double jeopardy claim was rejected by the Court, but the Court was unable to formulate a majority opinion.

The argument that the case involved no multiple punishment issue was factually undercut by the existence of separate fines.[500] Moreover, the government's broader proposition concerning the sequence of prosecutions was rejected by eight justices in separate opinions.[501] It was effectively

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497. *Id.* at 13.

498. *Id.* at 43 (citations omitted): "In short, he has not been 'twice put in jeopardy' for either offense . . . ."

499. Whenever the greater offense is prosecuted first, a subsequent prosecution on the lesser included offense is properly barred because the defendant will have been in jeopardy on that offense during trial of the greater. Conviction and punishment on the greater is tantamount to a conviction and punishment on the lesser offense as well, and the risk of these consequences constitutes jeopardy and bars the second trial even if the first trial results in an acquittal.

Similarly, when the lesser offense is tried first and results in acquittal, prosecution on the greater is properly barred in every case because the defendant cannot have committed an offense having as an essential element another offense of which he has been absolved. The acquittal of the lesser is tantamount to an acquittal on the greater, and the Double Jeopardy Clause forbids the government from a further attempt at conviction.

Id. at 40-42 (footnote and citations omitted).

500. *See supra* note 494. The plurality opinion of the *Jeffers* Court noted this fact:

Although both parties, throughout the proceedings, appear to have assumed that no cumulative-punishment problem is present in this case, the imposition of the separate fines seems squarely to contradict that assumption. Fines, of course, are treated in the same way as prison sentences for purposes of double jeopardy and multiple punishment analysis. See North Carolina v. Pearce, 395 U.S. 711, 718 n.12 (1969).

Jeffers v. United States, 432 U.S. 137, 154 (1977) (plurality opinion) (footnotes omitted). The four justices who joined a concurring and dissenting opinion concurred in the judgment to the extent it vacated "the cumulative fines." *Id.* at 160. They conceived that the plurality opinion made it clear that defendant had been denied his constitutional rights, and added several factors which "clinch the double jeopardy claim." One of these was that the defendant "was not only twice tried, but also twice punished for the same offense . . . ." *Id.* at 159 n.5 (Stevens, J., dissenting in part and concurring in part).

501. *See* 432 U.S. at 151 n.18 (plurality opinion concluding that "[a]ny adjustment in punishment for the fact that the defendant already has been punished for the lesser offense

swept away by reference to *Brown* and the view that subjection to second jeopardy is prohibited for the "same offense" and that LIO situations involve this protection.

Both the plurality and the dissenting-concurring opinions referred to *Brown's* general conclusion that the Double Jeopardy Clause prohibits the prosecution from trying a defendant for a greater offense after it has convicted the defendant of an LIO,[502] a proposition that rejects the government's broader position in *Jeffers*. Noting the reverse situation discussed in *Nielsen*, the plurality saw the prohibition on greater-following-lesser as based on the notion that the crimes involve the "same offense." From that, "it follows that the sequence of the two trials for the greater and the lesser offense is immaterial" and equally objectionable.[503]

The *Jeffers* plurality did not decide whether the particular conspiracy was an LIO.[504] Instead, these four justices assumed this arguendo and rejected the double jeopardy claim on other grounds, finding that the defendant had forfeited the claim. They concluded that, even if the prosecutions involved lesser-and-greater offenses, the defense's opposition to consolidation would place the case under an exception to the normal bar if there were an LIO, an exception based on the defendant's perceived election to have the charges tried separately.[505] Four other justices started with the proposition "that a defendant may not be tried for a

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is not adequate to cure the injury suffered because of multiple prosecutions, since the double jeopardy problem inheres in the very fact of a second trial for the 'same offense'."), *id.* at 159 (dissenting and concurring opinion) (quoted *supra* note 500). *See also* Abney v. United States, 431 U.S. 651, 660-61 (1977) (in interpreting federal statute to allow interlocutory appeals of double jeopardy claims, Court focused on the burdensome aspects of jeopardy, beyond propriety of subsequent conviction and multiple punishment).

502. 432 U.S. at 150-51 (four justice plurality); *id.* at 158 (four justices dissenting in part and concurring in the judgment in part) (viewing the *Brown* rule as traceable to BLACKSTONE and *Nielsen*).

503. *Id.* at 151. The plurality noted the possibility that the second prosecution might be barred on a different theory that as well, *i.e.*, "because the defendant is necessarily placed twice in jeopardy on the lesser offense." *Id.* at 151 n.17. This theory focuses on a second jeopardy for the LIO offense itself. "The risk of conviction on the greater means nothing more than a risk of conviction upon proof of all the elements of the lesser plus proof of the additional elements needed for the greater." *Id.* The opinion saw *Brown* as leaving "consideration of the implications of this theory for another day." *Id.* (citing *Brown*, 432 U.S. at 167 n.6). The repetition of evidence idea asserted in *Brown*'s footnote 6 dictum—that prior jeopardy on an element needed for a subsequent prosecution bars further jeopardy—has broader implications beyond LIOs. It took root in *Grady*, overruled in *Dixon*. *See supra* note 444.

504. *Id.* at 150 (Blackmun, J., plurality opinion) (joined by Burger, C.J., Powell and Rehnquist, JJ.).

505. *Id.* at 152. This had been an alternative argument of the government. Brief for the United States at 12-13, *Jeffers* (No. 75-1805).

greater offense after conviction of a lesser included offense" and contested the application of the election theory.[506] Justice White cast the decisive vote, concurring because he thought a recently decided case controlled by negating the claim that an LIO was actually involved.[507]

Jeffers thus stands mainly as a four justice opinion for one of the exceptions to any rule that might normally bar prosecution for a greater offense after prosecution for an LIO, and it has been relied upon as such.[508] The prosecution's argument in *Jeffers*, however, may well have had an effect on *Brown*. As noted, the cases were argued and decided at the same time, and it seems permissible to infer that the Court's opinion in *Brown* may have taken the opportunity to put to rest the argument advanced by the government in *Jeffers*.[509]

The argument raised by the government in *Jeffers* and the Court's answer to it in *Brown*—that an LIO is and has always been considered the same offense—points to a substantial inconsistency in the law, one that underscores the lack of consistent theory in the double jeopardy cases generally. Assuming that a second punishment can be truly noncumulative in some particular case[510] (by crediting sentences or otherwise[511]), what

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506. *Id.* at 158 (citing the language in *Brown*, quoted *supra* note 488).

507. *Id.* (relying on Iannelli v. United States, 420 U.S. 770 (1975) (holding particular statutes at issue did not involve LIOs)) (White, J., concurring in part and dissenting in part).

508. *Jeffers* formed part of the basis for the decision in the 1984 case of Ohio v. Johnson, 467 U.S. 493 (1984), when the Court confronted still another situation involving prosecution of a greater offense after conviction for a lesser offense. Johnson pled guilty to a lesser offense but did so over the state's objection. The Court allowed a subsequent prosecution for a greater offense, commenting that a defendant "should not be entitled to use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution on the remaining charges." *Id.* at 502. For other exceptions, *see infra* at notes 528-37.

509. The government's brief in *Jeffers* noted the pendency of *Brown*:

> That the question of the permissibility of prosecuting the greater offense after conviction on the lesser remained open after *Waller* [*v. Florida*, 397 U.S. 387 (1970),] seems plain from the manner in which the Court declined to reach it in *Blackledge v. Perry*, [417 U.S. 21, 25 (1974)], as well as from the grant of certiorari in *Brown v. Ohio*, *supra*.

Brief for the United States at 48 n.28, *Jeffers* (No. 75-1805). The United States did not participate in the oral argument or file a brief in *Brown*, a state case.

Blackledge, referred to in the government's brief, was a case in which the defendant had been convicted of a misdemeanor in a minor court, had taken a de novo appeal, and had then been charged with a more serious crime. Because the Supreme Court decided the case on the basis of a due process argument, the Court found it unnecessary to reach an independent contention that the second prosecution placed defendant in double jeopardy since he had already been convicted of an LIO charge in the more minor court. *Blackledge*, 417 U.S. at 25.

510. *But see* Benton v. Maryland, 395 U.S. 784 (1969) (discussing the possible punishment consequences in the context of concurrent sentences); Sibron v. New York, 392

is left after the defendant has been *convicted* on the LIO is a successive prosecution which implicates both the burdensomeness and anxiety concerns of the double jeopardy rationale, but not the multiple punishment concerns. *Brown* finds this enough to bar reprosecution.[512] By definition, however, the defendant has been convicted of elements of the LIO and then reprosecuted for those LIO elements, plus additional elements. If this is impermissible, why is it not also impermissible to do the same when the first offense consists solely of litigated elements that do not represent an LIO? Yet, the case law says it is generally permissible to reprosecute when the offenses are not LIO-greater (or are not otherwise the "same offense").[513]

Brown's "immateriality-of-sequence" language has been repeated by the Court in later cases, including *Illinois v. Vitale*[514] and *Garrett v. United States*.[515]

Illinois v. Vitale. In *Vitale*, the Court dealt with a pending second prosecution, this one for manslaughter by automobile, following a first conviction for careless failure to slow. The Court thought it possible that the first charge had not been a lesser offense under state law and so decided the case in a conditional way. However, in remanding for further proceedings the Court noted that: "If, as a matter of [state] law, a careless failure to slow is always a necessary element of manslaughter by automobile, then the two offenses are the 'same' under *Blockburger* and Vitale's trial on the latter charge would constitute double jeopardy under *Brown v. Ohio*."[516] Applying *Nielsen*, the *Vitale* Court said:

> a person who has been convicted of a crime having several elements included in it may not subsequently be tried for a lesser-included offense—an offense consisting solely of one or more of the elements of the crime for which he has already been convicted. Under *Brown*, the reverse is also true; a conviction on

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U.S. 40 (1968) (discussing consequences of punishment in context of mootness issues).

511. *See supra* note 490.

512. *See supra* note 489 and accompanying text.

513. *See Dixon*, discussed *supra* note 444.

514. 447 U.S. 410 (1980).

515. 471 U.S. 773 (1985). A few other Supreme Court cases involve either the application of *Brown*, *see* Montana v. Hall, 481 U.S. 400 (1987) (distinguishing *Brown* and described *infra* note 598), or purported LIO prosecutions followed by greater offense charges, *see* Ricketts v. Adamson, 483 U.S. 1 (1987) (involving a defendant charged with a greater offense after his guilty plea to LIO was negated).

516. *Vitale*, 447 U.S. at 419-20 (footnote omitted).

a lesser-included offense bars subsequent trial on the greater offense.[517]

Garrett *and Complex Crimes*

In *Jeffers*, the four justice plurality of the Court argued that prior case law "created no exception to these general jeopardy principles for complex statutory crimes,"[518] but this view was undercut in 1985 in *Garrett v. United States*.[519] There a majority of the Court read *Brown* as a general LIO-bars-greater holding, but questioned the applicability of the LIO-greater offense double jeopardy doctrine in regard to complex crimes. *Garrett* involved a CCE prosecution in which the defendant argued that his earlier conviction for some predicate acts underlying the CCE violation amounted to a conviction for an LIO of the CCE, precluding the second prosecution. The *Garrett* majority, however, thought "there is a good deal of difference between the classic relation of the 'lesser included offense' to the greater offense presented in *Brown*, on the one hand, and the relationship between" the first offense and the complex second offense involved in *Garrett*.[520] The majority opinion appears to strongly suggest the view that the CCE situation would not be treated under traditional LIO law principles of double jeopardy, but the Court did not decide the issue.[521] Instead, it assumed an LIO for purposes of deciding that Garrett would be excepted from such principles.[522] The Court concluded that the events included in the CCE were not completed by the time of the first-trial offense (asserted to be an LIO) and therefore the CCE was a different offense.[523] Justice Stevens (joined by Justices Brennan and Marshall) dissented in *Garrett*. The dissenters viewed the general double jeopardy rule as "easily stated" and applicable to complex statutory crimes. Quoting the plurality opinion in *Jeffers*,[524] they believed the "'Double Jeopardy Clause prohibits a State or the Federal Government from trying a defendant for a greater offense after it has convicted him of a lesser

517. *Id.* at 421.

518. *Jeffers*, 432 U.S. at 151 (Blackmun, J., with Powell and Rehnquist, JJ., and Burger, C.J.) (referring to Iannelli v. United States, 420 U.S. 770 (1975)).

519. 471 U.S. 773 (1985); *see supra* note 459.

520. 471 U.S. at 787. *Garrett* involved a marijuana importation charge in one federal district and a continuing criminal enterprise charge in another district. *See id.* at 775-77, 787-88.

521. *Id.* at 778-90.

522. *Id.* at 790.

523. *Id.* at 791-92, relying on Diaz v. United States, 223 U.S. 442 (1912) (discussed *infra* note 533).

524. Jeffers v. United States, 432 U.S. 137, 150 (1977).

included offense.'"[525] Justice O'Connor, concurring, also understood *Brown* as generally holding that "the Double Jeopardy Clause prohibits prosecution of a defendant for a greater offense when he has already been tried and acquitted or convicted on a lesser included offense," although she envisioned a general set of exceptions to the principle.[526]

The application of the greater/lesser principles to complex crimes has created its own bulge in the law, discussed extensively elsewhere in the literature.[527]

Exceptions

Under the cases, the rule that conviction of the lesser crime bars subsequent prosecution for the greater offense is subject to exceptions. Some of these exceptions flow from holdings. Others are possibilities perceived in dictum. One exception exists when the defendant's actions are taken to be a choice that the LIO cannot be submitted to the first decisionmaker.[528] Another exception occurs when the greater offense

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525. *Garrett*, 471 U.S. at 802-03 (footnote omitted). It is intriguing that the opinion cites the *Jeffers* plurality for this proposition, rather than the *Brown* majority opinion, issued at the same time. *Jeffers* did involve a CCE situation, but the quoted point was actually finally decided in *Brown*.

526. *Id.* at 796. Justice O'Connor saw this prohibition as one supported by concerns for finality. In her view, because these finality concerns are not absolute in other double jeopardy areas, they should not be viewed as absolute in this sequence either. Her opinion cited *Diaz* (*infra* note 533 and accompanying text), dictum in *Brown* (*infra* note 532), the *Jeffers* plurality (*supra* note 505 and accompanying text), and Ohio v. Johnson (*supra* note 508). She found the *Garrett* facts fit an exception premised on the need to yield to a justifiable public interest in law enforcement and on the absence of prosecutorial overreaching. *Id.* at 796-99.

527. Scholars have contended, in essence, that "extant double jeopardy analysis cannot address issues raised by compound liability because it relies on premises derived from the old model." Susan W. Brenner, *S.C.A.R.F.A.C.E.: A Speculation on Double Jeopardy and Compound Criminal Liability*, 27 NEW ENG. L. REV. 915, 917 (1993). For more extensive discussions of double jeopardy analysis and its effect on complex criminal cases, *see generally* Brenner, *id.*; Anne Bowen Poulin, *Double Jeopardy Protection Against Successive Prosecutions in Complex Criminal Cases: A Model*, 25 CONN. L. REV. 95 (1992); Kenneth Schuler, Note, *Continuing Criminal Enterprise, Conspiracy, and the Multiple Punishment Doctrine*, 91 MICH. L. REV. 2220 (1993). *See also* Whalen v. United States, 445 U.S. 684, 708 (1980) (Rehnquist, J., dissenting) (declaring that "the *Blockburger* test, although useful in identifying statutes that define greater and lesser included offenses in the traditional sense, is less satisfactory, and perhaps even misdirected, when applied to statutes defining 'compound' and 'predicate' offenses"). The Supreme Court recently granted certiorari in a CCE case involving an LIO problem. United States v. Rutledge, 40 F.3d 879 (7th Cir. 1994) (considering conspiracy an LIO of CCE count where the basis of conspiracy count was identical to conduct that established necessary element of CCE count, but concluding that no double jeopardy violation occurred where concurrent sentences imposed), *cert. granted*, 115 S. Ct. 2608 (1995).

528. Ohio v. Johnson, 467 U.S. 493 (1984), described *supra* note 508.

depends on facts that occur after the first trial.[529] A possible extension of this exception exists when the facts giving rise to the greater offense could not have been discovered by the prosecution through due diligence. This possible exception is envisioned in Supreme Court dictum and supported by a few lower court cases, but has not yet been directly encountered by the Supreme Court.[530]

That the *Brown* rule barring subsequent prosecutions for greater offenses following conviction for LIOs is not absolute is cautiously recognized by *Brown* itself and attested to by other holdings. In *Brown,*

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529. *See, e.g.,* Diaz v. United States, 223 U.S. 442 (1912) (prosecution for homicide does not place defendant in jeopardy twice for the same offense when he had previously been convicted of an assault and battery from which victim died subsequent to the proceedings); Garrett v. United States, 471 U.S. 773 (1985) (a subsequent prosecution on continuing criminal enterprise (CCE) charge following conviction on one of the predicate offenses is not barred when events included in the CCE charge had not been completed at time of original indictment); Mitchell v. Cody, 783 F.2d 669 (6th Cir. 1986) (following the "well recognized exception" which allows for prosecution on vehicular homicide charge when victim's death occurred after defendant pled guilty to lesser offenses stemming from the accident). *Cf.* State v. Fugate, 678 P.2d 710, 712 (N.M. Ct. App. 1983) (holding a subsequent prosecution for vehicular homicide following conviction on lesser traffic offenses was barred by double jeopardy because a single statute and penalty covers both "death by vehicle" and "great bodily injury by vehicle," and the latter could have been prosecuted at the first proceeding), *rev'd on other grounds sub nom.* State v. Padilla, 678 P.2d 686 (N.M. 1984), *aff'd by an equally divided court sub nom.* Fugate v. New Mexico, 470 U.S. 904 (1985) (per curiam). *See also* Commonwealth v. Caufman, 611 A.2d 1300, 1304 (Pa. Super. Ct. 1992) (holding no exception where guilty plea entered twelve days after death since prosecutor's office "was in possession of all necessary facts when [defendant] pled guilty"), *rev'd on other grounds*, 662 A.2d 1050 (Pa. 1995).

This new event exception has been applied both when the defendant has been convicted of the lesser offense but has not yet been sentenced, *e.g.*, Spencer v. State, 632 A.2d 214 (Md. Ct. Spec. App. 1993), and when the sentencing process on the original conviction has been completed, *e.g.* State v. Henry, 483 N.W.2d 2 (Iowa Ct. App. 1992).

The cases do not appear to contain any extensive discussion of the precise point at which the new event (death in most of the cases) must occur in comparison to some crucial point in the prosecution, described in the *Brown* dictum as the point at which the prosecution "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." 432 U.S. at 169 n.7 (emphasis added).

530. *See, e.g.,* Garrett v. United States, 471 U.S. 773, 796-97 (1985) (O'Connor, J., concurring) (discussed *supra* note 526); Brown v. Ohio, 432 U.S. 161, 169 n.7 (1977) (quoted *infra* in text at note 532); United States v. Stearns, 707 F.2d 391 (9th Cir. 1983) (defendants could be prosecuted for felony-murder when victim's body was discovered seven years after defendants had been convicted of the underlying theft and necessary facts had not been discovered despite the exercise of due diligence); United States v. Lee, 435 F. Supp. 974, 979 (E.D. Tenn. 1976) (where defendant successfully appealed his conviction on the LIO, the government is not barred from trying defendant on greater offense when it was "excusably unaware" of the evidence necessary for the greater offense at the time of the original prosecution).

the Court tempered its statement that "[w]hatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense,"[531] by picturing exceptional cases: "An 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."[532] One of the cases cited by the Court for this proposition concerning an exception was the 1912 *Diaz* case.[533]

Diaz v. United States. *Diaz* involved a prompt first misdemeanor conviction for assault and battery before a justice of the peace the day following the event. When the victim died nearly four weeks later, the defendant was prosecuted for homicide in a court with broader jurisdiction. He argued for a double jeopardy bar based upon the prior conviction of assault, clearly an LIO of the second charge. The Court stated that the prosecutions were not for "the same offense"[534] (a dubious characterization if the same elements test were applied), but the case is generally read as an exception to the lesser offense double jeopardy rule, as *Brown* itself implies.[535] In her concurring opinion in *Garrett*, Justice O'Connor read *Diaz* in this way as well:

> *Diaz* implies that prosecution for a lesser offense does not prevent subsequent prosecution for a greater offense where the latter depends on facts occurring after the first trial. Dicta in *Brown v.*

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531. 432 U.S. at 169.

532. *Id.* at 169 n.7. For this proposition the Court cited Diaz v. United States, 223 U.S. 442, 448-49 (1912), and Ashe v. Swenson, 397 U.S. 436, 453 n.7 (1970) (Brennan, J., concurring). *See also* Garrett v. United States, 471 U.S. 773, 802-03 (1985) (Stevens, J., dissenting) (discussing an exception that "may" apply in situations where lesser offense is prosecuted before greater); *id.* at 796-97 (characterizing *Diaz* exception as dealing with situation where greater offense "depends on facts occurring after the first trial") (O'Connor, J., concurring). *Cf.* Ricketts v. Adamson, 483 U.S. 1 (1987) (breach of plea agreement in LIO removed double jeopardy bar that otherwise would prevail in prosecution for greater offense).

It is not difficult to imagine a case involving the due diligence variation. Suppose, for example, a defendant is charged with a lesser crime involving destruction of property. The crime arises from what first appears to be a random shooting at a government building, and the defendant promptly pleads guilty. Upon further diligent investigation, the authorities then find evidence that the crime really involved an attempted assassination and charge the defendant anew with a greater encompassing crime.

533. Diaz v. United States, 223 U.S. 442 (1912).

534. *Id.* at 448. The Court did note that the jeopardy on assault and battery charge did protect from further prosecution on that charge "and therefore required that the latter be not treated as included, as a lesser offense, in the charge of homicide . . . ." *Id.* at 449. Assumedly, this would mean that the LIO could not be given to the jury as an option.

535. *Supra* note 532 and accompanying text.

> *Ohio* suggested the same conclusion would apply where the later prosecution rests on facts that the government could not have discovered earlier through due diligence. . . . See also *Jeffers v. United States* . . . .[536]

The majority in *Garrett* relied on *Diaz* in reaching its similar conclusion.[537]

D. Acquittals Followed by Successive Prosecutions

1. The Greater Offense-LIO Sequence: Acquittal of the Greater Offense Followed by Prosecution for the LIO

In *Nielsen*, the Court's language concerning the "familiar learning" about LIOs went beyond convictions to note the possible effect of an acquittal: "It is familiar learning that there are many cases in which a conviction *or an acquittal* of a greater crime is a bar to a subsequent prosecution for a lesser one."[538] Factually, *Nielsen* involved a *conviction* for a greater offense, and the Court cautioned: "Whether an acquittal would have had the same effect to bar the second indictment is a difficult question, on which we express no opinion."[539] The Court thereafter noted the acquittal principles, but only because the Court treated the acquittal cases as akin to *a fortiori* support for a holding that a prior *conviction* (the *Nielsen* facts) barred reprosecution for an LIO.

a. Acquittals and "Finality" in General

Acquittal verdicts have generally been accorded "special"[540] and "final"[541] status without regard to how egregiously incorrect the verdict

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536. 471 U.S. at 796-97 (citations omitted). For other cases referring to the exceptions that might exist under the *Diaz* line, *see, e.g.,* Ricketts v. Adamson, 483 U.S. 1, 8 (1987) (citing *Brown* for assumption that, absent special circumstances, conviction for LIO would have precluded prosecution for the greater charge, and citing Ohio v. Johnson, 467 U.S. 493 (1984), and Jeffers v. United States, 432 U.S. 137, 152 (1977) (plurality), as examples of special circumstances discussions). *See also* Sanabria v. United States, 437 U.S. 54, 75-77 (1978) (discussing and distinguishing exception cases).

537. *See supra* note 523.

538. 131 U.S. at 189 (emphasis added) (citing WHARTON ON CRIMINAL LAW, *supra* note 446).

539. *Id.* at 187. *See also id.* at 190, noting that the cases discussed were acquittals and viewing the state of the law to be that an acquittal of a greater offense at the first trial "would not or might not be a bar" to a successive prosecution for an LIO if conviction for the LIO could not have been had at the first trial of the greater offense. This concept relates to "implied acquittals," discussed *infra* note 584 and accompanying text.

540. *See, e.g.,* United States v. DiFrancesco, 449 U.S. 117, 129 (1980).

541. *See, e.g.,* Green v. United States, 355 U.S. 184, 188 (1957).

may have been.[542] The Court's continuing use of the term "final" in speaking broadly about acquittals beyond trial verdicts requires some brief clarification and qualification, however, especially since (to borrow Justice Brennan's language) "[t]erminology in the double jeopardy area has been confused at best."[543]

Under the general acquittal principle, finality precluding review has been accorded to acquittals in several situations: (1) a jury's verdict of acquittal or a judge's bench-trial finding;[544] (2) a trial judge's acquittal before the jury reaches a verdict, as long as jeopardy has attached;[545] (3) a judge's acquittal after a jury has been unable to reach a verdict;[546] and

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542. The possible inaccuracy of these determinations to acquit does not alter their nonreviewable character. *See, e.g.*, Sanabria v. United States, 437 U.S. 54, 77-78 (1978) (trial judge's erroneous acquittal still resulted in double jeopardy bar); *Green*, 355 U.S. at 188, 191 (elemental principle that prosecution "cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous"; no further prosecution even if it can be "convincingly demonstrated that the jury erred"); Fong Foo v. United States, 369 U.S. 141, 143 (1962) (per curiam) (implied recognition that judge's ruling may have been egregiously erroneous). Furthermore, the fact that "'the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles,' . . . does not alter its essential character" even if affects the accuracy of that determination. United States v. Scott, 437 U.S. 82, 98 (1978) (responding to argument of dissenting justice).

543. Grady v. Corbin, 495 U.S. 508, 521 n.12 (1990), *overruled on other grounds*, as discussed *supra* note 444.

544. *See* Kepner v. United States, 195 U.S. 100, 133 (1904). *See also* United States v. Scott, 437 U.S. 82, 91 (1978) ("the law attaches particular significance to an acquittal"; noting that a judgment of acquittal terminates the prosecution, whether based on a jury verdict of not guilty or on a ruling by the trial judge that the evidence is insufficient to convict); United States v. Ball, 163 U.S. 662, 671 (1896). *See also* United States v. Jenkins, 420 U.S. 358, 365 (1975) ("Since the Double Jeopardy Clause of the Fifth Amendment nowhere distinguishes between bench and jury trials, the principles given expression through that Clause apply to cases tried to a judge."); *Ex parte* Lange, 85 U.S. (18 Wall) 163, 169 (1873) ("The common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.").

545. *See, e.g.*, Richardson v. United States, 468 U.S. 317, 325 n.5 (1984) (reiterating that trial court's finding of insufficient evidence is the equivalent of an acquittal); Fong Foo v. United States, 369 U.S. 141, 143 (1962) (holding that acquittal barred review on appeal after trial judge directed verdict after only a few prosecution witnesses had been heard in anticipated long jury trial).

546. *See* United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) (federal trial judge's acquittal under Federal Rule of Criminal Procedure subsequent to hung jury mistrial bars reprosecution).

This entry of a judge acquittal following a hung jury mistrial needs to be distinguished from a simple hung jury situation with no judge acquittal. Mistrials resulting from a jury's inability to reach a verdict do not themselves create an acquittal barring retrial. *See, e.g*, Richardson v. United States, 468 U.S. 317, 326 (1984) (declaration of mistrial was not an event that terminated original jeopardy which had attached at original trial, thus undermining defendant's claim that if prosecution failed to introduce sufficient evidence to establish his

(4) a final determination on appeal that there was insufficient evidence.[547] These acquittals are "final" in the res judicata sense that any unaltered judgment will eventually be a preclusive end to litigation,[548] barring retrial for the same offense. Furthermore, these types of acquittals are "final" in the additional sense that they are not further reviewable for correctness; the acquittal action is supposed to end the charge. The impermissibility of second jeopardy therefore means generally that the defendant cannot be reprosecuted in the trial court. However, with regard to the first three types of acquittal, in federal courts and in most states, it has the additional and indirect effect of precluding any prosecution appeal. Double jeopardy rules play a crucial role in this appellate result, but the reasons for the appeal bar are based on something more than the Double Jeopardy Clause. (A bit more about these doctrines—involving advisory opinion limitations—is contained below.[549]) It seems necessary here only

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guilt at his first trial, he may not be tried again following a declaration of a hung jury mistrial). Mistrials for reasons other than a jury's inability to reach a verdict raise separate problems and require a different analysis. *See, e.g.*, Illinois v. Somerville, 410 U.S. 458 (1973) (discussing general "manifest necessity" standard); Oregon v. Kennedy, 456 U.S. 667 (1982) (discussing possible exception for certain prosecutorial misconduct in causing mistrial).

547. *See, e.g.*, Burks v. United States, 437 U.S. 1, 18 (1978) (unreversed judgment of appeals court based on insufficiency of evidence bars second trial on insufficiently proved first charge); Greene v. Massey, 437 U.S. 19 (1978) (applying *Burks* to state prosecutions). The effect is to treat that decision as the equivalent of a trial judge error in not ordering acquittal for insufficient evidence and giving that relief on appeal. *See* Lockhart v. Nelson, 488 U.S. 33, 41 (1988). In the sense meant here, an appellate ruling of insufficiency would become "final" when the prosecution exhausted its appeal rights, such as the right to appellate court rehearing following an adverse appellate ruling and the right to further appeal such a ruling to a higher court.

548. *See infra* note 566 and accompanying text. This concept is reflected in the language of Arizona v. Washington, 434 U.S. 497, 503 (1978), if the opinion's use of the term "innocence" is read to mean a finding of insufficient evidence of guilt: "If the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair." *Id.* at 503.

549. In federal prosecutions the appeal bar follows from the express wording of the federal appeals statute (*see supra* note 407), but without the statute the same result would follow from the constitutional case-or-controversy requirement (U.S. CONST. art. III, § 2, cl. 1). Since double jeopardy would preclude the remedy sought by the appellant-prosecution, the result would be an impermissible advisory opinion. *See, e.g.*, United States v. Evans, 213 U.S. 297 (1909) (statute appeared to give prosecution a right to appeal after acquittal; Court considered lower court's restrictive reading of statute sustainable by reference to advisory opinion problem that would otherwise arise). The Supreme Court's advisory opinion doctrine is a federal constitutional doctrine binding only on the federal courts. The states appear free to afford advisory opinions after acquittal should they so wish, *see id.* at 300, although few do so. For an example of a state case allowing a statutory prosecution appeal, and declaring error without allowing retrial, *see* State v. Keffer, 860 P.2d 1118 (Wyo. 1993).

Therefore, in the federal system and in most states the Double Jeopardy Clause's effect on the availability of a remedy works in combination with a jurisdiction's case-or-controversy

to note that those additional doctrines relate to the viability of an appellate remedy, without which the appellate exercise loses its case-or-controversy nature and leads to an advisory opinion. Most, but not necessarily all, acquittals are thus accorded a type of finality that precludes appeal.

Moreover, a major possible exception to the general principle of immediate finality accorded a trial level acquittal involves a fifth type of acquittal, different than the acquittals mentioned above: (5) an acquittal rendered by a trial judge following a jury's verdict of guilty (in convenient shorthand, an "acquittal n.o.v.").

Supreme Court dictum, set out below,[550] expressly indicates that this

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limitations to prohibit prosecution *appeals* when there has been an acquittal that is final for purposes of *reprosecution*. This is, however, an indirect effect of the Clause. A state could allow such an appeal if it allowed advisory opinions, though it could not require the acquitted defendant to participate in the appeal. *See, e.g.*, United States v. Evans, 213 U.S. 297 (1909). The Double Jeopardy Clause's effect—the denial of a judicial remedy to the appealing prosecutor—is a constitutional effect, but it does not itself bar appeal since that appeal process does not involve second jeopardy. It is only when combined with a particular jurisdiction's advisory opinion prohibition that there is a bar to a prosecution appeal otherwise permitted by statute.

550. The Supreme Court has suggested in several cases that a judge's acquittal notwithstanding a jury guilty verdict may be reviewable and would not, by virtue of double jeopardy, preclude reversal of the trial judge's "acquittal" for insufficient evidence. *See* United States v. Jenkins, 420 U.S. 358, 365 (1975). In *Jenkins*, the Court states,

> [w]here the jury returns a verdict of guilt but the trial court thereafter enters a judgment of acquittal, an appeal is permitted. In that situation a conclusion by an appellate court that the judgment of acquittal was improper does not require a criminal defendant to submit to a second trial; the error can be corrected on remand by the entry of a judgment on the verdict.

Id. This dictum is fortified by a footnote in United States v. Scott, 437 U.S. 82, 91 n.7 (1978), written by Justice Rehnquist, who also wrote *Jenkins*. Pointing out the above-quoted "assumption" in *Jenkins*, the *Scott* majority opinion notes that despite the heavy reliance on finality of an acquittal in two decisions subsequent to *Jenkins*, "neither decision explicitly repudiates" the assumption in *Jenkins* that this type of acquittal could be set aside without violating double jeopardy. *Id.*

In both *Jenkins* and *Scott*, the Court's suggestion that the trial judge's acquittal could be overturned without damage to the double jeopardy principle was dictum. The facts of neither case presented such a situation, nor has the Court had subsequent occasion to rule directly on this factual sequence. Further dictum in support of the permissibility of review appears in United States v. DiFrancesco, 449 U.S. 117, 130 (1980), built on the same premises. There, in dictum generally summarizing double jeopardy principles, the Court broadly stated that double jeopardy "does not bar a Government appeal from *a ruling* in favor of the defendant after a guilty verdict has been entered by the trier of fact." (Emphasis added.) The Court drew this broad statement *a fortiori* from the *Scott* principle that double jeopardy did not bar appeal where the trial had been terminated prior to a jury verdict at defendant's request "*on grounds unrelated to guilt or innocence.*" *Id.* (Emphasis added.) The Supreme Court case cited for the proposition, *Wilson*, involved only a ruling based on issues that did not go to factual guilt or innocence. Significantly, however, *DiFrancesco* also cited two circuit court opinions that did deal with an acquittal post-verdict, rulings that did go to factual guilt or

type of acquittal is reviewable and therefore not final in the important sense that it can be reviewed for correctness, reversed, and a new judgment of guilt imposed upon the defendant. The theory underlying this dictum—the ability to enter a judgment of guilt without subjecting the defendant to a second jeopardy[551]—may have even wider implications than for acquittals n.o.v.,[552] but it is enough now to address acquittals n.o.v.

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innocence. United States v. Rojas, 554 F.2d 938 (9th Cir. 1977) (judge unconvinced evidence amounted to guilt beyond reasonable doubt); United States v. De Garces, 518 F.2d 1156 (2d Cir. 1975) (judge found element not established beyond reasonable doubt). That the Court reached out to supplement its citation to *Wilson* by citing two lower court cases of acquittals n.o.v, going beyond its own cases, appears significant.

551. The *Jenkins-Scott* assumption is premised on the analysis in United States v. Wilson, 420 U.S. 332 (1975), the facts of which, like those in *Jenkins* and *Scott*, did not actually involve an acquittal. *Wilson* held there would be no double jeopardy bar to a remedy that imposed a new judgment of guilty in this sequence: when a jury returned a guilty verdict and the trial judge thereafter erred in dismissing the indictment on non-guilt/innocence grounds (there a speedy trial issue). Application of the *Wilson* theory to an acquittal at that procedural point posits a situation in which "a conclusion by an appellate court that the judgment of acquittal was improper does not require a criminal defendant to submit to a second trial; the error can be corrected on remand by the entry of a judgment on the verdict." United States v. Jenkins, 420 U.S. 358, 365 (1975). *See also* Arizona v. Rumsey, 467 U.S. 203, 211-12 (1984) (distinguishing *Wilson* on this basis). *Wilson*, as did *Scott* and *Jenkins*, presented a double jeopardy issue because of a government appeal under a statute precluding such appeal if double jeopardy would bar further proceedings in the trial court. *Wilson* itself characterized its grant of certiorari as one "to consider the applicability of the Double Jeopardy Clause to appeals from postverdict rulings by the trial court." 420 U.S. at 333.

552. If this assumption is correct, there may even be room to argue that an "acquittal" is not final in a bench trial where a trial judge acquits but clearly indicates that he or she would convict except for insufficiency of a certain element, and that element turns on a question of law. Suppose, for example, that the trial judge expressly notes that there is abundant evidence for conviction if intent is not an element of the crime, but that the evidence is insufficient if intent is an element. Stating a belief that intent is necessary—a debatable point—the judge finds the defendant not guilty. In such a situation, it might well be possible to have the legal issue reviewed on appeal and the trial judge ordered to enter a new verdict, this one, a verdict of guilty, followed by a judgment of guilty. Under *Martin Linen*, would "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged" be required? United States v. Martin Linen Supply Co., 430 U.S. 564, 570 (1977) (quoting United States v. Jenkins, 420 U.S. 358, 370 (1975)). *See also* Smalis v. Pennsylvania, 476 U.S. 140, 145 (1986) ("subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause.").

This type of prosecution argument was rejected on the facts and apparently rejected more broadly in *Jenkins*, but that aspect of *Jenkins* is somewhat undercut by *Scott*. Indeed, a report prepared by the Office of Legal Policy of the United States Department of Justice recommended that the Department consider seeking an appropriate case to argue the government's right to appeal even a bench trial acquittal when correction of the error would allow a verdict of guilty to be entered without a new trial. See Report, *Double Jeopardy and Government Appeals of Acquittals* (1987), *excerpted in* YALE KAMISAR, WAYNE LAFAVE, & JERALD ISRAEL, MODERN CRIMINAL PROCEDURE 1553 (8th ed. 1994), *and reprinted at* 22 MICH. J. L. REF. 837 (1989) (available on Lexis). *But see* Arizona v. Rumsey, 467 U.S. 203,

Beyond simple reliance on Court dictum, there are underlying arguments in favor of treating these acquittals n.o.v differently from other acquittals. For our purposes, these underlying arguments can be briefly stated here. The argument in favor of reprosecution centers on the fact that the error can be corrected without imposing the all important second jeopardy.[553] The argument against treating judgments n.o.v. differently is based on the view that all acquittals, including judgment n.o.v. actions, represent a unique judgmental assessment that is reposed solely in trial level mechanisms not subject to review.[554] Whatever the underlying

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211 (1984) (stating principle that "an acquittal on the merits by the sole decisionmaker in the proceeding is final and bars retrial on the same charge.")

553. The Supreme Court's dictum on this fifth type of acquittal (acquittals n.o.v.) is indeed in accord with the rationale of *Wilson* and *Scott* because the acquittal can be reversed and a judgment of conviction entered without subjecting the defendant to the attachment of a second jeopardy. *See also* Crist v. Bretz, 437 U.S. 28 (1978) (delineating the point at which jeopardy attaches). The dictum is also consistent with fact that simply subjecting defendant to another court proceeding (*e.g.*, further appeal from one level of appeal to another) does not violate double jeopardy, something that is frequently accepted without question. *See* United States v DiFrancesco, 449 U.S. 117, 132 (1980) ("The double jeopardy focus, thus, is not on the appeal but on the relief that is requested . . . ."); Spinelli v. United States, 382 F.2d 871 (8th Cir. 1967) (en banc) (implying no double jeopardy problem in appellate proceeding), *rev'd on other grounds*, 393 U.S. 410 (1969). Of course, the cases are legion in which prosecutors seek appeal or certiorari review in a higher court after intermediate appellate court decision, without double jeopardy objection on that ground alone.

The emphasis in this analysis is upon the subjection of a defendant to second jeopardy. In this view, the judge's post-verdict action may be conceptually treated as something other than a verdict, treated rather as a legal ruling distinguishable from a judge's bench trial verdict or a directed verdict before a jury consideration. This view would seem to imply that the "finality" normally accorded to acquittals, even erroneous ones, is not necessarily accorded for its own sake. Instead, this finality would be a tolerated consequence of the fact that a second jeopardy would have to follow a correction of the acquittal. Under this view, an acquittal can be reviewable and correctable if it can be done constitutionally. It can't be done if the acquittal action is taken during trial because the defendant has won on the crucial issue going to guilt or innocence and has lost the chance to have that same tribunal complete his trial. Moreover, the guilt or innocence determination is the crux of the decision reposed in the trial tribunal, a repose that can implicate the defendant's right to trial by jury. Even an erroneous acquittal, therefore, must be tolerated. This would not apply to the erroneous acquittal n.o.v. sequence, which need not be tolerated because there will be no second jeopardy.

If the appellate court does not affirm the judgment of acquittal, the appropriate procedure appears to be for the appellate court to reverse the judgment of not guilty, remand the case, and order the trial court to reinstate the verdict of guilty and enter a judgment of guilty. *See, e.g.*, United States v. Steed, 674 F.2d 284, 285, 290 (4th Cir. 1982) (en banc) (using both terms "reverse" and "vacate").

554. The Court's *Jenkins-Scott* dictum thus minimizes, and appears at odds with, the valued non-reviewable finality of judgment the Court has otherwise bestowed on other trial level acquittals. The dictum places an emphasis on the fact that this type of acquittal, uniquely, could be reviewed without placing the defendant in second jeopardy. Moreover,

arguments, lower courts have generally been in accord with the Supreme Court dictum allowing for review of acquittals n.o.v. They generally refuse to treat such acquittals as insulated by double jeopardy from a prosecution

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the *Jenkins-Scott* dictum is at odds with dictum in United States v. Martin Linen Supply Co., 430 U.S. 564 (1977). It may also be at odds with the tone in other cases such as Hudson v. Louisiana, 450 U.S. 40 (1981).

Martin Linen arose in connection with a Federal Rule of Criminal Procedure. That rule, FED. R. CRIM. P. 29, allows for judge acquittal at various points in the trial—before submission to the jury or after the jury is discharged, no matter whether the jury reaches a guilty verdict or is unable to reach a verdict. *Martin Linen* held that a judge acquittal following a hung jury was "final" and unreviewable. In so deciding, the Court placed some reliance on its conclusion "that judgments under Rule 29 are to be treated uniformly," with double jeopardy consequences. 430 U.S. at 575. If the *Jenkins-Scott* dictum is upheld, acquittals n.o.v. would not be treated "uniformly" with other acquittals. Moreover, in the mistrial situation involved in *Martin Linen* it would have been possible to have retried the defendant before the judge entered an acquittal, even though it literally would have submitted the defendant to second jeopardy. *See supra* note 546. If the acquittal in *Martin Linen* had been reviewed and reversed, the defendant would have been in no different a position than he or she would have been had the otherwise-permitted retrial occurred; nor would the defendant's interest in maintaining an original jury been anymore transgressed. Put another way, had the Court found hung-jury acquittals reviewable, the defendant would be in no worse situation than had the judge not acquitted. This is parallel to the situation in acquittals n.o.v. In a hung-jury judge acquittal, the defendant would be put back in the position of a permitted second jeopardy. In the *Scott-Jenkins* situations, the defendant would be put in a situation where there was no violation of double jeopardy. Thus, *Martin Linen* does not appear wholly consistent in principle with the *Jenkins-Scott* dictum.

In *Hudson*, the state trial judge granted a motion for new trial on grounds of insufficient evidence. The prosecution's attempt to have the decision overturned on appeal was unsuccessful when the state appeals court denied a writ of certiorari, noting, "[T]he trial court's grant of a new trial has not been shown to have been an abuse of discretion." State v. Hudson, 344 So. 2d 1, 2 (La. 1977). Under state law the trial judge was not permitted to enter a judgment of acquittal in a jury trial and a new trial motion was the only state procedure for challenging sufficiency. The Supreme Court of the United States treated the grant of the new trial motion as one based on insufficiency of evidence and, therefore, as an acquittal. Retrial was held to be barred by double jeopardy. On its face, the case may be taken as a decision simply applying *Burks*, treating the situation the same as one in which a review of the evidence was held to be finally reached in the first proceedings, *i.e.*, treating the case as the Court would a situation where an unreversed judgment of an appellate court had found insufficient evidence. The case did not, therefore, present the issue of whether the state appellate court could have reviewed the acquittal on direct prosecution appeal and refused to treat it as final for double jeopardy purposes under *Wilson*. Put another way, the first jeopardy clearly ended by the time the trial judge's ruling was no longer subject to appellate review under state law. *Cf.* Price v. Georgia, 398 U.S. 323, 328-29 (1970) (discussing continuing jeopardy concept). Concededly, therefore, *Hudson* is distinguishable from review of acquittals n.o.v. on direct prosecution appeal. On the other hand, while relying on *Burks*, the general tone of the Court's opinion in *Hudson* seems to attribute the important traditional finality to the mere fact that the trial judge found insufficient evidence (acquitted), even though the jury had convicted. In Richardson v. United States, 468 U.S. 317, 325 n.5 (1984), the majority opinion cited *Hudson* for the broadly-put proposition that "[o]f course, a trial court's finding of insufficient evidence also is the equivalent of an acquittal . . . ."

appeal otherwise permitted by statute.[555] Judgments of acquittal n.o.v. have therefore been treated as "final" only in the sense that if left unaltered (on appeal or by a trial court vacating them) they preclude retrial, as do other unreversed judgments for defendants. However, "acquittals" such as these would not, on the basis of double jeopardy, preclude review on prosecution appeal and have not been treated as "final" in the same sense that other trial level acquittals have been called "final."

However, if the trial judge has, in substance, acquitted after a jury has found the defendant guilty, a reprosecution would not be permitted once the appeal process has run its course. For reasons of judgment finality, the acquittal judgment would be preclusive of retrial, as would any other judgment whose review process has been concluded. This is, in effect, the

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555. Most federal and state courts have noted their accord with the Supreme Court dictum. In addition to *Rojas* and *De Garces*, discussed *supra* note 550, *see, e.g.*, United States v. Covino, 837 F.2d 65, 67-68 (2d Cir. 1988) (relying on *De Garces*); United States v. Martinez, 763 F.2d 1297, 1309-11 (11th Cir. 1985); United States v. Singleton, 702 F.2d 1159, 1161-62 (D.C. Cir. 1983) (collecting citations); United States v. Steed, 674 F.2d 284, 285-86 (4th Cir. 1982) (en banc) (collecting cases); Commonwealth v. Therrien, 420 N.E.2d 897, 899 (Mass. 1981) (holding no federal double jeopardy bar) (also holding that if a state constitutional double jeopardy guarantee exists court "would not interpret it to bar the Commonwealth from challenging an error of law in the setting aside or a" guilty verdict); State v. Kleinwaks, 345 A.2d 793, 794-97 (N.J. 1975) (holding neither federal nor state double jeopardy bars appeal of postverdict acquittal on basis of insufficiency of evidence); Commonwealth v. Feathers, 660 A.2d 90 (Pa. Super. Ct. 1995) (en banc) (holding post guilty jury verdict acquittal appealable by prosecution). *See also* State v. Dasher, 297 S.E. 2d. 414, 417 (S.C. 1982) (dictum) (stating that no double jeopardy exists because appeal merely reinstates the jury verdict, but holding trial judge really granted motion on basis of weight of evidence, not insufficiency).

A minority of cases indicate, usually in dictum, that double jeopardy would bar further proceedings in this judgment n.o.v. situation. *See, e.g.,* Freer v. Dugger, 935 F.2d 213 (11th Cir. 1991) (post guilty verdict action treated as an acquittal barring retrial on same charge) (opinion does not discuss *Jenkins-Scott* dictum and the language is inconsistent with the circuit's *Martinez* case, *supra*). Dictum contained in attempts to broadly restate double jeopardy law is sometimes inconsistent with actual holdings. For example, the *Freer* dictum is inconsistent with the same circuit's decision in *Martinez*, *supra*. Dictum in United States v. Altamirano, 633 F.2d 147, 151 n.2 (9th Cir. 1980), *cert. denied*, 454 U.S. 839 (1981) (stating that a judgment of acquittal is unappealable, and declaring that verdict on conviction reversed on motion for judgment n.o.v. bars reprosecution if reversal amounts to ruling that verdict was based on insufficient evidence) appears inconsistent with holdings in the same circuit, *e.g.*, *Rojas* (discussed *supra* note 550).

State-law reasons may, of course, offer the defendant greater protection and preclude appeal of this type of acquittal. *See, e.g.,* People v. Wallerstedt, 396 N.E.2d 568, 570 (Ill. App. Ct. 1979) (quoting state constitutional provision that "there shall be no appeal from a judgment of acquittal"); People v. Crozier, 587 P.2d 331 (Kan. 1978) (ruling that state statute is more restrictive than federal prosecution appeal statute); People v. Cooke, 355 N.W.2d 88, 89-90 (Mich. 1984) (ruling that state statute did not allow prosecution appeal of acquittal). *See also supra* note 1.

teaching of *Hudson v. Louisiana*.[556] There it was concluded that the trial judge had, in substance, acquitted on the basis of insufficient evidence after a jury guilty verdict, even though the action was framed in new trial terms. In the direct appeal process, the state was unsuccessful in obtaining appellate review of what was then viewed as the grant of new trial. The prosecution then attempted to reprosecute the defendant, but the Supreme Court held the reprosecution barred by the Double Jeopardy Clause.

The fifth type of acquittal, an acquittal n.o.v., is thus not treated with "finality" in the sense of precluding further proceedings since it does not necessarily preclude appellate proceedings and imposition of a guilty judgment. Instead, it appears to have "finality" once the direct appeal process has run its course. At that point, it is entitled to the finality of any unreversed judgment. In contrast, the first three types of acquittal are entitled to finality immediately upon entry of the acquittal judgment; the fourth is entitled to finality once the prosecution's direct appeal avenues are exhausted; the fifth type appears to be reviewable on appeal and "final" only if not reversed on appeal. As a result, it seems more appropriate to describe the "finality" accorded the first three types of acquittals as "non-reviewable finality."

The Definition of Acquittal

Ultimately, an action will be treated as an acquittal if the substance of that action measures up to the definition of an acquittal, no matter what the acquitting action may be labeled in the trial court record.[557] An

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556. Discussed *supra* note 554.

557. The label which the trial court gives the action is deemed non-controlling. *See, e.g.*, United States v. Scott, 437 U.S. 82, 96 (1978) ("trial judge's characterization of his own action cannot control the classification of the action") (quoting United States v. Jorn, 400 U.S. 470, 478 n.7 (1971), citing United States v. Sisson, 399 U.S. 267, 290 (1970)). *See also Martin Linen*, 430 U.S. at 571; Hudson v. Louisiana, 450 U.S. 40 (1981) (judge's action on insufficiency of evidence read as acquittal even though labelled a grant of a new trial); Smalis v. Pennsylvania, 476 U.S. 140, 144 (1986) (treating action on insufficiency of evidence which was labeled a grant of "demur" in state practice as an acquittal for constitutional purposes). Instead, the analysis must go beyond label and undertake to discern if a true acquittal was entered. This is usually clear enough where there is a jury verdict on the charge(s) upon which the defendant was tried. However, the issue may be less clear when a trial judge makes some ruling that terminates the trial. Under *Scott*, this issue becomes an inquiry into whether the trial judge terminated the first proceedings because the defendant deliberately chose "to seek termination . . . on a basis unrelated to factual guilt or innocence . . . ." 437 U.S. at 98-99. This rationale presupposes a request by the defendant, or perhaps at least an acquiescence if done sua sponte by the judge, because the reasoning is based on the defendant's choice to terminate the proceedings on a non-guilt/innocence basis rather than submit the merits to the trier of fact.

express jury verdict of not guilty obviously represents an acquittal,[558] and jury actions may sometimes be taken as implied acquittals.[559] More obscure problems often are presented by the action of a trial judge, in both jury and non-jury trials. With regard to judge actions, under the current Supreme Court definition of an "acquittal," an acquittal occurs when "the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged."[560] This definition focuses upon a resolution of the "factual elements of the offense,"[561] as contrasted with grounds "unrelated to guilt or innocence."[562] This means that a trial judge's evaluation of the prosecution's evidence as insufficient to sustain a conviction is an acquittal, whether the evaluation takes the form of a bench trial finding of not-guilty, a pre-verdict judge acquittal in a jury trial (or its equivalent, such as a directed verdict), or an acquittal following a hung jury.[563]

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558. *See* United States v. Ball, 163 U.S. 662 (1896). *See also* the test set out in *Martin Linen*, *infra* note 560 and accompanying text, and *Jenkins*, *infra* note 563 (applying jury law to judge actions).

559. See *infra* note 584 and accompanying text.

560. United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977), *quoted in* United States v. Scott, 437 U.S. 82, 97 (1978). For the view that this definition is too narrow, see Justice Brennan's dissenting opinion in *Scott*.

561. United States v. Scott, 437 U.S. 82, 97 (1978) (quoting *Martin Linen*, 430 U.S. at 571).

562. *Id.* at 96. *Scott* itself delineates a prejudicial pretrial delay argument as one not going to factual guilt or innocence. The *Scott* majority viewed the federal defenses of insanity and entrapment as among the issues that would go to factual guilt. 437 U.S. at 97-98. The four *Scott* dissenters expressed concern that entrapment and insanity defenses and pretrial delay defenses, as well as "a host of other principles and policies of the law—*e.g.*, . . . right to speedy trial, statute of limitations . . ."—cannot be manageably differentiated under the majority test. 437 U.S. at 111-16.

563. With regard to bench trials, *see* United States v. Jenkins, 420 U.S. 358, 365 (1975) ("Since the Double Jeopardy Clause of the Fifth Amendment nowhere distinguishes between bench and jury trials, the principles given expression through that Clause apply to cases tried to a judge"); *id.* at 366 ("A general finding of guilt by a judge may be analogized to a verdict of 'guilty' returned by a jury.").

With regard to grants by judges of pre-deliberation motions for acquittal or their procedural equivalents ("directed verdicts," grants of "demurs," etc.), *see, e.g.*, Smalis v. Pennsylvania, 476 U.S. 140 (1986) (grant of "demur" to prosecution evidence); Fong Foo v. United States, 369 U.S. 141 (1962) (per curiam) (holding unreviewable trial judge's grant of invited motion to direct verdict before conclusion of prosecution's case).

With regard to hung-jury acquittals, *see* United States v. Martin Linen Supply Co., 430 U.S. 564 (1977). There the Court placed weight on the uniformity of treatment believed to have been intended by the federal rule covering the various points in the proceeding at which acquittals can be entered by a trial judge. It held "accordingly" that the Double Jeopardy Clause treated this acquittal as final. The weight to be given this reading of the federal

The Rationale of Acquittal Finality

The rationale for the non-reviewable finality accorded acquittals is based upon the Supreme Court's view of the reasons underlying the Double Jeopardy Clause. Indeed, the Court has recognized that this finality was the basis of the earliest history of the double jeopardy protection.[564] However, these reasons have been variously, and not always consistently, stated in the cases. This is not surprising since the Court has set the meaning of the Clause loose from its early limits:

> The Fifth Amendment guarantee against double jeopardy derived from English common law, which followed then, as it does now, the relatively simple rule that a defendant has been put in jeopardy only when there has been a conviction or an acquittal—after a complete trial. A primary purpose served by such a rule is akin to that served by the doctrines of *res judicata* and collateral estoppel—to preserve the finality of judgments. And it is clear that in the early years of our national history the constitutional guarantee against double jeopardy was considered to be equally limited in scope . . . .
>
> But this constitutional understanding was not destined to endure. . . . [I]t became firmly established by the end of the 19th century that a defendant could be put in jeopardy even in a prosecution that did not culminate in a conviction or an acquittal, and this concept has been long established as an integral part of double jeopardy jurisprudence.[565]

Where successive prosecutions are involved and at least where the first charge has been tried to a verdict, the double jeopardy guarantee represents a constitutional policy of finality of judgment for the defendant's benefit.[566] Related, but not identical, underlying rationales have evolved

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procedural rule in reaching the result is not entirely clear.

564. United States v. Scott, 437 U.S. 82, 87 (1978) (referring to Green v. United States, 355 U.S. 184, 187-88 (1957): "These historical purposes are necessarily general in nature, and their application has come to abound in often subtle distinctions which cannot by any means all be traced to the original three common-law pleas referred to above.").

565. Crist v. Bretz, 437 U.S. 28, 33-34 (1978) (footnotes omitted) (majority opinion by Stewart, J., deciding that federal rule of when jeopardy attached in jury trial is binding on states). One of the authorities relied upon by the Court was Justice Story, who had explained:

> [The Double Jeopardy Clause] does not mean, that [a person] shall not be tried for the offense a second time, if the jury shall have been discharged without giving any verdict; . . . for, in such a case, his life or limb cannot judicially be said to have been put in jeopardy.

Id. at 33 (quoting 3 J. STORY, COMMENTARIES ON THE CONSTITUTION § 1781, at 659-60 (1833)).

566. *E.g.*, Brown v. Ohio, 432 U.S. 161, 165 (1977), citing United States v. Jorn, 400 U.S. 470, 479 (1971). This is consistent with the original value underlying double jeopardy. *See*

in Supreme Court opinions over the years. These rationales evoke the view that the prosecution, with its (assumedly) superior resources, should not be allowed repeated attempts to convict an individual, since this would subject a defendant to vexatious consequences (embarrassment, expense, ordeal, continuing anxiety, and insecurity), and would also raise the possibility that some trier of fact might eventually convict a repeatedly-tried defendant, even if innocent.[567] In accord with these often-cited rationales, some recent Supreme Court opinions have added the dubious gloss that the prosecution should not be allowed to hone its case in repeated prosecutions.[568] Although sometimes stated as a separate but

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supra note 403 and accompanying text.

567. Green v. United States noted:

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

355 U.S. 184, 187-88 (1957), quoted in Benton v. Maryland, 395 U.S. 784, 795-96 (1969). *See also* Ohio v. Johnson, 467 U.S. 493. 498-99 (1984). The idea has sometimes been more colorfully (but less concretely) encapsulated in the phrase that the defendant should not be made "to run the gantlet" more than once. *E.g.*, Green v. United States, 355 U.S. 184, 190 (1957); North Carolina v. Pearce, 395 U.S. 711, 727 (1969) (Douglas, J., concurring) ("The theory of double jeopardy is that a person need run the gantlet only once"). The "gantlet" phrasing is, in the end, analytically unhelpful and overbroad because there are situations (such as retrials following mistrial and appeals) in which the defendant is indeed forced to run the gantlet more than once; the task is to discern in which cases the defendant may be made to "run the gantlet" more than once.

568. *See, e.g.*, Tibbs v. Florida, 457 U.S. 31, 41-42 (1982):

> "[T]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks*, [437 U.S.] at 11. This prohibition, lying at the core of the Clause's protections, prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction. Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance. See Green v. United States, 355 U.S. 184, 187-188 (1957); United States v. DiFrancesco, 449 U.S., at 130 (1980).

The fact that this protection-against-rehearsal veneer is making a more frequent appearance as a separately stated rationale can be seen in recent opinions such those separate opinions in United States v. Dixon, 113 S. Ct. 2849, 2877, 2883 (White, J., concurring in part and dissenting in part; Souter, J., concurring in part and dissenting in part).

That this newly found rationale should exist as a theory behind double jeopardy, rather than as an ancillary consequence of the protection, is open to serious question. It is not only inconsistent with the earliest limitation of double jeopardy to final judgments of acquittal or conviction (*supra* note 403 and accompanying text), but it also is inconsistent with other permitted second prosecutions in which the prosecution may well hone its case (*e.g.*, following a successful defense appeal or a mistrial, or even in similar cases arising from the single event, where convictions are procured seriatim, such as prosecutions for multiple robberies). The

closely related rationale[569] rather than as a conclusion, the net effect is that the Double Jeopardy Clause is deemed to "[attach] special weight to judgments of acquittal."[570]

b. Express Acquittal When the Jury is Presented with Option to Convict or Acquit on Both the Greater Offense and on LIOs

This particular sequence seems clearly resolved. When the jury returns an express acquittal, whether on each charge separately or a general acquittal, an acquittal of the greater charge in this situation will be treated as the standard and final acquittal; likewise, the acquittal on the submitted lesser offenses will be so treated.[571] The result is consistent with the straightforward acquittal cases on any verdict[572] and the finality rationale applied to express acquittals. Moreover, the result conforms to the early historical treatment of acquittals for double jeopardy purposes.[573] The fact that some counts on which there was an express acquittal were characterized as LIOs is simply irrelevant. These principles derive from a well-developed line of cases.

Ball v. United States. A few years after *Nielsen*, the Supreme Court commented on the effect of an acquittal on LIOs in *Ball*,[574] a case involving a reprosecution following an acquittal for the same offense originally tried. Millard Ball was acquitted by a jury verdict at a murder trial involving several defendants. Some of the other defendants were convicted and, after successfully contesting the indictment on appeal, were retried. The *Ball* case is most frequently cited for a proposition involving co-defendant John Ball: that a defendant who appeals trial errors leading to conviction can be retried without violating the Double Jeopardy Clause.[575] However, the government had also retried Millard Ball for the

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strength of the "honing" rationale is discussed in Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1006-08 (1980).

569. *See, e.g.*, Tibbs v. Florida, 457 U.S. 31, 41 (1982).

570. *Id.* ("[T]he Double Jeopardy Clause attaches special weight to judgments of acquittal. A verdict of not guilty, whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial.").

571. "It is familiar learning that there are many cases in which . . . an acquittal of a greater crime is a bar to a subsequent prosecution for a lesser one." *In re* Nielsen, 131 U.S. 176, 189 (1889).

572. *See, e.g.*, United States v. Scott, 437 U.S. 82 (1978); Burks v. United States, 437 U.S. 1 (1978); Fong Foo v. United States, 369 U.S. 141 (1962); Green v. United States, 355 U.S. 184, 188 (1957); Kepner v. United States, 195 U.S. 100, 126 (1904).

573. *See supra* note 403 and accompanying text.

574. United States v. Ball, 163 U.S. 662 (1896).

575. *See* authorities cited *supra* note 475.

identical offense, contending that the defective indictment meant the court lacked jurisdiction in the first trial. The Supreme Court conceded authority supporting jurisdictional invalidity of the first acquittal, but ultimately rejected the possibility of a retrial. The conclusion that the acquittal is valid and conclusive under the Fifth Amendment and prevents retrial on the same charge, even in circumstances of trial on a defective indictment, stands as a major precedent on the effect of an acquittal verdict.[576]

Without referring to *Nielsen*, the *Ball* Court also remarked that the acquittal "verdict of the jury, after a trial upon the issue of guilty or not guilty, acquitted [the defendant] of the whole charge, of murder, *as well as of any less offence included therein.*"[577] The lesser offense proposition added by the Court concerned an issue not involved in the case. To support it, the Court cited only the federal statute that simply allowed LIO verdicts and said nothing about the effect of a conviction.[578]

Nielsen itself did not actually involve an acquittal. Nevertheless, the case had described an acquittal situation as a more complicated situation than reprosecution following a conviction, the situation involved in *Nielsen*. It recognized that a situation involving prior acquittal was a more difficult question than one in which a conviction could not have been had on the lesser crime under the indictment.[579]

The acquittal principles pertain even if a defendant upsets the conviction for the LIO on appeal after being acquitted of the greater and convicted of an LIO. That is, the successful appellant cannot be retried for crimes for which the defendant has been acquitted, even though normally the defendant can be retried for crimes for which the defendant was convicted.[580] The standard acquittal principle is applied; even if it might be thought that the jury compromised, double jeopardy precludes relief to the prosecution. For example, a defendant acquitted of first degree murder but convicted of the LIO of second degree murder can be retried for no more than second degree murder, provided there was sufficient evidence

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576. *See, e.g.*, Benton v. Maryland, 395 U.S. 784, 797 (1969).

577. United States v. Ball, 163 U.S. 662, 670 (1896) (emphasis added).

578. Act of June 1, 1872, ch. 255, § 9, 17 Stat. 196, 198 (repealed 1948):

> That in all criminal causes the defendant may be found guilty of any offence the commission of which is necessarily included that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offence so charged: *Provided*, That such attempt be itself a separate offence.

For the history of this statute, *see supra* Section III.D.3.a.

579. *In re* Nielsen, 131 U.S. 176, 190 (1889), *supra* note 539 and accompanying text.

580. See *supra* note 475.

for the conviction.[581] This result rejects a theory of continuing jeopardy.[582] It also discounts, in effect, the possibility that the jury compromised, favoring instead an irrebuttable presumption that the jury verdict means exactly what it says.

c. *Implied Acquittals and the Opportunity to Convict*

The acquittal principles described above have application to LIOs. A jury may receive its options about acquittal and conviction in different ways, depending on the jurisdiction and on more individualized courtroom practice.[583] Of course, when the jury communicates an express acquittal, by whatever mechanism, the acquittal rules have straightforward application. More complicated situations present themselves in a conviction for an LIO when the case goes to the jury on a greater and LIO(s). These circumstances are then likely to bring into play the notion of an "implied acquittal," a concept referred to in *Nielsen's* early double jeopardy discussion.[584] A jury that returns a verdict of guilt on an LIO and is silent on the greater offense will usually be taken, by implication, to have acquitted the defendant of the greater offense. The constitutional effect of this implication was developed in a series of significant cases, the most eminent of which is *Green v. United States*.[585]

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581. Green v. United States, 355 U.S. 184 (1957) (involving pre-*Benton* federal prosecution); Price v. Georgia, 398 U.S. 323 (1970) (applying *Green* to post-*Benton* state conviction); *cf.* Benton v. Maryland, 395 U.S. 784 (1969) (successful appellant cannot be retried for non-LIO offenses for which acquitted at trial); *but see* Brantley v. Georgia, 217 U.S. 284 (1910) (per curiam), *aff'g* 64 S.E. 676 (Ga. 1909) (over objection of implied acquittal, reprosecution allowed for greater offense after conviction of lesser was overturned on appeal), *overruled by Price*, 398 U.S. at 330; Trono v. United States, 199 U.S. 521 (1905) (defendants were acquitted of murder and convicted of LIO; on defense appeal, acquittals were overturned and defendants were adjudged guilty of a greater crime than that for which they had been convicted; defense appeal of lesser offense considered to destroy defense of former jeopardy on greater offense for which defendant already acquitted), *limited in Green*, 355 U.S. at 197. *Price* and *Green* are discussed in the text, *infra*.

582. *See* Benton v. Maryland, 395 U.S. 784 (1969); Price v. Georgia, 398 U.S. 323 (1970).

583. *See, e.g.*, *infra* note 635 and accompanying text.

584. *See In re* Nielsen, 131 U.S. 176, 190 (1889) ("If a conviction might have been had, and was not, there was an implied acquittal.").

585. 355 U.S. 184 (1957). *Green* has also played a part in multiple punishment debate. The Court has read *Green* as not creating a double jeopardy bar to imposition of a sentence more harsh than that originally given. North Carolina v. Pearce, 395 U.S. 711 (1969) (but holding that due process imposes some independent limitations on imposition of harsher sentences). Nevertheless, other cases have relied upon *Green* for the exception that when a jury was initially given the choice between the death penalty and life imprisonment and they imposed the lesser sentence of life, the defendant cannot be sentenced to death following his conviction upon retrial as the original sentence was an implied acquittal of the death penalty. *E.g.*, Bullington v. Missouri, 451 U.S. 430 (1981); People v. Henderson, 386 P.2d 677 (Cal.

Green v. United States & Price v. Georgia. In *Green*, the case went to the first jury on several charges, including first degree murder and second degree murder (on an LIO instruction). "The jury found [defendant] Green guilty of . . . second degree murder," the Court noted, "but did not find him guilty on the charge of murder in the first degree. Its verdict was silent on that charge. The trial judge accepted the verdict, entered the proper judgments and dismissed the jury."[586] Green was tried again for first degree murder under the original indictment after his double jeopardy plea was rejected; a new jury found him guilty of first degree murder. Viewing the case as one that presented "a serious question concerning the meaning and application" of the Double Jeopardy Clause,[587] a closely divided Supreme Court (5-4) treated the implied acquittal concept as having constitutional proportions in the circumstances involved.

Green's claim was "not based on his previous conviction for second degree murder but instead on the original jury's refusal to convict him of first degree murder"[588] when it had the opportunity to do so. The choice thereby given the first jury was an important factor underlying the assumption that the jury in fact had acquitted of the greater offense.[589] The Court went further, also resting its decision on the fact that "the jury was dismissed without returning any express verdict" on the greater offense and without the defendant's consent although it had been "given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so."[590] The Court focused on the Clause's design "to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense."[591]

Following the incorporation of the Double Jeopardy Clause, the Court extended the *Green* doctrine to the states and emphasized *Green's* opportunity rationale in *Price v. Georgia.*[592] The defendant had been

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1963).

586. *Green*, 355 U.S. at 186.

587. *Id.* at 185. Justice Frankfurter's dissenting opinion noted that the state courts addressing the issue had divided 19-17 in holding that there was no double jeopardy bar to retrial in the situation presented. *Id.* at 216 n.4.

588. *Id.* at 190 n.11.

589. *Id.* at 190.

590. *Id.* at 191. This further rationale downplays, as irrelevant, whether the jury in fact sequentially reached the greater option presented (*see infra* note 635 and accompanying text), deliberated on it, and actually refused to convict of the greater.

591. *Id.* at 187.

592. 398 U.S. 323 (1970). A pre-incorporation case also involving an implied acquittal problem initially attracted the Court's attention, but the writ of certiorari was subsequently

tried for murder but the jury returned a verdict convicting for the LIO of manslaughter, without making any reference to the greater offense charge.[593] On the defendant's appeal claiming erroneous jury instructions, the state court reversed. The defendant was retried for the greater offense (murder) over his double jeopardy objection. The jury once again returned a verdict of the LIO (manslaughter). The Supreme Court held that no aspect of double jeopardy prevented retrial for the offense for which he had been convicted (the LIO),[594] but that retrial for murder was prohibited under the rationale of *Green*.[595] The more broadly based reason behind the *Green* result was said to be that defendant's "jeopardy on the greater charge had ended when the first jury 'was given a full opportunity to return a verdict' on that charge and instead reached a verdict on the lesser charge."[596] Retrial for Price's murder indictment should therefore have been barred. The LIO manslaughter conviction was reversed because the Court was unable to conclude that the error in retrying the defendant for the greater offense (murder) was harmless.[597]

In subsequently applying *Green*, the Supreme Court has underscored that the implied acquittal concept presupposes that the jury had the opportunity to convict and that it chose not to do so.[598] The "opportuni-

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dismissed as improvidently granted. *See* Cichos v. Indiana, 385 U.S. 76 (1966) (state court held jury silence was not an implied acquittal).

593. *Id.* at 324.

594. *Id.* at 327.

595. *Id.* at 329.

596. *Id.* (quoting *Green*, 355 U.S. at 191).

597. The harmless error point is discussed *supra* note 46. The Court also requested memoranda concerning whether the defendant could still be retried under state law for only manslaughter. The memoranda indicated that the answer depended on the construction of state statutes and state court remedial powers, and the case was thus remanded to enable the state courts to resolve the issues pertaining to retrial, if any such retrial was to be had. *Price*, 398 U.S. at 332. Further proceedings do not appear in the reported cases.

598. *See* Montana v. Hall, 481 U.S. 400 (1987) (per curiam) (Court held that a jury conviction for incest was not an implied acquittal of sexual assault when the prosecution sought to try defendant for sexual assault but instead, at defendant's behest, tried him for incest, and sexual assault therefore not presented to the first jury). The Court stated that "there would have been an implied acquittal only if the jury had been presented with charges of both sexual assault and incest and had chosen to convict respondent of incest." *Id.* at 403 n.1. *See also* People v. Jackson, 231 N.E.2d 722 (N.Y. 1967) (finding that a jury verdict of guilty on premeditated murder did not have the effect of acquitting of felony murder when jury was instructed it could only render one verdict and it could convict of either felony murder or premeditated murder; jury was silent on felony murder). *Jackson* was cited by the Supreme Court in *Price*, 398 U.S. at 329 n.5, in discussing implied acquittals when the jury was given a full opportunity to return a verdict on the greater charge.

ty" rationale, so crucial to the implied acquittal logic, is consistent with language in *Nielsen*.[599]

The Scope of Green. An occasional case attempts to limit the *Green* doctrine of implied acquittal to only true LIOs,[600] but other cases can be found which apply the doctrine to non-LIO counts.[601] Generally, lower court cases interpreting *Green* look to the precise procedural setting of the case to discern whether a particular jury's silence should be interpreted as an implied acquittal. For example, the *Green* doctrine has been held inapplicable, and the jury allowed to re-deliberate, when the jury had not been instructed to indicate the options on which it had unanimously agreed, and first announced a conviction on one inappropriately phrased option while remaining silent as to the others.[602] Another court has ruled that it is a necessary predicate to an implied acquittal that the fact-finder had a full opportunity to return a verdict on that charge but rejected the opportunity.[603] Decisions such as this have generally viewed the proce-

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599. *See Nielsen*, 131 U.S. at 189-90:

> *[I]n order that an acquittal may be a bar to a subsequent indictment for the lesser crime, it would seem to be essential that a conviction of such crime might not have been had under the indictment for the greater.* If a conviction might have been had, and was not, there was an implied acquittal. But *where a conviction for a less crime cannot be had under an indictment for a greater which includes it*, there it is plain that while *an acquittal would not or might not be a bar*, a conviction of the greater crime would involve the lesser also, and would be a bar . . . .

(Emphasis added.)

600. *See* United States v. Reed, 617 F. Supp. 792, 800 (D. Md. 1985) (espousing view that "an implied acquittal barring reprosecution must necessarily entail a determination that one of the offenses charged was the lesser included offense of the other" and concluding that "[o]nly where the jury is given the full opportunity to return a verdict *either* on the greater, *or, alternatively*, on the lesser included offense does the doctrine of implied acquittal obtain.").

601. *See* United States v. Cavanaugh, 948 F.2d 405 (8th Cir. 1991) (relying on *Green* to preclude retrial of a non-LIO count after conviction for homicide was overturned for insufficient evidence; trial judge instructed the jury not to return verdict of guilt on both counts and jury did not return verdict on separate non-homicide count; some reliance placed upon concerns expressed in now-overruled *Grady* case, *see supra* note 444).

Green, of course, has been held to bar a second prosecution for an *expressly* acquitted count, when the defendant successfully appeals another jointly tried count on which the defendant was convicted. Benton v. Maryland, 395 U.S. 784, 796-97 (1969) (larceny for which defendant expressly acquitted barred even if defendant upset burglary conviction tried by same jury; relying also on United States v. Ball, 163 U.S. 662 (1896)).

602. *See, e.g.*, United States v. Hiland, 909 F.2d 1114, 1138 (8th Cir. 1990) (jury's verdict based on single misbranding option deemed imprecise held not to preclude further jury consideration of other, earlier submitted misbranding options; court alternatively holds first verdict was not final).

603. Lowery v. Estelle, 696 F.2d 333 (5th Cir. 1983) (prosecution's pretrial motion, which had effect of reducing charge to LIO, was then followed by jury conviction for that LIO and a successful defense appeal upsetting conviction and, in turn, a subsequent prosecution for

dural facts carefully in each case to discern whether the jury can in fact have been said to have impliedly acquitted, and often find that they do not suggest an implied acquittal.[604]

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greater offense; trial on offense not put in issue in first proceeding held not to involve implicit acquittal and did not violate double jeopardy). *Lowery's* emphasis on jury opportunity accords with the *Price* emphasis on the broader opportunity theory underlying *Green*, *see* text, *supra*.

604. *See, e.g.*, Kennedy v. Washington, 986 F.2d 1129, 1133 (7th Cir. 1993) (en banc) (when jury convicted on both murder and manslaughter in face of confusing instructions, court found no implicit jury finding and manslaughter conviction held not to preclude retrial on greater offense of murder: "Given the instructions, one cannot have any confidence as to what the jury thought."), *cert. denied*, 114 S. Ct. 876 (1994)); Flowers v. Illinois Dept. of Corrections, 962 F.2d 703, 706 (7th Cir. 1992) (holding defendant "cannot meet his burden of demonstrating an implied acquittal because the confusing and ambiguous jury instructions . . . make it impossible to know what the jury intended when it returned" verdicts of both murder and voluntary manslaughter), *vacated and remanded for further consideration as to another issue*, 113 S. Ct. 2954 (1992), *on remand*, 5 F.3d 1021 (7th Cir. 1993) (expressly noting prior double jeopardy disposition undisturbed); United States v. Garcia, 938 F.2d 12 (2d Cir. 1993) (jury conviction on offense for which two theories were possible, with jury silent as to which theory it applied, held not to bar retrial on one theory when the conviction was reversed for insufficient evidence on other theory; alternatively, court holds even had there been an implied acquittal, double jeopardy would not bar reprosecution because, unlike *Green*, defendants cannot complain about an ambiguity they had the opportunity to correct), *cert. denied*, 502 U.S. 1030 (1992); United States v. Schmidt, 376 F.2d 751 (4th Cir.) (jury told it need not consider other counts if convicted on one and it was impossible to determine on which count jury convicted; court concludes that when jury was instructed to return a guilty verdict based on only one count of multi-count indictment there was no implicit acquittal barring retrial on the counts as to which jury's verdict was silent), *cert. denied*, 389 U.S. 884 (1967); *but see* People v. Garcia, 531 N.W. 2d 683 (Mich. 1995) (court divides equally on effect where, in defendant's first trial, jury convicted of second degree murder when verdict slip expressly gave jury conviction choice of only either first degree felony murder, armed robbery, *or* second degree murder; defendant prosecuted and convicted for armed robbery upon retrial, and defendant claimed implied acquittal of robbery by virtue of that crime being an LIO of first degree felony murder), *cert. denied*, 64 U.S.L.W. 3379 (U.S. 1995).

Infrequent language regarding which party has the burden to show that there was or was not an implied acquittal also appears in the case law. *See Flowers*, 962 F.2d at 706 (placing burden on defendant who claims there is an implied acquittal). Furthermore, numerous cases have held that a guilty plea to an LIO does not constitute an implied acquittal on the greater offense for purposes of double jeopardy. *See, e.g.*, Klobuchir v. Pennsylvania, 639 F.2d 966 (3d Cir. 1981) (finding trial judge's acceptance of plea for LIO was not an implied acquittal and double jeopardy does not therefore bar trial for greater offense following upset of plea), *cert. denied*, 454 U.S. 1031 (1981); United States v. Williams, 534 F.2d 119 (8th Cir. 1976) (similar), *cert. denied*, 429 U.S. 894 (1976); People v. McMiller, 208 N.W.2d 451, 452-54 (Mich.) (finding that doctrine of implied acquittal by jury verdict does not apply to guilty plea conviction, although court bars higher charge than plea as a matter of non-constitutional state law), *cert. denied*, 414 U.S. 1080 (1973). *See also* Ohio v. Johnson, 467 U.S. 493, 501-02 (1984) (noting that: "The acceptance of a guilty plea to lesser included offenses while charges on the greater offenses remain pending . . . has none of the implications of an 'implied acquittal' which results from a verdict convicting a defendant on lesser included offenses rendered by a jury charged to consider both greater and lesser included offenses."); Taylor v. Kincheloe,

2. The LIO-Greater Offense Sequence: Acquittal of the LIO Followed by Prosecution for the Greater Offense

The remaining sequence of prosecutions—an acquittal for an LIO followed by a prosecution for a greater offense—now requires only brief discussion. The situation seems so clearly resolved under the general rubrics noted above that the situation is likely to arise in practice only if there is serious debate about whether a particular offense is or is not an LIO of another. The sequence will result in a double jeopardy bar because, in essence, the defendant will have been acquitted of a set of elements essential to the second prosecution. Successive prosecution for the greater offense is barred whether the issue is conceived as a straightforward acquittal case for the "same offense" under the general acquittal principles discussed earlier, or whether relitigation of essential elements is barred under the collateral estoppel doctrine.[605] Of course, this would not preclude prosecution for the non-overlapping elements, insofar as they constitute a separate crime.[606]

E. The Interaction Between Double Jeopardy and State Law LIO Approaches

Some state law methods of discerning LIOs appear broader than the *Blockburger* test for determining the "same offense" under double jeopardy. This raises questions about the impact of the double jeopardy analysis on state LIO law and vice versa.

In this context, as with many other aspects of LIO and double jeopardy law, sweeping statements by the courts and commentators have the power to mislead in their broadness. A proper understanding of the relationship between double jeopardy and state LIO principles requires a reading that reaches beneath the language to the underlying analyses. It is critical to avoid misleading assertions and equally important to recognize the actual constitutional consequences that may attend the various state law approaches. State law LIO approaches are consistent with constitutional

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920 F.2d 599 (9th Cir. 1990) (reindictment for greater offense after plea agreement to the LIO was vacated does not violate double jeopardy, even if plea was accepted after jeopardy had already attached).

605. *See supra* note 389.

606. For example, suppose a defendant were to be tried for simple assault and acquitted, but it was discovered during the trial that the defendant was carrying a dangerous weapon at the time of the event. The defendant could not then be prosecuted for assault with a dangerous weapon, but a prosecution for simply carrying a dangerous weapon would not necessarily be precluded by general double jeopardy principles.

same offense analysis, but the variations have a practical effect. Broader state approaches may present more opportunities for jury verdict choices. It is those verdicts that have constitutional consequences. Those consequences do not flow from the double jeopardy "same offense" doctrine operating on the crime originally charged, as some mistakenly assert.

Misconceptions about the interaction between double jeopardy "same offense" standards and state LIO definitions are prompted by language in Supreme Court opinions. *Brown v. Ohio* contains the most visible, overread statement: "Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense."[607] This language is repeated in later Supreme Court cases[608] and mirrors earlier Court statements.[609] Such categorical sounding language should not, however, be taken as an unqualified and independent statement of law. When it is, two misleading assertions result: one is that state law LIO definitions control double jeopardy protection; the other is that the *Blockburger* same elements test mandates a particular state LIO approach. These two assertions need to be examined critically.

The first misleading assertion argues that if, as the Court's language states, double jeopardy forbids successive prosecution for a greater and an LIO, then state law about what might be an LIO also automatically controls the extent of double jeopardy protection. If crimes *can* be LIOs under state law, they *must* be the same offense under double jeopardy.[610]

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607. 432 U.S. 161, 169 (1977) (footnote omitted), discussed *supra* notes 485-90, 512 and accompanying text.

608. *See, e.g.*, Illinois v. Vitale, 447 U.S. 410, 421 (1980), discussed *supra* note 514 and accompanying text. *See also* Garrett v. United States, 471 U.S. 773, 787 (1985), discussed *supra* note 519 and accompanying text.

609. *Brown v. Ohio* acknowledged that it was "merely restat[ing] what has been this Court's understanding of the Double Jeopardy Clause at least since *In re Nielsen* was decided in 1889." 432 U.S. at 168. In *Nielsen*, the Court had stated that it was "familiar learning that there are many cases in which a conviction . . . of a greater crime is a bar to a subsequent prosecution for a lesser one." 131 U.S. 176, 189 (1889), discussed *supra* notes 433, 488 and accompanying text.

610. *See, e.g.*, Ettinger, *supra* note 6, at 219 (footnotes omitted), stating:

> [T]he two areas [the LIO standard and double jeopardy law] are inextricably bound to each other by the fact that once one criminal violation is classified as a lesser included offense of another, the two have traditionally been treated as the same offense for purposes of double jeopardy. . . .
>
> Clearly, then, the impact of the standard chosen to identify a lesser included offense is that by implication it serves to delineate the scope of the double jeopardy protection . . . . If a jurisdiction adopts the lenient, factual definition of a lesser included offense . . . then that jurisdiction has also changed the scope of double jeopardy protection without directly addressing this constitutional issue.

The reasoning erroneously follows from these premises: for double jeopardy purposes an LIO is the same offense as the greater offense; under state law a certain crime is an LIO of another crime; therefore, under double jeopardy, the first crime must be the same offense as the second, and successive prosecutions are barred. This means, the assertion continues, that if state law adopts some method for discerning LIOs other than the strict statutory elements approach (*e.g.*, a pleadings or evidence approach, as discussed in Section II), then double jeopardy same offense protection is also automatically determined by that state test, even though it may be more expansive than the same elements test.

This thinking, in turn, leads to the second misleading assertion—that states must adopt the *Blockburger double jeopardy* test as their *state law approach* for discerning LIOs.[611] The reasoning behind this assertion is that state law cannot define same offense for double jeopardy purposes differently than the accepted federal constitutional double jeopardy test. That constitutional test is the *Blockburger* same elements test. Therefore, state law must discern LIOs by the strict statutory elements approach, and must reject, for example, the wider pleadings and evidence approaches. In this view, because state LIO law cannot override the federal double jeopardy test, that test (thought to be the strict statutory elements test) is seen as mandating the content of state LIO law.

The most obvious reason why both these assertions are misleading and unnecessary conclusions is that they rest upon Supreme Court language which is read out of context and erroneously translated into an independent and automatic constitutional rule. In truth, *Brown's* LIO language merely states a conclusion the Court reached through application of the *Blockburger* test to the LIO situation presented in that case. It is not helpful to repeat the Court's language without recalling the analysis, explicit in *Brown* itself, that underlies that conclusion. As discussed earlier, *Brown* stated, in the context of a prosecution for auto theft following a conviction for joyriding in an auto:

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611. *See, e.g.*, State v. Keffer, 860 P.2d 1118, 1129 (Wyo. 1993) (adopting the statutory elements test for LIOs as a matter of state law, reasoning, inter alia, that the "analysis to be used for identifying a lesser included offense must accommodate to the initial scope of double jeopardy protection . . . for 'once a criminal violation is classified as a lesser included offense of another, the two have traditionally been treated as the same offense for purposes of double jeopardy.' Ettinger, *supra* note 6, at 219."). *See also, e.g.*, Blair, *supra* note 11, at 462, concluding that "while the state might be able to impose multiple punishment for the 'same offense' through the adoption of a particular lesser included offense theory, it could not sanction multiple conviction for the 'same offense' by the same method." Earlier the article states, "All courts deciding a 'same offense' double jeopardy issue should now apply the *Blockburger* test, rather than state versions of a lesser included offense test." *Id.* at 459.

> As is invariably true of a greater and lesser included offense, the lesser offense—joyriding—requires no proof beyond that which is required for the conviction of the greater auto theft. The greater offense is therefore *by definition* the "same" for purposes of double jeopardy as any lesser offense included in it.[612]

As the Court made clear in the *Brown* opinion,[613] the "by definition" language meant as defined by the *Blockburger* test. The Court did not create a double jeopardy rule that automatically forbids successive prosecution simply because state law discerns, by whatever approach, that offenses can be greater encompassing and LIOs. Rather, analyzed under the *Blockburger* constitutional rule, not under state LIO law, the crimes in *Brown* had the same elements and, therefore, were the same offense. Indeed, as explained below, this would be true under any true LIO approach, properly understood and applied.

The Court's opinions also make clear that the *Blockburger* same elements test determines what are "same offenses" *for double jeopardy purposes*, regardless of how state law may define LIOs for *its own state purposes*. For purposes of deciding the propriety of successive prosecutions, of course, the double jeopardy test states the constitutionally required minimum standard. This does not support the further assertion that double jeopardy mandates that states adopt a strict statutory elements approach as a matter of state law. State law LIO rules serve other interests in addition to the values served by the federal constitutional successive prosecution bar. *Blockburger* may be the appropriate test for these constitutional values, but state law controls what approach best serves additional state LIO interests.[614]

The assertions about the interrelationship between double jeopardy and state LIO law are also erroneous because of the mistaken assumption that

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612. 432 U.S. at 168 (emphasis added), discussed *supra* at note 486 and accompanying text.

613. For example, *Brown* stated "a lesser included offense and a greater offense are the same under *Blockburger* . . . ." *Id.* at 166 n.6. *Brown* opined further that this was the understanding of double jeopardy since *Nielsen*, in which "the Court treated the formulation [that successive prosecutions for greater and lesser offenses are barred] as just one application of the rule that two offenses are the same unless each requires proof that the other does not." *Id.* at 168. The rule that offenses are the same unless each requires proof of an element not required for the other is the *Blockburger* same elements test. *See supra* at note 419 and accompanying text.

614. As discussed in Section III, it may be argued that the LIO doctrine is itself a federal constitutional requirement of due process of law and, therefore, that due process requires a particular LIO rule. However, as the Court has often recognized in its due process analyses, criminal procedure rules are largely matters of state concern and state law judgments are entitled to substantial deference.

some state LIO approaches are inconsistent with the *Blockburger* rule. To understand this mistake, it is necessary to recognize exactly what it is that separates the various state LIO approaches from each other, because they, in fact, share similarities, yet diverge at a certain point.

We discussed the various state LIO approaches in Section III. All true LIO approaches are the same in that they compare elements of crimes and all require that the elements of an LIO must be included within those of a greater offense. That is, under each approach, necessarily included offenses or LIOs exist whenever one crime includes all the elements of another, but also has an additional element(s); the elements of an LIO are a subset of the elements of a greater encompassing offense; the greater and the LIO do not *each* contain elements different from those of the other. That much of all true LIO approaches coincides with the *Blockburger* test.

State LIO approaches diverge in that they examine various data bases or sources of information to discern precisely *what is the greater offense involved in the particular case.* This will alter what LIO crimes are presented. Thus, under the strict statutory elements approach, only the abstract statutory definition of the charged crime is examined to discern the greater crime involved, limiting the LIO crimes that could possibly be presented. The pleadings and the evidence approaches consider the allegations or trial evidence, and thus expand the sources of information for discerning the greater crime. Accordingly, these more expansive approaches mean more flexibility about what LIOs can arise under the charged greater crime. Consider, for example, an indictment charging common law robbery and whether weapons possession is an LIO. Under a strict statutory elements approach, it would be possible to discern what are the LIOs of robbery by referring only to the statute books (which will not mention a weapon in the greater). However, in pleading or evidence approach jurisdictions, more flexibility is introduced because, to discern what LIOs are present, reference must be made to the particular indictment in the case (does it mention a weapon?) or the trial evidence (does it show possession of a gun?). The definition of LIO is the same under each approach—it is a lesser crime included within the elements of the charged offense—but whether (and what) LIO crimes are present in a particular case is discerned by using varying sources of information.

Thus, none of the state LIO approaches are inconsistent with the *Blockburger* double jeopardy test: each compares elements of crimes. Unlike the various state LIO approaches, however, the double jeopardy

same offense analysis does not mandate any particular data base or pool of information for discerning whether and what crimes to compare.[615]

This does not mean that state law approaches have no practical effect on double jeopardy questions. The effect, however, is indirect and not automatically the result of state LIO doctrines. The wider state approaches may interact with aspects of double jeopardy in addition to the way *Blockburger* would ordinarily apply to LIOs. The practical effect of any state law approach wider than the strict statutory elements approach is that it may cause the presentation to the jury of a wider number of offenses—offenses which would not have been considered the "same offense" as the original charge. The resulting jury verdicts on these offenses can trigger double jeopardy protection under the acquittal and conviction doctrines.

When the jury convicts or acquits (either expressly or impliedly), the conviction or acquittal doctrines discussed earlier forbid reprosecution.[616] These doctrines are predicated on submission of crimes to the jury and the jury's return of an express or implied verdict for the crimes. Double jeopardy limits reprosecution for such crimes without regard to whether they are considered the same offense as some other crime. Instead, double jeopardy protection follows from the jury's exercise of judgment when presented with an opportunity to convict. The more expansive state law approaches may have double jeopardy consequences, not because they *create* same offenses under double jeopardy, but because these more expansive doctrines become procedural vehicles for placing more crimes before the jury. Once the crimes are presented to the jury, the acquittal or conviction doctrine operates on the jury's verdict to create a double jeopardy bar for the offenses decided by the jury. Simply put, the more crimes submitted to the jury under state law, the more opportunities the jury has to expressly or implicitly convict or acquit. The double jeopardy consequences here are no different than when two unrelated, non-LIO crimes are presented to the jury, which convicts of one and expressly or impliedly acquits of the other. For example, a jury may consider jointly tried robbery and rape charges (which are not LIOs) and reach different verdicts, convicting of rape and acquitting of robbery. Double jeopardy

615. It should be noted, however, that a few states move beyond true LIO doctrines and adopt related offense rules. *See, e.g.*, People v. Geiger, 674 P.2d 1303 (Cal. 1984) (en banc), discussed *supra* note 24 and accompanying text. Since this separate doctrine requires or allows jury instructions for offenses that have different elements, that doctrine does not coincide with *Blockburger*.

616. *See* Sections IV.C. & D.

would bar reprosecution for both crimes, although they are not LIOs and not otherwise the same offense. The acquittal and conviction doctrines apply because the jury has operated on the crimes presented and various state approaches effect what crimes are presented in a given jurisdiction.

As the discussion above demonstrates, different double jeopardy doctrines interact differently with state LIO approaches in different situations. On the one hand, if state crimes are considered the same offense under *Blockburger*'s same elements test (which would include true LIOs as analyzed in *Brown*), it does not matter whether all the crimes were presented to the jury. Double jeopardy forbids successive prosecution even for a crime that was not presented, if under *Blockburger* it is the same offense as a crime that was presented. On the other hand, when crimes are actually submitted to the jury under state law and the jury renders an express or implied verdict on them, double jeopardy bars reprosecution based on that verdict, without regard to whether the crimes submitted might be considered the same offense under *Blockburger*.[617] If a crime could have been presented to the jury under state law but was not, double jeopardy forbids reprosecution only when under *Blockburger*, in addition to state law, the crime is considered the same offense as a crime for which the defendant was placed in jeopardy. The fact that a state crime *might* have gone to the jury as a state LIO does not, by itself, make it the same offense under *Blockburger* any more than does the fact that any other offense might have been originally *charged*, but was not. Both results highlight one of the significant practical consequences of *Blockburger's* "same elements" test, as distinguished, for example, from a "same conduct" type test.[618]

F. The Double Jeopardy Impact on LIO Procedural Choices and Remedies

These double jeopardy developments have substantial procedural implications for a large number of criminal prosecutions.

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617. Even if the crimes presented to the jury are not themselves the same offense under *Blockburger*, double jeopardy would operate to bar successive prosecution not only for those crimes, but also for any other crimes that would be considered, under *Blockburger*, the same offense as those presented. The verdict rendered on those crimes submitted would generally bar reprosecution for them, and the *Blockburger-Brown* same offense analysis would bar prosecution for any LIOs of the submitted crimes. For example, if robbery and rape are charged and presented to the jury, verdicts on those crimes would bar reprosecution for those specific crimes and, as well, would bar prosecution for larceny and assault, treating them as the same offenses as robbery and rape, respectively, under *Blockburger*.

618. *See supra* notes 404, 444.

First, these principles translate many state prosecution LIO issues into federal issues, giving rise to federal remedies. Not only must these claims be treated as constitutional issues in the trial of state and federal crimes, but they become potentially litigable in the Supreme Court in the direct appeal process. Even more notably, they become convertible into federal habeas corpus claims, as discussed above.[619] Beginning with *Ex parte Lange*,[620] it has become gradually clear that double jeopardy issues are cognizable on habeas corpus. *Nielsen* and other cases foreshadowed the present recognition that reprosecutions involving LIOs can be litigated on habeas as double jeopardy "same offense" issues.[621]

Second, the doctrines discussed previously will have an obvious impact on a prosecutor's ability to bring a successive prosecution, giving rise to defense motions to dismiss and judicial consideration under constitutional doctrines that are sometimes complex and often uncertain.

Third, during any first prosecution, these doctrines foreshadow future problems and thus call for the original litigation to take account of whether LIO possibilities will be submitted to the jury at the risk of those possibilities being barred in the future. The doctrines call for the attention not only of appellate courts deciding the permissibility of reprosecutions, but also the attention of trial judges, prosecutors, and defense attorneys[622] to be aware of these problems before they occur. Some of the procedural implications involve prosecutorial decision-making in bringing charges (*e.g.*, initial joinder and severance issues), some involve the manner in which the

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619. *See* Section III.C.3.

620. 85 U.S. (18 Wall.) 163 (1873) (ordering habeas relief for federal defendant subjected to sentencing in violation of double jeopardy protection).

621. *See, e.g., In re* Nielsen, 131 U.S. 176, 190 (1889) (described *supra* note 443); Benton v. Maryland, 395 U.S. 784 (1969) (granting double jeopardy relief to state defendant). There was some initial question about how far the Supreme Court would go under the now-outmoded "jurisdictional" formulation (*see* Section III.C.3.) in treating double jeopardy claims as cognizable. *See In re* Bigelow, 113 U.S. 328 (1885) (declining to treat as jurisdictional a habeas claim that trial court's determination to have separate trial violated double jeopardy). However, present habeas law shows no hesitation in treating double jeopardy claims as cognizable. *See, e.g, Benton, supra.* In fact, the injection of federal courts into state cases may be expanded if other circuits broadly follow the principle underlying the recent case of Gilliam v. Foster, 63 F.3d 287 (4th Cir.) (en banc court split 8-5 in finding state defendant's colorable double jeopardy claim justified federal habeas relief enjoining state criminal trial), *application for stay denied with opinion*, 116 S. Ct. 1 (1995) (Rehnquist, Circuit Justice).

For a discussion of the cognizability of due process claims on habeas corpus, see Section III of this Article.

622. *See Jeffers, supra* note 505 and accompanying text (plurality of Court considered defense opposition to consolidation claim to have forfeited claim).

case is submitted to the jury, and others involve the way in which jury verdicts, once reached, are ultimately taken by the judge.

The best remedies for double jeopardy violations are procedural and preventative. Avoidance of the double jeopardy problems discussed in this Article calls for prosecutorial foresight. Because a principal intent of the double jeopardy guarantee is to serve as a restraint on prosecutors,[623] prosecutors can avoid double jeopardy problems by making careful procedural choices. Such choices arise, for example, at the charging and motion stages, at the time the case is submitted to the jury, at the time the verdict is taken, and at the time of a defense appeal. These choices, of course, have corresponding implications for the defense and for the courts.

1. Charging and Severance

LIO theory assumes that charging the greater offense is considered a charge that encompasses the LIOs.[624] Nevertheless, it is the practice in some jurisdictions or in particular prosecutor offices to expressly charge both the greater and the LIOs in separate counts of the same indictment (or information).[625] LIO double jeopardy consequences generally follow whether the charges are in express separate counts or impliedly included in the crime charged in a single count.[626] An LIO separately charged, however, seems more likely to reach the jury, rather than being dependent upon a party's request for instruction and a judge's focused assessment that there is a reasonable evidentiary dispute about a distinguishing element. In turn, the submission of these expressly written counts raises the possibility of inconsistent-sounding jury verdicts (*e.g.*, guilty of first degree murder, but not guilty of an included lesser degree of homicide). More importantly, such jury submissions heighten the likelihood of an ambiguous jury verdict, which in turn may raise implied acquittal or other substantial problems.[627] Such problems may be minimized by a careful receiving of

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623. Brown v. Ohio, 432 U.S. 161, 165 (1977), quoted *supra* note 403.

624. *See, e.g.*, Schmuck v. United States, 489 U.S. 705, 718 (1989).

625. *See, e.g.*, *infra* note 627.

626. *Cf.* Green v. United States, 355 U.S. 184, 190 n.10 (1957), where the jury instructions treated the LIO as included in a count charging the greater offense: "In substance the situation was the same as though . . . [the defendant] had been charged with these different offenses in separate but alternative counts of the indictment. The constitutional issues at stake here should not turn on the fact that both offenses were charged to the jury under one count."

627. *See, e.g.*, Commonwealth v. Brightwell, 424 A.2d 1263 (Pa. 1981) (jury returned guilt verdict of both third degree murder and manslaughter; defense counsel's agreement to entry of judgment on greater count attacked as amounting to ineffective assistance of counsel). The separate charges were the result of separate indictments, each charging

the verdict, and in some cases may be avoided altogether by charging only the greater offense in the indictment or information.

Motions for severance of offenses require particular attention when greater and lesser offenses have been charged in the same indictment. A successful motion to sever may lead to a double jeopardy claim following the first trial and, while it might be argued that the severance motion amounts to a waiver, that argument is not predictably a winning one.[628] As a result, at least one court has directed trial judges to deny defense motions to sever where the indictment charges only greater and lesser included offenses, if the prosecution elects to try the greater offense.[629] In any event, the decision on the severance motion may eventually catapult the case into a federal habeas contest. Where it is unclear that the defendant is stating a willingness to forego a possible double jeopardy claim, the parties and the court would be prudent to take into account the double jeopardy implications of what might otherwise appear to be a simple severance motion.

2. Submitting Verdict Options to the Jury and Receiving the Verdicts

The cases discussed above reflect another crucial moment in the procedural path of what may ultimately become a successive prosecution case: the point at which the verdict choices are given to the jury in the original trial. A failure to instruct appropriately may, in some circumstances, raise a due process issue, as we have seen earlier.[630] A refusal to allow the jury to consider the LIO has, in addition, been seen as raising a double jeopardy bar in a number of cases. Putting aside the exceptional cases, both a guilty verdict[631] and an acquittal[632] of the greater offense are generally likely to have the effect of barring subsequent prosecution for

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different degrees of homicide. *See* Commonwealth v. Brightwell, 388 A.2d 1063, 1066 (Pa. 1978) (Manderino, J., dissenting) (opinion on direct appeal).

628. State *ex rel.* Hall v. Strickler, 285 S.E.2d 143, 145 (W. Va. 1981) (finding that felony murder conviction bars subsequent prosecution on the predicate robbery felony originally charged in same indictment but severed at defendant's request; also holding that defendant's motion for severance did not waive double jeopardy rights).

In the context of a plurality opinion concluding that the defendant's opposition to consolidation precluded a double jeopardy claim, four justices stated in Jeffers v. United States, 432 U.S. 137, 150 n.15 (1977): "Unless it is plain that two offenses are 'the same' for double jeopardy purposes, the parties and the court should be entitled to assume that successive prosecutions are an available option."

629. *Hall*, 285 S.E.2d at 145. *See also* State *ex rel.* Watson v. Ferguson, 274 S.E.2d 440 (W. Va. 1980) (collecting joinder rules and discussing double jeopardy).

630. *See* Section III.

631. *See* Section IV.C.

632. *See* Section IV.D.

LIO related offenses. Prosecutorial decisions to oppose defense LIO requests, or trial judge rulings concerning LIO requests, thus have important preclusive implications that transform those decisions from merely strategic and evidentiary ones into decisions of constitutional import.[633]

Moreover, given the problems that arise from a jury verdict when LIOs are involved, another critical procedural moment occurs when the possible verdicts are submitted to the jury. The form in which the jury is asked to decide takes on a real importance. Submission of unclear verdict options raises the potential for unclear verdicts on greater and LIOs—for example, an instruction to return a verdict of "guilty as charged" or "not guilty" when there are LIOs to be considered.[634] Especially in light of the implied acquittal doctrine, many jurisdictions have addressed the appropriate sequence in which juries should consider greater and LIOs. Some have fixed on a procedure instructing the jury to first unanimously resolve the greater offense before considering an LIO. Others allow the jury to proceed to the LIO without reaching a verdict on the greater, but only after making a reasonable effort to agree on the greater. A variation

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633. *Cf.* United States v. Cavanaugh, 948 F.2d 405, 413-17 (8th Cir. 1991) (prosecutor treated separate count crime as part of first count crime and judge instructed jury not to consider second crime if it convicted on first; court found that prosecution's actions were deliberate action resulting in trial terminating without verdict on second charge and that double jeopardy thus precluded successive trial for second charge) (court relies on some of concerns expressed in *Grady*, now overruled (*see supra* note 444)). *See also* State v. Myers, 158 Wis. 2d 356, 461 N.W.2d 777 (1990) (court refuses to modify to LIO, instead ordering new trial on LIO, in light of prosecution's successful objection to LIO instructions because modification would encourage prosecution to risk all or nothing and then seek modification to LIO if necessary).

634. *See, e.g.*, United States v. Cannon, 903 F.2d 849 (1st. Cir.) (court upheld conviction but was required to discuss possibly ambiguous verdict relating to LIO), *cert. denied*, 498 U.S. 1014 (1990); United States v. Barrett, 870 F.2d 953 (3d Cir. 1989) (remanding for new trial where original verdict slip options were only guilty or not guilty, and court later added LIO instruction; court's special interrogatories to jury held unacceptable to cure ambiguous guilty verdict); *cf.* United States v. Schmidt, 376 F.2d 751, 753-54 (4th Cir.) (jury instruction to return a guilty verdict based on only one count of multi-count indictment, followed by jury verdict of "guilty as charged," forced court to confront question of whether there was an implied acquittal barring retrial on the counts as to which jury's verdict was silent), *cert. denied*, 389 U.S. 884 (1967). *See also* Kreiser v. People, 604 P.2d 27, 30 (Colo. 1979) (en banc) (inaccurate verdict form submitted to jury).

By way of contrast, for a jury instruction that tends to preclude inconsistent-sounding verdicts on greater and lesser offenses, *see* State v. Moulden, 441 A.2d 699, 700 (Md. Ct. App. 1982) (directing jury not to proceed to consideration of LIO if it finds guilt on greater offense charged). *See also* 1 EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 20.05 (4th ed. 1992) (containing suggested instructions designed to reduce ambiguity of verdicts when LIOs are involved).

occasionally endorsed is to give the defendant the option of choosing which of these two other procedures will be followed.[635]

The counterpart of the moment of submission to the jury is the critical procedural moment when a tendered verdict is accepted. Some verdicts are reported in a form that requires immediate clarification by the trial court. For example, a jury verdict responding to several options, unless clarified, may present double jeopardy problems of implied (or even express) acquittal when it is unclear what the jury has decided.[636] The alertness of a trial judge to potential double jeopardy problems may prompt the judge to have the jury clarify its verdict before it is entered and before it raises successive prosecution or other double jeopardy problems.[637] A jury reporting a hung verdict on first degree, not guilty of second degree, and hung on manslaughter, predictably requires clarification or will surely raise a double jeopardy issue if the case is reprosecuted.

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635. For a discussion of these procedures—sometimes referred to as the "acquittal first procedure," the "reasonable effort procedure," and "the optional procedure"—*see* State v. Sawyer, 630 A.2d 1064 (Conn. 1993) (collecting cases).

636. *See* United States v. Schmidt, 376 F.2d 751 (4th Cir. 1967) (described *supra* note 634). *See also* United States v. Hiland, 909 F.2d 1114, 1136-38 (8th Cir. 1990) (upholding action of trial judge, as against double jeopardy and other claims, in resubmitting counts to jury; while jury deliberating, trial judge had recognized that instructions might not have been sufficiently precise to ensure unanimity and, after jury tendered verdict, judge directed jury to retire to consider more specific verdict); Kreiser v. People, 604 P.2d 27, 28-30 (Colo. 1979) (en banc) (trial judge discharged jurors without seeking timely clarification after jury, due to faulty instruction, returned verdict unresponsive to the offenses charged).

637. *See, e.g., Hiland*, 909 F.2d at 1136-38, *supra* note 636; State v. Peters, 855 S.W.2d 345 (Mo. 1993) (en banc) (rejecting double jeopardy claim and upholding propriety of trial judge's resubmission of case when jury originally returned acquittal verdict that was inconsistent with conviction verdict on another count), *cert. denied*, 114 S. Ct. 887 (1994); Commonwealth v. Terry, 521 A.2d 398, 410 (Pa.) (directing "trial judges to adopt and enforce procedures in all homicide cases which will prevent the recording of a jury verdict of not guilty on lesser included degrees of homicide when the jury returns a guilty verdict on a higher degree"), *cert. denied*, 482 U.S. 920 (1987), *denial of habeas relief sought on other grounds upheld*, 974 F.2d 372 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1338 (1993). On resubmission of tendered jury verdicts for further consideration, *see generally* 2 B. JAMES GEORGE, CRIMINAL PROCEDURE SOURCEBOOK § 310.50 (1976 & 1988 Supp.) (judge must resubmit legally defective verdict to jury for reconsideration; if error persists, court may either order acquittal or new trial); 4 CHARLES TORCIA, WHARTON'S CRIMINAL PROCEDURE §§ 505, 506 (13th ed. 1992) (dealing with reasons for which trial judge can direct jurors to reconsider or amend verdicts); United States v. Barrett, 870 F.2d 953, 955 n.1 (3d Cir. 1989) (reiterating general rule that trial judge has power to require that jury further consider ambiguous verdict). Partial verdict problems are not new. *See, e.g.*, HAWKINS, *supra* note 336 and CHITTY, discussed *supra* note 345.

Indeed, analogous unclarified verdicts may give rise to claims under other constitutional provisions.[638]

A trial judge's insistence on clarification will thus result in later benefits to the criminal justice system.

3. Appellate Procedural Choices and Avoidance of Double Jeopardy Issues by Modification of Judgment to LIO

The appellate stage offers another procedural point at which double jeopardy issues can be avoided. The modification procedure alluded to earlier[639] has the potential to avoid a significant number of second jeopardy cases otherwise arising from LIO issues. Even at the appellate level, appropriate procedures can avoid double jeopardy situations. One such example arises when an appellate court finds insufficient evidence of a greater offense and the defendant contends that retrial for the LIO would constitute double jeopardy. Contentions such as these are discussed above.[640] However, there appears to be no double jeopardy reason why a new trial would be normally required in this situation. To put it differently, this double jeopardy issue can and should be averted by avoiding a second jeopardy.

Under double jeopardy law, an appellate court can rectify the situation without imposing second jeopardy.[641] The appellate court can accomplish this by conforming the trial court judgment to the appellate court's real decision, modifying the judgment to an offense that was necessarily included in the offense for which the defendant had first been convicted. (Alternatively, the appeals court can remand with directions for the trial court to modify its judgment.) For example, if the appeals court finds insufficient evidence of the element that distinguishes common law first degree murder from second degree, the court could modify the judgment from first degree to second degree, or at least it could order the trial court to modify the judgment to a lesser offense. In such a situation, the first jury did not acquit of the lesser offense, directly or impliedly, but instead *a fortiori* had to have found all the elements of a necessarily included LIO, in addition to some element(s) that resulted in a guilty verdict concerning the greater and now-overturned offense.[642]

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638. *See* Section III (discussing the *Beck* and *Schad* cases); Terry v. Petsock, 974 F.2d 372 (3d Cir. 1992).

639. *See supra* text accompanying note 480.

640. *Supra* note 477 and accompanying text.

641. *Cf. Wilson*, *supra* note 551.

642. *See, e.g.*, Morris v. Mathews, 475 U.S. 237, 245 (1986) (discussed *infra* note 655) (jury which found defendant guilty of the greater offense of aggravated murder did not acquit

A considerable number of jurisdictions have allowed for appellate court modification to an LIO (or for remand with directions to modify) in a variety of situations.[643] Many of these cases involve modification to an LIO on the basis that the appellate court finds the evidence insufficient to sustain the greater offense but sufficient for conviction of an LIO.[644] In

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of lesser charge but, *a fortiori*, found defendant guilty of the lesser offense of murder as well).

643. *See, e.g.*, People v. Heffington, 107 Cal. Rptr. 859, 869-70 (Cal. Ct. App. 1973) (noting power to modify where error, at most, prevented a verdict of LIO) (rather than order new trial for erroneous jury instruction, court allows prosecution to opt for modification); Kreiser v. People, 604 P.2d 27, 30 (Colo. 1979) (en banc) (in face of uncertain jury verdict on greater and LIO, court ordered reduction to LIO; collecting cases); State v. Pontier, 518 P.2d 969, 976-77 (Idaho 1974) (judgment modified to lesser offense where defendant should have been tried only for misdemeanor); People v. McMiller, 208 N.W.2d 451 (Mich.) (judgment amended to LIO where court concluded that defendant should not have been retried for greater offense because of court's guilty plea policy), *cert. denied*, 414 U.S. 1080 (1973); State v. Alexander, 522 A.2d 464 (N.J. Super. Ct. App. Div. 1987) (in light of erroneous failure to give LIO instruction, court remands for new trial unless state requests an entry of LIO judgment in lieu of retrial); State v. Braley, 355 P.2d 467, 473-74 (Or. 1960) (power to modify found in cases and state constitution; collecting authorities); Commonwealth v. Sterling, 170 A. 258, 259 (Pa. 1934) (referring to both statutory and inherent appellate court power to modify erroneous criminal judgments, but refusing to modify particular judgment of death); State v. Dunn, 850 P.2d 1201, 1209 (Utah 1993) (noting limited statutory power, although court relies on "general power" to modify judgments; case involves trial error, although opinion collects cases dealing with various issues, including insufficient evidence).

644. *See, e.g.*, United States v. Dinkane, 17 F.3d 1192 (9th Cir. 1994) (remanding with instructions to enter judgment for LIO of unarmed bank robbery); Choate v. State, 279 S.E.2d 459, 460 (Ga. Ct. App. 1981) (remanding with directions to enter lesser judgment): People v. Mullinex, 465 N.E.2d 135, 138-39 (Ill. App. Ct. 1984) (reducing to LIO and itself imposing maximum sentence); State v. Lampman, 342 N.W.2d 77, 81 (Iowa Ct. App. 1982) (remanding with directions to enter LIO judgment); State v. Moss, 557 P.2d 1292, 1295 (Kan. 1976) (remedy is resentencing on LIO); Daniels v. State, 17 So. 2d 793, 794 (Miss. 1944) (lower court judgment "affirmed as a conviction" for LIO); Forsha v. State, 194 S.W.2d 463, 466-67 (Tenn. 1946) (correcting judgment to LIO). English law similarly gives the court of appeals power to substitute a guilty verdict of another necessarily found offense if the evidence warrants, *see* 11 HALSBURY, LAWS OF ENGLAND § 1392 at 1190-91 (4th ed. reissue 1990), a practice which the Supreme Court noted in Green v. United States, 355 U.S. 184, 189 n.7 (1957).

The logic of the modification principle extends as well to a verdict that is upset by a trial judge for insufficiency reasons on a post trial motion. *See* People v. Serrato, 512 P.2d 289, 293-96 (Cal. 1973) (stating trial court has power to modify to LIO, but concluding power erroneously applied to a non-LIO in this case), *another aspect of case disapproved in* People v. Fosselman, 659 P.2d, 1144, 1150 n.1 (Cal. 1983). Indeed, the vantage point of the trial judge puts that judge in an even better position to assess any undue prejudice to the defendant. For a case refusing to extend the modification theory beyond LIOs, to similar but non-LIO crimes, *see* United States v. Cavanaugh, 948 F.2d 405, 409 (8th Cir. 1991).

Cases occasionally afford the defendant an option for retrial or resentencing on an LIO. *See, e.g.*, State v. Haynie, 867 P.2d 416 (N.M. 1994), restricting State v. Garcia, 837 P.2d 862 (N.M. 1992), to its facts and deciding defendant should be afforded option only under fact patterns where interests of justice require. *Accord* State v. Sexson, 869 P.2d 301 (N.M. Ct.

some instances, courts have relied on state constitutional, statutory, or rule authority to sustain the modification remedy,[645] sometimes interpreting the common legislative authorization to "reverse, affirm, or modify" as

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App. 1994). Conversely, some other cases, particularly earlier ones, sometimes afford the prosecution the option for retrial or modification. *See, e.g.*, Richie v. State, 545 S.W.2d 638 (Ark. 1977). Some of these latter cases may be better understood in light of the status of double jeopardy law existing before Burks v. United States, 437 U.S. 1 (1978) (described *supra* note 547). That is, mandated modification rather than retrial at that time would have represented an unusual restriction for the prosecution because at the time these cases were decided pre-*Burks* cases allowed the prosecution to retry the greater offense for which the evidence was found insufficient. *Id.* at 6-12. This would seem to account for the option given the prosecution.

645. *See, e.g.*, Nix v. State, 624 P.2d 823, 825 & n.4 (Alaska Ct. App. 1981) (citing cases, statute and rule in support of power); State v. DiGiulio, 835 P.2d 488, 493 (Ariz. Ct. App. 1992) (power to modify comes from statute; collecting state cases); Porter v. State, 243 A.2d 699, 702-03 (Del. 1968) (constitutional amendment treated as having same effect as express authorization to modify); State v. Arlt, 833 P.2d 902, 908-10 (Haw. Ct. App. 1992) (remanding with instruction to enter LIO judgment after interpreting general statute as allowing modification); Stevens v. State, 422 N.E.2d 1297, 1301 (Ind. Ct. App. 1981) (citing cases and rule of appellate procedure among sources); State v. Hearold, 603 So. 2d 731, 734 n.1 (La. 1992) (citing statute and case); Commonwealth v. Whitman, 617 N.E.2d 625, 629 (Mass. 1993) (noting statutory power but upholding evidence and so refusing to exercise "extraordinary power" to order a new trial or reduce verdict to a lesser degree); State v. Gregory, 212 P.2d 701, 705-06 (Nev. 1949) (discussing possible statutory basis); People v. Dlugash, 363 N.E.2d 1155, 1163 (N.Y. 1977) (referring to statute); State v. Cannon, 671 P.2d 761, 762 (Or. Ct. App. 1983) (citing constitutional provision, court notes it can direct LIO because of insufficiency); Henderson v. State, 786 S.W.2d 62, 63 (Tex. Crim. App. 1990) (insufficient evidence on part of offense) (citing court rule and declaring power to reform and correct judgment as law and nature of cases require); State v. Tuttle, 780 P.2d 1203, 1219 n.20 (Utah 1989) (finding that statute allowing for modification to LIO "if such relief is sought by defendant" is satisfied by defense trial request for LIO instruction; instruction given but jury returned verdict for greater offense) (quoting UTAH CODE ANN. § 76-1-402(5) (1978)), *cert. denied*, 494 U.S. 1018 (1990); State v. Sorrentino, 224 P. 420, 424-26 (Wyo. 1924) (discussing cases and statutes; allowing prosecution option of retrial or modification). *See also* State v. Myers, 461 N.W.2d 777 (1990) (statutory basis to modify noted, although court refuses to do so in circumstances where jury was not instructed on LIO; in light of prosecution objection to LIO instructions, court concludes modification would encourage prosecution to risk all or nothing and then seek modification to LIO if necessary), *relied upon in* State v. Holley, 604 A.2d 772, 775-77 (R.I. 1992) (limiting modification to cases where jury instructed on LIO). *See also* CAL. PENAL CODE § 1181.6 (West 1994) (allowing modification of verdict to LIO on new trial motion when evidence shows guilt of LIO); OHIO R. CRIM. P. 33(A)(4) (Anderson 1993) (similar); ILL. S. CT. R. 615(b) (Smith-Hurd 1993) (power to modify judgment as well as express power to reduce degree of offense). A 1980 collection of statutes appears in State v. Byrd, 385 So. 2d 248, 253 (La. 1980) (Watson, J., dissenting).

It is conceivable that power to modify may be placed in one court but not in another. This is the current situation in Texas, for example, where TEX. R. APP. P. 80(b)(2) ("court of appeals may modify the judgment of the court below by correcting or reforming it"), has been read to apply to the Texas Court of Appeals but not to the Texas Court of Criminal Appeals. Bigley v. State, 865 S.W.2d 26 (Tex. Crim. App. 1993) (en banc).

covering modification to an LIO.[646] Nevertheless, a number of courts have found inherent judicial power to modify in case law or simply modify based upon an unspecified source of power.[647] Only a small number of current cases have refused to find a modification power, some in limited circumstances. These latter cases occasionally display a concern for due process or jury trial rights, or they refer to the lack of clearly expressed statutory authority.[648]

The power to modify should, of course, be used with care. This particular concept deals with situations where insufficient evidence on some elements is found, yet it is clear that a remaining LIO was impliedly found

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646. *See, e.g.*, Tinder v. United States, 345 U.S. 565, 570 (1953) (citing general statutory authorization in remanding for correction of judgment where defendant, convicted of felony, could only have been properly convicted of misdemeanor); State v. Gunn, 300 P. 212, 217-18 (Mont. 1931) (court collects earlier cases and cites general statutory power "to reverse, affirm, or modify" in modifying judgment to second degree murder after finding insufficient evidence for first degree); McArthur v. State, 862 P.2d 482, 484-85 (Okla. Crim. App. 1993) (finding general appellate power statute gives power to remand for modification). This is the usual view taken by the federal courts in interpreting 28 U.S.C. § 2106 (1988), which provides that federal appellate courts "may affirm, modify, vacate, set aside or reverse any judgment . . . and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." *See, e.g.*, Austin v. United States, 382 F.2d 129, 140-42 (D.C. Cir. 1967) (representing the typical federal court conclusion) (collecting cases in extensive discussion); Dickenson v. Israel, 644 F.2d 308, 309 (7th Cir. 1981) (per curiam), *adopting district court opinion,* 482 F. Supp. 1223 (E.D. Wis. 1980) (power is both statutory and based on common law).

647. *See, e.g., Ex parte* Edwards, 452 So. 2d 508, 509-10 (Ala. 1984) (relying on precedent from other jurisdictions); Richie v. State, 545 S.W.2d 638, 639 (Ark. 1977) (unspecified power; affording prosecution option for modification or retrial); State v. Falcon, 600 A.2d 1364, 1368-69 (Conn. App. Ct. 1991) (collecting state case law in remanding with directions to enter LIO judgment), *cert. denied*, 602 A.2d 10 (Conn. 1992); State v. Dahms, 310 N.W.2d 479, 481 (Minn. 1981) (reducing conviction without extensive discussion of power and remanding for resentencing); State v. Boone, 297 S.E.2d 585, 593-94 (N.C. 1982) (finding evidence supported only lesser offense and remanding for resentencing; basis of power unspecified); State v. Eiseman, 461 A.2d 369, 384 (R.I. 1983) (deciding court has power to modify; citing cases); State v. Quinn, 286 N.W.2d 320, 322 (S.D. 1979) (modifying verdict, citing authorities from other jurisdictions); State v. Liles, 521 P.2d 973, 977 (Wash. Ct. App. 1974) (unspecified basis; remanding for lower court to enter amended judgment for LIO).

648. Commonwealth v. Bivins, 740 S.W.2d 954, 956 (Ky. 1987) (reviewing court has no authority to reduce to LIO); State v. Day, 293 A.2d 331, 336 (Me. 1972) (court declines to assert power to modify in face of ambiguous statute and asserts that modification would tend to deny defendant right to jury trial; collecting cases); State v. Girouard, 373 A.2d 836, 838-39 (Vt. 1977) (summarily noting absence of statutory or constitutional authority to modify to LIO even if court were inclined to do so; however, court finds evidence sufficient for convicted offense). *See also* State v. Moulden, 441 A.2d 699 (Md. 1982) (noting cases on both sides of modification issue, as well as possibility of inconsistent jury verdict action, court takes the position that rendition of guilty verdict is province of trier of facts rather than appellate court; court also notes that, unlike many modification cases, case before it did not involve insufficient evidence).

by the trier of fact.[649] This power should not, for example, be confused with the separate issue of reducing a judgment because of appellate concern for the weight of the evidence (as contrasted with insufficiency),[650] nor should it be confused with appellate court modification of sentence because of disagreement with the sentence imposed.[651] Moreover, there may be situations in which the dynamics of a particular trial record suggest that the LIO should be the subject of a retrial, not an automatic modification.[652] Additionally, there usually will be a need to require that the trial court reconsider and impose the appropriate new sentence.[653] Nevertheless, assuming the modification power is used in a principled way, precisely and carefully so as to guard against exceptional cases, there is little to be said against such power and a great deal to be said in its favor, beyond its conceptual foundation. Appropriate modification also conserves resources and prevents what is essentially an unjustified bonus retrial opportunity for a defendant already found—and, by definition, legitimately found—to have committed all the elements of the LIO. As one court has put it:

> The case law approving entry of conviction on lesser included offense charges is logical because there is no guesswork about what the jury must have concluded. Because the lesser offense necessarily contains a subset of the elements of the greater offense, it is

649. *See, e.g.*, People v. Adams, 269 Cal. Rptr. 479, 483 (Cal. Ct. App. 1990) (emphasizing that remand and modification is possible only when there is a true or "necessarily" LIO).

650. *See, e.g.*, MASS. ANN. LAWS ch. 278, § 33E (Law. Co-op. 1981) (permitting modification in capital cases when the appellate court believes verdict is not only against law but against weight of the evidence).

651. *See, e.g.*, Austin v. United States, 382 F.2d 129, 141 n.25 (D.C. Cir. 1967) (noting that power to modify does not encompass appellate court power to review and reduce sentence); People v. Coleman, 398 N.E.2d 185 (Ill. App. Ct. 1979) (debating application of state rule granting appellate court power to reduce sentence).

652. A defendant might conceivably convince a court that an exception to modification should be made, perhaps because the manner in which the case was tried with a focus on the greater offense misled the defendant to forgo offering an additional defense to the LIO. *See, e.g.*, Stevens v. State, 422 N.E.2d 1297, 1301 (Ind. Ct. App. 1981) (reviewing record to determine whether modification would work an injustice to defendant: "Where it is evident that defendant has not been misled and the issues joined under the charging information have been determined, modification, rather than reversal is more appropriate.").

653. *See, e.g.*, State v. Dahms, 310 N.W.2d 479, 482 (Minn. 1981) (finding resentencing required after modification even if trial court concludes original sentence imposed on all counts is still appropriate); State v. Kingsley, 851 P.2d 370, 393 (Kan. 1993) (concluding case must be remanded for resentencing).

appropriate and "common sense" to order conviction on the lesser charge when the evidence supports the lesser offense.[654]

A few lower court decisions have expressly rejected double jeopardy objections to appellate modification, but, in any event, the Supreme Court itself now appears to have accepted the modification practice as nonviolative of double jeopardy in *Morris v. Mathews*.[655] In that case, following a conviction for aggravated robbery and based on additional information, the state had tried the defendant for aggravated murder, with the aggravated robbery underlying that new charge. The second jury was instructed on both aggravated murder and the LIO of murder. It convicted of aggravated murder. Ultimately, however, the state conceded that the second prosecution violated double jeopardy. The state appellate court reduced the conviction for aggravated murder to one for murder, and the case reached the Supreme Court. Because of the posture in which the case came before it, the Supreme Court treated the only issue before it as whether this reduction constituted an adequate remedy at law with regard to the double jeopardy violation. It placed the burden on the defendant "to demonstrate a reasonable probability that the [defendant] would not have been convicted . . . absent the presence of the jeopardy-barred offense."[656] Modifications under state law for LIOs are therefore

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654. United States v. Cavanaugh, 948 F.2d 405, 412 (8th Cir. 1991) (rejecting prosecution argument that appellate modification logic should be applied to render guilty judgment for a crime held not to be an LIO of one for which defendant had been convicted).

655. 475 U.S. 237 (1986). A few lower court cases decided before *Morris v. Mathews* had explicitly turned aside double jeopardy contentions in the course of modification discussions. *See* Dickenson v. Israel, 644 F.2d 308, 309 (7th Cir. 1981), *adopting district court opinion*, 482 F. Supp. 1223, 1225 (E.D. Wis. 1980) ("The constitutionality of the practice has never been seriously questioned."); *Ex parte* Edwards, 452 So. 2d 508, 510-11 (Ala. 1984) (5-4 vote rejecting double jeopardy argument; dissenting opinions variously argue that: LIO modification "overlooks dynamics of the fact-finding process" and, while it makes some kind of "sense on paper, and it may accord with judicial economy, its application is as faulty as a $3 bill"; no jury has ever found defendant guilty of LIO and trial attorney was forced to construct defense related the trial judge's erroneous finding of sufficient evidence on the greater offense, affecting trial strategy; or modification denigrates jury trial right). *See also* United States v. Cavanaugh, 948 F.2d 405, 415 (8th Cir. 1991) (stating that if crime at issue were an LIO offense of one for which defendant had been convicted "resentencing could be summarily implemented on the lesser count without placing the defendants in double jeopardy") (citing *Morris v. Mathews*); cases cited *supra* note 479 (permitting retrial for LIO although not necessarily focusing on double jeopardy issue). *Cf.* Jones v. Thomas, 491 U.S. 376 (1989) (rejecting double jeopardy claim where shorter of two redundant sentences was eliminated and state court credited time against longer of two sentences and upheld that sentence); Griffin v. United States, 502 U.S. 46 (1991) (5-4 vote rejecting due process argument against sustaining of general jury verdict on conspiracy where evidence is sufficient to support one of the two alleged objects but not the other).

656. 475 U.S. at 247.

constitutional absent a defendant's showing under the *Mathews* standard. "In cases like this," the Court observed, "where it is clear that the jury necessarily found that the defendant's conduct satisfies the elements of the [LIO], it would be incongruous always to order yet another trial as a means of curing a violation of the Double Jeopardy Clause."[657]

V. CONCLUSION

In building upon the long-standing LIO dictum derived from common law, the Supreme Court has made few concrete observations about how and why the LIO principles fit with other double jeopardy principles. The development of interplay between constitutional double jeopardy doctrine and LIOs demonstrates the difficulty of finding consistent theory in the Court's general treatment of double jeopardy law.[658] For example, the Court's treatment of LIO convictions as barring a successive prosecution for the greater encompassing offense ultimately depends upon the notion that the reprosecution implicates the harassing-burdensome aspect of the double jeopardy rationales, since this is a prosecution for the "same offense" as defined by the *Blockburger* test.[659] To understand this underpinning, it might be assumed, arguendo, that it is possible to preclude imposition of multiple punishment on a defendant tried for the same offense.[660] Without such multiple punishment, the Court's cases mean that subjecting the defendant to the "same offense" reprosecution really precludes requiring the defendant to endure reprosecution for the elements encompassed in the greater crime for which the defendant has already been tried on the LIO charge. This is, essentially, the meaning of the *Blockburger* test as applied to this situation. Yet, the Court has declined to reach the same result for reprosecutions for the same elements if the crime does not meet the *Blockburger* test. On either side of this line, the functional difference in these two situations is thus difficult to discern and

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657. *Id.* The defendant in the case had conceded in the Supreme Court that the Double Jeopardy Clause would not have prevented a new prosecution for murder, rather than aggravated murder. *Id.* at 244. The quoted language was written against the logic that another trial, rather than an appellate modification, was the only constitutional way to remedy the conceded wrong under the Double Jeopardy Clause which, ironically, has as one of its purposes protection against subjecting a defendant to certain additional trials.

658. Scholars have long noted that it is generally difficult to find consistency in present double jeopardy law. *See, e.g.*, MOORE, *supra* note 421, at 306-07; Westen & Drubel, *supra* note 390, at 82-84. Various justices have implied as much. *See supra* note 399.

659. *See supra* notes 486, 512-13 and accompanying text. *See also* the rationales set out in cases such as *Green*, *supra* note 567.

660. *See, e.g., supra* note 390, note 495 and accompanying text.

the results appear attributable to differing views on the Court about the basic scope of the Double Jeopardy Clause.

Moreover, the development of the double jeopardy exceptions for successive prosecutions involving LIO-greater offenses attests to the pragmatic manner in which the Court has generally treated the Clause, conceding practical pressures and devising forfeiture notions. The Court has, for example, expansively asserted that where the Double Jeopardy Clause applies "its sweep is absolute."[661] Yet such a statement needs to be read cautiously in view of other conflicting Court declarations[662] and the decisional limitations recounted above. It is difficult to find a consistent theory in the double jeopardy cases and the reports abound with exceptions to a literal reading of the Clause. It is easy enough to discern that a double jeopardy claim involves a threshold condition that the defendant have been placed at least once in "jeopardy" and that further action will place the defendant in a second jeopardy.[663] Moreover, the "same offense" usually must be involved (although collateral estoppel provides an exception[664]). LIOs are generally treated as the "same offense" under the Court's cases. But several previously mentioned positions taken by the Court continue to make it hard for the Court to reach common ground beyond this. Two of these positions bear particular mention. One is the extension of the double jeopardy bar beyond its common-law history,[665] making it possible for individual cases to rely on newly articulated interests as interests fundamentally justifying a particular result.[666] The other position is the existence of strong dissenting feelings held about the basic test for determining what constitutes the "same offense."[667]

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661. Burks v. United States, 437 U.S. 1, 11 n.6 (1978), *quoted in* United States v. DiFrancesco, 449 U.S. 117, 131 (1980).

662. For example, in a mistrial case, Arizona v. Washington, 434 U.S. 497, 503 n.11 (1978), Justice Stevens, speaking for the Court about the defendant's valued right to have a trial completed by that particular tribunal, noted that Wade v. Hunter, 336 U.S. 684, 689 (1949), "identifies that right as sometimes subordinate to a larger interest in having the trial end in a just judgment . . . ." *See also* O'Connor, J., concurring in Garrett v. United States: "Decisions by this Court have consistently recognized that the finality guaranteed by the Double Jeopardy Clause is not absolute, but instead must accommodate the societal interest in prosecuting and convicting those who violate the law." 471 U.S. 773, 796 (1985) (citing Tibbs v. Florida, 457 U.S. 31, 40 (1982), and United States v. Tateo, 377 U.S. 463, 466 (1964)).

663. *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977) (noting that the Clause "rests upon two threshold conditions" and its protections "are implicated only when the accused has actually been placed in jeopardy").

664. *See supra* note 389.

665. *See supra* note 403.

666. *See, e.g., supra* note 568.

667. *See supra* notes 404, 444, 465.

In this posture of double jeopardy law, it seems fair to say that the Supreme Court has maintained a strict double jeopardy bar in those circumstances in which the common law rules imposed a finality on judgments when it came to successive prosecutions.[668] However, where the Court has moved beyond these common law situations, its results appear to represent a majority assessment of a basically pragmatic balancing of interests. This pragmatism is sometimes expressly described as such[669] but the pragmatism is often unspoken. In many ways, the cases moving beyond the common law jeopardy situations seem consistent with a treatment of the double jeopardy protection as a presumptive bar to second jeopardy, a bar that can be defeated if the Court finds prosecutorial good cause in bringing the second prosecution.[670]

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668. *See supra* notes 403, 457.

669. Speaking for the Court in United States v. Tateo, 377 U.S. 463, 466 (1964), Justice Harlan noted that while different theories have been advanced in support of retrial following a defense-sought reversal, "of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of justice." Justice Stevens' majority opinion in Arizona v. Washington, 434 U.S. 497 (1978), described *supra* note 662, contains a similarly direct comparison of interests. Likewise, in her concurring opinion in Garrett v. United States, 471 U.S. 773, 796-97 (1985), Justice O'Connor was express in such an approach. *See supra* at note 526.

670. For example, the cases imply that there is good cause for such second jeopardy if (1) the conviction is upset on the basis of trial error at the defendant's request. *See supra* note 475. (2) There is good cause if there is a hung jury or other "manifestly necessary" mistrial. *See supra* note 546. (3) When there has been an LIO conviction, good cause may exist if there are certain new factual developments beyond the control of the prosecution's due diligence (the "exceptions" principles). *See supra* note 532. (4) Moreover, good cause may exist if the defendant is seen as having elected to forfeit the protections of double jeopardy, *e.g.*, either by (a) causing the first trial to terminate on a basis not going to guilt or innocence (and depriving the trier of fact from the opportunity to reach that central issue, *see* United States v. Scott, 437 U.S. 82 (1978)); or (b) by otherwise electing a procedure that creates a need for second jeopardy. *See* the plurality opinion in *Jeffers*, discussed *supra* note 505 and accompanying text; *cf.* United States v. Ball, 163 U.S. 662 (1896) (opinion written in a way consistent with this characterization of why defendant can be subjected to second jeopardy following defense appeal on trial error).

By contrast, it is not good cause to require second jeopardy when the trial judge rules erroneously on guilt or innocence, taking the issue away from the particular jury which would otherwise decide guilt or innocence, whether or not this is done on the defendant's initiative. *See* Smalis v. Pennsylvania, 476 U.S. 140 (1986), discussed *supra* note 557; United States v. Scott, 437 U.S. 82 (1979); Fong Foo v. United States, 369 U.S. 141 (1962), discussed *supra* notes 545, 562. In these instances, the trial judge's exercise of his or her procedural duty decision is basically substituted for the jury's, with the balance drawn on the side of insufficient cause to create a second jeopardy. The same is true for unreversed appellate court rulings that the trial judge erred in not acquitting for lack of sufficient evidence. *See supra* note 547. The absence of sufficient good cause is also seen in the result of decided cases where there is a prosecutorial desire to simply retry the case with better evidence than that introduced at the first trial (*see, e.g.*, the appellant insufficiency ruling cases, described

As discussed earlier, practical concerns similar to those generally revealed by the double jeopardy cases are presently affecting the developing interplay of due process and the LIO doctrine. Here too, the cases appear to draw a line not wholly satisfying on a conceptual level, but a line that makes substantial concessions to practical concerns. One of those concerns may be the exceptional volume of cases that might become subject to due process claims were the line to be drawn elsewhere. A different line would dramatically increase habeas corpus litigation and would even more substantially involve the federal courts in state LIO issues. In starting with a broad constitutional statement that is likely to be extensively qualified in subsequent cases, the Supreme Court has started down a path parallel to the broadly stated double jeopardy principles qualified in later cases.

The development of constitutional LIO doctrines also requires caution borne of federal-state relationship concerns. The development of these constitutional LIO doctrines already brings the federal courts into close proximity with a review of substantive state LIO decisions. These constitutional issues teeter on the brink of state substantive law, implicating questions about the elements of state law, the evidence sufficiency, and similar questions, such as the meaning of a particular jury's verdict. Although what is or is not considered an element of state crime is essentially a matter of state law,[671] the interplay of both double jeopardy and due process predictably brings the federal courts to the verge of the substantive decision concerning what is to be considered an LIO for purposes of the constitutional doctrines.[672] Moreover, these questions often force the federal courts to decipher idiosyncratic state law.[673] The meaning of that law may be particularly delicate and difficult to divine

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supra note 547), or to try the case to a new trier of fact rather than accepting a judge's assessment of insufficient evidence in a jury trial. *See* Hudson v. Louisiana, 450 U.S. 40 (1981), described *supra* note 554.

671. *See, e.g.*, Illinois v. Vitale, 447 U.S. 410, 416 (1980).

672. *Brown* itself testifies to this. *See supra* note 490 (discussing the Supreme Court's decision to take issue with the state division of the offenses involved into different time or harm possibilities). Other easily recognized examples of the interplay of state and federal law in this area are the *Harris* and *Vitale* discussions (*supra* notes 460, 514 and accompanying text). *See also* McIntyre v. Caspari, 35 F.3d 338, 342-43 (8th Cir. 1994) (federal court notes that it is required in habeas matters to accept state courts' interpretation of state law, but is not bound as to state determination of constitutional effect of that interpretation; court finds crime to be LIO of another crime despite contrary ruling of state intermediate appellate court), *cert. denied*, 115 S. Ct. 1724 (1995).

673. *See, e.g.*, United States *ex rel.* Matthews v. Johnson, 503 F.2d 339 (3d Cir. 1974), *cert. denied*, 420 U.S. 952 (1975), described *supra* note 343.

from the vantage point of the federal bench. As the substantive definitions of crimes become increasingly elaborate, the substantive LIO questions faced by the federal courts will become correspondingly more complicated and entangling. Supreme Court clarification about the required extent of this entanglement would benefit the courts and litigants.